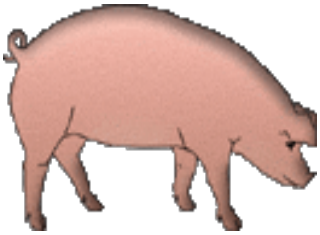
ROOTING FOR ACORNS



DISCOVERY IN TEXAS
DISCOVERY TOOLS

VOL. II

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2017 UPDATE

State Bar of Texas
Advanced Personal Injury Law

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INTRODUCTION

This paper (Discovery in Texas, Part. II) is intended to provide an update on Texas discovery practice, focusing on discovery tools and methods. The paper is organized to supplement and combine with my other ongoing paper (Discovery in Texas, Part I) ***"I'd Rather Be Fishing: 2017 Update,"*** (downloadable from my website www.cuttingedgejustice.com) which focuses on the scope of discovery in Texas, including objections and motions to limit discovery and for protection. That paper ends with section **5. Motions for Protection**. This paper picks up at **6. Scheduling Orders.** While most of the recent development in the discovery area continues to center around scope of discovery (especially in the area of windstorm litigation and discovery of other similar claims and lawsuits), there have been some significant developments over the last year with regard to discovery tools. Of particular note is a flurry of opinions dealing with medical and psychological examinations. These developments will be indicated by the flag, [UPDATE]**.** In a very recent opinion, the Texas Supreme Court has emphasized that "[t]he discovery methods matter;. . ." **In re National Lloyds Insurance Company, -- S.W.3d --, 2017 WL 2501107 at * 16 (Tex. 2017).** The purpose and goal of this paper, which is to help the bar understand and utilize the discovery methods provided in our Texas discovery rules, has thus been validated. Toward this end, I hope you find the paper helpful.

6. SCHEDULING ORDERS:

A. EFFECT OF CONTINUANCE: There continues to be a lot of confusion about the effect of a continuance on an existing discovery control plan. The general practice and policy is fairly clear. Unless there is a new order or an agreement to modify the control order, the original discovery control plan (except perhaps for the end of the discovery period) remains in place. This is the holding in ***Spin Doctor Golf, Inc. v. Paymentech, L.P.,*** 2013 WL 3355199 (Tex. App. - Dallas 2013). A summary judgment was appealed and the Appellate Court remanded some aspect of the judgment for reconsideration. The case was continued from its original trial setting and the Court instructed the parties to try to reach an agreement on new deadlines. No agreement was reached. Spin Doctor failed to timely designate experts in compliance with the original plan. Spin Doctor argued that the original plan was abrogated, but the Appellate Court held that there was no evidence that the Trial Court had retracted the original order. Further, Spin Doctor failed to prove good cause (extreme difficulty or impossibility) in failing to comply with the deadline and failed to prove that late designation would not cause undue prejudice. The Appellate Court found that there was no abuse in discretion

by the Trial Court disallowing Spin Doctor to designated experts beyond the original deadline.

B. COMMENT: Best practices would seem to dictate that it is wise to address the issue of potential continuance in the original discovery control plan, particularly since many cases are not reached for trial on the first setting. The control plan should include a statement that should the case be continued from its original setting that all or certain deadlines will remain in effect. This will eliminate the confusion that can occur if this matter is left to chance.

C. The above concept was employed in ***Jafar v. Mohammed***, Not Reported in S.W.3d, 2016 WL 1455978 (Tex. App. – Houston. [14th] 2016). In that case, the Court granted a continuance and extended the discovery deadline but noted that all other deadlines, including the expert designation deadlines, remained in effect. Accordingly, when the Plaintiff attempted to designate beyond the deadline and failed to demonstrate good cause or absence of surprise, the Trial Court disallowed the designation, which was upheld by the Appellate Court. ***Jafar v. Mohammed,*** *supra* at *3.

7. DISCOVERY TOOLS:

A. DISCLOSURE

1) ECONOMIC DAMAGES AND MODEL

a) Rule 194.1 (d) provides that disclosure must be made with regard to the "amount and any method of calculating economic damages." Comment 2 to the rule, which carries as much force as the rule itself explains the disclosure obligation as follows:

> Paragraphs (c) and (d) are intended to require disclosure of a party's basic assertions, whether in prosecution of claims or in defense. Thus, for example, a Plaintiff would be required to disclose that he or she claimed damages suffered in a car wreck caused by Defendant's negligence in speeding, and ***would be required to state how loss of past earnings and future earning capacity was calculated,*** but would not be required to state the speed at which Defendant was allegedly driving.
>
> Paragraph (d) does not require a party, either a Plaintiff or a Defendant, to state a method of calculating non-economic damages, such as for mental anguish. In the same example, ***Defendant would be required to disclose his or her denial of the speeding allegation and any basis for contesting the damage calculations***. [emphasis added].

I have observed in practice and from a review of recent discovery cases that the above rule and comments are frequently not followed, either because attorneys do not understand the rule or hope that there will be no consequence to ignoring it. Plaintiff will respond that damages are on-going which prevents the Plaintiff from stating an amount

of economic loss or a model for computing them. Similarly, Defendant will often respond with the inane response that Defendant is not seeking damages; therefore, it is not applicable. As will be seen from the cases highlighted below, it is a mistake not to take the rule seriously and to follow it literally. A failure to disclose properly in accordance with the rule may result in evidence being excluded pursuant to Tex. R. Civ. P. 193.6. By the same token, the disclosure requirement only requires fair notice, and as will be seen from the case law, the Courts are reluctant to approve sanctions if notice of the amount of economic damages and the economic model used to compute them is discernable from the pleadings or other discovery response.

b) Litigants who selectively respond to requests for disclosure, or respond to them insufficiently can find themselves in peril, particularly if the litigant fails to timely and completely respond to Request No. 194.2(d). That is the take away from ***Allan v. Nersesova,*** 307 S.W.3d 564 (Tex. App.–Dallas 2010, no pet.).

Allan arose from a claim of breach of contract and negligence by a condo owner whose property was damaged by faulty plumbing in another condo unit. Allan sued the other condo owner and the homeowners' association and went to trial only against the other condo owner, who did not settle pre-trial. At trial, the Defendant objected that Allan's response to the Defendant's Rule 194.2(d) request for disclosure was inadequate as to the diminution in market value because it did not specify the amount of the loss in market value or the method of calculating the loss. The Court sustained the motion and prevented Allan from putting on evidence of damages. The request and response are noteworthy and are set forth below:

> disclose the amount and any method of calculating economic damages." *See* TEX. R. APP. P. 194.2(d).
>
> Allan responded as follows:
>
> Plaintiff has suffered inconvenience, nuisance, negative health consequences and mental anguish, as would any person of ordinary sensibilities, from the repeated intrusion of raw sewage into her residence. In addition, while awaiting repairs following these episodes, she was constructively evicted from portions of her residence. When repairs were being attempted, Plaintiff (who is self-employed) was required to be present to allow access and supervise such repairs and was unable to pursue her occupation, thus suffering lost earnings. Certain of her personal property suffered damage from the leaks, and *as such water damages must be disclosed should Plaintiff list her residence for sale, such disclosure will result in a diminution in market value.* Furthermore, the failure of CCMC and the Association to fulfill the fiduciary duty owed to members of the Association requires the forfeiture of any fees Plaintiff paid to the Association. The refusal of Defendants to act forced Plaintiff to engage counsel and incur legal fees and expenses, and eventually lead [sic] to the filing of this litigation. To date, Plaintiff believes she has suffered actual

> damages totaling $100,000.00 exclusive of attorney's fees and exemplary damages.

Plaintiff argued that Defendant was not surprised because Plaintiff had revealed the amount of damages several days before trial in an affidavit responsive to a motion for summary judgment. The Court found this deficient for two reasons: 1) the response was not timely under Rule 193.6 because it was not provided more than thirty days before trial and 2) regardless of whether Plaintiff revealed the amount of its damages, at no time did Plaintiff provide the methodology by which she calculated the damages. For these reasons, and others, the Appellate Court held that the Trial Court had not abused its discretion.

c) The Dallas Court of Appeals has reiterated the importance of responding to requests for disclosure and supplementing responses timely ("reasonably promptly after the party discovers the necessity for such a response." TEX. R. CIV. P. 193.5(b) in ***In re Staff Care, Inc.* 422 S.W. 3d 876**(Tex. App. – Dallas 2014, orig. proceeding). Staff Care waited until the day three days before the discovery deadline to amend its response to disclosure for its economic model and one day before the deadline to supplement it. Staff Care thought it had responded and supplemented just under the wire, so to speak. Wrong. The Court observed that the request for disclosure had been pending two years and that it was obvious from the discovery in the case that Staff Care could have provided a substantive response long before the deadline. The Court also noted that if circumstances changed, Staff Care could have amended its response without having the prior response used against it. The Court also noted that Staff Care's demonstration of good cause was not legally or factually sound and that it did not show that the late disclosure would not cause prejudice. Moreover, the other party produced convincing evidence that the late disclosure would cause surprise and undue prejudice. The Appellate Court found that under these circumstances the Trial Court had not abused its discretion in upholding the ruling of an associate judge striking Staff Care's disclosure.

2) ATTORNEY'S FEES

a) Given all the cases involving attorneys' fees, I found noteworthy the holding in ***Jespersen v. Sweetwater Ranch Apartments,*** 390 S.W.3d 644 (Tex. App.-Dallas 2012, no pet.) that attorneys' fees do not have to be disclosed in response to a Rule 192.2(d) request for disclosure.

> Further, the calculation of the amount of attorney's fees incurred by appellees is not an economic damage that is required to be disclosed in response to a request for disclosure. ***Carter v. Flowers***, No. 02-10-00226-CV, 2011 WL 4502203, at *4 (Tex. App. – Fort Worth Sept. 29, 2011, no pet.) mem. op.); ***Shafer v. Gulliver***, No. 14-09-00646-CV, 2010 WL 4545164, at *11 (Tex. App. – Houston [14th Dist.] Nov. 12, 2010, no pet.) (mem. op.).

Id. at 10.

b) An interesting case on this point is ***Carpenter v. Carpenter,*** Not Reported in S.W.3d, 2011 WL 5118802 (Tex. App.-Fort Worth), which touches on whether attorney's fee contracts are discoverable. The opinion seems to suggest that the contract might be discoverable if a party is seeking attorney's fees; however, the opinion does not directly address this point and there is no holding in this regard. The opinion focuses instead on whether there was a direct request for the attorney's fee contract. The requesting party did not send a specific request for production of the attorney fee contract. Instead, it propounded a Request for Disclosure which required production of documents prepared by an expert in anticipation of litigation, but the Court did not consider a fee contract responsive to this request. Supra at p. 9.

c) [UPDATE] Also see, ***First Bank v. DTSG, Ltd***. 472 S.W.3d 1, *8-10 (Tex. App. – Houston [14th Dist.] 2015) discussing consequences of not timely designating a testifying expert on attorneys' fees.

d) [UPDATE] See generally, the recent Texas Supreme Court opinion on discovery of attorneys' fees when the party from whom the information is sought is not seeking attorneys' fees. ***In re National Lloyds***, --S.W.3d--, 2017 WL (Tex. 2017).

3) IDENTIFICATION OF INDIVIDUALS WITH KNOWLEDGE OF RELEVANT FACTS

a) [UPDATE] **Record Custodians:** It sometimes is hard in the heat of battle to decide whether to invoke a "rule," or merely concede that to go on the attack would be promoting form over substance. The holding in ***Fox v. Bank of America,*** Not Reported in S.W.3d, 2017 WL 626628 (Tex. App. – Houston [14th Dist.] 2017) illustrates this tension and errs on the side of pragmatism. In many smaller cases, much of the evidence consists of business records. The rules of evidence require that business records be served at least 14 days before trial, and in most instances attorneys wait until the last moment to serve these records. So, what happens if you file your business records affidavit fourteen days before trial, but you have not designated the custodian of records who signed the business records affidavit as an individual with knowledge of relevant facts and you have not supplemented to disclose that person at least thirty days before trial? That was the issue in this case. Bank of America brought a debt action against Fox. Trial was to the bench. BOA attempted to introduce business records into evidence and Fox objected that the business records custodian had not been timely disclosed as an individual with knowledge of relevant facts. While this technically was correct, the Court found that there was no prejudicial surprise because the identity of the custodian had been revealed to Fox when the records had been served with BOA's original petition months before trial. There was no evidence in the record that Fox had experienced any prejudicial surprise.

b) Address and Telephone Number: A party responding to a request for disclosure (or an interrogatory) is supposed to fully identify the individuals with knowledge of relevant facts by providing a full name, address, and telephone number. One controversial tactic is for a party to list the address of the party's law firm for individuals who might be under the control of the party. One of the reasons for this is to try and thwart the other side from contacting the individuals *ex parte*. While arguably, it might not be ethical to contact individuals who might be involved in the conduct at issue in the lawsuit, this is not necessarily so with all individuals under the party's control. Also, problems develop when the individual ceases to be under the party's control and the party cannot provide the individual's personal address. Still, under certain circumstances, providing the address of the party's law firm might suffice, if indeed the individual is under the party's control. This was finding in ***Gibbons v. Luby's Inc*.,** Not Reported in S.W.3d, 2015 WL 5116146 at *23 (Tex. App. – Fort Worth 2015):

> *[footnote 119] see also* ***In re C.S.,*** 977 S.W.2d 729, 732-33 (Tex. App. – Fort Worth 1998, pet. denied) (stating that the purpose of the rule requiring disclosure of a witness's identity or location in answers to interrogatories is to "allow the opposing party to easily locate, interview, and depose the proposed witness" and that, although a complete street address for the witness at issue was not disclosed, under the facts of the case, the Trial Court could reasonably have concluded that the witness could have been easily located with the information provided, and therefore the witness had been sufficiently identified).

4) MEDICAL AUTHORIZATIONS

a) ***Navarrete v. Williams,*** 342 S.W.3d 116 (Tex. App.–El Paso 2011, no pet.). This case deals with an issue that regularly comes up in personal injury cases, regarding requests for Plaintiff's medical records. The issue is whether a Plaintiff may sufficiently respond to a request for production of medical records by choosing instead to provide a medical authorization for records from the identified care providers, for the periods specified. In this case, the Plaintiff chose to respond to a proper request in this fashion and Defendant objected. The Court held that the Court did not abuse its discretion in finding that the response was insufficient and that **the requesting party, not the responding party, gets to choose whether to request records or an authorization.**

> Rule 194.2, as a whole, is directed toward a party requesting discovery, and, in turn, makes no reference to the limitations or requirements placed on the answering party. *See* Tex. R. Civ. P. 194.2. In addition, Ms. Navarrete fails to cite to, and we have been unable to locate, case law holding that Rule 194.2(j) gives a claimant the ability to relieve herself of the duty to answer and amend or **supplement discovery** by executing a medical **records** authorization. As such, we conclude the Trial Court did not abuse its discretion by overruling this argument.

The question not addressed by this opinion is whether the requesting party gets to ask for both the records from the Plaintiff and an authorization. Arguably, if the Defendant chooses to obtain records from the Plaintiff, which according to this opinion is its prerogative, then it waives its privilege to obtain an authorization to obtain the records as well, absent extenuating circumstances.

b) AUTHORIZATIONS FROM DEFENDANTS

Many Defendants wrongly believe that only a Plaintiff may be required to provide a medical authorization. If the Plaintiff puts the Defendant's medical condition into issue, **the Defendant's pertinent healthcare information may be discoverable.** More specifically, the Defendant's medical condition may be open to discovery if either "party relies upon the condition as a part of the party's claim or defense." (See discussion of ***In re Jarvis***, below under Medical Records and Medical History).

In re Kristensen, Not Reported in S.W.3d, 2014 WL 3778903 (Tex. App. Houston [14th Dist.] 2014) arose out of a rear end truck collision. Plaintiff alleged that the Defendant driver was not qualified to operate a tractor-trailer under applicable federal regulations as part of Plaintiff's claim of negligence against the Defendants. Plaintiff sent a request for production to the Defendant driver seeking a medical records release authorization for a five-year period in order to obtain Kristensen's medical records pertaining to alcohol abuse, diabetes, and hypertension. Defendant objected merely that this request was outside the scope of permissible discovery. The Trial Court ordered the production of the authorization. Defendants sought a petition for writ of mandamus arguing that Plaintiff had not put the Defendant's medical condition in issue and further that the Defendant had produced a medical certification for the Defendant driver which showed that he was qualified to drive.

In support of their petition for mandamus, Defendants asserted that the Defendant's medical records were protected by the physician/patient privilege. However, the Appellate Court noted that this privilege, as with all assertions of privilege, must be supported by evidence and that Defendants had produced no evidence at the Trial Court level to support an assertion of the physician/patient privilege. ***In re Kristensen***, supra at *6.

Defendants next argued that the requested discovery was irrelevant because Defendants had produced a medical certificate for the Defendant driver which established that he was medically cleared to operate a commercial vehicle. The Appellate Court found that Defendant had failed to demonstrate that the request was not relevant and that the Court was within its discretion in ordering the Defendant driver to produce a signed medical authorization.

> But the fact that Kristensen may have been medically certified to drive does not necessarily mean that there is no other information in Kristensen's medical history that may bear on the litigation. . . If, as Castillo suggests,

> Kristensen had a disqualifying condition that was not disclosed in connection with his medical certification, that could be germane to whether any of the Defendants acted with negligence. Therefore, relators have not demonstrated that discovery of Kristensen's medical records is outside the scope of permissible discovery. *Cf.* ***R.K. v. Ramirez,*** 887 S.W.2d 836 at 843-844 (Tex. 1994) (orig. proceeding) (concluding in context of privilege claim under TEX. R. EVID. 509 that doctor's medical and mental condition was relevant in a medical malpractice claim).

5) EXPERT DISCLOSURE

a) DISCLOSURE MUST BE REQUESTED

It is hard to conceive that now, nearly 15 years after the Texas Rules of Civil Procedure were amended to add a disclosure requirement, litigants still are not employing Rule 194.The startling fact, however, is that there are still some litigants that do not understand that in order to derive the benefits of the disclosure rule that requests for disclosure must be propounded. That is the lesson from ***In re C.C, M.C., L.O., and H.P.,*** *476 S.W.3d 632* (Tex. App. – Amarillo 2015, no writ). In that case, the appellant argued that the Trial Court had erred in allowing an expert to testify who had not been timely designated. The Court observed that there is a close relationship between Rule 194 and 195:

> Here, Dr. Keel was called as an expert witness by the intervenors (that is, the foster parents to two of the children) even though the intervenors had not designated her as a testifying expert. Yet, the record reveals **that no one had propounded any discovery requests upon the intervenors. Thus, a condition precedent to the application of Rule 195.2 never occurred.** That is, no one requested that the intervenors disclose their testifying experts under Rule 194.2(f). Nor do we find of record an order obligating the parties to disclose their testifying experts by any date irrespective of whether another party sought their disclosure. So, the intervenors had no obligation to disclose Keel before trial, and the Trial Court did not err in permitting her to testify. . . **Unless a Trial Court has ordered a deadline, the deadline to furnish information requested under 194.2(f) defaults to the deadlines provided in 195.2.** [emphasis added]

In re C.C., M.C., L.O., and H.P., *476 S.W. 3d at* 634.

b) INCOMPLETE DISCLOSURE

i) One of the more frustrating responses to requests for disclosure is a responding party's expert disclosure that merely states the topics that the expert is expected to address. For reasons that are never completely clear, the responding party simply ignores the requirement that the "general substance" of the

expert's opinions be disclosed. And the response, "will supplement further," is totally unacceptable. A response that merely states the subject matter of the expert's opinions is incomplete and vulnerable to the attack that it constitutes a failure to respond. This is a lesson to be drawn from the recent opinion in ***Bailey v. Respironics***, 2014 WL 3698828 (Dallas, 2014).

Bailey involved a death case due to a failure to properly ventilate a patient. The issue was whether there was negligence in using the ventilator or whether the ventilator was defectively designed. The litigation was very protracted and there were various agreements to delay discovery and continue the trial of the case. The issue that is pertinent for our review arose when the designation deadline finally was reached. Plaintiff designated an expert, but did not completely disclose with regard to that expert. Plaintiff's designation of its expert merely stated that the expert is "expected to testify generally about the ventilator and its role in the incident made the basis of this lawsuit." Subsequently, thirty days before trial, Plaintiff in response to the ventilator manufacturer's motion for summary judgment served a 42-page affidavit from its expert. The manufacturer complained that the affidavit should be stricken because Plaintiff had not fully disclosed timely with regard to her expert. The Trial Court agreed and struck the affidavit. The Appellate Court found no abuse of discretion:

> Bailey's vague disclosure of the substance of Reese's testimony did not comply with the requisites of rule 194.2(f). *See* ***Bexar Cnty. Appraisal Dist. v. Abdo****,* 399 S.W.3d 248, 256-257 (Tex. App. – San Antonio 2012, no pet.) (Trial Court did not err in excluding expert when "disclosure" regarding expert only vaguely stated expert may testify "about what is and what is not usable land and/or what is or is not in the floodplain ... and/or matters associated therewith"). A party who fails to respond to or supplement his response to a discovery request shall not be entitled to offer testimony of a witness having knowledge of a discoverable matter unless the trial court finds good cause sufficient to require admission or determines the other party will not be unfairly surprised or prejudiced. TEX. R. CIV. P. 193.6(a).

ii) ***In the Interest of D.W. and K.W.*** --- S.W.3d ---, 2015 WL 1262820 (Tex. App. – Ft. Worth 2015). It is very important to note that the disclosure rule194 requires that a party disclose multiple things regarding a testifying expert. These include the subject matter of the expert's expected testimony, the general substance of the expert's opinions and the data that the expert has compiled, been provided, considered, or reviewed in formulating his opinions. Even more important to note is that the failure to disclose with regard to each of these elements could result in a finding that the responding party has failed to disclose which can result in sanctions under Rule 193.6. This is the take away from In the ***Interest of D.W. and K.W.*** In this case, the appellant complained that the Trial Court had allowed the appellee's expert to testify, even though the appellant timely challenged the disclosure as being incomplete for want of having provided the general substance of the expert's opinions and the data that the expert had compiled, or that had been provided to or reviewed by him in formulating his opinions. The Appellate Court found that the appellee had failed to make discovery and the Trial

Court had abused its discretion in allowing the expert to testify at trial.

> Rule 194.2(f)(2) requires a party to request disclosure of "the subject matter on which the expert will testify." Tex. R. Civ. P. 194.2(f)(2). The parties are not disputing Appellee complied with subsection (2) of rule 194.2(f). Rule 194.2(f)(3) permits a party to request disclosure of "the **general substance** of the expert's mental impressions and opinions and **a brief summary of the basis for them."** Tex. R. Civ. P. 194.2(f)3); ***VingCard A.S. v. Merrimac Hospitality Sys. Inc***., 59 S.W.3d 847, 855 (Tex. App. – Fort Worth 2001, pet. denied) Additionally, when the expert is employed by the other party, as in this case, the party **may request disclosure of "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**." Tex. R. Civ. P. 194. 2(f)(4)(A). [emphasis added]
>
> The failure to respond to a request for the mental impressions and opinions of the expert is a complete failure to respond, which triggers the automatic exclusion under rule 193.6. ***$27,877 v. State***, 331 S.W.3d 110, 120 (Tex. App. – Fort Worth 2010, pet. denied); ***VingCard, A.S.,*** *supra* at 856.
>
> We conclude Appellee completely failed to comply with rule 194.2(f)(3), , as distinguished from simply giving an incomplete answer, which would have required Appellant to take additional measures to compel fuller compliance. *Compare* ***VingCard, A.S.***, 59 at 856 (finding complete failure to respond), *with* ***$27,877****,* 331 S.W.3d at 121 (holding response was sufficient to allow meaningful cross-examination). We sustain Appellant's first issue.

iii) **[UPDATE]** ***Kingsley Properties, LP v. San Antonio Title Services of Corpus Christi LLC,*** 501 S.W.3d 344 (Tex. App- Corpus Christi 2016) In this case, the Trial Court was found to have been within its discretion to disallow specific expert testimony. The expert had testified in deposition that he did not review various city ordinances. Later, without supplementation, the expert at trial attempted to offer opinion testimony based upon his review of the ordinances. While the Appellate Court intimates that it considered the testimony a refinement on disclosed opinions, it could not say that the Trial Court abused its discretion in disallowing the testimony based upon a failure to fully provide the basis for the expert's opinions. Tex. R. Civ. P. 195.6. Also, the Appellate Court noted that the offering party did not help its cause by failing to show good cause or absence of prejudicial surprise.

c) **[UPDATE]** **CANNOT RELY ON CATCH-ALL DESIGNATIONS or DESIGNATIONS OF OTHER PARTIES:** Although there is case law going back almost thirty years holding that one party may not rely on the designations of other parties to satisfy its designation obligation, it is apparent in daily practice that many attorneys still embrace the catch-all designation as an illusory life preserver. The opinion in ***First Bank v. DTSG, Ltd***. 472 S.W.3d 1, *8-10 (Tex. App. – Houston [14th Dist.]

2015) reminds us that it is imperative that if a party is going to call an individual as a testifying expert at trial that a party timely and completely disclose the testifying expert. The consequence of not doing so can be significant. In this case, DTSG failed to timely designate a testifying expert on its attorneys' fees. As a result, it lost its attorneys' fees on appeal under Tex. R. Civ. P. 193.6. In an act of cleverness or desperation, it sought to call the testifying expert of another party, who had been timely designated by that party, as DTSG's testifying expert on attorneys' fees. It relied on two arguments in support of this maneuver: 1) it had provided the opposing party its attorney fee invoices; 2) it had contended throughout the trial that it was seeking attorneys' fees and 3) it had a catch-all designation that it may possibly use the expert testimony of adverse parties. The Appellate Court rejected each of these arguments. First, merely providing attorney fees' invoices does not declare to the other side that the party intends to call an expert to testify that the fees are reasonable and necessary, or that the invoices reflect that reasonable fees would be more or less what it is reflected in the invoices. Second, merely alleging that a party seeks attorneys' fees does not provide the other side notice of an intention to call an expert on attorneys' fees. Third, the following catch-all phrase has been rejected by earlier opinions, holding that a party must make its own designation and cannot rely on the expert designation of another party:

> DTSG] express[es] [its] intention to possibly call witnesses associated with adverse parties and any other party's experts.
>
> ....
>
> [DTSG] hereby designate[s], as adverse parties, potentially adverse parties, ***9** and/or as witnesses associated with adverse parties, all parties to this suit and all experts designated by any party to this suit....

We conclude that this language was insufficient to designate Brumitt's counsel as an expert regarding attorney's fees or to satisfy DTSG's obligations to update its responses to First Bank's requests for disclosure.[6]See ***American Cyanamid Co. v. Frankson***, 732 S.W.2d 648, 655-56 (Tex. App. – Corpus Christi, 1987, writ ref'd n.r.e.) (concluding that an expert designation in which a party reserved the right to call all experts designated to testify as witnesses by other parties was insufficient).

d) EXPERT OPINIONS WITHIN MEDICAL RECORDS:

The question arises often whether physicians who render opinions or diagnoses in medical records should be identified at least as non-retained experts. The safest practice is to do so as opposed to believing that the opinions will be admissible if the records are proved up as business records. Merely proving records up as business records establishes the reliability of the records. However, arguably expert opinions have to be disclosed just as there must be an exception to the hearsay rule to allow hearsay in the business records to be admissible. While the issue was raised in ***In Interest of K.M. – J***., Not Reported in S.W.3d., 2015 WL 5451010 (Tex. App. – Houston.

[1st Dist. 2015), the Appellate Court really failed to address the issue head on, instead finding that because the case was continued for a number of months after the medical records were introduced that the opposing party was on notice. The Court was dealing with a compelling case and it is obvious that they did not wish to reverse on such a technical point.

6) SETTLEMENT AGREEMENTS

In re DCP Midstream, L.P., 2014 WL 5019947 (Tex. App. – Corpus Christi 2014). This opinion provides a very analytical discussion of a situation in a multi-party suit in which the Plaintiff and one of the Defendants attempt to keep significant details in their settlement agreement from the non-settling Defendant. The case arises out of an injury to real property claim arising from oil and gas operations. The procedural history is quite involved. However, important to our discussion are the following points: 1) the settling parties attempted to exclude the settlement agreement on the basis of confidentiality terms negotiated in the settlement, and 2) the Court allowed the settling parties to redact those portions of the settlement agreement that they considered confidential and irrelevant to the remaining issues in the lawsuit. The issue before the Appellate Court is summarized as follows:

> By one issue, DCP contends the Trial Court erred in refusing to order the disclosure of (a) the settlement amount, and (b) the full contents of the settlement agreement. In connection with this issue, DCP asserts that existing law requires the disclosure of the settlement agreement; the settlement agreement is relevant and necessary for DCP to receive credit for the injuries for which the Mays have already been compensated; the settlement agreement is relevant and necessary for DCP to be able to effectively examine the witnesses at trial; and discovery of the settlement agreement is necessary in view of the numerous overlapping claims and alleged injuries. DCP further contends that the Mays failed to carry their burden to demonstrate that the settlement agreement is not relevant to the issues remaining in this case.

The Court begins its analysis by pointing out that two rules of discovery authorize the discovery of settlement agreements. TEX. R. CIV. P. 192(3)(g) and 194.2(h). The Court further observes that settlement agreements have been found to be relevant to determining credits in relation to the common law “one satisfaction rule”, and for determining credits under TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(b). The Court also notes that settlement agreements may be relevant to demonstrate bias or prejudice that a party or witness may have for testifying a certain way. The Court then shifts its focus to the issue about whether relevant settlement agreements or terms of settlement may be shielded from discovery by confidentiality agreements negotiated within the settlement. The Court points out that merely because parties to a settlement agreement make confidentiality a term of the agreement does not absolutely preclude the subsequent discovery of the settlement agreement as a matter of law. The Court finds that such

agreements do not preclude otherwise warranted discovery of settlement agreements or terms of settlement as a matter of law. DCP, supra *5.

Another noteworthy observation is that Rule 194.2(h) requires the disclosure of settlement agreements and objection to the disclosure requirement is invalid. While a party may not object to a disclosure requirement, a party may file a request for protection relative to a disclosure requirement. The Court observes that the settling parties did not seek appropriate protective relief. DCP, supra *6. The Court found that the amount of the settlement agreement was relevant to the issues of credits and the one satisfaction rule. Further, the Court found that the Trial Court had not taken steps to identify and shield irrelevant, "confidential" provisions within the agreement, but instead had improperly delegated that responsibility to the settling parties.

> According to the record filed in this case, the Trial Court directed the disclosure of "[o]nly those portions of the settlement agreement which outline the claims released and preserved," and directed the "parties to that agreement" to "jointly redact those portions not relevant to the legal concerns of Defendant DCP." The Trial Court did not exercise its discretion in redacting the settlement agreement; rather it instructed the Mays and Apache to determine the "relevant" portions of the settlement agreement. This is akin to putting the fox in charge of the henhouse. The parties to the settlement have incentives to minimize the settlement's effects on the non-settling Defendant. *See* ***In re Univar USA, Inc.,*** 311 S.W.3d at 181.

B. INTERROGATORIES

1) CONTENTION INTERRROGATORIES

Historically, one of the most controversial discovery requests is one that requests a party's contentions and the factual basis for the contentions. Litigants and attorneys loathe these questions because it forces them to actually reveal their legal theories and the general factual bases for them. The 1999 amendments allow discovery of contentions and the general factual bases for them. TEX. R. CIV. P. 192.3(j). The discovery rules; however, sought to remove a lot of the discord over contention interrogatories with a presumptively unobjectionable disclosure requirement. Rule 194.2(c) (the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial)).[1] This disclosure provision, from my observations in practice, often is the subject of abuse. Either it is ignored entirely, or the party merely cuts and pastes its allegations from its petition or answer (or just says see the petition or answer). From my experience, rarely do litigants respond in good faith to the part of the disclosure requiring a statement of the general facts supporting the legal theory or the legal basis for the

[1] It should be noted that there was strong support for an unlimited number of contention interrogatories that would allow the requesting party to merely ask whether a party was making a particular contention. This proposal, however, was not adopted, possibly because a request for admission already can be used the same way and the rule would be unnecessarily duplicative.

theory. Also, surprisingly, the failure to sufficiently respond to this disclosure appears frequently to go unchallenged. Instead, parties tend to turn to interrogatories requesting the same information. Ironically, the interrogatories requesting the same information are not presumably unobjectionable and are frequently objected to on the basis that they call for attorney work product and that they require the party to marshal evidence, which is beyond the scope of permissible discovery. ***Sheffield Development Company, Inc. v. Carter & Burgess, Inc.,*** --- S.W.3d ----, 2012 WL 6632500 (Tex. App.-Waco) deals with this issue and helps inform the discussion about it.

Sheffield involved a claim for breach of contract and breach of warranty brought by a builder against a developer for improper grading and drainage that was resulting in earth movement and damage to homes built by the builder. The builder cross acted against a subcontractor engineer and surveyor. The engineer then propounded interrogatories to the developer that served as the basis for the discovery dispute. Because the case is noteworthy on the issue of marshaling, the interrogatories are set out below:

> Please identify/specify each and every lot in the Development which you contend deviated from or failed to conform to the approved grading and drainage plans. For each such lot, please identify and specify:
>
> (a) the specific nature of the alleged deviation or non-conformity;
>
> (b) the date(s) on which the alleged deviation or non-conformity existed;
>
> (c) the person(s) and/or event(s) which you contend caused or contributed to the alleged deviation or non-conformity;
>
> (d) the date the alleged deviation or non-conformity was discovered and by whom; and
>
> (e) any and all steps taken to correct or remedy the alleged deviation or non-conformity.

The developer objected to the interrogatory, claiming that it was premature, that SDC would not be able to answer the interrogatory until it had completed its discovery, and that the question improperly required SDC to marshal its proof. There is a considerable amount of circular back and forth that takes place, with the engineer filing motions to compel and the developer seeking depositions of the engineer's representatives and to enter property and inspect before it has to respond to the interrogatory. The Trial Court issued orders that the developer fully and completely respond to the interrogatories and that the engineer then produce its representatives for deposition. Also, there was an order allowing entry onto property. Nonetheless, the developer still sought continuances, which resulted in motions to quash and finally resulted in a sanctions order against the developer. The sanctions included preventing

the developer from putting on any evidence of its claims against the engineer until it had fully and completely responded to the interrogatories. The engineer promptly filed a motion for summary judgment. More motions for continuance were filed, limited additional discovery was granted and after several months of delays, the engineer's motion for summary judgment was granted.

The developer contended on appeal that the Trial Court had abused its discretion in denying the developer discovery it needed to respond to the motion for summary judgment. After a discussion of the rules and case law pertaining to discovery sanctions, the Appellate Court addressed whether the interrogatory in question was proper or whether it improperly called for marshaling of evidence. Because of the large amount of controversy regarding contention interrogatories and the appropriateness of a "marshaling objection," the Court's discussion is set out below in its entirety, because it provides significant guidance:

> Contention discovery is permitted by the rules of civil procedure. TEX. R. CIV. P. 192.3(j) ("A party may obtain discovery of any other party's legal contentions and the factual bases for those contentions."). But all that is required is a basic statement of those contentions and not a marshaling of evidence. TEX. R. CIV. P. 192 cmt. 5; ***In re Gen. Motors Corp.,*** No. 12-07000387-CV, 2008 WL 541679, AT *3 (Tex. App. – Tyler, Feb. 29, 2008, orig. proceeding) (mem. op.) **Marshaling means "[a]rranging all of a party's evidence in the order that it will be presented at trial." Black's Law Dictionary 1063 (9th ed.2009). Interrogatory 5 did not therefore require SDC to "marshal" its proof. Instead, it sought the facts underlying SDC's claims against C & B, which "is the very purpose of discovery."** ***In re SWEPI L.P.,*** 103 S.W.3d 578, 590 (Tex. App. – San Antonio 2003, orig. Proceeding). Moreover, even if the factual basis of a party's claims is supplied by an expert or experts, the party "must still reveal the factual basis of the claims ..., regardless of how those facts may ultimately be proved at trial." *Id.* (citing ***Able Supply Co. v. Moye,*** 898 S.W.2d 766, 771 (Tex. 1995) (orig. proceeding). [emph. Added]

C. REQUESTS FOR PRODUCTION

1) As a general rule, in determining over breadth, the focus is on whether the request could have been more narrowly tailored to avoid including tenuous information. *See* ***In re CSX Corp.,*** 124 S.W. 3d 149, 152 (Tex. 2003)(orig. proceeding). ***In re EOG Resources, Inc.,*** Not Reported in S.W.3d, 2011 WL 455280 (Tex. App.-Waco) provides a good discussion of this concept as well as the issue of specificity.

The case arises out of a personal injury incident. A worker was seriously injured when a mobile trailer on a well site was toppled during a severe storm. A number of entities were sued.

The opinion addressed two very common requests. The first request sought "all Documents on which you will rely to support any defense you assert in this case." The Appellate Court found that this request was improperly overbroad because it was not specific as to particular types and categories of documents requested. While this is true, it also would appear that the request is for the responding party to "marshal" its evidence on this particular issue, which is improper. (See discussion of "marshaling above, in ***Sheffield***). However, marshaling is not discussed in the opinion. The other request was for "all Documents relating to the damages claimed by Plaintiffs in this case." The Court found that this request was improper because it is not specific with regard to the type of damages for which the discovery is requested (i.e. lost earning capacity, physical impairment). However, even if the request were specific as to the damages, it would still appear to be in violation of the rule against "marshaling" evidence.

2) ***In re Collins,*** Not Reported in S.W.3d, 2013 WL 174801 (Tex. App.-Fort Worth). This was a per curiam decision denying the petition for mandamus. The Trial Court's order had limited discovery requests to the date the lawsuit was filed; however, the dissent by the Chief Justice is notable. The case involved an allegation of wrongful expulsion from a fraternity and breach of fiduciary duty. The charges were filed by the fraternity in 2002 and Defendant was expelled from his fraternity in 2003; however, the acts that led to the expulsion started in 1996, as noted in a letter from the fraternity to the Defendant. The Chief Justice would have allowed the Plaintiff to obtain discovery back as far as 1996, the year in which the fraternity indicated the conduct leading to the expulsion began.

3) ***In re Christus Health Southeast Texas,*** 399 S.W.3d 343 (Tex. App.-Beaumont 2013, orig. proceeding). This case involved a claim of medical malpractice arising from a death following a cardiac catheterization. Christus sought records regarding the Plaintiff's calls and purchases for the date of the catheterization. [Also, see below, under SCOPE: SOCIAL MEDIA, regarding Christus's request for social media postings]. While the Court noted that the Plaintiff's pleadings made such discovery relevant, it found that the actual request was overbroad because it was not closely tailored to include only relevant time periods.

> the request was not limited in time to the records relevant to the time period in dispute, the period after Arthur's catheterization. Nor has Christus demonstrated that documents reflecting purchases or calls made before Arthur's heart was catheterized are documents that will aid in the resolution of the disputed facts. ***Because the request could have been more narrowly tailored and Christus's request for purchase and phone records was overly broad, we hold that the Trial Court did not abuse its discretion by denying Christus's motion to compel the Lowes to produce all documents reflecting Laura's and Melissa's purchases and calls made on June 30, 2009. Supra at p. 3.*** [emphasis added]

4) ***In re Pinnacle Engineering, Inc.,*** 405 S.W.3d 835 (Tex. App.-Houston [1st Dist.] 2013, orig. proceeding). This case involves a request for production of hard drives and is discussed in detail, below, under SCOPE.

5) ***In re Air Liquide Industrial U.S., LP***, 2015 WL 2124999 (Tex. App. – Beaumont, 2015). The discovery requests in this case related to a Declaratory Judgment action that one party to a contract brought to determine that a Force Majeur provision did not apply. This party served a number of requests for production that were challenged as being overbroad. One of the complaints was to requests asking for **"any and all documents,"** which is a common type request, albeit facially overbroad. The Court made the following notable ruling:

> The requests for ***"any and all documents pertaining to"*** argon suppliers are insufficiently specific to put ALIUS on notice of the documents it must produce. *See* ***In re TIG Ins. Co.,*** 172 S.W.3d 160, 154 (Tex. App. – Beaumont 2005, orig. proceeding). Furthermore, ALIUS's previous reserve capacity would not be relevant to its capacity in August 2014, when the shortage occurred. "This is precisely the sort of fishing expedition that harvests vast amounts of tenuous information along with the pertinent information" about the supply disruption, and as such the request is facially overbroad. ***In re GMAC Direct Ins. Co***. No. 09-10-00493-CV, 2010 WL 5550672, at *1 (Tex. App. – Beaumont Dec. 30, 2010, orig. proceeding) (mem. op.). The Trial Court abused its discretion in compelling discovery responses to requests that are facially overbroad both in time and in scope. *See id*. [emph. added]

6) [UPDATE] **AMENDMENTS TO FRCP 34 REQUESTS FOR PRODUCTION**

While the 2015 revisions to Fed. R. Civ. P. 26 received a lot of the headlines this past year, there was a significant change to Fed. R. Civ. P. 34 which actually may have an important practical impact on federal discovery practice. Subsection (C) *Objections,* was amended to add the following provision regarding withholding:

> **An objection must state whether any responsive material are being withheld on the basis of that objection.** An objection to part of a request must specify the part and permit inspection of the rest.

There have been many instances when this author has fantasized about such a provision being added to the Texas Rules of Civil Procedure, particularly when opposing counsel serves voluminous boiler plate objections and then responds "subject to "the objections. This results in the receiving party having to seek a conference about whether there actually are any responsive documents and things in the responding party's possession that are being withheld based on such objections. Most often the answer is no. In the interest of due diligence, however, the question must still be asked. The above provision rectifies that weakness in the rules by requiring the responding party to expressly state whether any responsive documents are being withheld on the based on the objections.

The purpose of the amendment is to let the requesting party and the Court know whether there is anything worth fighting about or whether the objections are merely academic. Of course, this begs the question whether Texas should implement or enforce a rule similar to Rule 26(g) (we have such a rule, Rule 191.3) that would sanction a party for serving frivolous or untenable objections. What is unclear from the new provision is how specific or detailed the information about withholding has to be. *See,* ***Heller v. City of Dallas***, 303 F.R.D.466 (N.D. Tex., Dallas Div. 2014). From listening to federal judges and magistrates discuss this rule and how they are likely to interpret and apply it, my present belief is that the statement will not have to be as detailed as a privilege log, but still must state the nature of the documents and depending on the objection (i.e. unduly burdensome), the volume of data and how it is maintained.

D. REQUEST TO ENTER, INSPECT AND PHOTOGRAPH PROPERTY

1) TEX. R. CIV. P. 196 allows a party to request permission to enter onto another entity's property (party or non-party) for the purpose of inspecting, photographing, and inspecting. It is not a frequently used rule, but sometimes can be particularly informative, especially given that in civil cases in Texas jury views are disfavored. An inspection of the property may provide both the requesting party and the jury the opportunity to see the subject of the litigation (a piece of equipment, the condition of property, etc.) as an aid to understanding the claims and defenses in the lawsuit. Which begs the question, what is the scope of the inspection? The answer is explained in the recently reported opinion in ***In re Goodyear Tire & Rubber Company***, 437 S.W. 3d 923 (Tex. App-Dallas 2014, orig. proceeding). While a request must meet the relevancy standards, just as any other discovery tool, because of the potential for disruption of ongoing operations, the Trial Court must additionally engage in a more stringent cost/benefit analysis:

> Discovery involving entry onto the property of another involves unique burdens and risks including, among other things, confusion and disruption of the Defendant's business and employees. ***In re Kimberly-Clark Corp.,*** 228 S.W.3d 486 (further citations omitted). The Trial Court should conduct a "greater inquiry into the necessity for the inspection, testing, or sampling." *Id.* at 487. In conducting such an inquiry, the Court must balance the degree to which the proposed inspection will aid in the search for truth against the burdens and dangers created by the inspection. *Id.* at 486.

Goodyear involved a product liability case against the manufacturer for defective tires. Plaintiffs alleged that there were conditions at the particular plant where the subject tire was manufactured that contributed to the tire's defective condition. The problem was that the manufacturer changed the design of the tire and the conditions at the plant shortly after the tire was placed in the stream of commerce. In other words, at the time of the requested inspection, there was evidence before the Court in the form of affidavits that the plant had been changed and that neither the tire in question nor any other similar model tire was being manufactured at that particular plant. The Appellate Court concluded that the request was not for potentially admissible evidence at trial, but for demonstrative

purposes. This was a key finding.

The Appellate Court relies heavily on a Tyler Court of Appeals decision, ***Amis v. Ashworth***, 802 S.W.2d 374, 376 (Tex. App. – Tyler, 1990, orig. proceeding [leave denied]) which held that a party is not required to create evidence for an opponent. In this instance, the Court found that the inspection request was not designed to lead to potentially relevant evidence, but was requesting Goodyear to make its facility available so the Plaintiff could create demonstrative aids. This purpose was found to be improper.

> The video the Plaintiffs seek to record falls into the category of "new evidence." The demonstration the Trial Court has ordered does not involve merely inspecting the machine that produced the tire at issue to determine whether the condition of the machine may have caused the production of a defective tire. Instead, it requires Goodyear to provide demonstrations of the manufacture of completely different products with the intention that the Plaintiffs will use those demonstrations as a visual aid to illustrate their theories regarding the way the manufacture of the subject tire may have been deficient and how an alternate design that they deem simple and inexpensive could have avoided the accident. The recording the Plaintiffs want to make does not attempt to document the process used in making the actual tire at issue in the case nor does it document the condition of the plant at the time that the tire was manufactured. [citation omitted] Rather, seven years after the fact, it will document work performed by different workers, using either a different machine or making a different tire, under different conditions. In this respect, the Trial Court's order goes beyond the sort of inspection, measurement, surveying, photographing, testing, or sampling contemplated by Rule 196.7.

2) [UPDATE] ***In re Sun City Gun Exchange, Inc. d/b/a Kirk's Gun Shop***, --S.W.3d –2017 WL 1968019 (Tex. App. – El Paso 2017) This case deals with a motion to enter property of a **non-party**. Rule 196.7 applies in such an instance. The requesting parties in this instance failed to demonstrate good cause for such discovery:

> they failed to establish good cause to inspect, photograph, or video-record all of the firearms located in Bristow's bunker. Generally, good cause for a discovery order is shown where the movant establishes: (1) the discovery sought is relevant and material, that is, the information will in some way aid the movant in preparation or defense of the case; and (2) the substantial equivalent of the material cannot be obtained through other means. ***In re SWEPI, L.P.***, 103 S.W. 3d 578, 584 (Tex. App. – San Antonio 2003, orig. proceeding).

E. REQUESTS FOR ADMISSIONS

Requests for admissions are a constant source of controversy and

confusion. It is difficult to draft a clear, unobjectionable request and the respondent frequently objects to the requests or provides an evasive response. There is tremendous confusion about whether a request is for a pure question of law, which is improper, or for an application of law to fact, which is not objectionable. There also is confusion about the effect of an admission, and whether an admission may be qualified or explained at trial or withdrawn. There also is confusion about whether a respondent may plead the Fifth Amendment in response to a request for admission or whether the fact that a response may not be used in other litigation but the one in which is propounded makes such an objection improper. The following cases shed light on some of these issues.

1) The following quote very clearly states the rule and its interpretation:

> requests can encompass "any matter within the scope of discovery, including statements of opinion or of fact or of the application of law to fact...." TEX. R. CIV. P. 198.1; *see also* ***Maswoswe v. Nelson****,* 327 S.W.3d 889, 896-97 (Tex. App. – Beaumont 2010, no pet.) ("[A] party may ask another party to admit or deny issues of fact relevant to the pending action or to apply the law to relevant issues of fact....").

See ***George v. Colony Builders, Inc*****.,** 2014 WL 298591, Not Reported in --- S.W.3d --- (Tex. App. – Houston. [1st Dist.] 2014) (discussed in detail below).

2) FIFTH AMENDMENT: ***In re Ferguson*****,** --- S.W.3d ----, 2013 WL 941802 (Tex. App.-Houston [1st Dist.]). While the Appellate Court denied rehearing on Petitioner's petition for mandamus because an inadequate record was presented on appeal, the case contains a very thorough discussion of the interplay between the Fifth Amendment privilege against self-incrimination and requests for admissions when there is parallel litigation involving criminal and civil actions. The sole point on appeal was that the Trial Court had required Petitioner to respond to Requests for Admissions notwithstanding her assertion of her Fifth Amendment privilege against self-incrimination. Ferguson was sued for the hit and run wrongful death of a pedestrian. She reportedly was driving while intoxicated and the grand jury also returned a true bill against her for intoxication manslaughter. Plaintiff propounded a number of Requests for Admissions in the civil action (which are set out in the opinion). Ferguson responded, for each of the requests as follows: "On the advice of counsel, I hereby assert my rights under the Fifth Amendment to the United States Constitution and decline to answer this question." Subject to this objection, she denied each of the requests. Plaintiff filed a motion to compel, a hearing was conducted, and the Court overruled each of the objections.

The opinion points out that "The Fifth Amendment can be asserted in civil cases "wherever the answer might tend to subject to criminal responsibility [she] who gives it." ***Tex. Dept. of Pub. Safety Officers Ass'n v. Denton,*** 897 S.W.2d 757, 760 (Tex. 1995) (quoting ***McCarthy v. Arndstein,*** 266 U.S. 34, 40, 45 S.Ct. 16, 17, 69 L.Ed. 158 (1924)). Before compelling answers to discovery in a civil case over an assertion of the Fifth Amendment privilege, the Court must be "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer(s)

cannot possibly have such tendency to incriminate." Supra at p. 7. As stated above, since the Petitioner did not sustain her burden of bringing forth a proper record of the actions below, the Court did not grant her petition.

Justice Keyes filed a dissent, arguing that the majority misconstrued the appeal as being evidence- based rather than solely a question of law:

> I would hold that Ferguson, a Defendant in a civil case who is simultaneously subject to ongoing criminal proceedings alleging crimes that form the basis of the civil case, cannot be legally compelled to answer requests for admission of all the facts necessary to prove both the elements of each of the crimes with which she is charged and her liability in the civil case, as her answers would necessarily have a tendency to incriminate her. Indeed, the requests for admission she is compelled by Court Order to answer seek nothing but her self-incrimination or the potential basis for a perjury charge. I would grant the petition for writ of mandamus, and I would provisionally order the Trial Court to vacate its order.

Justice Keyes criticizes the Trial Court for apparently not reviewing and ruling on each objection discretely, but instead issuing a blanket order overruling the assertion of privilege. She notes that the Federal Fifth Circuit Court of Appeals recently held that a party may invoke the Fifth Amendment to avoid incriminating himself by answering requests for admissions. ***Davis-Lynch, Inc. v. Moreno,*** 667 F.3d 539, 547 ((5th Cir. 2012). Justice Keyes discusses how the constitutional law of the United States and Texas should be reconciled and that there is no reason why a party in Texas, as in Federal Court, cannot assert her Fifth Amendment privilege against responding to requests for admissions when there is a good faith belief that she is at risk for criminal prosecution and responding to the request would tend to incriminate her. Supra at 10.

3) DEEMED ADMISSIONS

a) Failure to properly respond to a request for admission within the appropriate time period (usually thirty days from service) is deemed admitted without the necessity of a Court Order. The propounding party does not have to obtain an Order from the Court deeming the requests admitted. It is automatic. *See* ***Wal-Mart Stores, Inc. v. Deggs,*** 968 S.W.2d 354, 355 (Tex. 1998) (per curiam). Any matter admitted or deemed admitted is conclusively established unless the Court, ***on motion***, permits withdrawal or amendment of the admission. TEX. R. CIV. P. 198.3; ***Boulet v. State,*** 189 S.W.3d 833, 836 (Tex. App. – Houston [1st Dist.] 2006, no pet.)(citing ***Mashall v. Vise,*** 767 S.W.3d 699, 700 (Tex. 1989). The phrase, "On Motion," is important and was a significant factor in the holding in ***George v. Colony Builders, Inc.*****,** 2014 WL 298591, Not Reported in --- S.W.3d --- (Tex. App. – Houston [1st Dist.] 2014). The requirements for requesting the withdrawal of a deemed admission are much the same as a motion under Rule 193.6 for late supplementation.

> Withdrawal of deemed admissions is permitted upon a showing of **good cause** and a finding by the Trial Court that (1) the party relying upon the deemed admissions **will not be unduly prejudiced** and (2) **presentation of the merits of the action will be served**. TEX. R. CIV. P. 198.3. [emphasis added]

In Colony Builders, George was served with requests for admission. However, on appeal, there was no evidence that George ever responded to the requests, much less responded untimely. [PRACTICE NOTE: When challenging a discovery ruling on appeal or by mandamus, 1) make sure there is a written Order, or evidence of the Court's ruling and 2) make sure the discovery requests or responses are made part of the record!]. To compound George's error, she failed to file a written motion to withdraw the deemed admissions. While she apparently offered an oral Motion, it still was legally and factually insufficient because **she failed to present evidence of good cause, absence of prejudice to opposing party, and that the merits would be served.** [PRACTICE NOTE: Argument of counsel, if objected to, is not evidence. See ***Banda v. Garcia*****,** 955 S.W.2d 270, 272 (Tex. 1997)].

There is an additional noteworthy point in ***Colony Builders*** regarding deemed admissions. George argued that she put on evidence at trial in contradiction of her deemed admission and because Colony Builders did not object, the error was waived. This would have been a winner argument if the evidence was found to have contradicted the admission. However, the Appellate Court found that it did not:

> *See* ***Marshall v. Vise,*** 767 S.W.2d 699, 700 (Tex. 1989) ("We hold that a party waives the right to rely upon an opponent's deemed admissions unless objection is made to the introduction of evidence contrary to those admissions."). ***USAA Cnty. Mut. Ins. Co. v. Cook,*** 241 S.W.3d 93, 102 (Tex. App. – Houston [1st Dist.] 2007, no pet. (holding that Defendant waived reliance on Plaintiff's judicial admissions when Defendant failed to object to Plaintiff's repeated testimony controverting prior admissions).

b) Deemed responses may support a motion for summary judgment when the requests for admissions are on file with the Court, the responding party has failed to timely respond, and has failed to timely and properly move to amend and produce evidence of good cause, absence of prejudice, and that the amended responses will serve justice. ***Williams v. America First Lloyds Insurance,*** 2013 WL 2631141 (Tex. App. – Ft. Worth 2013).

4) [UPDATE] MOTIONS TO WITHDRAW DEEMED ADMISSIONS

There have been several cases this past year dealing with motions to withdraw deemed admissions, particularly in relation to motions for summary judgment. I have drawn two observations from these cases. Courts presumptively are in favor of allowing amendments to withdraw deemed admissions. This is particularly the case when the requests involve issue preclusion and the burden is on the party moving for summary

judgment as part of its summary judgment proof to demonstrate that there was conscious indifference justifying a Court to deny a motion to withdraw and allowing a summary judgment based upon the deemed requests.

a) A trial court may permit withdrawal of an admission if (1) the party shows good cause for the withdrawal, and (2) the Court finds that the party relying on the deemed admission will not be unduly prejudiced and that the presentation of the merits of the case will be served by permitting withdrawal. Tex. R. Civ. P. 198.3. A party establishes "good cause" by showing that the failure to timely respond to the requests for admissions was an accident or mistake, not intentional or the result of conscious indifference. ***Wheeler v. Green***, 157 439, 442 (Tex. 2005) (per curiam). Even a "slight excuse" for the failure to timely respond will suffice, especially when delay or prejudice to the opposing party will not result from the withdrawal. ***Time Warner, Inv. V. Gonzalez***, 441 S.W.3d 661, 665 (Tex. App. – San Antonio 2014, pet. denied).

b) To substantiate a summary judgment based solely on merits-preclusive deemed admissions, the party relying upon the deemed admissions must demonstrate "flagrant bad faith or callous disregard for the rules. "Using deemed admissions as the basis for summary judgment does not avoid the requirement of flagrant bad faith or callous disregard, the showing necessary to support a merits-preclusive sanction; it merely incorporates the requirement as an element of the movant's summary judgment burden. ***Marino v. King,*** 355 S.W.3d 629, 633,634 (Tex. 2011).

c) "When admissions are deemed as a discovery sanction to preclude a presentation of the merits, they implicate the same due process concerns as other case-ending discovery sanctions." ***Marino v. King***, 355 S.W.3d 629, 632-34 (Tex. 2011). *See also,* ***Lee v. Wal-Mart,*** Not Reported in S.W.3d, 2016 WL 1072644 (Tex. App.–Eastland 2016); and ***TransAmerican Natural Gas Corp. v. Powell***, 811 S.W.2d 913 (Tex. 1991). See also, section on **Sanctions** below.

d) ***Ramirez v. Noble Energy, Inc***., -- S.W.3d --, 2017 WL 2180719 (Tex. App. – Houston [1st Dist.] 2017). This opinion is a very good example of the tendency of Appellate Courts to find in favor of the party seeking to withdraw deemed admissions whenever there is an indication that the party did not act in bad faith or in conscious disregard of its discovery obligations.

The Trial Court had prevented Plaintiff from withdrawing deemed admissions and it had granted defendant's motion for summary judgment. The Appellate Court began its analysis of the appeal by examining whether the admissions were "merits-preclusive."

> "the record must affirmatively show that the requests are not merit-preclusive, either by showing that they seek to authenticate or prove the admissibility of documents or by showing that they involve uncontroverted facts." Because merits-preclusive admissions implicate due process concerns, we must presume that the admissions are merits-preclusive if the record does not affirmatively establish that they are not merits-preclusive.

[citations omitted]

While Noble argued that its requests were not merit-preclusive and that they were factual, the Court observed that the requests asked the Plaintiff to admit that Noble was not a proper party and most importantly that Noble relied only upon the deemed admissions in support of its motion for summary judgment. Noble offered no other proof in support of its motion for summary judgment other than the deemed admissions. **The Court found that three key requests were not merit-preclusive, but since eight other requests were deemed merit-preclusive, therefore the overall effect of the requests was found to be merit-preclusive**. The Court reversed the summary judgment because Noble failed to demonstrate that there was a flagrant disregard in failing to respond to the requests for admission.

> Ordinarily, the party seeking withdrawal of deemed admissions bears the burden of establishing the requirements of Rule 198.3: that good cause exists for the withdrawal, that the withdrawal will not unduly prejudice the party relying upon the deemed admissions, and that withdrawal will serve the presentation of the merits. TEX. R. CIV. P. 198.3, ***Boulet***, 189 S.W.3d at 836 ("The party seeking withdrawal of deemed admissions has the burden to establish good cause."). **However, when as here, the party seeks withdrawal of merits-preclusive deemed admissions, due process requires the party *opposing* withdrawal to prove that the moving party's failure to timely answer the requests resulted from flagrant bad faith or callous disregard for the discovery rules. *Medina***, 492 S.W. 3d at 62; ***In re Sewell***, 472 S.W.3d at 456; ***Time Warner***, 441 S.W.3d at 666. "This showing of flagrant bad faith or callous disregard is 'an element of the movant's summary judgment burden.' " ***Medina,*** 492 S.W.3d at 62; *see also* ***Marino,*** 355 S.W.3d at 634(stating that using merits-preclusive deemed admissions as basis for summary judgment "incorporates the requirement [of showing flagrant bad faith or callous disregard] as an element of the movant's summary judgment burden"). [emphasis added]

e) ***Terry Swanson v. State of Texas and County of Trav*****is**, Not Reported in S.W.3d, 2017 WL 1832492 (Tex. App. – Aust. 2017). The issue in this case and the analysis is similar to **Rodriguez**, discussed above, except in this case the Plaintiff was pro se, which made it even more difficult to demonstrate conscious disregard. The opinion, however, also is informative on the issue of undue prejudice. Here, Plaintiff provided amended answers prior to the motion for summary judgement being filed and at least a month before trial. The Court noted that under these circumstances, Courts infrequently find undue prejudice.

> *see also* ***Watson v. Dallas Indep. Sch. Dist****.,* 135 S.W. 3d 208, 215 (Tex. App. – Waco 2004, no pet.) (explaining that "[u]ndue prejudice has generally been found in those instances in which a party waited until the day of trial or after to request the withdrawal of deemed admissions"), *overruled on*

other grounds by ***University of Tex. Med. Branch at Galveston v. Barrett****,* 159 S.W.3d 631, 633 n. 6 (Tex. 2005).

f) ***Hewitt v. Roberts,*** Not Reported in S.W.3d, 2013 WL 398940 (Tex. App.-Corpus Christi)

Roberts filed a DTPA against Hewitt for fraud in a real estate transaction. Roberts filed a motion for summary judgment based in part upon deemed admissions to 143 Requests for Admission. The day following the summary judgment hearing, Hewitt filed answers to the deemed admissions "mostly denying the requests." This was done without leave of the Court. Hewitt then filed a motion to withdraw deemed admissions and a motion for new trial, both of which were denied. Hewitt filed an affidavit trying to explain why it was that he "never received the requests," which included moving and not informing the post office, Plaintiff, or the Court. Hewitt's burden on his motion to withdraw the deemed admissions was to show: (1) good cause; and (2) no undue prejudice. To establish good cause, the party seeking to withdraw the deemed admissions must show that the failure to respond was not intentional or the result of conscious indifference, but the result of accident or mistake. ***Wheeler v. Green,*** 157 S.W.3d 439, 442 (Tex. 2005). The Appellate Court points out that "Hewitt does not say he never received any notice or that he did not actually receive the admissions until January 2011. ". . Hewitt makes no proffer of what his claimed mistake was, i.e., he relies upon a conclusory, self-serving statement and offers no proof of why or how he made a mistake." Supra at p. 13. The Court observed that there was some evidence in the record supporting conscious indifference and the Trial Court had discretion to weigh the evidence. Further, Hewitt, by his own admission, knew of his "mistake" a month before the summary judgment hearing, but took no action to correct the situation. The Court observed consequently he waived his right to raise the issue thereafter.

Hewitt also argued that many of the requests were improper and could not support a motion for summary judgment because they were pure questions of law. The Court acknowledged that as a general proposition this is true; however, it seemed to hold that many of the Roberts requests were not pure questions of law but requests asking to mixed issues of fact and law. Unfortunately, the Court did not give a detailed analysis of its finding with regard to the discrete requests, probably because there was other evidence supporting the motion for summary judgment. ***Marino v. King,*** 355 S.W.3d 629, 633 (Tex. 2011) (admissions may be used to elicit "statements of opinion or of fact or of the application of law to fact" (citing TEX. R. CIV. P. 198.1)).

F. DEPOSITIONS

1) SCOPE

a) ***In re Arpin Moving Systems, LLC,*** --- S.W.3d ---2013 WL 6229156 (Tex. App.-Dallas 2013) This is a great case for discussing the scope of discovery in depositions. Many trial attorneys seem to take the position that the scope of discovery by way of oral depositions is different than the scope of discovery through

written discovery. Wrong! The scope of discovery under Rule 192 applies to all forms of discovery, particularly the forms set out in TEX. R. CIV. P. 192.1, which includes oral and written depositions. *See* TEX. R. CIV. P. 192.1(f). If the rule were not clear enough in this regard, the Texas Supreme Court made it clear in ***K Mart Corp. v. Sanderson,*** 937 S.W.2d 429, 431 (Tex. 1996) when the Court admonished the bench and bar that no discovery device can be used to "fish." However, these road signs notwithstanding, the Plaintiff in ***Arpin*** argued that the scope of discovery is different in an oral deposition. The Appellate Court reiterated what the above rule and the Texas Supreme Court have stated. The Plaintiff was claiming gross negligence and sought the deposition of a corporate representative to address the topic of "gross sales." The Court observed that the scope of discovery for gross negligence is limited to the current net worth of the Defendant and that gross sales discovery had been held to be beyond the scope of permissible and relevant discovery.

> *See e.g.,* ***In re Ameriplan Corp.,*** No. 05-09-01407 CV, 2010 WL 22825, at *1 (Tex. App.- Dallas, Jan. 6, 2010, orig. proceeding) (mem. op.) (real party in interest was not entitled to documents that do not show current net worth of relator, including income statements and old balance sheets; ***In re House of Yahweh,*** 266 S.W.3d 668, 673 (Tex. App. – Eastland 2008, orig. proceeding) (Trial Court abused its discretion by failing to limit net worth discovery to relators' current balance sheet because earlier balance sheets would not be relevant to relators' current net worth).

b) DEPOSITIONS OF CORPORATE REPRESENTATIVES: UIM CASES: There appears to be a raging debate, at least amongst litigants, if not the among the Courts, about whether an insurance company must produce a corporate representative for deposition in an underinsured/uninsured contractual dispute. The issue previously has been addressed by the San Antonio Court of Appeals in ***In re Garza,*** Not Reported in S.W.3d, 2007 WL 1481897 (Tex. App. – San Antonio 2007), holding that a Trial Court abuses its discretion when it quashes a corporate representative deposition on topics that are relevant and go to the heart of a party's claims.

> We conclude the Trial Court erred in quashing the deposition in its entirety because doing so unreasonably restricted Garcia's access to relevant information. Without the opportunity to fully discover information about State Farm's multiple defenses, Garcia is effectively prevented from verifying or refuting those defenses. . . . Thus, quashing the deposition in its entirety severely compromises Garcia's ability to present and prove her case. [omitting citations] *Supra* at *2.

[UPDATE] ***In re Crystal Luna***, Not Reported in S.W.3d, 2016 WL 6576879 (Tex. App. – Corpus Christi 2016) reiterates the holding in ***In re Garza*****.** Because of the significance of the issue in a very active area of personal injury law, I believe a more in-depth review of the holding in ***Luna*** is probably warranted. This opinion clarifies why the deposition of the corporate representative in one context may be irrelevant and inappropriate, while in another context may be not only be relevant, but go to the heart of the Plaintiffs' claims.

Plaintiff sought a petition for mandamus compelling the Trial Court to grant Plaintiff's motion to compel the deposition of a first party insurance company's corporate representative. The case arose from severe personal injuries Plaintiff sustained when she was hit by an uninsured drunk driver. Plaintiff sued the drunk driver and made a claim under her first party uninsured motorist coverage. Three separate lawsuits resulted. The first lawsuit against the drunk driver resulted in a default judgment for Plaintiff. Two lawsuits then remained: a contractual claim against the insurance company, State Farm and an extra-contractual claim against State Farm. The extra contractual claim was a petition for mandamus which arises from the contractual claim against State Farm.

In the original action, against the drunk driver, Plaintiffs sought to take the deposition of the State Farm corporate representative. The Court denied the motion to compel this deposition. After a default judgment was obtained, the Court lifted the abatement on Plaintiff's contractual claim against State Farm. The parties reportedly stipulated that all the discovery that was obtained in the original action would be equally usable in the contractual proceeding. Shortly after the stay was lifted on the contractual claim, Plaintiff sought the deposition of the State Farm corporate representative. State Farm objected, stating that the Court had already denied the deposition in the underlying case against the drunk driver. Plaintiff served a notice for the representative with the most knowledge on the following topics: "which are the basis of this lawsuit. . . "

> (1) the damage sustained by all vehicles involved in the collision at issue; (2) whether Antunez was an uninsured motorist at the time of the collision; (3) whether Antunez was driving an uninsured vehicle at the time of the collision; (4) State Farm's contention that Fred Ochoa Sr. was a responsible third party with regard to this collision; (5) State Farm's contention that Luna "has failed to comply with all conditions precedent to recovery, including the failure to obtain a legal determination of the existence and amount of liability, if any, of the owner or operator of the allegedly uninsured motor vehicle"; (6) whether the term "uninsured motor vehicle" is correctly defined in the State Farm insurance policy at issue in this lawsuit; (7) State Farm's claims and defenses regarding Luna's assertions in this lawsuit; (8) State Farm's contention that it is entitled to "credit and offset" for the personal injury protection (PIP) benefits in the amount of $5,000 paid to Luna as a result of the accident; (9) State Farm's contention that it is "entitled to offsets, including any recovery by [Luna] from other parties or their insurance carriers"; (10) State Farm's contention that Luna's "recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant"; (11) State Farm's contention that "the claim for punitive damages is subject to statutory and constitutional limitations, including, without limitation, TCPRC 41.008"; (12) State Farm's contention that it "generally denies [Luna's] allegations"; and (13) State Farm's contention that it "does not believe [Luna] is entitled to recover damages in the amount sought."

In re Luna, at *2. The defendant filed a motion to quash basically throwing a "kitchen sink" battery of objections at the notice. In addition to arguing that the Court had already quashed the notice in the underlying case, the Defendant objected that the deposition was irrelevant, unduly burdensome, cost outweighs likely benefit, never granted in the past when evidence of burden produced.

Interestingly, State Farm's argument had undertones of a "proportionality" argument. It submitted testimony that it would cost a minimum of $10,000 to prepare and present a corporate representative. Further, while State Farm had produced such a representative for deposition on a couple of different occasions, those were situations in which there were agreements and the damages were catastrophic. So, effectively, State Farm was arguing that the size of the claim in this instance did not justify the expense of $10,000 to produce the representative. The Trial Court granted the motion to quash resulting in the petition for writ of mandamus.

The Appellate Court notes that generally a party has the right to depose anyone. Tex. R. Civ. P. 200.1 (a); *see* ***Crown Cent. Petroleum Corp. v. Garcia***, 904 S.W.3d 125, 127 (Tex. 1995) (construing the former Rules of Civil Procedure); This is particularly true regarding the deposition of another party to the litigation*. See* ***Mobile Oil Corp. v. Floyd***, 810 S.W.2d 321, 323-24 (Tex. App. – Beaumont 1991, orig. proceeding). However, depositions are given no greater latitude than any other discovery device. They are allowed subject to the limitations on discovery provision of Tex. R. Civ. P. 192.6. Then, the question is whether State Farm had proven its entitlement to limitation (or disallowance) of discovery under the provision of Rule 192.6.

The Appellate Court easily dispensed with the first argument that the Court already had ruled on the matter. As stated at the outset, there were three distinct cases. The fact that the Court ruled that the deposition was not relevant in the first case did not have any bearing on whether the deposition was relevant in the second, contractual dispute case.

The Appellate Court next turned to State Farm's arguments that the deposition was irrelevant, that the representative did not have personal knowledge, and that the cost outweighed the potential benefit.

The deposition was found to be relevant even though State Farm and the Plaintiff had stipulated that the Plaintiff was covered by the policy and that the underlying defendant did not have insurance. There was not a stipulation on responsibility and damages. Therefore, the deposition was found to be relevant. The Court also gave a nod to the holding in ***In re Garza****, supra*, observing that it is an abuse of discretion to deny discovery on matters going to the heart of the parties' claims and defenses. The argument that the representative had no personal knowledge was of little moment since a corporate representative under Rule 199.1 is not required to have personal knowledge. The representative is testifying based on the composite knowledge of the corporation. The last argument based upon a cost benefit analysis is particularly interesting. The Court acknowledged that the Defendant had claimed the cost would be $10,000 to provide the

deposition. However, the Court noted that the jury had awarded Plaintiffs in the underlying case over $161,000, so apparently, the potential benefit when monetized was greater than the cost. But the Court also noted that the defendant's cost projection probably was not accurate and that a party should not be able to exploit its own inefficiency to deny discovery.

> We further note that many of the costs that State Farm estimates for the proposed deposition are the result of State Farm's own internal policies or procedures, and a discovery request will not result in an undue burden when the burdensomeness of responding to it is the result of the responding party's own "conscious, discretionary decisions." ***ISK Biotech Corp. v. Lindsay,*** 933 S.W.2d 565, 569 (Tex. App. – Houston [1st Dist.] 1996, no writ); *see* ***In re Whiteley***, 79 S.W.3d 729, 734-35 (Tex. App. Corpus Christi, 2002, orig. proceeding).

2) PLACE OF DEPOSITION

In re Dodeka, LLC, Not Reported in S.W.3d, 2012 WL 5381438 (Tex. App.-Waco). It seems like every three or four years a case appears regarding where a corporate representative's deposition is to take place. This year the case is ***Dodeka.*** Plaintiff expressed an intention to take the deposition of a corporate representative. The rub was that the "majority of the information sought to be discovered from the deposition pertained to the knowledge and actions of Holly Chaffin, a Dodeka employee who resides in King County, Washington." Defendant offered to produce Holly Chaffin in Washington. Plaintiff instead issued the notice for a corporate representative to be taken in the county of suit. Defendant filed a motion to quash claiming that it had not designated a corporate representative. The Appellate Court dismissed the argument, finding that the Court had not abused its discretion, since the Court had not ordered that Defendant produce the employee (who arguably could only be deposed in the county of her residence in Washington state), but had ordered that the deposition of the corporate representative take place in county of suit, pursuant to TEX. R. CIV. P. 199

> Texas Rule of Civil Procedure 199.2(b)(2) addresses the time and place for the oral deposition. In particular, Rule 199.2(b)(2) provides that an oral deposition may take place in:
>
> (A) the county of the witness's residence;
>
> (B) the county where the witness is employed or regularly transacts business in person;
>
> ***(C) the county of suit, if the witness is a party or a person designated by a party under Rule 199.2(b)(1);***
>
> (D) the county where the witness was served with the subpoena, or within 150 miles of the place of service, if the witness is not a resident of Texas or

is a transient person; or

(E) subject to the foregoing, at any other convenient place directed by the Court in which the cause is pending. [emphasis added]

3) REQUESTS FOR PROTECTION – MOTIONS TO QUASH

From time to time, the question arises whether an individual should be protected from having to give a deposition either because of age (too old or too young) or infirmity. If a motion for protection or a motion to quash is filed, in order to be sustained, it must be supported by evidence. ***Garcia v. Peebles,*** 734 S.W.2d 343 (Tex. 1987) (orig. proceeding). However, there are few cases addressing the type of evidence that may be considered. The issue is addressed head on in ***Sells v. Drott,*** 330 S.W.3d 696 (Tex. App.–Tyler 2010, pet. denied). The procedural history of the case is long and contorted, but the salient fact for this consideration is that the Defendant was 84 years old. Although she was sound of mind, her memory was failing and an attorney filed a motion for appointment of a guardian ad litem for her because he did not believe she could effectively aid in the preparation of her case for trial. The Plaintiff sought to take the Defendant's deposition, in part because of a fear that her memory would continue to fade. Defendant filed a motion to quash supported by the affidavit of a physician stating that it could be potentially harmful to Defendant's health to be forced to endure the stress of a deposition. The Court held that affidavit testimony had been recognized by the Texas Supreme Court in prior rules and prior rulings regarding protective orders as proper and admissible for resolving discovery disputes. The Court accordingly found that in this instance the physician's affidavit should have been considered by the Trial Court and that it was an abuse of discretion for the Trial Court not to do so. The following passage from the appellate decision is informative:

> Here, the goal of the discovery process was frustrated by the adversarial approach used. Attorneys must balance common sense and compassion with zealous advocacy. The Trial Court should have balanced the parties' competing needs and rendered an order tailored to the situation, allowing the parties to quickly get to the truth of the issue of Sells's health and ability to appear for a deposition rather than allowing Drott to focus on Sells's deposition.

Supra at 708.

* * *

The title of Rule 199 is "Depositions Upon Oral Examination." The title of Rule 199.6 is "Hearing on Objections." Rule 199.6 refers to "an objection or privilege asserted by an **instruction** not to **answer** or suspension of the **deposition**" and provides that the party seeking to avoid discovery must present evidence by testimony or affidavit. TEX. R. CIV. P. 199.6.

> Although Rule 199.6 does not explicitly cover a situation such as this where a party objected to appearing for a deposition, we conclude that it implicitly applies here.

Supra at 708.

4) QUASHING RELEVANT DEPOSITIONS – ABUSE OF DISCRETION

A) ***In re Staff Care, Inc.,*** 422 S.W. 3d 876 (Tex. App. – Dallas 2014, orig. proceeding). While a Trial Court has broad discretion to limit discovery, a trial judge must be very careful with regard to denying a party the right to depose individuals with knowledge of relevant facts, particularly when the individuals potentially have knowledge of facts that go to the heart of the requesting party's claims or defenses. In ***In re Staff Care, Inc.,*** the trial judge was found to have abused his discretion in granting a motion to quash a number of depositions of parties and fact witnesses. The party moving to quash the notices did not claim that the depositions sought irrelevant information. Rather, they claimed that the notices for the depositions were untimely and Staff Care did not exercise due diligence in seeking the depositions earlier. The facts did not support this allegation, nor does the applicable law. The facts were that the notices and the dates selected for the depositions both preceded the discovery cutoff deadline. Also, there were a number of communications about trying to set up the depositions earlier. There was in effect no good cause for granting the motion to quash and granting the motion deprived Staff Care of potential evidence to support its case.

B) A deponent may move to quash a 30(b)(6) deposition on the basis that the deposition is duplicative of other discovery,[2] invades attorney-client privilege or attorney core work product, or the topics are irrelevant. However, where the deposition is sought on material issues that are core to the deposing party's case, it has been found that it would be an abuse of discretion to quash the deposition. See ***In re Garza,*** 2007 WL 1481897 (Tex. App.-San Antonio) (unreported).

5) INSTRUCTIONS NOT TO ANSWER

Rangel v. Gonzalez Mascorro, 274 F.R.D. 585, 2011 WL 1570329 (S.D.Tex.)

The 1999 amendments to the discovery rules enacted radical changes regarding the conduct of depositions, particularly with regard to how objections were preserved and with regard to instructing the witness not to answer particular questions.

> **(f)** ***Instructions not to answer.*** An attorney may instruct a witness not to answer a question during an oral deposition only if necessary to preserve a privilege, comply with a Court Order or these

[2] See TEX. R. CIV. P. 192.4.

> rules, protect a witness from an abusive question or one for which any answer would be misleading, or secure a ruling pursuant to paragraph (g). The attorney instructing the witness not to answer must give a concise, non-argumentative, non-suggestive explanation of the grounds for the instruction if requested by the party who asked the question.[3]

Comment 4 to Rule 194, elaborates on what constitutes an "abusive question": "Abusive questions include questions that inquire into matters clearly beyond the scope of discovery or that are argumentative, repetitious, or harassing." Add to this comment the holding in ***K Mart Corp. v. Sanderson,*** 937 S.W.2d 429, 431 (Tex.,1996) to the effect that no tool, even oral depositions, may be used for fishing.[4] One might conclude that if a question during a deposition were "fishing," that such a question would be improperly abusive and the attorney representing the witness may properly instruct the witness not to answer.

While not a Texas state case and while it is interpreting the Federal rule, which is not as expansive as the Texas rule, the ***Rangel*** decision is informative with regard to how a Texas Court might interpret whether questioning is "abusive" from a relevancy standpoint, such that an instruction not to respond to the question is proper.

Rangel involved a personal injury case arising from a motor vehicle collision. The defense attorney asked the Plaintiff how she got her healthcare provider's name and how she got the name of the attorney she consulted with before going to the Laredo Healthcare Clinic. Plaintiff's attorney instructed the Plaintiff not to answer these and other similar questions and ultimately terminated the deposition. A motion to compel hearing was conducted at which the defense attorney argued that the information he was seeking was relevant in the case because "this [was] a low impact accident ... that resulted in eventually a referral to a doctor who eventually did surgery on [Plaintiff Rangel's] back." According to the defense attorney, "the reasonableness and necessity of the medical expenses, and how she chose her doctors, and the financial arrangements with those doctors is going to be the main issue in this case."

The Court, while sympathetic to the Plaintiff's attorney's desire not to have these issues to deal with at the trial of the case, made clear that the issue can and should be dealt with at time of trial and not in the deposition, that the scope of discovery is much broader than relevancy at trial, and that what is discoverable is not necessarily admissible at trial. The Court further pointed out that discovery should be allowed unless it is palpable that the evidence sought can have no possible bearing upon the issues should a Court deny discovery, citing ***Gateway Engineers, Inc. v. Edward T. Sitarik Contracting, Inc.,***

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[3] Compare with FED. R. CIV. P. 30(c)(2). See fn 4 below.

[4] A reference in ***Loftin*** suggests that interrogatories and depositions may properly be used for a fishing expedition when a request for production of documents cannot. ***Loftin,*** 776 S.W.2d 148 ("Unlike interrogatories and depositions, Rule 167 is not a fishing rule."). We reject the notion that any discovery device can be used to "fish".

2009 WL 3206625, at *2 (W.D. Pa. Oct. 9, 2009). This sounds very similar to the language of the Texas Supreme Court in ***Ford Motor Co. v. Castillo:***

> *The Trial Court's preemptive denial of discovery could have been proper only if there existed no possible relevant, discoverable testimony, facts, or material to support or lead to evidence that would support a defense to Castillo's claim for breach of contract.* [emphasis added].

Ford Motor Co. v. Castillo, 279 S.W.3d 656, 664 (Tex., 2009).

The Court concluded that the defense attorney's questions were relevant to the claims and defenses in the lawsuit and then discussed FED. R. CIV. P. 30(d)(3) and 30(c)(2). The Court found that it is improper to instruct a witness not to answer a question based on relevancy,[5] and that the better practice is to allow the questioning and deal with the issue of relevancy in terms of admissibility at trial. The Court pointed out, however, that if the questioning were particularly "abusive" (i.e. in bad faith), then the party could stop the deposition and seek a protective order. ***Rangel v. Gonzalez Mascorro*** at *4. There are two holdings from this opinion that might help inform Texas state practice. First, as in ***Rangel***, a Court may find that it is not permissible to instruct a party not to answer a question based on relevancy unless there has been a pattern of questioning that far exceeded the scope of permissible discovery. Second, applying the procedure from FED. R. CIV. P. 30(d)(3) and 30(c)(2), if a party believes there is evidence that the questioning is palpably "abusive" for being far beyond the scope of permissible discovery, the party should terminate the deposition and promptly seek a protective order.

6) APEX DEPOSITIONS

a) The apex deposition doctrine holds that a high level corporate official who does not possess unique or superior knowledge may be protected from being deposed. *See* ***Crown Central Petroleum Corp. v. Garcia,*** 904 S.W.3d 125, 128 (Tex. 1995). Often, what is in controversy is whether the individual whose deposition is being sought is an apex level official. In ***In re Titus County, Texas,*** 412 S.W.3d 28 (Tex. App. - Texarkana 2013, no pet.) the issue is whether a property owner in an eminent domain proceeding could be properly classified as an apex level official. The Texarkana Court of Appeals held that he could not:

> The County contends that it is not attempting to depose William Priefert in his capacity as a high-ranking officer of any type of corporate entity. Instead, it is "trying to depose [William] Priefert who is the property owner in these cases." The County contends that "it's just not possible" to fit this type of condemnation dispute, involving valuation and involving an individual landowner who has bought and sold property in the immediate vicinity of

[5] FED. R. CIV. P. 30(c)(2) states that "[a] person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion [to terminate or limit the deposition] under Rule 30(d)(3)."

the two properties involved, into “the Apex deposition situation.” We agree.

Id at 35.

b) PARTY AS APEX WITNESS

In Re Miscavige, 436 S.W.3d 430 (Tex. App. – Austin, 2014, orig. proceeding). This is a case of first impression which holds that, even if an executive is sued personally, if that executive qualifies for the apex deposition immunity, the immunity will apply unless the party seeking the deposition can show that the executive has unique knowledge or, in the alternative, that the deposition testimony sought is relevant and cannot be obtained through less intrusive means. The Court notes that this opinion is at odds with the opinions of two other sister Courts.

> At least two of our sister courts of appeals have stated that the apex-deposition doctrine does not apply when the deponent is a named party. *See* ***In re Titus Cnty.,*** 412 S.W.3d 28, 35 (Tex. App. – Texarkana 2013, orig. proceeding) (“[T]he apex doctrine does not protect named parties from deposition.”); ***Simon v. Bridewell***, 950 S.W.2d 439, 443 (Tex. App. – Waco 1997, orig. proceeding) (per curiam).

The key to the Court’s decision is its determination that if the deposition of the party executive relates to the executive’s activities as an executive, then the executive is entitled to the immunity regardless of whether he/she has been named as a party. However, if the deposition sought information that did not relate to the executive’s activities as an executive (i.e. the executive were an eyewitness to a car collision), then the apex immunity would not apply.

> We conclude that if an apex executive is named as a Defendant based on his capacity as an executive, then the apex doctrine is implicated and the *Crown Central* standard should be applied to a request for his deposition.

The second part of the ***Miscavige*** opinion dealt with the interplay between a special appearance and the apex deposition rule. For guidance, the appellate court turned to the recent Texas Supreme Court decision ***Moncrief Oil International, Inc. v. OAO Gazprom,*** 414 S.W.3d 142, 157-158 (Tex. 2013). The Court held that the while Rule 120a allows a party to obtain discovery to confront the claim that the Court lacks subject matter or personal jurisdiction over the Defendant, the discovery is limited in scope to the issue of jurisdiction. Further, when the party opposing the special appearance wishes to take the deposition of an apex employee, even if the apex employee is the Defendant raising the special appearance, Plaintiff must still demonstrate that the apex employee has unique knowledge relevant to the jurisdiction issue and that the relevant discovery cannot be obtained through less intrusive means.

G. PRE-SUIT DEPOSITIONS

Rule 202 is a very unique and potentially very useful tool that allows for depositions prior to suit. The rule, drafted in 1999, is a combination of two prior rules -- Rule 187, which allowed depositions to perpetuate testimony and Rule 737, which allowed pre-suit discovery. The scope of discovery under this rule according to the Texas Supreme Court is broader than any other device in any other jurisdiction in the United States. ***In re Doe***, 444 S.W.3d 603 at *3 (Tex. 2014). In view of the broad scope of this tool, the Texas Supreme Court has admonished trial courts to "strictly limit and carefully supervise pre-suit discovery..." ***In re Wolfe***, 341 S.W.3d 932, 933 (Tex. 2011) (orig. proceeding) (per curiam).

1) PROCEDURAL REQUIREMENTS

TEX. R. CIV. P. 202 authorizes a Court to permit depositions pre-suit either to investigate a potential claim or suit or to perpetuate testimony in an anticipated suit, provided the requirements of the rule are met in each instance. The ***In re Reassure America Life Insurance Company*** opinion is a very well-written opinion that provides a comprehensive discussion of the policy considerations underlying the rule, the scope of permissible discovery allowed, and the requirements that must be met to proceed with discovery under the rule. The Court's initial observations are noteworthy:

> There are practical as well as due process problems with demanding discovery from someone before telling them what the issues are." ***In re Jorden,*** 249 S.W. 3d 416, 423 (Tex. 2008). Accordingly, Courts must strictly limit and carefully supervise pre-suit discovery to prevent abuse of the rule. ***In re Wolfe,*** 341 S.W.3d 932, 933 (Tex. 2011) (orig. proceeding).

The rule recognizes and attempts to reconcile competing interests. On the one hand, there are legitimate instances when pre-suit discovery may aid the interests of justice and in which the benefits exceed the costs. However, the rule also acknowledges that an individual or entity is entitled to know the purpose for which the pre-suit discovery is sought. The tension that must often be addressed is determining the scope of discovery and limiting fishing when the petitioner seeking the pre-suit discovery is not required to plead a claim. If a petitioner is not required to plead a valid claim in order to obtain pre-suit discovery, what is it that the petitioner must plead? This is the question that is excellently addressed and answered in ***In re Reassure America Life Insurance Company,*** --- S.W.3d ---, 20013 WL 6053832 (Tex. App. – Corpus Christi/Edinburg 2013).

Ironically, it is difficult to tell what the nature of anticipated litigation was that gave rise to the petition for Rule 202 pre-suit discovery in ***Reassure America***, which essentially was one of the main bases for the Reassure America's complaint. The petitioner never set out or provided the Court the factual basis for his anticipated litigation for which presumably he was seeking investigatory information. Because this is such an important aspect of the opinion, the Petitioner's allegation in this regard is set out for instructional

purposes:

> Garcia further alleged that he sought to obtain the depositions "for use in an anticipated suit in which [he] may be a party," the "subject matter of the anticipated suit is with regard to the policy number MP0153991 belonging to [Garcia]," and [his] "interest in the anticipated suit is that he holds potential legal causes of action."

While Garcia in his petition tracked the wording of the rule in checklist fashion, he failed to provide any factual bases for the statements. This was key. The opinion focuses on what must be set out in the Rule 202 petition to define the parameters of the scope of discovery.

It is important to recall that Rule 202 does not require a petitioner to set forth a claim, rather only the subject matter of the anticipated action, if any, and the petitioner's interest in the anticipated action. *See* ***In re Emergency Consultants, Inc.,*** 292 S.W.3d 78, 79 (Tex. App. – Houston [14th Dist.] 2007, orig. proceeding). Garcia's allegation that the suit is with regard to his insurance policy did not meet this requirement. It did not set out the factual basis for the anticipated action, if any.

> The petition does not otherwise describe the "incident made the basis of this cause," identify the date or dates that the "incident" occurred, the anticipated suit, or the potential claim or suit. *See* TEX. R. CIV. P. 202.2. The petition does not name any adverse parties or state that they cannot be identified through diligent inquiry. *See id.* Further, the petition does not state why the depositions would prevent a failure or delay of justice in an anticipated suit or why the likely benefit of the depositions outweighs their burden or expense. *See id.;* R. 202.1, 202.4.

As this author has noted in numerous papers and presentations over the last decade, the scope of discovery in Texas presently is defined by the pleadings. For discovery to be proper, it must be relevant to a pled claim or defense. This concept is somewhat broader in the context of a petition for pre-suit discovery under Rule 202 because the petitioner is not required to plead a cause of action or claim and arguably may not have sufficient facts with which to do so ethically under Rule 13. ***However, the discovery sought must still be relevant to the subject matter of the anticipated claim.***

> In this regard, we note that the scope of discovery is delineated by the subject matter of the anticipated action. *See* TEX. R. CIV. P. 192.3(a); *see also* ***In re CSX Corp.,*** 124 S.W.3d 149, 152 (Tex. 2003) (orig. proceeding). A petition that merely tracks the language of Rule 202 in averring the necessity of a pre-suit deposition, without including any explanatory facts regarding the anticipated suit or the potential claim, is insufficient to meet the petitioner's burden.

The opinion also addresses the scope of written discovery under Rule 202. Garcia, in conjunction with the requested deposition, also requested that Reassure America produce four categories of documents. This also was significant because the Trial Court's actual order required that Reassure America produce eight categories of documents. One of the primary holdings in Reassure is that the Trial Court abused its discretion in ordering that Reassure produce more documents than were requested.

> We agree that a party cannot be compelled to produce discovery that has not been requested. *See* ***In re Exmark Mfg. Co. Inc.,*** 299 S.W. 3d at 531; ***In re Lowe's Companies, Inc.,*** 134 S.W.3d 876, 880 n. 1 (Tex. App. – Houston. [14th Dist.] 2004, orig. proceeding). Accordingly, the Trial Court abused its discretion to the extent that it ordered the production of discovery that was not requested.

2) REQUIRED FINDINGS

a) It is critical that the when fashioning an order allowing a pre-suit deposition, the Court consider whether the benefits of taking the deposition outweigh the potential undue burden (for an investigative deposition) or whether the deposition will prevent the failure or delay of justice (for a deposition taken in anticipation of litigation). Pre-suit discovery under Rule 202 expressly requires that discovery be ordered "only if the required findings are made." ***In re Does***, 337 S.W.3d 862, 865 (Tex. 2011) (orig. proceeding) (per curiam). Failure of an order to contain one of these findings could be fatal and result in a finding that the Trial Court abused its discretion in granting the petition. ***In re Cauley***, 437 S.W.3d 650 (Tex. App. – Tyler 2014, orig. proceeding).

b) A petitioner seeking pre-suit depositions under Rule 202 must do more than merely "parrot" the requirements of the rule. A petitioner must present evidence that the deposition either will prevent the failure or delay of justice or that the benefit outweighs the potential burden. ***In re East***, 476 S.W.3d 61 (Tex. App.- Corpus Christi 2014, orig. proceeding). There is some controversy about whether a verified petition is sufficient evidence. However, in this instance, the verified petition apparently was not introduced into evidence. Regardless, this Court does not resolve the debate about the adequacy of a verified petition as evidence. It does not reach that issue. Instead, the Court holds that in this instance the verification was inadmissible evidence because it was conclusory and provided no factual basis for the claims.

> The Dallas, Tyler, and Amarillo Courts of appeals have rejected Salinas's assertion that a verified petition constitutes competent evidence in support of a pre-suit deposition. *See, e.g.,* ***In re Dallas Cnty Hosp. Dist.,*** 2014 WL 1407415, at *2*,* ***In re Noriega,*** 2014 WL 1415109, at *2; ***In re Contractor's Supplies, Inc.,*** 2009 WL 2488374, at*5; ***In re Rockafellow,*** 2011 WL 2848638, at 4. We need not reach that issue here; however, because the verified petition did not contain sufficiently detailed recitations to satisfy the burden of proof. The petition is vague and conclusory insofar as it merely tracks the language of the statute and does not include any explanatory

> facts regarding why allowing the depositions would prevent an alleged failure or delay of justice in an anticipated suit, or why the benefit of allowing the depositions outweighs the burden or expense of the procedure. A petition that merely tracks the language of Rule 202 in averring the necessity of a pre-suit deposition, without including any explanatory facts, is insufficient to meet the petitioner's burden. *See* ***In re Does****, 337 S.W.3d at 865* (noting that the petitioner "made no effort to present the Trial Court with a basis for the [Rule 202] findings" where the allegations in its petition and motion to compel were "sketchy");

In re East, 476 S.W.3d at 69.

c) *See also,* ***In re Reassure Am. Life Ins. Co.***, supra, stating that the petition must do more than reiterate the language of the rule and must include explanatory facts. It is not sufficient to articulate a "vague notion" that evidence will become unavailable by the passing of time without producing evidence to support such a claim. [UPDATE] And see more recently, ***In re Pickrell*****, Not Reported in S.W.3d, 2017 WL 1452851 (Tex. App. – Waco 2017)** to the same effect**.**

3) JURISDICTION: THE "PROPER COURT"

A Trial Court must have personal jurisdiction over the potential Defendant to issue an order granting a petition for a 202 deposition. Although Rule 202 is silent regarding jurisdiction, the Texas Supreme Court observed that it is implicit that if the Trial Court does not have subject matter jurisdiction, then it does not have the authority to order the requested relief. In this case, the potential Defendant could neither be identified nor his residence confirmed (he appeared by attorney subject to a rule 210a special appearance to contest jurisdiction). Petitioner sought to prevent a blogger from posting disparaging comments about it on the blogger's blog. Petitioner sought to take the Rule 202 deposition of Google, which hosted the blog, to learn the blogger's identity. The blogger claimed that he did not to live in the jurisdiction and that his only contact with the jurisdiction was his blog. The Court recognized that this placed the petition at an extreme disadvantage in meeting the jurisdiction requirement. Nonetheless, the Court drew a clear line regarding the burden:

> The burden is on the Plaintiff in an action to plead allegations showing personal jurisdiction over the Defendant. The same burden should be on a potential Plaintiff under Rule 202. We recognize that this burden may be heavier in a case like this, in which the potential Defendant's identity is unknown and may even be impossible to ascertain. But even so, Rule 202 does not guarantee access to information for every petitioner who claims to need it.

The Court held that since the Court could not meet the threshold requirement of having personal jurisdiction, it could not grant the requested relief. ***In re Doe***, 444 S.W.3d 603 (Tex. 2014).

4) CANNOT BE USED TO CIRCUMVENT OTHER PROCEDURES

Rule 202 cannot be used to circumvent other laws, such as the labor code, which requires that all administrative remedies must be exhausted before filing a civil action. Rule 202 is a civil action, albeit not a claim. The 202 Procedure cannot expand the scope of discovery of the anticipated litigation it precedes. In ***In re Bailey–Newell,*** 439 S.W. 3d 428 (Tex. App. – Houston [1st Dist.] 2014), petitioner stated that she sought pre-suit discovery to "investigate a potential retaliation claim or suit under the Texas Labor Code." "It is beyond serious dispute that the Texas Commission on Human Rights Act requires a complainant to first exhaust his administrative remedies before filing a civil action." ***Lueck v. State***, 325 S.W.3d 752, 761-762 (Tex. App. – Austin 2010, pet. denied).

5) PRIVILEGES

In re Cauley, 437 S.W.3d 650 (Tex. App. – Tyler 2014, orig. proceeding).

The same rules that apply for the assertion of privileges and protection of privileged data in litigation apply in the context of Rule 202. The ***In re Cauley*** case not only examines the evidentiary value of an verified petition in support of a petition for pre-suit depositions; it also examines the sufficiency of an affidavit asserting trade secrets. When the affidavit merely is conclusory and sets out no facts, the affidavit is inadequate to raise the privilege. The respondent asserted trade secrets, but its affidavit failed to set out any factual basis for its assertions. Therefore, the Appellate Court found that the Trial Court would not have abused its discretion in allowing questions to delve into the information for which the trade secrets privilege was asserted. Ironically, however, the Appellate Court found that the Trial Court abused its discretion in permitting the deposition because the petitioner's proof needed to establish entitlement to the deposition was inadequate. See discussion above.

5) [UPDATE] PRODUCTION OF DOCUMENTS AND THINGS

[UPDATE] ***In re Pickrell*****, Not Reported in S.W.3d, 2017 WL 1452851 (Tex. App. – Waco 2017).** This case provides us the opportunity to discuss the somewhat controversial issue of whether a Trial Court may order the production of documents in conjunction with a Rule 202 petition. The Waco Court, in ***Pickrell***, citing the holding in ***In re Akzo Nobel Chem., Inc.***, ruled that Rule 202 does not provide the Court discretion to order anything but an oral deposition and that nothing in the rule provides the Court discretion to order the production of documents in conjunction with a pre-suit deposition either in anticipation of a lawsuit or to investigate a potential claim.

> "Neither by its language nor by implication can we construe Rule 202 to authorize a Trial Court, before suit is filed, to order any form of discovery but deposition." ***In re Akzo Nobel Chem., Inc.,*** 24 S.W.3d 919, 921 (Tex. App. -- Beaumont 2000, orig. proceeding).

I believe the Waco Court of Appeals is incorrect both in its interpretation of the holding in ***Akzo*** and on the interpretation of Rule 202 to the extent it has held that a notice of oral deposition under Rule 202 cannot contain a request for production.

a) Rule 202.5 specifically allows the Court to order a deposition pursuant to Tex. R. Civ. P. 205.

> Except as otherwise provided in this rule, **depositions authorized by this rule are governed by the rules applicable to depositions of nonparties in a pending suit**. The scope of discovery in depositions authorized by this rule is the same as if the anticipated suit or potential claim had been filed. A Court may restrict or prohibit the use of a deposition taken under this rule in a subsequent suit to protect a person who was not served with notice of the deposition from any unfair prejudice or to prevent abuse of this rule. [emphasis added]

Rule 205 (c) 1 expressly allows for the issuance of a notice of deposition and subpoena on a non-party, which includes a request for production of documents.

> a request for production of documents or tangible things, pursuant to Rule 199.2(b)(5) or Rule 200.1(b), served with a notice of deposition on oral examination or written questions;

Tex. R. Civ. P. 205(3)(a) expressly address the method of issuing a notice of oral deposition and production of documents on a non-party:

> ***Notice; subpoena.*** A party may compel production of documents and tangible things from a nonparty by serving, a reasonable time before the response is due but no later than 30 days before the end of any applicable discovery period, the notice required in Rule 205.2 and a subpoena compelling production or inspection of documents or tangible things.

Those Courts that state that nothing in Rule 202 allows for the production of documents, overlook this fact that Rule 202 incorporates by reference the method and scope of discovery from non-parties under Tex. R. Civ. P. 205.

b) The Waco Court of Appeals in ***Pickrell,*** arguably misinterprets the holding in ***Akzo***. Akzo did not deal with production of documents, but a request to enter onto and inspect property. The Court in ***Akzo*** correctly ruled that nothing in Rule 202 allows a Trial Court to order a pre-suit entry on to property for inspection and copying. Akzo, supra at 920.

> The Respondent issued two orders. One ordered the depositions of Anthony Semien and of witnesses designated by the Relators. **The other required the Relators to make the accident scene available for inspection, photographing and videotaping.** [emphasis added]

Akzo properly states that the rule only allows for a deposition. Akzo, supra at 921. However, ***Pickrell*** arguably overstates this proposition when it holds that ***Akzo*** says that a notice for oral deposition ordered under Tex. R. Civ. P. 202 cannot contain a request for production for the reasons set out above, particularly that a notice of oral deposition of a non-party under Tex. R. Civ. P. 205 inherently may contain a request for production of documents.

H. [UPDATE] MEDICAL AND PSYCHOLOGICAL EXAMINATIONS

1) Texas Cases:

a) Frequently, in personal injury cases, the Defendant seeks an adverse medical examination. This tactic may be to obtain an "independent" assessment of the Plaintiff's alleged injuries and extent of damages. The term, "independent" is a misnomer and will not be used in this discussion.

> Although the phrase "independent medical examination" ("IME") might suggest an examination by a Court-appointed physician, an IME in Texas is simply an examination by a physician upon another party's motion. An IME does not entail the Court's appointment of an independent physician. Under Rule 204.1 of the Texas Rules of Civil Procedure, a party may move to compel another party to submit to a medical examination, and the Court may issue an order granting that motion if certain conditions are met. *See* Tex. R. Civ. P. 2014.1. This is colloquially referred to as an "IME."

Guzman v. Jones, 804 F.3d 707, at footnote 1 (5th Cir. 2015). I typically use the terms "defense medical examination (DME) or simply "defense physical or psychological examination" (DPE).

b) Some attorneys treat these examinations as a matter of right. This not correct, there is not an automatic right to a medical/psychological examination. ***In re Ten Hagen Excavating, Inc.*** 435 S.W.3d 859, 866 (Tex. App. – Dallas 2014, orig. proceeding). There are certain criteria that ***must*** be met in order to entitle a Defendant to such an examination. A party must show good cause, the condition for which the Defendant seeks an examination must be in controversy, there must be a nexus between the testing and the claims being made (relevance), and the information may not be obtained through less intrusive means. Over the last year the focal point of controversy regarding the discovery device has been on the criteria that the information may not be obtained through less intrusive means. As will be discussed below, the Texas Supreme Court has recently weighed in on this issue.

c) A Plaintiff may place her medical or psychological condition in issue through her allegations. *See* ***Beamon v. O'Neill***, 865 S.W.2d 583, 586 (Tex. App. – Houston [14th Dist.] 1993, orig. proceeding). But a mere allegation of mental distress or anguish will not place the Plaintiff's psychological condition in issue. ***In re Doe***, 22 S.W.3d 601, 605 (Tex. App.-Austin 2000, orig. proceeding). *See also* ***Amis v. Ashworth***, 802

S.W.2d 374, 378 (Tex. App. – Tyler 1990, orig. proceeding) (holding that an allegation of self-defense is insufficient to warrant granting an examination by a mental health professional.)

d) 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. In ***Coates v. Whittington, supra,*** the manufacturer alleged that there was good cause for a mental examination based on notes in the medical records and testimony that Ms. Coates had suffered from depression prior to the incident. The Court rejects this argument observing that the Defendant had failed to demonstrate a "nexus" between the prior alleged condition and the claims that Plaintiff alleged resulting from the occurrence.

> Mrs. Coates' prior problems and attendant complaints of depression are distinct from the mental anguish she claims as a result of her injury. Drackett has failed to show any connection or "nexus" between Mrs. Coates' pre-injury depression and her post-injury embarrassment. ***Coates,*** 758 S.W. 2d at 752

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

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****,* 379 U.S. at 117-18, 85 S. Ct. at 242-43. [emphasis added].

NEXUS

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

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,*** 379 U.S. at 118, 85 S. Ct. at 242;

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

> "[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 as designating an expert on the Plaintiff's mental or medical condition resulting from the occurrence).

e) 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.

Coates, 758 S.W.2d 753.

f) [UPDATE] In addition to the Plaintiff placing her medical or psychological condition in issue, the Defendant or the opposing party (the Plaintiff may put the Defendant's medical or psychological condition in issue) may put another party's medical or psychological condition in issue. The physician-patient privilege is intended to facilitate full communication between patients and their physicians and to prevent disclosure of personal information to third parties. This physician patient privilege is limited by exceptions, including a "litigation exception," which applies when "any party relies on the patient's physical, mental, or emotional condition as part of the party's claim or defense and the communication or record is relevant to that condition." TEX. R. EVID. 509(e)(4), 510(d)(5). This exception applies when "(1) the records sought to be discovered are relevant to the condition at issue, and (2) the condition is relied upon as a part of a party's claim or defense, meaning that the condition itself is a fact that carries some legal significance." *See* ***R.K. v. Ramirez,*** 887 S.W. 2d 836, 843 (Tex. 1994). This begs the question, what must the party who is seeking the medical or psychological condition do to place the other party's medical condition in issue. The most important thing it must do is place the condition in issue through its pleadings. This is the holding in ***In re Nikki Lauren Morgan***, 507S.W.3d 400 (Tex. App. – Houston [1st Dist.] 2016, orig. proceeding).

> Because no pleading contains a claim or defense mentioning Nikki's medical condition or treatment for RSD, the Trial Court abused its discretion in concluding that the litigation exception applies and in ordering production of Nikki's medical records concerning her RSD.

g) ***In re Click,*** 442 S.W.3d 487, 491 (Tex. App. – Corpus Christi 2014, orig. proceeding). ***Click*** is an interesting case for a couple of reasons. First, it involves a Plaintiff seeking a medical examination of the Defendant. Second, the case turns on the scientific reliability of the basis for which the examination was sought. The case involved claims of wrongful death arising from a head on vehicular collision. The police report indicated that the Defendant may have fallen asleep at the wheel. Also, the Defendant had been convicted in the past of possession of controlled substances. Plaintiff sought hair samples from Defendant to establish that Defendant was under the influence of controlled substances at the time of the collision. Defendant filed a response pointing out that good cause had not been established because there was no indication that the Defendant was under the influence of any drugs at the time of the collision. Defendant supported the response with an affidavit from a medical toxicologist. The substance of the affidavit is informative. The reported pertinent contents of the affidavit are as follows:

> Hair testing has "limited use" in determining whether an individual's hair has been exposed to a potential drug because a test can reflect drug usage by bystanders rather than the individual subject to testing; and hair cleaning and manipulation, hair pigment, color, race, dosage of drug exposure, and sampling methods can all affect the availability and existence of drugs in the hair at the time of testing. Dr. Beberta stated that in "situations like the present case, hair testing is ***no longer considered a scientifically reliable method*** to determine whether an individual used drugs, when the individual used drugs, or whether the individual was impaired or intoxicated by a particular drug found in the hair." Dr. Beberta further opined that testing hair samples more than ninety days after an alleged drug exposure was scientifically unreliable.

The affidavit, which was not rebutted, effectively was a ***Daubert*** attack on the viability of the theory on which the requested examination was based, and it was a very effective strategy. The Trial Court did not actually order an examination of Defendant, but ordered Defendant to produce a hair sample for analysis. The Appellate Court dispensed with Plaintiff's argument that the Court had not ordered an actual examination of the Defendant but merely a hair sample. The Court found that Rule 204 applies both to examinations and the product of examinations (i.e. a hair sample). The Court then found that the Court had abused its discretion by ordering the production of the examination:

> The evidence before the Trial Court did not establish that the requested examination is relevant to issues that are genuinely in controversy in the case and the examination would produce, or would likely lead to, relevant evidence, or that a reasonable nexus exists between the condition in controversy and the examination sought. *See, e.g.,* ***Coates,*** 758 S.W.3d at 751. Moreover, the real parties have made no attempt to show that it is not possible to obtain the desired information through less intrusive means.

h) LESS INTRUSIVE MEANS REQUIREMENT:

1) ***In re Gonzales*****,** Not Reported in S.W.3d, 2015 WL 5837896 (Tex. App. – San Antonio 2015). The take away from this case is that a Trial Court does not abuse its discretion in denying a motion for adverse medical examination when the requesting party fails to demonstrate that it cannot obtain the information it is seeking through less intrusive means. Plaintiff's original treating doctor had recommended a four-level cervical fusion. However, Plaintiff obtained a second opinion which resulted in the Plaintiff having a single disc repair surgery. Defendant had requested an adverse examination before the surgery which was denied. After the surgery, Defendant again sought an adverse examination. Apparently, however, Defendant did not have the examiner update and supplement his affidavit. The Defendant produced an affidavit from its adverse examiner physician that Plaintiff "undergo an independent medical examination before he undergoes a four-level cervical fusion." Regardless, the Court found that the proof was insufficient to establish why the examination was necessary and why the information could not be obtained through less intrusive means. A physician merely stating in a conclusory fashion that the physician believes that an examination should be conducted is insufficient to meet the less intrusive means requirement:

> Dr. Meadows does not, however, detail any information necessary to his evaluation or development of opinions that is not covered by existing examinations or medical records, or that could not be obtained by other discovery, such as deposing additional witnesses. *See id.* at 870. The real parties did not establish that the information regarding Gonzalez's condition which would be available to their experts through other forms of discovery is inadequate for the purpose of defending against Gonzalez's claims and obtaining a fair trial.

2) [UPDATE] ***In re H.E.B,*** 2016 WL 3157533 (Tex. 2016) (per curiam). **It is questionable whether the holding in In re Gonzales, supra, would the same today. Arguably it would not.** The Texas Supreme Court in ***In re H.E.B,*** 2016 WL 3157533 (Tex. 2016) (per curiam) appears to effectively eliminate the "less intrusive means" that has existed in both the Texas and Federal rules since the U.S. Supreme Court handed down the ***Schlagenhauf*** decision in 1964. ***Schlagenhauf v. Holder***, 379 U.S. 104, 118 (1964). The take away from H.E.B is that if the Plaintiff has put her medical condition in issue and has designated a physician or psychologist as a testifying expert, the Defendant, absent extenuating circumstances, probably is going to be entitled to a medical or psychological examination of the Plaintiff.

> (1) the Plaintiff intended to use expert testimony to prove causation and damages; (2) HEB sought to allow its competing expert "the same opportunity" to examine the Plaintiff as the Plaintiff's expert had; (3) the results of this requested examination "go to the heart of HEB's defense strategy"; (4) the credibility of HEB's expert would be questioned at trial if he opined without having examined the Plaintiff; and (5) a subsequent injury introduced complications regarding the nature, extent, and cause of the

injuries.

Since H.E.B arguably alters longstanding practice, it probably is instructive to analyze how the Court got to its result. The Plaintiff was injured when he tripped on an exposed piece of metal on the H.E.B premises. The allegation was that this resulted in an injury to his spine. To complicate matters, the Plaintiff was involved in a second incident at a different store in which an object fell on his head. The nature of the alleged injuries from that incident are not explained, but it is reported that the Plaintiff filed suit against that store as well. HEB hired Dr. William Swan to provide expert testimony on the issue of damages. The seeds of controversy were planted when Dr. Swan prepared a report after only reviewing the medical records. Although Dr. Swan apparently testified that he routinely examines the Plaintiff before providing a report, this one "slipped by." Some important facts appear in the following footnote in the opinion:

> HEB did not request that Dr. Swan be permitted to examine Rodriguez before preparing the report. But when asked in a deposition whether "a treating doctor is in a better position to examine and treat a patient's injuries" than a "records review doctor," Dr. Swan testified that an examining doctor has "the best feel for the patient." He also testified that he routinely examines patients in most cases, but that examining Rodriguez "slipped by."

It would be interesting to see the actual transcript of what Dr. Swan's testimony was, as it appears that the interpretation of what was said may be different than what Dr. Swan actually said. There seems to be a commingling of the terms "treating doctor," and "examining doctor. The term "treating doctor" appears in quotes, which the term "examining doctor" does not. It makes total sense that a treating doctor is in a better position to examine and treat a patient's injuries than a records review doctor," The next sentence, however, seems out of context. "Dr. Swan testified that an examining doctor has the best feel for the patient." What does that mean? It would have made more sense if the doctor had testified that to best formulate a diagnosis to be able to treat the patient properly an examination of the patient is preferable to making a decision on a records review. In other words, the quote that the Texas Supreme Court relies upon does not appear to support the argument that in this instance the Defendant's expert could not formulate a proper opinion through less intrusive means than a physical examination of the patient. It appears that the decision was based less upon whether the Defendant's expert could formulate an opinion without a physical examination of the Plaintiff than it was that without the opportunity to examine the Plaintiff that the Defendant's expert would have a credibility issue at trial.

> The purpose of Rule 204.1's good-cause requirement is to balance the movant's right to a fair trial and the other party's right to privacy. *See id.* at 753. . . Although Dr. Swan has reviewed Rodriguez's medical records, he explained in his deposition why "a treating doctor is in a better position to examine and treat a patient's injuries" than a "records review doctor." Significantly, Rodriguez intends to prove causation and damages through

> expert testimony, and Rodriguez's expert has already examined him. HEB merely seeks to allow its competing expert the same opportunity, and the results of Dr. Swan's requested examination go to the heart of HEB's defense strategy. *See* ***Able Supply Co. v. Moye***, 898 S.W.2d 766, 772 (Tex. 1995) (stating that denial of discovery goes to the heart of a case when the party is prevented from developing critical elements of its claim or defense). **Further, requiring Dr. Swan to testify at trial without the benefit of examining Rodriguez places him at a distinct disadvantage because it allows Rodriguez to call into question his credibility in front of the jury. [emphasis added]**

[**Comment:** Rule 204 is an unusual rule. While the Courts have held regarding other discovery devices that a party does not have to create evidence for an opponent, effectively this is what Rule 204 requires. The rule attempts to allow the acquisition of information, while also trying to provide for fairness at trial. This creates tension, as does the balancing of fairness with protection of privacy. The HEB decision appears to seek to provide fairness (an even playing field) at trial. That indeed is one of the policy considerations underlying the rule. What is troubling is that the opinion appears to sacrifice the "less intrusive means" criteria to achieve this end. This is unfortunate because these criteria were supposed to be used to balance the needs for fairness against the right to privacy. A better analysis in this regard might have been for the Court to find that from the evidence presented, the benefits of fairness at trial outweighed any potential harm that examination might have on the Plaintiff's privacy. That would have been a fact specific determination that would have left the "less intrusive criteria" as a meaningful consideration.]

3) [UPDATE] ***In re Offshore Marine Contractors***, 496 S.W.3d 796 (Tex. App. – Houston [1st Dist. 2016). The holding in ***In re H.E.B.*** is followed in Offshore Marine. This case is interesting additionally because it addresses the third requirement of ***Coates v. Whitington:*** the less intrusive means requirement, which arguably is effectively vitiated by the Texas Supreme Court in ***In re H.E.B***.

> The third element of good cause—"less intrusive means"—addresses whether the desired information "is required to obtain a fair trial and therefore necessitates intrusion upon the privacy of the person he seeks to have examined." ***Coates***, 758 S.W. 2d at 753. The desired information is not required to obtain a fair trial when a party may obtain the same information by deposing the opposing party's physicians or relying on existing expert reports. *See* ***Ten Hagen***, 435 S.W. 3d at 870. On the whole, Courts must attempt to balance "the party's right of privacy and the movant's right to a fair trial." *Id*. at 866. Therefore, in determining whether the movant has demonstrated good cause, the Trial Court must evaluate the adequacy of the less intrusive measures "in light of the fair trial standard." *Id*. at 870.

The Court then goes on to explain the rationale in ***In re H.E.B.*** such that the fair trial consideration almost always is going to require that the Court grant an adverse examination if the other party has obtained an examination by a testifying physician or psychologist.

> Jones's physicians and therapists have performed examinations and tests, and the results of these examinations will form part of the evidence and the basis for expert opinion on causation and damages. Like HEB, OMC is asking for its expert, Dr. Yohman, to have the same opportunity to examine Jones. Additionally, this requested examination goes to the heart of OMC's defense strategy. *See* ***Able Supply Co. v. Moye****, 898 S.W.2d 766, 772 (Tex. 1995)* (denial of discovery goes to the heart of a Defendant's case when it prevents it from developing critical aspects of its defense, including injury and lack of causation). Without the benefit of the requested examination, Yohman's credibility could be attacked in front of the jury. *See* ***In re H.E. B.*** 2016 WL 315733, at *3.

While the less intrusive means requirement still technically exists, it is likely to be trumped by the right to fair trial requirement anytime the party from whom an examination is requested has undergone an examination by a physician or psychologist who is then designated as a testifying expert. Arguably, the less intrusive means requirement might have some validity and effect in the instance in which a party places in issue the medical psychological condition of the party from whom the examination is requested and that party has not undergone an examination by a physician or psychologist designated as a testifying expert. In such an instance, the fair trial requirement arguably might not be activated.

4) [UPDATE] ***In re Advanced Powder Solutions***, 496 S.W.3d 838 (Tex. App. -Houston [1st Dist.] 2016) also provides an excellent analysis and discussion of the tension between the right to privacy and the fair trial standard. In this case, the holding was that the Trial Court abused its discretion in not ordering a defense medical examination when Plaintiffs' testifying expert testified that much of his opinion was based upon a physical examination of the Plaintiff. The Court refers to the discussion in ***Ten Hagen*** about the general insufficiency of less intrusive means in meeting the fundamental fairness test:

> The means of obtaining information that are less intrusive than a compelled examination include "deposing the opposing party's doctors," "attempting to obtain copies of medical records, ... or relying on existing expert witness reports already filed in the case." ***Ten Hagen***, 435 S.W. 3d at 869-70 (collecting authorities). "The adequacy of these measures must still be evaluated in light of the fair trial standard, however." *Id.* at 870. ***"In many cases, the treating physician's notes, the medical records of the complaining party, and expert witness reports filed by other parties cannot serve these legitimate purposes."*** *Id.* (emphasis added).

i) [UPDATE] **EXAMINATION ONLY ALLOWED BY A PHYSICIAN OR PSYCHOLOGIST:**

In re Advanced Powder Solutions, 496 S.W.3d 838 (Tex. App. -Houston [1st Dist.] 2016) addresses and is informative on another important issue that arises under Rule 204. An examination may only be ordered conducted by a qualified physician or psychologist. For instance, unlike under the Federal Rule which has been amended specifically to allow vocational examinations, examinations by vocational counselors have been held to be improper under Rule 204.1. ***Moore v. Wood***, 809 S.W.2d 621, 622-24 (Tex. App. – Houston [1st Dist. 1991, orig. proceeding). In Advanced Power, there was a request for a functional capacity examination. The Court does not address whether a functional capacity examination, by definition, is permissible, if conducted by a physician. Rather, the Court points out that because the Defendant neither at the trial level or in its brief had indicated who was going to perform the examination, the Defendant had failed to meet the requirements of Rule 204, which allows examinations only by a physician or psychologist.

> APS's motion, like its mandamus petition, is silent regarding who would perform the "functional capacity evaluation and impairment rating" examination, the nature of that examination, or whether it would be performed by a "qualified physician." For this reason, APS has failed to show that its motion satisfies the requirements of Rule 204.1.

2) Federal Cases: While there have not been many Texas Appellate decisions regarding physical/mental examinations under Rule 204, or its predecessor, in contrast, there have been many decisions in other jurisdictions, particularly those adopting the federal rule (FED. R. CIV. P. 35). These decisions from the Federal Courts and jurisdictions adopting the federal rule help inform our practice because Rule 204 in large part is very similar to FED. R. CIV. P. 35. In this regard, there have been two recent, noteworthy cases out of Texas Federal Courts. Both primarily deal with the timing of what I refer to as "defense medical exams" (DMEs). The cases discuss the interplay between FED. R. CIV. P. 35 and FED. R. CIV. P. 26. There is no deadline set out in FED. R. CIV. P. 35 as to when a request for DME must be made, except that the request be made within the discovery period. This might be true in a vacuum; however, the question that arises concerns the potential impact of Rule 26, which authorizes a Court to impose a discovery deadline and a deadline for designating expert witnesses. Specifically, the issue is whether a Court Order setting out a discovery deadline and a deadline for designating experts tacitly imposes a deadline for requesting a DME so that the expert, if he or she is going to be a testifying expert at trial, is fully designated by the designation deadline. The controversy arises when a request for DME is made at or after the time of expert designation. In such a situation should a Defendant be able to get an exception from the expert designation deadline? The answer may turn on whether the Defendant intentionally procrastinated or whether events occurred in the development of the case which made the late request unavoidable. The following two cases help inform the answer to this issue and to others that arise with this peculiar procedure.

a. ***Diaz v. Con-Way Truckload, Inc.,*** --- F.R.D. ----, 2012 WL 130915 (S.D. Tex.). This was a motor vehicle collision case that got removed to Federal Court. A scheduling order was entered. After the deadline for Defendant to designate experts, Defendant requested a Rule 35 medical exam. Plaintiff objected that the request was untimely because the expert designation deadline had expired. Defendant responded by saying that there was no deadline in Rule 35 for requesting and examination or for providing a report. After noting that there is disagreement among Courts that have addressed the interplay between Rule 26 and Rule 35, the Court found that the better course is to recognize that the two rules operate together rather than independent of one another. Accordingly, the Court found that Defendant did not exercise diligence in attempting to request a Rule 35 examination before the expert deadline and therefore Defendant's request for an examination beyond the designation deadline should be denied. It should be noted that Plaintiff filed a late report from a neurologist to whom Plaintiff had been referred by his treating physician. The Court wound up allowing Plaintiff's late designation and in return allowed Defendant an extension of its expert designation deadline. Nonetheless, the opinion stands for the proposition that Rule 35 and Rule 26 are to be read together and that a request for a Rule 35 medical/mental examination must be in coordination with the expert designation deadline under Rule 26.

b. ***Naranjo v. Continental Airlines, Inc.,*** Slip Copy, 2013 WL 1003485 (S.D. Tex.)

It is important to note that the ***Diaz*** Court observed in footnote 3 of that decision that "The Court concedes that there may be circumstances when a Rule 35 examination after the expert report deadline and discovery deadline may be warranted." ***Naranjo*** presents such a circumstance. The opinion notes that in his original pleadings, Mr. Naranjo "asserted vague claims of emotional damages"; however, during his deposition for the first time he claimed he suffered "a fear of flying, depression, post-traumatic stress disorder, anger, and hyper-vigilance." This assertion in his deposition put his mental or psychiatric in issue and Continental promptly moved for a Rule 35 psychological examination. Since the Plaintiff's deposition was late in the discovery period, Defendant's request for the psychological examination came after its expert designation deadline. The Court found that these circumstances constituted good cause to allow an extension of the deadline to permit the psychological examination.

8. EXPERTS:

A. DISCLOSURE OF EXPERTS

See discussion above, under DISCOVERY TOOLS – DISCLOSURE

B. [UPDATE] FORMS OF ALLOWED DISCOVERY – ATTORNEY FEES

In re National Lloyds Insurance Company, -- S.W.3d --, 2017 WL 2501107 (Tex. 2017). This recent Texas Supreme Court case is noteworthy on multiple levels. However, for purpose of this paper, we are focusing on the aspect of the opinion

that deals with permissible forms of discovery regarding testifying experts. The opinion focuses on the discoverability of attorneys' fees from a Defendant insurance company involved in windstorm litigation. The central holding of the case is that if the party is not seeking attorney fees, then discovery of its attorneys' fees generally is going be found to be irrelevant and an invasion of the core attorney work product exemption. It also is noteworthy what the opinion says it does not restrict:

> Our holding does not prevent a more narrowly tailored request for information relevant to an issue in a pending case that does not invade the attorney's strategic decisions or thought processes. Nor does our holding preclude a party from seeking noncore work product "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means." [footnotes omitted]

In re National Lloyds Insurance Company, supra at *7

The majority in ***In re National Lloyds Company***, goes on to point out that not only was the discovery sought irrelevant and exempt from discovery, Plaintiffs had not complied with Rule 195.5 in seeking discovery about the testifying expert regarding attorney fees. Therefore, the exceptions to the work product rule found in Tex. R. Civ. P. 192.3 (i.e. waiver of the work product exception) were in fact not waived.

[Comment]: I am not sure why the Court engaged in the non-waiver of the work product exception analysis in this setting, as it already had determined that the discovery of Defendant's attorney fees was irrelevant. It would seem, that all the Court needed to say under these facts was that the Plaintiff had not used the proper method of obtaining discovery from Defendant's expert on attorney's fees so the discovery should have been denied. Also, it is not clear to me how a violation of the restrictions in Tex. R. Civ. P. 195.5 waives the exceptions to the work product exception under Tex. R. Civ. P. 192.3. Nonetheless, this is what the majority has held. If a party seeks discovery from or about a testifying expert using a method of discovery that is not authorized, then the party having retained or specially employed the testifying expert not only may object to the request, but may withhold work product materials compiled or reviewed by the testifying expert. In ***National Lloyds***, the Plaintiff sought discovery through interrogatories and requests for production, which are not methods of discovery authorized under Tex. R. Civ. P. 195.5 for obtaining information about or from a testifying expert. It is understandable that the Court may have wanted to make clear that in a different setting, had the information that was being sought been relevant, if the Plaintiff's had used the proper discovery methods, then the work product exception (which was not waived in this instance) would be waived.

What is unclear, is whether **a request for production served in conjunction with an oral deposition of a testifying expert** would be an authorized method of obtaining discovery of or from a testifying expert. I think the answer is and should be yes, this method is allowed. I infer this from the discussion and rules cited in footnote 92 of the

opinion:

> *See* TEX. R. CIV.P. 195.1 ("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." (emphasis added)). Via requests for disclosure, as authorized by Rule 195.1, a party is entitled to limited expert-witness document discovery, including "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." TEX. R. CIV. P. 194.2(f)(4); *see also* TEX. R. CIV. P. 192.3 (e) (delineating the scope of expert discovery), 195.5 ("In addition to disclosure under Rule 194, a party may obtain discovery concerning the subject matter on which the expert is expected to testify ... and other discoverable matters, **including documents not produced in disclosure, only by oral deposition of the expert** and by a report prepared by the expert under this rule."). [emphasis added]

It would appear, that under Tex. R. Civ. P. 195.5 **a party may obtain additional documents** from a testifying expert not produced in disclosure by serving a notice for an oral deposition of the testifying expert, which may include a request for production pursuant to Tex. R. Civ. P. 199.2 (b)(5). See Comment 1 to Tex. R. Civ. P. 199:

> 1. Rule 199.2(b)(5) incorporates the procedures and limitations applicable to requests for production or inspection under Rule 196, including the 30-day deadline for responses, as well as the procedures and duties imposed by Rule 193.

While my analysis might arguably be correct, and if so, might be useful in some other context, it is of little moment in ***National Lloyds*** because even if the Plaintiffs had served a notice for oral deposition, including a request for production, the Court still likely would have found that the discovery should be disallowed as irrelevant even if by designating the attorney as a testifying expert since, the Defendant would have effectively waived the work product exemption from discovery regarding that testifying expert.

C. PRODUCTION OF THINGS CREATED AND REVIEWED

1) ***Collins v. Western Digital Technologies, Inc.,*** Slip Copy, 2012 WL 7189181 (E.D. Tex.). In this Federal Case, Defendant argued that it was entitled to all the products that Plaintiff's expert had tested, not just the model and serial numbers, which is what had been disclosed. The federal judge held that the "Federal Rules of Civil Procedure further require the production of all data considered by testifying experts and the opportunity to inspect and test all designated tangible things. FED R. CIV. P. 26 and 34. Providing model and serial numbers rather than the actual drives that were tested

does not comply with either the Discovery Order or the Federal Rules of Civil Procedure.

2) What happens when the expert witness produces a complete report and is offered for deposition, but unintentionally loses his complete file and cannot recreate it? This problem was confronted in ***Harris County Appraisal Dist. v. Houston 8th Wonder Property, L.P.,*** --- S.W.3d ----, 2012 WL 5457448 (Tex. App.-Houston. [1 Dist.]). The Appraisal District argued that under TEX. R. CIV. P. 192 and 194, it was entitled to everything that the expert had created or reviewed in anticipation of litigation. Interestingly, the Appraisal District did not seek exclusion of the expert's testimony under TEX. R. CIV. P. 193.6 or as a sanction under TEX. R. CIV. P. 215. Rather, it saw exclusion of the expert under ***Daubert*** because the expert could not provide the data that he had relied upon in formulating his opinions. The Court held that the exception to TEX. R. CIV. P. 193.6 exclusion applied because 1) the expert testified that the loss of the file was inadvertent; 2) the expert had provided a comprehensive report; and 3) the Appraisal District was able to take a complete deposition of the expert. *See* TEX. R. CIV. P. 193.6(a). *Supra* at p. 12.

3) [UPDATE] **DOCUMENTS REVIEWED BY A COMPANY REPRESENTATIVE DESIGNATED AS TESTIFYING EXPERT**: It is axiomatic, in Texas, that if something is reviewed or relied upon by a testifying expert in formulating the expert's opinions to be expressed in the case, those data are subject to discovery. ***In re Christus Spohn Hosp. Kleberg***, 222 S.W.3d 434, 445 (Tex. 2007) orig. proceeding) (holding that work product was not protected if provided to or reviewed by a testifying expert. Apparently, while communications between the expert and counsel were involved, no claim of attorney-client privilege was before the Court). But what is the rule when the testifying expert is a "specially employed" expert, such as a company employee or representative? I have written in the past that the discovery of and from the specially employed expert is the same as for any testifying expert. The case I cited for this proposition was ***Aetna Casualty & Sur. Co. v. Blackmon***, 810 S.W.2d 438 (Tex. App.--Corpus Christi 1991, orig. proceeding), which 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*** (this was before the rule was amended to include "reviewed.") upon in forming his opinions. However, implicit in the holding was that documents and data not relied upon continued to be protected by any privilege that otherwise applied. So, what is the result if the specially employed representative testifying expert is provided or reviews data protected by the attorney/client privilege? Recent opinions suggest that if the specially employed expert qualifies as a company representative, any attorney/ client data reviewed by the expert continues to retain its privileged status, which is not waived by designating the representative as a testifying expert.

a) ***In re Segner*** involved claims in bankruptcy by a limited liability partnership against a bank. The trustee designated an individual as a testifying expert and the bank sought the expert's deposition. At issue were communications between the expert and attorneys for the trust, which claimed the communications were protected because the expert also was a "representative" of the estate. The Court found that the expert was a

representative of the trust and accordingly communications between the representative and the trust attorneys were protected by the attorney-client privilege, notwithstanding the individual also was designated as a testifying expert. Finding that the holding in ***Christus*** was not applicable because the Court in that instance was dealing with work product and not matters protected by the attorney-client privilege, the Appellate Court found simply that communications protected by the attorney/client privilege are not waived by designating the individual as a testifying expert. Further, and even more curiously, the Court found that Tex. R. Civ. P. 195.1 does not expressly allow for discovery of matters protected by the attorney-client privilege. The Court's analysis here is somewhat confusing. It seems to intimate that had the notice of deposition been issued under Rule 199.1, discovery of attorney-client communications might be discoverable, but since the notice was issued under Rule 195.1 (and 195.4), no such exception is allowed. *Supra* at 412-413. Why this is curious is because there is no unique deposition rule under Rule 195.1 and 195.4. Arguably, a deposition of a testifying expert is taken under Rule 195.1 through either Rule 199.1 which allows for the oral depositions of parties, or under Rule 205, which allows for the depositions of non-parties. In either event, attorney-client communications are presumably protected subject to claim of waiver. The issue that is not clearly raised and discussed in ***Segner*** is whether designation of an individual as a testifying expert waives the attorney/client privilege in any respect. The inference of the Court's holding appears to be no.

b) [UPDATE] ***In re Texas Windstorm Insurance Association***, Not Reported in S.W.3d, 2016 WL 7234466 (Tex. App. – Houston [14th Dist.] 2016] This case arose out of a first party insurance dispute. The insurance company, in response to a motion for summary judgment, tendered the affidavit of a company representative who also was designated as a non-retained expert. The City of Dickinson somehow learned that the affidavit had been modified after communications between the attorney for the insurance company and the affiant, and the City requested the communications between the attorneys and the affiant. The Trial Court ordered the production of these communications. The Appellate Court, citing the holding in Segner, held that the communications were protected by the attorney-client privilege and were not waived by designating the representative as a testifying expert.

> We agree with ***Segner*****,** and conclude that the email exchanges and the accompanying drafts of Strickland's affidavit between Texas Windstorm's counsel and Strickland are protected by the attorney-client privilege and are not subject to discovery. Supra at *6.

It should be noted that the Federal Rules have been amended to protect communications between attorneys and experts regarding the drafting of expert reports unless the communications can be shown to provide factual data. Fed. R. Civ. P. 26.b(4):

> **(B)** *Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.
> **(C)** *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses*. Rules 26(b)(3)(A) and (B) protect

> communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:
> **(i)** relate to compensation for the expert's study or testimony;
> **(ii)** identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
> **(iii)** identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

c) The holdings in ***Segner*** and ***Texas Windstorm Insurance*** appear premised on the proposition that the attorney-client privilege is sacrosanct and that it cannot be invaded under any circumstances. This is contrary to the holding in the Texas Supreme Court case ***Republic Ins. Co. v. Davis***, 856 S.W.3d 158 (Tex. 1993).

> We conclude the better position applies the ***Ginsberg*** offensive use waiver to the attorney-client privilege. The common law and now our rules of evidence acknowledge the benefit provided by the attorney-client privilege. In an instance in which the privilege is being used as a sword rather than a shield, the privilege may be waived. [footnotes omitted] ***Id*** at 163.

Arguably, by designating an employee representative as a testifying expert, Pinnacle was using the attorney-client privilege offensively and an argument could be made that by doing so, it waived the privilege. The ***Segner*** opinion talks about balancing interests, but no real balancing analysis is provided in the opinion. While the result may have been the same, I believe the Court could and should have followed the balancing test set out in ***Davis.***

> Privileges, however, represent society's desire to protect certain relationships, and an offensive use waiver of a privilege should not lightly be found. For that reason, the following factors should guide the Trial Court in determining whether a waiver has occurred.
>
> First, before a waiver may be found, the party asserting the privilege must seek affirmative relief. Second, the privileged information sought must be such that if believed by the fact finder, in probability, it would be an outcome determinative of the cause of action asserted. Mere relevance is insufficient. A contradiction in position without more is insufficient. The confidential communication must go to the very heart of the affirmative relief sought. Third, disclosure of the confidential communication must be the only means by which the aggrieved party may obtain the evidence. If any one of these requirements is lacking, the Trial Court must uphold the privilege. [footnote omitted*] **Id.*** at 163.

D. INVESTIGATIONS AND CONSULTING EXPERT DATA

1) ***In re Energy Transfer Partners, L.P.,*** Not Reported in S.W.3d, 2009 WL 1028056 (Tex. App.-Tyler 2009).

Energy built a compressor station and some neighbors complained about the noise. Transfer 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 neighbor's property. The testing was conducted but the results were never shared. A group of neighbors filed suit against Energy and send 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. This 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 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 does 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 uses this 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.

This finding is less than compelling. However, 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; but they could be deposed as fact witnesses 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. Id at 555.

Similarly, in this instance, one could ask why the Trial Court was found to have abused his discretion in allowing discovery of the "raw data" which arguably would be considered the core "factual" data compiled by the consultant.

2) ***In re Fast-Trak Const., Inc.***, --- S.W.3d ---, 2010 WL 730581 (Tex. App.-Dallas, 2010)

Fast Trak reaches a result similar to that reached in ***In re Energy Transfer Partners, L.P.*** The case involved an alleged construction defect and whether the soil was properly prepared prior to construction. The parties entered into a Rule 11 agreement allowing the Defendant's consulting expert to conduct destructive soil testing. The parties agreed that the Defendants would "produce photographs or electronic images taken during the investigation as may be required under Rule 192.5." A dispute arose about the discoverability of "underlying data." The Trial Court issued an order that Defendant produce "the underlying facts and data from the laboratory testing of the soil samples." The Appellate Court found that underlying data equated with mental impressions which are protected from discovery and, therefore, the Trial Court abused its discretion in ordering the discovery of "underlying data." See comments above regarding how this type finding reconciles with the holding in ***Axelson, Inc. v. McIlhaney****,* 798 S.W.2d 550, 555 (Tex. 1990).

3) ***In re Jourdanton Hospital Corporation***, Not Reported in S.W.3d, 2014 WL 3745447 (Tex. App. – San Antonio 2014).

What happens when an employee of a party who is subsequently designated as a testifying expert, reviews investigative materials in anticipation of litigation, prior to the employee being designated as a testifying expert? ***Jourdanton*** helps dissect and inform this difficult issue.

The issue arose in the context of a medical malpractice case against Jourdanton Hospital. The hospital received notice of a claim and its risk manager (who also is an attorney) commissioned an adjusting company to investigate and provide a report. Subsequently, suit was filed and Plaintiff requested the hospital's investigation. The risk manager filed an affidavit in support of protecting the investigation as core work product created in anticipated of litigation. Later, the risk manager was designated as a testifying expert. Plaintiff sought the production of the investigation report because it had been "provided" to the risk manager.

The hospital de-designated the risk manager (which will be discussed below in a different section of the paper) and argued that the privilege had not been waived because the investigation report had not been reviewed or relied upon by the risk manager in the formulation of expert opinions and testimony. The Appellate Court points out that there is a distinction between a report reviewed in anticipation of litigation and one reviewed for the formulation of expert opinions.

> There is a distinction between a report prepared in anticipation of litigation and one provided to or prepared by or for an expert in anticipation of trial or deposition testimony. [citations omitted] A report provided to an expert for the purpose of preparing the witness to provide expert opinion testimony is discoverable, while one provided solely for the purpose of evaluating potential claims in anticipation of possible future litigation is not.

E. SCOPE OF DISCOVERY FROM EXPERT-BIAS

1) *In re Ford*, 427 S.W. 3d 396 (Tex. 2014).

The bench and bar have a love/hate relationship with experts. While experts drive up the cost of litigation and sometimes do more to misdirect the jury than guide and inform them, they are a necessary tool in explaining and proving many complex points that are beyond the common understanding of many jurors. For this reason, the Texas Supreme Court has repeatedly expressed that it will not condone overbroad discovery of expert's personal and financial data. While this information might arguably be relevant to the issue of "bias," the Court seeks to balance the benefit of such discovery against the potential to dissuade genuine experts from participating in the judicial system. ***Ex parte Sheppard***, 513 S.W.2d 813, 816 (Tex. 1974) (orig. proceeding). See also ***Russell v. Young***, 452 S.W.2d 434, 437 (Tex. 1970) (orig. proceeding) (denying discovery of financial records from a potential medical expert witness because "[t]here is ... a limit beyond which pre-trial discovery should not be allowed").

In ***Ford****,* which involved a claim of product defect, the Plaintiff sought to depose the corporate representative of each of the Defendant's two testifying expert's employers. One expert worked for Exponent and the other for Carr Engineering. Both of these companies regularly appear in automotive product liability cases for the Defendant automotive company, particularly Ford Motor Co. Plaintiff wanted to depose the corporate representatives on "detailed financial and business information for all cases the companies have handled for Ford or any other automobile manufacturer from 2000 to 2011." The Texas Supreme Court rejected this type of discovery as an improper fishing expedition. The Court points out in the decision that both experts gave testimony relevant to the issue of bias. Both testified that they had never testified against Ford and one testified that she had never testified that a vehicle had any type of design defect. It is clear that the Texas Supreme Court is not holding that discovery of bias is impermissible; rather it is reiterating that when a party seeks to delve into the financial records of the expert (or the expert's employer) the Court has drawn a very red line.

2) ***In re Siroosian***, --- S.W.3d ---, 2014 WL 6911024 (Ft. Worth 2014). Many smaller motor vehicle collision cases come down to establishing the true amount of medical bills, particularly those incurred in the past. Plaintiffs may employ a procedural device to have a treating physician provide an affidavit that the care provider's bills are reasonable and necessary. If not timely controverted, the testimony of the affiant is dispositive on the issue. ***Siroosian*** involved such a situation. The Plaintiff originally had designated Siroosian as a testifying expert, but after successfully having Siroosian file a reasonable and necessary affidavit that was not timely controverted, Plaintiff de-designated Siroosian as a testifying expert. Defendant then sought through deposition on written questions to attempt to demonstrate that Siroosian had biases that should be considered regarding his testimony. The questions centered on the Siroosian's practice of taking letters of protection.

> a. Whether there is an accounts receivable report or some sort of report in June of 2012 that would have shown how much was owed by each patient?
>
> i. This question is not seeking patient names.
>
> b. Is there a report or a document that shows letters of protection accounts that went into collection in 2012 for Chiropractic Doctors Clinic?
>
> i. This question is not seeking patient names.
>
> c. Can you think of a patient who went into collection under a letter of protection for whatever reason that didn't get a recovery?
>
> i. This question is not seeking patient names.
>
> d. Have you ever contributed to any campaign to Domingo Garcia the Plaintiff's lawyer?
>
> e. Did Chiropractic Doctors Clinic have the ability in 2012 to generate, and does it possess a revenue report for each patient?
>
> f. What is the identity of the software used to create the revenue reports for Chiropractic Doctors Clinic?
>
> g. What is the dollar amount of collections efforts in 2012 by Chiropractic Doctors Clinic for patient bills after a letter of protection was provided to Dr. Siroosian and/or Chiropractic Doctors Clinic?
>
> h. What is the impact of the letter of protection provided to Dr. Siroosian and/or Chiropractic Doctors Clinic by Plaintiff's counsel for this matter?
>
> i. What is the identity of any individuals who worked for Chiropractic Doctors Clinic that would be better suited than Dr. Siroosian to answer questions about the collection efforts of Chiropractic Doctors Clinic for patient bills after a letter of protection was provided?

The Appellate Court, in deciding whether the trial judge had abused her discretion in ordering Siroosian to answer the above questions, relied heavily on ***In re Ford***, discussed above. The Appellate Court not only was concerned with the relevancy of the requests but with the breadth of the requests, pointing out importantly that overbroad requests for irrelevant discovery are improper whether there is an undue burden or not. ***In re Nat'l Lloyds Ins. Co.,*** No. 13-0761, 2014 WL 5785871, AT *1-2 (Tex. Oc. 31, 2014) (orig. proceeding). The Court found that all the above requests, except (d) and (i) (which were rejected for other reasons) were not relevant to the claims and defenses pled in the

lawsuit and therefore it was an abuse of discretion for the Trial Court to order that the questions be answered:

> We fail to see how accounts receivable reports showing amounts owed by each patient, collection efforts by Relators from patients on letters of protection, collection efforts by Relators from patients on letters of protection when the patient did not obtain a recovery, revenue reports concerning each patient, the total dollar amount of collections under letters of protection, the software utilized by CDC, or Siroosian's thoughts on the impact of a letter of protection are probative of the Plaintiff's injuries or the treatment of those injuries by Siroosian, CDC, or other chiropractic doctors at CDC.

The Court further found that the questions were not designed to reveal any "bias" toward one side or the other. The majority opinion hinges in large part on its definition of bias. "Bias, in its usual meaning, is an inclination toward one side of an issue rather than to the other." *See* ***Compton v. Henrie***, 364 S.W.2d 179, 182 (Tex. 1963). This may or may not prove to be too restrictive a definition. However, using this definition, the Appellate Court found that the subject requests were both overbroad and irrelevant.

The Court then turned to questions about campaign contributions and found that the question was improper for its infringement on free speech and also with regard to its relevancy. Lastly, the majority addresses the dissent's view that the requested discovery could be relevant on "billing bias." The majority's response is informative not only on the issue of scope generally, but also regarding the interplay between the rules of discovery and TEX. CIV. PRAC. & REM. CODE § 18.00(e).

> Siroosian's bill is reasonable, or it is not; it is for medical treatment that was necessary or that was not necessary. Procedures exist for Mazurek to challenge the reasonableness of the amount Siroosian billed the Plaintiff and to challenge whether the treatments that Siroosian provided to the Plaintiff were necessary. *See* Tex. Civ. Prac. & Rem. Code § 18.00 (e). (Setting forth procedure for filing counter-affidavit concerning cost and necessity of services); *see also* ***Horton v. Denny's Inc****.,* 128 S.w.3d 256, 258 (Tex. App. – Tyler 2003, pet. denied) (involving cross-examination of treating doctor at trial concerning reasonableness and necessity of medical expenses).

F. DE-DESIGNATION OF A TESTIFYING EXPERT

1) Recall several years ago, in ***Hooper v. Chittaluru*****,** 222 S.W.3d 103, 108 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) it was held that an opposing party may call in its case in chief the opposing party's testifying expert. But what happens if a party de-designates its testifying expert, rendering the expert a consulting only expert? We get an answer in ***Kevin D. Spruill and Darcy Spruill, Individually and as Next Friend of Camryn Spruill, a Minor v. USA Gardens at Vail Leasco, L.L.C.; USA***

Gardens at Vail, L.L.C.; and Internacional Realty, Inc., --- S.W.3d ----, 2013 WL 362740 (Tex. App.-Waco). The Spruill's had designated Michael Welton as one of their testifying experts and presented him for deposition. After the deposition, the Spruill's "de-designated" Welton as one their testifying experts, reclassifying him as a consulting only expert. However, Defendants filed a motion asking the Court to allow them to designate the expert as their testifying expert, as they had relied upon the expert's testimony. The Court granted the motion and the Defendants used the expert's testimony in support of their motion for summary judgment. The Appellate Court held that the Trial Court had not abused its discretion.

What is unclear from the opinion is whether Defendants had designated the expert as their testifying expert before or after the Spruill's de-designated him as their testifying expert. However, it is arguable whether the timing would have made any difference. The question that is not clearly resolved from this opinion is whether it is material that the Spruill's de-designated Welton after he had given deposition testimony. As a practical matter, while it may not make a difference legally whether the expert has testified before de-designation, it will be much harder for an opposing party to obtain the testimony it wants and needs if the de-designation occurs *before* the testifying expert is de-designated, as it is unlikely the testifying expert will cooperate willingly with the adverse party.

2) ***In re Jourdanton Hospital Corporation*****,** Not Reported in S.W.3d, 2014 WL 3745447 (Tex. App. – San Antonio 2014).

In ***Jourdanton*** (discussed above), the hospital had obtained an affidavit from its risk manager to the effect that she had commissioned and obtained an investigative report in anticipation of litigation. The hospital later designated the risk manager as a testifying expert. When it did so, the Plaintiff demanded that the investigation be produced because it had been provided to a testifying expert. The hospital then de-designated the risk manager as a testifying expert to protect the investigation privilege. Plaintiff argued that the de-designation was improper, citing ***In re Christus Spohn Hosp. Kleberg,*** 222 S.W.3d 434, 435 (Tex. 2007) (orig. proceeding). In ***In re Christus Spohn***, the hospital tried to snap back documents that had been reviewed by one of its testifying experts. The Supreme Court ruled that the hospital could snap back the documents if it de-designed the expert but that if it did not de-designate the expert, it would waive the privilege. In ***Jourdanton***, the Appellate Court found that ***In re Christus Spohn*** was not controlling.

> We do not agree that ***Christus Spohn*** compels the conclusion that the Hospital's privilege was irrevocably destroyed by Castillo's designation. This Court has held, "Texas law permits a testifying expert to be 'de-designated' so long as it is not part of 'a bargain between adversaries to suppress testimony' or for some other improper purpose." [citations omitted]

No bargain or improper purpose was demonstrated. Therefore, Jourdanton's de-designation of its risk manager as a testifying expert was held proper and its investigation report retained its privileged status.

3) ***In re Robins & Morton Group,*** Not Reported in S.W.3d, 2016 WL 2584526 (Tex. App. – San Antonio, 2016). This is a noteworthy case regarding de-designation. What is significant is that each of the Defendants' experts noted in their respective designations that they had "reviewed" the Plaintiff's original petition which incorporated a certificate of merit, which later was disclosed as Plaintiff's expert's report. The Plaintiff later de-designated her expert as a consulting expert and attempted to preclude the Defendants from taking the expert's deposition. The Appellate Court held that since the other experts had "reviewed" the expert's report, even though the experts offered affidavits that they had not "relied" upon the report, the expert could be deposed.

> Because the mandamus record reflects that Nardella's report and opinions were ***reviewed*** by other testifying experts in this suit, we conclude relators are entitled to further discovery regarding Nardella under rule 192.3(e), and the Trial Court's order thus constitutes an abuse of discretion. *See* ***Martin v. Boles****, 843 S.W.2d 90, 92* (Tex. App. – Texarkana 1992, orig. proceeding) (granting mandamus to allow deposition of defense consulting expert where expert's opinions about the case were reviewed by Plaintiffs testifying expert). [emphasis added]

In re Robins & Morton Group*, supra at *4.*

G. [UPDATE] **EXPERT REPORTS:**

While the general rule in Federal Court is, if substantive opinions are not contained in the testifying expert's report, the expert will be precluded from offering such opinions, (*See,* ***Honey- Love v. United States***, 664 Fed. Appx. 358 (5th Cir. 2016)) Texas Courts do not seem to adhere to the same rigidity in interpreting the Texas rule. In ***Plunkett v. Christus St. Michael Health System, et al***, Not Reported in S.W.3d, 2016 WL 7335872 (Tex. App. – Texarkana 2016) the Defendant's expert did not reveal in his report that he believed that the cause of death may have been a pulmonary embolus. Almost a year later, during his deposition, he offered this opinion and conceded that it was not in his report. The Appellate Court found that the Trial Court was within its discretion in allowing the testimony and observed that the testimony was provided within a reasonable period prior to trial.

> Here, it is undisputed that Koch was timely designated as an expert witness, and his report was timely provided to Plunkett. Plunkett was able to explore the basis of Koch's opinion regarding pulmonary embolism in detail during Koch's deposition, which took place more than thirty days before the commencement of trial on October 19, 2015. ***Although the better practice is to include all expert opinions in a report that is timely provided***, we cannot say that the Trial Court's decision to allow Koch to testify as to an

> opinion which was not included in his report—that Curtis may have suffered from a pulmonary embolism—in any way unfairly surprised or prejudiced Plunkett. We find no abuse of discretion with respect to the timely-disclosure question. [emphasis added]

Supra at *6.

It is noteworthy that, at trial, the expert reportedly did not offer the opinion, instead opining that a different condition was the probable cause of death.

H. DUTY TO SUPPLEMENT

***See* discussion below, under general topic, DUTY TO SUPPLEMENT**.

9. DUTY TO SUPPLEMENT:

A. AS SOON AS PRACTICABLE

1) Supplementation often is an area of controversy with respect to damages, probably because most attorneys approach the preparation of a case linearly; deferring focus on damages until late in the case, once liability has been thoroughly developed. Waiting to the last moment to supplement can be fraught with peril. ***Navarrete v. Williams***, *supra*, discussed above regarding medical authorizations, also is informative on the issue of supplementation. Many attorneys believe and argue, as did the attorney in ***Navarette,*** that so long as supplementation occurs more than thirty days before trial, then under TEX. R. CIV. P. 193.5(b) the supplementation is presumptively timely and valid. ***Navarette*** stands for the proposition that a Court is within its discretion to find that supplementation is untimely even if it is made more than thirty days before trial.

> In essence, Ms. Navarrete contends that because a discovery supplement made less than thirty days before trial is presumed to be untimely, that the opposite presumption must also apply. We disagree. If the opposite presumption had been intended, it would have been included in the language of the provision. *See* ***Snider v. Stanley,*** 44 S.W.3d 713, 715 (Tex. App. Beaumont 2001, pet. denied). Because no such language appears in the provision, we conclude the Trial Court did not abuse its discretion by excluding Plaintiff's Exhibits 10, 15, 16, and 17.

2) *See also,* ***In re Staff Care, Inc.,*** 422 S.W.3d 876 (Tex. App. – Dallas 2014, orig. proceeding) (Discussed above, under DISCLOSURES and above, under DEPOSITIONS).

B. [UPDATE] MANNER OF SUPPLEMENTATION

So long as supplementation is in writing, in pleadings or in other forms of discovery, it should meet the requirements of Tex. R. Civ. P. 193.5 (a) (2)

> (2) to the extent that the written discovery sought other information [excluding identification of persons with knowledge of relevant facts, trial witnesses, or expert witnesses], unless the additional or corrective information has been made known to the other parties in writing, on the record at a deposition, or through other discovery responses.

See, ***In re M.F.D.,*** Not Reported in S.W.3d, 2016 WL 7164063 at *5 (Tex. App. – Houston [1st Dist.] 2016)

C. [UPDATE] ABSENT DEMONSTRATION OF GOOD CAUSE OR ABSENCE OF PREJUDICE SANCTIONS FOR FAILING TO TIMELY SUPPLEMENT ARE MANDATORY

The First Court of Appeals recently has made clear that when a party brings a motion for sanctions under Rule 193.6 for failing to timely make or supplement discovery, the sanction of excluding evidence is mandatory, absent a showing of good cause or absence of prejudicial surprise. ***In re M.F.D.,*** Not Reported in S.W.3d, 2016 WL 7164063 at *5 (Tex. App. – Houston [1st Dist.] 2016)

> The Department urges us to rely on the general rules regarding discovery sanctions, i.e., "whether (1) there is a direct relationship between the offensive conduct and the sanction imposed and (2) the sanction is no more severe than necessary to satisfy its legitimate purpose." (*citing* ***In re Hood***, 113 S.W.2d 525, 529 (Tex. App. – Houston [1st Dist.] 2003, no pet.)). . . .
>
> we reject the Department's argument that the general analysis applicable to discovery sanctions applies when a violation of Rule 193.6 occurs. We have previously held that the exclusion of evidence provided for under this rule "is mandatory, and the only permissible sanction for a violation ... unless the Trial Court finds good cause or a lack of surprise or prejudice." ***Dyer v. Cotton***, 33 S.W.3d 703, 717 (Tex. App. – Houston [1st Dist.] 2010, no pet.); *see also* ***Gibbs v. Bureaus Inv. Grp. Portfolio No. 14, LLC****, 441 S.W.3d 764, 766 (Tex. App. – El Paso 2014, no pet.* ("The sanction for failure to comply with this rule is the 'automatic and mandatory' exclusion from trial of the omitted evidence.").

D. AUTOMATIC SANCTIONS NOT CONSIDERED DEATH PENALTY SANCTIONS

1) *See* discussion of ***In re Staff Care, Inc.,*** 422 S.W. 3d 923 (Tex. App. – Dallas 2014, orig. proceeding) below, under SANCTIONS. (Case also discussed above, under DISCLOSURES and below, under DEPOSITIONS)

2) In ***Lee v. Wal-Mart,*** Not Reported in S.W.3d, 2016 WL 1072644 (Tex. App. - Eastland- 2016) the appellant argued that the Court had abused its discretion

in denying its late filed expert affidavit in response to a motion for summary judgment and that such a denial was in effect a death penalty sanction. The Eastland Court of Appeals, applying the law of the Austin Court of Appeals, from which the case had been transferred, found that 1) the sanctions under Rule 193.6 are not death penalty sanctions; 2) that the appellant did not at the trial level ever attempt to demonstrate good cause for the untimely designation or that it would not unfairly prejudice the opposing party. Since there was no explanation for the untimely designation, the Appellate Court found that the Court was in its discretion in denying the affidavit under Rule 193.6 and that regardless of the effect, such an action did not constitute a death penalty sanction.

E. EXPERTS

1) REFINEMENTS

As a general proposition, experts can refine or perfect their opinions for trial without the necessity of supplementing so long as the expert does not make a material alteration that constitutes a surprise at trial. *See* ***Exxon Corp. v. W. Texas Gathering Co.,*** 868 S.W.2d 299 (Tex. 1993) and ***Navistar Int'l Transp. Corp. v. Crim Truck & Tractor Co.,*** 883 S.W.2d 687 (Tex. App. – Texarkana 1994, writ denied). In ***Pilgrim's Pride Corp. v. Smoak,*** 134 S.W.3d 880 (Tex. App.–Texarkana 2004) this concept is applied to an economist's revisions to his report. The Court found that the expert's methodologies were unchanged and that he merely substituted different variables that became available to him. Accordingly, the Court held that the expert did not need to supplement his report. The complaining party also claimed surprise. It was aware of the economist's revisions but claimed it was surprised because it did not receive a supplemental report. The Court was unimpressed with this argument and rejected it.

2) MATERIAL CHANGES IN OPINIONS

There is a difference between refining or enlarging upon an expressed opinion and materially altering or adding a new opinion. As discussed above, altering a conclusion because variables have changed likely will be considered a "refinement" if the expert's model is unaltered. However, when an expert materially changes her opinion from "no" to "yes," such a change likely is not going to be considered a refinement, but a material change. Failure to timely supplement an expert report or designation likely will result in the supplementation being stricken. This is demonstrated in ***Beinar v. Deegan***, 432 S.W. 3d 398 (Dallas 2014).

Beinar arose out of a property dispute. Ms. Beinar argued that Deegan and the homeowner's association had caused her potential injury to the foundation of her home by diverting drainage onto her property. The procedural dispute important for our consideration involved an affidavit that Ms. Beinar's expert submitted in support of a response to Deegan's motion for summary judgment. The affidavit testimony asserted opinions that were materially different from the opinions that previously had been disclosed for this expert. Deegan moved to strike the affidavit. The Trial Court agreed and the Appellate Court found no abuse of discretion.

> A party must not be allowed to present a material alteration of an expert's opinion that would constitute a surprise attack. The purpose of requiring timely disclosure of a material change in an expert's opinion is to give the other party an opportunity to prepare a rebuttal. ***Norfolk Southern Railway Co. v. Bailey****,* 92 S.W.3d 577, 581 (Tex. App. – Austin 2002, no pet.). The Deegans were not given this opportunity. As such, the Trial Court did not abuse its discretion by sustaining the Deegans' objections and excluding Tolson's affidavit attached to Beinar's summary judgment response. Accordingly, we overrule Beinar's second issue.

3) "MULLIGAN" ARGUMENT REJECTED

In ***PopCap Games, Inc. v. MumboJumbo, LLC,*** 350 S.W.3d 699 (Tex. App.-Dallas 2011, pet. denied), Plaintiff argued that good cause existed for the Court to allow late designation of experts on damages because Plaintiff's first expert had been stricken as unreliable. The Court held that having an expert stricken under ***Daubert*** is not good cause sufficient to allow late designation of a replacement expert.

4) [UPDATE] **SANCTIONS**

A Trial Court was found to have been within its discretion to disallow specific expert testimony. The expert had testified in deposition that he did not review various city ordinances. Later, without supplementation, the expert at trial attempt to offer opinion testimony based upon his review of the ordinances. While the Appellate intimates that it considered the testimony a refinement on disclosed opinions, it could not say that the Trial Court abused its discretion in disallowing the testimony, based upon a failure to fully provide the basis for the expert's opinions. Tex. R. Civ. P. 195.6. Also, the Appellate Court noted that the offering party did not help its cause by failing to show good cause or absence of prejudicial surprise. ***Kingsley Properties, LP v. San Antonio Title Services of Corpus Christi LLC,*** -- S.W.3d – 2016 WL 5243134 at *14 (Tex. App- Corpus Christi-Edinburg 2016).

10. DISCOVERY AND MOTIONS FOR SUMMARY JUDGMENT:

A. In *Booklab Inc. v. Konica Minolta Business Solutions, Inc.,* Not Reported in S.W.3d, 2012 WL 3893521 (Tex. App.-Dallas) Booklab sued Konica and CIT alleging various claims in association with a printer it had acquired from Konica. Booklab acquired the printer by entering into a "finance lease" with CIT. Konica filed a "no evidence" motion for partial summary judgment on Booklab's claim for damages. Booklab contended the Trial Court erred in granting Konica's "no-evidence" motion because it did not have an adequate time for discovery.

Booklab's argument was that since the discovery period set forth in the Trial Court's agreed scheduling order was not over when Konica filed its motion, the motion was premature and should be denied. The Appellate Court rejected this argument,

observing that the determination of whether there has been an adequate time for discovery will be a case specific determination and the Court ordered discovery period is not the determinant.

> The rules do not require that the discovery period applicable to the case to have ended before a no-evidence summary judgment may be granted. *See* TEX. R. CIV. P. 166a(i); ***Rest. Teams Intern., Inc. v. MG Sec. Corp.,*** 95 S.W.3d 336, 339 (Tex. App. – Dallas 2002, no pet.). Whether a nonmovant has had an adequate time for discovery is case specific. *Id;* ***McClure v. Attebury,*** 20 S.W.3d 722, 729 (Tex. App. – Amarillo 1999, no pet.). **To determine whether an adequate time for discovery has passed, we examine such factors as: (1) the nature of the case; (2) the nature of evidence necessary to controvert the no-evidence motion; (3) the length of time the case was active; (4) the amount of time the no-evidence motion was on file; (5) whether the movant had requested stricter deadlines for discovery; (6) the amount of discovery that had already taken place; and (7) whether the discovery deadlines in place were specific or vague. *Martinez v. City of San Antonio*,** 40 S.W.3d 587, 591 (Tex. App.- San Antonio 2001, pet. denied). . . [emph. added].

The Court observed that Booklab had had eighteen months to conduct discovery. Further, Booklab's argument that the case was complicated carried little moment since what was being challenged in the no evidence motion for summary judgment was Booklab's own damages. The Court was incredulous why additional discovery would be needed to establish the Plaintiff's own damages.

> The nature of the evidence necessary to establish a Plaintiff's own **damages** in this type of case is not evidence that would ordinarily require significant, if any, **discovery**. Booklab's damages claim was based on alleged loss of its own business opportunities with its own clients. The only discovery Booklab complains it was prevented from obtaining concerned depositions of Konica's employees and corporate executives. Booklab wholly fails to articulate how such deposition testimony was necessary to raise a fact question on damages. To the extent Booklab asserts it needed additional time to obtain "discovery" from its clients and an expert witness, Booklab had well over a year to do so. We cannot conclude the Trial Court abused its discretion in concluding Booklab had an adequate time for discovery.

B. See also, ***Williams v. America First Lloyds Insurance***, 2013 WL 2631141 (Tex. App.–Ft. Worth 2013) (Discussed below under DEEMED ADMISSIONS).

C. EXPERT OPINIONS:

1) *See,* ***Beinar v. Deegan***, 432 S.W.3d 398 (Dallas 2014). (Discussed above, under SUPPLEMENTATION):

> A party who fails to amend or supplement a discovery response in a timely manner may not introduce into evidence the material or information that was not timely disclosed unless the Court finds (1) there was good cause for the failure to timely amend or supplement the discovery response or (2) the failure to timely amend or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties. TEX. R. CIV. P. 193.6(a). This exclusionary rule applies equally to trial and summary judgment proceedings. ***Fort Brown Villas III Condo Ass'n, Inc. v. Gillenwater,*** 285 S.W.3d 879, 881 (Tex. 2009).

2) *See also,* ***Bailey v. Respironics***, 2014 WL 3698828 (Dallas, 2014) (Discussed above under DISCLOSURE-EXPERTS).

11. CONTINUANCE AND DISCOVERY:

A. CONTINUANCE SOUGHT FOR ADDITIONAL DISCOVERY

In many situations involving a motion for summary judgment, the responding party claims there is additional discovery that is needed and that the hearing on the summary judgment (or the trial of the case) should be continued. What the requesting party often fails to demonstrate is that the additional discovery is "material" and that the requesting party, prior to the motion for continuance, had exercised due diligence in trying to obtain the discovery. Failure to prove both requirements can be fatal to the motion for continuance, as was demonstrated in ***The Crawford Family Farm Partnership v. TransCanada Keystone Pipeline, L.P.***, 409 S.W.3d 908 (Tex. App. – Texarkana 2013). The Appellate Court found that the Trial Court had not abused its discretion in denying the motion for continuance because the movant had not met the recognized criteria for continuance based on inadequate discovery:

> the Appellate Court considers the following nonexclusive factors: (1) the length of time the case has been on file, (2) the materiality of the discovery sought, and (3) whether due diligence was exercised in obtaining discovery. ***Joe v. Two Thirty Nine Joint Venture,*** 145 S.W.3d 150, 161 (Tex. 2004).

The case had been on file for nearly one year and there was no evidence that prior to the motion the Defendant had sought the requested discovery and the Court observed that the requested discovery did not appear material. ***Id*** at 925-926.

B. EFFECT OF CONTINUANCE ON DISCOVERY CONTROL PLAN

There continues to be a lot of confusion about the effect of a continuance on an existing discovery control plan. The general practice and policy is clear. Unless there is a new order or an agreement to modify the control order, the original discovery control plan (except perhaps for the end of the discovery period) remains in place. This is the holding in ***Spin Doctor Golf, Inc. v. Paymentech, L.P.,*** 2013 WL 3355199 (Tex. App. - Dallas 2013). A summary judgment was appealed and the Appellate Court

remanded some aspect of the judgment for reconsideration. The case was continued from its original trial setting and the Court instructed the parties to try to reach an agreement on new deadlines. No agreement was reached. Spin Doctor failed to timely designate experts in compliance with the original plan. Spin Doctor argued that the original plan was abrogated, but the Appellate Court held that there was no evidence that the Trial Court had retracted the original order. Further, Spin Doctor failed to prove good cause (extreme difficulty or impossibility) in failing to comply with the deadline and failed to prove that late designation would not cause undue prejudice. The Appellate Court found that there was no abuse in discretion by the Trial Court disallowing Spin Doctor to designated experts beyond the original deadline.

12. SANCTIONS:

A. TRANS-AMERICAN FACTORS-CONSIDERATION OF LESSER SANCTIONS

1) One of the seminal cases on discovery sanctions in Texas is ***Trans-American Natural Gas Corp. v. Powell***, 811 S.W.2d 913, 917 (Tex. 1991). The Texas Supreme Court analyzed and set out criteria for assessing discovery sanctions, particularly death penalty sanctions.

> In our view, whether an imposition of sanctions is just is measured by two standards. First, a direct relationship must exist between the offensive conduct and the sanction imposed. This means that a just sanction must be directed against the abuse and toward remedying the prejudice caused the innocent party. It also means that the sanction should be visited upon the offender. The Trial Court must at least attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both. The point is, the sanctions the Trial Court imposes must relate directly to the abuse found. Second, just sanctions must not be excessive. The punishment should fit the crime. A sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes. It follows that Courts must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance.

2) ***Imagine Automotive Group v. Boardwalk Motor Cars, Ltd.***, 430 S.W.3d 620 (Tex. App. – Dallas 2014, pet. denied) addresses the issue of whether the Trial Court must "impose" lesser sanctions before administering harsher sanctions or whether the Trial Court must merely "consider" lesser sanctions before imposing harsher sanctions. As the wording from ***Trans-American*** reflects above, the Appellate Court found that a Trial Court only must "consider" lesser sanctions.

> And we have recently explained that "the Court need not test the effectiveness of each available lesser sanction by actually imposing the lesser sanction on the party before issuing the death penalty." ***Shops at***

Legacy (Inland) Ltd. Pp. v. Fine Autographs & Memorabilia Retail Stores, Inc., 418 S.W.3d 229, 233 (Tex. Appl. – Dallas 2013, no pet.) (citing ***Cire v. Cummings***, 134 S.W.3d 835, 840 (Tex. 2004)). Rather, the Trial Court "must analyze the available sanctions and offer a reasoned explanation as to the appropriateness of the sanction imposed." *Id.* (citing ***Cire,*** 134 S.W.3d at 840).

B. DEATH PENALTY SANCTIONS

JNS Enterprise, Inc. V. Dixie Demolition L.L.C., 2013 WL 3791502, -- S.W.3d -- (Tex. App. – Austin 2014) presents a different consideration of death penalty sanctions. A party in a contract dispute falsified contracts, produced them in discovery, and had corporate representatives give false testimony in depositions based upon the false documents. The Trial Court imposed death penalty sanctions. In a display of incredible audacity, the wrong-doing party did not express remorse for falsifying evidence, but instead argued on appeal that the Court abused its discretion because there was no discovery abuse. JNS argued that falsifying documents really is not discovery abuse so the Court acted outside the law in entering sanctions, particularly under TEX. R. CIV. P. 215. The Austin Court of Appeals had little trouble deflecting these arguments and finding that the Trial Court had not abused its discretion:

> Producing false documents in discovery and then lying about those documents in deposition undoubtedly qualifies as an abuse—flagrant, in fact—of the discovery process, whose ultimate goal is, after all, a search for the truth. *See* ***Jampole v. Touchy,*** 673 S.W.2d 569, 573 (Tex. 1984) (noting 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"); *see also* ***First Nat'l Bank of Louisville v. Lustig,*** 96 F.2d 1554, 1573 (5th Cir.1996) (characterizing fabrication of evidence as "the most egregious conduct" and as "fraud on the Court"). Accordingly, Rule 215 was properly invoked.

C. EFFECT OF SANCTIONS-DAMAGES

Paradigm Oil, Inc. v. Retamco Operating, Inc. 372 S.W.3d 177 (Tex. 2012).

This case provides an interesting twist and important concept regarding death penalty discovery sanctions. While this case involved death penalty sanctions, the granting of the sanctions was not an issue before the Court. The sanctioned party did not contest death penalty sanctions. Rather, the point on appeal was that even though the sanctioned party's pleadings had been stricken, it was an abuse of discretion to prevent the party from participating in the damages trial. The Texas Supreme Court, reversing the Appellate Court, held that it was.

The case arises out of a very complicated oil and gas dispute, with Retamco alleging that Paradigm defrauded it. Paradigm answered the lawsuit but for reasons unspecified in the opinion refused to participate in discovery. After two sanctions hearing, the Court entered a default judgment against Paradigm and entered a $1.6 million judgment against it. In sanctioning Paradigm for **discovery** abuse, the Trial Court's order not only precluded Paradigm from contesting its liability but also Retamco's **damages**, stating:

> Paradigm Oil, Inc., Pacific Operators, Inc. and Pacific Operators of Texas, Inc., may not, and are disallowed to, oppose Plaintiff's claims to overriding royalty interests, damages, exemplary damages, pre-judgment interest, or attorney's fees, whether by cross examination, objection to evidence offered, or offer of evidence[.]

Three different damage trials were conducted and the judgment in each was reversed for insufficient evidence. A fourth damage trial was conducted in which Defendant Paradigm still was not permitted to participate. A verdict of $35 million was returned against Paradigm and it appealed for the third time.

The Texas Supreme Court agreed with Paradigm that the general rule in Texas and elsewhere is that a defaulted party may participate in the post-default damages hearing. The Court, however, also found that a Trial Court should have discretion to bar a Defendant's participation, such as at the damages hearing in this case, if such a sanction is necessary to remedy the abuse but that such an extreme sanction must be carefully tailored to comport with the requirements of ***Transamerican Natural Gas Corp. v. Powell,*** 811 S.W.2d 913 (Tex. 1991) due process. The Court observes that the destruction of evidence that directly and significantly impairs a party's ability to prove damages might reasonably justify a sanction like the one in this case. Such was not the case in this instance. While the Court observed that the Plaintiff might have been entitled to lesser sanctions, barring Paradigm's participation in the **damages** trial was "more severe than necessary to satisfy its legitimate purposes." ***Transamerican,*** 811 S.W.2d at 917.

D. AUTOMATIC SANCTIONS NOT CONSIDERED DEATH PENALTY SANCTIONS

In ***In re Staff Care, Inc.,*** **422 S.W. 3d 876** (Tex. App. – Dallas 2014, orig. proceeding) (Discussed about under DISCLOSURES and below, under SANCTIONS and DEPOSITIONS), the Dallas Court of Appeals addressed Staff Care's argument that the Trial Court's action striking its disclosure of an economic model as untimely supplemented amounted to an improper death penalty sanction because the Trial Court should have imposed lesser sanctions first. Not so, said the Dallas Court of Appeals. It's holding in this regard is informative:

> In discussing Rule 193.6, we have explained, "The rule is mandatory, and the penalty—exclusion of evidence—is automatic, absent a showing of: (1)

> good cause or (2) lack of unfair surprise or (3) unfair prejudice." ***Oscar Luis Lopez. V. La Madeleine of Texas, Inc.,*** 200 S.W.3d 854, 860 (Tex. App. – Dallas 2006, no pet.). We continued, "The sanction of automatic exclusion of undisclosed evidence, subject to the exceptions set forth in the rule, is well established. The party offering the undisclosed evidence has the burden to establish good cause or lack of surprise, which must be supported by the record." *Id.* (citations omitted). The Trial Court applied the proper standard under Rule 193.6. *See id.*

E. PROSPECTIVE CONTINGENT SANCTIONS

The trial judge ***In re Kristensen***, Not Reported in S.W.3d, 2014 WL 3778903 (Tex. App. Houston [14th Dist.] 2014) entered an order stating, "[A]dditional motions by Defendants to reconsider this Court's discovery rulings may be met with significantly higher sanctions amounts, potentially on the Court's own motion." Defendants challenged this order as being "pre-emptive" and "chilling." The Appellate Court found that the order did not prejudice Defendants because it used the term "may" rather than stating that the penalty would be automatic. Since the order was prospective and not "ripe" the Appellate Court found there was no basis for a petition for writ of mandamus.

F. MONETARY SANCTIONS

1) In ***In re Ford Motor Company***, 988 S.W.2d, 988 714 (Tex. 1988) orig. proceeding, the Texas Supreme Court held that an order imposing an unconditional monetary sanction on a party if it appealed the Court's sanction order against, was chilling of the party's rights and improper. ***In re Ford Motor Company,*** 988 S.W.3d 714 (Tex. 1998) (orig. proceeding).

> Although a Trial Court may grant Appellate attorney's fees as part of a sanctions order under Rule 215, the Court must condition the award on the outcome of the appeal. Rule 215 does not authorize a court to shift the costs of Appellate or mandamus proceedings to the party seeking review of the Trial Court's sanction order unless that party is ultimately unsuccessful. *[citations omitted].*

2) The Trial Court in ***Galindo v. Prosperity Partners, Inc.***, 429 S.W.3d 690 (Tex. App. – Eastland 2014, pet. denied) imposed monetary sanctions on Plaintiff and her attorneys for improperly raising claims of privilege during depositions and not answering the questions propounded. The court awarded over $10,000 in attorney's fees and then ordered an additional $12,000 plus in expenses for the depositions that the Court ordered be retaken. Plaintiffs immediately requested reconsideration on the basis that neither Plaintiffs nor their attorneys could pay the fees. Plaintiffs sought writ of Mandamus, which was denied. Defendants sought to retake the depositions and propound the questions that the trial court ordered were not privileged. Plaintiffs objected and Defendants moved to dismiss the case, which the Trial Court granted. On appeal,

the Appellate Court found that the sanctions order was inappropriate in the first instance. Further, the Trial Court should have deferred the sanctions when Plaintiffs and their attorneys produced evidence (affidavits) that they could not pay the sanctions and that the order impeded their ability to prosecute the case.

> Under [the holding in ***Braden v. Downey***, 811 S.W.2d 922 (Tex. 1991)] ***Braden***, once the Galindos contended that the sanctions were cost-prohibitive and precluded their ability to continue with the litigation, the Trial Court was required to modify the sanctions order to provide that the sanctions were to be paid when a final judgment was entered or to make express findings, after a hearing, as to why the sanctions did not have a preclusive effect.

3) The defense attorney was sanctioned in the amount of $1,500 in ***In re Kristensen***, Not Reported in S.W.3d, 2014 WL 3778903 (Tex. App. Houston [14th Dist.] 2014). Defendants sought mandamus relief. However, the Appellate Court held that Appellate relief was adequate upon final judgment. See, TEX. R. CIV. P. 215.3. A monetary sanction, however, may be so large that it impedes the continued prosecution or defense of a claim. In such circumstances, mandamus review might be appropriate. That was not the situation in this case, in which $1,500 was the sanction:

> But for this exception to the general rule to apply, a relator must advise the Trial Court that the monetary sanction would preclude continuation of the litigation. *See* ***In re Le****,* 335 S.W.3d 808, 814-815 (Tex. App. – Houston [14th Dist.] orig. proceeding). Nothing in the record before us establishes that the $1,500 sanction will preclude continuation of the litigation.

G. SPOLIATION

1. TEXAS:

Easily one of the most controversial and most discussed opinions over the several years has been ***Brookshire Bros., Ltd v. Aldridge***, 438 S.W.3d 9 (Tex. 2014). This opinion deals with the issue of spoliation and how that issue should be handled. The Texas Supreme Court held that spoliation is not a cause of action and should rarely be a focus at trial. However, spoliation can and should be dealt with prior to trial in the context of sanctions, when appropriate. While the Court holds that a Trial Court should and does have broad discretion to deal with sanctions, the Court imposes ("with greater clarity") criteria and parameters on how the sanctions may be imposed and the scope of the sanctions. Indeed, the Court points out that neither the Texas Rules of Civil Procedure nor the Texas Rules of Evidence reference spoliation and that "we have never crafted a complete analytical framework for determining whether an act of spoliation has occurred. . ." This discussion will deal with the scope of the Trial Court's discretion in crafting an appropriate response to proven spoliation. The considerations applicable to presenting spoliation evidence at trial, however, are beyond the scope of this discussion.

The primary focus of this discussion is the following statement of the Texas Supreme Court:

> spoliation is essentially a particularized form of discovery abuse, in that it ultimately results in the failure to produce discoverable evidence, and discovery matters are also within the sole province of the Trial Court. Supra, at 20.

The Court's summary of holdings provides a good outline for discussing the ramifications of the opinion:

> We first hold that a spoliation analysis involves a two-step judicial process: (1) the Trial Court must determine, as a question of law, whether a party spoliated evidence, and (2) if spoliation occurred, the court must assess an appropriate remedy. To conclude that a party spoliated evidence, the Court must find that (1) the spoliating party had a duty to reasonably preserve evidence, and (2) the party intentionally or negligently breached that duty by failing to do so. Spoliation findings—and their related sanctions—are to be determined by the trial judge, outside the presence of the jury, in order to avoid unfairly prejudicing the jury by the presentation of evidence that is unrelated to the facts underlying the lawsuit. Accordingly, evidence bearing directly upon whether a party has spoliated evidence is not to be presented to the jury except insofar as it relates to the substance of the lawsuit. Upon a finding of spoliation, the Trial Court has broad discretion to impose a remedy that, as with any discovery sanction, must be proportionate; that is, it must relate directly to the conduct giving rise to the sanction and may not be excessive. Key considerations in imposing a remedy are the level of culpability of the spoliating party and the degree of prejudice, if any, suffered by the nonspoliating party.
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> While the spectrum of remedies that may be imposed range from an award of attorney's fees to the dismissal of the lawsuit, the harsh remedy of a spoliation instruction is warranted only when the Trial Court finds that the spoliating party acted with the specific intent of concealing discoverable evidence, and that a less severe remedy would be insufficient to reduce the prejudice caused by the spoliation. This intent requirement is congruent with the presumption underlying a spoliation instruction—that the evidence would have hurt the wrongdoer. A failure to preserve evidence with a negligent mental state may only underlie a spoliation instruction in the rare situation in which a nonspoliating party has been irreparably deprived of any meaningful ability to present a claim or defense.

The focus in ***Brookshire Bros*.** centered on whether the store had spoliated evidence by failing to preserve. The majority of the Court frames the issue as the store preserving the surveillance videotape "that was requested," but failing to preserve additional videotape that originally was not requested (this framing helps the Court

underscore that there did not appear to be intentional destruction of material evidence). The store manager took the initiative of preserving about 8 minutes of tape that was recorded on a continuous loop. The video started just prior to the Plaintiff's fall and ended shortly after it. The rest of the surveillance was automatically taped over and lost. About a year later, Plaintiff's attorney requested the rest of the videotape, which no longer existed. At trial, Plaintiff requested a spoliation instruction and argued that the additional footage prior to the incident would have been probative on whether the store manager had actual or constructive notice of the condition of the floor that Plaintiff argued resulted in Plaintiff's fall.

What could in later cases be an interesting distinguishing factor: the store manager testified that at the time that he requested the videotape be preserved, he did not anticipate litigation. Rather, he was just preserving videotape to confirm that the Plaintiff fell. He testified that there was just a man making a claim that he fell. It is worth considering whether it would have altered the outcome in this case in any regard if the manager testified as do most Defendants that he anticipated litigation from the instant that he learned of the claim. The Court points out that the first determination is whether there is a duty to preserve evidence and this arises only if the party believes that there was a substantial chance of litigation. Supra at 20, see also, ***National Tank Co. v. Brotherton,*** 851 S.W.2d, 193, 204 (Tex. 1993). While trying to mitigate the effects of putative spoliation, Defendants might inadvertently open the door to what otherwise would be attorney work product compiled in anticipation of litigation.

The Trial Court found spoliation and permitted the submission of a spoliation instruction. A jury returned a substantial verdict, the Appellate Court affirmed. The Texas Supreme Court reversed and remanded.

The Court begins its spoliation analysis with observations regarding the need to preserve the integrity of the judicial process by preserving probative evidence versus the concern for diverting the attention of the jury from the merits of the case to the conduct involved in spoliating evidence. Justice Lehrman observes that there are particular costs and complexities in preserving electronic data. She notes that the federal rules have been amended to modify sanctions for inadvertent, good faith destruction of electronic data where costs of preserving evidence are particular, but that the Texas rules have not been so amended.

> The Federal Rules of Civil Procedure were amended in 2006 to prohibit Federal Courts from imposing sanctions when discoverable electronic evidence is lost "as a result of the routine, good-faith operation of an electronic information system." FED. R. CIV. P. 37(e). The Texas ***18** rules do not contain a comparable provision, but the challenges facing Texas Courts are just as acute.

Under the Court's new or clarified framework, it is the Court that conducts a hearing outside the presence of the jury to hear evidence of alleged spoliation, to make a determination whether spoliation has occurred, the nature of the conduct, and to fashion an appropriate sanction. Supra at 20. The Trial Court must first determine whether there was a duty to preserve evidence, which is gauged by whether the party knew or should have known that there was a substantial chance of litigation. The party seeking relief from the alleged spoliation must prove a breach of this duty. The breach may either be negligent or intentional.

Many members of the bar who have written or commented on the ***Brookshire Bros.*** opinion overstate the holding in terms of the permissibility of a Trial Court issuing a spoliation instruction by generally stating that such an instruction is no longer permissible. That is not the case. It certainly will be harder, if not unlikely, in most instances to get a spoliation instruction. However, the Court expressly recognized in the opinion that a Trial Court still has the discretion, when appropriate, to issue a spoliation instruction.

> After a Court determines that a party has spoliated evidence by breaching its duty to preserve such evidence, it may impose an appropriate remedy. Rule 215.2 of the Texas Rules of Civil Procedure enumerates a wide array of remedies available to a Trial Court in addressing discovery abuse, such as an award of attorney's fees or costs to the harmed party, exclusion of evidence, striking a party's pleadings, or even dismissing a party's claims. *See* TEX. R. CIV. P. 215.2-.3. These remedies are available in the spoliation context. ***Trevino v. Ortega****,* 969 S.W.2d 950, 953 (Tex. 1998) (Baker, J., concurring). The Trial Court also has discretion to craft other remedies it deems appropriate in light of the particular facts of an individual case, including the submission of a spoliation instruction to the jury. *Id.*

The Trial Court, in fashioning an appropriate sanction, must be considerate of the alleged offending party's due process rights and, therefore, must fashion a remedy that fits the demonstrated abuse. There must be a nexus between the sanction and the abuse and the sanction must be proportionate to the abuse. The Trial Court must follow the criteria set out in ***TransAmerican Natural Gas Corp. v. Powell***, 811 S.W.2d 913, 917-918 (discussing constitutional limitations on the power of Courts to adjudicate a party's claims without regard to the merits, but instead based on a party's conduct in discovery). In this regard, the opinion seems to give a nod to the federal three-part test. In crafting a remedy for spoliation, the Trial Court should assess 1) the degree of fault of party who failed to preserve evidence, (2) the degree of prejudice suffered by the opposing party, and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party. Supra at 21.

If it is found that the spoliation was intentional, then an instruction may likely be deemed permissible. However, in the context of negligent spoliation, the Courts are cautioned to be guided by the evidence and the nature and significance of the evidence that allegedly has been destroyed.

The differences in kind and quality between the available evidence and the spoliated evidence will thus be a key factor in analyzing prejudice to the nonspoliating party. Supra at 21.