"SO, WHO DIED AND MADE YOU KING?"

DISCOVERY IN TEXAS PERTINENT TO EXPERTS

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I. INTRODUCTION:

Major changes were made to how litigants disclose expert witnesses and discovery information about experts by the 1999 amendments to the Texas Rules of Civil. This short article is intended to focus on some of the major issues that have been the subject of appellate review over the intervening seven years since the above amendments went into effect.[1] Most of the developments in the area of expert discovery over the last several years have been with regard to scope of discovery, adequacy of disclosure, and the relationship of expert designation to motions for summary judgment. This paper will explore those and other recent, interesting developments in this area of the law.

II. SCOPE OF DISCOVERY:

Tex. R. Civ. P. 195 sets out the parameters for obtaining discovery of and from testifying expert witnesses. There has been controversy not only about what may be discovered from testifying experts, but also how to obtain discovery from experts that are non-retained.

A. CONSULTING PLUS EXPERTS

The comments to the Rule 195 are most instructive on these points. In particular, comment 1 makes clear that the Rule does not limit permissible methods of discovery concerning consultants whose mental impressions have been reviewed by a testifying expert. This point has been reiterated in ***In re TIG Insurance Company***, 172 S.W.3d 160 (Tex. App.—Beaumont, 2005, no pet.).

B. THINGS CREATED OR REVIEWED BY EXPERTS

[1] This paper will not discuss in any meaningful detail the issue of expert reports in medical malpractice cases. The topic is simply beyond the scope and space limitation of this discussion.

It is virtually axiomatic that whatever a testifying expert reviews or creates relevant to the mental impressions and opinions he or she offers in the litigation for which they are retained is going to be discoverable. The notes that a testifying expert created were held to be discoverable in ***In re Family Hospice, Ltd.***, 62 S.W.3d 313 (Tex. App. – El Paso 2001 orig. proceeding); *see also* Tex. R. Civ. P. 192.3(e) (3), (4), and (6). ***In re Jobe Concrete Products,*** 2002 WL 31898065 (Tex. App.-El Paso 2002)(not designated for publication) basically stands for the proposition that if a testifying expert relies upon something in support of his or her opinions, the underlying data cannot be protected from disclosure.

C. BIAS

Except for the changes with respect to the permissible methods for obtaining discovery from and about testifying experts, the scope of permissible discovery about experts was essentially unchanged by the 1999 amendments, except ostensibly for one addition allowing discovery "of any bias of the witness."[2] Several cases have clarified that established precedent in this area was not changed by this amendment. The defendant hospital in ***In re Doctors Hospital of Laredo,*** 2 S.W.3d 504 (Tex. App.-San Antonio 1999, no pet.) contended that income tax schedules and calendars of nonparty witnesses are not discoverable to show bias. The appellate court found that the trial court abused its discretion in ordering the production of such documents, finding that the precedent of ***Russell v. Young***, 452 S.W.2d 434 (Tex.1970) had not been overruled by the 1999 amendments.[3] A similar result was reached in **In re George Wharton,** 2005 WL 1405732 (Tex. App. Waco)(not designated for publication) with regard to a doctor retained to conduct a medical examination, but who had not yet been designated as a testifying expert. The court noted that if a party seeks to obtain documents from a non-party expert for impeachment purposed, the party seeking discovery must first present evidence "raising the possibility that [the expert] is biased." *See* ***Walker v. Packer***, 827 S.W.2d 833, 838 (Tex. 1992 (orig. proceeding). This latter point was the focus of the decision in ***In re Francis W. Weir***, 166 S.W.3d 861 (Tex. App. – Beaumont 2005, no pet.). Weir, an expert witness in an asbestos case, testified that he could not answer a question about what percentage of his income came from litigation over the past two years because he does not subdivide his records by categories. He also admitted in

[2] Rule 192.3(e)(5) Tex. R. Civ. P.

[3] Justice Harberger in a well-written dissent, disagreed that Russell v. Young had not been overruled by the enactment of the 1999 amendments, but he reached the same result, finding that the trial court had abused its discretion in not first attempting to find whether there was a less intrusive of way of obtaining the information sought without ordering defendant's tax returns. *See* ***Sears, Roebuck & Co. v. Ramirez***, 824 S.W.2d 558, 559 (Tex.1992); See also ***El Centro del Barrio, Inc. v. Barlow***, 894 S.W.2d 775, 780 (Tex. App.--San Antonio 1994, orig. proceeding) (stating tax returns are not material if the same information can be obtained from another source); ***Olinger v. Curry***, 926 S.W.2d 832, 834-35 (Tex. App.--Fort Worth 1996, orig. proceeding) (holding tax returns not discoverable where doctor admitted to potential bias in deposition); ***Kern v. Gleason***, 840 S.W.2d 730, 738 (Tex. App.--Amarillo 1992, orig. proceeding) (asserting party seeking production must show information unavailable from another source).

testimony that he testifies almost exclusively for defendants. Since bias was no longer in issue, compelling further discovery on the point was held to be an abuse of discretion. A related issue is whether an expert's reports from other cases are relevant and discoverable. The court in **In re George Wharton,**[4] held no, pointing out that Dr. Wharton had not yet been designated as a testifying expert. However, one justice pointed out that applying Justice Harbeger's analysis in ***In re Doctors Hospital of Laredo****, see above,* he believed allowing such discovery would be an abuse of discretion even if Dr. Wharton had been designated.[5]

III. DESIGNATION:

A. COMPLETENESS AND TIMELINESS

Completeness and timeliness of designation have been two frequent issues before the appellate courts. The first thing to keep in mind is that there needs to be a request for designation by way of a request for disclosure. ***Mora v. Chacon,*** 2005 WL 2562616 (Tex. App. – Corpus Christi) (not designated for publication) involved a claim for personal injuries arising from a motor vehicle accident. Defendants complained that Plaintiffs failed to timely designate their experts. The problem for Defendants was that they could not demonstrate that they had sent a request. Absent a demonstration that Defendants had made a request, the appellate court concluded that the trial court had not abused its discretion in allowing Plaintiffs to call expert witnesses at trial without having previously designated them.

Vingcard v. Merrimac Hosp. Sys., 59 S.W.3d 847 (Tex. App.– Ft. Worth 2001, pet. denied) is one of the more important discovery cases regarding experts to be handed down under the 1999 rules. The case involved an action for economic damages based on claims for breach of contract, tortious interference with contract, conspiracy, and fraud. The discovery issue focused on the adequacy of disclosure.

Defendants argued that, although Plaintiff properly identified one of its experts in its disclosure responses and identified the subject matter on which the expert might be called to testify, Plaintiff did not disclose the expert's mental impressions and opinions, or a brief summary of the basis for those opinions. Defendants argued that subject matter did not equate with substance and that Plaintiff had failed to comply fully with Tex. R. Civ. P. 194.2.f. Accordingly, Defendants argued that the trial court erred in admitting the expert's testimony over their objection because rule 193.6 requires exclusion of evidence that is not disclosed

[4] Supra at _____.

[5] This opinion of course is *dicta* and may be an overly expansive interpretation of Justice Harberger's analysis.

during discovery, absent a showing of good cause or lack of unfair surprise or prejudice, which Plaintiff did not show. Plaintiff framed the issue as one of adequacy of response versus a complete failure to respond, arguing that only a complete failure to disclose warrants exclusion of evidence under rule 193.6. Defendant's request for disclosure sought "the information or material described in [r]ule 194.2(a)-(i)," which included all items listed under Rule 194.2(f). In response, Plaintiff provided only its expert's name and the subject matter on which he would testify, the projected future sales of the company which was the subject of the suit. The appellate court held that Plaintiff was required to provide information in response to all components of the request. Rule 193.5 requires a party to not only amend or supplement the expert's identity and subject matter of his testimony, but also provide any "other information" sought by written discovery. Tex. R. Civ. P. 193.5(a). The appellate court found that Plaintiff had completely failed to supplement its disclosure responses in accordance with Rule 193.5(a) (2). Therefore, Defendant's trial objections to the admission of the expert's testimony on future sales were sufficient to preserve error.[6]

It would be a mistake to believe that there are any real hard fast rules in this area of completeness and timeliness of designation. There is a lot of nuance. In ***City of Paris v. McDowell***, 79 S.W.3d 601 (Tex. App. – Texarkana, 2002, pet..ref'd) the appellate court found that where Plaintiff had designated a reconstruction expert to testify "as to all aspects of the accident investigation and reconstruction.. "… the Defendant had received adequate notice of the "possible scope" of the plaintiffs' testifying expert's testimony, which included "bio-mechanics." The discovery issue in ***Birnbaum v. Alliance of American Insurers***, 994 S.W.2d 766, 781 (Tex.App. - Austin 1999, pet. denied) also involved the adequacy of discovery responses regarding experts. The Austin Court of Appeals found answers to interrogatories unresponsive because they failed to disclose the expert's factual observations and opinions .***Birnbaum***, 994 S.W.2d at 781. While such a failure may result in exclusion of the expert witness' testimony, the appellate court did not find that the trial judge abused his discretion in allowing the testimony of the expert, primarily because the expert had been offered for deposition which the complaining party had declined. A similar result was reached in ***Mauzey v. Sutliff,*** 2003 WL 1882263 (Tex. App.-Austin)(not designated for publication).

Interceramic v. S. Orient R. R. Co., 999 S.W.2d 920 (Tex. App. – Texarkana, 1999, pet. denied) is another very important case in this area as it points out the error of thinking that if your opponent has inadequately, improperly, or

[6] Plaintiff's deficiencies in disclosing its expert notwithstanding, the court found that the testimony of the expert was cumulative and therefore the admission of the testimony, although error, was harmless error in this instance.

incompletely designated his/her experts, the deficiency may be waived by not raising it prior to trial. The discovery issue in the case focused on whether the party requesting discovery by interrogatories timely brought to the attention of the court the responding party's failure to supplement its responses timely, thereby waiving the objection. The resolution of this issue pivoted on whether there was an inadequate response or a failure to respond. A party may object at trial for the first time if there has been a failure to respond (*see* ***Vingard,*** above), but must bring the matter to the court's attention prior to trial if there is an inadequate response. The Plaintiff's expert initially did not reveal his opinions in answers to interrogatories, only the subject matter upon which he would offer testimony. Eight days before trial, the expert provided a supplemental report setting out his opinions. Defendant did not object or seek protection from the court until trial when the witness took the stand. The court noted that in situations where supplemental responses are for some reason inadequate, and the complaining party is aware of the inadequacy before trial but waits until trial to object, the objection is too late and the complaint is waived. ***State Farm Fire & Cas. Co. v. Morua,*** 979 S.W.2d 616, 619-20 (Tex.1998).[7] (per curiam). The court explains that, as in ***Morua,*** the defect in this instance is not a complete failure to respond to interrogatories. "It is not a failure to disclose a witness or provide details about his address or his expertise in a particular area, or a failure to identify the expected scope of his testimony, or a failure to specify the facts upon which his testimony would be based." The inadequacy in this instance the court pointed out was the failure to give the details of a report previously and timely referenced and described. Since the Plaintiff did not object or attempt to obtain relief before trial, either before or after the report was provided for its review, the court held it waived any complaint.

There remains a lot of uncertainty with regard to designating non-retained experts. Comment 2 to Rule 195 explains that neither Rule 194 nor 195 address depositions of non-retained experts. ***Cirlos v. Gonzalez*** , 2002 WL 31423885 (Tex. App. – San Antonio) (not designated for publication) addresses the issue of completeness of designation regarding a non-retained expert. Rule 194.2.f.3 states that the disclosing party must disclose documents reflecting the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them. In ***Cirlos,*** the disclosing party produced a treating physician's records, but then attempted to elicit testimony that was not "reflected" in the records. Since the disclosing party had not otherwise disclosed these mental impressions, the Court ruled that the witness could testify to his factual observations (presumably reflected in his

[7] In the ***Morua*** case, the Supreme Court adopted the reasoning of the 14th Court of Appeals, agreeing that the proper procedure in such a case is either a pretrial objection or a pretrial motion to compel or for sanctions. The court distinguished ***Sharp v. Broadway Nat'l Bank,*** 784 S.W.2d 669 (Tex.1990) in which a party wholly failed to identify its expert although the expert was deposed before trial.

records) but not as to his mental impressions (presumably that were not reflected in his records.

B. CROSS-DESIGNATION

Over twenty years ago, I had a hard fought trial against a blood bank in Dallas defended by a skilled defense attorney. One of the key legal arguments in the trial (which I ultimately lost) involved whether I could call the Dfendant's expert witness adversely. I lost the argument primarily because I could point to no precedent that said I could call the opposing side's expert adversely in my case in chief. The result might be different today. In ***Hooper v. Chittaluru, M.D. et al***, ___3d ____, 2006 WL 1766002 Houston [14th Dist.] June 29, 2006) the Fourteenth Court of Appeals, disregarding defendant's lament that "you cannot hijack her expert," found that where Plaintiff had timely cross designated defendants' expert following Defendants' designation of the expert, the court knew of no precedent that disallowed Plaintiff from calling Defendants' expert in plaintiff's case in chief at trial.

C. DE-DESIGNATION

Ironically, de-designation of experts often involves as much strategic and tactical consideration as designation. The lines here, also are only deceptively clear and things can often go as unintended. ***In re Doctors Hospital of Laredo****(see above)* is instructive on this point.[8] The San Antonio Court of Appeals held that the hospital properly re-designated a doctor from testifying expert to consulting expert, and thus trial court abused its discretion in ordering the doctor's deposition. Rule 192.3(e) prevents discovery of a consulting expert's opinion, provided the opinion has not been reviewed by a testifying expert. Tex. R. Civ. P. 192.3(e). A "testifying expert [may] be 'de-designated' as long as it is not part of 'a bargain between adversaries to suppress testimony' or for some other improper purpose." ***Castellanos v. Littlejohn***, 945 S.W.2d 236, 240 (Tex. App.--San Antonio 1997, orig. proceeding) (distinguishing ***Tom L. Scott, Inc. v. McIlhany***, 798 S.W.2d 556 (Tex.1990)). There was no evidence that the de-designation was part of a bargain or other improper purposed. The same result was reached in ***Rendon v. Avance,*** 67 S.W.3d 303 (Tex. App. – Fort Worth 2001, pet. granted). However, for a case where the appellate court found an improper purpose, see ***In re State Farm Mutual Automobile Insurance Company***, 100 S.W.3d 338 (Tex. App.-- San Antonio 2002, no pet.) The appellate court held that the trial judge was within its discretion to determine that the purpose of the de-designation was to conceal facts.

[8] See above.

IV. AMENDMENT AND SUPPLEMENTATION:

The issue of supplementation of expert opinions continues to be a source of controversy. Rule 193.6 admonishes that subject to meeting some burdens (good cause and no surprise), a party who fails to supplement in a timely manner may not introduce into evidence the material or information that was not timely disclosed.

A. TIMELINESS

One of the first considerations is to make supplementation of experts timely. The appeal in ***Snider v. Stanley***, 44 S.W.3d 713 (Tex. App. – Beaumont 2001, pet. denied) arose from a judgment in a motor vehicle collision case. The discovery issue involved whether there is a presumption of timely supplementation. The Court of Appeals affirmed the judgment of the trial court holding that: (1) Defendants' accident reconstruction specialist was not timely designated; (2) motorist showed that Defendants did not supplement their discovery responses to name their witness as expert "as soon as practical"; (3) Defendants lacked good cause for failing to timely designate witness as expert; (4) exclusion of witness' testimony did not entitle Defendants to continuance; and (5) Defendants were not entitled to present the witness in question as fact witness. This case points out that even if a party technically complies with the rules, the court may still find that the supplementation was not "timely." Here, the offending party literally waited until the absolute final minute to provide supplementation regarding its testifying expert, confident that if it supplemented thirty days before trial there would be a presumption of timeliness. The trial court and appellate court found that where the offending party had retained the expert long before the deadline and waited until the last moment to designate the expert, the offending party had not supplemented "as soon as practicable."

B. REFINEMENT AND EXPANSION OF OPINIONS

Another problem arises when an expert merely refines or expands upon a previously disclosed opinion. The plaintiff in ***Norfolk Southern Railway Co. v. Bailey,*** 92 S.W.3d 577 (Tex. App. – Austin 2002, pet. granted) was exposed to asbestosis while working for the Defendant in the 1940s and 1950s. In 1997, a doctor diagnosed Bailey with asbestosis with no evidence of impairment based on a pulmonary function test performed around the same time. Shortly before the original trial setting, the doctor testified in a deposition that the Plaintiff had mild asbestosis *with no evidence of impairment.* The case was reset.Shortly prior to the new trial date the Plaintiff had another pulmonary function test, which showed that the asbestosis had progressed to "mild impairment." Plaintiff produced the report to the Defendant about two months before trial and just before the trial the doctor was

again deposed and this time he revised his diagnosis to asbestosis *with mild impairment.* The trial court allowed the treating physician to testify regarding his revised diagnosis. The appellate court began its analysis recognizing that there is precedent in Texas for an expert being allowed to change his or her opinions without being required to formally supplement discovery:

> For example, an expert may refine calculations or perfect a report up until the time of trial. ***Exxon Corp. v. West Tex. Gathering Co.,*** 868 S.W.2d 299, 304 (Tex.1993). An expert also may change an opinion without supplementation if the opinion is an "expansion of an already disclosed subject." ***Navistar Int'l Transp. Corp. v. Crim Truck & Tractor Co.***, 883 S.W.2d 687, 691 (Tex.App.-Texarkana 1994, writ denied). However, a party may not present a material alteration of an expert's opinion at trial that would constitute a surprise attack. See ***West Tex. Gathering***, 868 S.W.2d at 305. 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. *See* ***id.*** at 304.

The appellate court found that the doctor's revised opinion"falls somewhere between a refinement in calculations, *See* ***West Tex. Gathering***, 868 S.W.2d at 304, and an expansion of an already disclosed subject, *See* ***Navistar***, 883 S.W.2d at 691, both of which are admissible without the need for supplementation " While the appellate court admonished that Plaintiff should have supplemented his discovery response, it noted that the Defendant could not realistically claim surprise or prejudice, particularly since it had received the revised test two months before trial, and these test results were admitted at trial without objection. Therefore, even if there was an abuse of discretion, it was held to be harmless error.[9]

C. SUPPLEMENTATION AND HEARINGS:

1. Summary Judgment

Probably the most litigated issue in the expert discovery area over the last several years has been the issue of timeliness of designation with respect to hearings, particularly summary judgment hearings. ***Ersek v. Davis & Davis,***

[9] See also, ***Koko Motel v. Mayo***, 91 S.W.3d 41, 50-51 (Tex.App.-Amarillo 2002, pet. denied); and more recently, ***Vela v. Wagner & Brown,LTD.***, --- S.W.3d ----, 2006 WL 1684191 (Tex.App.-San Antonio)

69 S.W.3d 268 (Tex. App. – Austin 2002, pet. denied) is a very important discovery case on this issue and the holding has become virtually a rule. The ***Ersek*** Rule basically stands for the proposition that in order to be able to supplement, a party must first comply with the court's scheduling order for designating experts and the testimony of an expert not timely and properly designated may not be used for purposes of a motion for summary judgment. The ***Ersek*** case arose from a legal malpractice action. The trial court issued a scheduling order requiring the parties to designate experts by certain dates. The Plaintiff failed to comply with this deadline. The Defendant filed a motion for summary judgment. In response to the Defendant's motion for summary judgment, Plaintiff produced an affidavit from an expert (who of course had not been timely designated). The trial court excluded the affidavit. The Austin Court of Appeals affirmed the ruling of the trial court rejecting the Plaintiff's interesting argument that it had complied with the court's scheduling order by not designating an expert. The appellate court observed that the rules required a designation. Further, assuming the Plaintiff had preserved the right to supplement, he had not supplemented "reasonably promptly." [10] ***F.W. Industries, Inc. V. McKeehan***, ____ S.W.3d ___, 2005 WL 1639078 (Tex. App. – Eastland), involving a legal malpractice claim, follows the holding in ***Ersek***. Plaintiff opted for a Level 2 Discovery Control Plan, which meant that the discovery period ended nine months after the due date for the first response to written discovery. Plaintiff's deadline for designating her experts then would have been 90 days before the end of the discovery period. Defendant filed a no evidence motion for summary judgment motion three months after Plaintiffs deadline for designating experts. The court referred to ***Ersek***, noting that the 1999 amendments imposed a "date certain" for designating experts and that therefore after these amendments, the expert designation deadline applies to motions for summary judgment. Presumably, the deadline for designating experts provides adequate time for a party to designate experts. If not, the party should timely file a motion for protection or continuance, which was not done in this case. Accordingly the court held that the trial court had not abused its discretion in striking Plaintiff's experts and granting Defendant's motion for summary judgment. See also, ***Cunningham v. Columbia/St. David's Healthcare System, L.P.,*** 185 SW3d 7 (Tex. App. – Austin 2005, no pet.) for a similar holding.[11]

Mack v. Suzuki Motor Co., 6 S.W.3d 732 (Tex. App. – Houst. [1st Dist.] 1999, no pet.) is an interesting case, because it combines elements of ***Ersek*** regarding timeliness and elements of ***West Tex. Gathering*** regarding supplementation of an expert's prior opinion. The case involves a product liability claim against an automotive manufacturer. The issue on appeal centers on a summary judgment rendered in favor of Defendants. Plaintiffs had responded to the summary

[10] See also ***Snider v. Stanley,*** above.

[11] See also ***Cantu v. Horany***, __ S.W.3d ___, 2006 WL 1792746 (Tex. App.-Dallas) which although decided on other issues, points out the potential outcome determinative consequences of not designating experts completely and timely.

judgment motion with a supplemental report in the form of an affidavit prepared by one of experts after the expert designation deadline. The affidavit testimony was stricken. The trial court's scheduling order allowed supplementation of an expert's opinions after the deadline "upon motion and good cause." Instead of making a motion and showing good cause, Plaintiffs reportedly appeared at a pre-trial conference seven days before sending their expert's new report to appellees, and announced "ready" for trial. Plaintiffs did not seek a continuance of the summary judgment hearing and did not seek leave to modify their expert's earlier opinions. Consequently, the appellate court held that the trial judge did not abuse his discretion by striking the affidavit as untimely.

2. NON-EVIDENTIARY HEARINGS

In re Toyota Motor Corporation, 191 S.W.3d 498 (Tex. App. – Waco, 2006, no pet.) clarifies that a failure to timely designate expert does not necessarily exclude the use of the expert's opinions from all hearings. The key appears to be whether the hearing is on the merits. **Toyota** involved a claim that the allegedly defective design of an automobile trunk caused children, who were seated in the back seat of the vehicle, to sustain injuries during a collision. Toyota wanted to depose some of the children regarding their recollection of where the children were seated and whether they were restrained. The children's parents objected and produced the testimony of a psychologist that the children suffered from post traumatic stress syndrome and that it could be psychologically harmful for them to recount the incident. The trial court sustained Plaintiffs' motion for protection and required Toyota to obtain the requested information by deposition on written questions. Toyota complained on appeal that the testimony of the psychologist should have been excluded because the psychologist was not designated timely as a testifying expert, notwithstanding Plaintiffs represented the psychologist would not be testifying at trial. The appellate court rejected the argument, finding that Rule 193.6 does not exclude an undisclosed experts' testimony from all hearings, but only from hearings on the merits.[12]

V. EX PARTE CONTACT

Durst v. Hill Country Memorial Hosp. 70 S.W.3d 233 (Tex.App.-San Antonio 2001, no pet.) involved a medical malpractice action brought by patient and her husband against a hospital. The appellate court held that the trial court did not abuse its discretion refusing to strike the testimony of four expert physicians because an *ex parte* contact occurred between physicians and hospital's counsel. The court

[12] As examples, the court referred to ***Barr v. AAA Tex., LLC***, 167 S.W.3d 32, 37 (Tex. App.- Waco 2005, no pet.) (trial); and to ***Villegas v. Tex. Dep't of Transp***., 120 S.W.3d 26, 35 (Tex. App. – San Antonio 2003, pet. denied) (summary judgment).

observed that the patient and her husband did not demonstrate how they were harmed by the *ex parte* contact, they did not identify that any privileged communications were improperly disclosed, and patient and her husband did not offer any authority to show that the alleged error was immune to harm analysis. Tex. R. App. P. 44.1(a). The court also noted that the Plaintiffs could have, but failed to seek protection from the trial court:

> a plaintiff may invoke the court's protection for privileged material, and it appears it is his burden to do so. *See* ***Mutter***, 744 S.W.2d at 601 (citing ***Martinez v. Rutledge***, 592 S.W.2d 398, 401 (Tex.Civ.App.--Dallas 1979, writ ref'd n.r.e.)), in which the court noted plaintiff could have requested that the court require the examining or treating doctors not be questioned out of his presence, or require delivery of records for in camera inspection to determine materiality or relevancy.

The appellate court discusses the public policy reasons that would support a prohibition against ex parte contact between a Plaintiff's treating physician and Defendant's counsel. *See* e.g., ***Horner v. Rowan Companies, Inc***., 153 F.R.D. 597, 601 (S.D.Tex.1994) (when treating physician is interviewed ex parte by defense counsel, there are no safeguards against revelation of matters irrelevant to the lawsuit and personally damaging to the patient, and the potential for breaches in confidentiality can have a chilling effect upon the critically important underlying relationship); ***Perkins v. United States***, 877 F.Supp. 330, 332 (E.D.Tex.1995) (privately contacting a physician could expose the physician to civil liability or professional sanctions); see also ***Travelers Ins. Co. v. Woodard***, 461 S.W.2d 493, 496 (Tex.Civ.App.--Tyler 1970, writ ref'd n.r.e.) (noting there is nothing in the rules requiring a party to grant his adversary the right to have access to the files of his doctors and other witnesses, together with the right to interrogate them outside of his presence and hearing). The court notes that given the potential for disclosure of irrelevant (and thus privileged) information during ex parte communications," perhaps the wisest course of conduct is for defense counsel to obtain information from the plaintiff's treating physicians through formal discovery measures." However, the court, noting its recent ruling in *Rios*, reiterates that there is no specific rule prohibiting ex parte communications between a plaintiff's treating physician and defense counsel. See ***Rios v. Texas Dep't of Mental Health & Mental Retardation***, 58 S.W.3d 167 (Tex.App.--San Antonio 2001, no pet.); see also ***Hogue v. Kroger Store No. 107***, 875 S.W.2d 477, 481 (Tex.App.--Houston [1st Dist.] 1994, writ denied) (holding ex parte meeting between patient's doctor and defense counsel not improper). The appellate court invited the State Bar to craft some proposed rules in this regard. There reportedly has been lively discussion within the Supreme Court Advisory Board on this matter; however, no consensus or product has been

forthcoming. It probably would be prudent to consider the affect of HIPPA on this issue.[13]

VI. SANCTIONS

Appellate courts remain very reluctant to condone striking experts as a sanction unless the ***Transamerica*** protocol has been complied with. ***In re Harvest Communities of Houston, Inc.***, 88 S.W.3d 343 (Tex.App.-San Antonio2002, no pet.) dealt with the issue of whether striking experts is a death penalty sanction and whether a party may be so penalized for the acts of its attorney.[14] The Defendant in the case was able to demonstrate that by striking its two "retained" experts, the effect would essentially be a death penalty sanction. The appellate court agreed and found that the trial court had not attempted to invoke lesser sanctions. Therefore, it was held that the striking of the defendant's two retained experts was an abuse of discretion under this particular fact situation. In ***Vaughn v. Ford Motor Co.,*** *91* S.W.3d 387 (Tex. App.-Eastland 2002, pet.denied) the Plaintiff designated over ninety experts but did not produce reports for any of them, except one. The Plaintiff also did not make the experts readily available for depositions. The trial judge excluded all the experts (by the time of trial the Plaintiff had whittled the list to six) except for the one expert for whom the Plaintiff produced a report. The appellate court, while not condoning the conduct, indicated that the draconian sanction was not warranted:

> The plaintiff had a duty under Rule 195.3 to make her experts available reasonably promptly after designation. The plaintiff did not comply with this duty. The plaintiff supplemented her discovery responses to designate a total of 97 experts and narrowed the list to 6 only shortly before the trial date. The plaintiff then opposed the defendants' request for additional time to depose the plaintiff's experts and complete discovery. Although this conduct, which was attributable to plaintiff's counsel, was sanctionable, we find that the sanctions imposed in this case were excessive. Thus, we must hold that the trial court abused its discretion. ***TransAmerican Natural Gas Corporation v. Powell,*** *supra.*

[13] Health Insurance Portability and Accountability Act of 1966 (HIPPA) effective April 14, 2003. The healthcare provider being asked to release information must receive satisfactory assurance that the requesting party has provided notice of the request to the individual who is the subject of the request.

[14] The opinion also is worth reading with regard to what the appellate court found to be sanctionable conduct of an attorney during the course of a deposition.