"I'D RATHER BE FISHING"

SCOPE OF DISCOVERY IN TEXAS

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CHAPTER 7

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"I'D RATHER BE FISHING" SCOPE OF DISCOVERY IN TEXAS

I. OVERVIEW

The permissible scope of discovery continues to be a very active area for appellate review. Over the last twelve months, there have been a number of decisions dealing with this area of pre-trial discovery. In view of this situation, I have updated this paper in the hope of helping the bar better understand the present parameters of discovery in Texas. Before discussing where we are presently, it probably would be helpful to review the historical path that got us here.

While at the time the new rules were promulgated, effective January 1, 1999, the Texas Supreme Court announced that the amendments themselves were not intended to change the scope of discovery. There had been considerable debate during the reform process about whether the parameters of discovery should be altered and whether the traditional statement regarding scope of discovery should be revised.

In one draft of the revisions, the Supreme Court proposed that discovery no longer would be as broad as the subject matter of lawsuit, but instead would be only as broad as the subject matter of the case. This language was later retracted in the body of the rule, but significantly, it remains in the commentary, which has equal effect. This change beckons the paradigm shift the Texas Supreme Court has sought to implement over the last decade with regard to the permissible breadth of discovery. Further, while the Supreme Court did not ultimately alter the wording of the rules with regard to scope of discovery, it should be noted that it had handed down significant rulings before the amendments which significantly influenced and narrowed the universe of permissible discovery in Texas. Rule 192.4, which was added as a new rule in 1999, makes clear that a trial court has the discretion to limit discovery and should if it is unduly cumulative, duplicative or costly.[1]

The pivotal issue when analyzing the scope of discovery is relevancy. There has been an increasing tension in virtually all courts across the country between the concept of subject matter relevancy and case relevancy. This tension is most clearly revealed in the debate and developments that have occurred regarding the scope of discovery on the federal level.

As will be discussed in greater detail below, Federal Rule 26(b) was changed effective December 1, 2000, to restrict the scope of discovery to information and materials relevant to the claims or defenses pled in the case. Normally, the Texas Supreme Court could be expected to shift gradually toward the federal model. However, in this instance, Texas arguably has already adopted the same principles, if not in the letter of the rules, in its judicial interpretations.

While the Texas Supreme Court has denounced "fishing" in various decisions, attorneys still seem to be confused regarding the term's precise meaning. Texas jurisprudence is developing a body of decisions that provides the beginning of some bright line tests that may be universally applied to determine the permissible scope of discovery .The relevancy analysis, however, likely still will be conducted on a case by case basis. In the discovery area, appellate decisions provide guidance. However, each case is inherently fact driven and the trial court is given great discretion within the guidelines provided by the rules, the comments of the Texas Supreme Court, and the opinions handed down by the appellate courts.

II. DEFINING SCOPE

A. What is the Goal?

There has not been a more accurate and eloquent statement of the purpose of discovery than the statement found in *Jampole v. Touchy,* 673 S.W.2d 569, 573 (Tex. 1984).

> [w]e note that the ultimate purpose of discovery is to seek the truth, so that disputes may be decided by what the facts reveal, not by what facts are concealed.

Unfortunately, the statement does little to answer the question of how much discovery is enough. Does "seek the truth" envision a wide-ranging exploration of every aspect of a party's existence, or is it constrained by reasonable parameters? If the latter, what defines the boundaries? Can discovery be limited and still properly serve the search for truth? This is the question that continues to be explored and debated.

B. Rule 192

1. The scope of permissible discovery is now outlined generally in Rule 192. Parties may obtain generally discovery regarding:

> any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party.
>
> TEX. R. CIV. P. 192.3(a).[2]

[1]These provisions are incorporated verbatim from Federal Rule Civil Procedure 26(b) (2) (i) and (iii). Subpart (ii) was deleted following criticism from the trial bar that it would be a potentially undue restriction on the scope of discovery.

[2]Note that in *Supreme Court of Texas, Tentative Draft No. 2*

2. In its comments to Rule 192, the Supreme Court makes the following observation:

> While the scope of discovery is quite broad, it is nevertheless confined by the ***subject matter of the case*** and reasonable expectations of obtaining information that will aid resolution of the dispute. The rule must be read and applied in that context.[emphasis added].

3. In *In re American Optical*, 988 S.W.2d 711 (Tex. 1998) the Supreme Court re-emphasized that discovery must be relevant to the subject matter of the case.

4. What is the subject matter? Does it include whether a party has engaged in any prior immoral, unethical or illegal conduct of any kind? Is it limited solely to the place, the act, or the product in question? Or is it defined by the parties' allegations and defenses articulated in the pleadings? What we may permissibly obtain and why we should be permitted to obtain it are twin concepts that define the scope of discovery. Perhaps the more significant phrase in the Court's comment is, "will aid resolution of the dispute." It is here that the trial court tacitly is encouraged to exercise its discretion. *See In re CSX***,** 124 S.W. 3d 149 (Tex. 2003). In just about any case there can be extraneous information that if discovered might bring about the resolution of the dispute. What the Court is attempting to discourage is discovery that brings about the resolution of the dispute through intimidation, harassment and excessive burden.

5. It could be said that the object is to bring about the resolution of the case through probative evidence and not through extortion.[3] The questions a trial court must ask are whether the information is or will lead to probative evidence, and more particularly, what is probative? The issue I believe that is begged by the Court's admonition is whether the information is material to the allegations that have been alleged and which circumscribe the issues to be decided in the lawsuit.

6. The problem is posed not by allowing discovery with regard to what is actually pled, but how to efficiently allow the full development of issues that can and probably will be pled later in the case. This is an issue which the federal rules have attempted to address, but which the Texas appellate courts have yet to address in a systematic way.

III . RELEVANCY

A. How Is It Defined?

1. Historically, the threshold consideration as to whether a matter is discoverable is its relevancy to the subject matter of the litigation. While this statement has been long-lived, it has always been a rather amorphous concept in the context of discovery. This is illustrated by the following observation of the appellate court in *Independent Insulating Glass v. Street*, 722 S.W.2d 798, 803 (Tex. App.--Fort Worth 1987, writ dism'd): "Obviously, relevance is not the test in discovery." What they were talking about is evidentiary relevance, which is totally different than how the term is conceived in the scope of discovery.

2. Relevance in the discovery context has always been thought to have a broader meaning than in the context of trial. Therefore, simply because information may not be probative of an issue at trial does not mean it is beyond the scope of permissible discovery, if it would reasonably *lead* to admissible evidence at trial.

TEX. R. CIV. P. 192.3(a) specifically points out that:

> It is not grounds for objection that the information sought will be inadmissible at trial if the information appears reasonably calculated to lead to the discovery of admissible evidence.

For a matter to be admissible at trial it must be relevant to a material issue in the trial, that is, a matter contained in the pleadings. Is discovery then confined only to the matters placed in issue by the pleadings? If a matter being sought by discovery regards a matter that is irrelevant to an issue raised by the pleadings, arguably, the matter cannot lead to admissible evidence.

3. Is discovery properly a tool to explore beneath and around the obvious issues alleged in the case? For instance, is discovery permitted to develop a factual basis for an allegation, or is it solely a device for supporting the allegations that have been pled?

a. Some members of the bar have argued that §10.001(3) Tex. Civ. Prac. & Rem. Code mandates that a claim be fully supported by evidence *before* it is filed. If this were so, what then would be the discovery? What becomes of due process? Rule 166i seems to tacitly reject this argument, by

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*of proposed discovery rules, June 9, 1998***,** the Texas Supreme Court proposed altering the scope of discovery in what was at the time Rule 3.3. to read as follows: (a) **generally**. In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending ***case. . .*** [emphasis added]

[3] *See, In re CSX***,** 124 S.W. 3d 149, (Tex. 2003).

requiring that a party be allowed the reasonable opportunity to obtain discovery before having to respond to a no evidence motion for summary judgment.

b. The Texas Supreme Court has in selected instances (particularly with regard to other similar lawsuits brought against the defendant) indicated that parties should be required to investigate cases independent of discovery by utilizing their own resources.[4] Of course, many participants in the legal system cannot afford to undertake an exhaustive independent investigation. Further, there is only so much an independent investigation can reveal. Oftentimes the question is not whether a party can obtain the information from a source other than from its opponent, but whether the opponent was actually in possession of the information at times relevant to the occurrence giving rise to the lawsuit.

c. The supporters of the limited discovery concept routinely point to criminal litigation, arguing that the parties get virtually no discovery except for the defendant under a *Brady* motion.[5] The comparison, however, may not entirely be fair. The state has vast resources which are unavailable to the typical personal injury victim. Further, in recent history, only the criminal defendants with vast resources themselves are the ones that seem to prevail against the state. Size and wealth should not determine the quality of justice one receives. One of the most common complaints about our legal system arising from the O.J. Simpson trial is that there appears to be one system of justice for the wealthy and another for the poor. If the Court goes too far with its limitation on discovery, it will only intensify this criticism. Oftentimes, the only way the personal injury claimant has of defining the real issues in the trial (whether in terms of negligence, statutory violation, strict liability or breach of warranty), is through discovery. Moreover, in many cases the defendant in a personal injury case holds the critical evidence that will be needed to prove a case against it.

4. In *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984) the Supreme Court underscored the reason for the broadened concept of relevancy in the discovery context:

> To increase the likelihood that all relevant evidence will be disclosed and brought before the trier of fact, the law circumscribes a significantly larger class of discoverable evidence to include anything reasonably calculated to lead to the discovery of *material evidence*.[emphasis added].

The above statement was merely a recitation of the Court's earlier statement in *Allen v. Humphreys,* 559 S.W.2d 798, 803 (Tex. 1977).

5. *Allen* involved a workers' compensation claim for an occupational injury resulting from the worker's exposure to polyvinyl chloride particles which had been released into the air of the employee's workplace by a packaging process. *Allen,* 559 S.W.2d at 800. The Supreme Court held that prior claims and lawsuits were discoverable because they might establish a pattern of disease, which would be relevant on the issue of causation. *Allen,* 559 S.W.2d at 803. Compare the expansive concept of relevancy in *Allen* with the much more strict approach adopted in *K Mart v. Sanderson,* 937 S.W.2d 429 (1996), which will be discussed below.

6. It stands to reason that if information which might lead to the discovery of admissible evidence is discoverable, information which in the first instance is admissible should be discoverable. This is what the Austin Court of Appeals held in *Aztec Life Ins. Co. v. Dellana,* 667 S.W.2d 911 (Tex. App.--Austin 1984, orig. proceeding). The Court noted that prior claims handling practices of an insurer would be relevant in a trial based upon wrongful denial of health benefits to demonstrate a plan or scheme on the part of insurance company. Therefore, the information was held to be discoverable. See *Aztec Life Ins. Co. v. Dellana,* 667 S.W.2d at 915. The advisory committee notes to the federal rule amendments seem to make clear that under amended Rule 26(b) this same type of information should be considered relevant to the plead claims and defenses.[6]

B. Subject Matter Relevance

1. The Texas Supreme Court has increasingly focused on the subject matter of the litigation holding that discovery requests transcending the theories and claims set forth in the pleading are well outside the bounds of proper discovery. *See Texaco v. Sanderson,* 898 S.W.2d 813 ,815(Tex. 1995); *Dillard Dept. Stores, Inc. v. Hall,* 909 S.W.2d 491, 492 (Tex. 1995); *K Mart v. Sanderson,* 937 S.W.2d

[4]See also, In re American Optical, supra.

[5]See, Downey, Discoverectomy: A Proposal to Eliminate Discovery, 11 Rev. of Litig. No.3, pp. 474-499 (1992); Downey, Discoverectomy II: The End of Gotcha Litigation, 13 Rev. of Litig. No. 2, pp. 183-218 (1994).

[6]See discussion of federal rules amendments, below.

429, 431 (1996) and *In re American Optical,* 988 S.W. 2d 711 (Tex. 1998).

2. The Supreme Court's approach appears to reflect a desire to balance the tension between the interests of allowing full investigation of a claim or defense and the interests of judicial economy. Attorneys in civil litigation oftentimes in discussing burden of proof during voir dire explain to the panel members that the burden of proof is less than in a criminal case because the parties lack the resources of the state to prove a case beyond a reasonable doubt. Whether this is a correct statement is not going to be debated here. However, it does emphasize an important issue with regard to the scope of discovery in civil matters. At some point, in the interest of maintaining the efficiency of the judicial system, someone has to say enough.

3. Much has been written by plaintiff's attorneys over the last couple of decades about the value of seeking and finding the smoking gun. The smoking gun is that mythical document buried within volumes of otherwise worthless materials, which the defendant yields unwittingly, turning the tide of the case. Finding this invaluable item is not as easy as one might think. To the extent a smoking gun surfaces, it does so only after the expenditure of tremendous resources. Nonetheless, corporate defendants live in fear of this phenomenon (oftentimes with good justification) and have strategized how to avoid it. One way is to increase the number and breadth of privileges.[7] Another, however, is merely to limit the permissible scope of the request. If the scope is narrowed, it is predictable the responsive body of documents will be smaller thus reducing the likelihood of the smoking gun. Tort reform over the last decade has aggressively pushed both concepts.

4. During the 1990s, the Texas Supreme Court focused on what it has referred derisively as "fishing". In one case it equated "fishing" to exploring, observing that requests for production are not be used to explore for additional causes of action or theories of recovery. *See Dillard Dept.. Stores, Inc. v. Hall,* 909 S.W.2d 491, 492 (Tex. 1995). In *K Mart v. Sanderson*, 937 S.W.2d 429 (Tex. 1996) the Court held that *no discovery device* may be used for fishing:

> 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 v.Martin*, 776 S.W.2d[145] at 148[(Tex.1989)] (unlike interrogatories and depositions, Rule 167 is not a fishing rule.) We reject the notion that any discovery device can be used tofish.

5. In earlier writings on the scope of discovery, I suggested that fishing simply meant exploring for causes of action that had not been pled. *See Texaco v. Sanderson*, 898 S.W.2d at 814-815. More recently, the Texas Supreme Court seemingly has held that fishing also means asking requests it believes are excessively over broad. This does not mean the discovery just goes beyond what has been pled. It apparently means that it goes beyond being reasonably calculated to lead to the discovery of admissible evidence. The Court, alluding to its holding in *G.M. v. Lawrence,* 651 S.W.2d 732 (Tex. 1983), has strongly indicated that discovery requests must have reasonable limitations as to time place and subject matter.[8]

6. In *K Mart v. Sanderson,* 937 S.W.2d 429, 431 (Tex. 1996), the Court, in somewhat loose language, held that a twenty-state search for documents over a five-year period is overly broad as a matter of law. One can only guess whether the Court actually meant what it said as applied to every conceivable circumstance or whether it was limiting its edict to the particular facts of the case before it. Until there is some further clarification on this point, one should anticipate that anytime a request is sent to an opponent for a search of documents beyond five years and/or which requires a search of its records in at least twenty states, there is going to be an objection to scope based upon the holding in *K Mart v. Sanderson.* If the Court meant for its holding to be taken literally, it is worth considering whether a three or four year search of records in 5 to 10 states might arguably be permissible. My guess is that the Court expects the trial court to exercise its discretion. While in *K Mart* the request was over broad in view of the facts, there may be instances when the circumstances justify a five year search for

[7] An example is the ongoing effort to have self-critical analysis granted privilege status. While there has been limited recognition of a self-critical analysis privileged in the context of medical peer review (See, *Weekoty v. United States*, 30 F.Supp. 2d 1343 (D.N.M. 1998)), most courts have refused recognize self-critical analysis as a privilege. See, *Roberts v. Hunt*, 187 F.R.D. 71 (W.D.N.Y. 1999) and *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990).

[8] See, *Texaco v. Sanderson,* 898 S.W.2d at 815 ("The trial court's ruling requiring production beyond that permitted by the rules of procedure was a clear abuse of discretion. Defendants have no adequate remedy by appeal."), and *Dillard,* 909 S.W.2d at 492 ("A discovery order that compels overly broad discovery 'well outside the bounds of proper discovery' is an abuse of discretion for which mandamus is the proper remedy")

documents in twenty or even a fifty states. The guideline should be need in terms of potential probative evidence versus burdensomeness.

7. The issue of burdensomeness was addressed by the Texas Supreme Court in *Dillard Dept. Stores v. Hall*, 906 S.W.2d 491 (Tex. 1995). In its third request for documents from Dillard, the plaintiff sought a computer report as well as incident reports and claims files for 668 name customers who had filed false arrest claims from stores across the country during the years 1984 through 1992. The trial court ordered production of a computer-generated listing of the claims. Although there is no discussion in the opinion about how Dillard proved it was unduly burdensome to produce the computer report,[9] the Texas Supreme Court held that the purpose for the request was an improper "fishing expedition" and held the order to be an abuse of discretion. The Court noted that 'as presently postured, this is a simple false arrest case,' impliedly indicating that claims involving civil rights violations were not relevant to the subject matter of the lawsuit as circumscribed by the pleadings. We are left to ponder whether the computer report would have been properly discoverable if the pleadings embraced civil rights violations. Moreover, we are not informed whether the computer report was capable of being edited to pertain solely to the false arrest issues raised by the pleadings.

8. In *K Mart Corp. v. Sanderson*, 937 S.W.2d 429, 431 (Tex. 1996) the Texas Supreme Court held that a discovery request for reports of criminal conduct occurring at K Marts across the nation was simply overly broad as a matter of law:

> The likelihood that criminal conduct on the parking lot of a K Mart store or other property owned by Weingarten in El Paso or Amarillo as long ago as 1989, or outside Texas as long ago as 1986, *will have even a minuscule bearing on this case is far too small to justify discovery.* [*emphasis added*]

10. Most recently, in *In re Graco Children's Products, Inc*, 210 S.W.3d (Tex. 2006) the Texas Supreme Court has re-emphasized that in product liability cases, the requests must be relevant to the product at issue in the case:[10]

> Evidence about different products and dissimilar accidents has long been inadmissible, as it generally proves nothing while distracting attention from the accident at hand. *See Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 138 (Tex.2004).

11. Another recent case,[11] dealing with epidemiology, has discussed the required nexus between the discovery request and the material issues in the case in terminology found in the Daubert line of cases:

> The concept of "fit" discussed by the Supreme Court in *Daubert* is a critical issue to the question of generalizing epidemiology study results to a plaintiff in a particular case. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591, 113 S.Ct. 2786, 2796, 125 L.Ed.2d 469 (1993).

12. To demonstrate the significant shift in philosophy over the last decade, compare the above language in *K Mart* and *Graco* with the appellate court's observations in *Independent Insulating Glass v. Street*, 722 S.W.2d 798 (Tex.App.--Fort Worth 1987):

> Furthermore, the discovery of customers and buildings in which realtors glass has been installed, would also lead to evidence of how similarly constructed windows have performed, and therefore, weigh on the issue of negligent manufacture and design. Id. at 803.

13. The Courts ruling in *K Mart* arguably raises the interesting question about what happens if an expert witness testifies that the type of data the Court has held irrelevant and undiscoverable is the very type of evidence typically relied upon in the particular specialty in drawing conclusions. See Tex. R. Civ. Evid. 702. It appears the Court is setting arbitrary discovery parameters rather than articulating clear and rationale guidelines to assist the bench and bar in determining relevancy.

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[9] *Cf., American Bankers Insurance Company of Florida v. Caruth*, 786 S.W.2d 427 (Tex. App.--Dallas, 1990 no writ).

[10] It is interesting to note that the Court references Tex. R. Evid. 401 for the definition of relevancy rather than using the standard definition of relevancy in the discovery context, that the information is calculated to lead to admissible evidence. See, *In re Graco*, 598 S.W.3d at 601.

[11] *In re BP Amoco Chemical Co.*, 2007 WL 177437 (Tex.App.-Hous. (14 Dist.))

14. *ISK Biotech Corp. v. Lindsay,* 933 S.W.2d 565 (Tex. App. --Houst..[1st Dist.] 1996) provides a refreshingly commonsense analysis to the standard " solely for harassment" and "undue burden" objections.

> We have already concluded, however, that these discovery requests were reasonably calculated to lead to the discovery of admissible evidence, a request that meets that criterion is manifestly not. Sought *solely* for the purpose of harassment merely showing that a discovery request is burdensome is not enough; it is only *undue* burden that warrants non-production. To the extent that a discovery request is burdensome because of the responding party's own conscious, discretionary decisions, that burdensomeness is not properly laid at the feet of the requesting party, and cannot be said to be undue. Id. at 569.

B. Discovery Limited to Claim or Defense

1. The Texas Supreme Court has been most concerned about the scope of discovery pertaining to requests for production.[12] And this no doubt will become an increasing concern with the rapid development of electronic discovery. In *Loftin v. Martin,*[13] the Texas Supreme Court signaled an intention to reign in the scope of discovery with regard to requests for production. The Court stated that unlike interrogatories and depositions, requests for production are not a tool for fishing.[14] To be proper, it was held that requests must identify particular types and categories of documents. A later appellate opinion offered the clarification that the requested documents had to be relevant to the issues that had been pleaded.[15] More recently, the Court has stressed that no discovery tool may used as a device for fishing,[16] but the scope of discovery allowed with regard to requests for production still appears to be a primary concern.

2. In Version 1 of the new rules of discovery,[17] the Court proposed to limit the scope of discovery pertaining to requests for documents and things. Parties could obtain documents and things relevant to "the claims or defenses of the parties" by request, but could obtain those relevant to the "subject matter of the action" only after a Court granted a motion demonstrating that the benefits of discovery outweighed the costs of production. This proposal was quickly retracted after much criticism from the bar:

> The bar severely criticized this proposal, contending that its novel and largely undefined concept of relevance to claims and defenses, coupled with the requirement of a motion to obtain broader discovery, would lead to a proliferation of satellite disputes and hearings. [citing letters on file with the Clerk of the Supreme Court of Texas].[18]

While the proposal was retracted, the concept remains very much alive in Texas practice. Further, as will be discussed below, it has recently been adopted, virtually verbatim, in the new amendments to federal rule 26(b) pertaining to the scope of discovery generally, in federal practice.

C. Federal Court Developments

1. Historically, the scope of discovery under FED. R. CIV. P. 26(b) has been quite broad. *See generally*, *Hardy v. Johns-Manville Sales Corp.,* 509 F.Supp.1353 (E.D. Tex. 1981); *Duplan Corp. v. Deering Milliken, Inc.,* 397 F.Supp. 1146, 1187 (D. S.C. 1974); and *Burns v. Thiokol Chem. Co.,* 483 F.2d 300 (5th Cir. 1973). This in large part was based upon the rule which allowed discovery relevant to the subject matter of the litigation.

2. Effective December 1, 2000, the scope of discovery allowed by Rule 26(b) has been modified. Rule 26(b) now reads as follows:

> (b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

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12 See, *In re Graco Children's Products, Inc*, 210 S.W.3d (Tex. 2006)

[13]776 S.W.2d 145 (Tex. 1989)

[14]*K Mart v. Sanderson,* 937 S.W.2d 429, 431 (Tex. 1996)

[15]*Davis v. Pate,* 915 S.W.2d 76 (Tex. App.--Corpus Christi 1996, orig. proceeding, [leave denied]). See more detailed discussion below.

[16] *K Mart v. Sanderson,* 937 S.W.2d 429 (Tex. 1996).

[17]Supreme Court of Texas, Tentative Draft of proposed discovery rules, January 19, 1998, reprinted in Albright, et al, **Handbook on Texas Discovery Practice**, App. F p.589 (West Group, 1999).

[18]See, Albright, et al, **Handbook on Texas Discovery Practice**, §6.3, p.107 (West Group 1999)

> (1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i),(ii), and (iii).

3. This new rule effectively creates two tiers of discovery: attorney managed discovery and court supervised discovery.[19] So long as the discovery is relevant to the claims or defenses of the parties involved in the litigation, presumably the requesting party is entitled to such discovery as a matter of right, subject to claims of privilege. However, if the attorney seeks discovery beyond the issues pleaded by the parties, but relevant to the subject matter of the litigation, the court may allow broader discovery, but only upon a showing of good cause. Judge Lee Rosenthal, in her paper discussing the new rules, makes the following helpful observation in this regard:

> The standard of relevant to claims or defenses is not novel. It has been debated since the 1970s. Discovery is relevant to the claims and defenses when it tends to prove, disprove, or illuminate the claims and defenses in the pleadings. Discovery is relevant to the subject matter of the suit when it is relevant to claims and defenses that, while not currently pleaded, may reasonably become part of the pleadings through amendment. The amended rule does not introduce unknown terms.[20]

4. The advisory committee notes make clear that discovery of other prior or similar acts, conduct or events would be discoverable under this new rule as being relevant to the claims or defenses.[21] Special mention is made of Rule 26(b) (2) which allows the trial court to grant appropriate protective relief regarding the scope of discovery. It is noteworthy that the Texas Supreme Court has adopted Rule 26(b) (2) verbatim, except for provision (ii).[22]

D. Burden of Proof

1. Previously, I have written that the burden of pleading and proving that requested matters are *not* relevant has been held to be on the party seeking to prevent discovery. *See Weisel Enterprises., Inc. v. Curry*, 718 S.W.2d 56,58 (Tex. 1986); *Peeples v. Fourth Court of Appeals*, 701 S.W.2d 635, 637 (Tex. 1986); *Texaco v. Dominguez*, 812 S.W.2d 451, 454 (Tex. App.--San Antonio 1991, orig. proceeding); *Independent Insulating Glass v. Street*, 722 S.W.2d 798, 802 (Tex. App.--Ft. Worth 1987, writ dism'd). This statement of the law, if it was ever correct, is no longer.

2. For over the last decade, the rule in Texas has been that a party resisting discovery had the burden of objecting to the request and proving why it should not be answered. This included objections that the discovery was irrelevant, over broad or unduly burdensome. *See Independent Insulating Glass v. Street*, 722 S.W.2d 798, 802 (Tex. App. -- Fort Worth 1987 writ dismd); and *Gufstafson v. Chambers*, 871 S.W.2d 938 (Tex.App.--Houst. [1st Dist.] 1994). Arguably, the Texas Supreme Court may be trending back toward the practice of requiring the requesting party to prove relevance. *See Texaco, Inc. v. Sanderson*, 898 S.W.2d 813 (Tex. 1995). The Court states for instance, "The plaintiffs *have not demonstrated* how the requested information relating to fire training bears any relation to the case at all." [*emph. added*] Id at 815. Granted, the case had nothing to do with fire training; however, the language could be interpreted as signaling a change in the burden of proof. What the Texas Supreme Court has seemingly done is adopt Justice Hecht's dissenting opinion in *Loftin v. Martin*, 776 S.W.2d 145 (Tex. 1989)**.** Assuming a responding party need not have to follow the Rule 166b (4) [now Tex. R. Civ. P. 193.2] protocol with regard to improper discovery requests, this should not obviate the requirement that the responding party who objects to a discovery request on the basis that it is improper has to produce proof of such an assertion.

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[19]See generally, Hon. Lee H. Rosenthal, The 2000 Amendment To the Federal Rules of Civil Procedure" Federal Bar Seminar (2000).

[20]Id.

[21]Id.

[22]Tex. R. Civ. P. 192.4

3. The rules of procedure contemplate that the party objecting to a discovery request, proper or not, has the burden of objecting to that aspect of a discovery request that is improper or objectionable and responding to as much of the request as is not objectionable. *See* Tex. R. Civ. P. 193.2.b. Presumably, this means is that if an overly broad discovery request is served the responding party should respond to so much of it as is reasonable and relevant and object to the remainder. If this rule is followed, the requesting party more likely than not will not get what she requested, but very well may get what she needs and no further court intervention will be needed. Under the Court's developing protocol, the responding party need merely object to a request as being overly broad, improper, or unduly burdensome and nothing more until the requesting party shows the relevancy of the request. While the Texas Supreme Court has written that the trial court should assure that requests are tailored to the material issues in the case,[23] and has provided guidance in its comments to the rule, there has not yet been a decision that clearly sets out how the above provision is to be applied in the face of an over broad request. So far, the cases seem to suggest that when a party sends an overbroad request and the other party objects on the basis that the request is improperly over broad, no further response is being required until the requesting party narrows the request. If this is an accurate assessment, then it does not appear that Rule 193.2 is being followed as written.

4. Arguably, a party should not be permitted to not provide any response to a discovery request simply because the request exceeds the scope of permissible discovery. The responding party should be required to provide an answer to the request within the permissible scope of discovery. This is the point made by Rule 193.2 (a) and (b):

> **(a)** ***Form and time for objections.*** A party must make any objection to written discovery in writing — either in the response or in a separate document — within the time for response. The party must state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request.
>
> **(b)** ***Duty to respond when partially objecting; objection to time or place of production.*** A party must comply with as much of the request to which the party has made no objection unless it is unreasonable under the circumstances to do so before obtaining a ruling on the objection. . .

5. The Texas Supreme Court in *In Re Union Pacific Resources Company*, 22 S.W.2d 338 (Tex. 1999 per curiam) reiterated that evidence may not always be necessary to support a claim of protection from discovery. In this instance, the party was seeking the amount that was paid to the opposing party in settlements obtained in separate litigation. The trial court, without hearing or considering any evidence granted the responding party's motion for protection. The Supreme Court held that the trial court properly exercised its discretion, noting that it could not conceive of what type of evidence could have been produced in support of the objection. The Court distinguished both *Peeples* and *Weisel*, observing that both those cases dealt with claims of privilege, while the instant case dealt only with an objection on the basis of relevancy.

6. Prior to *Union Pacific*, one court has acknowledged that an order to produce documents might be so overly broad on its face that it would require production of clearly irrelevant documents and thus be subject to objection, without a requirement of proof of non-relevancy. *Brad Caraway & Assoc., Inc. v. Moye*, 724 S.W.2d 892, 893 (Tex. App.--Texarkana 1987, orig. proceeding). Also consider this rationale in analyzing the decision of the Texas Supreme Court in *Mutter v. Wood*, 744 S.W.2d 600 (Tex. 1988), regarding requests for unlimited medical authorizations.

7. While evidence may not always be necessary to prove that a request is irrelevant, it is likely that a party objecting on the basis that the request is unduly burdensome, will be required to produce evidence in support of such an objection. In *Independent Insulating Glass v. Street*, 722 S.W.2d at 803, the Court observed that, where the defendant manufacturer opposed the production of complaints regarding windows it had manufactured other than the model in question on the ground that said complaints were not relevant to the subject matter of the lawsuit, the discovery would be permitted because the defendant had failed to prove that the other window units were so dissimilar as to make discovery unnecessary. "Any party seeking to limit discovery has the burden of pleading and proving that contention." *Independent Insulating Glass v. Street*,722 S.W.2d at 802**.**

8. The concept of good cause *per se* for not objecting to improperly over broad discovery request was rejected in *Young v. Ray,* 916 S.W.2d 1 (Tex. App. -- Houst. [1st Dist.] 1995). *See also Gutierrez v. D.I.S.D,* 729 S.W.2d 691 (Tex.1987). The appellate court in *Young* pointed out that *Texaco v. Sanderson*

[23] See, *In re CSX*, 124 S.W. 3d 149 (Tex. 2003).

established a two step procedure to object to a discovery request on grounds of over breadth and to assert privileges:

> First the party must make a timely objection on the grounds of over breadth. Second, one the trial court determines the appropriate breadth of discovery; the party must be given a chance to assert privileges. Id. at 4.

9. In *K Mart Corporation v. Sanderson*, 937 S.W.2d 429, 431 (Tex. 1996) the Texas Supreme Court suggests arguably that a discovery request must specifically exclude work product and that an order that does not mention work product while granting a plaintiff's discovery request that does not exclude work product is erroneous unless there is a basis for compelling work product.[24] It must be assumed that the work product was clearly discernable even without the proffer of evidence. I conclude this because there is no discussion in the opinion of the responding party having done anything to prove its assertion of work product.

E. Determination of Scope

1. Several opinions have addressed the problematic issue of determining what matters are reasonably calculated to lead to the discovery of admissible evidence. What can be readily gleaned from the opinions is that there is no universal rule applicable to every situation. Instead the courts have attempted to formulate a *balancing test*.

2. Justice Barrow, in his dissenting opinion in *Jampole v. Touchy*, 673 S.W.2d at 578 (Tex. 1984), proposed the following approach for determining relevance of matters sought through discovery:

> [R]elevance does implicate a balancing of the probative value of the information sought and the burden upon the movant if discovery is denied weighed against the burden placed upon the respondent if discovery is granted.

3. In *Independent Insulating Glass, Inc. v. Street*, 722 S.W.2d at 803 (Tex. App.--Ft. Worth 1987, writ dism'd), the appellate court observed that the Texas courts have developed a balancing test in which the probative value of the information sought and the prejudice to the requesting party if discovery is denied, is weighed against the burden placed upon the responding party if the discovery is granted.

> . . . However, whether a request for discovery will lead to admissible evidence is often a guessing game. The courts of Texas have developed a balancing test for determining the potential relevance of discovery requests. In this test, the probative value of the information sought and the burden on [the requesting party] if discovery is denied, is weighed against the burden placed upon [the responding party] if the discovery is granted.

4. *G.M v. Lawrence*, 651 S.W.2d 732 (Tex. 1983) has served as a touchstone for advocates of limiting the scope of discovery. Unfortunately, the holding is oftentimes misstated, even unfortunately by the Texas Supreme Court. In *Texaco v. Sanderson*, the Court observed that in *G.M. v. Lawrence*

> . . . We granted mandamus relief directing the trial court to set aside its order requiring compliance with the discovery requests. Id. at 34.

The Court's observation, while accurate is taken out of context. The trial judge in *G.M v. Lawrence* had actually granted all the plaintiffs' discovery requests as an apparent sanction against G.M. for alleged discovery abuse. The Court made clear that such an approach was an abuse of discretion: Compelling discovery of non-relevant material, however, is not one of the available sanctions under our rules. Id. at 734.

a.. What is unfortunate in some of the Supreme Court's recent interpretations of *G.M. v. Lawrence* is the failure to clarify that the plaintiffs had narrowed their discovery requests and the trial court's order was thus impermissibly more expansive than the requests.

> Counsel for the Smiths has indicated by statements to the trial court and to this Court and by the terms of the agreement the material he considers relevant. *Under these facts*, it was an abuse of discretion for Judge Lawrence to refuse to limit

[24] Requiring the requesting party to exclude matters appears to be the wrong approach. Requiring the requesting party tot specifically state that it is excluding work product, allows the responding party free reign to designate a number of documents as being work product, without scrutiny. A much better approach is to have the responding party state what documents it is withholding as work product. *See, Proposed Rule 4 Texas Supreme Court Advisory Board Proposal.*

> discovery of information to vehicles relevant to this suit. Id. at 734

Of course, it is clear that an order that exceeds the scope of a proper request is an abuse of discretion.

b. The most fascinating aspect of *G.M. v. Lawrence,* particularly in view of the Court's current ostensible zeal to limit the scope of discovery, is what G.M. itself considered relevant and material. The vehicle involved in *Lawrence* was a 1966 Chevrolet chassis cab truck. The plaintiffs contended the truck was defectively designed because of the location of the gas tank inside the cab and behind the seat and a fuel filler neck that protruded from the cabs side. The plaintiffs issued discovery requests that requested all investigation made by or on behalf of G.M. relating to fuel spills resulting from damaged fuel necks in *any vehicle* manufactured by G.M. G.M. objected that the request for discovery would require producing information on all automobiles it had manufactured since 1908, as well as data on locomotives and tanks. The plaintiffs' request was admittedly over broad. G.M. requested that the scope be limited to vehicles for model years 1949 to 1972. Id. at 732. The plaintiffs' attorney originally agreed that the plaintiffs were interested only in test results pertaining to "in-cab gas tanks and through the cab filler necks from 1949-1972, When G.M. insisted on further limiting the tests to side-impact tests, the agreement broke down and the plaintiffs re-urged that the response to their original requests be compelled. Id. at 733-734.

c. Particularly worth noting is that even G.M. considered the appropriate scope of discovery included model vehicles other than the one involved in the case, for a period of time before and after the model year in question, spanning a period of twenty three years. Question whether the instant Court would agree with scope G.M. considered reasonable. *See Dillard Department Stores v. Hall,* 909 S.W.2d 491 (Tex. 1995) ("We hold that a twenty state search for documents over a *five* year period is overly broad as a matter of law.") Id. at 492.

d. In his concurring opinion in *General Motors Corp Lawrence,* 654 S.W.2d 732 (Tex. 1983), Justice Ray made clear that the Courts holding was very narrow:

> The opinion cannot be construed as an expression of limitation upon discovery. We do not say that discovery should be limited to information regarding the particular vehicle model involved in the cause of action. In passing upon the relevancy and materiality of such information sought to be discovered, the various remedies sought by a plaintiff and the burdens of proving entitlement to such remedies must be kept in mind. Id. at 734

As the Court and legislature progressively increase the burdens on plaintiffs of proving various causes of action, it would seem the scope of discovery, applying Justice Ray's analysis, should enlarge. Ironically, the reverse appears to be taking place.

5. Justice Ray went on in his concurring opinion in *G.M. v. Lawrence* to explain that in certain types of cases, a balancing of considerations might result in a broadening of discovery parameters:

> For example, the scope of discovery in product defect cases may be permissibly wide, especially where the plaintiff is alleging grounds for the award of exemplary damages.

G.M. v.Lawrence, 651 S.W.2d at 734 (Ray, J. concurring) (emphasis added). This argument was more recently advanced in *Texaco v. Sanderson*, 898 S.W.2d 813 (Tex. 1995**).** While the Court did not reject the notion that greater latitude should be allowed when gross negligence is an issue, it reiterated the concept that the discovery still must have a discernable nexus to the issues in the case:

> While plaintiffs are entitled to discover evidence of defendants' safety policies and practices as *they relate to the circumstances involved in their allegations,* a request for all documents authored by Sexton on the subject of safety, without limitation as to time, place or subject matter is over broad. Id. at 814 [emphasis added].

6. In fairness to the Texas Supreme Court, it has made very clear that requests must be tailored to the material issues in a particular case. It is unfortunate that several cases have made their way to the Court that have contained requests that clearly have no basis to the pleaded allegations. This has resulted in opinions that seemingly limit discovery very conservatively. I do not believe it has been the intention of the Court to state what can be discovered so much as to state a policy that the requests must have a reasonable nexus to allegations in the case. To paraphrase a popular statement about politics, "in the end, all discovery issues are local." This means that each case must be decided on its own facts. Similarly, the breadth of discovery in a

particular case will depend not so much on a particular prior court opinion as it will on what is alleged in the pleadings on file in the particular case. This point is illustrated by several recent courts of appeals decisions.

a. *In re BNSF Ry Co.*, 2006 WL 3239954 (Tex.App.-Beaumont) arose from a railroad crossing case. The trial court granted plaintiff's request for all prior incidents arising at the crossing. The appellate court found an abuse of discretion. The appellate court seemed willing to allow discovery of other prior similar incidents and actions that the defendant had taken relevant to those incidents, but it found that the requests for such materials were far too over broad and had not been tailored to the specific allegations in the case.

> The trial court did not limit ordered production to documents that show the railroads' responsibility for the construction and warning or traffic control devices for the crossing. Instead, the relators were required to produce all documents of any kind regarding the design of, responsibility for, and maintenance of the crossing. There is no time limitation whatsoever on the documents to be produced.

b. *In re Brookshire Grocery Company*, 2006 WL 2036569 (Tex.App.-Tyler) addressed the issue of discovery pertaining to other prior similar incidents in a premises liability action. A non-employee plaintiff requested of prior OSHA claims that inherently would only have pertained to injuries sustained by employees. The Court found that the inquiry, if properly drawn could be relevant.

> We acknowledge that OSHA pertains to employees, their employment, and their places of employment. However, evidence of other accidents, near accidents, or related similar events is probative evidence in Texas courts, provided an adequate predicate is established. *Henry*, 475 S.W.2d at 294. Once the proper predicate is established, the evidence is probative on several issues, including notice to the owner/operator of the existence of an alleged dangerous condition. [omitting citations]. The fact that a similar accident involved an employee rather than a non-employee does not bar admission of the evidence. Consequently, we conclude that OSHA evaluations pertaining to accidents similar to Floyd's are reasonably calculated to lead to admissible evidence.

The problem for the plaintiff in Brookshire Grocery was that he had not adequately narrowed the request in the relevant area of inquiry. This highlights the dichotomy between what is relevant and how relevant information is requested.

F. What is a Proper Request?

1. There is some nuance in stating that while the limits of discovery remain broad, discovery requests cannot be over broad. To cut to the chase, discovery requests must be specifically drawn. Well drafted discovery requests may still lead to broad discovery in the appropriate case. Requests must be crafted for discrete information, relevant to the issues that have been pleaded. The trial judge has a responsibility to see that discovery is tailored to the to the particular issues in the case. *See*, *In re CSX***,** 124 S.W. 3d 149, (Tex. 2003). Arguably, the more expansive and detailed the pleadings, the broader should be the potential universe of discoverable data.

2. In *Loftin v. Martin*, 776 S.W.2d 145 (Tex. 1989), the Texas Supreme Court dealt with the issue of over breadth, in the context of a request for production.[25] In this regard, the Court examined the following request:

> All notes, records, memoranda, documents and communications made that the carrier contends support its allegations . . . .

Id. at 148. The Court held that a request for all records a party contended supported its all allegations was "vague, ambiguous, and over broad" and that the trial court was within its sound discretion in sustaining the defendant's objections to it on those grounds. The Court pointed out that while a party is entitled to see the evidence against him, he needs to formulate his requests with "a certain degree of specificity." The decision implies that a proper request should identify particular "classes or types" of documents being sought.[26]

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[25]The Court reiterated that the Rule 167 request for production is not to be used as a fishing expedition; it cannot be used to simply *explore*. ***Loftin***, 776 S.W.2d at 148 (*citing* Steely &, *Operation of the Discovery Rules*, 2 HOU. L. REV. 222 (1964)).

[26]See also ***Fanastiel v. Alworth***, 856 S.W.2d 585 (Tex. App.--Beaumont 1993, orig. proceeding), noting that the trial

3. *Davis v. Pate*, 915 S.W.2d 76 (Tex. App.-Corpus Christi 1996, orig. proceeding, [leave denied]) helps clarify the degree of specificity required of a request for production of documents. The case involved claims of defamation, slander, and negligent misrepresentation arising out of a negative reference that the defendant gave to a former employee's (the plaintiff) prospective new employer. At issue were 26 requests for production, to which the plaintiff objected on the ground that they "did not set forth items to be inspected either by individual item or by category, and did not describe each item and category with reasonable particularity." The Court held that two of the requests were insufficiently specific, and upheld the rest.

a. The two requests held to be insufficiently specific are as follows:

> Please produce any and all documents and tangible things and/or all tape recordings, videos, electrical or mechanical recordings or transcriptions, evidencing, reflecting or pertaining in anyway to the subject matter of this litigation.

Please produce copies of any and all photographs that evidence, reflect or pertain in anyway to the subject matter of this litigation.

b. By way of contrast, the following two requests were held to be sufficiently specific:

2. Produce any and all documents which evidence, reflect or pertain in anyway to your contention that The Bank of Robstown and/or William D. Dodge III had a personal animosity towards you.

5. Produce any and all documents which evidence, reflect or pertain in anyway to your contention that the alleged slanderous statements injured you in your profession as a banker, finance/credit manager.[27]

c. Citing *Loftin v. Martin*, 776 S.W.2d 145 (Tex. 1989), the Court said that "a request for all evidence that supports an opposing party's allegations, but which does not identify any particular class or type of documents, amounts to merely an improper request to be allowed to generally peruse all evidence the opposing party might have." *Id*. at 79. "However, a request for '*any and all*' documents does not in itself violate the specificity requirements of *Loftin*, so long as the request is further restricted to a particular type or class of documents."[*emph. added*] *Id.* at 79**.**

d. In holding that requests 17 and 18 were not sufficiently specific, the Court rejected the defendant's contention that it eliminated the specificity problem by defining "documents" to include a large number of specific types of communicative media. The error, according to the court, was not that the term "documents" is uncertain, but that the class of documents requested, with regard to subject matter and content, is uncertain and open to speculation.

e. As to the other requests, each specified a particular subject matter to which the request was limited, such that they were sufficiently restricted to a particular type or class of documents. Each request specified a particular aspect or element of the plaintiff's claims. Unlike the plaintiffs in *Dillard Dep't Stores, Inc. v. Hall*, 651 S.W.2d 732 (Tex. 1983); *Texaco v. Sanderson*, 898 S.W.2d 813 (Tex. 1995), and *General Motors Corp. v. Lawrence*,651 S.W.2d 732 (Tex. 1983), who were fishing for additional causes of action or theories, the defendant here was merely trying to discover the nature of the claims against it. As such, according to the Court, the requests were not a fishing expedition so much as a request for the plaintiff to put his cards on the table.

4. Justice Hecht, writing for the dissent in *Loftin v. Martin*, focused upon another request which the majority had failed to find objectionably over broad. He noted that the defendant had objected to the other request not because of the nature of the documents requested, but because the request was over broad. In such an instance, the Justice argued, the ***Peeples/Weisel*** procedures (now essentially codified in Rule 166b(4)) do not apply. Those procedures, according to the dissent, should only be triggered when a party is responding to "an *appropriate* discovery request." The dissent would have held that a request that is over broad is, on its face, inappropriate, and an objection on that ground should be sustained without the objecting party having to comply with the Rule 166b(4) procedures. This is essentially the holding in the recent case of

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court has a great deal of discretion in determining if a discovery request is over broad. The ***Fanastiel*** court also held that an in camera inspection is not required for the trial court to rule on an over breadth objection. ***Fanastiel***, 856 S.W.2d at 588.

[27]Nineteen of the 26 requests are reproduced verbatim in the opinion.

In Re Union Pacific Resources Company, 22 S.W.2d 338 (Tex. 1999 per curiam).[28]

5. The Texas Supreme Courts opinion in *Texaco v. Sanderson*, 776 S.W.2d 145 (Tex. 1989), appears to have adopted Justice Hecht's *Loftin* position. Texaco objected to a discovery request on the ground that it was overly broad.[29] When the trial court ruled that the request was not over broad, Texaco lodged an objection based upon privilege. The trial court held that Texaco had waived its privilege claims by failing to assert them properly in response to the plaintiffs' discovery request. After finding that the discovery request was outside the bounds of proper discovery, the court held that the trial court abused its discretion in denying Texaco's privilege claims. The Court stated:

> Rule 166b(4) of the Texas Rules of Civil Procedure requires that an assertion that requested information is exempt or immune from discovery must be made only in response to 'an appropriate discovery request within the scope of paragraph 2.' Because plaintiffs' request was not an appropriate request due to it's over breadth, defendants were not obliged to assert their claims of privilege when they lodged their initial objection to the request, and any deficiency in defendants' response cannot constitute waiver. Defendants must have an opportunity to assert any claims of privilege when a proper discovery request is made.

Id. at 815. The Supreme Court's opinion was issued per curium and did not mention *Loftin v. Martin.*

6. The Court in *K Mart v. Sanderson*, 937 S.W.2d 429 (Tex. 1996), sought to distinguish one of the requests in that case from the requests that were at issue in *Loftin:*

> We think the request in the present case is distinguishable from the one in *Loftin.* Thompson requested all documents relating *to the incident*, in which she was injured, not all documents which support K Mart's position or which relate to the claims and defenses in the cause of action. Because the incident was an isolated occurrence, we think a reasonable person would understand from the request what documents fit the description. *supra at* 431.[*emphasis added*].

I believe the members of the Texas Supreme Court may have a misplaced faith in the bar, or at least the members of it that I have had to deal with on a day to day basis. A request for all documents and things relevant to the incident in question predictably is going to evoke an objection that the request is improper, over broad, non-specific and unduly burdensome. Both requests are seemingly over broad as they are not confined to particular types and categories of documents. Moreover, what does the Court mean by the phrase "isolated occurrence"? It surely is not clear from the context of the case. Indeed, the plaintiffs seem to have been trying fruitlessly to establish that this was not an isolated occurrence when one considered the total experience of K Mart as a whole. What would be the result if the incident were not an isolated one? What is the rationale for the court's determination that a request for virtually everything relating to the incident is not over broad? How does this decision reconcile with the Court's demand for particularized requests? Perhaps looking for bright lines is the wrong search. The key is understanding the limits of the trial court's discretion within the policy guidelines enunciated by the Texas Supreme Court.

G. Trial Court Discretion

1. The Texas Supreme Court, in *In re American Optical,* reiterated that a trial Court has discretion over the scope of discovery.

> Plaintiffs argue that they must be afforded latitude in a mass toxic-tort case such as this involving numerous plaintiffs and defendants. For example, until discovery takes place, individual plaintiffs may be uncertain about precisely what products

[28] See discussion of this case, above.

[29] The plaintiffs' cause of action was for gross negligence in allegedly exposing the plaintiffs' decedents to asbestos, benzene, and other toxic substances. The plaintiffs requested production of "all documents written by John Sexton, who was corporate safety director, that concern safety, toxicology, and industrial hygiene, epidemiology, fire protection and training." ***Texaco, Inc. v. Sanderson***, 898 S.W.2d 813, 814 (Tex. 1995). To Texaco's objection that the request was over broad, the plaintiffs argued that they wanted to prove a general "corporate strategy to ignore safety laws." ***Id.*** The Court held the request over broad. The Court stated that while the plaintiffs were entitled to discover evidence of defendants' safety policies and practices as they related to the circumstances involved in their allegations, the request for all documents authored by Sexton on the subject of safety, without limitation as to time, place, or subject matter, was "not merely an impermissible fishing expedition; it is an effort to dredge the lake in hopes of finding a fish." ***Id.***

> they used at a particular shipyard at a particular time. We recognize these problems. This is why trial courts are vested with discretion over the course of discovery. See Dillard, 909 S.W.2d at 492 ("The scope of discovery is largely within the discretion of the trial court.").

Unfortunately, the Texas Supreme Court while stating that the scope of discovery is largely within the discretion of the trial courts has repeatedly overturned trial courts, holding that they had abused their discretion.[30]

2. The Texas Supreme Court has held that it is an abuse of discretion for a court to refuse to limit discovery of information in a product defect case to products relevant to the particular suit. *General Motors Corp. v. Lawrence*, 651 S.W.2d 732, 734 (Tex. 1983). However, Justice Ray, in his concurring opinion, pointed out the Court was not holding "that discovery should be limited to information regarding the particular [product] model involved in the cause of action." supra at 734; *See Cantrell v. Hennessey*, 829 S.W.2d 875, 877 (Tex. App.--Texarkana 1992, writ denied).

3. In *Lindsey v. O'Neill*, 689 S.W.2d 400, 402 (Tex. 1985), the Texas Supreme Court ruled that it *was not an abuse of discretion* for a trial court to limit the scope of permissible inquiry to only such facts as are, or may lead to, matters relevant to the issues identified in plaintiff's petition. However, compare this with the holding in *Stevenson v. Melady*, 1 F.R.D. 329 (S.D. N.Y. 1940), in which a federal court interpreting the scope of FED. R. CIV. P. 26 pointed out:

> to limit examination to matters relevant to only the precise issues presented by the pleadings would be contrary to the express purposes of Rule 26 . . . .

4. *Cantrell v. Hennessy Indus., Inc.*, 829 S.W.2d 875 (Tex. App.--Tyler 1992, writ denied), *cert. denied*, 113 S. Ct. 2347 (1993), demonstrates how a trial courts abuse of discretion in limiting the scope of discovery may result in reversible error. *Cantrell* involved a products liability claim that a defect in a Coats tire machine was a producing cause of personal injuries sustained by the plaintiff. The trial court sustained the defendant's request for protection and limited the plaintiff's discovery solely to the model machine involved in the incident and only for a five-year period, although, as the plaintiff demonstrated on appeal, Coats manufactured a number of different model machines prior to the date of the incident, which incorporated a safety device that could have presumably prevented the occurrence at issue. The Court held that the trial court had not only abused its discretion in restricting the scope of discovery, but that the denial of the evidence needed by the plaintiff to demonstrate a feasible alternative design resulted in harmful error, necessitating a reversal of the judgment that had been entered for the defendants.

5. Mandamus may be available when a court denies discovery of relevant data. Erroneous denial of discovery going to the heart of a party's case severely compromises a party's ability to present a viable claim or defense at trial, and renders the appellate remedy inadequate. *ISK Biotech Corp. v. Lindsay*, 933 S.W.2d 565, 567 (Tex. App.--Houst.[1st Dist.]1996); *Able Supply Co. v. Moye*, 898 S.W.2d 766,772 (Tex. 1995)(orig. proceeding); *General Motors Corp. v. Tanner*, 892 S.W.2d 862, 864 (Tex. 1995)(orig. proceeding); *see also Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223, 225-26 (Tex. 1992) (orig.proceeding) (order protecting corporate information vacated because it prevented shareholders from pursuing claim of fraud).

6. Appellate courts have generally noted that trial courts have great discretion with regard to determination of relevancy. *See Fanastiel v. Alworth*, 856 S.W.2d 585 (Tex. App.--Beaumont 1993, orig. proceeding) (noting that the trial court has a great deal of discretion in determining if a discovery request is over broad). In *C-Tran Dev. Corp. v. Chambers*, 772 S.W.2d 294 (Tex. App.--Houston [14th Dist.] 1989, orig. proceeding), it was held that a trial judge has broad discretion in ruling upon relevancy objections and that appellate courts should resist intervening in discovery disputes that involve *solely* the issue of relevancy.

7. Notwithstanding the lower appellate court decisions deferential to the trial courts rulings on relevancy, the Texas Supreme Court has with increasing regularity conditionally granted writs of mandamus holding that the trial courts had granted discovery well outside the bounds of proper discovery and thus had abused their discretion. *See Texaco v. Sanderson*, 898 S.W.2d at 815; *Dillard Department Stores, Inc. v. Hall*, 909 S.W.2d at 492; and *K Mart v. Sanderson*, 937 S.W.2d 429, (Tex. 1996).

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[30] *See, Texaco v. Sanderson*, 898 S.W.2d 813 ,815(Tex. 1995); *Dillard Dept. Stores, Inc. v. Hall*, 909 S.W.2d 491, 492 (Tex. 1995); *K Mart v. Sanderson*, 937 S.W.2d 429 (1996) and *In re American Optical*, 22 S.W.2d 338 (Tex. 2000).

8. See discussion in the preceding section regarding discretion of trial court to rule on a relevancy objection without considering evidence. *In Re Union Pacific*, 22 S.W.2d 338 (Tex. 1999 per curiam).

IV. SO WHAT DO YOU DO WHEN YOU CAN'T FISH?

Given the foregoing analysis, I can offer a few proposals for helping to avoiding the characterization of being a fisherman, while hopefully helping to assure something meaningful appears on your catch line. These suggestions focus on increased pleading specificity and more particularized discovery requests.

A. PLEADINGS:

Since the pleadings define materiality and hence relevancy, it will be important to make sure the pleadings articulate a basis for scope of your discovery requests. This is at odds with the concept of notice pleading, but it is obvious the Court is putting increasing importance on the pleaded allegations for determining the proper scope of discovery. Perhaps the best approach in this regard, is to plead broadly in the original petition and concomitantly keep the scope of the initial discovery requests fairly narrow. As the pleadings become more refined and more expansive, the discovery similarly may be broadened.

B. REQUESTS FOR DISCLOSURE

1. Consideration should be given to using responses to requests for disclosure as the basis for the claims or defenses upon which a party may base its arguments pertaining to permissible scope of discovery. Arguably, the disclosures supplement a parties notice pleadings, while affording the benefit that the disclosures may be amended or supplemented without the preceding disclosures being used against the disclosing party as impeachment.

2. Rule 194, Requests for Disclosure, is very unique to Texas. It is not similar to the federal disclosure rule, either before or after the amendments to that rule, effective December 1, 2000. It is unique with regard to its provision regarding contentions. The intent of the rule was to reconcile a tension that existed between notice pleadings and the desire to eliminate the burdensomeness of contention interrogatories. The Supreme Courts comment 2 to the rule is most instructive in this regard:

> Rule 194.2(c) and (d) permit a party further inquiry into another's legal theories and factual claims than is often provided in notice pleadings. So-called "contention interrogatories are used for the same purpose. Such interrogatories are not properly used to require a party to marshal evidence or brief legal issues. Paragraphs (c) and (d) are intended to require disclosure of a party's basic assertion, 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 defendants 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.

3. Rule 194.6 deals with the admissibility of responses to requests, and in particular make responses to requests for disclosure pertaining to contentions inadmissible for purposes of impeachment:

> A response to requests under Rule 194.2(c) and (d) that has been changed by an amended or supplemental response is not admissible and may not be used for impeachment.

C. DISCOVERY REQUESTS:

It is clear all discovery requests need to be carefully tailored to the specific facts and issues involved in the particular case. Since the holding in *Loftin*[31], this author has advocated issuing interrogatories and taking depositions of corporate representatives to identify and define the scope of relevancy for the particular case. This may be accomplished by asking the respondent to do such things as identify similar occurrences or claims,[32] and the particular types and categories of documents the responding party typically keeps, collects or considers in the ordinary course of its business relevant to the particular issues in the case. If the respondent does not

[31] *Loftin v. Martin*, supra.

[32] This was done in *ISK Biotech Corp. v. Lindsay*, 933 S.W.2d 565 (Tex. App.--Houston [1st Dist.] 1996) ("List and fully identify all other [projects similar to Bravo 825] to which [Browncо] has provided engineering or construction services since January 1, 1985.") Id. at 566.

identify any responsive documents and things, it should be prevented from offering any documents on the topic at trial. If the defendant does identify particular types of documents, then the requesting party is provided the blueprint for discovery. This can be supplemented by the requesting parties experts providing insights about what data should typically be generated or collected.

In a product liability case, an interesting and potentially productive line of questions might be crafted inquiring about what things the defendant, in the ordinary course of business considered relevant in researching, developing, producing, testing and distributing the product. Predictably, the defendant will object that the term is is vague, ambiguous and undefined. This, however, will not prevent the defendant from arguing before the court, unabashedly, that the request is overbroad, irrelevant, and not designed to lead to admissible evidence. My experience is that most, if not all, defendants, generally lack a sense of irony.

D. EXPERTS:

Experts may be utilized to define the universe of data that is used in the particular field to formulate opinions and conclusions.[33] The expert may provide this information by affidavit, deposition or live testimony. Testimony from other cases may be probative in this regard. Further, learned treatises may help provide guidance to the court. If the area is technical or scientific, it might be suggested that the court retain a special master or appoint a court expert to assist the court in determining relevancy.

V. RECENT DEVELOPMENTS

[To be supplemented during the oral presentation of the paper].

[33] In *ISK Biotech Corp. v. Lindsay*, 933 S.W.2d 565, (Tex. App.--Houst. [1st Dist.] 1996), ISK attached to its motion to compel and affidavit from one of its expert witnesses.

> [The expert] described the documents Browncо had produced at that point, and his examination of them, and listed several categories of documents which, he said are generated on any project of this magnitude[, and] which were missing from [Brownco's] production, and which are essential to evaluating [Brownco's] performance on the project[.]. . .