

## 2010 DISCOVERY UPDATE

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# 2010 DISCOVERY UPDATE

## PAUL N. GOLD

This paper will attempt to provide an overview of the developments that occurred in the area of Texas discovery during 2009 and 2010 (through April 2010). Probably the most significant developments occurred with regard to scope of discovery, particularly with respect to e-discovery and pre-arbitration discovery. The Texas Supreme Court, in *In Re Weekley Homes, L.P.* clarified rules for obtaining e-discovery in Texas. There were some interesting cases that explain the significance of pleadings with respect to scope of discovery. What is an overbroad request was discussed in several cases. Other cases dealt with the issues of scope of discovery in terms of financial records and with regard to authorizations, particularly medical authorizations. There were some informative cases with regard to expert discovery. Additionally, there were cases regarding a trial court's discretion to limit discovery and to impose sanctions.

### 1. DISCOVERY CONTROL PLANS:

*In re Kings Ridge Homeowners Ass'n, Inc.*, --- S.W.3d ----, 2009 WL 3337234 (Tex.App.-Fort Worth, 2009, no pet.)

The underlying facts and procedural machinations of this case are far too arcane and complicated to set out in this context. What is important for our discussion is the review of how to handle a situation in a multi-party case in which additional parties are added beyond the deadlines set out in the original discovery control plan. The original parties to the suit entered into a level 3 discovery control plan. After the control plan had expired, an additional party was added. When that party attempted to designate experts, the other parties persuaded the trial court to rule that the experts should be stricken because the added party did not comply with the original discovery control plan (of course, since the party was added after it had expired) and that the party should be controlled by a level 2 control plan (which the appellate court observed also had expired, because it was more than nine months after the case was filed that the new party was added). The appellate court, in finding that the trial court had abused its discretion, applied very pragmatic reasoning, holding that all parties must be bound by the same Level Control Plan:

Discovery control plans therefore apply to "cases" and "suits," not parties. There is no provision in the rules, nor have Defendants provided any case holding, that some parties in a multi-party case are governed by Level 2 while other parties in the same case are governed by Level 3. Application of different discovery and expert deadlines under different discovery levels to various parties in a multi-party suit would create unacceptable confusion and proliferation of discovery disputes as this case illustrates. . .

Certainly, the better practice would have been for all parties, upon HOA's joinder, to have submitted to the trial court a modified or new agreed scheduling order to establish a new discovery period and deadlines. Indeed, the confusion in this case arises from the fact that the previous scheduling order had expired; the parties proceeded with discovery without regard to the fact that their discovery cutoff had passed and without seeking a new or modified scheduling order.

## 2. TRIAL COURT DISCRETION:

### A. OVERVIEW

As the cases below illustrate, a trial court has the discretion to limit discovery. This discretion is particularly provided in Tex. R. Civ. P. 192.4. However, in addition, the trial court has inherent power to modify the scope, manner and timing of discovery in the interest of fair administration of justice. The following excerpt from *In re West* (discussed below) is instructive in concisely explaining the scope of the trial court's discretion:

In discovery situations, the trial court is granted latitude in limiting or tailoring discovery. Tex. R. Civ. P. 193.4. Generally, a trial court should limit discovery methods to those which are more convenient, less burdensome, and less expensive, or when the burden or expense of the proposed discovery outweighs its likely benefit. *In re Alford Chevrolet-Geo*, 997 S.W.2d 173 (Tex. 1999)(orig. proceeding); Tex. R. Civ. P. 192.4. Discovery requests themselves must be reasonably tailored to matters relevant to the case at issue. *In re Xeller*, 6 S.W.3d 618, 626 (Tex. App.- Houston [14<sup>th</sup> Dist.] 1999, orig. proceeding. Consequently, the trial court has broad discretion to limit discovery requests by time, place, and subject matter. See *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995) (orig. proceeding).

### B. POWER TO MODIFY RULES AND ENFORCE ORDERS

*Esty v. Beal Bank S.S.B.*, 298 S.W.3d 280 (Tex.App.-Dallas,2009, no pet. h)

A trial court may modify the rules of civil procedure. A court has inherent power to enforce its scheduling order. In this case, the court entered a scheduling order requiring the party seeking affirmative relief to designate experts and provide reports by a date certain. The plaintiff did not comply with this order by timely producing a report. The defendant filed a motion for summary judgment and the plaintiff responded with an

affidavit from its expert which was struck by the trial court. The court held that the court had the discretion to enter a scheduling order and the inherent power to enforce it and that the court's order superseded the Tex. R. Civ. P. 195 regarding designation of experts.

**C. DISCRETION TO MODIFY SCOPE OF DISCOVERY**

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

See discussion under scope of discovery and jury misconduct.

**D. DISCRETION TO CONDITIONALLY LIMIT SCOPE OF DISCOVERY**

***In re Watson***, 259 S.W.3d 390 (Tex.App.-Eastland,2008, no pet.)

The discovery dispute in this instance arose in the context of a will contest. There was an issue about testamentary capacity. The plaintiff sought medical records regarding the testator. The administrator of the estate objected to the scope of the discovery and the Court issued a "conditional" order limiting the scope of discovery provisionally to a specific time period (seven days) before the will was signed, "and conditioned further discovery requests upon a good-faith showing that Watson had a meritorious challenge to the 2003 will." Plaintiff filed a petition for writ of mandamus which was denied. The appellate court held that the trial court was within its discretion to limit discovery, particularly since the plaintiff was given the opportunity to have the scope of discovery expanded upon a demonstration of relevancy and need.

**E. DISCRETION TO MODIFY SCOPE OF DEPOSITIONS**

***In re West***, --- S.W.3d ----, 2009 WL 946847 (Tex.App.-El Paso, no pet.)

Just as the scope of discovery is the same for oral depositions as it is for written discovery (see, Tex. R. Civ. P. 192.3 and 199 comment 3), a trial judge has the same discretion to modify the scope of a deposition as with written discovery. This is illustrated in ***In re West***.

In light of the evidence presented, we find that it was reasonable for the trial judge to require that the deposition of CPA Henderson be tailored so as to protect Real Party's privileged matters and to limit the deposition to matters relevant to the case. We also find that in light of Relator's refusal to agree to a limited scope of discovery, it was reasonable for the judge to grant the Motion for Protective Order and to Quash the Notice of Deposition. See Tex. R. Civ. P. 192.6(b).

## F. LIMITATION ON DISCRETION

*In re Liberty Mut. Ins. Co.*, Not Reported in S.W.3d, 2009 WL 441897 (Tex.App.- Hous. [14th Dist.] 2009, no pet.)

A trial court has broad discretion to limit the scope of discovery. *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex.2003) (orig.proceeding) (per curiam). However, a writ may issue where the trial court's order improperly restricts the scope of discovery defined by the Texas Rules of Civil Procedure. *Lindsey v. O'Neill*, 689 S.W.2d 400, 401 (Tex.1985) (orig.proceeding) (per curiam). In this case, the insurance companies being sued for bad faith claimed that the trial court had improperly denied their discovery from non-parties regarding the plaintiff's knowledge of policy provisions and the scope of coverage, prior to the alleged bad faith. The appellate court agreed that the information sought was relevant to defendants' defense, not in terms of whether the information was admissible at trial, but only that it could lead to admissible evidence regarding its defense. Accordingly, the appellate court found that the trial court had abused its discretion in denying the discovery sought by the insurance companies relevant to their defenses.

### 3. SCOPE OF DISCOVERY:

#### A. OVERVIEW

The scope of discovery continues to be defined by the courts generally and on a case by case basis. It is becoming clearer what constitutes "fishing," and the role that pleadings play in defining the parameters of discovery. This concept becomes even more significant as e-discovery becomes more common-place and parties begin to struggle with the cost-shifting discretion afforded trial courts.

#### B. BURDEN OF ESTABLISHING RELEVANCY

- 1) *Allstate Ins. Co. v. Plambeck*, Slip Copy, 2008 WL 5411435 (N.D.Tex. Dec.29, 2008)

This is a federal court opinion dealing with the relevancy of discovery sought from a non-party. It is informative because the general rule regarding relevancy in federal court is similar to the standard in Texas. The opinion makes clear that it is the burden of the party seeking discovery to demonstrate the relevancy of the request. See *E.E.O.C. v. Renaissance III Organization*, No. 3-05-CV-1063-B, 2006 WL 832504 at \*1 (N.D.Tex. Mar. 30, 2006) (Kaplan, J.), citing *Vardon Golf Co., Inc. v. BBMG Golf Ltd.*, 156 F.R.D. 641, 650 (N.D.Ill.1994) ("To place the burden of proving that the evidence sought is not reasonably calculated to lead to the discovery of admissible evidence on the opponent of discovery is to ask that party to prove a negative. This is an unfair burden, as it would require a party to refute all possible alternative uses of the evidence, possibly including some never imagined by the proponent."). Once plaintiffs

establish that the documents requested are within the scope of permissible discovery, the burden shifts to Chateau to show why discovery should not be permitted. See **Spiegelberg Manufacturing, Inc. v. Hancock**, No. 3-07-CV-1314-G, 2007 WL 4258246 at \*1 (N.D.Tex. Dec. 3, 2007) (Kaplan, J.) (citing cases).

What is particularly noteworthy about this decision that informs our practice is that the non-party agreed to produce discovery relevant and limited to plaintiffs' pleading. The Court held that to allow discovery beyond this would amount to a fishing expedition.

### C. BURDEN WITH REGARD TO IRRELEVANCY

- 1) **In Re Exmark Manufacturing Co., Inc.**, --- S.W.3d ----, 2009 WL 3647395 (Tex.App.-Corpus Christi, 2009)

While the central question in the case is whether in a product liability case a plaintiff may seek discovery of products "the plaintiff never used," (See **In re Graco Children's Prods.**, 210 S.W.3d 598, 600-01 (Tex. 2006) (orig. proceeding) the opinion informs a number of issues that arise in disputes regarding the scope of discovery.<sup>1</sup>

The case arose from injuries the plaintiff sustained when the riding mower he was operating overturned. Plaintiff alleged that the mower was defectively designed and that there was a safer alternative design. The trial court entered an order that allowed discovery of mowers manufactured by the defendant that had not been used by Plaintiff, but it narrowed the number and scope of inquiries it allowed Plaintiff to propound. The appellate court noted that Exmark "offered no evidence regarding any objections or privileges to the proposed discovery order, or any evidence suggesting an alternative scope of discovery. . ."

The first issue is whether Exmark had properly objected to the scope of discovery. The opinion observed that mere conclusory objections regarding the scope or burden are insufficient. See **In re Alford Chevrolet-Geo**, 997 S.W.2d 173, 181 (Tex. 1999) ("A party resisting discovery ... cannot simply make conclusory allegations that the requested discovery is unduly burdensome or unnecessarily harassing. The party must produce some evidence supporting its request for a protective order."); and **In re CI Host, Inc.**, 92 S.W.3d 514, 516-517 (Tex. 2002) (orig. proceeding). If the

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<sup>1</sup> "Exmark complains that: (1) it should not be compelled to produce documents regarding products that were not used by the injured party and incidents that have no discernible connection to the accident in question; (2) it should not be compelled to produce documents over an unreasonably long time period, including a time period that exceeds ten years prior to the accident in question and, in some cases, pre-dates the date of manufacture for the exact product at issue; (3) the trial court awarded the real parties more relief than was sought in their original discovery requests or in their motion to compel; (4) the trial court improperly restricted the production of documents to one of two manners of production set forth in Tex. R. Civ. P. 196.3 (c), especially because real parties never asked for such relief in their motion to compel; and (5) the trial court abused its discretion in compelling the production of documents within ten days instead of thirty days."

request is not patently irrelevant,<sup>2</sup> or the burden is not self-evident,<sup>3</sup> then the party objecting to the discovery must produce evidence that the discovery is neither relevant or will be unduly burdensome to produce. The appellate court found that Exmark had failed to meet this burden.

We conclude that the discovery order at issue here was reasonably tailored to the relevant product defect and was not impermissibly overbroad. *In re SCI Tex. Funeral Serv.* 236 S.W.3d 759, 761 (Tex. 2007) (orig. proceeding). The order focuses on the production of documents about the inclusion or the lack of rollover protective systems on zero-turn riding lawnmowers and focuses on different models of the same basic product rather than different products. The order at issue is saliently different from the discovery orders that were reversed by the Supreme Court insofar as, in the instant case, there is a connection between the alleged defect and the discovery ordered. The order compels discovery of documents that are reasonably calculated to lead to the discovery of admissible evidence regarding whether Exmark knew about the necessity for, or defects in, its rollover protective systems. In reaching this conclusion, we note that we do not consider countervailing factors such as the burden, expense, and time needed to produce the proposed discovery given that Exmark did not provide evidence on these issues.

*In re Exmark Mfg. Co.*, Inc., --- S.W.3d ----, 2009 WL 3602078 at 7.

#### **D. PLEADINGS DEFINE SCOPE OF DISCOVERY**

##### **1) *Ford Motor Co. v. Castillo*, 259 S.W.3d 390 (Tex.2009).**

This case presented extraordinary issues to the parties to the litigation and the courts that had to rule on the issues. The issues arose because of what one may surmise was the improper conduct of a juror that lead to an injustice. Because of the juror misconduct, the parties entered into a settlement rather than let the jury reach a verdict. The Texas Supreme Court ultimately was faced with the task of restoring the opportunity for justice. However, in attempting to reach a just end in this case, the Court made what arguably are some extraordinary, result oriented rulings that may affect the practice of discovery in Texas long after the issues in the case are resolved.

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<sup>2</sup> See *In re CSX Corp.*, 124 S.W.3d 149, 152, 153 (Tex. 2003) (orig. proceeding) (per curiam) (The information sought is not “patently irrelevant.”)

<sup>3</sup> *In re Union Pacific Resources Co.*, 22 S.W.3d 338, 341 (Tex. 1999) (orig. proceeding) (holding that evidence is not required to support “an assertion relating to discovery when evidence is unnecessary to decide the matter”).

During jury deliberations, the presiding juror sent out a note asking what the maximum amount of damages was that could be awarded. Based upon this note, Ford reportedly entered into a settlement agreement with Castillo. Thereafter, Ford learned from other jurors that the note was not authorized by the other jurors. Ford obtained affidavits to this affect, but Castillo moved to strike the affidavits as hearsay, which the court granted. Ford moved to delay the settlement agreement and for leave to obtain discovery. The trial court observed that Ford did not need to conduct formal discovery, but could and had conducted an independent investigation in support of its claim of jury misconduct. Ford additionally argued that when it withdrew its agreement to settle, Castillo's only remedy was to file a claim for a breach of contract (presumably as to which Ford would assert an affirmative defense of mistake). Castillo did not plead breach of contract, but instead merely filed a motion for summary judgment without a pleading. The trial court overruled Ford's motions for continuance to allow it to obtain discovery and granted Castillo's motion for summary judgment. The appellate court upheld the Court's ruling. The Texas Supreme Court agreed with Ford and reversed:

Ford asserts that the court of appeals erred by holding that Ford waived error as to its discovery requests. Next, Ford urges that the trial court erred in denying it the right to conduct discovery because Castillo's claim for breach of the settlement agreement is the same as any other claim for breach of contract and is subject to the same procedures, including discovery procedures, that apply to any other breach of contract claim. We agree with Ford.

At the heart of this dispute is the consensus that when a party withdraws its consent to a settlement agreement, even if prior to entry of judgment on the agreement, the remedy is a claim for breach of contract. Castillo effectively made such a claim when it filed a motion to enforce the settlement agreement. In other words, regardless of whether Castillo filed a formal complaint for breach of contract or a motion for enforcement of the settlement agreement, the effect was the same. In either event, the Texas Supreme Court ruled that Ford was entitled to obtain discovery in support of its defense to such claim or motion.

Parties are "entitled to full, fair discovery" and to have their cases decided on the merits. ***Able Supply Co. v. Moye***, 898 S.W.2d 766, 773 (Tex.1995) (orig. proceeding); see ***State v. Lowry***, 802 S.W.2d 669, 671 (Tex.1991) ("Only in certain narrow circumstances is it appropriate to obstruct the search for truth by denying discovery.").

The Texas Supreme Court ruled that the trial court had denied Ford discovery that went to the heart of Ford's defense; therefore the trial court abused its discretion:

A trial court abuses its discretion when it denies discovery going to the heart of a party's case or when that denial

severely compromises a party's ability to present a viable defense. **Able**, 898 S.W.2d at 772.

Ford sought discovery regarding its defense of “mutual mistake.” Castillo argued that the discovery Ford sought was immaterial because “mutual mistake” was not a valid defense in this instance. The court’s response contains language that on first blush appears inconsistent with the narrow view of scope of discovery it has taken over the last decade (see **Texaco v. Sanderson**, 898 S.W.2d 813 (Tex., 1995).

The parties disagree as to whether mutual mistake is applicable in this case, **but a party is not required to demonstrate the viability of defenses before it is entitled to conduct discovery.** Rather, a party may obtain discovery “regarding any matter that is not privileged and is relevant to the subject matter of the pending action.” TEX. R. CIV. P. 192.3. The phrase “relevant to the subject matter” is to be “liberally construed to allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial.” **Axelson, Inc. v. McIlhany**, 798 S.W.2d 550, 553 (Tex.1990). **The trial court's preemptive denial of discovery could have been proper only if there existed no possible relevant, discoverable testimony, facts, or material to support or lead to evidence that would support a defense to Castillo's claim for breach of contract.** [emphasis added].

2) **In re Jacobs**, --- S.W.3d ----, 2009 WL 3347486 (Tex.App.-Hous. [14 Dist.] 2009) (see discussion below).

The opinion turns on **Lunsford v. Morris**, 746 S.W.2d 471, 473 (Tex.1988) (orig. proceeding), overruled on other grounds with regard to scope of discovery relative to net worth when gross negligence is alleged. Also see the concurring decision, which encourages the Texas Supreme Court to revisit **Lunsford v. Morris**).

3) **In re Pennington**, Not Reported in S.W.3d, 2008 WL 2780660 (Tex.App.-Fort Worth,2008, orig. proceeding) (discussed below).

4) **In re Manion**, Not Reported in S.W.3d, 2008 WL 4180294 (Tex.App.-Amarillo,2008, no pet.)

This case involved a breach of syndication agreement relating to the care and breeding of a stallion. Various claims and counterclaims of breach of contract were alleged, including a claim that the syndication really was not a legitimate business entity. Defendant served written discovery requests for numerous financial documents relating to Plaintiff’s purchase and sale of horses, and also served a deposition with

subpoena *duces tecum* for documents from Plaintiff's bank. Plaintiff moved to quash the notices and Defendant filed a motion to compel claiming the documents were relevant to its allegation that Plaintiff had breached its fiduciary duty. Plaintiff claimed the records requests were unduly burdensome and that the records were confidential. However, Plaintiff produced no evidence to support his claims. The Amarillo Court of Appeals pointed out that the general rule in financial records production cases is that the party attempting to prevent or restrict discovery has the burden of pleading and proving the basis for the desired limitation. *In re Patel*, 218 S.W.3d 911, 915 (Tex. App.-Corpus Christi 2007, orig. proceeding). This court previously had ruled that there is no constitutionally protected privacy right in one's personal financial records. *Martin v. Darnell*, 960 S.W.2d 838, 844-45 (Tex. App.-Amarillo 1997, no writ). The records in this instance were found to be relevant to the allegations alleged in Defendant's petition. Given the absence of evidence supporting a claim of privilege and the demonstration of relevancy, the trial court was found to have not abused its discretion in ordering the production of the financial records.

5) *In re Ace Credit Services, LLC*, Not Reported in S.W.3d, 2010 WL 1491780 (Tex.App.-San Antonio)

The scope of discovery is circumscribed by the parties' pleadings. This also applies to all forms of discovery, including topics delineated for deposing an organization's designated representatives. In this case, the plaintiff sought class certification. The court observed and held that the scope of pre-certification discovery is very limited. *In re SCI Tex. Fun. Serv., Inc.* 236 S.W.3d 759 at 760 (Tex. 2007) (trial courts are encouraged "to limit pre-certification discovery to the particular issues governing certification in each case, considering factors such as the importance, benefit, burden, expense, and time needed to produce the proposed discovery.") The court, however, then goes on to analyze the topics that the plaintiff had delineated concerning the desired deposition of defendant representatives. The court held that many of the topics dealt with areas that did not form a basis of plaintiff's claims for damages. Thus these topics were held to be overbroad and improper as follows:

Several of these matters relate to services provided in connection with obtaining a loan. Because Ramirez never obtained a loan from ACE, this information is not relevant to his claim. *Cf. In re Graco Children's Products, Inc.* 210 S.W.3d 598, 600-601 (Tex. 2006) (noting discovery in products liability case of products never used by plaintiffs was overly broad). Having compared the allegations in Ramirez's petition with the overly broad matters on which he sought to depose ACE's corporate representative, we hold the trial court abused its discretion by compelling discovery that was not narrowly tailored to the relevant dispute. See *In re SCI Tex. Fun. Serv., Inc.* 236 S.W.3d at 761.

## E. OVERBREADTH

- 1) *In re Mallinckrodt, Inc.*, 262 S.W.3d 469 (Tex.App.-Beaumont 2008, no pet.)

The discovery dispute arises out of a benzene case that allegedly resulted in a worker developing non-Hodgkins lymphoma that caused his death. Plaintiffs noticed Defendant's corporate representatives and in conjunction with the depositions, requested the production of a number of documents regarding Defendant's use of benzene from 1945-1985 (forty years). The trial court overruled Mallinckrodt's motion to quash.

The appellate court cites *In re Dana* for the proposition that before a court can order production based on discovery requests that cover multiple decades the discovery proponent must make a threshold evidentiary showing to demonstrate the relevance of the requested documents. See *In re Dana Corp.*, 138 S.W.3d 298, 301 (Tex.2004) (per curiam). The trial court failed to define the universe of relevancy and hence abused its discretion. "In this case, Mallinckrodt's motion to quash required the trial court to address a preliminary scope-of-discovery issue and define the universe of Mallinckrodt products for which Strother's evidence demonstrated an exposure." The court held that the trial court abused its discretion by not tailoring the requests to the products to which Plaintiff alleged to have been exposed and by not tailoring the requests to dates of alleged exposure.

- 2) *In re Steadfast Insurance*, Not Reported in S.W.3d, 2009 WL 1424634 (Tex. App.-Hous. [1st Dist.] 2009, no pet.)

The fact situation in this case is fairly convoluted. There was a wrongful death occurrence. The owner of the property settled with the survivors but reserved the right to sue a subcontractor for indemnification. The subcontractor in turn sued the owner's insurance carrier for bad faith. The subcontractor issued discovery requests. Two are in issue in this decision:

Request No. 28: Your entire claim file for each claim in which you have been alleged to have acted in bad faith or in breach of an insurance policy with respect to a claim against an employee, borrowed servant, consultant or subcontractor for your insured for the period beginning on January 1, 1998 through the present.

Interrogatory No. 8: Identify each insurance claim in which you have been alleged to have acted in bad faith or in breach of an insurance policy with respect to a claim against an employee, borrowed servant, consultant or subcontractor for your insured for the period beginning on January 1, 1998 through the present including for each such claim the court

and case number; contact information for all parties, attorneys, adjusters, insurance agents, insurance brokers, insureds and claimants involved.

Discovery requests must be limited by time, place, and subject matter. *In re Xeller*, 6 S.W. 3d 618, 626 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1999, orig. proceeding). The court found that Law, the party seeking the discovery, was engaged in an improper fishing expedition:

Law, too, seeks to conduct a fishing expedition. Specifically, Law seeks insurance claims in which Steadfast is alleged to have “acted in bad faith or in breach of an insurance policy.” This broad language encompasses conduct beyond Law’s allegation of conspiracy to prevent him from claiming insurance coverage. Additionally, Law is seeking discovery whose production entails, according to evidence, approximately a fifty-state search over a ten-year period. A discovery request requiring a fifty-state search over a ten-year period is overbroad as a matter of law. [omitting citations].

**3) *In re Memorial Hermann Healthcare System*, 274 S.W.3d 195(Tex. App.-Houston [14<sup>th</sup>Dist.],2008, pet. filed)**

This case arises out of a dispute between two rival hospitals. Stealth Limited filed an anti-trust suit against Memorial Hermann Healthcare claiming that it caused the demise of a hospital owned and operated by Stealth. The Texas Attorney General, independent of that litigation, issued a civil investigative demand (CID) on Memorial Hermann Healthcare. In the instant lawsuit Stealth sought that Memorial Hermann produce copies of all materials previously disclosed to the attorney general in response to the CID. Memorial Hermann took the position that the requested materials were privileged from discovery in private antitrust litigation and that Stealth’s requests were overly broad. The trial court ordered production and Memorial Hermann filed a petition for writ of mandamus.

The appellate court held that “any privilege created by section 15.10(i) of the Texas Free Enterprise and Antitrust Act does not extend to CID materials held by the defendant in private antitrust litigation.” It also found the requests were not “facially” overbroad.

Essentially, Memorial Hermann claimed that when it turned over approximately 87,000 pages of documents to the State Attorney General in connection with the Attorney General’s CID, it created a blanket privilege with regard to all such documents in a private anti-trust action against Memorial Hermann. The Court found that the statute clearly did not contemplate such a privilege and that to engraft such a privilege would be against good public policy as it would hamstring any private litigant in

obtaining documents relevant to its cause of action. The Court goes on to construe the Texas statute in harmony with the sister federal statute, finding that federal courts have not afforded private defendants the privilege that Memorial Hermann sought in this case.

The next complaint the Court addressed was whether Plaintiffs' request was improperly overbroad. Memorial Hermann contended that, because the attorney general is authorized to conduct a "fishing expedition" through a civil investigative demand, any discovery request that echoes a CID therefore must be patently overbroad. The Court disagreed. The peculiar thing about Memorial Hermann's position is that the statute limits what the Attorney General may request to only materials that would be discoverable under the Texas Rules of Civil Procedure. A demand may require the production of documents "only if the material or information sought would be discoverable under the Texas Rules of Civil Procedure or other state law relating to discovery." Tex. Bus. & Comm. Code Ann. § 15.10. The Court points out that Memorial Hermann never demonstrated that the discovery being sought was not relevant to Stealth's cause of action. There was no demonstration that the discovery request would capture irrelevant documents requiring that the discovery request needed to be tailored. "When a party's attempted reach exceeds its legal grasp, we routinely limit the reach; we do not amputate the hand." *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 191-92 (Tex.1999) (orig. proceeding) (citations omitted) (Hecht, J., concurring in part and dissenting in part).

4) ***Heaney v. Time Warner Cable, Inc.***, Slip Copy, 2010 WL 56068 (W.D.Tex. 2010).

This is another federal case that I include because it addresses a very common and frustrating response tactic. A party sends a request for production and the responding party neither objects to the time period set out in the requests for responding nor provides a proposed alternative date. Rather the responding party merely states that it will produce responsive documents when they are located or it will supplement at a later time. This decision points out that such a response is improper.

[T]he Court cannot agree with Defendant's implicit claim that it may produce documents over a time frame it views as reasonable. The rules of procedure allow the requesting party to initially set the time and place of production. FED. R. CIV. P. 34(b)(1)(B).. "Absent a court order or an agreement among the litigants, a party from whom discovery is sought cannot unilaterally alter these directives to suit its fancy." ***Resolution Turst Corp. v. North Bridge Assocs., Inc.*** 22 F.3d 1198, 1205 (1<sup>st</sup> Cir. 1994). The burden is on the responding party to object to the time and place provided, and to demonstrate that the time and place are not reasonable. See ***Wernecke V. Texas Dept. of Family and Protective Services***, No. C-07-238, 2008 WL 1776509 at \*1

(S.D. Tex. April 16, 2008). Thus, a party may not serve a written response stating that “responsive documents will be produced,” and then take whatever time they deem reasonable to make the documents available.

This also would be true under Texas practice. If the time and place for responding to a request for production are set out in the request and the responding party believes the time or place are inconvenient, then the responding party should timely object and propose a reasonable alternative time or place. If an agreement is not reached, then the responding party should seek a protective order or the requesting party may seek a motion to compel.

**F. REQUEST MUST BE FOR SPECIFIC TYPES AND CATEGORIES OF DOCUMENTS AND DATA**

- 1) *In re Premcor Refining Group, Inc.*, Not Reported in S.W.3d, 2009 WL 2253290 (Tex.App.-Beaumont 2009).

This case deals with yet another aspect of scope of discovery. A discovery request must be reasonable. The discovery request also must be tailored to the issues in the case and should be made as narrow as practicable to obtain relevant discovery, and the request must be confined to a reasonable time period. This opinion addresses the issue of specificity of the request and reiterates that the request must be for specific types and categories of documents. General requests for “information,” are improperly too broad.

The dispute arose out of appraisal of a chemical plant acquired by Valero in a merger with Premcor. Valero contended the appraisal was very inflated. A lawsuit ensued and the appraisal district sought discovery from Valero. Valero contended that the discovery was overbroad and sought trade secrets. The trade secrets issue really is not a primary focus because as the court observed, without specific requests it is difficult to determine what types and categories of documents may contain trade secrets.

The decision focuses on the construction of the requests.

Here is a sample request:

6. Please provide the following information (for each month from January 2001 through the valuation date) for each of the following:

A. Facility Material Balances

1. Inputs

a. Primary inputs (e.g. crude oils, ethane-propane (EP) mix, etc., itemized by

name and internal accounting code).

b. Secondary or other inputs, itemized by name and internal accounting code.

c. Defining physical or chemical properties of each input, e.g.

i. API or specific gravity

ii. Sulfur content

iii. Viscosity

iv. Distillation cut point

v. Other, as appropriate

The court found that these type requests were improperly overbroad and did not comply with the admonition in ***Loftin v. Martin***, 776 S.W.2d 145, 148 (Tex. 1989) (orig. proceeding) that requests must be for specific types and categories of documents.

Instead of requesting items or even categories of items, JCAD's requests are general requests for information and do not define the document or category of document that JCAD wanted Valero to produce. Because these requests did not ask for specific items or identifiable categories of items, the requests are overly broad.

In our opinion, the requests at issue are like the requests the Supreme Court determined to be overly broad in ***Loftin***, 776 S.W.2d 148. The Court stated that Loftin's request was "merely a request that Loftin be allowed to generally peruse all evidence Lumbermens might have." *Id.* These requests appear to us to be similarly flawed.

For the reader thinking that merely substituting "documents," for "information" and defining "documents" broadly would have solved the problem, the appellate court had a different answer. It would not.

"Document" as defined by JCAD in its requests, includes, among other things: "books, manual[s], instructions, financial reports, working papers, records, notes, letters, ... interoffice and intraoffice communications, contracts, cables, notations or memoranda of any sort of conversations, telephone calls, meetings or other communications" and also "other written, printed, typed or other graphic or recorded matter of any kind or nature, however produced or reproduced." Even when we

consider the limitations the trial court placed in its order, in light of the expansive definition of documents, the requests on their face would require the production of substantial amounts of tenuous information. . .

Here, even if we substituted the word document for information, all of the requests at issue still suffer from JCAD's expansive definition of "document." Request nine expands the problem of breadth even further by using the phrase, "any and all."

- 2) SEE ALSO, E-DISCOVERY- REQUESTS FOR PRODUCTION, subpart Q, below.

#### **G. PARTY MAY NOT BE FORCED TO CREATE DOCUMENTS THAT DO NOT EXIST**

- 1) ***Baughn v. Capps***, Not Reported in S.W.3d, 2010 WL 730369 (Tex.App.-Waco, 2010)

This case stands for the proposition that a party may not be forced to create a document that does not exist in that party's possession in response to a request for production. See also ***In re Guzman***, 19 S.W.3d 522, 525 (Tex. App. – Corpus Christi 2000, orig. proceeding ("The rules do not permit the trial court to force a party to create documents which do not exist, solely to comply with a request for production.")). The court reached this opinion in ruling upon an argument about whether a request for production is a proper vehicle under Tex. R. Civ. P. 791 for making a demand for an abstract of title. The court held that a request for production was not a proper tool to activate Tex. R. Civ. P. 791. A party may demand that an abstract be created under Tex. R. Civ. P. 791, but the court held that such a demand cannot be made under the guise of a request for production under Tex. R. Civ. P. 196 because a responding party may not be required to create a document that does not already exist. Since the request was improper, the sanction under Tex. R. Civ. P. 792 of disallowing proof of title for not timely providing an abstract of title in response to a demand was not available.

#### **H. ORAL DEPOSITIONS**

- 1) ***In re Univar USA, Inc.***, --- S.W.3d ----, 2010 WL 1610760 (Tex.App.- Beaumont)

This case deals with the scope of discovery in the context of an oral deposition. Recall that no discovery device, including depositions, may be used for "fishing." ***K Mart Corp. v. Sanderson***, 937 S.W.2d 429, 431 (Tex. 1996) (per curiam). The plaintiffs brought a wrongful death case arising from the decedent's alleged exposure to benzene. The plaintiffs sought the deposition of a defendant that reportedly

supplied benzene to plants at which the decedent worked. Apparently, plaintiffs produced testimony that the decedent recalled that benzene was delivered to the plants at which he worked in either black or green and white 55 gallon drums. There was evidence that the supplier from whom the plaintiff was requesting a corporate representative deposition had supplied benzene to one of decedent's employers in black drums. Accordingly, the trial court found that the deposition (the topics on which the representative was to testify unfortunately are not delineated or discussed in the opinion) was designed to lead to admissible evidence. Therefore the scope was relevant. The appellate court agreed. In conjunction with the deposition, the plaintiff requested various documents. Many of the requests were not adequately limited to place and time:

Most of the topics listed in both the notice and the subpoena contain no geographical restrictions. Both the notice and the subpoena require discovery regarding medical policies and medical surveillance that is not limited to benzene.

Defendant objected on the basis of over breadth. The appellate court held that the trial court had abused its discretion in not tailoring or requiring that the discovery be tailored to the places and times relevant to the claims and defenses pled.

## I. PRIVILEGED MATTERS

### 1) TRADE SECRETS

- a. *In re Cooper Tire & Rubber Co.*, --- S.W.3d ----, 2010 WL 343509 (Tex.App.-Hous. [14 Dist.] 2010) See discussion below, under Other Similar Incidents and Products.
- b. *Dos Santos v. Bell Helicopter Textron, Inc.*, Slip Copy, 2009 WL 3734147 (N.D.Tex. 2009).

This case is included because it is one of the few cases I have read over the last number of years holding that requested documents, even if considered trade secrets, were "material and necessary to the litigation." See *In re Continental General Tire, Inc.*, 979 S.W. 609, 615 (Tex. 1998). Bell sought to establish itself as a third party beneficiary of a lease between Textron and Helisul. Helisul sought discovery from Bell regarding its relationship with Textron. The court held that the information sought was material to the issues in the litigation and therefore were discoverable:

Evidence related to Bell's ability to enforce the lease agreement is not merely relevant - it is essential to Bell's claim for indemnity. These topics seek discovery of information regarding Bell's relationship with Textron and TFC as a means to assess that ability. Hence, the topics seek relevant information.

More importantly, even assuming they are trade secrets, they are subject to discovery if they are “material and necessary to the litigation.” *In re Continental General Tire, Inc.* 979 S.W.2d 609, 615 (Tex. 1998).

## 2) WORK PRODUCT

- a. *In re Boxer Property Management Corp.*, Not Reported in S.W.3d, 2009 WL 4250123 (Tex.App.-Hous.[14 Dist.] 2009).

This is a very thoughtful and nuanced opinion that should be read by anyone dealing with the issue of corporate representative depositions. However, for purposes of this discussion, we are going to focus solely on the macro issue in the case which was whether a party may notice the deposition of a corporate party to produce a corporate representative to explain what due diligence the corporate party used in responding to a request for production that no responsive documents could be located. Plaintiffs believed that the defendant was “hiding documents,” and sought the deposition of a corporate representative to explore what the defendant had done to investigate its files to respond to the request. The defendant objected on a number of grounds, but the main argument was that the topic impermissibly sought to invade attorney work product. The appellate court found that the trial court had abused its discretion in allowing the deposition, albeit by allowing only 13 written questions. The court noted that the topic inherently involved interrogation regarding attorney work product and that the only witness who could appropriately be designated to respond would be in house counsel, which would only re-enforce the finding that the deposition was an invasion of attorney work product.

The assertion of discovery abuse rests entirely on relators' representation that responsive documents do not exist. Under these circumstances, a deposition of relators' general counsel aimed at exploring how this attorney responded to discovery constitutes an impermissible fishing expedition. . .

The only purpose here is to police relators' discovery compliance. Bare assertions that an opponent is hiding documents do not justify deposing in-house counsel at the courthouse about whether a diligent document search really was conducted. *In re Boxer Property Management Corp.*, Not Reported in S.W.3d, 2009 WL 4250123 at 6

## J. INVESTIGATIONS AND CONSULTING EXPERT DATA

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

Energy built a compressor station and some neighbors complained about the noise. Transfer responded that it would investigate the complaint. Upon receiving a promise from Energy that the “results” of the testing would be shared with them, the neighbors allowed a consulting company hired by Energy to conduct sound testing on the neighbor’s property. The testing was conducted but the results were never shared. A group of neighbors filed suit against Energy and send a request for production that sought “reports relating to sound at or around the subject pump station.” Defendant agreed to produce non-privileged documents responding to the request. This production did not include the report of the consultant because Energy asserted that the consultant was a consulting expert hired in anticipation of litigation and that the report and consultant’s conclusions were protected. The trial court found that the “raw data” was discoverable, but not the consultant’s opinions that were formulated in anticipation of litigation.

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

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

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

This finding is less than compelling. However, there is one argument that does not appear to be raised or considered by the appellate court. In ***Axelson, Inc. v. McIlhaney***, 798 S.W.2d supra at 555 (which is cited by the appellate court as authority for the “dual capacity” rule, see above), the Texas Supreme Court upheld a trial court finding that individuals designated as consultants could not be deposed about their conclusions; but they could be deposed as fact witnesses about the facts they possessed.

Axelson sought only factual discovery from Biel, Fowler and Hill regarding the condition of wellhead equipment in addition

to the condition of Axelson's relief valve. The trial judge limited the scope of discovery from these consulting-only experts to the Axelson valve. The trial judge abused his discretion in refusing discovery of these facts because the exemption for consulting-only experts does not extend to facts known to them. *Id* at 555.

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

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

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

## K. OTHER SIMILAR INCIDENTS AND PRODUCTS

- 1) ***In re Cooper Tire & Rubber Co.***, --- S.W.3d ----, 2010 WL 343509 (Tex. App.--Houston [14 Dist.] Feb. 2, 2010, orig. proceeding) (motion for en banc rehearing pending).

The underlying claim in this personal injury, product liability lawsuit is that the Cooper tire in question was defectively designed because it failed to incorporate a design element known as belt edge gumstrips (“BEGs”) into the design for the Weather-Master S/T, and that the incorporation of this design element would have resulted in a safer alternative design. It is important to know with regard to tire cases that tire companies can manufacture several different model tires using the same basic “green tire specification.” In this instance, Plaintiffs sought discovery of a model tire different from the one involved in the alleged injury, but which presumably was made from the same green stock. (It is not clear from the opinion whether the plaintiffs made or the court accepted the argument that the green tire specification was the same for the tire in question and for the model tires for which plaintiffs sought discovery). Cooper Tire argued that the requested documents contained trade secrets which are not relevant

because they concern information on a tire other than the tire involved in the accident. The plaintiffs contended that the documents for green tire specification they sought (GTS 2257) were relevant because they show when BEGs were added and removed and the circumstances surrounding tire failures both with and without BEGs. The trial court conducted an in camera review and issued the following order:

To prevail on their design defect claim at trial, Plaintiffs have the burden of proving Defendant could have provided a safer alternative. Documents which show that Cooper Tire knew of possible design changes that could have made the tire at issue less likely to fail are relevant and a proper subject for discovery. Any danger of disseminating this information is remedied by the Protective Order that is in place.

IT IS THEREFORE ORDERED that Defendant Cooper Tire shall produce the documents reviewed in camera on October 5, 2009, to Plaintiffs within 5 business days of this order.

***In re Cooper Tire & Rubber Co.***, --- S.W.3d ----, 2010 WL 343509 at 2. The trial court determined the documents are relevant. The appellate court noted that the trial court did not address whether the documents contained trade secret information. The appellate court reiterated the recognized law in Texas with regard to raising and overcoming an assertion of trade secret:

The party asserting the trade secret privilege has the burden of proving that the discovery information sought qualifies as a trade secret. ***In re Bass***, 113 S.W.3d 735, 737 (orig. proceeding). If the resisting party meets its burden, the burden shifts to the party seeking the trade secret discovery to establish that the information is necessary for a fair adjudication of its claim. *Id.* It is an abuse of discretion for the trial court to order production once trade secret status is proven if the party seeking production has not shown necessity for the requested materials. *Id.* at 738.

While six factors are recognized as criteria in determining whether a trade secret exists,<sup>4</sup> ***In re Union Pac. R.R. Co.***, 294 S.W.3d 589, 592 (Tex. 2002) (orig. proceeding) (per curiam), a party does not necessarily have to demonstrate all six factors. ***In re Bass***, 113 S.W.3d at 740. To add to the murkiness of this area, the Texas Supreme

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<sup>4</sup> (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and to its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Court has not provided a bright line test for what is necessary to show a “necessity for a fair adjudication of the facts.” *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 732 (Tex. 2003) (orig.proceeding). Cooper presented three affidavits, which the appellate court found established the information being sought as a trade secret. Consistent with most appellate and Texas Supreme Court holdings addressing the issue of trade secrets, the Fourteenth Court of Appeals found that the plaintiffs had failed to meet their burden of demonstrating that the trade secret information was necessary for a fair adjudication of the facts. *In re Cooper Tire & Rubber Co.*, --- S.W.3d ----, 2010 WL 343509 at 9.

For the most current Supreme Court of Texas opinion on trade secrets, which reiterates many of the same points and cases as found in *In re Cooper*, See *In re Union Pacific R. Co.*, 294 S.W.3d 589 (Tex.,2009). In that case, the Texas Supreme Court found that the defendant railroad had met the criteria for establishing that its rate structure was a trade secret and that the plaintiff had failed to demonstrate that the information it sought about rate structures was necessary for a fair adjudication of the case.

While a Texas appellate court finding (or for that matter a Supreme Court of Texas finding) that the party resisting discovery had established that the information being sought was a trade secret and that the party seeking the information had failed to demonstrate that the information was necessary for a fair adjudication of facts is not extraordinary, the next ruling of the Fourteenth Court of Appeals in *In re Cooper* is notable. After deciding that the information sought by plaintiffs could not be discovered because it was trade secrets, the court went on to find that the information was not relevant, holding that discovery was limited to the tire in question:

Cooper Tire argues that discovery sought in a product liability case is limited to the product at issue in the case. We agree.

***In re Cooper Tire & Rubber Co.***, --- S.W.3d ----, 2010 WL 343509 at 9.

This holding arguably is dicta; moreover, it also arguably is incorrect. It would be one thing if the court had said that Cooper Tire argues that the discovery sought about the tire in question under the circumstances appearing in the record should be limited to the product in issue. It is quite another to state boldly that in every product liability case, regardless of the circumstances and allegations, discovery is limited to the product at issue in the case (which tacitly is how the statement above may be interpreted). If valid, this would be similar to saying that discovery of other similar events are never discoverable regardless of the circumstances or the reason for which such discovery is sought. Such discovery frequently is and should be allowed depending upon the purpose of the discovery and the similarity of events. See, *Nissan Motor Co. Ltd. v. Armstrong*, 145 S. W. 3d 131, 138-139 (Tex. 2004) and *In re Brookshire Grocery Company*, Not Reported in S.W.3d, 2006 WL 2036569 (Tex.App.-Tyler). The Texas Supreme Court has never issued a blanket holding that discovery is limited to the

product in issue. Rather, discovery of other models or products may be discoverable, *provided there is a rational nexus (connection) between the products*. See ***In re Graco Children's Prods., Inc.***, 210 S.W.3d 598, 601 (orig.proceeding) (per curiam) ("In this case, there is again no apparent connection between the alleged defect and the discovery ordered."), a case cited by the Fourteenth Court of Appeals in support of its finding. See also, ***Jampole v. Touchy***, 673 S.W.2d 569, (Tex. 1984), ***Cantrell v. Hennessy Industries, Inc.***, 829 S.W.2d 875 (Tex.App.-Tyler Mar 31, 1992) (NO. 12-89-00251-CV), rehearing denied (Jun 18, 1992), writ denied (Oct 21, 1992), rehearing of writ of error overruled (Dec 02, 1992) cert. denied, ***Coats Co. v. Cantrell***, 508 U.S. 912, 113 S.Ct. 2347, 124 L.Ed.2d 256, 61 USLW 3684, 61 USLW 3767, 61 USLW 3772 (U.S.Tex. May 17, 1993) (NO. 92-1580); and ***Independent Insulating Glass v. Street***, 722 S.W.2d 798 (Tex. App. – Fort Worth, 1987 writ dism'd). Whether other prior events are admissible at trial depends on the degree of similarity.

2) ***In re Deere & Co.***, --- S.W.3d ----, 2009 WL 4877773 (Tex.2009).

The finding in ***In re Cooper Tire*** that the Texas Supreme Court has held that discovery in a product liability case is always limited to the product in question appears to be at odds with the most recent Texas Supreme Court opinion dealing with this matter. In ***In re Deere & Co.***, the plaintiff allegedly was injured when a step on a Deere backhoe broke and the plaintiff fell under the moving backhoe. Plaintiff sought discovery of other Deere models:

Martinez served requests for production on Deere, including a request seeking "all [non-governmental] documents of customer complaints received by [Deere] relative to the sidestep on any model backhoe." Deere objected to the request as overly broad, and Martinez moved to compel production. The trial court conducted a hearing, and the parties agreed to limit production to documents relating to models with similar handles and step assemblies, and only going back approximately 12 to 15 years (when production began on the 410D).[footnote omitted]. At the trial court's request, Martinez then filed a proposed order. The proposed order included more than 30 product lines such as backhoes, tractors, and other loaders and did not include a time limit.

The defendant reportedly produced no evidence of dissimilarity among the various model backhoes, while the plaintiff produced expert testimony from which it could be inferred that the various models had similarity relevant to the issue in question. The court found that discovery of the other model backhoes under these circumstances was within the permissible scope of discovery.

Here, the trial court made a proper effort to narrow discovery from "any model backhoe," as stated in the request for

production, to only those products with handles and step assemblies similar to the allegedly defective 410D. Deere presented no evidence to meet its burden of supporting its objection, failing to show that any of the specific product lines lacked such assemblies.[footnote omitted] Thus, it was not error for the trial court to permit discovery as to the list of product lines proposed by Martinez. See Tex. R. Civ. P. 193.4.

However, relevancy among the products is only one factor. Another factor is reasonableness of the time period. Here a reasonable time period was not included in the trial court's order. The Texas Supreme Court found that without a reasonable time period (it specifically pointed out that it was not ruling on whether a 15 year time period, which is what the parties reportedly agreed upon, under these circumstances would be reasonable) the defendant could have to produce documents from many decades and that this would be unreasonable. For this reason, it was held that the trial court had abused its discretion and the case was remanded so that this defect in the trial court's order could be corrected. *In re Deere & Co.*, --- S.W.3d ----, 2009 WL 4877773 at 2.

In *In re Cooper Tire & Rubber Co.*, --- S.W.3d ----, 2010 WL 343509 (Tex.App.-Hous. [14 Dist.] 2010), the Fourteenth Court of Appeals makes the following observation regarding its holding that in a product liability case, discovery is limited to the product in question.

The Texas Supreme Court has granted mandamus relief in several product-liability cases when the discovery order covered products the plaintiff never used.<sup>FN3</sup>

In footnote 3, it notes only one opinion to the contrary, *In re Exmark Mfg Co.* noting the following,

*but see In re Exmark Mfg. Co.* 12-09-00438-CV, 299 S.W.3d 519, 2009 WL 3602078 (Tex. App.—Corpus Christi Oct. 30, 2009, orig. proceeding [mand. pending.]) (denying relief on order allowing discovery regarding lawnmowers not used by plaintiffs).

*In re Exmark Mfg. Co.* is the next opinion we discuss. While the central question in the case is whether in a product liability case a plaintiff may seek discovery of products “the plaintiff never used,” (See *In re Graco Children’s Prods.*, 210 S.W.3d 598, 600-01 (Tex. 2006) (orig. proceeding) the opinion informs a number of issues that arise in disputes regarding the scope of discovery.<sup>5</sup>

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<sup>5</sup> “Exmark complains that: (1) it should not be compelled to produce documents regarding products that were not used by the injured party and incidents that have no discernible connection to the accident in question; (2) it should not be compelled to produce documents over an unreasonably long time period, including a time period that exceeds ten years prior to the accident in question and, in some cases, pre-

The case arose from injuries the plaintiff sustained when the riding mower he was operating overturned. Plaintiff alleged that the mower was defectively designed and that there was a safer alternative design. The trial court entered an order that allowed discovery of mowers manufactured by the defendant that had not been used by Plaintiff, but it narrowed the number and scope of inquiries it allowed Plaintiff to propound. The appellate court noted that Exmark “offered no evidence regarding any objections or privileges to the proposed discovery order, or any evidence suggesting an alternative scope of discovery. . .”

The first issue is whether Exmark had properly objected to the scope of discovery. The opinion observed that mere conclusory objections regarding the scope or burden are insufficient. See *In re Alford Chevrolet-Geo*, 997 S.E.2d 173, 181 (Tex. 1999) (“A party resisting discovery ... cannot simply make conclusory allegations that the requested discovery is unduly burdensome or unnecessarily harassing. The party must produce some evidence supporting its request for a protective order.”); and *In re CI Host, Inc.*, 92 S.W.3d 514, 516-517 (Tex. 2002) (orig. proceeding). If the request is not patently irrelevant,<sup>6</sup> or the burden is not self-evident,<sup>7</sup> then the party objecting to the discovery must produce evidence that the discovery is neither relevant or will be unduly burdensome to produce. The appellate court found that Exmark had failed to meet this burden.

We conclude that the discovery order at issue here was reasonably tailored to the relevant product defect and was not impermissibly overbroad. *In re SCI Tex. Funeral Serv.* 236 S.W.3d 759, 761 (Tex. 2007) (orig. proceeding). The order focuses on the production of documents about the inclusion or the lack of rollover protective systems on zero-turn riding lawnmowers and focuses on different models of the same basic product rather than different products. The order at issue is saliently different from the discovery orders that were reversed by the Supreme Court insofar as, in the instant case, there is a connection between the alleged defect and the discovery ordered. The order compels discovery of documents that are reasonably calculated to lead to the discovery of admissible evidence regarding

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dates the date of manufacture for the exact product at issue; (3) the trial court awarded the real parties more relief than was sought in their original discovery requests or in their motion to compel; (4) the trial court improperly restricted the production of documents to one of two manners of production set forth in Tex. R. Civ. P. 196.3 (c), especially because real parties never asked for such relief in their motion to compel; and (5) the trial court abused its discretion in compelling the production of documents within ten days instead of thirty days.”

<sup>6</sup> See *In re CSX Corp.*, 124 S.W.3d 149, 152, 153 (Tex. 2003) (orig. proceeding) (per curiam).. (The information sought is not “patently irrelevant.”)

<sup>7</sup> *In re Union Pacific Resources Co.*, 22 S.W.3d 338, 341 (Tex. 1999) (orig. proceeding) (holding that evidence is not required to support an “an assertion relating to discovery when evidence is unnecessary to decide the matter”).

whether Exmark knew about the necessity for, or defects in, its rollover protective systems. In reaching this conclusion, we note that we do not consider countervailing factors such as the burden, expense, and time needed to produce the proposed discovery given that Exmark did not provide evidence on these issues.

*In re Exmark Mfg. Co.*, Inc., --- S.W.3d ----, 2009 WL 3602078 at 7.

- 3) *In Re Exmark Manufacturing Co., Inc.*, --- S.W.3d ----, 2009 WL 3647395 (Tex.App.-Corpus Christi, 2009) discussed above under Burden With Regard to Irrelevancy.

#### L. AUTHORIZATIONS

- 1) *In re Mitsubishi Heavy Industries America, Inc.*, 269 S.W.3d 679 (Tex. App.-Dallas 2008, no pet.)

In this original proceeding, Mitsubishi complained that the trial court abused its discretion in ordering it to sign an authorization permitting the release of proprietary documents in the files and databases of the Federal Aviation Administration, or within the FAA's custody or control, pertaining to Mitsubishi MU-2 aircraft.

The Court found that the trial court could order the parties to sign authorizations and that it was in the discretion of the trial court to harmonize the competing interests and fashion an authorization that protected any asserted privileges. See *Mutter v. Wood*, 744 S.W.2d 600, 601 (Tex.1988); *Martinez v. Rutledge*, 592 S.W.2d 398, 400 (Tex .Civ. App.-Dallas 1979, writ ref'd n.r.e.) The parties apparently had in place a protective order that prevented dissemination of materials marked confidential. This protective order, however, would not provide much protection in obtaining documents from the FAA. The Court inquired of Mitsubishi's attorney whether the order was inadequate and should be modified. The appellate court notes that there is no evidence in the record that Mitsubishi's attorney ever offered any modification. Accordingly, no abuse of discretion was found.

- 2) *In re Pennington*, Not Reported in S.W.3d, 2008 WL 2780660 (Tex. App.-Fort Worth, 2008, orig. proceeding)

This case involved a motor vehicle collision resulting in personal injuries. The trial court issued an order requiring the Plaintiff to sign a blanket medical release that encompassed any records relating to her mental health history. Of course, that does not tell the full story. In this instance, not only did the Plaintiff refuse to sign a blanket medical authorization, but she also refused to provide the names of her mental health care providers and asserted that this information was privileged. Plaintiff, however, did provide the names of her healthcare providers for the 10 years prior to the collision and she provided the actual records of all of her medical care providers relating

to the injuries sustained in the collision. These records revealed that Plaintiff was taking antidepressant and anti-anxiety medication at the time of the accident.

Naturally, upon learning the above information, Defendants amended their answer to claim that Plaintiff's injuries pre-existed the collision. They also filed a motion to compel ostensibly claiming that the identity of the mental health professionals was relevant to their defense that Plaintiff's claims of emotional/psychological injury were pre-existing at the time of the collision.

Plaintiff argued that the applicable rules allowed her to choose whether to produce an authorization or the records:

Pennington responded to the motion, claiming that she was not required to sign the medical release because she had tendered all the medical records related to her injuries in lieu of signing a release under rule 194.2(j) of the rules of civil procedure. TEX.R. CIV. P. 194.2(j) (providing that in suit alleging physical or mental injury and damages for same, opponent may request "all medical records and bills that are reasonably related to the injuries or damages asserted or, *in lieu thereof*, an authorization permitting the disclosure of such medical records and bills" (emphasis added)); ***In re Shipmon***, 68 S.W.3d 815, 820 (Tex. App.-Amarillo 2001, orig. proceeding [mand. denied] ) (interpreting rule 194.2(j) as authorizing party to obtain discovery of medical records through request for disclosure **or** by obtaining records through obtaining opposing party's authorization for disclosure).

Defendants, not being content with merely alleging "pre-existing condition," filed a second amended answer, which is reprinted because of its artfulness:

All injuries, damages and/or liabilities complained of by [Pennington] herein are the result, in whole or in part, of pre-existing mental, emotional and/or physical conditions and disabilities, and are not the result of any acts or omissions on the part of [McBride and Zachry]. Such conditions and disabilities specifically include but are in [no] way limited to [Pennington's] ... depression, [and] anxiety ... and/or resulting from each and every one of the foregoing. Such conditions and disabilities also include but again are in no way limited to any and all ... emotional and/or mental consequences of [Pennington's] 1998 low back injury, [Pennington's] 1999 motor vehicle collision, [Pennington's] numerous surgical treatments, and/or [Pennington's] marital, criminal and employment history over the ten years

preceding the incident in question, as well as any and all conditions or disabilities treated or in any way caused by [Pennington's] use of Lithium, Xanax, Wellbutrin, Trazadone....

A key case in this analysis is **R.K. v. Ramirez**, 887 S.W.2d 836, 843 (Tex.1994).

As a general rule, a mental condition will be a 'part' of a claim or defense if the pleadings indicate that the jury must make a factual determination concerning the condition itself. In other words, information communicated to a doctor or psychotherapist may be relevant to the merits of an action, but in order to fall within the litigation exception to the privilege, the condition itself must be of legal consequence to a party's claim or defense.

**Ramirez**, 887 S.W.2d at 843; **In re Toyota Motor Corp.**, 191 S.W.3d 498, 502 (Tex.App.-Waco 2006, orig. proceeding [mand. denied] )

"[O]nly if the patient's condition itself is a fact that carries legal significance and only to the extent necessary to satisfy the discovery needs of the requesting party" will discovery be allowed. **Ramirez**, 887 S.W.2d at 843.

Another important case in the analysis is **In re Nance**, 143 S.W.3d 506, 511-12 (Tex. App.-Austin 2004, orig. proceeding).

Defensive claims that a plaintiff's damages and injuries were caused by pre-existing conditions do not involve the resolution of ultimate issues of fact that have legal significance standing alone. **In re Nance**, 143 S.W.3d at 512. Instead, these types of defensive assertions are in the nature of inferential rebuttal claims and, thus, are not sufficient to put a plaintiff's mental condition at issue so as to make medical records about that condition discoverable. **Id.** at 512-13;

Based upon the holding in **Nance** case, the appellate court found that the order for a blanket authorization for all of the Plaintiff's mental health records going back to 1996 was an abuse of discretion. See also, **In re Robert L. Williams, Individually and on behalf of the Estate of Alberta Sue Williams, deceased and on behalf of Wrongful Death Beneficiaries Robert L. Williams and Dustin Strom**, --- S.W.3d ----, 2009 WL 540961 (Tex.App.-Waco, 2009) (mental health records of a plaintiff merely alleging mental anguish held not discoverable).

3) **In re Soto**, 270 S.W.3d732 (Tex. App. Amarillo- 2008, orig.

proceeding [man.denied])

This opinion centers on the interpretation of Tex. R. Civ. P. 194.2(j). The case involved a motor vehicle collision. Most of the Plaintiffs alleged personal injuries. Defendant served a request for disclosure. Plaintiffs responded that they would make available to Defendant all medical records obtained and filed with the court. Defendant filed a motion to compel Plaintiffs each to sign a medical authorization for all medical records from birth. The Court modified the request to require that each Plaintiff sign a medical authorization for medical records from and after 2004.

The Amarillo court deferred to its earlier opinion in *In re Shipmon*, 68 S.W.3d 815 (Tex. App.-Amarillo 2001, orig. proceeding). In that case, the court held that under the “new rules [of civil procedure] a party may obtain discovery of medical records of another party or obtain an authorization from another party by request for disclosure.” The Amarillo court interpreted this rule to allow the requesting, not the responding party, to choose whether it wished to accept production of records or compel production of an authorization so it could obtain the records itself.

The court goes on to point out that Plaintiffs raised neither an “objection” or a “privilege” to the request for disclosure or the request for an authorization. This is a curious observation because Tex. R. Civ. P. 194.5 states specifically that “no objection or assertion of work product is permitted to a request under this rule.” Arguably, particularly under this opinion, a party may and should raise an objection to a request for a medical authorization if the scope of the authorization is outside the scope of permissible discovery (i.e. a fishing expedition) and if the requested authorization invades privileged matters (see, *Mutter v. Wood* 744 S.W.2d 600 (Tex. 1988) the responding party should assert a privilege under Tex. R. Civ. P. 193 and file a motion for protection.

## **M. FINANCIAL INFORMATION**

### **1) NON-GROSS NEGLIGENCE CASES**

- a. See *In re Manion*, Not Reported in S.W.3d, 2008 WL 4180294 (Tex.App.-Amarillo,2008, no pet.) (discussed above).

### **2) GROSS NEGLIGENCE CASES**

- a. *In re Brewer Leasing, Inc.*,255 S.W.3d 708 (Tex.App. Houston[1stDist.],2008,orig. proceeding [mand. denied]).

This opinion deals with the issue of scope of discovery relevant to net worth when gross negligence is alleged. See *Lunsford v. Morris*, 746 S.W.2d 471, 473 (Tex.1988). More specifically, the Plaintiff sought financial records and corporate income tax returns. While a trial court may order documents produced relevant to net

worth when gross negligence is alleged, a trial court abuses its discretion by ordering the production of financial records “that would not necessarily evidence” net worth. *In re Garth*, 214 S.W.3d 190, 194 (Tex.App.-Beaumont 2007, orig. proceeding).

Defendants in this instance produced an unaudited, uncertified balance. The appellate court noted that *Garth* does not provide guidance with regard to the nature of the balance sheet required to foreclose discovery regarding net worth, but noted that in *Sears, Roebuck & Co. v. Ramirez*, 824 S.W.2d 558, 559 (Tex.1992) Sears disclosed its net worth “by providing its audited and certified annual reports” and by including an affidavit by the Manager of Federal Income Tax Returns for Sears that stated that the annual reports accurately reflected Sears's net worth.” In view of the uncertified, unaudited balance sheet, the appellate court concluded that the court’s order compelling production of additional financial records was not an abuse of discretion.

The Court next turned to the issue of whether the corporate tax returns were relevant and discoverable on the issue of net worth. While Plaintiffs argued that there were schedules in a corporate tax return that might be relevant on the issue of net worth and that corporate tax returns did not have the same protection as personal income tax returns (See *Hall v. Lawlis*, 907 S.W.2d 493, 494-95 (Tex.1995). The appellate court disagreed and held that corporate income tax returns should be given the same consideration as personal tax returns (See *Sears, Roebuck & Co. v. Ramirez, supra*) and that “[t]ax returns may be discovered only when the “pursuit of justice between litigants outweighs protection of their privacy.” *Maresca v. Marks*, 362 S.W.2d 299, 301 (Tex.1962). The Court found that Plaintiffs had not made such a showing in this instance and that the court had abused its discretion in ordering the production of corporate income tax returns. However, the following caveat is noteworthy:

We are mindful that our opinion is based solely on the record before us and we express no opinion regarding whether, after additional discovery, the tax returns could be shown to be material. See *Kern v. Gleason*, 840 S.W.2d 730, 735-37 (Tex.App.-Amarillo 1992, no writ) (noting that if alternate source of information proves to be incomplete, renewed request for income tax returns could be made).

b. *In re House of Yahweh*, 266 S.W. 3d668 (Tex.App.-Eastland,2008, orig. proceeding)

This case also dealt with the issue of discovery of financial data and tax returns relevant to a claim of gross negligence. The trial court ordered production of all the requested information. The issues in this case were slightly different from those in *Brewer, supra*. In this case, Defendant objected to the production of titling records and also argued that a prima facie showing of gross negligence was required before a Defendant has to disclose net worth information.

The Court first disposed of the argument that a prima facie showing of gross

negligence was a pre-requisite to allowing discovery of net worth. A party seeking discovery of net worth information is not required to make a prima facie showing of a right to recover exemplary damages before discovery is permitted. **Lunsford**, 746 S.W.2d at 473.

Citing **Brewer**, supra, the appellate court held that the trial court did not abuse its discretion in allowing broad discovery of net worth, but that the court likely abused its discretion in not narrowing the discovery to the issue of net worth. In this regard, it held that the trial court erred in failing to limit discovery to Defendants' **current** balance sheet because earlier balance sheets would not be relevant to Defendants' current net worth.

The appellate court also held that, to the extent the court's order required the production of documents not relevant to net worth, the court had exceeded its discretion. In this regard, the following types of documents were found not to be relevant to net worth: property lists (Request No. 20), bank statements (Request No. 21), stock ownership statements (Request No. 22), tithing records (Request No. 23), donation records (Request No. 24), income tax returns (Request No. 25), asset lists (Request No. 26), income and budget forecasts (Request No. 29), evaluations of financial performance (Request No. 30), and correspondence relating to House of Yahweh's profitability (Request No. 31). The appellate court observed that there was no evidence in the record linking these documents to net worth. Therefore, the court order compelling production of these categories of documents was an abuse of discretion.

Once again, as in **Brewer**, income tax returns were not found to have relevancy to the Defendants net worth in this instance.

c. **In re Jacobs**, --- S.W.3d ----, 2009 WL 3347486 (Tex.App.-Hous. [14 Dist.] 2009)

This opinion provides a great overview of the current state of the law with regard to discovery of net worth in cases in which gross negligence is alleged, as well as the current tensions. It reiterates that all that is required is an valid allegation of gross negligence to entitle a party to discovery of the opponent's net worth. The concurring opinion, however, encourages the Texas Supreme Court to re-visit the law in this regard despite the fact that every time the Texas Supreme Court has addressed the issue, it has followed *stare decisis* and reiterated the ruling in **Lunsford v. Morris**, 746 S.W.2d 471, 473 (Tex.1988) (orig. proceeding), overruled on other grounds. The Court does however, provide some very good guidance on the scope of discovery with regard to net worth. For instance, the Court holds that only the party's current net worth is discoverable (discovery of net worth beyond the current net worth is described as "fishing"). The Court also holds that the responding party need not create affidavits such as it would to a lending institution regarding its net worth, as a party is not required to create documents that do not already exist. Finally, the Court outlines the scope of permissible deposition questioning regarding the party whose net worth is in issue:

Accordingly, with respect to net-worth discovery during the

oral depositions of Dr. Jacobs and Dr. Gunn, the McCoy's are limited to asking each physician to state (1) his or her current net worth, i.e., the amount of current total assets less current total liabilities determined in accordance with generally accepted accounting principles ("GAAP"), and (2) the facts and methods used to calculate what each physician alleges is his or her current net worth. Any questioning beyond these two narrow inquiries shall be allowed only upon leave of the trial court after a showing that the McCoy's have reason to believe that the information provided was incomplete or inaccurate.

## N. EX PARTE COMMUNICATIONS

### 1) *In Re Collins*, 286 S.W.3d 911 (Tex. 2009)

In this case the Texas Supreme Court dealt with the issue of *ex parte* communications, particularly in the context of a medical malpractice action under Ch. 74 Tex.Civ. Prac. & Rem. Code. While the case will no doubt be cited by some for the proposition that *ex parte* communications are proper and cannot be restricted, this author believes the opinion is not so broad and is much more nuanced. While the Court reviews the arguments for and against allowing *ex parte* communications, and finds that neither HIPAA nor Ch. 74 disallows *ex parte communications* regarding a plaintiff's health care information when the plaintiff provides an authorization, (see *In re Collins*, 286 S.W.3d at 918), the Court did not decide whether all *ex parte* communications with a plaintiff's treating physician are always proper. ("We need not decide, however, whether section 74.052(c) \*919 authorizes *ex parte* contacts in all situations because, as explained below, the Regians failed to carry their burden in obtaining a protective order." *In re Collins* 286 S.W.3d at 918-19.). Arguably, the opinion is more informative about the requirements of seeking a protective order than about the scope of *ex parte* communications.

The plaintiffs served a Ch. 74 notice of intent to prosecute a medical negligence claim. Attached to the notice, as required by Ch. 74, were three authorizations setting out the identities of medical care providers that the plaintiffs had seen prior to the incident, those physicians that the plaintiff had seen for treatment of the alleged injuries, and the identity of physicians who plaintiff contended had not provided care relevant to the plaintiff's claims. The issue in the case arose when plaintiffs filed a motion to prevent defendants from conducting *ex parte* communications with plaintiff's treating physicians. The Court observed that plaintiff did not set out either in her authorization or in her motion what healthcare information her treating physicians might possess that would be irrelevant to plaintiff's claims and hence retain protection under the physician/patient privilege. This turned out to fatally undermine plaintiff's position.

Plaintiff reportedly relied heavily in support of her argument on *Mutter v. Wood*, 744 S.W.2d 600, 601 (Tex.1988). The Court reiterated its holding in *Mutter*, but

distinguished its applicability in Collins:

we held that the trial court abused its discretion by requiring the plaintiffs to sign an authorization permitting the defendant-hospital's attorney to discuss the plaintiff's medical information with treating physicians. We did so, however, ***not because the authorization allowed ex parte contacts, but because it allowed access to information that was not relevant to the underlying suit and thus remained privileged. In re Collins***, 286 S.W.3d at 919. [emphasis added]

Similar to the issue discussed above with regard to overbroad medical authorization, the Texas Supreme Court saw the main issue before it as a failure by the plaintiffs to seek proper protection:

A party seeking a protective order “must show particular, specific and demonstrable injury by facts sufficient to justify a protective order.” ***Masinga v. Whittington***, 792 S.W.2d 940, 940 (Tex.1990), (citing ***Garcia v. Peebles***, 734 S.W.2d 343, 345 (Tex.1987)).

A party confronting in a similar situation in the future should identify what medical providers may possess health-care information irrelevant to the claims pled in the case, and seek protection limiting discovery and ex parte communications regarding these matters which if found by the court to be irrelevant should be protected from discovery under the physician/patient privilege.

## O. PRE-ARBITRATION DISCOVERY

- 1) ***In re Houston Pipe Line Co.***, --- S.W.3d ----, 2009 WL 1901640 (Tex.2009)

This case dealt with the discretion of a trial court to allow pre-arbitration discovery. The Supreme Court noted that when deciding a motion to compel arbitration under the Federal Arbitration Act, a Texas trial court should apply Texas procedure, which ***permits*** discovery to be taken when it is needed before the arbitration or to permit the arbitration to be conducted in an orderly manner. TEX. CIV. PRAC. & REM.CODE § 171.086(a)(4),(6); *see also* ***Jack B. Anglin Co. v. Tipps***, 842 S.W.2d 266, 268 (Tex.1992). Nonetheless, in this instance the Texas Supreme Court found that the trial court abused had abused its discretion by permitting over broad discovery on damage calculations and other potential defendants, instead of deciding the motion to compel arbitration.

The Court notes that pre-arbitration discovery is expressly authorized under the Texas Arbitration Act when a trial court cannot fairly and properly make its decision on

the motion to compel because it lacks sufficient information regarding the scope of an arbitration provision or other issues of arbitrability. See TEX. CIV. PRAC. & REM.CODE §§ 171.023(b), 171.086(a)(4),(6).

This, however, is not an authorization to order discovery as to the merits of the underlying controversy. Motions to compel arbitration and any reasonably needed discovery should be resolved without delay. *Tipps*, 842 S.W.2d at 269.

- 2) ***In re Houston Pipe Line Co.***, --- S.W.3d ----, 2009 WL 3403924(Tex. 2009)(Rehearing)

On re-hearing the Texas Supreme Court clarified that it's ruling notwithstanding, a trial court has discretion to allow limited discovery "on issues of scope or arbitrability, if necessary." The discovery ordered by the trial court in this instance was found to exceed the scope of permissible discovery allowed by TEX. CIV. PRAC. & REM.CODE §§ 171.023(b), 171.086(a)(4),(6) and was over broad.

#### **P. BREACH OF CONTRACT**

- 1) ***Ford Motor Co. v. Castillo***, 259 S.W.3d 390,(Tex.2009) (see discussion above and below).

#### **Q. JURY MISCONDUCT**

- 1) ***Ford Motor Co. v. Castillo***, 259 S.W.3d 390,(Tex.2009) (Also see discussion above).

Discovery involving jurors will not be appropriate in most cases, but in this case there was more than just a suspicion that something suspect occurred-there was some circumstantial evidence that it did. . .

We believe the better policy, in general, is to conform discovery involving jurors to those matters permitted by Rule of Civil Procedure 327 and Rule of Evidence 606. That is, discovery involving jurors should ordinarily be limited to facts and evidence relevant to (1) whether any outside influence was improperly brought to bear upon any juror, and (2) rebuttal of a claim that a juror was not qualified to serve.<sup>FN3</sup> And although we have determined that the trial court abused its discretion by entirely depriving Ford of discovery on the breach of contract claim, it remains within the trial court's discretion to reasonably control the limits of discovery and the manner in which the discovery may be obtained. ***In re CSX Corp.***, 124 S.W.3d 149, 152 (Tex.2003) (per curiam).

## R. E-DISCOVERY- REQUESTS FOR PRODUCTION

- 1) ***In re Honza***, 242 S.W.3d 578, (Tex. App.-Waco 2008, mandamus denied).

Surprisingly it was not until 2008, that a Texas Court first addressed the issue of scope of e-discovery under the Texas Rules of Civil Procedure. ***In re Honza***, decided by the Waco Court of Appeals, was a self-described case of first impression. The Waco court approved the following protocol with regard to discovery of hard drives:

- a. The party seeking discovery selects a forensic expert to make a mirror image of the computer hard drives at issue.
- b. After creating the mirror images and analyzing them for relevant documents or partial documents, courts typically require the expert to compile the documents or partial documents obtained and provide copies to the party opposing discovery.
- c. That party is then to review the documents, produce those responsive to the discovery request, and create a privilege log for those withheld.
- d. Finally, the trial court will conduct an in-camera review should any disputes arise regarding the entries in the privilege log.

- 2) ***In re Weekley Homes, L.P.***, --- S.W.3d ----, 2009 WL 2666774 (Tex. Aug. 28, 2009).

Almost a year after the opinion in ***In re Honza*** was handed down, the Texas Supreme Court issued this opinion which sets out a specific protocol for obtaining discovery of an entities hard drive:

In this mandamus proceeding, we must decide whether the trial court abused its discretion by ordering four of the defendant's employees to turn over their computer hard drives to forensic experts for imaging, copying, and searching for deleted emails. Because the plaintiff failed to demonstrate the particular characteristics of the electronic storage devices involved, the familiarity of its experts with those characteristics, or a reasonable likelihood that the proposed search methodology would yield the information sought, and considering the highly intrusive nature of computer storage search and the sensitivity of the subject matter, we hold that the trial court abused its discretion. ***In re Weekley Homes, L.P.***, --- S.W.3d ----, 2009 WL 2666774 (Tex. Aug. 28, 2009).

Given the growing use of e-discovery in Texas and the extreme importance of this decision to the conduct of such discovery, we will analyze this opinion in some depth.

Without devoting a lot of space to a description of the underlying litigation out of which the discovery dispute arose, the pertinent fact is that the plaintiff sought electronic mail reportedly between Weekley and another entity that it suspected was on Weekley's servers and backup tapes. Weekley explained that in the ordinary course of its business, its employees' email boxes were of limited size and purged when the maximum amount of email was reached. While information was transferred to back up, this was only for a limited time period of thirty days. The bottom line was that Weekley claimed additional emails, if any, responsive to plaintiffs requests were not readily or easily accessible. The trial court denied plaintiff's motion to compel. Plaintiff then filed a "Motion for Limited Access to [Weekley's] Computers." Essentially, the motion sought access to Weekley's employees' hard-drives to recover the deleted emails. During the hearing, Weekley complained about the intrusiveness of the protocol, that it would intrude into trade secrets and the privacy of its employees, that it would be disruptive of the company's business, and that no evidence was produced showing that it was feasible for the protocol to retrieve information that had been deleted in the ordinary care of business. The trial court granted the motion, ordering a procedure be followed similar to that endorsed *in In re Honza*. **Weekley sought mandamus relief.** Supreme Court granted writ to decide whether the trial court had abused its discretion in allowing plaintiff's forensic experts access to Weekley's employees' hard drives.

First, the Court found that deleted emails clearly are "electronic information" and therefore Tex. R. Civ. P. 196.4 applies to requests for production of such items. Second, the key to the opinion is that the Court observes and holds that while the plaintiff wanted deleted emails, *it never specifically requested deleted emails*. Although the decision does not hinge on this technicality (the Court finds that the intent became clear and that Weekley was not prejudiced by the lack of a specific request in this instance), the Court emphasized the importance of specificity:

To ensure compliance with the rules and avoid confusion, however, parties seeking production of deleted emails should expressly request them.

The opinion reviews the federal cases regarding e-discovery and then **discusses In re Honza** by observing that the procedure followed was similar to that endorsed in that case. The Court, however, goes to great lengths to distinguish **In re Honza**. It observes that there was a clearer connection between the claims in that litigation and the electronic information sought than there was in **In re Weekley**, and that while this consideration is not dispositive, it is a factor that should be considered by trial courts. More importantly, however, the Court observed that the electronic information in *Honza* was available, while in **In re Weekley**, it was speculative whether the information, if it existed, could be retrieved.

Absent some indication that the experts are familiar with the particularities of the Employees' hard drives, that they are qualified to search those hard drives, and that the proposed methodology for searching those hard drives is reasonably likely to yield the information sought, **Honza** does not support the trial court's order. We conclude that by ordering forensic examination of Weekley's hard drives without such information, the trial court abused its discretion.

The Court then goes on to summarize and clarify the protocol that is to be followed under Tex. R. Civ. P. 196.4 in requesting electronic discovery in future cases:

With these overriding principles in mind, we summarize the proper procedure under Rule 196.4:

the party seeking to discover electronic information must make a specific request for that information and specify the form of production. TEX.R. CIV. P. 196.4.

The responding party must then produce any electronic information that is "responsive to the request and ... reasonably available to the responding party in its ordinary course of business." *Id.*

If "the responding party cannot-through reasonable efforts-retrieve the data or information requested or produce it in the form requested," the responding party must object on those grounds. *Id.*

The parties should make reasonable efforts to resolve the dispute without court intervention. TEX.R. CIV. P. 191.2.

If the parties are unable to resolve the dispute, either party may request a hearing on the objection, TEX.R. CIV. P. 193.4(a), at which the responding party must demonstrate that the requested information is not reasonably available because of undue burden or cost, TEX.R. CIV. P. 192.4(b).

If the trial court determines the requested information is not reasonably available, the court may nevertheless order production upon a showing by the requesting party that the benefits of production outweigh the burdens imposed, again subject to Rule 192.4's discovery limitations.

If the benefits are shown to outweigh the burdens of

production and the trial court orders production of information that is not reasonably available, sensitive information should be protected and the least intrusive means should be employed. TEX. R. CIV. P. 192.6(b). The requesting party must also pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information. TEX.R. CIV. P. 196.4.

Finally, when determining the means by which the sources should be searched and information produced, direct access to another party's electronic storage devices is discouraged, and courts should be extremely cautious to guard against undue intrusion.

3) ***MRT, Inc. v. Vounckx***, 299 S.W.3d 500 (Tex.App.-Dallas, 2009)

*MRT* follows *In re Weekley Homes* with regard to back up tapes. The court found that where the requesting party did not specifically request back-up tapes, the responding party does not have an obligation to object that such tapes or the documents contained on them are not reasonably available. The court reiterates the importance of specificity, particularly with regard to electronic data. Another inference from the decision is that unless data are described with particularity either in a preservation letter or a request for production, it may be difficult to obtain a spoliation instruction that the responding party intentionally destroyed data knowing that it was potentially relevant to the issues in the case.

Because appellants did not meet their burden of demonstrating IMEC knew or should have known the pre-2000 backup tapes contained material and relevant evidence with respect to their claims, they failed to establish that IMEC had a duty to preserve the backup tapes in question.

***MRT, Inc. v. Vounckx***, 299 S.W.3d at 511.

4) ***In re Harris***, --- S.W.3d ----, 2010 WL 1612205 (Tex.App.-[Hous. 1 Dist.] 2010) also follows *In re Weekley Homes*.

4. **OBJECTIONS:**

A. **BOILER PLATE OBJECTIONS IMPROPER**

1) ***Mancia V. Mayflower Textile Service Co.*** , 2008 WL 4595175 (D. Md. 2008)

Although this is opinion is not out of a Texas appellate court or even out of

the Fifth Circuit, I have included it because it raises an interesting idea. In this Fair Labor Standards case, the defendant asserted a number of what the magistrate characterized as “boiler-plate” objections. The magistrate found that by the very nature of the objections the defendant had apparently violated Fed. R. Civ. P. 26 (g) 1, which requires the attorney to sign discovery requests and responses. Inherent in signing a set of requests or responses is the representation that the attorney has made a “reasonable inquiry.” By filing general objections that the discovery requests were unduly overbroad, burdensome and not designed to lead to admissible evidence, the magistrate observed that the defendant had failed to provide the specificity required by the rules in stating an objection and that therefore the defendant had failed to make a reasonable inquiry, which was potentially sanctionable.

Tex. R. Civ. P. 191(c) 3 requiring signature of attorneys with regard to disclosures, requests and response to discovery is remarkably similar to Fed. R. Civ. P. 26 (g)(1). The rationale applied by the magistrate in *Mancia*, therefore, conceivably could be applied by a judge considering boiler plate objections in a Texas case. Under Tex. R. Civ. P. 193.2 (a), a party responding to discovery “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.” (This rule also is similar to Fed. R. Civ. P. 33. b (4), which also was relied upon by the magistrate in *Mancia*). Many trial attorneys seem to have adopted the practice of merely making a general, “boiler-plate” objection subject to the requesting party or the court demanding more specificity. This practice could subject the responding party or her client to discovery sanctions, as the rule clearly requires specificity in the first instance.

## **B. BURDEN REGARDING IRRELEVANCY**

*In Re Exmark Manufacturing, Co., Inc.*, --- S.W.3d ----, 2009 WL 3647395 (Tex.App.-Corpus Christi, 2009)

This case essentially stands for the proposition that a party complaining that a discovery request is overbroad and irrelevant cannot always assume that this is apparent as a matter of law. When the breadth and relevancy of the request are rationally connected to the matters plead in the case, the burden is on the party objecting to the discovery to produce evidence regarding the scope of the request and the burden involved in complying with it, if it hopes to strike or narrow the request.

Plaintiffs brought a product liability action alleging defective design and the availability of reasonable alternative design. Defendant objected to a number of discovery requests on the basis that they were over broad and irrelevant. Defendant claimed that the discovery should not be allowed with regard to other model products (mowers) it had made and if discovery was allowed with regard to other products the time period should be considerably narrower than that allowed by the court. Defendant did not produce any evidence that the design of the other model mowers would be irrelevant to the issue of unreasonable alternative design. The Court pointed out that it would be ludicrous to disallow discovery with regard to other model mowers when

plaintiffs had the burden of proving reasonable alternative design.

it would be absurd to limit discovery to the specific model at issue because that would necessarily preclude discovery on alternative designs. Moreover, we also note that the similarity of the products need not be identical, as Exmark seems to argue, because the similarity may be defined in terms of the defect and any differences among the products may merely go to the weight of the evidence and not its discoverability or admissibility.

We conclude that the discovery order at issue here was reasonably tailored to the relevant product defect and was not impermissibly overbroad. *In re SCI Tex. Funeral Servs.*, 236 S.W.3d 759, 761 (Tex.2007) (orig .proceeding).

Defendant complained that the time period for the production was over broad, but it failed to produce any evidence regarding what should be a reasonable time period. Nor did it produce any evidence of undue burden in complying with the request.

Exmark complains about the time parameter on some of the discovery ordered, but Exmark offered no evidence to give the trial court any useful guidance in evaluating whether one time frame for discovery was comparatively burdensome in contrast to another proposed time frame.

## 5. PRIVILEGES

### A. PRESERVING THE PRIVILEGE

#### 1) TIME PERIOD FOR ASSERTING PRIVILEGE

*In re Robert L. Williams, Individually and on behalf of the Estate of Alberta Sue Williams, deceased and on behalf of Wrongful Death Beneficiaries Robert L. Williams and Dustin Strom*, --- S.W.3d ----, 2009 WL 540961 (Tex.App.-Waco, 2009, no pet.)

The opinion in this case notes that there is no definite time for asserting a privilege, and that the plaintiff in this instance had preserved the privilege by asserting it in a supplemental response:

Rule 193.3 makes clear that privileges need not be asserted in the response to discovery requests, but may be asserted in supplemental or amended responses or a separate document. See TEX.R. CIV. P. 193.3(a). Nor is there a time

limit within which to assert such a privilege. See *In re Graco Children's Prods.*, 173 S.W.3d 600, 605 (Tex.App.-Corpus Christi 2005, orig. proceeding) (“Although the time limit for objecting to written discovery is 30 days from the date of service, no objection needs to be made to preserve a privilege and the rules set no time-limit for asserting a privilege.”); see also TEX.R. CIV. P. 193.2(f), 193.3(a)

## 2) SPECIFICITY

*In Re Union Energy, Inc., Gulf Exploration, Inc. And Mc2 Resources, Llc, Relators*, --- S.W.3d ----, 2008 WL 4757008 (Tex.App.-Tyler,2008 no pet.)

The issue in this case, which essentially involved a breach of contract dispute, was whether a “stock register” was protected from a request for production because it impermissibly invaded “personal, constitutional, or property rights.” So, the question was whether a stock register could be protected from discovery and, if so, whether alleging as the basis for protection broad personal, constitutional and property rights would preserve the putative privilege. The party raising the privilege claimed that the rights of shares holders could potentially be invaded if the shareholders’ identities were revealed by production of the stock register. The trial court ordered production of the stock register.

It is important to note that there is no presumption of privilege. See, *In re BP Products North America, Inc.*, 2006 WL 2973037, at \*4. A party seeking to protect documents on the basis of privilege must specifically allege that it is withholding documents on the basis of a specific privilege and then if requested produce a privilege log setting out the what is being withheld and the legal basis for the allegation. See, Tex. R. Civ. P. 193.6. see also *In re Monsanto Co.*, 998 S.W.2d 917, 926 (Tex.App.-Waco 1999, orig. proceeding) (explaining that asserting privilege and providing proof to support privilege are distinct concepts). The responding party in this case failed on these fronts to assert, prove and preserve its alleged privilege. It appears the responding party attempted to assert elements of a trade secret privilege, but it never specifically asserted trade secret as the privilege, leaving a clear connotation with the court that it sought merely to protect the privacy, constitutional and property rights of its shareholders.

The responding party first alleged on appeal that the stock register was a “trade secret;” however, in responding to the request for production, the responding party never specifically asserted this privilege nor stated the support for the privilege. The responding party merely objected on the basis of relevancy and then asserted that the request invaded “personal, constitutional, or property rights.” This does not perfect a claim of trade secrets. See, *In re Bass*, 113 S.W.3d 735, 739 (Tex.2003). It is

important to realize that in this case the responding party not only reportedly did not assert a specific privilege in its written response and did not assert the term “privilege” or “trade secret,” during the motion to compel hearing. The respondent claimed at hearing that the stock register itself was proof of the privilege. This is circular logic, which the appellate court found unpersuasive. The responding party also attempted to argue that the court could and should enter a protective order under Tex. R. Civ. P. 162 to protect privacy of the shareholders, but as the appellate court pointed out stock registers have not been found in Texas to be protected as private.

## **B. SWORD/SHIELD**

- 1) ***In re Beirne, Maynard & Parsons, L.L.P.***, 260 S.W.3d 229, Tex.App.-Texarkana 2008, mandamus denied).

This dispute arose from a fee dispute lawsuit. Beirne Maynard filed suit against a client for its fee but then sought protection from a court order allowing the client to review invoices to determine whether they were accurate. The appellate court noted that this constituted “offensive use” of what Beirne Maynard categorized as work product. Bottom line: “you cannot deny a party the right to review documents supporting your claim for reimbursement.”

- 2) ***In re Suarez***, Not Reported in S.W.3d, 2008 WL 4310098 (Tex.App.-Hous. [14 Dist.] 2008)

A trial court is supposed to assure that all parties have “a level playing field.” Therefore, while a party has a right to assert the fifth amendment declining to respond substantively to discovery, the court may impose an order restricting that party from seeking discovery from others.

By protecting Mijares from written discovery and limiting the availability and scope of the parties' depositions until the conclusion of the criminal trial, the trial court remedied the inherent fairness that was occasioned by Seden-Suarez's lawful refusal to participate in meaningful discovery. ***See Wehling v. Columbia Broad. Sys.*** 608 F.2d 1084, 1087-89 (5<sup>th</sup> Cir. 1979).

## **C. ATTORNEY CLIENT PRIVILEGE**

- 1) **CRIME/FRAUD EXCEPTION**

***In re Small***, --- S.W.3d ----, 2009 WL 1620436 (Tex.App.- El Paso, 2009)

This case, in the context of an oil and gas dispute, provides an excellent review of the attorney client privilege and what must be established both to perfect the assertion of privilege and what must be established to overcome it. The case involved a claim that a landman, Small, had fraudulently induced a lessor to release its lease. The plaintiffs sought a number of documents, reduced to five categories in the opinion,

which defendants claimed were protected by attorney client privilege. Rather than going into a detailed discussion of the court's analysis, we will discuss here only a couple of the notable points:

**a)** The attorney-client privilege protects confidential communications between client and counsel made for the purpose of facilitating the rendition of legal services from disclosure. See Tex.R.Evid. 503(b); *Huie v. DeShazo*, 922 S.W.2d 920, 922 (Tex.1996). This privilege attaches to the complete communication between attorney and client. *Marathon Oil Co. v. Moye*, 893 S.W.2d 585, 589 (Tex.App.-Dallas 1994, orig. proceeding);

**b)** A communication is "confidential" if it is not intended to be disclosed to third persons other than those persons to whom disclosure is made "in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."Tex.R.Evid. 503(a)(5);

The Court found that the proponent of the privilege had sustained its burden with regard to each of the above elements and had not waived the privilege. All communications were found to have been transmitted to individuals within the scope of the privilege. The plaintiff then attempted to overcome the privilege by alleging the crime fraud exception.

The crime fraud exception only applies if: (1) the party asserting the exception establishes a *prima facie* case of contemplated fraud; and (2) there is a relationship between the document for which the privilege is challenged and the *prima facie* proof offered. *In re Seigel*, 198 S.W.3d 21, 28 (Tex.App.-El Paso 2006, orig. proceeding)

In this instance, the only proof offered in support of the crime fraud exception was the allegation of fraud which was the basis of the underlying action. This was held to be inadequate to sustain the burden of proving the crime/fraud exception:

Here, the majority of S.L.D.S.'s "evidence" demonstrating that Enerplus engaged its attorney for fraudulent purposes is its own allegations of fraud, which serve as the basis of its lawsuit. Such a demonstration will not serve as a basis for the application of the crime-fraud exception.

## **2) WAIVER**

*In re Hicks*, 252 S.W.3d 790 Tex.App.-Houston [14 Dist.],2008) (Motion for En Banc Rehearing denied) 267 S.W.3d 555 Tex.App.- Houston [14<sup>th</sup> Dist.], 2008)

Hicks involved an interpleader action that arose following a non-subscriber

lawsuit that resulted in a substantial verdict. The defendants subsequently declared Ch. 13 bankruptcy. The bankruptcy judge ordered the bankruptcy applicant, Hicks, to sign an assignment requiring his attorney in the underlying non-subscriber suit to release his file to the bankruptcy trustee. The bankruptcy applicant subsequently filed a retraction. In the interpleader action, the plaintiff in the non-subscriber case and the bankruptcy trustee requested the non-subscriber defense attorney's complete litigation file, claiming that the attorney-client privilege had been waived by the bankruptcy applicant signing the authorization for release of the information.

A majority of the appellate court found that the attorney client privilege must specifically be waived and that an assignment did not constitute either an express or implied waiver of the attorney client privilege, and that the defense attorney could protect his core work product and matters protected by the attorney client privilege.

#### **D. CORE WORK PRODUCT**

- 1) ***In Re BP Products North America Inc.***, 263 S.W.3d 106 (Tex.App.-Houston [1st Dist.],2006, orig. proceeding)

This opinion arose out of the BP Plant Explosion Litigation. Days after the explosion, BP announced that it had reserved \$700 million to pay claims arising from the explosion. The Plaintiff Steering Committee sought and obtained a court order compelling Defendant to produce documents used by BP to compute the reserve figure reported to the Securities and Exchange Commission ("SEC"). BP asserted attorney-client privilege as to the calculations claiming announcement of the amount reserved did not waive the privilege as to the documents underlying the calculation and the methodology used to obtain the reserve total (these items were not disclosed to the SEC). In support of its response to the motion to compel production, BP produced the affidavit of its in-house attorney who prepared the reserve number. In the affidavit he stated that, while the number was not confidential, the materials that he used to reach the calculation and the methodology he used were confidential. Plaintiffs contended before the trial court and on appeal that the affidavit was conclusory and therefore constituted no evidence. The trial court granted the motion to compel finding essentially that there had been a knowing waiver of the attorney-client privilege by publishing the reserve amount. The appellate court found that the affidavit was evidence based and not conclusory.

In addition, Noble provides factual bases for BP's assertion that the documents in question constituted work product, in the form of "material prepared or mental impressions developed in anticipation of litigation or for trial" by or for a party, or a party's representatives, and "a communication made in anticipation of litigation or for trial" between a party and the party's representatives or among the party's representatives. See TEX.R. CIV. P. 192.5.

Given the adequacy of the affidavit and the apparent fact that it was difficult to identify the documents without waiving the privilege (Tex. R. Civ. P. 193.6 requirements do not apply to documents for which attorney-client privilege is asserted), the appellate court found that the trial judge had abused her discretion by not viewing the documents *in camera*.

The other issue in this decision was whether BP had waived its privilege by disclosing information derived from privileged matters in conformance with federal regulations. The Court essentially dodged this issue. While finding that federal cases had generally held that a party complying with federal regulatory agencies waived the privilege (See ***United States v. El Paso, Co.***, 682 F.2d 530, 538-40 (5th Cir.1982), the appellate court was able to factually distinguish each of the cases which leaves open the question in Texas about whether a party's disclosure of confidential matters (i.e. protected attorney client communications and core work product) to a federal agency constitutes waiver of the entire privilege.

- 2) ***In re Certain Underwriters At Lloyd's London***, --- S.W.3d ----, 2009 WL 2616252 (Tex.App.- Beaumont,2009) (also discussed below with regard to the snap back provision).
- 3) ***In re Boxer Property Management Corp.***, Not Reported in S.W.3d, 2009 WL 4250123 (Tex.App.-Hous. (14 Dist.) 2009)

In this case, the plaintiffs thought the defendant was hiding documents and had not conducted a diligent search for documents responsive to plaintiffs' requests for production. Plaintiffs convinced the trial court to allow them to ask a limited number of questions of a representative designated by defendant to explain what the defendant did to comply with its obligations in responding to plaintiffs' request for production. Defendant objected that the trial court's order was an abuse of discretion because the deposition would invade core attorney work product. The appellate court agreed by finding that such a deposition would inherently invade attorney work product and therefore was improper. While the appellate court agreed that defendant's in-house attorney would likely be the most knowledgeable individual about what was done to respond to plaintiffs' request for production, the representative does not have to have personal knowledge. Regardless, any representative on the subject would necessarily have to consult the in-house attorney to obtain complete answers in response to questions and that also would invade core attorney work product.

#### **E. ORDINARY WORK PRODUCT – ANTICIPATION OF LITIGATION**

- 1) ***In re Certain Underwriters At Lloyd's London***, --- S.W.3d ----, 2009 WL 2616252 (Tex.App.- Beaumont,2009) (also discussed below with regard to the snap back provision)
- 2) ***In re Small***, --- S.W.3d ----, 2009 WL 1620436 (Tex.App.- El Paso, 2009) (See discussion above with regard to Attorney/Client)

Privilege-Crime Fraud Exception).

A party merely alleging undue hardship and substantial need is held to be insufficient to demonstrate such a proposition. A party must present facts that there is a substantial need for the work product gathered by an opponent's attorney and that there will be undue hardship in obtaining the information from another source.

## F. INVESTIGATIVE PRIVILEGE

*In re Westwood Affiliates, L.L.C.*, 263 S.W.3d 176 (Tex.App.- Houston [1st Dist.],2007, orig. proceeding).

Plaintiff filed an inadequate security case for the wrongful death of an individual by a shooting. Plaintiff sought the Houston Police Department investigation of the shooting and filed a petition for writ of mandamus when the trial court denied its motion to compel. The Firsts Court of Appeals originally granted the writ, however, on this motion for rehearing before the full panel, the original opinion was withdrawn and the petition for writ was denied, based upon the Texas Supreme Court holding in **Hobson v. Moore**, 734 S.W.2d 340 (Tex.1987), which established the "investigative privilege" and upon the law enforcement exception to the Texas Public Information Act ("TPIA"). Tex. Gov't Code Ann. §552.108 (Vernon Supp.2006). See also, **In re Bexar County Criminal Dist. Attorney's Office**, 224 S.W.3d 182, (Tex.,2007) (applying privilege to District Attorney's investigation file and its investigators).

The court also noted that these privileges also pertain to requests under The Texas Opens Records Act:

Section 3(a)(8) of the Texas Open Records Act, Tex.Rev.Civ.Stat. Ann. art. 6252-17a, exempts from disclosure: records of law enforcement agencies and prosecutors that deal with the detection, investigation and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution. *We recognize this privilege in civil litigation for law enforcement investigation. See Houston Chronicle Pub. Co. v. City of Houston*, 531 S.W.2d 177 (Tex.Civ.App.-Houston [14th Dist.], writ ref'd n.r.e. per curiam) 536 S.W.2d 559 (Tex.1976)

## G. PATIENT/PHYSICIAN PRIVILEGE

*In Re Collins*, 286 S.W.3d 911 (Tex. 2009)  
(See discussion above)

## H. MENTAL HEALTH RECORDS

***In re Robert L. Williams, Individually and on behalf of the Estate of Alberta Sue Williams, deceased and on behalf of Wrongful Death Beneficiaries Robert L. Williams and Dustin Strom***, --- S.W.3d ----, 2009 WL 540961 (Tex.App.-Waco, 2009)

The key determination in whether a party's mental health records are discoverable is whether the records are "relevant to the condition at issue" and whether the condition itself is of legal consequence to a claim or defense." ***R.K. v. Ramirez***, 887 S.W.2d 836, 843 (Tex.1994) (orig.proceeding). In this case, the court found that the jury did not need to determine plaintiff's mental condition; therefore, the order allowing discovery of plaintiff's mental health records was an abuse of discretion. Merely because a plaintiff has sought treatment for mental issues in the past does not make that healthcare or records relating to it relevant when the plaintiff only alleges mental anguish arising from the incident at issue in the pending litigation. That is all the plaintiff alleged in this case; therefore, his past mental health history was held to be irrelevant. See also ***In re Pennington***, discussed above.

The court also rejected the defendant's offensive use argument,<sup>8</sup> finding that the defendant did not establish all the elements of the offensive use doctrine:

Robert contends that the second element cannot be met because Dustin's records are not outcome determinative: (1) Real Parties in Interest must take Dustin as they found him and "compensate him for the amount of mental anguish he suffered," regardless of his mental state at the time of Sue's death; and (2) Dustin's strained relationship with Sue does not defeat his mental anguish claim. Robert further argues that the third element cannot be met because evidence of a strained relationship between Sue and Dustin is available from other sources. We agree.

## I. TRADE SECRETS

1) ***In re Waste Management of Texas, Inc.***, 286 S.W.3d 615 (Tex.App.-Texarkana,2009).

This case merely reiterates the long-standing requirement of necessity to

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<sup>8</sup> This doctrine consists of three elements: (1) a party must be seeking affirmative relief; (2) the party is using a privilege to protect outcome determinative information; and (3) the protected information is not otherwise available to the defendant. ***Ginsberg v. Fifth Court of Appeals***, 686 S.W.2d 105, 107 (Tex.1985) (orig.proceeding). See also, ***In re Beirne, Maynard & Parsons, L.L.P.*** 260 S.W.3d 229, Tex.App.-Texarkana 2008, mandamus denied) (discussed above, under Sword/ Shield).

overcome the trade secrets privilege. Merely advocating that the information is relevant or might assist an expert is insufficient.

The party seeking to obtain disclosure of a trade secret must make a particularized showing that the information is necessary to the proof of one or more material elements of the claim and that it is reasonable to conclude that the information sought is essential to a fair resolution of the lawsuit. *In re XTO Res. I, LP*, 248 S.W.3d 898, 904 (Tex.App.-Fort Worth 2008, orig. proceeding) (citing *Cont'l Gen. Tire*, 979 S.W.2d at 611-12).

In this case, the trial court was held to have abused its discretion in ordering the production of a party's trade secrets because the requesting party had failed to produce evidence that the materials were necessary for a fair adjudication of the lawsuit.

**2) *Volvo Car Corp. v. Marroquin***, Not Reported in S.W.3d, 2009 WL 3647348 (Tex.App.-Corpus Christi)

At first blush, this appears to be a Rule 76a case. Upon closer reading, it appears to also be more informative on the issue of trade secrets than on Rule 76a. This case involved an allegation of defective product against Ford. However, the plaintiffs also sought documents from Volvo (which had been acquired by Ford) which was a non-party. There had been an earlier proceeding, in which the plaintiffs had sought discovery from these same defendants. That case had gone to the Texas Supreme Court which had overruled the plaintiffs' discovery request. In this instance, the plaintiffs were seeking documents which in the earlier case had been the subject of a protective order, but which had been inadvertently disseminated by the court and were published in print media and on the National Highway Traffic Safety Administration's ("NHTSA") website. Plaintiffs claimed that the documents were no longer privileged. The trial court found that some of the Volvo documents were "non-confidential." The Supreme Court granted a petition for writ of mandamus and found that the documents were protected as trade secrets. While the case was on appeal to the Texas Supreme Court, the case was tried and the plaintiffs obtained a verdict. Ford and Volvo moved to seal two documents that were admitted into evidence although the defendants claimed such documents contained trade secrets. The two Ford documents are in general terms: (1) an internal, customer preference study used by Ford to improve its vehicle design and marketing strategies; and (2) an industry survey procured by Ford from J.D. Powers & Associates under a non-exclusive licensing agreement, which was also used for design and marketing purposes. The appellate court noted that it was assuming without deciding that the documents were trade secrets and that while Volvo had proven a basis for sealing its documents, Ford had not.

The court noted that while trade secrets is a factor to take into consideration in deciding whether to seal a document, it is not dispositive. The critical factor is whether

the claim of trade secrets is shown to overcome the “presumption of openness.” In this instance, the court found that Ford had not carried its burden in this regard.

Assuming without deciding that the Ford documents are trade secrets and as such rise to the level of “a specific, serious and substantial interest,” we nonetheless believe that because (1) Ford does not complain on appeal about the trial court's denial of its Motion to Close Courtroom; (2) Ford did not seek an instruction prohibiting the jury and other non-parties from discussing the Ford documents beyond the setting of the trial; and (3) specific findings in the Ford documents were discussed in open court and were admitted without objection, albeit under a temporary seal, Ford's interest in maintaining secrecy does not “*clearly* outweigh” the presumption of openness.

Additionally, the court noted that Ford had failed to demonstrate that no less restrictive means than sealing the Ford documents would adequately and effectively protect its interest. See Tex. R. Civ. P. 76(1). For instance, Ford put forth no evidence why its goals could not be achieved by redacting the document. (It is important to keep in mind that the court was dealing with a request to “seal” a document containing trade secrets rather than a request to “discover” trade secrets). One of the difficulties confronting Ford in this regard was that case involved the Ford Expedition, which as the court pointed out, Ford no longer manufactures. This fact weakened the potency of the trade secrets claim considerably. It was Ford's burden to show that no less restrictive means than sealing existed and Ford failed in this regard.

The Volvo claim was considerably stronger. The document that Volvo intervened to protect was the “cookbook” for building its SUV. Volvo was able to demonstrate that allowing its competitors to have access to this document would put Volvo at a disadvantage against its competitors. The appellate court found that the Volvo had met its burden, particularly since its product was not involved in the litigation and was not alleged to be defective. Accordingly, there was no evidence that the Volvo product posed a risk of harm to the public.

Because (1) Volvo was not a party to the case; (2) the vehicle involved in the underlying law suit was not a Volvo vehicle; (3) the Volvo document was the “cook book” for the development of a brand new model and body type of Volvo vehicle and also a trade secret; (4) unlike the Ford documents, the contents of the Volvo document were discussed only cursorily in open court; (5) there was no finding or evidence indicating that the Volvo XC90, the subject of the Volvo document, was in any way defective or unsafe; and (6) releasing any portion of the Volvo document could arguably destroy Volvo's competitive advantage, we

conclude that Volvo carried its burden under rule 76a. See Tex. R. Civ. P. 76a(1). Thus, Volvo demonstrated that its “specific, serious and substantial interest which clearly outweighs” the “presumption of openness” and “any probable adverse effect that sealing will have upon the general public health or safety” and that there is “no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.” *Id.* As such, we conclude that the trial court abused its discretion. We sustain Volvo's issue on appeal.

## **J. SNAP BACK PROVISION**

### **1) ATTORNEYS**

*In re Parnham*, 263 S.W.3d 97 (Tex.App.-Houston [1 Dist.], 2006, orig. proceeding).

This arises out of the notorious criminal case in Harris County in which Clara Harris repeatedly drove over her ostensibly cheating husband, killing him in the parking lot of his reputed love nest. Once Clara was convicted, she turned her attention and scorn on her criminal defense attorney, and sued him over his fees and alleged breach of fiduciary duty. Parham's attorneys sought to inspect records. In complying with the request Clara's attorneys inadvertently produced their litigation file, containing a number of privileged documents. The holding in this case is that when an attorney receives and reads privileged information inadvertently produced in discovery, the remedy is for the producing party to file a snap back request to have the documents returned. If the documents are found to be privileged and ordered returned, then the documents may not be used for any purpose in the litigation. The trial court abused its discretion in disqualifying the attorney who received and read the inadvertently produced privileged documents:

Rule 193.3(d) contemplates a hearing on the privilege, and if the privilege is sustained, then counsel may assert it despite any inadvertent disclosure. The assertion of the privilege allowed in rule 193.3(d) contemplates that such documents will not be used in the litigation. The rule does not contemplate disqualification of counsel. *In re Parham* 263 S.W.3d at 106

### **2) USE OF SNAP BACK PROVISION BY NON-PARTIES**

*In re Certain Underwriters At Lloyd's London*, --- S.W.3d ----, 2009 WL 2616252 (Tex.App.- Beaumont,2009)

In 2008, the Houston Fourteenth Court of Appeals held that the snap back

provision, Tex. R. Civ. P. 193.3(d) does not apply to non-parties. *In re Ortuno*, No. 14-08-00227-CV, 2008 Tex.App. LEXIS 3396, at \*5 (Tex.App.-Houston [14th Dist.] May 6, 2008, orig. proceeding). In the instant case, the Beaumont Court of Appeals, states that it disagrees with the Fourteenth Court of Appeals' opinion, finding that Tex. R. Civ. P. 193.3(d) does in fact apply to non-parties.

The Court first finds that an adjusting agent's notes of communications with the defendant Underwriters' attorney retained in anticipation of litigation are protected as core work product. With regard to the remainder of the notes that were not considered core work product, but rather, ordinary work product, the court found that the plaintiffs had failed to show undue hardship and substantial need required to obtain discovery of such items. The plaintiffs argued that nonetheless, the adjusting company for whom the agent worked had produced the notes, thereby waiving any privilege the documents may have had. Plaintiffs further argued that under *Ortuno*, the non-party could not assert the snap back provision, that the real party in interest (the Underwriters', through their litigation attorney) had no standing to assert the snap back provision because he had not produced the records, and in any event the time to assert the snap back provision had passed, thereby waiving the protection. The Beaumont Court of Appeals disagreed on all counts.

The Court first held that Tex. R. Civ. P. 193.3(d) should apply to non-parties, was intended to apply to non-parties and does apply to third parties. The court found that "party" is not limited to the parties to the litigation, but instead is broader, meaning the party to the production request. The court found that this rule was not intended to restrict the right of a party to assert the snap back provision as to privileged documents pertaining to it or its claims and defenses inadvertently produced by a non-party. The court also found that the party had acted diligently and within the time allowed by Tex. R. Civ. P. 193.3(d) in requesting back the privileged documents produced by the non-party insurance company. The attorney had requested the documents back promptly after he learned they had been produced.

## **6. PROTECTIVE ORDERS:**

- A. *In Re Collins*, 286 S.W.3d 911 (Tex. 2009)**  
(See discussion above, under Ex Parte Communications)
- B. *In re Soto*, 270 S.W.3d 732 (Tex. App. Amarillo- 2008)**  
(See discussion above, under Scope, Authorizations)

## **7. WRITTEN DISCOVERY:**

### **A. REQUESTS FOR ADMISSION**

#### **1) DEEMED ADMISSIONS**

**Clark v. Porter**, Not Reported in S.W.3d, 2009 WL 2618359 (Tex.App.- San Antonio, 2009)

In this case, Porter served Clark with requests for admissions that were never timely answered. Thus, the matters in the requests for admissions were automatically admitted. When this case was called to trial, the deemed admissions were on file and Clark had not moved to withdraw the admissions. The Court held as follows:

As a result of the deemed admissions, there were no contested fact issues remaining in this case, and Clark was not entitled to admit evidence contradicting the deemed admissions. And, by moving for judgment when he did, Porter protected the record and avoided any waiver of the deemed admissions as he was required to do. See **Marshall v. Vise**, 767 S.W.2d 699, 700 (Tex.1989) (stating a party relying on deemed admissions at trial must protect the record by objecting to the introduction of controverting evidence and to the submission of any issue bearing on the facts admitted).

## **2) DUAL CAPACITY**

**United States Fidelity and Guaranty Co. V. Goudeau**, 272 SW3d 603 (Tex. 2008)

In this case, the Texas Supreme Court reiterates that requests for admission may only be used against the party to whom they are propounded, in the action in which they are propounded, and may only bind the party in the capacity in which she has responded. A party may have a dual capacity in a lawsuit. Requests propounded to the party in one capacity may not bind the party in another capacity. For instance if an individual brings suit individually and as an executrix of an estate, requests for admission propounded to the party in their individual capacity may not be used to bind the estate, and vice versa.

## **B. REQUESTS FOR PRODUCTION**

**In re Weekley Homes, L.P.**, --- S.W.3d ----, 2009 WL 2666774 (Tex.).

(See discussion above regarding procedure for requesting electronic information under Tex. R. Civ. P. 196.4).

## **8. EXPERTS:**

### **A. EXPERT DESIGNATION AND SUMMARY JUDGMENT**

***Fort Brown Villas III Condominium Association v. Gillenwater*, 285 SW3d 879(Tex.2009)**

There has been a heated debate since the inception of the amendments to the discovery rules in 1999 about whether the discovery rules apply to a motion for summary. More specifically, the issue has been whether the disclosure/designation rule regarding testifying experts applied to motions for summary judgment, such that if a party had not timely designated the party could still use testimony from an undisclosed expert to controvert a motion for summary judgment. In this premises liability case, the Texas Supreme Court, resolves the issue by holding that Texas Rule of Civil Procedure 193.6, which provides for the exclusion of evidence due to an untimely response to a discovery request, applies in a summary judgment proceeding.

In this case a discovery control plan had been entered. Despite two extensions of the expert designation deadline, the plaintiff complied with none of the deadlines. Defendant filed a no evidence motion for summary judgment on the issues of whether the product in question (an allegedly defective pool-side chair) posed an unreasonable risk of harm and whether the property owner had notice of the condition. The plaintiff filed an affidavit of an undisclosed expert in response to the motion for summary judgment. The trial court struck the affidavit and granted the motion for summary judgment. The appellate court reversed the trial court, holding that Tex. R. Civ. P. 193.6 does not apply to summary judgment proceedings, thus framing the issue for the Texas Supreme Court. The Court answered with this rationale:

Because we have already held that evidentiary rules apply equally in trial and summary judgment proceedings, ***Longoria v. United Blood Services***, 938 S.W.2d 29, 30 (Tex.1995), we also hold that the evidentiary exclusion under Rule 193.6 applies equally.

The Court points out that the discovery rules prior to the 1999 amendments were fluid, depending on a trial date. However, the 1999 amendments provide fixed deadlines independent of the trial date. Further, with regard to a no evidence motion for summary judgment, it is contemplated that all discovery has been completed. While this case did not involve a traditional motion for summary judgment, this author assumes that the same rational would apply.

**B. DESIGNATION: COURT DISCRETION**

***Hilburn v. Providian Holdings, Inc.***, Not Reported in S.W.3d, 2008 WL 4836840 (Tex.App.-Hous. [1<sup>st</sup> Dist.] 2008, no pet.)

This matter involved a declaratory judgment on an easement dispute. The issue pertinent to the discovery discussion was whether the trial court abused her discretion during a bench trial in allowing testimony of an undisclosed expert on attorneys' fees.

There was a unresolved issue of whether the defendant ever sent a request for disclosure requesting designation of experts and if not, whether plaintiff had an obligation to designate experts pursuant to Tex. R. Civ. P. 194.2(f) and 195. This question comes up relatively frequently, but it has yet to be ruled upon, and the court took a pass to do so in this case. The decision instead focused on Tex. R. Civ. P. 193.6:

Rule 193.6 nonetheless allows the trial court to admit evidence violating (for example) rule 195.2 upon a showing of good cause or if its use would not unfairly surprise or prejudice the other party. TEX.R. CIV. P. 193.6(a)(1)-(2).

But even if the party seeking to introduce testimony does not carry its burden of establishing the grounds for the exception, the court may grant a continuance or temporarily postpone the trial to allow the proponent to make its discovery response and to allow the opponent to conduct discovery regarding any new information presented by that discovery response. See TEX.R. CIV. P. 193.6(c).

In this case Hilburn objected to the Providence being able to put on expert testimony regarding attorney fees because the expert had not been timely designated. The court granted Hilburn the opportunity before trial to depose the expert, which Hilburn declined. The appellate court found that in this instance the trial court did not abuse his discretion in allowing the testimony of the expert.

### **C. CONSULTING EXPERTS**

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

Energy built a compressor station and some neighbors complained about the noise. Transfer responded that it would investigate the complaint. Upon receiving a promise from Energy that the “results” of the testing would be shared with them, the neighbors allowed a consulting company hired by Energy to conduct sound testing on the neighbor’s property. The testing was conducted but the results were never shared. A group of neighbors filed suit against Energy and send a request for production that sought “reports relating to sound at or around the subject pump station.” Defendant agreed to produce non-privileged documents responding to the request. This did not include the report of the consultant because Energy asserted that the consultant was a consulting expert hired in anticipation of litigation and that the report and consultant’s conclusions therefore were protected. The trial court found that the “raw data” was discoverable but not the consultant’s opinions that were formulated in anticipation of litigation.

The appellate decision centers first on whether the consultant was a consulting expert. The court does a ***National Tank Co. v. Brotherton*** analysis and finds that in examining the “totality of the circumstances” Energy proved that it anticipated litigation when it hired the consultant and that the consultant’s work was done in anticipation of

litigation (even if there were other ostensible purposes for the report). Energy conceded that the consultant was a “dual capacity witness,” one who possessed both expert opinions and knowledge of relevant facts. *Axelson, Inc. v. McIlhaney*, 798 S.W.2d 550, 555 (Tex. 1990). Interestingly, the appellate court uses this to overrule plaintiffs’ argument that Energy had waived the consulting expert exemption by identifying the consulting expert.

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

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

This finding is less than compelling; however, there is one argument that does not appear to be raised or considered by the appellate court. In *Axelson, Inc. v. McIlhaney*, 798 S.W.2d supra at 555 (which is cited by the appellate court as authority for the “dual capacity” rule, see above) the Texas Supreme Court upheld a trial court finding that individuals designated as consultants could not be deposed about their conclusions; however, they could as fact witnesses, be deposed about the facts they possessed.

Axelson sought only factual discovery from Biel, Fowler and Hill regarding the condition of wellhead equipment in addition to the condition of Axelson’s relief valve. The trial judge limited the scope of discovery from these consulting-only experts to the Axelson valve. The trial judge abused his discretion in refusing discovery of these facts because the exemption for consulting-only experts does not extend to facts known to them. *Id* at 555.

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

#### **D. OBJECTING TO ADEQUACY OF DISCLOSURE**

*Barry v. Jackson*, --- S.W.3d ----, 2010 WL 985202 (Tex.App.- Austin)

A party should not feel secure relying on the technicality that an opponent did not fully disclose with regard to an expert witness. If a party has not fully disclosed, the opposing party should object or file a special exception at the risk of waiving the complaint. In this case, the defendant only provided the subject matter on which its

expert would testify. The opposing side did not object or specially except to the deficiency in the disclosure. However, it subsequently moved to limit or exclude the expert's testimony for the opponent's failure to completely disclose. The concurring opinion addresses the issue of whether an expert's testimony should be allowed when there has not been complete disclosure regarding the "substance" of the expert's testimony. The concurring opinion would have allowed the testimony by finding that the opponent was unable to show surprise because it had waited too long from the date of disclosure without raising an objection to the inadequacy of the response. The court cited cases holding that a trial court has discretion to allow testimony even when it has not been fully disclosed absent a showing of surprise and prejudice. See also Tex. R. Civ. P. 193.6(a)(2) (evidence not properly disclosed may be admitted if the court finds other party will not be unfairly surprised).

#### E. SANCTIONS FOR IMPROPER OR INADEQUATE EXPERT DISCOVERY

- 1) ***Duerr v. Brown***, 262 S.W.3d 63 (Tex.App.-Houston [14th Dist.], 2008, no pet.).

This case discusses the interplay between Tex. R. Civ. P. 194.2 (f) regarding designation of testifying experts and Tex. R. Civ. P. 195.3 regarding scheduling depositions of testifying experts. In this case the plaintiff chose not to produce an expert report. This action invoked Tex. R. Civ. P. 195.3(1).

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

In this instance not only did plaintiff not produce her expert reasonably promptly for deposition, she failed to fully and timely designate, providing only the subject matter of the expert's expected testimony and not the substance. It was only after opposing counsel filed a motion to strike expert opinions and a motion for summary judgment that ten days before the hearing plaintiff served a report from her expert and even then the report was flawed because it offered only conclusory opinions.

The appellate court points out that the failure to provide expert information as required by the rules is sanctionable by exclusion of that expert's report. See, Tex. R. Civ. P. 193.6. To avoid the sanction, the party designating the expert must demonstrate that the failure to fully designate did not surprise OR prejudice the other party OR that the failure to make complete discovery was for good cause. The plaintiff in this case

failed to make any of these demonstrations; therefore, it was found that the trial court has not abused his discretion in striking the expert and his report or affidavit testimony.

2) ***Izaguire v. Cox***, Not Reported in S.W.3d, 2008 WL 4427272 (Tex.App.- Waco, 2008)

***Izaguire***, as ***Duerr***, discussed above, deals with the failure to make complete expert disclosure and the consequences of such a failure. In this instance the plaintiff sought to offer the testimony of the chief of police. The case involves a somewhat bizarre claim by a suspected DWI defendant that \$4,000 was stolen from his impounded vehicle either by the wrecker driver or the arresting officers. A detective was assigned to investigate the allegation, who concluded that neither of the arresting officers were guilty of the alleged theft.

First, Plaintiff sought to call the police chief adversely regarding policies and procedures. Defendant objected claiming that plaintiff had not disclosed the chief as an individual with knowledge of relevant facts. Plaintiff countered that this was unnecessary because Plaintiff had identified the police chief as a potential third party, which presumptively meant that the police chief had knowledge of relevant facts. The trial court excluded the police chief's testimony.

Plaintiff also had retained an expert investigator. During the direct examination of this expert, the expert testified that he did not believe there was probable cause to arrest the plaintiff for DWI based upon polygraph examinations. Defendant objected to this testimony because it had not been previously timely disclosed. Plaintiff's attorney argued that he only had learned of the expert's conclusions in this regard with the last twenty four hours because it "had not become an issue until trial." The trial court questioned why Plaintiff could not have informed opposing counsel of the testimony after learning of it and why no report was provided. Plaintiff provided an answer to neither question. The court would not allow the expert to offer undisclosed opinions.

Plaintiff had only provided the defense with the subject matter, not the substance, of the expert's expected testimony. Thus the disclosure was incomplete, making it subject to exclusion. As in ***Duerr***, Plaintiff made no attempt to demonstrate that the failure to fully designate did not surprise OR prejudice the other party OR that the failure to make complete discovery was for good cause. Plaintiff made no attempt in these regards, but instead tried to argue only that he did not become aware of the opinions until twenty four hours before the expert testified at trial. Plaintiff failed to convince the court that he was not aware of the issue and the probable need for the expert's testimony long before trial.

3) ***Rankin v. FPL Energy, LLC***, 266 S.W.3d 506 (Tex.App.-Eastland 2008, pet. denied).

***Izaguire*** raises some issues that are similar to those raised with regard to untimely designated rebuttal witnesses or experts. ***Rankin*** actually addresses this

issue. The case arises from a claim for injunctive relief brought by plaintiffs against a wind farm on the basis that the wind farm was a visual nuisance. There is no cause of action for visual nuisance in Texas; however, plaintiffs tried valiantly to get around this obstacle. Defendant filed a motion for summary judgment and the trial court struck plaintiffs fact and expert rebuttal witnesses. Plaintiffs appealed claiming this was error.

Plaintiffs had attempted to call three non-party landowners who had property adjacent to the wind farm to provide factual testimony. These witnesses had not been timely disclosed and were excluded. Additionally, Plaintiff attempted to recall their sound expert to rebut testimony by defendant's sound expert concerning an EOA publication on sound levels. Plaintiffs had not disclosed that their expert would offer testimony on this subject matter and the testimony was excluded. While there was disagreement about whether the fact witnesses had to be disclosed, the appellate court found the matter moot because there was no demonstration of harm from the exclusion of the witnesses' testimony. There were other witnesses who offered the same testimony. The main issue focused on the undisclosed rebuttal opinions of plaintiff's testifying sound expert.

The dispute in this instance once again centered on what was disclosed with regard to the expert's anticipated testimony and what was not disclosed. Plaintiffs merely disclosed that their expert "would evaluate FPL's expert opinions and that he would render an opinion based upon any conclusion expressed in their report. Plaintiffs, however, did not contend that they specifically disclosed [their expert's] opinion on the proper application of the Levels Document." This is insufficient and the court so found in excluding the testimony.

When the three above cases are read together it becomes clear that there is an advantage for the party seeking affirmative relief to produce an expert report at time of designation. This finesse's an obligation on the part of the parties not seeking affirmative relief to fully disclose with regard to their respective testifying experts, before the parties seeking relief must produce their experts for depositions. The advantage of this approach is that the experts for the party's seeking affirmative relief will be aware presumably of all the defense expert's opinions and can timely respond to them with a supplemental report, disclosure and/or in their deposition. If the party seeking affirmative relief does not take advantage of this procedure, the risks and outcomes outlined in the above cases are predictable. See *Moore, v. Mem'l Hermann Hosp. Sys., Inc.* 140 S.W. 3d 870, 875 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2004, no pet.) (when a party reasonably anticipates the need to rebut the testimony of an opposing expert, the failure to disclose is not excused by characterizing the witness as a rebuttal witness).

## **9. DEPOSITIONS:**

### **A. SCOPE**

**See, *In re Univar USA, Inc.*, --- S.W.3d ----, 2010 WL 1610760 (Tex.App.-**

Beaumont), under Scope of Discovery-Oral Depositions, above.

## **B. 202 PRE-SUIT DEPOSITIONS**

### **1) *In re Contractors Supplies, Inc.*, Not Reported in S.W.3d, 2009 WL 2488374 (Tex.App.-Tyler)**

This decision involving the requirements of a 202 petition to perpetuate testimony arises from a pathetic situation. A man who had worked for a company for a number of years retired and then filed a petition for 202 videotaped deposition to perpetuate his own testimony because he had stage 4 metastatic lung cancer that he allegedly contracted from silica exposure so he did not expect to live long enough to file or participate in the anticipated subsequent litigation. His ex-employer fought him tooth and nail over whether the trial court had jurisdiction to hear the petition. Since those arguments are not germane to the discovery issues, they will not be discussed here. However, the respondent also objected because the petitioner had failed to produce and have admitted evidence in support of his motion supporting the claim that "allowing [him] to take the requested deposition may prevent a failure or delay of justice in an anticipated suit[.]" **See** Rule 202.4(1). The petitioner filed a verified petition, but a verified petition does not constitute evidence. Further, petitioner's attorney submitted a letter setting out his understanding of petitioner's diagnosis and prognosis. This letter was held to be hearsay. Additionally, no evidence was actually submitted to the court. Without evidence having been submitted by the petitioner showing that the deposition may prevent a failure or delay of justice, a trial court abuses its discretion in ordering a Rule 202 petition to perpetuate testimony.

### **2) *In re Donna ISD*, --- S.W.3d ----, 2009 WL 3194691 (Tex.App.-Corpus Christi)**

The terminated chief financial officer of the Donna Independent School District sought an investigatory pre-suit deposition regarding statements that were made against him that he considered slanderous. More specifically, he sought the depositions of various board members to investigate a potential claim of slander and tortious interference with a business relationship. The school district raised a number of objections (including immunity and failure to exhaust administrative remedies) regarding the jurisdiction of the court to hear the petition. However, these objections were rejected and it was found that the petitioner had established a basis in the proper court to take the pre-suit depositions. The key to the ruling is that the court did not accept the respondent's argument that it was clear that the petitioner anticipated filing a lawsuit against the board. If there was a potential for a case against some other individuals or entities, then the jurisdictional arguments were irrelevant and the court in which the petition for 202 deposition would have jurisdiction of any subsequent suit. The court found that the petitioner had established that he merely wished to investigate the basis for a potential claim of slander and tortious interference, which might not include the board. Therefore, the court was proper and would have jurisdiction under the future suit. The court pointed out that "[t]here is no requirement in Rule 202 that the person

sought to be deposed be a potentially liable defendant in the claim under investigation." **City of Houston v. U.S. Filter Wastewater Group, Inc.** 190 S.W. 3d 242, 245 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2006, no pet.

### C. NON-PARTIES

**In re Reaud**, 286 S.W.3d 574 (Tex.App.-Beaumont, 2009, no pet.)

In this case an outside director of a corporation's board was noticed for a deposition by the opposing party serving the corporation's attorney. The director, a non-party, asserting that he was not under the control of the corporation and that he was one of the corporation's attorneys, moved for protection from the deposition. The corporation (Huntsman) insisted that the director be served with a subpoena and that his deposition be taken in the county of his residence, but the noticing party refused these requests and obtained an order compelling the director to appear for a deposition. The appellate court ruled that the trial court abused its discretion in ordering the deposition because there was insufficient evidence that the board member was under the Huntsman's control.

There is no question that a non-party who is under the control of a party can be compelled to attend a deposition by serving a notice on the attorney for the party who has control of the non-party witness. Although the court observed "Rules 199.3 and 205.1 do not expressly provide a procedure for resolving a dispute over control," it made no ruling about what party in this situation would bear the burden.

The parties had chosen to follow the procedure for objecting to an Apex deposition (See **In re Alcatel USA, Inc.**, 11 S.W.3d 173, 175 (Tex.2000) (orig. proceeding)). The corporation opposing the deposition produced an affidavit from the non-party director that he was not under the control of the bank corporation and that he had no unique information about any material facts. Without deciding whether this was a proper approach, the appellate court found that the affidavit under the procedure tacitly agreed upon by the parties shifted the burden to the party seeking the deposition to prove that the non-party witness was under the control of the corporation opposing the deposition.

The Court found no statute, nor any corporate by-law that ostensibly gave the corporation any power over the director to compel his appearance at the deposition; therefore, the appellate court concluded that the party seeking the deposition had failed to sustain its burden to show that the non-party director was under the control of the corporation opposing the deposition.

Under the record before us, which does not contain the corporation's articles or bylaws, and based on the Texas statutes relevant to corporate governance, we hold that there is no evidence in the record to support the trial court's implied finding that Huntsman could control Reaud's

appearance at a deposition as a person subject to the control of a party.

It should be noted that the appellate court made no ruling regarding whether the non-party director could be subpoenaed, nor with regard to the scope of discovery at such a deposition.

**D. COURT DISCRETION TO LIMIT**

*In re West*, --- S.W.3d ----, 2009 WL 946847 (Tex.App.-El Paso) (See discussion above).

**10. SUPPLEMENTATION:**

**A. LATE REFINEMENTS TO AN EXPERTS OPINIONS ARE ALLOWED WITHOUT TIMELY SUPPLEMENTATION**

*BP America Production Co. v. Marshall*, 288 S.W.3d 430 (Tex.App.-San Antonio 2008)

This case involved a dispute over an oil and gas lease, so of course revenue calculations were an important factor in the case, and where there are revenue calculations there are of course experts and predictably disputes over the completeness of expert designations. This case followed convention.

In this case the Plaintiffs were moving to exclude testimony of Defendant's expert on revenue calculations claiming that the expert's opinions had not been timely disclosed. Plaintiffs responding by showing that the expert's testimony was based upon numbers provided by an important witness who had only been produced by Plaintiff's one month before trial. The trial court allowed the testimony. The appellate court found that this demonstration was sufficient to show good cause for the late disclosure of the expert's opinions and that based upon this record the trial court had made an "implicit" finding of good faith.

Also it is important to note that the Court found that the expert's contested calculations:

were updates of previously disclosed information, altered due to the passage of time. This court has held that an expert may "modify his testimony based on refinements in his calculations ... through the time of trial without ... the need to supplement." *Vela v. Wagner & Brown, Ltd.* 203 S.W.3d 37, 53 (Tex. App. – San Antonio 2006, no pet.) ("When an expert simply applies different data of record to a previously disclosed formula to render an alternate opinion

than the opposing expert, that qualifies as a mere refinement of his opinion without the need to supplement.” *Vela, supra*. The provision of the calculations shortly before trial was not a bar to the admission of Graham's testimony. See *id*.

This latter concept also is discussed in *In re Commitment of Salazar*, abstracted below.

## **B. DUTY TO SUPPLEMENT- EXCEPTIONS**

*In re Commitment of Salazar*, Not Reported in S.W.3d, 2008 WL 4998273 (Tex.App.-Beaumont 2008, pet. denied)

The underlying matter involved a petition to civilly commit Joes Salazar as a sexually violent predator pursuant to Chapter 841 Texas Health & Safety Code.

I fear this is one of those cases where the result justifies the means. At the hearing, a witness for the State testified that she based her opinions in part on review of notes of recent interviews that she had conducted independently. She had not informed the District Attorney about the interviews nor had she provided the State with her notes. Defendant moved to strike the testimony. The State argued that 1) the individuals who had been interviewed had been identified as individuals with knowledge of relevant facts; 2) the notes had never been produce to the District Attorney's office; therefore, the State was not obligated to produce the notes to the defendant; and 3) the interviews did not add new opinions to those the expert already had disclosed.

The Court found that the defendant had had the opportunity to depose the interviewees prior to trial. The appellate court points out that the duty to supplement does not arise until a party learns that its response is no longer complete and correct. The Court may exclude a witness when this duty is violated. What is somewhat controversial about the appellate court's opinion is that it seems to state that since the District Attorney (i.e. the State) was not aware of the interviews or notes there was not a duty to supplement. This raises the question of whether there is “imputed” knowledge through the retained expert witness. In other words, is the party sponsoring the retained expert on constructive notice of what opinions the expert formulates and what data the expert relies upon in the formation of all such opinions? Or is there essentially a policy of “don't ask, don't tell” in this situation. This question is neither raised nor addressed in the opinion. Indeed, this issue is marginalized in the opinion because the appellate court finds that the expert's opinions were not substantially modified by the interviews, but that the information obtained by the interviews merely was a “reiteration” of information the expert already had compiled and did not change the expert's opinions. See, *BP America Production Co. v. Marshall*, above.

11. **SANCTIONS:**

**A. SUPPLEMENTATION AND CONTINUANCE**

***PR Investments and Specialty Retailers, Inc. v. State***, 251 S.W.3d 472 (Tex.2008)

The underlying dispute involved a condemnation proceeding and the specific question of whether the trial court had subject matter jurisdiction to hear the matter. Without going into an exhaustive substantive discussion of the main issue in the case, the nut of the holding with regard to discovery sanctions is that if a court may impose lesser sanctions, then draconian sanctions are inappropriate. The Supreme Court sympathized with the trial court that given the trial court's erroneous understanding of its jurisdiction the draconian measure of dismissing the State's claim and imposing harsh economic sanctions for costs and expenses was warranted, but that applying the correct law the draconian sanction was no longer warranted.

**B. RULE 193.6 SANCTIONS**

***Stonehill-PRM WC I, L.P. v. Chasco Constructors, Ltd.***, Not Reported in S.W.3d, 2009 WL 349136 (Tex.App.-Austin 2009)

Tex. R. Civ. P. 193.6 allows a court to strike allegations for which discovery is not timely disclosed or to grant a continuance of the trial to allow the supplementation and examination of it by the opposing side. However, party must demonstrate good cause for the untimely disclosure and that there is a lack of unfair prejudice or unfair surprise to the opposing party by the late disclosure. In this case, Stonehill failed to timely disclose an alternate measure of damages. In fact it did not disclose the alternate measure until after the discovery control plan deadline. The court struck the alternative measure of damages and Stonehill sought mandamus review. The appellate court found that the trial court was within its discretion to strike the late disclosure because Stonehill had failed to meet its burden for obtaining leniency for its late disclosure. Further, Stonehill had not requested a continuance to allow the late supplementation and the opponents' examination of it:

Stonehill has failed to address its burden to show good cause for its failure to disclose that it was seeking its cost to complete the Project as an alternative measure of damages or why there is a lack of unfair prejudice or unfair surprise to appellees. Nor did Stonehill seek a continuance or trial postponement to amend its discovery responses or to allow Chasco to conduct discovery regarding the costs to complete the Project

### C. FAILURE TO FOLLOW AND DOCUMENT TRANSAMERICAN CRITERIA EQUALS ABUSE OF DISCRETION

***Texas Integrated Conveyor Systems, Inc. v. Innovative Conveyor Concepts, Inc.*** --- S.W.3d ----, 2009 WL 3177570 (Tex.App.- Dallas, 2009)

A trial court entering sanctions against a party must follow the Transamerican criteria, which must be evident from the record. ***TransAmerican Natural Gas Corp. v. Powell***, 811 S.W.2d 913, 916 (Tex.1991)

First, a direct relationship must exist between the offensive conduct and the sanction imposed. *Id.* Second, the sanction must not be excessive. *Id.* “A sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes. It follows that a court must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance.”

Compliance with these criteria must be evident from the record. In this instance the appellate court found that the record failed to detail the offenses for which sanctions were assessed and failed to indicate that the court had considered lesser sanctions. Accordingly, the appellate court found that the trial court had abused its discretion and overruled the sanctions order.

### D. MONETARY SANCTIONS UPHELD

***ABN Amro Mortg. Group, Inc. v. Rabalais***, Not Reported in S.W.3d, 2008 WL 5248880 (Tex.App.-Corpus Christi, 2008)

At issue in this case was ABN's conduct with regard to its responses to discovery requests propounded to it by the Rabalaises. The bulk of the discovery requests at issue were served in 2004. In response, ABN generally made the promise that it “*will supplement*” its discovery answers. (How many times have you seen that response?). The problem is that ABN did not show good faith in timely providing discovery. It disregarded Rule 11 agreements and disregarded Court orders. It produced documents five minutes before the last motion for sanctions hearing, and even then the production was neither complete nor in compliance with the Court's order. The trial court assessed \$100,000 in sanctions against ABN, which continued to assert that it was producing discovery as soon as possible, but that responding to discovery was hard and laborious, but the appellate court made clear that a party cannot complain of undue burden when it creates the undue burden by its own discretionary actions:

”However, ABN's difficulty in responding to the discovery was the direct result of its own discretionary actions and inactions, and accordingly, should not excuse ABN's dilatory efforts. *Cf. In re Whitely*, 79 S.W. 3d 729, 735 (Tex. App. –

Corpus Christi, 2002, orig. proceeding) (“We also recognize that, “[t]o the extent that a discovery request is burdensome because of the responding party's own conscious, discretionary decisions [for example, the unorganized storage of inactive patient records], that burdensomeness is not properly laid at the feet of the requesting party, and cannot be said to be ‘undue.’”) (quoting *ISK Biotech Corp. v. Lindsay*, 933 S.W.3d 565, 569 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1996. orig. proceeding)).

The appellate court upheld the \$100,000 sanction, finding that under the facts in this particular case, the trial court had not abused its discretion.

#### **E. DISCOVERY AGAINST ATTORNEY UPHELD**

*De Los Santos v. Johnson*, Not Reported in S.W.3d, 2008 WL 3971455 (Tex.App.-Corpus Christi,2008, pet. denied)

Donna Johnson, a vocational rehabilitation counselor, filed a sworn account against an attorney who had hired her to as an expert in a medical malpractice case, seeking to recoup her fees she claimed she had earned. Johnson sought the attorney’s deposition plus the written agreement she had with the attorney for payment of fees. The attorney refused to produce the agreement to Johnson or for in camera inspection by the court, even subject to a confidentiality agreement or with redactions of putatively privileged information.

The opinion is informative because it sets out how the trial court went about imposing sanctions and crafting a sanctions order that effectively was a sustainable “death penalty” sanction against the attorney for flagrant discovery abuse. The trial court had imposed a number of lesser sanctions and had documented the attorneys prior and continuance conduct in the order along with the court’s prior measured response to such conduct. The appellate court found that the death penalty sanctions, including striking the attorney’s expert witnesses was not an abuse of discretion but was a proper exercise of the court’s inherent power. See also, *In re Gupta*, 263 S.W.3d 184 (Tex.App.-Houston [1st Dist.],2007).

#### **F. PAYMENT OF MONETARY SANCTIONS**

*In re Arnold*, Not Reported in S.W.3d, 2008 WL 4367495 (Tex.App.-Beaumont,2008)

This case dealt with the imposition of monetary sanctions. The appellate court noted that Supreme Court has made clear that “[i]f the imposition of **monetary sanctions** threatens a party's continuation of the litigation, appeal affords an adequate remedy only if **payment** of the **sanctions** is deferred until final judgment is rendered and the party has the opportunity to supersede the judgment and perfect his

appeal.” **Braden v. Downey**, 811 S.W.2d 922, 929 (Tex. 1991); see also **In re TIG Ins. Co.** 172 S.W.3d 160, 171 (Tex. App. – Beaumont 2005, orig. proceeding) (“[W]here sanctions are imposed, the trial court should delay the payment of sanctions until the termination of the lawsuit, or make a written finding that the payment of sanctions would not obstruct the ability of the party being sanctioned to defend the suit.”). Petition for mandamus in this instance was denied because the petitioners had not made any demonstration to the trial court that imposition of monetary sanctions would in any way obstruct his ability to proceed with the prosecution or defense of his claim. Should the petitioner present such evidence to the trial court, the trial court would be obliged to followed the rule set down in **Braden v. Downey**, *supra*.

#### **G. COURT PLENARY POWER**

**Sims v. Fitzpatrick**, 288 S.W.3d 93 (Tex.App.-Houston [1st Dist.]2009, no pet.)

The holding in this case notes that a sanction order does not need to be included in a final judgment, it may be issued separately. Further, the trial court has discretion to enter a sanctions order even after a judgment, as long as the trial court maintains plenary power.