

**2009 DISCOVERY STIMULUS PACKAGE:
TEXAS DISCOVERY UPDATE**

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CHAPTER 13

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A. SCOPE

1. COURT DISCRETION:

a. *In re Watson*

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

Trial court conditional limitation on scope of discovery:

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.

b. *In re West*

Trial Court may limit scope of deposition.

Just as a trial court has discretion to limit the scope of written discovery (*See, In re Watson*, above) the trial court has discretion to limit the scope of depositions. Tex. R. Civ. P. 192.4. Indeed, the Texas Supreme Court long ago made clear that no discovery device may be used for fishing. *K Mart v. Sanderson*, 937 S.W. 2d 429 (Tex. 1996). The scope of discovery set out in Tex. R. Civ. P. 192.3 applies to all discovery devices.

The factual background in *West* is a little arcane. It essentially dealt with an action for injunctive relief sought by a bail bond company who contended it was being harassed by the local sheriff. Under law, a bail bondsman is required to file a financial statement with the sheriff. The sheriff sought the deposition of the bail bondsman’s CPA and all the supporting documentation for the financial statement for 3 years. The bail bondsman filed a motion to quash claiming the request was overbroad. The judge granted the motion to quash. The trial court found that the scope of the deposition (and attendant request for production) should be tailored to the claims in the case which related only to

one year, 2006. The sheriff would not agree to this limitation so the trial court quashed the depositions:

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 Realtor’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).

2. BURDEN REGARDING RELEVANCY

Allstate Ins. Co. v. Plambeck

Slip Copy, 2008 WL 5411435 (N.D.Tex 2008)

Requirements and burdens with regard to demonstrating relevancy.

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 important in 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.

3. IMPORTANCE OF PLEADING

a. *Ford Motor Company v. Castillo*

279 S.W.3d 656(Tex. 2009)

Jury Abuse, Withdraw of Settlement Agreement, Breach of Contract, Scope of Discovery.

This case involved a very troubling allegation about potential jury abuse. During deliberations, the jury sent out a note asking the judge about the maximum amount of damages that could be awarded. Ford became concerned the jury was about to return a substantial verdict against it and settled with plaintiffs. Subsequently, Ford learned that the presiding juror on her own had sent out the note without the knowledge and consent of the other jurors and that the majority of the jurors at the time of the note were answering questions in favor of Ford. Ford filed a motion to delay settlement and asked for discovery concerning potential jury abuse. The plaintiff filed a breach of settlement contract claim for which it sought summary judgment. Ford responded that there had been a mutual mistake with regard to the settlement. The trial court denied Ford the requested discovery. The appellate court affirmed. The Texas Supreme Court agreed with Ford and reversed. The Supreme Court's discussion of scope of discovery is informative.

Castillo asserts that the trial court did not abuse its discretion in denying Ford's discovery request because the evidence Ford sought to develop was immaterial as it did not bear on any proper defense to the breach of contract action. Ford offers mutual mistake as one such potential defense. 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." *Axlelson v. McInhany*, 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. This record does not demonstrate such a situation. [emphasis added; footnotes omitted]

Also important in the discovery context is how the Texas Supreme Court dealt with the issue of discovery of potential discovery abuse:

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. 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). [Footnotes omitted]

b. *In re Pennington*, see below.

Inferential rebuttal allegations

4. OVERBREADTH

a. *In re Mallinckrodt, Inc.*

262 S.W.3d 469 (Tex.App.-Beaumont 2008, no pet.).

Scope of decades overbroad, burden of proof re relevance.

The discovery dispute arises out of a benzene case that allegedly resulted in a worker developing non-Hodgkin's lymphoma that caused his death. Plaintiffs notice Defendant's corporate representatives and in conjunction with the depositions, requested the production of a number of documents regarding Defendants 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 curium). 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.

b. *In re Steadfast Insurance*

Not Reported in S.W.3d, 2009 WL 1424634 (Tex.App.-Hous. [1st Dist.]

Discovery request overbroad; not properly limited by time and geographic expanse.

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 [14th 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].

c. *In re Memorial Hermann Healthcare System*

274 S.W.3d 195(Tex.App.-Houston[14thDist.], 2008, pet. filed)

Discovery request not overbroad.

This case arises out of a dispute between two rival hospitals. Stealth Limited filed an antitrust 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).

5. CORE WORK PRODUCT NOT DISCOVERABLE

a. *In Re BP Products North America, Inc.*

263 S.W.3d 106 (Tex. App. Houston [1st Dist.], 2006, orig. proceeding)

Reserve calculation beyond scope of discovery.

No waiver of attorney client privilege and core work product by disclosing to the SEC the amount but not the calculations and methodology.

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 which he stated that while the number was not confidential the materials that he used to reach the calculation and the methodology he used were and remain 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 (Rule 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, leaving 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.

b. *In re Beirne, Maynard & Parsons, L.L.P.*

260 S.W.3d 229, (Tex.App.-Texarkana 2008, mandamus denied)

No Sword/ Shield protection, See below.

6. FINANCIAL RECORDS

a. *In re Brewer Leasing, Inc.*

255 S.W.3d 708 (Tex.App.-Houston [1st Dist.]2008, orig. proceeding).

Scope – financial records and corporate tax returns with regard to net worth.

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, holding 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 therefore 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*

266S.W.3d 668, Tex.App.-Eastland 2008, no pet.)

Order for financial records regarding net worth overbroad.

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 *supra*, 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: these included 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 Manion*

Not Reported in S.W.3d, 2008 WL 4180294 (Tex.App.-Amarillo,2008)

Financial records relevant to claims pled.

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 Plaintiffs purchase and sale of horses, and also served a deposition with subpoena duces tecum for documents from Plaintiffs 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.

7. AUTHORIZATIONS

a. *In re Mitsubishi Heavy Industries America, Inc.*

269 S.W.3d 679, (Tex.App.-Dallas 2008, no pet.)

Court discretion to order signed medical authorization.

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 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 offer any modification. Accordingly, no abuse of discretion was found.

b. *In re Soto*

270 SW3d 732 (Tex.App.-Amarillo2008, mandamus denied).

Medical authorizations.

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 Rule 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 Rule 193 and file a motion for protection.

c. *In re Pennington*

Not Reported in S.W.3d, 2008 WL 2780660 (Tex.App.-Fort Worth,2008)

Blanket authorization abuse of discretion when no mental condition pleaded

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 encompasses 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, asserting that this information is 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 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 Plaintiffs 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).

Defendant’s, 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 the Plaintiff's mental health records going back to 1996 was an abuse of discretion:

8. HARD DRIVES

a. *In re Weekley Homes, L.P.*
2008 WL 4335183 (Tex. App. – Dallas, 2008)
application
For mandamus filed (October 03, 2008)

The central issue in this case is whether a trial court abuses its discretion by ordering a party to produce its hard drives to an opposing party so that the requesting party's expert may examine the hard drives for relevant information. The decision in this case likely could have great significance not only for the scope of e-discovery in Texas but also with regard to the scope of discovery generally. **See, Robbins "Hard Drives and Determination: Texas Supreme Court to Decide How Far Is Too Far in E-Discovery" (Texas Lawyer, April 6, 2009).**

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

Case of first impression in Texas.

The court approved the following protocol with regard to discovery of hard drives:

1) the party seeking discovery selects a forensic expert to make a mirror image of the computer hard drives at issue.

2) 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.

3) That party is then to review the documents, produce those responsive to the discovery request, and create a privilege log for those withheld.

4) Finally, the trial court will conduct an in-camera review should any disputes arise regarding the entries in the privilege log.

B. OBJECTIONS

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

Boiler plate objections improper

Although this 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 Rule 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.

C. PRIVILEGES

1. *In re Union Energy, Inc., Gulf Exploration, Inc. And Mc2 Resources, Llc, Relators*

--- S.W.3d ----, 2008 WL 4757008
(Tex.App.-Tyler,2008)

Privacy rights inadequate to raise specific privilege

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, it 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 Rule 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.

2. *In re Beirne, Maynard & Parsons, L.L.P.*

260 S.W.3d 229, Tex.App.-Texarkana 2008, mandamus denied).

Attorney billing records in attorney suit for fee – sword shield analysis with regard to attorney claim of protection based upon attorney work product privilege

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.”

3. *In re Suarez*

Not Reported in S.W.3d, 2008 WL 4310098 (Tex.App.-Hous. (14 Dist.) 2008)

May not plead 5th Amendment and seek discovery from opponent

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 Sedeno-Suarez's lawful refusal to participate in meaningful discovery. *See Wehling v. Columbia Broad. Sys.* 608 F.2d 1084, 1087-89 (5th Cir. 1979).

4. *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 Dist.],2008)

Waiver of attorney/client privilege.

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.

5. *In re Parnham*

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

No disqualification for attorney reviewing snapped back documents

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

6. *In re Westwood Affiliates, L.L.C.*

263 S.W.3d 176 (Tex.App.-Houston [1st Dist.],2007, orig. proceeding).

Investigative privilege.

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 Open 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)

D. EXPERTS

1. THE ERSEK RULE

Fort Brown Villas III Condominium Association v. Gillenwater
2009 WL1028047, 52 Tex. Sup. Ct. J. 632
(Tex.2009)

Tex. R. Civ. P. 193.6 applies to motions for summary judgment

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, 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 rationale would apply.

2. COURT DISCRETION

Hilburn v. Providian Holdings, Inc.
Not Reported in S.W.3d, 2008 WL 4836840
(Tex.App.-Hous. [1st Dist.] 2008)

Court discretion to grant late designation (See also, supplementation)

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) and *PR Investments and Specialty Retailers, Inc. v. State*, 251 S.W.3d 472, 51 Tex. Sup. Ct. J. 484 (Tex.,2008), discussed below.

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.

3. CONSULTING EXPERTS

In re Energy Transfer Partners, L.P.

Not Reported in S.W.3d, 2009 WL 1028056 (Tex.App.-Tyler 2009)

Protection of consulting only witness opinions and reports

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 consultants 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. *Axelsson, 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 *Axelsson, 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.

4. SANCTIONS

a. *Duerr v. Brown*

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

Sanctions for not producing expert promptly for deposition when no report.

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 C due to the actions of the tendering party C 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.

b. *Izaguire v. Cox*

Not Reported in S.W.3d, 2008 WL 4427272 (Tex.App.-Waco, 2008)

Sanctions for failure to make complete expert disclosure (See also, sanctions)

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 probably 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.

c. *Rankin v. FPL Energy, LLC*

266 S.W.3d 506 (Tex.App.-Eastland 2008, pet. denied).

Opinions of rebuttal expert struck for failure to timely disclose

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 finesses 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 [14th 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).

E. REQUESTS FOR ADMISSIONS

United States Fidelity and Guaranty Co. V. Goudeau

272 SW3d 603 (Tex. 2008)

Dual capacity

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.

F. SUPPLEMENTATION

1. *BP America Production Co. v. Marshall*

--- S.W.3d ----, 2008 WL 5169635 (Tex.App.-San Antonio, 2008)

Supplementation allowed

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 important to note 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.

2. *In re Commitment of Salazar*

Not Reported in S.W.3d, 2008 WL 4998273 (Tex.App.-Beaumont 2008)

Duty to supplement – exceptions.

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 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.*

G. SANCTIONS:

1. *PR Investments and Specialty Retailers, Inc. v. State*

251 S.W.3d 472 (Tex.,2008)

Supplementation and continuance.

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.

2. *ABN Amro Mortg. Group, Inc. v. Rabalais*

Not Reported in S.W.3d, 2008 WL 5248880 (Tex.App.-Corpus Christi, 2008)- Monetary sanctions upheld

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 [1st 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.

3. *De Los Santos v. Johnson*

Not Reported in S.W.3d, 2008 WL 3971455 (Tex.App.-Corpus Christi, 2008)

Discovery against attorney upheld.

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 [1 Dist.], 2007).

4. *In re Arnold*

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

Payment of monetary sanctions.

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*.