

**DISCOVERY UPDATE 2008:  
WE STILL GET PEANUTS;  
THE BAGS ARE JUST SMALLER**

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**State Bar of Texas  
24<sup>th</sup> Annual Advanced Personal Injury Law Course  
July 16-18, 2008  
August 6-8, 2008  
August 27-29, 2008**

**CHAPTER 16**

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**I. RULE 76a**

**A. *BP Products North America, Inc. v. Houston Chronicle Pub. Co.***--- S.W.3d ----, 2006 WL 1350303 (Tex.App.-Hous.(1 Dist.)). **SEALING DOCUMENTS**

Sealing documents disapproved based upon failure to prove basis for sealing court documents.

**II. DISCOVERY CONTROL PLANS**

**A. *Abdelhak v. Farney***, Not Reported in S.W.3d, 2007 WL 4180133 (Tex.App.-San Antonio).

Sanctions for failure to comply with requirements of Rule 190.5.

**B. *Litchenburg v. Conmed Corp.*** Not Reported in S.W.3d, 2008 WL 598267 (Tex.App.-Hous. (1 Dist.)). **SANCTIONS AND NEW TRIAL SETTINGS**

Sanction for not complying with Court order Rule 215 survives trial re-setting. Tacitly observing that a Rule 193.6 automatic exclusion might survive a trial re-setting.

**C. *Allen v. United of Omaha Life Ins. Co.***, 236 S.W.3d 315 (Tex.App.-Fort Worth,2007). **LEVEL 2 DEADLINES APPLY BY DEFAULT**

While the rule states that the court “must” enter a level 3 scheduling order on a party’s motion, it does not require that the order provide deadlines different from those under a level 2 case; even under a level 3 scheduling order, the level 2 deadlines continue to apply “unless specifically changed in the discovery control plan ordered by the court.” TEX.R. CIV. P. 190.4(b). That decision is left to the trial court’s discretion: “The discovery control plan ordered by the court ...*may* change any limitation on the time for ... discovery set forth in these rules.” *Id.* (emphasis added).

**D. *In re BP Products North America, Inc.***, ---

S.W.3d ----, 2008 WL 204506 (Tex.2008). **RULE 11 AGREEMENTS**

This case arose out of the BP Plant Explosion. The plaintiff’s sought the deposition of the CEO at the time of the explosion, Lord Browne (who at the time of the discovery dispute had resigned in disgrace as CEO). The parties had entered into an agreement to take the deposition of another executive in lieu of Lord Browne’s deposition, subject to Plaintiff having leave to take the deposition of Lord Browne if evidence was developed in the other deposition that Lord Browne had knowledge of unique facts not possessed by the other executive. After the agreement was entered, Lord Browne started making public appearances and providing public information that Plaintiffs claimed showed he had unique knowledge and that they had been duped into entering the agreement. On its surface, the issue appeared to be one involving the Apex Witness Rule; however, on closer examination the Texas Supreme Court held that the issue came down to whether a trial court had discretion to overrule a valid Rule 11 agreement between the parties to modify the rules of procedure. It held that in this instance, the trial court had abused its discretion.

Rule 191.1 provides that “except where specifically prohibited” the parties may modify the “rules pertaining to discovery” by agreement. TEX.R. CIV. P. 191. An agreement is enforceable when it complies with the terms of Rule 11, or as it affects an oral deposition, if made a part of the record of the deposition. *Id.* The agreement in this case complied with the requirements of Rule 11. *See* TEX. R. CIV. P. 11. The parties do not argue that the agreement was specifically prohibited or that the agreement was outside the scope of Rule 191.1. The question here is whether the trial court had adequate reason to set aside the parties’ agreement...The trial court abused its discretion in setting aside a valid discovery agreement without good cause. [footnotes omitted].

### III. SCOPE

#### A. *Barkley v. Life Ins. Co. of North America*, Slip Copy, 2008 WL 450138 (N.D.Tex.). **CONTENTION INTERROGATORIES**

This federal Court opinion is informative with respect to the issue of responding to contention interrogatories:

*Interrogatory No. 1:*

Please state the basis for each of the denials expressed in Defendant's Original Answer.

*Interrogatory No. 2:*

Please state the basis for each affirmative defense expressed in Defendant's Original Answer.

Now that discovery is closed, defendant should be able to *generally explain* the factual basis for each of the denials and affirmative defenses pled in its original answer. That is all the interrogatories require. Plaintiff is entitled to these interrogatory answers at this stage of the litigation particularly in light of the March 7, 2008 deadline for filing dispositive motions. *Cf. Everett v. USAir Group, Inc.*, 165 F.R.D. 1, 3-4 (D.D.C.1995) (requiring defendant to answer contention interrogatories in ERISA action, but postponing the obligation to respond until near the end of the discovery period).

#### B. *Cedyco Corp. v. Whitehead*, --- S.W.3d ----, 2007 WL 5145392 (Tex.App.-Beaumont). **REQUESTS FOR ADMISSIONS**

Summary judgment based upon admissions to **requests for admissions** on pure questions of law is improper and reversed.

No. 8: The sole current legal owner of the Judgment is Anderson Martin Whitehead.

No. 9: Defendant Cedyco Corporation is not the current legal owner of the Judgment.

No. [sic] 10: Reasonable and necessary legal fees of the plaintiff in this suit are \$25,000.00.

The deemed admissions Numbers 8

and 9, as quoted above, are purely questions of law and, therefore, are improper summary judgment evidence. *See, Wheeler v. Green*, 157 S.W.3d 439, 443 (Tex.2005) (equating merits-preclusive discovery sanctions with merits-preclusive deemed admissions for due process purposes); *Boulet v. State*, 189 S.W.3d 833, 838 (Tex.App.-Houston [1st Dist.] 2006, no pet.) (summary judgment may not be sustained by deemed admissions that “embrace the fundamental legal issues to be tried”); *Gore v. Cunningham*, 297 S.W.2d 287, 291 (Tex.Civ.App.-Beaumont 1956, writ ref'd n.r.e.) (requests for admissions exist “to eliminate in advance of the trial fact issues which would not be in dispute, and ... the rule does not contemplate or authorize admissions to questions involving points of law”).

#### C. *In re Allied Chemical Corp.*, --- S.W.3d ----, 2007 WL 1713378 (Tex.). **ABEL INTERROGATORIES**

*Abel* interrogatories. “Premature” mass tort for harm allegedly caused from pesticide exposure. Tex. R. Civ. P. 193.1 duty to provide discovery. *See also, Able Supply Co. v. Moye*, 898 S.W.2d 766, 770 (Tex.1995).

“The discovery rules have been amended since *Able Supply*, now requiring that “a party must make a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made.” Parties and attorneys certify this to be true when they sign a discovery response; they can no longer simply choose to delay disclosure until the last minute.” [omitting footnotes].

#### D. *In re BP Amoco Chemical Co.*, Not Reported in S.W.3d, 2007 WL 177437 (Tex.App.-Hous. (14 Dist.)). **OVERBROAD REQUESTS**

Discovery of epidemiological studies. Claim of acute myelogenous leukemia (AML) due to benzene exposure.

**Request for Production No. 18:** Produce all **DOCUMENTS** in your possession reflecting

epidemiological studies and any underlying data for all epidemiological studies that were conducted and/or participated in by **DEFENDANT** with respect to exposure to **BENZENE**. All identifying information may be redacted.

**Request for Production No. 25:** Produce all correspondence and/or communications between this **DEFENDANT** and the American Petroleum Institute related to potential toxic effects of and/or safe levels of exposure to **BENZENE**. This request includes, but is not limited to, any and all draft reports, proposals, studies, research projects, submissions and/or discussions with Dr. Richard Irons.

Moffett's requests are overbroad because they do not limit the document production to time, place, and subject matter...Further, the discovery order is not limited to studies concerning the particular disease from which Moffett suffers... there is no requirement that realtors produce evidence to support their contention that the order is overbroad. It is overbroad on its face. . . The concept of "fit" discussed by the Supreme Court in *Daubert* is a critical issue to the question of generalizing epidemiology study results to a plaintiff in a particular case. . . Because Moffett has failed to show that he could qualify as a member of those study groups, his request is not reasonably tailored to include only relevant matters. See *In re CSX*, 124 S.W. 3d at 152.

**E. *In re Brewer Leasing, Inc.*, --- S.W.3d ----, 2008 WL 1833186 (Tex.App.-Hous. (1 Dist.)).**  
**FINANCIAL RECORDS AND CORPORATE TAX RETURNS**

Punitive damage claim. Plaintiff sought **financial records and corporate tax returns**. Defendant argued it had already produced unverified balance sheets showing net worth and that tax returns were undiscoverable.

The court held that unlike the situation in *Sears*, where the balance sheets produced were audited and verified, here the balance sheets are not audited, not certified, and do not include any affidavit or other statement to represent that they accurately reflect the net worth of the corporations. See *Sears, Roebuck & Co. v. Ramirez*, 824 S.W.2d 558, 559 (Tex.1992).

Therefore, the court held the additional financial records discoverable. However, the court concluded that the plaintiff had failed to show that the tax returns would not be unnecessarily duplicative of the other financial records ordered produced by the trial court, (i.e. the financial statements for a period of five years, the 2007 monthly financial statements, the bank statements for a period of time of over two years, and all documents reflecting any transfer of assets from each of the corporations to any other person or entity from June 1, 2006 through the present). Therefore, the corporate tax returns were held to be undiscoverable.

**F. *In re BNSF Ry. Co.*, Not Reported in S.W.3d, 2007 WL 4822488 (Tex.App.-Beaumont).**  
**OVERBROAD REQUESTS**

**Discovery of relevant documents and things.** FELA claim, alleging harm from repetitive exposure to ergonomic risk factors to legs. Requests for production of all files and videos pertaining to "ergonomics." The court found the requests objectionable as being improperly overbroad. "The requests for production are not limited to ergonomics issues related to knee injuries, or to employment conditions related to Holmes's employment as a brakeman, switchman, and conductor."

**G. *In re Cadle Co.*, Not Reported in S.W.3d, 2007 WL 2430027 (Tex.App.-Dallas).**  
**POST JUDGMENT DISCOVERY**

**Post judgment discovery** follows the same rules as does pre-trial discovery. Where defendant sought to protect various trusts from discovery, mere identification of the trusts was inadequate. To protect the trusts from discovery the defendant was required to produce evidence,

A party seeking discovery limits should provide evidence to the trial court in the form of affidavits or testimony, although in the circumstances involving claims of privilege, the documents themselves may, standing alone, constitute sufficient proof. Accordingly, we conclude that by presenting no evidence, Brorson has waived all objections. . .

**H. *In re Crown Castle Intern. Corp.*, --- S.W.3d ----, 2008 WL 222770 (Tex.App.-Hous. (14 Dist.)).**  
**CHOICE OF LAW**

This case involved a shareholders' derivative

action. While the general law in Texas is that discovery is procedural and that the law of the forum applies to procedure. (See *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex.2003) (per curiam) (orig.proceeding) (stating that Texas procedural rules define the scope of discovery). See also, *PennWell Corp. v. Ken Assocs., Inc.*, 123 S.W.3d 756, 763 (Tex.App.-Houston [14th Dist.] 2003, pet. denied) (stating that procedural matters are governed by the law of the forum); *In re Wells Fargo Bank Minn., N.A.*, 115 S.W.3d 600, 605 n. 7 (Tex.App.-Houston [14th Dist.] 2003) (orig.proceeding) (stating that even when the parties contractually choose the law of a state other than the forum state, matters of remedy and procedure are governed by the law of the forum state)), in this instance, Delaware law held that pleading was substantive therefore Delaware's law applied with regard to discovery.

**I. *In re General Motors Corp.*, Not Reported in S.W.3d, 2008 WL 541679 (Tex.App.-Tyler).  
DISCOVERY IN A PRODUCT LIABILITY DESIGN DEFECT CASE**

Defective fuel system fire case. The court ruled that the discovery was not properly limited in time or to vehicles relevant to the defect at issue in the case:

A number of the Albrights' discovery requests seek information on all General Motors vehicles made at any time. Although most of the Albrights' discovery requests focus on the S-10, even those discovery requests are not adequately limited in time. In failing to limit their requests, the Albrights clearly exceeded the scope of discovery. . .

See also, *In re Graco Children's Products, Inc.*, 210 S.W.3d 598, 601 (Tex.2006) (orig.proceeding) (While a corporate defendant's "state of mind" about a particular product may be discoverable, attempts to extend that inquiry to every product ever made by that party are likewise impermissible).

**J. *In re Honza*, --- S.W.3d ----, 2007 WL 4591917 (Tex.App.-Waco).  
DISCOVERY OF HARD DRIVES**

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.

**K. *In re Kimberly-Clark Corp.*, --- S.W.3d ----, 2007 WL 1881498 (Tex.App.-Dallas).  
REQUEST TO ENTER AND INSPECT PREMISES**

Scope of discovery for a **request to enter and inspect premises**. This case involved a real estate dispute. Plaintiff alleged fraudulent inducement and sought an phase II environmental inspection as part of its claim for declaratory relief. It also sought to inspect the property under Rule Tex. R. Civ. P. 196.7. The court held that the a balancing test was required for discovery and that the potential benefit of the discovery did not outweigh the potential harms that were alleged and uncontested:

a trial court's inquiry into whether to compel inspection must go beyond mere "relevance" and must balance the need presented by the moving party against the "burdens and dangers created by the inspection." See *Belcher v. Bassett Furniture Indus., Inc.*, 588 F.2d 904, 910 (4th Cir.1978);

Additionally, the court held that discovery cannot be used to accomplish the ends that are sought by the litigation:

a trial court abuses its discretion if it grants an order compelling discovery that allows a party to receive through discovery the relief sought in the main suit. See generally *Uvalde Rock Asphalt Co. v. Loughridge*, 425 S.W.2d 818, 820-21 (Tex.1968) (orig.proceeding).

**L. *In re Miller*, Not Reported in S.W.3d, 2008 WL 191960 (Tex.App.-Eastland).  
FEDERAL INCOME**

## FAX RETURNS

Another case involving discovery of **federal income tax returns**. See *In re Brewer Leasing, Inc.*, --- S.W.3d ---, 2008 WL 1833186 (Tex.App.-Hous. (1 Dist.)), above. Court addressed the following question: Does the trial court abuse its discretion by ordering the production of income tax returns for an *in camera* inspection without a showing that the information sought from the returns is not available from any other source? Yes.

### M. *In re Patel*, 218 S.W.3d 911 (Tex.App.-Corpus Christi, 2007). **FINANCIAL RECORDS AND FEDERAL INCOME TAX RETURNS**

Scope of discovery regarding depositions on written questions with subpoena duces tecum for **financial records and federal income tax returns**. This suit arises out of a claim for insurance coverage for damage to an inn caused by hail damage.

The defendant insurance company issued a third-party deposition on written questions with a subpoena duces tecum attached to plaintiff's bank requesting the following:

Any and all documents, including but not limited to, any and all bank statements, checks, deposit slips, withdrawal slips, loans, loan applications, property appraisals or any other documents relating to Baldev Patel and/or Baldev Patel d/b/a The Wharton Inn and/or Jayesh Patel, including, but not limited to, Accounts 20567123, 20903849 and any other open or closed accounts.

A similar notice to plaintiff's accountant asked for the following documents:

Copies of any and all documents relating in any way to Baldev Patel, Jayesh Patel and/or Baldev Patel d/b/a Wharton Inn, including, but not limited to U.S. Income Tax Returns with all accompany [sic] schedules and forms, income statements, balance sheets, financial statements, invoices and other documents supporting any deductions, expenses, or income for 1997 to the present.

**"Any and all"** does not make request over broad. The mere existence of the language "any and all" does

not violate the specificity requirements of discovery as long as the request is further restricted to a particular type or class of documents. See *Chamberlain v. Cherry*, 818 S.W.2d 201, 204 (Tex.App.-Amarillo 1991, orig. proceeding). Both subpoenas in question contain a description of a particular type or class of documents following the language "any and all." The requests show a reasonable expectation of obtaining information that will aid the dispute's resolution. See *In re Am. Optical Corp.*, 988 S.W.2d at 713.

The court held that the insurance company had met its burden showing the relevancy of financial documentation, but that it failed to meet its burden to require the production of income tax returns. See also, *In re Brewer Leasing, Inc.*, --- S.W.3d ---, 2008 WL 1833186 (Tex.App.-Hous. (1 Dist.)), above.

## IV. WRITTEN DISCOVERY

### A. *Izen v. Sjostrom*, Not Reported in S.W.3d, 2007 WL 968841 (Tex.App.-Hous. (14 Dist.)) **DUTY TO MAKE TIMELY DISCOVERY.**

It is the affirmative duty of the party from whom discovery is requested to provide an objection or assert a **privilege** protecting them from the discovery. See *In re Union Pac. Res. Co.*, 22 S.W.3d 338, 340 (Tex. 1999) (holding that a party who "seeks to exclude documents, records or other matters from the discovery process has the affirmative duty to specifically plead the particular **privilege** or immunity claimed").

In *Izen*, the plaintiff was bringing a claim for attorneys' fees against a group of investors who he alleged had wrongfully and libelously terminated his legal representation of the investors through an investor group. The plaintiff served interrogatories and requests for production on the investors, who did not timely serve any responses. The plaintiff filed a motion to compel, which was denied. The appellate court held this was a clear abuse of discretion:

The rules clearly mandate that the party from whom discovery is requested must respond to the discovery request in some way, whether by producing the information, providing an objection, or asserting a **privilege**. See Tex.R. Civ. P. 193.1 (stating that a party "*must* respond to written discovery in writing within the time provided by court order or these rules"...

This is true even if the information being requested in many of the discovery requests probably could have been protected from discovery by assertion of privilege. If the privilege is not timely asserted, it is waived:

Many of Izen's requests might have been subject to various objections or **privileges**, however, it is not the duty of this court to supply such. *See In Re Union Pac.*, 22 S.W.3d at 340. We find that, because Izen was denied access to information that is critical to the pursuit of his claims, he was prevented from properly presenting his case to this court.

**B. *Cedyco Corp. v. Whitehead***, --- S.W.3d ----, 2007 WL 5145392 (Tex.App.-Beaumont, 2008) *See* discussion above, under **SCOPE**.

**C. *CooperVision, Inc. v. Ciba Vision Corp.***, Slip Copy, 2007 WL 2264848 (E.D.Tex., 2007). **IMPROPER PRODUCTION**

One of the discovery issues involved in this reportedly acrimonious case involved how documents are produced in response to requests for production. The issue involves “boxcar” production, the situation in which a party in response to requests for production merely produces boxes of documents, claiming they are being produced as they are kept in the ordinary course of business. Since the Texas and federal request for production rules are similar and this issue raises its from time to time in Texas discovery disputes, the opinion is informative.

Fed. R. Civ. Pro. 34(b)(i) states that a party producing documents “shall produce them as they are kept in the usual course of business or shall organize them to correspond with the categories in the request.” The Magistrate noted that the committee note accompanying the rule indicates that the reason this sentence was added was to prevent production of critical documents in a manner that might obscure their significance. Clearly, the underlying assumption was that production of records as kept in the usual course of business ordinarily will make their significance pellucid. That is the overarching purpose of the rule.

When a producing party chooses not to organize documents to correspond with categories in the request, it is the producing party's burden to demonstrate that documents are produced as kept in the usual course of business. *See Johnson v. Kraft Foods North America*, 236 F.R.D. 535 (D.Kan.2006) (“a

party who chooses the Rule 34(b) option to produce documents as they are kept in the ordinary course of business bears the burden of showing that the documents were in fact produced in that manner and [ ] a mere assertion that they were so produced is not sufficient to carry that burden” ). Moreover, simply placing documents in boxes and making them available does not conform to the rule. *See Innovative Therapy Products, Inc. v. Roe*, 1999 WL 13934 (E.D.La.1999) (“ [b]y simply making ‘ boxes of documents’ available for inspection, defendant may also have failed to make the documents available in the manner contemplated by Rule 34(b)” ); *Bowman v. Orleans Parish School Board*, 2004 WL 459313 (E.D.La.2004).

**D. *In re Allied Chemical Corp.***, --- S.W.3d ----, 2007 WL 1713378 (Tex. 2007) *See* discussion above, under **SCOPE**.

**E. *Thompson v. Woodruff***, 232 S.W.3d 316 (Tex. App.-Beaumont, 2007). **WITHDRAWAL OF DEEMED ADMISSIONS**

Courts disfavor deemed admissions as they are anathema to trying the case on the merits. A court may allow the withdrawal of deemed admissions if there is not a showing that the failure to respond was intentional or a result of conscious indifference. *See Stelly v. Papania*, 927 S.W.2d 620, 622 (Tex.1996) (“A party can establish good cause by showing that its failure to answer was accidental or the result of a mistake, rather than intentional or the result of conscious indifference.”).

In *Thompson*, the court found that Plaintiffs failure to respond to discovery was because of impairments suffered by Plaintiffs’ attorney, who developed a chronic illness. Plaintiffs moved to withdraw admissions to very broad requests that one of the defendants had propounded which basically sought to affirm that that Plaintiffs had no cause of action against the defendant.

Kacy requested admissions that include the following: that he was not negligent in his treatment of Stacy Thompson; that he used that degree of care that a physician of ordinary prudence practicing plastic surgery would use under the same or similar circumstances; that he used ordinary care in his treatment of Stacy Thompson; that his treatment was not a proximate cause of injury to Stacy Thompson; and that his treatment of Stacy Thompson was not a proximate

cause of injury to Sean Thompson. That none of the requested matters were purposefully admitted by the Thompsons would be evident from the specific allegations contained in their pleadings. Kacy could not have been misled into thinking that the Thompsons admitted he was not negligent in his treatment of Stacy Thompson, and his defense could not have been prejudiced by the late response.

The appellate court found that the trial court had abused its discretion in not allowing Plaintiffs to withdraw their deemed admissions to the above requests. The court's observations in this regard are informative:

Withdrawing such broadly-stated admissions would require neither repeating previously conducted discovery nor delaying the trial. "[W]hen a party uses deemed admissions to try to preclude presentation of the merits of a case, the same due-process concerns arise" as in death penalty sanction cases. See *Wheeler v. Green*, 157 S.W.3d at 443. Cf. *Morgan v. Timmers Chevrolet, Inc.*, 1 S.W.3d 803, 807 n. 5 (Tex.App.-Houston [1st Dist.] 1999, pet. denied) (party relied on specific admissions in preparing case for trial).

## V. DEPOSITIONS

### A. RULE 202 DEPOSITIONS:

1. *AVCO Corp. v. Interstate Southwest, Ltd.* --- S.W.3d ----, 2007 WL 4845443 (Tex.App.-Hous. (14 Dist.)) 2007. **SCOPE OF DISCOVERY**

This case did not pivot on a 202 deposition; however, the following footnote from the decision is informative:

A person may petition the court for an order authorizing the taking of a deposition on oral examination or on written questions to investigate a potential claim or suit. Tex.R. Civ. P. 202.1(b); see also Tex.R. Civ. P. 201.1 (governing depositions in foreign jurisdictions for use in Texas

proceedings); 203.4 (governing exhibits to depositions). The scope of discovery in such a pre-suit deposition "is the same as if the anticipated suit or potential claim had been filed." Tex.R.App. P. 202.5.

2. *Doe(s) v. Haddock*, Not Reported in S.W.3d, 2007 WL 940761 (Tex.App.-Fort Worth, 2007). **APPEAL FROM A RULE 202 ORDER**

Pursuant to Tex. R. Civ. P. 202.1(b), Haddock filed a petition to investigate claims. Haddock's petition alleged that he desired to investigate "libel and/or slander claims against certain individuals who posted defamatory statements about [him] on a Yahoo! Finance message board."

The case poses an interesting fact issue and an provides an important opinion regarding appeal and mandamus. Haddock sought a deposition on written questions from Yahoo! with regard to the identity of various individuals who Haddock believed posted defamatory remarks against him. Haddock indicated that he did not intend to sue Yahoo! The Court required Yahoo! to provide the information. Yahoo! Posted the Court's order on the website and the individuals whose identity was to be revealed filed an appeal from the court's order. Yahoo! did not join in the appeal. The appellate court held that it had no jurisdiction of the appeal.

Tex. R. Civ. P. 202 incorporates the prior equitable bill of discovery procedures previously found in rules 187 and 737. See TEX.R. CIV. P. 202 cmt. 2. Under both Tex. R. Civ. P. 202 and the prior rules, if a petition to investigate a claim seeks discovery from a third party *against whom suit is not contemplated*, then the trial court's ruling on the petition is final and appealable. See *Ross Stores, Inc. v. Redken Lab., Inc.*, 810 S.W.2d 741, 742 (Tex.1991).

The problem in Haddock was that Yahoo! was the party, but Haddock did not contemplate any litigation against Yahoo! While Yahoo! therefore could have appealed the order, it chose not to do so. Since the appellants are non-parties against whom Haddock *did contemplate litigation*, the order was not final and the appellate court did not have jurisdiction over an appeal. The only remedy available to the appellants was mandamus, which they did not seek. Accordingly, the appeal was denied and the trial court's order remained in force.

3. *In re Bed Bath & Beyond, Inc.*, Not Reported in S.W.3d, 2007 WL 4292304 (Tex.App.-Fort Worth,

2007). **APPEAL FROM A RULE 202 ORDER**

A situation similar to Haddock arose in *Bed, Bath & Beyond*, with a similar result. In *Bed, Bath & Beyond Armstrong McCall L.P. (AMLPLP)* had an exclusive distribution agreement with Farouck Products to distribute Farouck's hair care products in Texas. AMLPLP learned that *Bed, Bath and Beyond (BBB)* was selling Farouck products. AMLPLP filed a petition for 202 deposition against BBB seeking the identity of the distributors who were wrongfully supplying Farouck products to BBB. AMLPLP stated that it did not contemplate bring a lawsuit against BBB, but that it did against the entities that were wrongfully supplying Farouck products to BBB. The Court ordered BBB to produce a corporate representative to answer questions in this regard and BBB sought a writ of mandamus regarding the Court's ruling. This time the Fort Worth Court held that BBB *a non-party against whom litigation was not contemplated* had an adequate remedy on appeal; therefore, mandamus was not available. See *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex.1998) (orig.proceeding) and *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex.1992) (orig. proceeding).

**4. *In re Does I-10*, --- S.W.3d ----, 2007 WL 4328204 (Tex.App.-Texarkana, 2007). **DISCOVERY FROM NON-PARTIES****

A somewhat similar situation to the one in *Bed, Bath & Beyond* and *Haddock* arose in *Does I-10* but with a vastly different analysis and result. In *Does I-10* a hospital was distressed because an unidentified blogger apparently was posting on the internet disparaging remarks about the hospital and its medical staff. The hospital reportedly filed a petition against the *Does*-combined with an "ex parte request to non-party to disclose information" directed at SuddenLink (the *Does* internet service provider (ISP), the trial court to direct SuddenLink to disclose the identities of the *Does*. On the day of filing, the court granted the motion. There is no indication that the petition sought a 202 deposition but it appears that may have been the intent. Unfortunately, it is unclear what procedural device the hospital employed and what procedural rules it was following. Bad facts often result in bad law. Here, bad facts just result in confusion.

The *Does* filed a petition for writ of mandamus requesting that the appellate court order the trial court to retract his order requiring the ISP to identify *Does*. At least the *Does* selected the right remedial path. See *Doe(s) v. Haddock* and *In re Bed Bath & Beyond*, above. After engaging in a thorough history of Rule 202 and its predecessor, the equitable bill of discovery,

the appellate court concludes that the trial court did not have procedural authority to follow the procedure that it did or to enter the order that it did and therefore conditionally granted writ of mandamus. The Court observed that there are procedural devices available to obtain discovery from non-parties, citing Tex. R. Civ. P. TEX.R. CIV. P. 205.1(c), (d), which authorizes discovery from a nonparty by serving a subpoena compelling production of documents and tangible things under the rule, and which allows a party to compel discovery from a nonparty by obtaining a court order under TEX.R. CIV. P. 196.7, 202, or 204.

In truth, the hospital probably could have used Tex. R. Civ. P. 202 to obtain what it was seeking, if it had properly invoked and followed the rule. See *In re Bed, Bath & Beyond*, discussed above. The larger issue raised by all the above cases is how to protect a non-party's due process and privacy rights when that individual's confidential records or identity are at issue and the individual has not been provided proper or timely notice of the proceeding.

**5. *In re Jorden*, 249 S.W.3d 416 (Tex., 2008). **MEDICAL MALPRACTICE****

The Texas Supreme Court has held that Tex. Civ. Prac. & Rem. Code §74.351(s) bars Tex. R. Civ. P. 202 depositions related to a health care liability claims.

**B. DEPOSITIONS OF ORGANIZATIONS**

*In re Garcia*, Not Reported in S.W.3d, 2007 WL 1481897 (Tex.App.-San Antonio 2007)

This case arises from breach of contract action on an uninsured motorist policy. Plaintiff issued a notice for the insurance company's representatives on the insurance company's defenses. The insurance company produced no evidence in support of its objections that the plaintiff could obtain the same information through less intrusive means, that the deposition was unduly burdensome. The insurance company also offered that it *would* stipulate several matters; however, the court found assurances of future stipulation is not a substitute for discovery. The appellate court held it was an abuse of discretion to quash the entire deposition when the topics were relevant to Plaintiff's claims.

**VI. EX PARTE COMMUNICATIONS**

**A. *In re Collins*, --- S.W.3d ----, 2007 WL 1395588 (Tex.App.-Tyler 2008) pet. granted.**

The question in this case was whether in view of

Tex. Civ. Prac. & Rem. Code § 74.052 allowing a party to obtain written and verbal healthcare information about a medical malpractice claimant, the trial court abused its discretion in entering a protective order that prevented Defendant from engaging in ex parte communications with Plaintiffs physicians regarding Plaintiff's healthcare.

The Tyler Court of Appeals found that Tex. Civ. Prac. & Rem. Code § 74.052 does not change existing law and therefore defendants are not prohibited from engaging in ex parte communications with Plaintiff's healthcare providers regarding information relevant to Plaintiff's claims in the pending litigation. The court, however, also found that there was nothing in the statute that granted the defendants the unfettered right to engage in ex parte communications under all circumstances when a patient is prosecuting a health care claim:

Because section 74.052 does not prohibit the issuance of a protective order to protect privileged information that is irrelevant to a health care liability claim, we conclude that the legislature did not intend to overrule or modify *Mutter v. Wood*, 744 S.W.2d 600, 601 (Tex.1988) or *Durst v. Hill Country Mem'l Hosp.*, 70 S.W.3d 233, 237-38 (Tex.App.-San Antonio 2001, no pet.). Thus, we hold that section 74.052 did not change existing law in this area. . . . Because we have construed section 74.052 as not changing existing law regarding ex parte communications, and because we have concluded that the trial court reasonably could have found that a protective order was necessary in this case to protect privileged information, we hold that the trial court in this case did not abuse its discretion in prohibiting post suit ex parte communications.

[*Comment:* This is a very controversial issue; however, regardless of the reader's perspective or position on the issue, the above opinion is very thoughtful and well-reasoned and provides a thorough exposition of the factors that are in tension, regardless of the conclusion. It is well worth reading.]

**B. *In re H.E.B. Grocery Co.***, Not Reported in S.W.3d, 2007 WL 1150035 (Tex.App.-Hous. (14 Dist.) 2007)

In a much more cryptic per curiam opinion, the Houston 14<sup>th</sup> Court of appeals held that the relators had not shown they were entitled to mandamus relief from an order disallowing them from engaging in ex parte communications with Plaintiffs current and past employers about Plaintiff's employment history or with Plaintiff's treating health care providers regarding Plaintiff's medical history.

## **VII. OBJECTIONS, PRIVILEGES AND PROTECTIVE ORDERS**

### **A. *In re BNSF Ry. Co.***, Not Reported in S.W.3d, 2007 WL 4822488 (Tex.App.-Beaumont). **ASSERTION OF PRIVILEGE MAY BE MADE AFTER RULING ON OBJECTION TO SCOPE**

FELA claim. Exposure to ergonomic risk factors to legs. Harm from repetitive exposure. **Request for production of all files and videos pertaining to "ergonomics."** Defendant objected that the requests were overbroad and that they sought matters protected as attorney work product.

BNSF was entitled to a ruling on its objections asserted under Rule 193.2 before pursuing its privileges under Rule 193.3. *See In re Lincoln Elec. Co.*, 91 S.W.3d 432, 437 (Tex.App.-Beaumont 2002, orig. proceeding). BNSF has not waived its privileges and may proceed pursuant to Rule 193.3. *See TIG Ins. Co.*, 172 S.W.3d at 170 (stating that parties may proceed under Rule 193.3 when the record showed the issue of attorney work product was not properly before trial court).

### **B. *In re Bexar County Criminal Dist. Attorney's Office***, 224 S.W.3d 182, (Tex.,2007). **PROTECTION OF PROSECUTORS FROM DEPOSITIONS. SELECTION OF WAIVER OF WORK PRODUCT**

This case presents an issue of first impression: whether the work-product privilege protects prosecutors from testifying in a malicious prosecution suit when they have already released the prosecution file. A majority of the Texas Supreme Court answered the question, yes. The DA voluntarily produced his investigation file to the plaintiff in a civil malicious prosecution case. The Court found that this was a "selective waiver" of the work product privilege and that it did not waive the entire privilege requiring the DA to additionally offer opinion testimony. The plaintiff argued that he would have undue hardship in proving causation in his case without the testimony of the DA as to why the DA dropped the criminal case

and that there was substantial need for this information. The Court, however, did not buy the argument, going out of its way to speculate alternative ways the plaintiff might be able to prove this issue. It is obvious that the Court as a matter of policy wanted to signal that it would not allow prosecutors to be subpoenaed without exceptional cause. In a very carefully worded and limited opinion the Court held as follows:

We therefore hold on this record, given the protected nature of what Crudup intends to elicit, that the DA's selective disclosure of the prosecution file, while waiving the privilege as to the documents themselves, does not waive the DA's testimonial work-product privilege regarding the prosecutor's mental processes; nor did the DA's file disclosure itself give rise to a "substantial need" or "undue hardship" sufficient to overcome the privilege that protects non-core work product.

**C. *In re Alvarez*, Not Reported in S.W.3d, 2007 WL 3227654 (Tex.App.-Houston [1 Dist.],2007). NO BLANKET ORDERS GRANTING FIFTH AMENDMENT**

The issue in this case was whether to abate a civil action for a parallel criminal action so that the defendant in both cases would not have to invoke his Fifth Amendment rights. After filing and having sustained several motions to quash the defendant's deposition, the defendant filed a motion for protection from discovery that was denied. The appellate court upheld the trial court's refusal to grant a blanket motion for protection from discovery:

Alvarez has yet to assert a Fifth Amendment privilege in response to discovery, but instead asserts he is entitled to protection from all discovery while the criminal proceedings are pending. This is not Texas law. *See, e.g., In re Edge Capital Group, Inc.*, 161 S.W.3d 764, 768 (Tex.App.-Beaumont 2005, orig. proceeding) (blanket assertions of Fifth Amendment privilege generally are not permitted in civil cases); *In re R.R.*, 26 S.W.3d 569, 574 (Tex.App.-Dallas 2000, orig. proceeding) (blanket denial of all discovery in civil case due to pending criminal case is not good public policy); *Burton v.*

*West*, 749 S.W.2d 505, 508 (Tex.App.-Houston [1st Dist.] 1988, orig. proceeding) (holding relator may not make blanket Fifth Amendment objection to all interrogatories propounded, but must instead state objections to each individual interrogatory).

For discussion of a related issue involving snap-back of a consulting expert's report, see, *In re Ortuno*, Not Reported in S.W.3d, 2008 WL 2339800 (Tex.App.-Hous. (14 Dist.)), discussed below.

**D. *In re Espinoza*, Not Reported in S.W.3d, 2007 WL 4180216 (Tex.App.-San Antonio 2007). NO BLANKET ORDERS OVERRULING FIFTH AMENDMENT**

This case poses an interesting counterpoint to the holding in *In re Alvarez*, above. In *Espinoza* there also was parallel litigation. The plaintiffs in the civil action propounded interrogatories to the defendant and then noticed the defendant's deposition. The defendant asserted the Fifth Amendment as to all questions. The Court, apparently exasperated by the defendant's apparent total un-cooperation in providing discovery, overruled all the defendant's objections and assertions of the Fifth Amendment and sanctioned the defendant, holding that if the defendant asserted the Fifth Amendment, he would be prevented from offering evidence on the point and trial and the defendant additionally would be fined. The appellate court found that the trial court had abused its discretion in these rulings. Just as blanket assertions of the Fifth Amendment are not condoned neither are blanket orders overruling all assertions of the privilege. *See, In re Speer*, 965 S.W.2d 41, 45 (Tex.App.-Fort Worth 1998, orig. proceeding). The holding in *Espinoza* is noteworthy for its discussion of the court's duty when a party asserts his Fifth Amendment right against self-incrimination:

It is the trial court's duty to consider the witness's evidence and argument on each individual question and determine if the assertion of the privilege against self-incrimination is meritorious.

Also interesting, particularly in light of the holding in *Alvarez*, was the argument that the defendant had waived his right to assert his Fifth Amendment right against self incrimination because he had not previously sought to abate the civil action for the pending criminal action. The appellate court observed

that a request for abatement is not a pre-requisite for assertion of the privilege and cited cases for the proposition that such an abatement has been held to be an abuse of discretion.

While the appellate court observes that the better practice is for the party asserting the Fifth Amendment to do so selectively, it did not find that the defendant's assertion as to virtually all discovery based on a claim that the questions violated his Fifth Amendment rights constituted actionable discovery abuse. Instead, the appellate court placed the burden on the trial court to review each assertion and to make a careful determination as to whether the privilege was justified.

**E. *In re Garza*, Not Reported in S.W.3d, 2007 WL 2246779 (Tex.App.-Corpus Christi). OFFENSIVE USE OF FIFTH AMENDMENT**

*In re Garza* also involves assertion of the Fifth Amendment privilege. The issue here was whether the privilege is waived under the offensive use doctrine. Recall that there are three factors that must be established to demonstrate waiver of a privilege by offensive use:

Three factors must be considered before we may determine whether a party has made an offensive use of his privilege: (1) whether the party asserting the privilege is seeking affirmative relief; (2) whether the party is using the privilege to protect outcome determinative information; and (3) whether the protected information is not otherwise available to the defendant. *Republic Ins. v. Davis*, 856 S.W.2d 158, 161 (Tex.1993).

All three criteria must be met or the privilege must be upheld. The court held that the defendant had not proved all elements of offensive use, so Plaintiff could not and should not be sanctioned for asserting his Fifth Amendment privilege. The trial court was admonished to conduct a question by question review of the assertion of the Fifth Amendment. (See discussion above of *In re Alvarez* and see also, *In re Edge Capital Group, Inc.*, 161 S.W.3d 764, 768 (Tex.App.-Beaumont 2005, orig. proceeding). However, there still are available consequences for assertion of the Fifth Amendment privilege under these circumstances in a civil action:

For instance, when a plaintiff invokes the privilege against self-

incrimination, the trial court can subsequently prohibit the plaintiff from introducing evidence on the subject, and such an act of judicial discretion does not constitute penalizing the plaintiff's use of the privilege. *Id.* The trial court can also allow an adverse inference to be drawn against Garza. See Tex.R. Evid. 513(c).

It is worth noting the Court's observation regarding the assertion of the Fifth Amendment in a civil case:

In a civil suit, a witness's decision to invoke the privilege against self-incrimination is not absolute. *In re Speer*, 965 S.W.2d at 46; see *Ex parte Butler*, 522 S.W.2d 196, 198 (Tex.1975). In *Butler*, the Supreme Court explained that:

The judge is entitled to determine whether the refusal to answer appears to be based upon the good faith of the witness and is justifiable under all of the circumstances. The inquiry by the court is necessarily limited, because the witness need only show that an answer to the question is likely to be hazardous to him; the witness cannot be required to disclose the very information which the privilege protects. Before the judge may compel the witness to answer, he must be " ' perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer(s) cannot possibly have such tendency' to incriminate." *Hoffman v. United States*, 341 U.S. 479, 95 L.Ed. 1118, 71 S.Ct. 814 (1951).

**F. *In re Hagemann*, Not Reported in S.W.3d, 2007 WL 1517992 (Tex.App.-Waco). STATEMENTS NOT PROTECTED**

Statements to government investigators in connection with a settlement of an investigation are held not privileged.

**G. *In re Hicks*, --- S.W.3d ----, 2008 WL 1839123 (Tex.App.-Hous. (14 Dist.)). NON-WAIVER OF ATTORNEY/CLIENT PRIVILEGE**

Assignment of a claim to a bankruptcy trustee does not automatically result in waiver of attorney client privilege. Unless the privilege is expressly and intentionally waived it continues, notwithstanding the assignment of rights to the bankruptcy trustee. See also, *In re General Agents Ins. Co. of America, Inc.*, 224 S.W.3d 806 (Tex.App.-Houston [14th Dist.] 2007, orig. proceeding).

**H. *In re Higgins*, --- S.W.3d ----, 2007 WL 4533473 (Tex.App.-Eastland). DENTAL PATIENT LISTS PROTECTED**

Dental patient lists are protected from discovery under the dentist/patient privilege. **TEX. OCC.CODE ANN.** §§ 258.101-.108 (Vernon 2004) See also, *In re Anderson*, 973 S.W.2d 410 (Tex.App.-Eastland 1998, orig. proceeding).

**I. *In re Intracare Hosp.*, Not Reported in S.W.3d, 2007 WL 2682268 (Tex.App.-Hous. (14 Dist.)). MEDICAL PEER REVIEW OCCURANCE REPORTS PRIVILEGED**

A nurse was injured on the job by a psychiatric patient, while employed by Intracare. The nurse brought suit against Intracare and sought various discovery against which Intracare asserted the “peer review” privilege. The medical peer review privilege protects the products of the peer review process: reports, records (including those produced for the committee's review as part of the investigative review process), and deliberations.” *In re Living Centers of Texas, Inc.*, 175 S.W.3d 253, 260 (Tex.2005). The court reviewed documents that were submitted in camera and ordered production of an **occurrence report**, finding it was not protected by the medical committee and peer review privilege. Intracare contended that the occurrence report was protected by the medical committee and peer review privileges because (1) the hospital's safety committee was a “medical committee” under **§161.031(a) of the Health and Safety Code** established by the hospital to evaluate the medical and health care services provided; (2) the Safety committee required the completion of an occurrence report for unusual events, accidents, or injuries; and (3) the reports were then used by the hospital to investigate and analyze medical and health care services. The petition for mandamus centered on this particular “occurrence report.”

This is a recurring issue in the area of medical malpractice litigation, in particular. The incident report no doubt contains the most proximate factual information about what probably occurred and why; however, there is a strong policy of protecting the

internal deliberative processes of a healthcare institution in the interest of encouraging quality care. Texas courts more often than not have come down on the side of protecting such reports if a prima facie case is made that it is a medical peer review document or was generated to aid the medical peer review process. Administrative and healthcare records generated in the ordinary course of business are not protected. And documents that otherwise are discoverable but gratuitously provided to a medical peer review committee are still discoverable.

In this instance, the plaintiff relied heavily on *In re Osteopathic Medical Center of Texas*, 16 S.W.3d 881 (Tex.App.-Fort Worth 2000, orig. proceeding). The Court distinguished the applicability of *In re Osteopathic* to the report before it finding that it was clear from the face of the report that it was intended 1) not to be part of the medical chart and was for risk management, and 2) it was intended to be confidential. What was lacking from the face of the document was whether it was intended for peer committee use and this information was provided by affidavit. Thus the appellate court found that a prima facie showing had been made that the report was a medial peer review document and the trial court therefore had abused its discretion in ordering that it be produced.

**J. *In re Ortuno*, Not Reported in S.W.3d, 2008 WL 2339800 (Tex.App.-Hous. (14 Dist.)). SNAPBACK PROVISION DOES NOT APPLY TO NON-PARTIES**

The plaintiff in this case sought enforcement of Rule 193.3(d), compelling the defendant to return an inadvertently-produced consulting expert report to non-party Texas Children's Hospital. The opinion focused on whether Rule 193.3(d) applies to non-parties. It held that it does not.

The plaintiff (a young child who had fallen from an apartment balcony and allegedly suffered injuries) hired a consulting neuro-psychologist who performed an evaluation of the plaintiff, created a report and for reasons that are not explained in the opinion, and unbeknownst to the plaintiff, gave the report to her employer, Texas Children's Hospital, which incorporated the report in the plaintiff's medical chart. The consulting report was produced to the defendant when the defendant subpoenaed medical records from Texas Children's Hospital. Upon learning of the disclosure, the plaintiff demanded the report be returned pursuant to Tex. R. Civ. P. 193.3(d). The trial court denied the motion, finding that the rule did not apply to production by a non-party. (The court did not reach the issue of whether the report was inadvertently

produced).

The plaintiff conceded that the rule does not apply to non-parties, but argued instead that the consultant was plaintiff's agent. This did not matter because it was not the consultant who produced the report, but rather Texas Children's Hospital. The consultant merely provided the report to Texas Children's Hospital as part of her employment. She did not produce the report in discovery. It was Texas Children's Hospital that produced the report in response to a deposition on written questions, and because it was a non-party, the snap-back provision did not apply.

While the defendant did not need to return the report, the appellate court did observe that the plaintiff could move the trial court to protect the plaintiff from use or dissemination of the confidential information. *See In re AEP Texas Cent. Co.*, 128 S.W.3d 687, 694 (Tex.App.-San Antonio 2003, orig. proceeding) (mandating that the trial court "enter an order preventing the use of" privileged materials produced in discovery).

For a case on a related issue involving an expert reviewing privileged matters, see *In re Christus Spohn Hosp. Kleberg*, --- S.W.3d ----, 2007 WL 1225351 (Tex.), discussed below.

**K. *In re Christus Spohn Hosp. Kleberg*, --- S.W.3d ---, 2007 WL 1225351 (Tex.). SNAPBACK PROVISION AND PRIVILEGED DOCUMENTS PROVIDED TO TESTIFYING EXPERTS**

In this medical malpractice mandamus proceeding, the defendant hospital sought to recover privileged documents that were mistakenly provided to its designated testifying expert witness. An additional issue arose whether the expert had relied upon the documents in formulating her opinions, reviewed the documents or not reviewed the documents. Plaintiff argued that it did not matter since what the expert chooses not to review may be as significant as what she chose to review. Notably in this regard, the Texas Supreme Court noted that Tex. R. Civ. P. 192.3(e)(6) which amended prior rule 166b, now mandates discovery of documents "that have been provided to, [or] reviewed by" a testifying expert. The Court also observed that notwithstanding the documents in question were work product, by giving them to the testifying expert, they would lose their exemption from discovery under Tex. R. Civ. P. Rule 192.5. The Court attempted to make a Solomonic decision in attempting to balance protection of work product against the potential unfairness to the plaintiff of allowing

defendant to provide the documents to its testifying expert but disallow plaintiff's from being able to see the documents and cross examine the expert about them. It held that Tex. R. Civ. P. 193.3(d) applied but that if the documents were returned, the expert could not rely upon them. The hospital could either get back its privileged documents and designate a new testifying expert, or it would not get back its privileged documents. It could not have it both ways:

We conclude that Rules 192.3(e)(6) and 192.5(c)(1) prevail over Rule 193.3(d)'s snap-back provision so long as the expert intends to testify at trial despite the inadvertent document production. That is, once privileged documents are disclosed to a testifying expert, and the party who designated the expert continues to rely upon that designation for trial, the documents may not be retrieved even if they were inadvertently produced.

We hold that the inadvertent nature of the production in this case preserved the privilege under Rule 193.3(d) and entitled the hospital to recover the documents upon realizing its mistake, provided the hospital's designated expert does not testify at trial. The hospital has not attempted to name another testifying expert, instead indicating an intent to rely upon the expert to whom the documents were disclosed. So long as the hospital stands upon its testifying expert designation, Rule 192's plain language and purpose and the policy considerations that surrounded its amendment compel the conclusion that the documents may not be snapped back.

**L. *In re Richland Baptist Church*, Not Reported in S.W.3d, 2007 WL 4417197 (Tex.App.-Dallas). FAILURE TO OVERCOME INVESTIGATIVE PRIVILEGE BY PROVING UNDUE HARDSHIP**

The issue in this instance dealt with the discovery of non-core work product (witness statements obtained by Defendant's employee). The information apparently was compiled as part of an investigation in anticipation of litigation. The court observes that a party seeking non-core work product bears a heavy burden in showing that he "has substantial need" for the material and that he "is unable without undue hardship to obtain

the substantial equivalent of the material by other means.” *In re Bexar County Criminal Dist. Attorney's Office*, 224 S.W.3d 182, 188 (Tex.2007) (orig.proceeding) (see discussion, above).

In this case, the plaintiff failed to produce evidence of substantial need *and* undue hardship in obtaining the information from another source. The plaintiff attempted to rely upon the deposition testimony of the employee to establish that the employee could no longer adequately and independently recall information that would have been contained in her notes; however, this failed to establish undue hardship.

**M. *In re Westwood Affiliates, L.L.C.*, --- S.W.3d ----, 2007 WL 441692 (Tex.App.-Hous. (1 Dist.)). LAW ENFORCEMENT INVESTIGATIVE PRIVILEGE**

This case involved an allegation of inadequate security that resulted in the shooting death of a young man. The premises owner sought the Houston police department investigation of the incident (“any and all records, reports, correspondence, witness statements, investigation notes, offense reports, and any and all photographs pertaining to the incident.”) by way of a deposition on written question. HPD objected on the basis that the discovery requested public information that was part of an ongoing investigation and that the information was privileged pursuant to *Hobson v. Moore*, 734 S.W.2d 340 (Tex.1987), and the law enforcement exception to the Texas Public Information Act (“TPIA”). Tex. Gov’t Code Ann. § 552.108 (Vernon Supp.2006). We agree with HPD. The appellate court agreed.

The court also notes that this privilege also pertains 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).

**N. *In re XTO Resources I, LP*, 248 S.W.3d 898 (Tex.App.-Fort Worth,2008). FAILURE TO MEET EVIDENTIARY BURDEN FOR OVERCOMING TRADE SECRET PRIVILEGE**

This case involved a breach of contract claim relative to oil leases. The issue was whether the defendant had established certain information was trade secrets and if so whether the opposing party had established that the information was necessary to prevent fraud and injustice. The court found there was a trade secret and the burden had not been met to overcome the privilege.

The plaintiff filed a motion to compel, arguing that the requested information would “assist” their expert and that the defendant’s confidentiality concerns could be addressed by a confidentiality agreement. The defendant filed a response, asserting that the requested data are trade secrets and that plaintiff could obtain the necessary information from other sources.

The party asserting a 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 at 737; *In re Cont'l Gen. Tire, Inc.*, 979 S.W.2d 609, 612-3 (Tex.1998); *see also In re CI Host, Inc.*, 92 S.W.3d 514, 516 (Tex.2002). The burden then shifts to the party seeking the trade secret disclosure to establish that the information is necessary for a fair adjudication of a claim or defense in the litigation. *In re Cont'l Gen. Tire, Inc.*, 979 S.W.2d at 612-13. The court discussed the 6 factor test recognized in Texas for establishing the trade secret privilege from discovery:

To determine whether information is a trade secret, Texas courts apply a six-factor test adopted from the Restatement of Torts. *In re Bass*, 113 S.W.3d at 739. The Restatement factors are (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of the measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; and (6)

the ease or difficulty with which the information could be properly acquired or duplicated by others. *Id.* (quoting RESTATEMENT OF TORTS § 757 cmt. B (1939) and RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 reporter's n. cmt. d (1995)).

The court in this instance found that the defendant proved all the factors (although proving all the factors is not necessary, if the weight of the factors weigh in favor of the matter being a trade secret). The burden then shifted to the plaintiff to prove that the materials sought were necessary for a fair adjudication of the issues in the case and that the requested information could not be obtained elsewhere. Plaintiff's expert conceded that at least some of the information could be obtained from other sources and that the information was not necessary for his opinions, merely that the information would "assist" him. Based on this evidence, the court found that the plaintiff had not met its burden to overcome the trade secret privilege.

**O. *Izen v. Sjostrom*, Not Reported in S.W.3d, 2007 WL 968841 (Tex.App.-Hous. (14 Dist.)). WAIVER FOR FAILING TO TIMELY RESPOND TO DISCOVERY**

It is the affirmative duty of the party from whom discovery is requested to provide an objection or assert a **privilege** protecting them from the discovery. *See In re Union Pac. Res. Co.*, 22 S.W.3d 338, 340 (Tex.1999) (holding that a party who "seeks to exclude documents, records or other matters from the discovery process has the affirmative duty to specifically plead the particular **privilege** or immunity claimed").

In *Izen*, the plaintiff was bringing a claim for attorneys' fees against a group of investors who he alleged had wrongfully and libelously terminated his legal representation of the investors through an investor group. The plaintiff served interrogatories and requests for production on the investors, who did not timely serve any responses. The plaintiff filed a motion to compel, which was denied. The appellate court held this was a clear abuse of discretion:

The rules clearly mandate that the party from whom discovery is requested must respond to the discovery request in some way, whether by producing the information, providing an objection, or asserting a **privilege**. *See* Tex.R. Civ. P. 193.1 (stating that a party "*must* respond to

written discovery in writing within the time provided by court order or these rules"...

This is true even if the information being requested in many of the discovery requests probably could have been protected from discovery by assertion of privilege. If the privilege is not timely asserted, it is waived:

Many of *Izen's* requests might have been subject to various objections or **privileges**; however, it is not the duty of this court to supply such. *See In re Union Pac. Res. Co.*, 22 S.W.3d 338, 340 (Tex.1999) We find that, because *Izen* was denied access to information that is critical to the pursuit of his claims, he was prevented from properly presenting his case to this court.

**P. *In re Universal Coin & Bullion, Ltd.*, 218 S.W.3d 828 (Tex.App.-Beaumont, 2007): NECESSITY REQUIREMENT FOR OVERCOMING TRADE SECRET PRIVILEGE**

This appeal arose from a tortious interference case. There was an assertion of trade secrets in response to discovery. (See general discussion of trade secrets under *In re XTO Resources I, LP*, above) The appellate court found here that the plaintiff had established the trade secret privilege; however, there was **not a proper determination of "necessity"** to overcome the privilege. While the trial court apparently conducted a hearing to determine necessity and found fraud, the fraud finding went to the underlying case and not that the denial of the privileged information would result in fraud or unjust result. *Supra* at 832.

The court also notes that there is provision for a confidentiality order, but that it is overbroad, noting that confidentiality orders should be closely tailored to the needs of the particular case. *Garcia v. Peebles*, 734 S.W.2d 343, 347 (Tex.1987).

**Q. *In re Gore*, --- S.W.3d ----, 2007 WL 4321714 (Tex.App.-San Antonio). FIFTH AMENDMENT IN CIVIL ACTIONS**

This case involves the issue of abatement of civil litigation when there is a pending parallel criminal action. In this instance the appellate court held that the trial court had abused its discretion by indefinitely abating proceedings in the civil action:

it is “not good public policy to deny civil litigants their entitlement to a fully authorized discovery to assist in preparation of the civil lawsuit merely because criminal matters may be pending.” *Texas Attorney General's Office v. Adams*, 793 S.W.2d 771, 777 (Tex.App.-Fort Worth, 1990, no pet.). Rather, the proper remedy is an individually tailored protective order. See *Underwood v. Bridewell*, 931 S.W.2d 645, 647 (Tex.App.-Waco 1996, orig. proceeding) (abuse of discretion to abate civil forfeiture action until criminal prosecution completed); *In re Messervey Trust*, No. 04-00-00700-CV, 2001 WL 55642, at \*4 (Tex.App.-San Antonio, Jan. 24, 2001, orig. proceeding) (not designated for publication).

The following principals enunciated in the opinion are noteworthy: The parties in the civil case are entitled to full discovery within a reasonable time, to develop their claims and defenses, and to have the case tried. See *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941-942 (Tex.1998) (holding that order abating discovery from all but small group of plaintiffs until that group's claims were resolved unreasonably interfered with defendants' ability to prepare a defense and was abuse of discretion); *Trapnell v. Hunter*, 785 S.W.2d 426, 429 (Tex.App.-Corpus Christi 1990, orig. proceeding) (holding that refusal to proceed to trial by arbitrarily abating case violates the open courts provision of article I section 13 of the Texas Constitution); *McInnis v. State*, 618 S.W.2d 389, 392-93 (Tex.App.-Beaumont 1981, writ ref'd n.r.e.) (upholding trial court's refusal to continue civil disbarment case until final disposition of related criminal case), *cert. denied*, 456 U.S. 976 (1982); (“We find no constitutional or statutory provisions granting this appellant the right to choose the case, either criminal or civil, which he desires to first proceed to trial.”)

## VIII. EXPERTS

**A. *Carbonara v. Texas Stadium Corp.*, 244 S.W.3d 651 (Tex.App.-Dallas,2008). FAILURE TO DESIGNATE TIMELY INVOKES THE ERSEK RULE**

Plaintiff brought a premises liability claim against Texas Stadium for an improperly designed escalator, which he claimed was the cause of him falling three

stories and suffering personal injuries. Plaintiff filed suit and requested a Level 2 discovery control plan. The discovery period for Level 2 cases begins when suit is filed and continues until the earlier of 30 days before the date set for trial, or nine months after the earlier of the date of the first oral deposition or the due date of the first response to written discovery. See TEX.R. CIV. P. 190.3(b)(1)(B). Subsequently the parties agreed to and filed a Level 3 discovery control plan. The judge apparently never approved this order. The agreement was for parties seeking affirmative relief to designate testifying experts by July 7, 2006. On July 14, defendant filed its motion for summary judgment. Plaintiff then attempted to notice depositions for a month later. Defendant's motion to quash was granted. In response to the motion for summary judgment, Plaintiff filed an affidavit of an expert and licensing records from the Texas Department of Licensing and Regulation. The trial judge sustained Defendant's objections to Plaintiff's proffered evidence (the affidavit and supporting documents), granted Defendant's motion for summary judgment, and denied Plaintiff's motions to compel discovery and for continuance.

Nothing in the record shows Plaintiff designated his expert by either the Level 2 deadline or by the deadline in the parties' agreement. See TEX.R. CIV. P. 195.2(a) (unless otherwise ordered by court, party seeking affirmative relief must designate experts by 90 days before end of discovery period or 30 days after request served). Tex. R. Civ. Rule 193.6 provides that a party may not offer the testimony of a witness who was not timely identified unless the court finds good cause or lack of unfair surprise. See *Perez v. Embree Constr. Group, Inc.*, 228 S.W.3d 875, 884 (Tex.App.-Austin 2007, pet. denied) (exclusion of untimely designated expert's testimony is mandatory if plaintiff does not establish good cause for late designation or lack of unfair surprise or prejudice). In this instance there was no showing of good cause for late designation; therefore, the appellate court held that the trial judge had not abused his discretion in striking the Plaintiff's expert's testimony (affidavit) and supporting documents:

Without a showing of good cause or lack of unfair surprise, we conclude it was not an abuse of discretion for the trial judge to strike Harrison's affidavit. See TEX.R. CIV. P. 193.6; see also *Ersek v. Davis & Davis, P.C.*, 69 S.W.3d 268, 270-74 (Tex.App.-Austin 2002, pet. denied) (no abuse of discretion in striking expert's affidavit where plaintiff failed to designate

expert witness by deadline provided by rules and only informed opposing party “at the last possible moment—after a motion for summary judgment had been filed”).

There is a split of authority regarding the “The Ersek Rule.” For instance, the Corpus Christi Court of Appeals has rejected it. See, *Gillenwater v. Fort Brown Villas III, Condominium Ass'n, Inc.*, Not Reported in S.W.3d, 2007 WL 3227685 (Tex.App.-Corpus Christi), discussed below.

**B. *Abdelhak v. Farney*, Not Reported in S.W.3d, 2007 WL 4180133 (Tex.App.-San Antonio). FAILURE TO DESIGNATE TIMELY INVOKES THE ERSEK RULE**

Virtually the same situation found in *Carbonara* (see above) repeated itself in *Abdelhak*. The result also is similar. Failure to timely designate invokes the *Ersek* Rule.

**C. *Formosa Plastics Corp., USA v. Kajima Intern., Inc.*, 216 S.W.3d 436(Tex.App.-Corpus Christi,2006). EXPERT CONFLICT OF INTEREST**

Formosa moved to disqualify *Kajima*'s testifying expert because the expert's colleague previously had consulted with Formosa. The appellate court held that Formosa had met its burden for requiring the disqualification of the expert.

The court first reviewed the majority rule regarding this situation:

When disqualification based on a prior relationship with an adversary is requested, the majority of courts have adopted a two-prong test which balances the competing interests of the parties. See *W. Va. ex rel. Billups v. Clawges*, 620 S.E.2d 162, 167, 218 W.Va. 22 (2005) (collecting cases); *Mitchell v. Wilmore*, 981 P.2d 172, 175 (Colo.1999). Under the test, disqualification is warranted if: (1) the moving party possessed an objectively reasonable basis to believe that a confidential relationship existed between that party and the expert witness; and (2) confidential or privileged information was in fact provided to the expert by the moving party. See *Koch Ref. Co. v. Jennifer L. Boudreaux MV*, 85 F.3d 1178,

1181 (5th Cir.1996) *Hewlett-Packard Co. v. EMC Corp.*, 330 F.Supp.2d 1087, 1093 (N.D.Cal.2004) In the usual case, both factors must be present to merit disqualification

The majority found that *Formosa* had **failed** to meet the above test. The following are issues of first impression addressed by the court:

More specifically, the issues of first impression we must address are: (1) whether an expert should be disqualified where he was retained by one side but was somehow related to an expert previously retained by the opposing party; and (2) whether the entire firm of experts to which both of these experts belong should be disqualified.

The first prong is whether there was an objectively reasonable basis to believe that a confidential relationship existed with the expert,

In examining this prong of the test, the emphasis is not on whether the expert was retained per se, but whether there was a relationship that would permit the litigant to reasonably expect that any communications would remain confidential. *Lacroix v. Bic Corp.*, 339 F.Supp.2d 196, 200 (D.Mass.2004);

Since *Formosa* did not meet its burden with regard to the first prong, the court was not required to address the second prong.

**D. *Gillenwater v. Fort Brown Villas III, Condominium Ass'n, Inc.*, Not Reported in S.W.3d, 2007 WL 3227685 (Tex.App.-Corpus Christi). REJECTION OF ERSEK RULE**

This is a premises defect case. *Gillenwater* claimed a personal injury as a result of an allegedly defective lawnchair that collapsed when he sat in it. Defendant filed for summary judgment and Plaintiff produced an expert affidavit from an expert who previously had not been designated. The Corpus Christi court rejects the *Ersek* Rule, holding that the discovery rules do not pertain to motions for summary judgment:

We have already held that the rules

regarding discovery supplementation do not apply to the comprehensive framework of summary judgment proceedings. *Alaniz v. Hoyt*, 105 S.W.3d 330, 340 (Tex.App.-Corpus Christi 2003, no pet.); *Gandara v. Novasad*, 752 S.W.2d 740, 743 (Tex.App.-Corpus Christi 1988, no writ).

Therefore, the Corpus Christi Court of Appeals held that the trial court had abused its discretion in striking the expert affidavit and granting the motion for summary.

**E. *In re A.P.*, Not Reported in S.W.3d, 2007 WL 283006 (Tex.App.-Austin). FAILURE TO TIMELY DISCLOSE. NO SURPRISE OR PREJUDICE**

In this case the appellant claimed the trial judge had abused its discretion in failing to strike experts who were not properly disclosed in response to requests for disclosure under Tex. R. Civ. P. 194. The case involved termination of parental rights. A preliminary detailed report was provided to the Court by a psychologist finding that it was in the best interest of the child to take the child from the mother because the mother was unfit to tend to and protect the child. The state subsequently designated this expert as a testifying expert at trial but clearly did not fully comply with Rule 194. Nonetheless, the appellate court did not find that there was surprise or prejudice because the expert testified consistent with his report which the Plaintiff already had. The case is very similar to *In re W.D.W.*, 173 S.W.3d 607, 614-15 (Tex.App.-Dallas 2005, no pet.).

**F. *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, (Tex.,2007). See discussion of this case under **OBJECTIONS, PRIVILEGES, AND REQUESTS FOR PROTECTION**, above.**

**G. *In re Commitment of Marks*, --- S.W.3d ----, 2007 WL 2002927 (Tex.App.-Beaumont). FAILURE TO TIMELY DESIGNATE REBUTTAL EXPERT**

This case involved the involuntary commitment of an individual found by a jury to be a sexually violent predator. See Tex. Health & Safety Code Ann. § 841.081. The Court granted the State's motion to strike an expert witness from testifying at trial because Marks had not timely designated the expert. Marks did not make an argument of good cause for not properly or timely designating the expert nor did he argue lack of prejudice. Accordingly, he waived these arguments. Marks' attorneys argued instead that Marks was not

required to designate the expert because he intended to use him only as a rebuttal expert. The appellate court observed that there was no evidence that Marks was surprised by the state's expert and further that the discovery rules regarding designation also apply to rebuttal experts. *Moore v. Mem'l Hermann Hosp. Sys., Inc.*, 140 S.W.3d 870, 875 (Tex.App.-Houston [14th Dist.] 2004, no pet.)

**H. *In re Mendez*, 234 S.W.3d 105 (Tex.App.-El Paso, 2007). WAIVER OF CONSULTING EXPERT EXEMPTION**

At issue in this case was whether a consulting expert who provides a controverting affidavit as to reasonable and necessary medical services waives privilege and is subject to deposition. The answer is yes.

**I. *Perez v. Embree Const. Group, Inc.*, 228 S.W.3d 875 (Tex.App.-Austin,2007). FAILURE TO MAKE COMPLETE DESIGNATION**

This is a premises liability case. Plaintiff stated in its disclosure that it might use testimony at trial of two individuals that had been retained by another party who had been non-suited from the case. The Plaintiff however **did not provide the witness' complete address** before the designation deadline and failed to prove good cause or absence of prejudice. The Austin Court of Appeals held that in light of these circumstances the trial court did not abuse its discretion by striking the witness and even if it did, it was an evidentiary ruling and there was no harmful error.

**J. *Phan v. Addison Spectrum, L.P.*, --- S.W.3d ----, 2008 WL 328938 (Tex.App.-Dallas). FAILURE TO TIMELY DESIGNATE**

The Phan opinion relatively is a "no brainer." The defendant sent Phan several requests for the identity of testifying experts. Phan provided none. Phan then complained when the trial judge struck his expert regarding attorneys' fees. The rule is straight forward: A party needs to designate timely and properly. If a party does not do so, then the party needs to prove good cause and no surprise or unfair prejudice to the other parties. Phan did none of this.

**K. *Thompson v. King*, Not Reported in S.W.3d, 2007 WL 677898 (Tex.App.-Tyler,2007). FAILURE TO COMPLETELY DISCLOSE**

This case involved a claim of medical negligence. The Plaintiffs apparently produced an adequate

Chapter 74 report from an expert; however, they inadequately designated this expert as a testifying expert. They failed to provide in designation the substance of the expert's opinions and they failed to provide the documents that had been provided to, reviewed by, or prepared by or for the expert] in anticipation of [his] testimony." The plaintiff failed to show good cause or that the failure to properly designate would not cause unfair prejudice to the defendant. Accordingly, there was no abuse of discretion in striking the expert. Recall that a Chapter 74 report may not be used for or referred to in connection with discovery in the case.

**L. *Tranum v. Broadway*, --- S.W.3d ----, 2008 WL 1822257 (Tex.App.-Waco). SURPRISE AND PREJUDICE FOR UNTIMELY DISCLOSURE**

This is a malicious prosecution case. Three days before trial Tranum responded to Defendant's requests for disclosure by designating his expert. The court excluded the expert. Tranum argued there was no unfair surprise or prejudice because Defendant had obtained the expert's report a year before. The appellate court held that the trial court had not abused its discretion, finding that even if Defendant had knowledge it still would not overcome the burden:

That Broadway was aware of Niemeier's report and may have been aware that Niemeier might be called as an expert witness does not negate unfair surprise or prejudice. . . . *Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 915 (Tex.1992) ("A party is entitled to prepare for trial assured that a witness will not be called because opposing counsel has not identified him or her in response to a proper interrogatory").

**IX. SANCTIONS**

**A. *Fertic v. Spencer*, 247 S.W.3d 242 (Tex. App.-El Paso,2007).**

In this case a pro se plaintiff failed to properly disclose fact and expert witnesses in response to a request for disclosure. A hearing was conducted on Defendant's motion to compel and Plaintiff was given additional time to comply with the disclosure rules. After the extended time, when Plaintiff had not complied with the order, the court entered an order striking Plaintiff's fact and expert witnesses. Plaintiff appealed from this ruling, claiming the trial judge had abused his discretion. The appellate court disagreed

and overruled the point of error.

When a party fails to make timely or proper discovery, Tex. R. Civ. P. 193.6 comes into play. A trial court under this rule may exclude witnesses that are not properly and timely disclosed. TEX.R.CIV.P. 215.2, a trial court may, after notice and hearing, impose sanctions authorized by subparagraphs (1)-(8) of Rule 215.2(b). See TEX.R.CIV.P. 215.3. The enumerated sanctions include prohibiting a party from introducing designated matters in evidence. See TEX.R.CIV.P. 215.2(b)(4). The sanction, however, must be just. *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex.1991). The appellate court found that the trial court in this instance had attempted to give the pro se plaintiff additional time to learn and conform to the rules. It also found that the sanction was "no more severe than necessary to satisfy its legitimate purpose." Given these considerations, the court concluded that the trial court had not abused its discretion. ,

**B. *Jones v. American Flood Research, Inc.*, --- S.W.3d ----, 2007 WL 969584 (Tex. App.-Dallas, 2007)**

This was a very contentious case, with the discovery dispute centering on presentation of witnesses for deposition. The matter went up to the Texas Supreme Court with regard to sanctions assessed against Jones for failure of witnesses to appear at depositions. The Texas Supreme Court concluded there was evidence to support a sanction against Jones under rule 215.2(b), a provision cited in the motion for sanctions but not in the sanctions order or the trial court's conclusions of law. See *Am. Flood Research, Inc. v. Jones*, 192 S.W.3d 581 (Tex.2006). The supreme court reversed the judgment and remanded to the appellate court to consider the second prong of the *TransAmerican* analysis-whether a \$15,000 sanction was excessive. See *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex.1991).

There must be a reasonable and just correlation between the wrong-doing or abuse and the punishment. The appellate court could find no evidence in the record setting out the judge's analysis for how he concluded that \$15,000 was the proper sanction amount for the offense at issue. Concluding that the punishment did not fit the crime, the appellate court reversed the sanctions order and dismissed the case.

**C. *Litchenburg v. Conmed Corp.*, Not Reported in S.W.3d, 2008 WL 598267 (Tex. App.-Houston [1 Dist.],2008).**

This case deals with a question that often arises. What is the affect of a new trial setting on a discovery control plan? In this instance the question was a variation: What is the affect of a new trial setting on a sanctions order for failing to comply with a court order? The answer is it has no affect. The case points out the different effect of an automatic exclusion under Tex. R. Civ. P. 193.6 versus a court ordered exclusion under Tex. R. Civ. P. Rule 215.

In this instance the plaintiffs failed to properly disclose timely their testifying expert. The court, rather than striking the expert under Tex. R. Civ. P. 193.6 entered an order under Tex. R. Civ. P. 215, in which the plaintiffs were given additional time to properly disclose, provided plaintiffs produced the expert for deposition by a date certain and plaintiffs paid a \$1,000 fine. Plaintiffs cleaned up their designation and paid the fine, but they did not produce their expert for deposition when ordered. On the date of the initial trial setting, the trial court granted Defendant's second motion and excluded Plaintiffs' expert witness. The trial was reset. A month later Defendant moved for no evidence summary judgment. Plaintiffs asserted that since the trial had been moved the Court should reverse its order striking Plaintiff's expert as having been untimely designated. The court did not buy the argument. It refused to vacate its order and granted the motion for summary judgment.

The appellate court explains that had the court struck Plaintiff's experts under Tex. R. Civ. 193.6 then the new trial setting may have been grounds for vacating the order because there would have been a new discovery control plan. (Generally, a trial resetting has the effect of nullifying a discovery deadline set by a docket control order if the trial is reset to a date more than thirty days from the initial trial date. *Daniels v. Yancey*, 175 S.W.3d 889, 893 (Tex.App.-Texarkana 2005, no pet.); see *Coastal Mart, Inc. v. Hernandez*, 76 S.W.3d 691, 699 (Tex.App.-Corpus Christi 2002, pet. dism'd. by agr.) (noting that when trial setting is rescheduled, party may supplement answers to discovery)). However, the court in this instance did not enter sanctions under Tex. R. Civ. P. 193.6, but instead under Tex. R. Civ. P. 215. When the Plaintiffs did not produce their expert in compliance with the court's order on defendant's motion to compel, Plaintiff violated the court's order, not the automatic exclusion under Tex. R. Civ. P. 193.6; therefore the new trial setting had no affect on the sanction. A sanction under Rule 215 may survive a trial reset. See *H.B. Zachry Co. v. Gonzalez*, 847 S.W. 2d 246, 246 (Tex.1993) (under former rule 215(5), for automatic exclusion to remain beyond previous trial date, trial court's order must have been based on "some other sanctionable

conduct" of party).

Tex. R. Civ. P. 215 requires that a sanction be "just." The appellate court performed a *Transamerican* analysis and found that the sanction was just and further that a direct relationship existed between the violation and the sanctions imposed. See *Adkins Servs., Inc. v. Tisdale Co., Inc.*, 56 S.W.3d 842, 845 (Tex.App.-Texarkana 2001, no pet.) (holding there was direct relationship between sanction and conduct when trial court prohibited party from using evidence from witness when party failed to provide information about witness to other party). Accordingly, the sanction was affirmed.

**D. *Scott Bader, Inc. v. Sandstone Products, Inc.***, --- S.W.3d ---, 2008 WL 522870 (Tex. App.-Houston [1 Dist.], 2008).

In this case, Scott Bader was found to have engaged in serious and continuous discovery abuse. The court entered sanctions against it, which included an instruction to the jury regarding inferences that could be drawn against Scott Bader and striking Scott Bader's witnesses. Scott Bader had the court severe the sanction order from the trial on the merits so that it constituted a final and appealable judgment.

The appellate court found that Scott Bader's conduct warranted sanctions; however, the trial court failed to construct a "just" sanction order. Whenever a trial court's sanctions order is reviewed for "justness" the applicable standard is a *Transamerican* analysis. It is fundamental that in order for a sanctions order to be just, the trial court must consider lesser sanctions and impose no more sanctions than is necessary to achieve the ends of justice:

Because a sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes, courts must first consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance. See *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex.1991).

The court in this instance merely set forth a conclusory statement in its order that it considered lesser sanctions and concluded that none would be effective. This was held to be inadequate. The order or record must show specifically what lesser sanctions the trial court considered and rejected. The order

striking witnesses and instructing the jury was overruled. The attorneys' fee sanction against Scott Bader, however, was upheld on the basis that Scott Bader did not prove it was excessive. A notable point in the court's analysis pertains to proof of attorneys fees as sanctions:

In cases in which the judgment is not one for earned attorney's fees, but rather a judgment imposing attorney's fees as sanctions, it is not invalid because a party fails to prove attorney's fees. *Condit v. Gonzales*, No. 13-04-426-CV, 2006 WL 2788251, at \*12 (Tex.App.-Corpus Christi Sept. 28, 2006, no pet.)(mem.op.) (citing *Glass v. Glass*, 826 S.W.2d 683, 688 (Tex.App.-Texarkana 1992, writ denied)). **“When attorney's fees are assessed as sanctions, no proof of necessity or reasonableness is required.”** *Miller v. Armogida*, 877 S.W.2d 361, 365 (Tex.App.-Houston [1st Dist.] 1994, writ denied); see *Brantley v. Etter*, 677 S.W.2d 503, 504 (Tex.1984).

**E. *Thompson v. Woodruff***, 232 S.W.3d 316 (Tex. App.-Beaumont, 2007)

This case involves the appeal of a medical malpractice claim dismissed as a sanction for discovery abuse. The basic nut of the opinion is that unless there is evidence that a client knew of her attorneys impairment or abuse and effectively aided, abetted or colluded in the discovery abuse, the client should not bear the brunt of sanctions imposed because of the attorney's neglect or abuse with regard to discovery.

Plaintiff's attorney became chronically ill, which led to dysfunction in her office, loss of staff, and impairment to her financial status. These circumstances apparently impaired her from timely responding to discovery, presenting witnesses for depositions and attending hearing. While the court exhibited some patience with these circumstances for a period, ultimately the court entered sanctions, which included striking plaintiffs' expert witness, granting summary judgment and dismissing the case for want of prosecution.

While it is apparent plaintiffs did not cooperate with discovery, the appellate court focused on the “justness” of the sanctions order. The court found that the circumstances bore some similarity to those in *Spohn Hospital v. Mayer*, 104 S.W.3d 878, 882

(Tex.2003). In that case the Texas Supreme noted that discovery sanctions that inhibit presentation of the merits of a case should be reserved for instances of “a party's flagrant bad faith or counsel's callous disregard for the responsibilities of discovery under the rules[.]” *Spohn Hospital v. Mayer* 104 S.W.3d at 883. The trial court must attempt to determine whether the offensive conduct is attributable to counsel only, to the party only, or to both. *Spohn Hospital v. Mayer* 104 S.W.3d at 882. The appellate court found that the trial court had punished the appellants for the conduct of their attorney without first imposing lesser sanctions; therefore, the sanctions order was held to be an abuse of discretion.

**F. *Van Es v. Frazier***, 230 S.W.3d 770 (Tex.App.-Waco, 2007).

This case reiterates the holding in *Cire v. Cummings*, that an oral hearing is not necessary under Tex. R. Civ. P. 215 for a trial court to impose death penalty sanctions.

Rule 215.3, which authorizes a trial court to impose sanctions, does require “notice and hearing” before sanctions are imposed. However, nothing in the rule indicates that this must be an “oral hearing.” A “hearing” does not necessarily contemplate a personal appearance before the court or an oral presentation to the court.

*Cire v. Cummings*, 134 S.W.3d 835, 843-44 (Tex.2004) (footnote and citations omitted); *Tidrow v. Roth*, 189 S.W.3d 408, 413 (Tex.App.-Dallas 2006, no pet.).

Defendant argued that Plaintiffs presented no evidence of discovery abuse; however, the appellate court noted that a trial court may consider the entire record and no particular “evidence” in assessing sanctions. *Am. Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex.2006) (per curiam)