

KINESIOLAWGY

A STUDY OF MOTIONS AND THEIR RELATIONSHIP TO PRE-TRIAL PRACTICE

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KINESIOLAWGY: A STUDY OF TEXAS PRE-TRIAL DISCOVERY MOTION PRACTICE

A. INTRODUCTION:

The author's intention is for this paper to provide some practical insights about motion practice in Texas, from the perspective of a Plaintiffs' trial attorney. The focus will be on discovery motions.¹

From my experience, the secret to successful motion practice is focus, timing, and nimbleness. Knowing whether or when to file a motion is probably as determinative of success as is the content of the motion. While one should always have a plan, the reality is that circumstances change continuously. Accordingly, one must always be flexible and adjust to conditions on the ground. To paraphrase Gen. Dwight D. Eisenhower, while very little in a trial context ever goes strictly according to plan, planning is always essential. It is critical to know when to go for the jugular and when strategic retreat probably is the best option. The ultimate skill is knowing how to identify what truly is needed to make the case, as oftentimes there is not opportunity to get everything on the wish list. Lastly, it is important to know when to move and when to sit perfectly still . . . and wait.

B. STRATEGY, TACTICS and STYLE:

Reportedly, outside the Oracle of Delphi were two inscriptions: "Know thyself" and "Nothing in excess." These admonitions apply equally to requesting relief from a modern day court: "Know your case and your strategy," and "Ask for only what you truly need."

Equally, if not sometimes more important than knowing the facts of your case and the applicable law is knowing the judge's preferences and proclivities. Merely following a cookie cutter approach to all disputes and all courts is likely to result in embarrassment and failure. Offering the judge a prime steak on a platter is a meaningless gesture if the judge is a professed vegetarian! All glory is fleeting. Past performance in other venues is not necessarily a good prognosticator of success in a new or unfamiliar

venue. One of the first things a trial attorney should do upon filing a case is obtain the rules of the particular court in which the case will be heard. If there is a published profile on the judge such as a "Bench Book", this resource should also be obtained and studied. Know the Court.

Motion practice should not necessarily be viewed as a strategy in itself. It really is merely a tactical consideration in the party's long-range discovery strategy. When an attorney files a case, there should be a plan for what it is that the attorney really needs to prove a cause of action, and how best to attain the necessary information efficiently and expeditiously so as to maximize its probative value as evidence at trial.

Timing is an important consideration. You want to make sure that you file the motion early enough to obtain timely relief; however, you also want to make sure the motion is not premature. Recall the Delphi admonition, "nothing in excess." Many trial attorneys suffer from the sin of impatience. These trial attorneys typically begin the pre-trial campaign by serving onerous sets of discovery that ask for more information and materials than can be practicably processed and absorbed, even if the other side is inclined to produce it. Predictably, the discovery is met with a barrage of objections deriding the requests as irrelevant, over broad and unduly burdensome. This discovery tactic then forces the requesting attorney's hand by requiring him to file a motion to compel. The same gene that compels the attorney to serve the onerous set of discovery frequently directs the attorney to file a similarly dense and convoluted motion for compel. This gene of compulsive excess must be identified and controlled, (there should be a twelve step program out there somewhere) if the trial attorney is to expect and enjoy long-term success.

As part of the long range discovery strategy, the attorney should identify the most efficient order for obtaining potential evidence. For instance, scheduling depositions before you have obtained the important documents could prove not only inefficient, but potentially may compromise the probative value both of the documents and the related testimony. The trial attorney needs to quickly identify the bedrock discovery that is needed and then proceed to obtain such discovery. Therefore, if court intervention is required, the motion to compel may be heard in sufficient time without disrupting the rhythm and flow of the discovery strategy.

It is a potentially foolish mistake not to include motion considerations as part of the pre-trial strategy. If an attorney does not file and pursue motions timely,

¹For instance, with regard to the topic of Motions for Summary Judgment, the reader is referred to Hitner & Libertato's papers on Summary Judgment, on file with the State Bar of Texas, and Liberato, *Summary Judgments in Texas*, 54 Baylor L. Rev. 1 (2002). And, on the topic of Daubert Motions, the reader should refer to Hon. Harvey Brown's papers on file with the State Bar of Texas and with TTLA.

then the requested relief could be denied or waived because of un-timeliness. Texas appellate courts have made clear that a party seeking relief regarding a discovery matter should request the relief promptly, and if the motion is not filed until time of trial, the relief will be considered waived. *See State Farm Fire & Casualty Company v. Morua*, 979 S.W.2d 616 (Tex. 1998); and *Copenhaver v. Medina*, 2003 WL 22215152 (Tex.App.-El Paso, no pet.h.)(holding that a party failing to obtain a ruling on motion to compel waives right to requested discovery. Failure to object to untimely production waives rights on appeal).

Of course, discovery motions should be considered a back up weapon and not the initial weapon of choice. The rules require attempted voluntary dispute resolution and trial courts generally expect that this will be explored before the motion is filed and set for hearing. Tex. R. Civ. P. 191.2 requires a certificate of conference:

Parties and their attorneys are expected to cooperate in discovery and to make any agreements reasonably necessary for the efficient disposition of the case. ***All discovery motions or requests for hearings relating to discovery must contain a certificate*** by the party filing the motion or request that a reasonable effort has been made to resolve the dispute without the necessity of court intervention and the effort failed. [emphasis added]

Some local jurisdictions even have their own requirements for the certificate.² As will be discussed below, this rule is frequently ignored, particularly with respect to Motions to Quash. Many attorneys believe that they may file a motion to quash, without first conferring in an attempt to reach an agreement on a mutually acceptable date, time and place for a deposition. This author believes this practice is wrong. Note that Tex. R. Civ.P. 191.2 requires certification of conference for all “motions *and* requests for hearings.” Arguably this rule requires that for a motion to quash under Rule 199.4 to be proper, (activating the automatic stay of the deposition) the motion must contain a certificate of conference even if a hearing is not required or requested.

To comply with Tex.R. Civ. P. 191.2, I use what I refer to as “Discovery Dispute Initiatives” and “Deposition Scheduling Initiatives.” I recommend that such letters be sent out long in advance of the proposed motion or deposition and that there be a request to engage in a conference. It has been my experience that many opposing attorneys inexplicably ignore such initiatives. In such instances, I merely attach the letter as an exhibit to the certificate of conference. This practice not only satisfies the conference requirements, but helps advance the arguments underlying the motion.

Another important consideration is the number of motions that a party files, or for that matter, the total number of motions filed by the parties cumulatively. I cannot give you a standard rule of thumb about how many motions a judge is willing to consider or how many hearings a judge is willing to conduct. However, it is safe to say that generally the attorneys’ propensity to file motions far exceeds the judges’ patience and willingness to consider them. The key strategy here is to be judicious regarding the number of times you go to the well. Make every motion count. Approach the exercise with the philosophy that each motion could be your last. Every motion has a potential benefit and a potential cost even if you prevail. Don’t proceed on a motion with marginal benefit. Prioritize your requests for relief so that you request the relief that is most important first. Those points that are saved for the end may not be reached or may not be given much consideration.

Over the years, I have been involved in a number of large, acrimonious cases that involved numerous discovery disputes. Often, it seemed opposing counsel were disputing everything on the mistaken belief that I would not have the stamina or perseverance to challenge all the objections, or that the judge would not have the patience to consider all the objections. (I’m sure there may have been another side to the story, but unfortunately with the passage of time, I have forgotten it). The defense strategy was to make my requests appear over-reaching and overwhelming. My success depended on me demonstrating that the requests were pertinent to material issues and comparatively simple and easy to answer. What I learned from these experiences is that it is important to formulate key themes, and to group and categorize the disputes under these themes.

The importance of themes cannot be overstated. We, as trial attorneys, tend to get wrapped up in the nuances and intricacies of our cases to a greater extent than is probably healthy. If we are not careful, we get absorbed by the minutiae and can lose sight of the big

² See, Tarrant County Local Rule, 3.06: Motion Practice.

picture. Judges, on the other hand, tend to be big picture people when it comes to our cases. They usually just want to know what our case is about and what we really need to prove it.

Ironically, while most trial attorneys know that themes are important in presenting a case to a jury, many of us fail to acknowledge or employ this concept in presenting motions to courts. While this may be a controversial statement in some quarters, a judge, first and foremost, should be considered an ordinary human being who learns and processes information essentially the same way as the hoi polloi. If you are to prevail, the judge needs to like you and think you are credible. The judge needs to be presented a clear, concise theme of the case that resonates with his or her belief system. And the judge needs to be presented a simple, logical argument, even if the underlying issue is complex.

Simplicity is an important watchword in formulating a motion strategy. Unless you have an unusual judge, most judges (especially state court judges who do not have large staffs) have only a limited period of time on their hearing docket to consider and rule upon your motion. Their attention span – especially if yours is the one hundredth discovery motion hearing the judge has heard that week-- is likely to be even more limited. Therefore, you need to simplify, simplify, and simplify. You need to decide what issues need to be heard and which can be deferred to another time or dropped altogether. You need to decide what issues you want to argue and which you are willing to perhaps trade for concessions on other issues. Motion practice, like life, is often a negotiation.

A good way to keep things simple and concise is to follow the federal court format of presenting a short motion with an accompanying brief. There are several benefits of this method. First, it allows you to present your motion concisely without the encumbrance of a lot of legal analysis and cites.

Second, it allows you to quickly file your motion. The analysis, in the form of a brief, may be submitted separately later. You may file the brief shortly after the motion or after the Defendant has filed a response to the motion or at the hearing, depending on your judge's tendencies and preferences. Some judges prefer to read the law regarding a motion in advance of the hearing and only want to hear argument that is not contained in the motion or brief. Other judges prefer to have a simple motion and allow the attorneys

to provide the substance of the arguments at the hearing. It is important to do your homework and learn your judge's preferences in this regard. If you have a judge that prefers to read the law prior to the hearing and you wait until the hearing to offer a brief, you may find that the judge has already ruled or that he/she is disinclined to listen fully to your arguments.

Know the local practice about submission and/or hearings. A number of courts prefer to rule on matters without oral hearing unless a hearing is specifically requested. If there is any doubt an oral hearing will be granted, submit a brief with your motion or response.

Whether you follow the motion/brief model, include the analysis in the motion, or if you are one of those attorneys who like to surprise everyone by presenting the legal analysis at the hearing then it is advisable to provide a legible, highlighted copy of the complete opinion to the judge. As many authors before me have noted, always preface your remarks about the opinion with "as her honor may recall. . ." Never suggest or imply that the Court is unfamiliar with a case or the controlling the law. Judges tend to like attorneys who do not cause them embarrassment.

What is the nature of the dispute? It is incredible to me that the majority of motions that I have read over the years fail to state this proposition early and clearly. For reasons that are not at all clear to me, attorneys insist on wasting at least half a page of the motion with meaningless verbiage about the parties and the history of the dispute before stating what is in dispute and what the movant wants from the court. Maybe buried somewhere on page 3 or 4 of the motion is a statement about what actually is in dispute. It is senseless to waste the judge's time. The judge knows who the parties are and really could care less about the evolution of the dispute. The motion should set out in the first paragraph who is bringing the motion and what is in dispute. The next paragraph should set out simply the nature of the case and the third paragraph should set out why the requested relief is important and why the movant is entitled to it.

Why is the requested relief important? All too often our motions fail to answer this question which frequently is a fatal mistake. It is one thing to argue that we are entitled to something. It is quite another to argue that the requested relief is necessary for a fair adjudication of the facts. The judge is – or should be— interested in a fair exposition of the material facts and a just result. When the Plaintiff couches his/her arguments in these terms, the odds of winning are

significantly greater than if the judge is merely hearing that the Plaintiff wants something because the Plaintiff believes he/she is entitled to it. When you are presenting a motion, you are a salesperson. If you expect to make the sale, you have to convince the purchaser of the product's benefits. If all you do is tell the purchaser why the sale would be good for you, chances are you are not going to make the sale.

What is the nature of the case? Early in the case, the attorney should come up with a one or two sentence statement of what the case is about. The theme of the case should be clearly set out in this statement. This statement should be included in every motion you file in the case. As with trial, repetition of the theme helps reinforce it in the mind of the listener, which in the case of motion practice is the judge. It is similar to an opening statement. It should be a persuasive and compelling statement to the judge about why this matter is of interest and importance. It also will outline the predicate for establishing the materiality of the requests contained in your motion.

Materiality is an often overlooked concept in motions. How does the requested relief relate to the matters that have been placed in issue by the pleadings? Just because a party is technically entitled to some information does not necessarily mean the information is material to the case that has been presented to the court. Recall that just because something is relevant at trial, does not necessarily mean it always gets admitted. Judges often will apply a cost/ benefit analysis. If the requested discovery is not material, the Plaintiff is going to have an incredibly difficult time persuading the court that relief is necessary and that it should be granted.

Don't request things merely because you think you may be entitled to them. Instead, formulate a clear strategy about what you need, (as opposed to what you would like) and focus your attention on these matters, at least initially. Get what you need first, and then depending on the temperament and patience of the court, go after the things you want. Unless you simply are in need of some affirmation, getting what you need often is less costly and more rewarding than chasing what you want.

Argue in a pyramid format. Get to the point and spread out, as needed, and as time and the Court's patience permits. Somewhere in law school each of our brains was surreptitiously re-wired to think and communicate in a very peculiar fashion (our professors proudly referred to it as "thinking like a

lawyer.") Rather than stating the key point and then broadening the thought as we progress, we start with a lot of seemingly disorganized points or data and proceed to refine them down to a conclusion. The brilliant minds who developed this process obviously are the same ones who conceived billing by the hour! No rational person has the time or patience to listen to or read through such an analysis. Identify your bottom line and make it your thesis sentence.

It is foolish to postpone your conclusion to the end of your brief or motion. Chances are the judge is never going to read that far or listen that long. We all seem to think that judges and juries hang on our every word and that our arguments are "good to the last drop." Nothing could be farther from the actual truth. The name of the game is primacy, punch, and persuasion. Get there first with the best. We all dream of making the final game-winning argument, while in most instances our first argument actually is where we win or lose. Write your motion and present it as though you were writing a newspaper article: have an eye grabbing headline, followed by a potent first paragraph that tells the reader who, what, when, where, why and how.

Get rid of the law speak. From personal experience, I can tell you this is easier to preach than to put into practice. When writing and arguing to the court, use clear and strong language. Use declarative sentences. If you don't know where an expression came from, don't use it. Further sayeth not . . . whatever.

Do not mindlessly cite propositions of law without connecting them to the facts in your particular case. Which means it might be alright to mindlessly cite things if they all end up connecting nicely to the facts underlying your main argument. It's probably not a very well kept secret that we all probably use the same paragraphs in our motions, having plagiarized them from other's motions and court opinions. What is often lacking in the analysis is how the particular proposition relates to the facts in our case. In the *Daubert* context this is referred to as the "analytical gap." It is easy to string together a series of propositions; however, frequently such a technique is not persuasive. If you state a proposition of law, then explain to the court how the proposition has application in the particular case or argument before court. Courts are attracted to relevancy.

Do not use string cites unless you are campaigning for a seat on the Texas Supreme Court and want to impress everyone that you have completely canvassed

the jurisprudence of the free world on a particular point. One, or at most two, strong cases are all you need. Also, as a practical matter, the more cases you cite the greater the chance of inconsistency or compromise.

Do not intentionally or unintentionally misstate the law or mislead the court. Both of these mistakes are unforgettable and unforgivable. If you misstate the law, you are faced with the Hobson's choice of conceding you are an idiot or a sociopath. How do you avoid unintentionally misstating the law? Do not cite a case that you have not read personally or that you do not understand. The reasoning behind this concept should be obvious.

If you make a mistake, own up to it. Don't lay it off on your staff. Personal responsibility is more than a bumper sticker slogan; it is a part of our code of ethics. We may delegate responsibilities, but accountability starts and stops with the trial attorney in charge.

You have filed your simple motion and the accompanying brief, and the judge has granted your request for an oral hearing. What do you do next? Get organized. How you impress the judge at the hearing is going to determine the respect the judge probably is going to give you at trial. Be prepared to proceed with the hearing the way the judge wishes. Ask the judge if there are particular points he/she wants you to address. If not, proceed with your argument, using the considerations discussed above.

Your presentation should be concise, organized and seamless:

- Pre-mark your exhibits the same as you would for trial.
- Consider using a presenter to present documentary evidence. A PowerPoint presentation can be very helpful. However, it can often be inefficient and boring if not properly planned. Keep it short and simple. Check with the bailiff regarding the judge's preferences in these regards before carting a lot of technology into the courtroom. Some judges might perceive a lot of technology as an indication the matter should be deferred.
- Always attach highlighted copies of the pertinent decisions to the brief or have them available for the court's consideration at the hearing. Provide your opponent a copy of what you are presenting the court,

in a timely manner. Don't be a chump. You are either right about the law or not. Hiding the case from your opponent is wrong on many levels.

▪ PRACTICAL CONSIDERATIONS:

- ◆ Choose the high road first; Judges are people. It is difficult for them not to lean first toward the attorney they respect and trust;
 - ◆ Define the issue and your requested relief;
 - ◆ Re-state the nature of the case;
 - ◆ State why the requested relief is important to the fair administration of justice in this matter;
 - ◆ Outline the argument and then expand upon it if requested by the Court;
 - ◆ Avoid getting baited into arguments that will trivialize your request for relief;
 - ◆ Be professional and courteous.
- I have commonly witnessed attorneys jockeying for who can address the court first. If it is your motion, you should be entitled to present it before your opponent starts arguing about it or framing the issue.
 - Don't interrupt your opponent and definitely do not interrupt the Court.
 - Do not get into a personal argument with your opponent; address your arguments to the Court.
 - Never argue with the Court. The house always wins.

Should the hearing be recorded? This is similar to asking whether voir dire or opening should be recorded. Regrettably, it often depends on the outcome. Typically evidentiary hearings should be recorded. If you have the burden of proof and the hearing is not recorded, you are going to have an uphill battle prevailing on appeal if the ruling goes against you. While most judges prefer to restrict recordings to evidentiary hearings, I try to have all hearings recorded. I believe having a transcript of the hearing significantly reduces the wasted time arguing over what the court ruled. Sometimes, in particularly contentious disputes, I have found it useful

to submit a proposed order that is annotated with references to the actually hearing transcript.

Always submit a proposed order to the court with the motion and have a proposed order at the hearing. I have developed a very useful technique in this regard. I write my request for relief in the motion in exactly the format that I want the order. Then I can merely copy and paste the request for relief into the order. Not only is this efficient, but it assures that the order complies with the request for relief.

As soon as you get a favorable ruling, get it rendered on the record and produce a proposed order to the judge. A docket entry is not an enforceable order. See *Unifund CCR Partners v. Hackman*, 2007 WL 475326, (Tex.App.-Dallas, February 15, 2007) and *In Re Bill Heard Chevrolet*, 209 S.W.3d 311, (Tex.App.-Houston [1st Dist.] 2006). If you wait, it is predictable the opposing attorney is going to object to your proposed order, or he/she will file a motion for reconsideration to delay enactment of the ruling.

Make sure to always request a specific deadline for compliance. The Rules of Procedure were amended in 1999 to make thirty days from the order the default with regard to rulings on objections and assertions of privilege;³ however, often you will want compliance in a much shorter period of time. Be sure to include the time for compliance in your request for relief.

Once you win the ruling, say “thank you, your Honor” and “get out of Dodge.” If you wait around, there is always the chance the opposing attorney will keep talking (euphemism for arguing) (“Judge, I just want to make sure I’m clear on your ruling...”) and he/she may prevail upon the court to modify or reconsider the ruling.

C. THE FIRST HEARING

The first hearing in the case is often one of the most important. This hearing will provide the court the first impression of you and your case. Once that impression is formed, it is going to be hard to shake for better or for worse.

1. TIMING

The most important insight I can offer about timing is that it can be very beneficial to be the one to

get in front of the judge first with a winning motion. The emphasis is not on “first,” but rather on “winning.” You do not want to present a losing argument to the judge at the beginning of the case. Instead, you want to appear focused, organized, and reasonable. You also want it to appear that you are there reluctantly because the other side is being unreasonable, not because you are “entitled.”

The lawyer should approach the judge as she would prospective jurors. It is important to convince the judge that your case is meritorious, interesting and worth listening to, and that you are honest and prepared. Timing is an important consideration in these regards.

Regrettably, it does not seem many attorneys give proper consideration to the first appearance before the court. Instead of planning the appearance; they simply wind up in front of the court. They are less concerned with what will appeal to the judge than what they think they want to tell the judge.

What the judge probably wants to know at the first hearing is that the parties have a focused plan for getting the case to trial, that the case is interesting and worthy of the court’s attention and the attention of twelve citizens who may be selected to hear it, that the parties have a command of the facts and the law and that the parties are prepared to work together in a reasonable, civil manner to get the case prepared fairly and expeditiously for resolution. It is toward this end that I offer the following insights:

a) The first thing Plaintiff’s counsel should do is research the local rules of the court and the judge’s preferences with regard to discovery control plans and motions. It does little good to formulate a motion strategy if the judge disfavors hearings. Further, it important to know the judge’s preferences with regard to matters that might be issues in our particular case. In addition to obtaining a copy of the local rules, it is a good idea also to meet and discuss the judge’s preferences with his staff (the coordinator, the clerk, the reporter, and the bailiff). It is also prudent to find out the staff’s preferences. Does the court accept courtesy copies of motions? Does the court request highlighted copies of cases? When should the parties notify the court whether they want a reporter for the hearing? The bailiff is particularly knowledgeable about what rules the judge enforces in the court. Does the judge demand that the attorneys stand behind a podium? Does the judge expect for exhibits to be pre-marked?

³ See, Rule 193.4 Tex. R. Civ. P.

b) Armed with advance intelligence about the judge's preferences, Plaintiff's counsel should push for a Discovery Control Plan hearing beginning as soon as the Defendant files an answer in the lawsuit. This, however, should not be a mindless initiative. Instead, Plaintiff's counsel before filing the lawsuit should have a plan formulated for getting the case prepared for trial or settlement expeditiously. This includes having an idea of a reasonable date for trial which concomitantly means knowing when Plaintiff will be able to fully designate expert witnesses.

c) Prior to the first hearing, the Plaintiff's attorney should send a letter to all defense counsel setting out a proposed discovery plan and discovery schedule, including a proposed deposition schedule, and request that the parties respond by providing suggestions for the discovery control plan and proposed dates for depositions. The letter should also propose a conference for the purpose of reaching agreements on these matters or identifying disputed issues for the court. This letter becomes Exhibit A to the certificate of conference for Plaintiffs' Motion for Discovery Control Plan Hearing.

d) Plaintiff's counsel should circulate the proposed discovery control plan quickly after the Defendant files its answer to the petition. Time should be allowed to confer meaningfully about the proposed discovery control plan then Plaintiff's counsel should schedule a Discovery Control Plan Hearing. If economically feasible, the conference should be reported by a court reporter or tape recorded so that there is a record of what was agreed upon. This will save a lot of time in coming up with a proposed Discovery Control Plan for the court. Unfortunately, however, it is often very difficult to get attorneys to voluntarily agree to discuss anything on the record. As the Defendants fail to comply with discovery requests, these matters can and should be added to the hearing.

e) The first hearing should be scheduled about sixty (60) days after the Defendant's answer date. This assumes that the Plaintiff will be pro-active and aggressive in seeking discovery. Ideally, Plaintiff will have served written discovery with Plaintiff's Original Petition (meaning that the responses will be due 50 days after service). Additionally, Plaintiff will have circulated a request for depositions and depositions dates shortly after the Defendant filed an answer to the petition. If this is the case, the Defendant's responses to discovery will be due about thirty (30) days after its answer date. Plaintiff's counsel should allow another ten (10) days to confer about objections (and if the

Defendant has withheld documents because of a privilege, fifteen (15) days will need to be allowed from the date of a request for a privilege log for the Defendant to respond). Of course, at the end of the 15 day period, there should be a conference about the log.

As soon as the Defendant files an answer to the petition, Plaintiff's counsel should circulate a letter requesting depositions and dates for depositions (I usually request alternate dates -- at least 3 to 5-- during the upcoming three month period). Typically, I allow 7-10 days for a response from defense counsel, and usually I do not get any response. So between 20 – 30 days after the Defendant has answered, Plaintiff's notices are served, and within 6 days after that Defendants' motions to quash will be served. Of course, the Defendants will only object to the time, date and place of the depositions and will not offer any alternatives, so once again there will need to be a conference. All the above should be accomplished in the first 50 days after the Defendant has answered.

f) The first hearing should be a platform to explain to the court what the case is about, to discuss what discovery the plaintiff's attorney thinks is needed to properly develop the facts, to discuss potential or anticipated problems in the preparation process, to present a reasonable discovery control plan and to obtain an agreement or order regarding a deposition schedule.

D. TYPES OF DISCOVERY MOTIONS

1. MOTION FOR PRE-TRIAL CONFERENCE

During the formulation of the 1999 amendments to the Texas Rules of Procedure pertaining to discovery, there was considerable discussion about whether the trial courts should initially conduct pre-trial conferences similar to the practice in federal court. It was decided that such a construct would be too time consuming and inefficient for State practice. Nonetheless, Rule 166a remains as an option for parties who wish to meet with the Court early in the litigation and hammer out a more structured approach and timetable for preparing the case for trial. If there is particular uniqueness about the issues in dispute that might impact the amount and type of discovery that needs to be conducted, it is important to request a pre-trial conference early. Such a conference serves a purpose similar to a summary judgment hearing or a motion in limine hearing. It is an opportunity to inform the Court regarding the issues in the case, so the Court has some context for deciding the various discovery motions that might "matriculate"

(with apologies to the great coach, Hank Stram) his or her way.

2. MOTION FOR DISCOVERY CONTROL PLAN

Rule 190.4(a) provides that the court, must, on a party's motion, and may, on its own initiative, order that discovery be conducted in accordance with a discovery control plan tailored to the circumstances of the specific suit. The parties may submit an agreed order to the court for its consideration. The court should act on a party's motion or agreed order to the court for its consideration.

When the above rule was first enacted, there was a lot of discussion about whether it was more preferable to proceed under a Level 2 or Level 3 plan. As a practical matter, most courts continued to issue their own discovery control plans, so the issue in most instances has turned out to be somewhat academic. What is important to remember is that if a particular area is not addressed in a control plan, the Level 2 requirements and deadlines operate by default. *See Carter v. MacFadyen*, 93 S.W.3d 307(Tex. App.—Houston [14th Dist.] 2002, pet. denied). For instance, if your discovery control plan does not set out a deadline for the discovery period, the Level 2 time period will be applicable, which is 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 for written discovery.

From sad experience, I can tell you that a date certain for the discovery period deadline is far preferable to the default period under Level 2.

I recommend that the Plaintiff's attorney always take the opportunity at the beginning of the case to file a motion for a discovery control plan tailored to the circumstances of the specific case. Even if the judge denies the motion, the hearing will have served a useful purpose. However, in most instances, the trial judge will be inclined to approve a control plan approved by the parties.

There are many considerations in formulating a discovery control plan. This paper will focus only on some of those considerations relevant to formulating a motion strategy. First and foremost, the plan should be designed to obtain a fair and expeditious resolution of the case. This means that serious thought should be given to the deadline for adding new parties, as you do

not want to have the deadline so close to trial that the court will be required to grant the newly added party's request to modify the discovery control plan. The deadlines for designation of experts need to take into account the complexity of the underlying discovery issues and the length of time it is going to take to resolve them. You do not want your expert deadlines coming up before the parties have fully exchanged written discovery and completed all or substantially all fact witness depositions. The pleading deadline should be a sufficient amount of time before the discovery deadline so that the parties will have time after the amendments to the pleadings to file appropriate discovery to learn more about new contentions or defenses. There should be a date certain before which dispositive motions, such as motions for summary judgment, cannot be filed and a deadline for filing such motions. Similarly, there should be a deadline for challenging the qualifications and opinions of expert witnesses. The goal in these latter regards is to make sure all matters have been raised by a date certain so that they may be addressed before trial, preferably at a pre-trial conference and ideally so that there is sufficient time prior to trial to modify or supplement discovery if discovery responses are found deficient.

3. MOTION TO MODIFY DISCOVERY CONTROL PLAN

Rule 190.5 provides that the court "may modify a discovery control plan at any time and must do so when the interest of justice requires." *See Vaughn v. Ford Motor Co.*, 91 S.W.3d 387 (Tex. App.—Eastland 2002, pet. filed). In this regard, I have found that in certain cases it is advisable to build into the discovery control plan a date for reconsideration and adjustment of the deadlines. If this is not acceptable or feasible, it is recommended that a motion to modify discovery control plan be filed prior to the deadlines the party is hoping to modify. As a general rule, it is advisable to file a motion for protection or modification prior to, rather than after, the deadline for which modification is sought.

Keep in mind that a court *must* allow additional discovery under the following circumstances:

- (a) related to new, amended or supplemental pleadings, or new information disclosed in a discovery response or in an amended or supplemental response if:
 - 1) the pleadings or responses were made after the deadline for complete of discovery or so nearly before that deadline that an adverse party

does not have an adequate opportunity to conduct discovery related to the new matters, and

2) the adverse party would be unfairly prejudiced without such additional discovery.

There has been longstanding controversy about whether a control plan remains in place, if a trial setting is continued. First, recall that under Rule 190.5 the court may modify a discovery control plan at any time. Rule 190.5(b) mandates a court to allow additional discovery in the following situation:

regarding matters that have changed materially after the discovery cutoff if trial is set or postponed so that the trial date is more than three months after the discovery period ends.

Arguably, modification must be allowed, even if the trial date is not more than three months after the discovery period ends, if new matters have developed since the end of the discovery control period which require modification of the control plan.

4. MOTION TO MODIFY DISCOVERY PROCEDURES

A concept related to a motion for modification of the discovery control plan is a motion for modification of discovery procedures. Rule 191.1 allows the parties to modify the discovery procedures or to obtain modification of the procedures by order, upon a showing of good cause.

Unless the discovery control plan specifically addresses a particular limitation delineated in Level 2, the Level 2 limitation is operational by default. If the parties cannot reach an agreement on these matters, it behooves the plaintiff to seek a timely motion for modification of discovery procedures. Important considerations in this regard are the limitation on number of interrogatories. If the case is particularly complicated, the Plaintiff may want to request an enlargement of the number of permissible interrogatories. Additionally, if the case is complex, the Plaintiff may want to request an enlargement of the limitation on hours of deposition of testimony from the 50 hour limitation under Level 2. The Plaintiff may also wish to obtain specific procedures with regard to production of documents, such as requiring the parties to identify documents by bates numbers in written responses to requests for

production. Most importantly, this process allows the parties to know specifically what, if anything, is being produced in response to a request, and it allows the requesting party to know the volume of documents being produced so that informed decisions may be made about inspection and copying of the items.

5. MOTIONS TO LIMIT SCOPE OF DISCOVERY

Rule 192.4 is a new rule, adopted from the federal rules, which allow the court on motion or on its own initiative to limit methods of discovery under certain circumstances:

(a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or

(b) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

This rule may in some instances be a shield, while in others it may be a deadly sword. If you are the Plaintiff, you want to be very careful about asserting this motion, as more often than not, it will be the Defendant arguing that the Plaintiff is seeking more discovery than it needs to prove its case. This is one of the reasons why I advocate the Plaintiff seeking a discovery control plan hearing as early as feasible to assist in defining the Plaintiff's case and the projected discovery needed to effectively and properly prove it. If the Plaintiff does not take the initiative in this regard, he/she risks having his/her case and its discovery needs first defined by the Defendant, who of course, will argue that the case is tenuous, that very little discovery is needed, and that the burden of responding to Plaintiff's discovery requests far exceeds the potential benefit of the discovery in proving the Plaintiff's case. A couple of recent cases are helpful in this area.

The court in *In re Whiteley*, 79 S.W.3d 729 (Tex. App.—Corpus Christi 2002, orig. proceeding) held that under Rule 192.4(b), discovery requests are not overly broad if adequate time restrictions are set and the information's benefit outweighs the party's burden in producing it. The court recognized that if the request is burdensome only because of the producing party's

own disorganization, it cannot be an “undue” burden as required by the rule. *In re Energas Co.*, 63 S.W.3d 50 (Tex. App.—Amarillo 2001, orig. proceeding) holds that while Rule 192.4 places limits on discovery if the request is overly broad or unduly burdens the adverse party, the party resisting discovery must produce some evidence to support a protective order. Evidence must show that the discovery request is unduly burdensome or unnecessarily harassing. Stating that compliance with the request would force the party to incur travel expenses and lose work time is insufficient to show undue burden.

6. MOTIONS FOR PROTECTION

a) GENERAL RULES:

1) The purpose of a motion for protection is to protect the responding party from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights. *In re Alford Chevrolet-Geo, Inc.*, 997 S.W.2d 173, 181-82 (Tex. 1999). Rule 193 is to be followed in asserting objections to the form of the discovery and for purposes of protecting privileged information or data.

2) “A person from whom discovery is sought, and any other person affected by the discovery request, may move within the time permitted for response to the discovery request for an order protecting that person from the discovery request.” Rule 192.6(a). While it is clear the motion must be filed on or prior to the deadline for responding to the request, it is not clear from the rule whether a ruling needs to be obtained prior to the deadline. Arguably, all that is required is that motion be filed timely.

3) “A person should not move for protection when an objection to written discovery or an assertion of privilege is appropriate, but a motion does not waive the objection or assertion of privilege.” See *In re Aaron*, No. 07-03-0324-CV, 2003 Tex. App. LEXIS 6898 (Tex. App.—Amarillo Aug. 12, 2003, orig. proceeding).

4) “If a person seeks protection regarding the time or place of discovery, the person *must* state a reasonable time and place for discovery with which the person will comply.” Ask yourself when was the last time you saw this in a motion to quash. If your practice is like mine, it was a very long time ago, if ever. This provision is often ignored. Question

whether a motion to quash is proper if it does not contain this information.

5) “A person must comply with a request to the extent protection is not sought unless it is unreasonable under the circumstances to do so before obtain a ruling on the motion.”

More often than not it is going to be the Defendant in a personal injury case who is going to be filing a motion for protection. Therefore, the principal focus of this section will be on responding to a motion for protection. However, there are instances in which the Plaintiff may want to file a motion for protection, and I would like to address those situations first.

b) DEPOSITIONS ON WRITTEN QUESTIONS

Defendants frequently issue depositions on written questions for all sorts of records pertaining to the Plaintiffs. Some of the records requests that I see frequently include requests for medical records, psychiatric records, employment records, insurance records (health, auto, life, and workers compensation), social security files, income tax records, school records, and laboratory specimens and slides. For reasons that are not quite clear to me, Defendants uniformly ignore the rules regarding scope of discovery when it comes to such requests. While a Defendant might tailor a request for production regarding medical records propounded to the Plaintiff when the request is made to a non-party medical care provider, the request is incredibly over broad. The Texas Supreme Court has repeatedly admonished attorneys that requests for production are to be tied to the claims and defenses alleged in the case, both in terms of the scope of materials requested and the time period for which records are requested. Requests that do not conform to this requirement are considered improper “fishing expeditions.” In *K Mart Corp. v. Sanderson*, 937 S.W.2d 429, (Tex. 1996), the Texas Supreme Court made clear that no discovery device may be used for fishing. Presumably, this ruling includes depositions on written questions. The problem created by the deposition on written question subpoena is that the Plaintiff does not have the records to withhold and therefore cannot properly comply with Rule 193. Accordingly, when a request is improperly overbroad, it is appropriate to file a motion for protection and to inform the responding party that it may refuse to comply with the subpoena pending an agreement of the parties regarding the dispute or a court order. Rule 176.6 (e):

A person commanded to appear at a deposition, hearing, or trial, or to produce and permit inspection and copying of designated documents and things, *and any other person affected by the subpoena*, may move for a protective order under Rule 192.6(b) – before the time specified for compliance – either in the court in which the action is pending or in a district court in the county where the subpoena is served. The person must serve the motion on all parties in accordance with Rule 21a. *A person need not comply with the part of a subpoena from which protection is sought under this paragraph unless ordered to do so by the court.* The party requesting the subpoena may seek such an order at any time after the motion for protection is filed. [emphasis added].

I have developed a procedure for responding to such a situation. First, I send to the Defendant a Discovery Dispute Initiative objecting to the improper request and proposing an alternative approach. The proposed alternative approach basically allows the court reporter to obtain all the records. If an authorization is needed, I agree to provide a broad authorization for records only. In return, the Defendant agrees that the records will be delivered only to me and that I will have 7 – 10 days to review the documents. If I have objections to any of the documents on the ground that they are irrelevant to the claims and defenses plead in the instant lawsuit and therefore should remain private, I agree to follow the procedure set out in Rule 193 for protecting items claimed to be privileged.

c) RESPONDING TO MOTIONS FOR PROTECTION

The same cases cited above with regard to Rule 192 are also applicable to motions for protection. The burden is upon the party seeking the protection to produce proof of the privilege or to produce proof of the undue burden, unnecessary expense, harassment, annoyance, or invasion of personal constitutional, or property rights. Probably the best cases to refer to regarding the burden remain *S.W Independent Insulating Glass v. Street*, 772 S.W.2d 798 (Tex. App.—Fort Worth 1987), and *Garcia v. Peebles*,

734 S.W.2d 343 (Tex. 1987). It is not enough for the responding party to merely produce a conclusory affidavit stating that it would be unduly burdensome to comply with the request or that the request would cause harm or embarrassment. As stated in *Garcia*, the respondent must prove a “particular, articulated and demonstrable injury.” This must be done with specific factual evidence of the harm.⁴

Typically, the burden of proof with regard to a motion for protection is solely upon the responding party. However, it should be noted that there have been decisions in the area of trade secrets that impose a burden upon the requesting party, once the responding party has established that a matter is a trade secret. Once the trade secret is established, the requesting party must then prove that the requested material is not only relevant, but that it is necessary for a fair adjudication of the facts. The proof in this regard must be more than a conclusory statement of an expert. See *In re Bass*, 113 S.W.3D 735 (Tex. 2003).

7. MOTION TO QUASH

A motion to quash is available to quash a deposition that is inappropriate, to challenge a subpoena duces tecum contained in a notice,⁵ and to challenge the time date and place of a deposition.

a) SUBSTANTIVE CHALLENGE TO NOTICE

If a party is challenging the propriety of a deposition, the party must file a motion to quash and have it heard prior to the date and time scheduled for the deposition. Courts are disinclined to prevent the taking of a deposition merely because there is a potential that the questioning may elicit privileged information. The general rule is that the deposition should proceed, subject to the party properly asserting privileges during the deposition. *Smith, Wright & Weed v. Stone*, 818 S.W.2d 926 (Tex. App. --Houston [14th Dist.] 1991, orig. proceeding). Additionally, the same rules that pertain to a motion for protection will apply to a motion to quash: the party seeking the motion must prove a “particular, articulated, demonstrable harm.” See, *Massinga v. Whittington*, 792 S.W.2d 940 (Tex. 1990), holding that before a party could quash a notice to take the videotaped deposition

⁴ Also, refer to discussion under Motions to Compel, below.

⁵ See discussion, above, regarding Depositions on Written Questions.

of the defendant; the objecting party was required to demonstrate a “particular, articulated, demonstrable harm.”

b) CHALLENGE TO TIME, DATE OR PLACE

Rule 199.4 applies to objections to time and place of oral depositions:⁶

A party or witness may object to the time and place designated for an oral deposition by motion for protective order or by motion to quash the notice of deposition. If the motion is filed by the third business day after service of the notice of deposition, an objection to the time and place of a deposition stays the deposition until the motion can be determined.

c) PRACTICAL CONSIDERATIONS:

- 1) The motion must be *filed* by the third business day after service of the notice;
- 2) If the notice is served by mail, arguably the time limit is third business day after service plus three days (not necessarily business days), pursuant to Rule 21a;
- 3) The motion must contain a certificate of conference;
- 4) The motion must state a reasonable alternative time and place for the deposition, pursuant to Rule 192.6.

8. MOTIONS TO COMPEL

From a Plaintiff’s perspective, the motion to compel is probably the motion that warrants the most attention with regard to strategy and tactics. Defendants oftentimes will object to all requests for discovery, forcing the Plaintiff to make critical decisions about whether to seek a motion to compel, and if so, when.

It is important to note at the outset that if the requesting party wishes to obtain information to which the responding party has objected or provided a deficient response, it is incumbent upon the requesting party to file a motion to compel, and obtain a hearing and ruling timely. The burden is on the party opposing the discovery. *In re Born*, No. 01-01-00971-CV, 2002 Tex. App. LEXIS 3279 (Tex. App.—Houston [1st Dist.] May 9, 2002, orig. proceeding). If a responding party asserts that items are privileged, the use of such items will be excluded at trial unless the requesting party timely supplements to produce the items. Tex. R. Civ. P. 193.4(c). However, most courts are going to be inclined to find a way to let in the evidence in the interest of deciding the case on the facts. While the requesting party always has the option of waiting until trial and moving to limit or exclude evidence that was not timely produced in response to discovery requests, such is a risky approach, as some cases highlighted below will illustrate. The better and more prudent approach is to challenge objections and deficient responses before trial.

There are problems with filing motions to compel. For one thing, courts do not like them. While I cannot give you a magic formula, each trial judge has a tolerance for only so many motions to compel in a case. At some point, regardless of whether you are right technically, the judge is going to lose patience and stop granting relief, or worse, the judge will start restricting discovery. I am convinced that a few parties sometimes abuse the discovery process in an attempt to reach this point of critical mass. This is unfortunate, but there are ways to avoid this situation.

As noted earlier in this paper, the first motion to compel hearing is critical, as it sets the stage for the rest of the discovery process. If it appears that you, as the Plaintiff’s attorney, are being indiscriminate and irresponsible in your discovery requests, it is likely you will lose credibility with the judge and you will fare poorly not only on the first motion, but on all successive motions.

a) PREDICATE CONSIDERATIONS:

Probably one of the worst things a Plaintiff can do is use boiler plate requests for discovery. If the discovery requests are broad, the Defendant is going to be entitled first to object to the requests as being improperly over broad and second, to produce documents without much refinement or specificity. Think of it as “garbage in, garbage out.” You are going to have a hard time getting a judge to make the

⁶The rule, by definition, does not apply to depositions on written questions.

Defendant provide a response that is more specific or particularized than is the request. The request must be relevant and material to the issues in the case.

In *Loftin v. Martin*,⁷ the Texas Supreme Court signaled an intention to reign in the scope of discovery with regard to requests for production. To be proper, it was held that requests must identify particular types and categories of documents. A later appellate opinion offered the clarification that the requested documents had to be relevant to the issues that had been pleaded.⁸ More recently, the Court has stressed that no discovery tool may be used as a device for fishing.⁹

One of the key components to scope of discovery is the specificity of the pleadings. If the Plaintiff pleads generally and nebulously, there will be a liberal basis for admitting evidence at trial. However, the irony is that in such a situation, the Plaintiff's scope of discovery will probably be limited by reducing the amount of data that the Plaintiff may obtain to offer into evidence at trial. Before the Plaintiff starts requesting discovery, there should be a careful review of the pleadings to make sure there are allegations that support the requests. When the discovery is not related to the pleadings, the discovery is going to be vulnerable to the charge of "fishing."

When drafting your discovery requests, make sure they are particularized. Request particular types of documents and things for time periods that are relevant to the alleged incident or injuries which are relevant to the allegations contained in the pleadings. It is important to make sure you restrict the discovery requests to reasonable time periods. *G.M v. Lawrence*, 651 S.W.2d 732 (Tex. 1983). If a party fails to properly draft discovery in this regard, the discovery requests most likely are going to be objected to on the basis of being improperly over broad. However, note that a responding party may not claim that a request is unduly burdensome because the responding party had inadequate accounting procedures. The court in *In re Whiteley*, 79 S.W.3d 729 (Tex. App.—Corpus Christi 2002, orig. proceeding), held that under Rule 192.4(b), discovery requests are not overly broad if adequate time restrictions are set and the information's benefit outweighs the party's burden in

producing it. The court recognized that if the request is burdensome only because of the producing party's own disorganization, it cannot be an "undue" burden as required by the rule.

While the rules require parties responding to an over broad request to respond to so much of a request that is relevant (in terms of the incident, defective product, injuries, and time period); there are cases that hold that if the request is unduly over broad, the responding party may be free to object to the entire request. This particularly is a problem when the request seeks information or items for which the responding party claims a privilege. In such an instance, the responding party may first object to the scope of the discovery and then once there has been a ruling on the breadth of the request, the responding party may for the first time withhold documents because of alleged privileges. See *In re CI Host, Inc.*, 92 S.W. 3d 514 (Tex. 2002) (orig. proceeding).

I strongly recommend asking questions in subparts. Ask the first question for a very specific item or for a very limited time period that is clearly relevant to the occurrence giving rise to the lawsuit. In each successive subpart, broaden the scope slightly. In this way, the court may make a determination easily about where to draw the line, rather than having to make a decision on one question.

b) TRYING TO RESOLVE THE DISPUTE INFORMALLY:

Rule 191.2, requires that before any discovery motion is filed, the party filing the motion seek a conference on the disputed matter and certify to the court that attempt was made to resolve the dispute and that no agreement could be reached. I have tried several approaches to resolving discovery disputes. While sometimes this approach is successful, for the most part attempted informal resolution is frustrating.

Some attorneys see this rule as yet another billing opportunity. They will object to all the discovery requests, knowing that the requesting party must first confer before seeking a motion to compel. Either the responding party will ignore requests for a conference, assign an associate who has no knowledge of the matter and no authority to confer about the matter, or they will want to engage in a marathon telephone debate about each minute matter without agreeing to anything.

I have tried sending letters. I, however, have come to the conclusion that other than serving as a venting

⁷ 776 S.W.2d 145 (Tex. 1989)

⁸ *Davis v. Pate*, 915 S.W.2d 76 (Tex. App.—Corpus Christi 1996, orig. proceeding, [leave denied]). See more detailed discussion below.

⁹ *K Mart v. Sanderson*, 937 S.W.2d 429 (Tex. 1996).

mechanism, the letter accomplishes very little. You may attach it to a certificate of conference to show that you tried to be reasonable, but most judges are either unimpressed or simply see the letter as one more thing that has to be read. Further, if the responding party does respond in writing, there then has to be a comparison and merging of the two documents to identify those points of agreement and those points of remaining dispute. At the end of the day, the letter approach is not very efficient.

More recently, I have simply drafted a motion to compel and sent it to the responding party for consideration. The most ideal way of doing this is by email so that the party may simply interlineate his/her responses; however, few attorneys seem inclined to engage in such an exercise. Nonetheless, by sending the responding party a draft motion to compel, you identify the issues clearly and you let the responding party know that you are prepared proceed with filing the motion should an agreement not be reached promptly.

c) **DRAFTING THE MOTION:**

An added benefit of drafting the motion is that it forces the movant to focus the issues. It is similar to drafting the charge at the beginning of your case; it sets out your plan of attack in such a way that you can evaluate its probable effectiveness.

Oftentimes, when we engage in the conference regarding disputed discovery all that happens is that the requesting party goes down the list of requests and says "I'm entitled to this," and the responding party responds "you're fishing." In drafting the motion the requesting party should identify particular issues that he/she wishes to develop and then group the disputed discovery requests under these topics. It is easier for a judge to rule on an issue than it is for him/her to rule on each request.

In a way, motions to compel discovery are similar to conducting voir dire. Most judges think that voir dire can and should be conducted in a limited amount of time, and that most "questioning" is non-productive. A lot of judges see discovery the same way. When confronted with this judicial mind-set in voir dire, I have found that if you continue to ask meaningful questions, the judge may be inclined to grant extensions on the normal time limits. Similarly, if you can show that your discovery is being productive and that it is being conducted with a plan,

the judge probably will be more inclined to grant you more leeway.

The motion should quickly get to the point and there should never be more than three to five points. Actually, when you get beyond three points, your likelihood of prevailing on the remaining ones diminishes exponentially.

The best recommendation I can give is to be discrete in what you request. Determine what you really need to get to the next stage of discovery and defer that which is non-essential to another time, or seek to obtain it a different way.

d) **STRATEGY:**

Try to develop a discovery plan early in your case so that you know what you need and when you need it. Documents are unquestionably the most important discovery, probably even more so than deposition testimony. Make sure that you have sent out your request for documents early enough so that you can get rulings on disputed requests and have the records produced before you start conducting depositions. Otherwise, you will find yourself deposing witnesses without having the documentary basis to guide your questioning.

Know the procedure for objections and preserving privileges outlined in Rule 193, and know the rules of evidence pertaining to privileges.

With regard to most objections, the issue is going to be scope. In a personal injury case, there have been decisions on many particular items, such as income tax returns, personnel files, performance evaluations, photographs, statements, insurance policies, medical records. Indeed, many of the basic items in a personal injury case must be produced in response to requests for disclosure. See Rules 192 and 194. More often than not, the issue is not whether an item is discoverable, rather it is that the request does not identify particular types and categories of documents,¹⁰ the request is for "all" of a category of documents, the request is not limited to items relevant to the pleadings and the request is not limited to a reasonable time period.

For the most part, the party seeking discovery is going to have to meet the primary burden of

¹⁰ This wording has been found acceptable. See, *Davis v. Pate*, 915 S.W.2d 76 (Tex. App.--Corpus Christi 1996, orig. proceeding, [leave denied]).

proving relevancy. This used to mean merely proving that the discovery was likely to lead to the discovery of admissible evidence; however, now, as a practical matter, the party may also have to prove a nexus to the pleadings or materiality. See *Texaco v. Sanderson*, 898 S.W.2d 813 815(Tex. 1995). Rule 193.4 seems to suggest that the party raising the objection must present evidence in support of the objection, at the risk of waiving the objection. In some instances, however, evidence has been held to be unnecessary. The Texas Supreme Court in *In Re Union Pacific Resources Company*, 22 S.W.3d 338 (Tex. 1999, per curiam) reiterated that “evidence may not always be necessary to support a claim of protection from discovery.” In certain instance, however, failure of a party to set out the evidentiary basis for their objections to discovery requests could result in waiver. In *Gustafson v. Chambers*, 871 S.W.2d 938 (Tex. App.--Houston [1st Dist.] 1994, orig. proceeding) the court held that discovery objections generally must be supported by evidence to be sustained. Most discovery objections not supported by evidence are waived unless the objecting party shows that it is one of the few discovery objections that do not require evidentiary support. *Gustafson* specifically identified the following discovery objections as requiring evidentiary support: privileges; privacy; beyond scope of discovery; not limited to a reasonable time period; overbroad request; harassing discovery request; trade secrets; attorney-work product; attorney-client privilege; consulting expert reports/information. See also *Masinga v. Whittington*, 792 S.W.2d 940 (Tex. 1990) and *Southwest Independent Insulating Glass v. Street*, 722 S.W.2d 798 (Tex.App.--Fort Worth 1987) (regarding a claim of burdensomeness).¹¹ Recently, it has been held that Rule 192.4 places limits on discovery if the request is overly broad or unduly burdens the adverse party. The party resisting discovery must produce some evidence to support a protective order. Evidence must show that the discovery request is unduly burdensome or unnecessarily

harassing. Stating that compliance with the request would force the party to incur travel expenses and lose work time is insufficient to show undue burden. *In re Energas Co.*, 63 S.W.3d 50 (Tex. App.—Amarillo 2001, orig. proceeding).

Surprisingly, despite the admonition of Rule 195, many attorneys continue to propound written discovery regarding testifying experts. This type discovery is essentially frivolous since under no circumstances will it ever become proper. It is not an issue of timing; the rule makes clear that interrogatories and requests for production are no longer appropriate discovery tools for obtaining information about testifying experts. Further, to the extent a testifying expert relies on the mental impressions of a consulting expert, making the consulting expert subject to discovery as though the expert were a testifying expert, the same admonition arguably would pertain to such experts. While discovery about experts has been restricted, it is my experience that the best time to file a motion to compel is after the designation deadlines.

It has been my experience that filing motions to compel responses to disclosure early in the case is a wasted effort. The disclosure requirements are quite general and the responding party may amend contentions freely without the prior answers being used as impeachment. This makes it difficult to use disclosures to pin down an opponent, at least early in a case. However, once the parties have designated experts, motions to compel complete responses to requests for disclosures take on much more significance and it is at this juncture that motions to compel should be seriously considered.

Motions to compel matters claimed to be privileged typically will be evidentiary hearings. The burden will be upon the party asserting the privilege to prove that the requested item is privileged. Realize that before a responding party has to plead privileges, it is entitled to object to the breadth of the discovery request. This means that a motion to compel probably needs to be filed and heard to refine the requests, prior to the responding party asserting privileges. Once the responding party indicates that it is withholding documents because of a privilege, the requesting party must send a request for what effectively is a privilege log. The responding party, within fifteen days of the request must file a log setting out the identity of what is being withheld and the legal and factual basis for the privilege. After this log has been filed, the requesting party may then file a motion to compel.

¹¹ *ISK Biotech Corp. v. Lindsay*, 933 S.W.2d 565 (Tex. App. --Houst. [1st Dist.] 1996) provides a refreshingly commonsense analysis to the standard “solely for harassment” and “undue burden” objections.

Any party may request a hearing on a claim of privilege asserted under Rule 193, and meet its burden of proving the privilege by presenting live testimony or affidavits served at least seven days before the hearing. Tex. R. Civ. P. 193.4(a); *In re Carbo Ceramics, Inc.*, 81 S.W.3d 369; *In re Monsanto*, 998 S.W.2d at 925. While courts may relax this requirement, parties should formally offer supporting affidavits into evidence. *Id.* at 926. It is important to emphasize here that argument of attorneys is not considered evidence, unless the attorney makes clear that he is in effect testifying.¹²

Note that all hearings under Rule 193 do not require admissible evidence. *In re Toyota*, 191 S.W.3d 498 (Tex. App.—Waco, 2006) stands for the proposition that Rule 193.6 does not exclude an undisclosed expert's testimony from hearings unless they are on the merits. See, e.g., *Barr v. AAA Tex., LLC*, 167 S.W.3d 32, 37 (Tex.App.-Waco 2005, no pet.) (trial); *Villegas v. Tex. Dep't of Transp.*, 120 S.W.3d 26, 35 (Tex.App.-San Antonio 2003, pet. denied) (summary judgment). Rule 193.6 does not operate to exclude an undisclosed expert's testimony from a preliminary hearing not on the merits. See *Monsanto Co. v. Davis*, 25 S.W.3d 773, 785 (Tex.App.-Waco 2000, pet. dismissed w.o.j.) (class certification hearing).

e) TIMING

Rule 193.4 states that any party may at "**any reasonable time**" request a hearing. Although unstated in the rule, this provision should probably be interpreted as meaning that a requesting party may waive the right to have a hearing and determination on an objection, if the request for hearing is not timely made. See *National Union Fire Ins. Co. v. Hoffman*, 746 S.W.2d 305 (Tex. App.—Dallas 1988, orig. proceeding). This interpretation has recently been reiterated. See *Copenhaver v. Medina*, No. 08-02-00136-CV, 2003 Tex. App. LEXIS 8396 (Tex. App.—El Paso Sept. 25, 2003, no pet. h.) (holding that a party failing to obtain a ruling on motion to compel waives right to requested discovery. Failure to object to untimely production waives rights on appeal). In *Interceramic v. S. Orient R. R. Co.*, 999 S.W.2d 920 (Tex. App. – Texarkana, 1999), the court

noted that in situations where supplemental responses are for some reason inadequate, and the complaining party is aware of the inadequacy before trial but waits until trial to object, the objection is too late and the complaint is waived. *State Farm Fire & Cas. Co. v. Morua*, 979 S.W.2d 616, 619-20 (Tex.1998). (per curiam). However, compare the holding in *Vingcard v. Merrimac Hosp. Sys.*, 59 S.W.3d 847 (Tex. App.— Ft. Worth 2001), in which the court held that a responding party had totally failed to properly respond to a discovery request, entitling the requesting party to move to exclude testimony at trial. See also *Courtney v. Courtney*, No. 14-01-01103-CV, 2002 Tex. App. LEXIS 5530 (Tex. App.—Houston [14th Dist.] July 25, 2002, no pet.). The prudent practice would be to challenge a perceived deficiency in a response before you get to trial, rather than betting on whether the responding party has incompletely or totally failed to respond to a discovery request.

Further, it probably is a good idea to file a motion and seek a hearing earlier rather than later. *Service Lloyds v. Ins. Co. v. Harbison*, 826 S.W.2d 930 (Tex. 1991) provides a good example of the problem with waiting until the eve of trial to compel responses to discovery. The Court in *Harbinson* found that the responding party had timely asserted an objection to the requesting party's interrogatory for individuals with knowledge of facts relevant to the subject matter of the litigation. The requesting party, shortly before trial, filed a motion to compel which the trial court granted. The responding party was ordered to identify expert witnesses 15 days before trial. The Texas Supreme Court held that identification of expert witnesses within thirty days of trial was permissible when done in conformance with a court order.

9. MOTIONS FOR SANCTIONS

The following are the most important things I can tell you about motions for sanctions:

- a) Carefully establish a pattern and record of offenses before seeking sanctions.
- b) Confirm that the sanctions that are issued are supported by your pleadings;
- c) Avoid requesting money sanctions except in unusual cases. Judges do not like requests for money sanctions and appellate courts are wont to reverse on due process grounds. It is permissible and proper, however, to request reimbursement of fees and

¹² See, *Banda v. Garcia*, 955 S.W.2d 270, (Tex. 1997).

expenses incurred in responding to a frivolous request or in having to obtain a court ruling.

d) Be sure to give the respondent timely notice of a motion for sanctions. The respondent must be provided due process.

e) Make sure you and the court have exhausted lesser remedies before issue a significant sanction. The punishment must meet the crime. *Transamerican v. Powell*, 811 S.W.2d 913 (Tex. 1991).

In re Harvest Communities of Houston, Inc., 88 S.W.3d 343 (Tex.App.-San Antonio, 2002) is a noteworthy case that demonstrates how reluctant courts are to impose draconian, potentially outcome determinative sanctions. This case dealt with the issue of whether striking experts is a death penalty sanction and whether a party may be so penalized for the acts of its attorney. The opinion is worth reading with regard to what the appellate court found to be sanctionable conduct of an attorney during the course of a deposition. While the court found the conduct egregious, it was reluctant to visit sanctions upon the attorney's client. The defendant in the case was able to demonstrate that by striking its two "retained" experts, the effect would essentially be a death penalty sanction. The appellate court agreed and found that the trial court had not attempted to invoke lesser sanctions. Therefore, it was held that the striking of the defendant's two retained experts was an abuse of discretion under this particular fact situation.