DISCOVERY PRACTICE TIPS

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CHAPTER 23
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Administrative Assistant to Attorney General, John Hill.
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TABLE OF CONTENTS

I. THE POINT OF VIEW OF THIS ARTICLE ......................................................................................................... 1

II. DISCOVERY PRACTICE IN TEXAS ................................................................................................................ 1
   A. The Costly Problem of Discovery .............................................................................................................. 1
   B. The Scope of discovery: ............................................................................................................................. 1
   C. The Crafting of Discovery Requests ........................................................................................................... 2
   D. Be familiar with the rules ............................................................................................................................ 2
      1. Waiver of Objection - Tex. R. Civ. P. 193.2(e) ..................................................................................... 2
      2. No Objection to preserve privilege - TRCP 193.2(f) .......................................................................... 2
   E. Discovery regarding Testifying Expert Witnesses - TRCP 194 & 195 .................................................... 2
   F. Financial Information ................................................................................................................................... 3
   G. Personnel Files .......................................................................................................................................... 3
   H. Deemed Admissions ................................................................................................................................. 3
   I. Level II Bear trap ...................................................................................................................................... 3

CASES OF NOTE ................................................................................................................................................. 4
DISCOVERY PRACTICE TIPS

I. THE POINT OF VIEW OF THIS ARTICLE

I have been a trial judge since 1991. When I first came on the bench, discovery hearings were the most active area of civil litigation. At that time “Rambo” discovery practice was in full flourish. In the first ten years on the bench, I estimated that I had over 2400 discovery hearings. In 1999, the Texas Supreme Court promulgated the “new” rules; I was skeptical that the new rules would have a propitious effect. I was wrong. The new rules embrace some fundamental changes in discovery practice. The Scope of discovery has been curtailed, and seldom are mistakes in discovery practice outcome determinative. In 2003, I began an experimental docket in Travis County, the discovery docket. In eighteen months, I heard all the District Court discovery hearings, approximately 1600 hearings. During that period of time, I believe that I heard more discovery than any other Judge in Texas. I developed some strong opinions about discovery practice and how it should be done. The following are some lessons that I’ve gleaned from over 4000 discovery hearings. If you’re looking for some secret tips, there are none (read the rules). Rather the following is what became evident to me about Discovery.

II. DISCOVERY PRACTICE IN TEXAS

A. The Costly Problem of Discovery

In its November 9, 1998 Order adopting the new discovery rules, the Supreme Court of Texas wrote that... Experience has shown that discovery may be misused to deny justice to parties by driving up the costs of litigation until it is unaffordable and stalling resolution of cases. As any litigant on a budget knows, the benefits to be gained by discovery in a particular case must be weighed against its costs. The rules of procedure must provide both adequate access to information and effective means of curbing discovery when appropriate to preserve litigation as a viable, affordable, and expeditious dispute resolution mechanism."

Now, nearly seven years after the adoption of the “new” rules, wasteful discovery is still driving up the cost of litigation. Given the reforms of Congress and the Texas Legislature curtailing civil litigation, a fair reading today is that litigation is less viable, affordable, and expeditious as a dispute resolution mechanism today than seven years ago. Why?

1. The 80/20 Rule. I venture to guess that 80% of the discovery that is obtained in the course of litigation is not used in the litigation. Ask yourself, how much of the written discovery and depositions have you used in trials or hearings in the last two years? If you have used as much as 20% you are in minority, most often it’s significantly less than that. Who pays for the 80% waste? Litigants and taxpayers who provide the court system.

2. Neither the Bar nor the Bench has truly embraced the idea that we should curb discovery. In general, we operate as if we are in 1984, Jampole v. Touchy, 673 SW2d 569 (Tex. 1984) “[the] ultimate purpose of discovery is to seek the truth...” As if that were the end all and be all.

3. Well it’s not. Not all discovery material discloses the truth. So much of the information discovered becomes just a clutter of noise and chatter in the quest for essential facts. Nor is there any cost benefit analyses to this unbridled quest for “truth”. In every case there are some essential “dynamite” facts. These are very worthwhile. Then there are lesser facts of consequence and so on until there are facts about a case that are of no consequence. There has to be a cost benefit consideration to acquiring every fact about a case, because at the end of the day a judgment is about money. If, in general, civil litigation is about money, then costs and outcomes have to be considered. My least favorite response when I place limitations on discovery is “Judge, there might be something there.” My response is “then again there may not and who bears the cost if it’s not.” The limits of discovery are what is relevant and what is reasonably calculated to lead to the discovery of relevant evidence. Reasonably calculated has got to mean more than a mere possibility. I likewise think that trial judges should shoulder more responsibility at putting appropriate curbs on the scope of discovery considering costs and likely benefits. This requires activism on the part of the judiciary rather than irritation at the number of discovery hearings.

B. The Scope of discovery:

TRCP 192.3 provides “a party may obtain discovery regarding any matter that is...relevant to the subject matter of the pending action.” The footnote to TRCP 192 says in part that the “scope of discovery...is...confined by the subject matter of the case.” In re American Optical Corporation, 988 S.W. 2nd 711 (Tex. 1998) the Texas Supreme Court says...
that discovery “requests must be reasonably tailored to include only matters relevant to the case.”

*In re CSX Corporation*, 124 S.W.3d 149 (Tex. 2003) the Supreme Court says “[the issue] in determining over breadth [of a discovery request] is whether the request could have been more narrowly tailored to avoid including tenuous information.”

In short, all discovery requests, whether interrogatories or production requests, must be confined to the subject matter of the case, and tailored to matters relevant to the case, and further tailored to avoid tenuous information. Discovery requests must be limited to time, place, and subject matter of the case. Further, they should exclude tenuous information.

### C. The Crafting of Discovery Requests

Albert Einstein said that “Insanity is doing the same thing over and over again and expecting a different result.”

I have a very serious question for you, do these phrases look like they confine or narrowly tailor anything???

“Any” “Any and All” “Each and Every” “In any way regarding, relating or concerning”

The phrases don’t tailor anything, and are expansive rather than confining. Now look at the discovery you propound, in fact look at your opponents’ discovery, I’ll bet it is peppered with these phrases. So why do you use these words? You are afraid not to use them. You believe that if you use them, then magically the other side is compelled to give you the “smoking gun”. Do you really think that if the other side is of a surreptitious heart, that the use of these “magic” words will cause them to be forthcoming?

What these phrases do instead is to guarantee that your discovery will be objected to as overly broad, unduly burdensome, and beyond the scope of discovery. This results in a discovery dispute, and most often a hearing. I believe that 90% of the discovery hearings I’ve heard were because of the use of these phrases in discovery requests. By their very use, the discovery request is not confined to the subject matter of the lawsuit, is not tailored to exclude tenuous information.

Is it possible to craft a discovery request that is case specific, tailored to exclude tenuous information, limited as to time, subject matter and place of the lawsuit? Can you do it? Yes you can. In fact, the Rules of Civil Procedure require it; see TRCP 196.1 (Request for Production).

“The request must specify the items to be produced or inspected, either by individual item or by category, and describe with reasonable particularity each item or category.”

So the next time you are crafting discovery or reviewing the opponents’ discovery look out for the magic words. Remember, specific requests are good; unlimited broad requests are bad.

For a good case that talks about the pitfalls of using “all” and “every” see


### D. Be familiar with the rules


   An objection that is not made within the time required, or that is obscured by numerous unfounded objections (those that object to each and every discovery request with a lengthy boilerplate objection, this means YOU!) is waived unless the court excuses waiver for good cause shown.

   There is a heavy price to be paid for not answering on time or with the clever boilerplate you recycled from 1998. In my Court you pay an inconvenience tax (attorney’s fees to the other side) for not answering on time or with boilerplate.

2. **No Objection to preserve privilege** - TRCP 193.2(f).

   “A party should not object to a request for written discovery on the grounds that it calls for production of material or information that is privileged but should instead comply with Rule 193.3. Privilege should be asserted pursuant to TRCP 193.3. “

   Pursuant to TRCP 193.3, the party withholding information on the grounds of privilege must state that information is being withheld on the basis of privilege, which privilege applies and which request the information relates to. If no information is being withheld, no prophylactic objection is needed to protect privileged information that may become know later.

   So if this is true, and it has been the law for nearly seven years, why do I frequently see objections that the request calls for attorney-client communications or attorney work product? Every time I read that you object because of attorney-client or work product privilege, I know that you don’t understand the rules or haven’t read them.


### E. Discovery regarding Testifying Expert Witnesses-T RCP 194 & 195

Pursuant to TRCP 195.1, the only permissible discovery vehicle for the designation and disclosure of information concerning expert witnesses is a Request for Disclosure under TRCP 194.2(f).
Okay, answer me this. How come I still see interrogatories and request for production regarding testifying experts? Hmm, could it be that the attorney hasn’t read or understood the rule? This results in more damage to the attorney’s credibility.

F. Financial Information

Everybody is asking for tax returns. You got a problem with that? None, other than the fact that the Texas Supreme Court has said tax returns are only discoverable if they are relevant and material to the issues presented in the law suit. The Supreme Court has also said that they have a reluctance to allow uncontrolled and unnecessary discovery of federal income tax returns. See Hall v. Lawlis, 907 S.W. 2d 493 (Tex. 1995).

What if they might lead to the discovery of relevant evidence? In my opinion you can’t get it without a heightened showing that it is relevant and material. You might say, “but we need it to show net worth.” Read Chamberlin v. Cherry, 818 S.W.2d 201 (Tex.App.-Amarillo 1991) and, Lunsford v. Morris, 746 S.W.2d 471 (Tex. 1988) where courts have said the return doesn’t show the net worth of the party.

Here is a suggestion. Go to the IRS Website (www.irs.gov) and download tax forms to your heart’s content. Then, craft your discovery request for a specific schedule or a specific line(s) of the tax return. That way you are specific and are not asking for sensitive unnecessary material. Remember specific requests are good; unlimited broad requests are bad.

G. Personnel Files

In general, requests for the personnel file are discoverable. A request for the personnel files of a named individual has been held to be a request made with reasonable particularity, TRCP 196.1(b) Tri-State Wholesale Grocers, Inc. v. Barrera, 917 S.W.2d 391, 399 (Tex. App.-El Paso 1996, writ dism’d by agr.). There may be privileged material within the file, such as peer-review material, social security information and health insurance, that needs to be withheld pursuant to Tex. R. Civ. P. 193 and a privilege asserted.

But do you need the whole file? Why? Most often you are looking for discipline records or evaluations. If so, craft a request for just what you want and not everything else. A request for the personnel file is not narrowly tailored to exclude tenuous information and is not limited to the subject matter of the lawsuit. These contain private privileged information in addition to a wealth of irrelevant information, which is not likely to lead to the discovery of admissible evidence, such as 401K elections, number of dependents, health insurance information and leave requests.

H. Deemed Admissions

Admissions are deemed admitted as a matter of law when no response is filed to the Request for Admissions. TRCP 198.2(c). No hearing or Motion to Deem is necessary. Many lawyers still show up with a Motion to Deem Admissions. Did they not read TRCP 198.2(c)?

“If a response is not timely served, the request is considered admitted without the necessity of a court order.”

Oh my God!!!! I have missed the deadline by _____. Fill in the blank and now these stupid requests are deemed admitted, WHAT DO I DO?? Read the Rule TRCP 198.3 Withdrawal or Amendment. Follow the rule assiduously. Get this case Wheeler v. Green, 157 S.W.3rd 439 (Tex.-2005). Memorize this case, put a lot of the language from this case in your motion, and then pray. The day of the hearing be as contrite as you can be, with just a touch of pleading in the eye and pray some more. Make sure you point out the lack of prejudice. If you’re so inclined, offer to pay the other sides’ attorneys fees.

If you are opposing the motion and you are not upon the cusp of trial and the trial won’t be delayed, SHAME ON YOU. You have never made a mistake? We don’t trap the unwary anymore.

I. Level II Bear trap

The Level II discovery period for non-family civil cases during which all discovery must be conducted is the earlier of 30 days before trial date or nine months after the due date of the first response to written discovery or nine months after the first deposition. Many lawyers have filed a case, not specified the discovery level, thereby defaulting to a Level II case, done a little discovery, and then let the case set. Much later, the case comes alive again, trial date is set, discovery starts in earnest, and your opponent responds,” I’m not answering because we are out of the discovery period.”

What do I do?

1. Don’t file a Level II case; always ask for Level III, even if you are not going to do much discovery.
2. If you are more than sixty days ask the court via a motion to extend TRCP 190.5.
 CASES OF NOTE

Scope

Loftin v. Martin, 776 S.W. 2d 145 (Tex. 1989).


Dillard Department Stores v. Hall, 909 S.W. 2d 491 (Tex. 1995).


In re American Optical, 988 S.W. 2d 711 (Tex. 1998).


TRCP 193.2 and Privilege


Offensive Use of Privilege

Republic Insurance v. Davis, 856 S.W. 2d 158 (Tex. 1993).

Discoverability of Net Worth versus Tax Returns

Robert Hall v. Lawlis, 907 S.W. 2d 493 (Tex. 1995).

Sears v. Ramirez, 824 S.W. 2d 558 (Tex. 1992).

Lunsford v. Morris, 746 S.W. 2d 471 (Tex. 1988).

APEX Depositions


Anticipation of Litigation


Awarding of Attorneys Fees

Street v. The Second Court of Appeals, 715 S.W. 2d 638 (Tex. 1986).