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TABLE OF CONTENTS

I. RULE 190 – DISCOVERY LIMITATIONS........................................................................................................... 1
   A. What is an Adequate Time for Discovery? ........................................................................................................ 1
   B. Extending the Discovery Period...................................................................................................................... 1

II. RULE 192 – DISCOVERY.................................................................................................................................. 1
    A. Relevance ...................................................................................................................................................... 1
       1. Texas Standard- Rule 192.3(a) .................................................................................................................... 1
       2. Federal Standard Rule 26(b)(1) .................................................................................................................. 2
    B. Rule 192 - Possession, Custody and Control............................................................................................... 2
    C. Do the Discovery Rules Apply In Summary Judgment Proceedings? ......................................................... 3
    D. Witness Statements – Rule 192.3(h) ............................................................................................................. 3
    E. Rule 192.4 — Limitations on Scope of Discovery......................................................................................... 3

III. RULE 193 -- WRITTEN DISCOVERY............................................................................................................ 3
     A. 193.2(a): Form and Time for Objections ...................................................................................................... 3
     B. Rule 193.6 (a) and (b) Supplementation, Exclusion and the Good Cause Requirement............................. 4
     C. Continuances - Rule 193.6(c) .................................................................................................................... 6
     D. Protecting Privileged Communications – Inadvertent Disclosure.............................................................. 6
     E. Rule 193.3 -- Asserting a Privilege ........................................................................................................... 7
     F. Inadvertent Disclosure – Rule 193.3(d) ....................................................................................................... 7
     G. Privilege Does Not Protect Life - Threatening Statements Regarding Lawyers ......................................... 8
     H. Hearings.................................................................................................................................................... 8
     I. Document Self-Authentication—Rule 193.7 ............................................................................................... 8

IV. RULE 194 – REQUESTS FOR DISCLOSURE.................................................................................................. 8
    A. Disclosures are Not Subject to Objections ................................................................................................... 9
    B. Disclose Expert and Fact Witnesses or Risk Exclusion .............................................................................. 9
    C. Designating an Expert as Rebuttal Does Not Avoid Expert Disclosure Requirements.......................... 10

V. RULE 195 – DISCOVERY REGARDING TESTIFYING EXPERT WITNESSES ............................................. 10

VI. RULE 196- REQUESTS FOR PRODUCTION AND INSPECTION................................................................. 11

VII. INTERROGATORIES – RULE 197 AND RULE 33 ..................................................................................... 11
     A. Motion to Compel Required to Determine Sufficiency of Answers ........................................................... 11
     B. Hearing Not Required on Objections to Interrogatories........................................................................... 11
     C. Parties Can Not Use Their Own Interrogatory Answers ............................................................................ 11

VIII. RULE 198 -- REQUESTS FOR ADMISSIONS ........................................................................................... 11
      A. The Use of Admissions In Summary Judgment Motions ............................................................................ 11
      B. Deemed Admissions Can Support Summary Judgment ........................................................................... 12
      C. Admissions Must be in the Record to Support Summary Judgment ......................................................... 12
      D. Competing Admissions Will Not Support Summary Judgment .............................................................. 12
      E. Actual Notice of Request Required to Deem Admissions ..................................................................... 12
      F. Legal Admission v. Factual Admission ................................................................................................... 13
      G. Good Cause – A More Lenient Standard With An Eye to Due Process ............................................... 13

IX. FEDERAL ADMISSIONS – RULE 36 ............................................................................................................ 14
    A. Trial Court has Broad Discretion ................................................................................................................. 14
    B. Admissions Apply Only to Pending Action ............................................................................................... 14

X. RULE 199- DEPOSITIONS................................................................................................................................ 14
    A. Depositions Of Attorneys............................................................................................................................ 14
    B. Apex Depositions ....................................................................................................................................... 15
    C. Deposition on Written Questions -- Rule 31 ............................................................................................. 15
Chapter 10

D. Correcting Depositions -- Rule 30

XI. RULE 202 - PRE-SUIT DISCOVERY
A. When is a Rule 202 Order An Appealable Order?
B. Jurisdiction of Trial Courts to Hear Rule 202 Cases

XII. RULE 205 – DISCOVERY FROM NONPARTIES

XIII. RULE 215 – SANCTIONS
A. Standard for Review
B. Meeting the Sanctions Standard
C. Waiver - Pretrial Objection Required to Obtain Discovery Sanctions

XIV. RULE 37 SANCTIONS
A. The Basics
B. Federal Courts will Impose Major Sanctions

XV. ATTORNEY CLIENT PRIVILEGE
A. State Definition
B. Federal Definition
C. Determining the Applicability of A Privilege - Privilege Logs and In Camera Inspections

XVI. WORK PRODUCT PRIVILEGE
A. State Definition – Rule 192.5
B. Federal Definition – Rule 26(b)(3)
C. Primary Motivating Purpose Test
D. Burden of Proof
E. Expert Materials Are Not Work Product
F. Work Product Privilege Does not Prevent Attorney Deposition
G. Undue Burden and Substantial Hardship

XVII. RULE 508- IDENTITY OF INFORMER PRIVILEGE

XVIII. RULE 509 - PHYSICIAN-PATIENT PRIVILEGE
A. Texas Cases
B. Federal Cases

XIX. RULE 513 – COMMENT ON INFERENCE ON CLAIM OF PRIVILEGE
## TABLE OF AUTHORITIES

### CASES

<table>
<thead>
<tr>
<th>Case</th>
<th>Citation</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allred v. City of Grenada, 988 F.2d 1425 (5th Cir. 1993)</td>
<td>........................................................................</td>
<td>8</td>
</tr>
<tr>
<td>In re Anderson, 163 S.W.3d 136 (Tex. App.—San Antonio 2005, orig. proceeding)</td>
<td>........................................................................</td>
<td>7</td>
</tr>
<tr>
<td>In re Baptist Hospitals of Southeast Texas, 172 S.W.3d 136</td>
<td>(Tex. App.—Beaumont 2005, orig. proceeding)</td>
<td>14, 21, 22</td>
</tr>
<tr>
<td>Barr v. AAA Tex., LLC, 167 S.W.3d 32</td>
<td>(Tex. App.—Waco 2005, no pet.)</td>
<td>6, 9</td>
</tr>
<tr>
<td>Borden Inc. v. Valdez, 773 S.W.2d 718</td>
<td>(Tex. App. - Corpus Christi 1989, orig. proceeding)</td>
<td>15</td>
</tr>
<tr>
<td>In re Buggs, 166 S.W.3d 506</td>
<td>(Tex. App.—Texarkana 2005, orig. proceeding)</td>
<td>2</td>
</tr>
<tr>
<td>In re CI Host, Inc., 92 S.W.3d 514</td>
<td>(Tex. 2002)</td>
<td>23</td>
</tr>
<tr>
<td>In re Christus Health Southeast Tex., 167 S.W.3d 596</td>
<td>(Tex. App. - Beaumont 2005, no pet.)</td>
<td>11</td>
</tr>
<tr>
<td>In re Christus Health Southeast Tex., 167 S.W.3d 596</td>
<td>(Tex. App.—Beaumont 2005, orig. proceeding)</td>
<td>7</td>
</tr>
<tr>
<td>In re Christus Health Southeast Texas, 167 S.W.3d 596</td>
<td>(Tex. App. - Beaumont 2005, orig. proceeding)</td>
<td>22</td>
</tr>
<tr>
<td>City of Willow Park v. Squaw Creek Downs, L.P., 166 S.W.3d 336</td>
<td>(Tex. App. - Fort Worth 2005, no pet.)</td>
<td>16</td>
</tr>
<tr>
<td>Contemporary Contractors, Inc. v. Strauser, No. 05-04-00478-CV, 2005 WL. 1774983</td>
<td>(Tex. App.—Dallas July 28, 2005, no pet.)</td>
<td>4</td>
</tr>
<tr>
<td>In re Crudup, No. 04-05-00297, 2005 WL. 1676718</td>
<td>(Tex. App.—San Antonio July 20, 2005, orig. proceeding)</td>
<td>22</td>
</tr>
</tbody>
</table>
In re Graco Children's Prod., Inc., 173 S.W.3d 600 (Tex. App. - Corpus Christi 2005, orig. proceeding) 11
In re Graco Children's Prods., Inc., 173 S.W.3d 600 (Tex. App. — Corpus Christi 2005, orig. proceeding) 7
In re Grand Jury Subpoena, 419 F.3d 329 (5th Cir. 2005) 20
Jimmie Luecke Children P'ship, Ltd. v. Pruncutz, No. 03-03-00388-CV, 2005 WL. 910144 (Tex. App. - Austin, Apr. 21, 2005, no pet.) 11
In re Living Ctrs. of Tex., Inc., 175 S.W.3d 253 (Tex. 2005) ........................................................................ 7
In re Mason & Co. Prop. Mgmt., 172 S.W.3d 308 (Tex. App.—Corpus Christi 2005, orig. proceeding) ............ 1
In re Mason & Co. Property Management, 172 S.W.3d 308 (Tex. App.—Corpus Christi 2005, orig. proceeding) ... 15
In re Mason & Co. Property Mgmt., 172 S.W.3d 308 (Tex. App.—Corpus Christi 2005, orig. proceeding) ........ 2
Meyer v. Cathey, 167 S.W.3d 327 (Tex. 2005) ................................................................................................... 18
Mims v. Dallas County, 230 F.R.D. 479 (N. D. Tex. 2005) ............................................................................ 20, 21
In re Morse, 153 S.W.3d 578 (Tex. App.-Amarillo 2004, no pet.)................................................................. 9
Patriot Homes, Inc. v. Lopez, No. 04-04-00645-CV, 2005 WL. 1676711
(Tex. App.—San Antonio July 20, 2005, no pet.) ....................................................................................... 8
R.K. v. Ramirez, 887 S.W.2d 836 (Tex, 1994) ......................................................................................... 23
Remington Arms Co. v. Caldwell, 850 S.W.2d 167 (Tex. 1993) ............................................................... 18
Reynolds v. Murphy, No. 2-03-294-CV, 2005 WL. 1654992 (Tex. App.—Fort Worth July 14, no pet.) ....... 12
Reynolds v. Murphy, No. 2-03-294-CV, 2005 WL. 1654992 (Tex. App.—Fort Worth July 24, 2005, no pet.) ... 8
Russell v. Young, 452 S.W.2d 434 (Tex. 1970) ........................................................................................... 3
Santos v. Comm'n for Lawyer Discipline, 140 S.W.3d 397 (Tex. App.—Houston [14th Dist.] 2004, no pet.) .... 10
In re Shell E&P, Inc., No. 04-05-00345-CV, 2005 WL. 2085337
(Tex. App.—San Antonio Aug. 31, 2005, orig. proceeding) ................................................................. 2

v
Smith v. Smith, 145 F.3d 335 (5th Cir. 1998)........................................................................................................... 18
In re Texas Farmers Insurance Exchange, 990 S.W.2d 337 (Tex. App. - Texarkana 1999, orig. proceeding [mand. denied]) ................................................................................................................................. 21
In re Texas Genco, LP, 169 S.W.3d 764 (Tex. App.—Waco 2005) ................................................................. 15
Thomas v. Fitzgerald, 166 S.W.3d 746 (Tex. App. - Waco, 2005, no pet.) ..................................................... 16
TransAm. Natural Gas Corp. v. Powell, 817 S.W.2d 913 (Tex. 1991) ............................................................ 17
Warrantech Corp. v. Computer Adapters Servs., Inc., 134 S.W.3d 516 (Tex. App.—Fort Worth 2005, no pet.) ........ 8
In re Weir, 166 S.W.3d 861 (Tex. App.—Beaumont 2005, orig. proceeding)................................................... 3
Whalen v. Roe, 429 U.S. 589 (1977) .................................................................................................................. 23
In re Wharton, No. 10-04-00315-CV, 2005 WL 1405732 (Tex. App.—Waco June 15, 2005, orig. proceeding) . 3
DISCOVERY

I. RULE 190 – DISCOVERY LIMITATIONS

Since the 1999 amendments which set forth discovery periods in TEX. CIV. P. 190, one of the main issues addressed by the courts is whether courts allow sufficient time for discovery under the various discovery periods.

A. What is an Adequate Time for Discovery?


   The issue on appeal was whether the trial court had allowed the appellant sufficient time for discovery before dismissing his case for want of prosecution. The trial court had quashed appellant’s discovery requests which had been filed approximately two weeks before the trial date. The appellate court held that Rule 190 requires that discovery be served in time sufficient to give a party the opportunity to respond within the discovery period and that discovery requests, such as interrogatories and requests for disclosure, production and admissions, be served on the opposing party no later than thirty days before the end of the discovery period. Service two weeks before trial did not meet the standard. The discovery was properly quashed.


   In this case for personal injury and property damages resulting from a collision with a cow, the appellate court upheld the trial court’s decision to deny a continuance to conduct discovery, finding that the Court had allowed ample time for discovery. The case, governed by a Level 2 discovery plan under Rule 190.3, had been on file 14 months before appellee filed his no-evidence motion for summary judgment. Appellants contended that the trial court erred in hearing the no-evidence summary judgment motions before the end of the discovery period and argued that they had not had sufficient time to conduct discovery.

   The appellate court stated that when a party contends it has not had an adequate opportunity for discovery before a summary judgment hearing, it must either file an affidavit explaining the need for further discovery or a verified motion for continuance. Id. at 749. In this case, the motion, while verified, did not request a continuance and did not explain the need for further discovery. Thus, appellant failed to present sufficient evidence to show that the trial court had improperly denied its motion to continue the summary judgment hearing.

II. RULE 192 – DISCOVERY

A. Relevance

1. Texas Standard- Rule 192.3(a)

   The Texas Rules allow discovery of any matter not privileged that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of a party seeking discovery so long as it appears reasonably calculated to lead to the discovery of admissible evidence. In re Mason & Co. Property Mgmt., 172 S.W.3d 308 (Tex. App. — Corpus Christi 2005, orig. proceeding). The cases below discuss relevance.

General allegations of negligence or negligence per se do not support the conclusion that a defendant’s medical and mental health conditions are at issue, and therefore, without more, discovery requests seeking defendant’s medical records are not reasonably tailored to aid in the resolution of the dispute. A mere general denial by a defendant in a personal injury case will likewise not place the defendant’s medical conditions at issue. As a result, these records were not within the scope of discovery as defined by Rule 192.3 merely because a plaintiff has alleged negligence or negligence per se.


The scope of discovery as defined in Rule 192.3(a) allows an attorney to be deposed, even if the lawyer represents a party to the litigation in issue. Further, a deposition may not be quashed in its entirety on the grounds that some of the matters to be explored may be privileged. However, although the court states that a party’s attorney may be deposed, the court does not favor this tactic, but in this case it was demonstrated that the deposition was relevant to the claims and defenses in the case and the party seeking the deposition had no other means of discovery.


Rule 192.3 clearly distinguishes between persons with knowledge of relevant facts and trial witnesses. If a party identifies someone as a person with knowledge of relevant facts in response to a request pursuant to Rule 194, this response does not relieve a party of its duty to respond to an interrogatory asking for a name of all trial witnesses. The failure to respond to the interrogatory results in the witness being subject to exclusion at trial.


The plaintiff in this insurance coverage case served requests to produce pursuant to Rule 192.3(b) requesting documents for a twenty-six year period. The plaintiff also requested documents that reflected the insurance company’s position, construing policies that the company had issued, since its inception in 1911. The insurance company objected to all of the requests.

The trial court found that the requests were not restricted to the policy years in which the insurance company issued policies to plaintiff. As a result, many of the requests were overly broad on their face. The trial court found that to the extent some documents might be relevant beyond the years that the insurance company issued policies to the plaintiff, the time limits placed on discovery must be narrowed so the products of such a search are reasonably calculated to lead to admissible evidence.

Further, the court found that, before a party is required to produce, and after determining the years relevant to the case and controversy, a trial court is required to evaluate whether the documents requested meet Rule 192.3(a)’s scope of discovery test:

[The rules] require a threshold showing of applicability must be made before a party can be ordered to produce multiple decades of insurance policies; only those insurance policies under which any person may be liable to satisfy part or all of a judgment are subject to discovery.

Applying this test, the plaintiff failed to show which policy years were at issue. The court held that the plaintiff could have made the necessary threshold showing by providing pleadings in the underlying cases to demonstrate that the years alleged by the asbestos claimants in the suits overlapped with the years that the insurer issued the policies. However, the court found that a discovery request for insurance policies during periods for which no asbestos claimants were asserting claims against the insured, or for policies that did not arguably cover the claims, would be overly broad.

2. Federal Standard Rule 26(b)(1)

The federal courts also apply a broad standard of relevance in which information that encompasses “any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or maybe in the case” is discoverable. FED. R. CIV. P. 26(b)(1). Information is discoverable unless “it is clear that the information sought can have no possible bearing on the claim or defense.” Merrill v. Waffle House, Inc., 227 F.R.D. 467, 469 (N.D. Tex. 2005).

B. Rule 192 - Possession, Custody and Control


The scope of discovery only requires the production of items within a person’s possession, custody or control, not information that the person must “seek out and obtain.”


Plaintiffs sought discovery of the attorney’s case file, including documents that were the subject of a
protective order and were disclosed in a prior case by the defendant Shell. The protective order precluded the attorneys from disclosing the documents to any other person and required the documents to be returned to Shell within 24 months after the conclusion of the lawsuit. The court found that the documents were not in the “possession” of the attorneys, as defined by Rule

Therefore, the attorneys were not required to produce the documents. The court based its conclusion on the fact that the documents were subject to a protective order that required them to return the documents and that they were not the owner of the documents sought by plaintiff. The court also noted that the protective order was still binding on the parties and that the attorneys would be subject to a potential lawsuit by Shell for any violations.


The prior Supreme Court case of Russell v. Young, 452 S.W.2d 434 (Tex. 1970), was not overruled by the promulgation of Texas Rule of Civil Procedure 192.3(e)(5). Therefore, if, under Rule 192.3, a party seeks to obtain documents from a non-party expert for impeachment purposes, the party seeking discovery must first present evidence raising the possibility of bias.

C. Do the Discovery Rules Apply In Summary Judgment Proceedings?


Relying on its decision in Ersek v. David & Davis, P.C., 69 S.W.3d 268 (Tex. App.—Austin 2002, pet. denied), the Austin Court of Appeals again confirmed that the civil discovery rules apply to summary judgment proceedings. The court rejected appellant’s contention that she was not required to designate her experts and that Rule 193.6 dictating that expert testimony is inadmissible unless properly designated was inapplicable to her. Because she had not designated her expert, she was not able to rely on her medical malpractice expert’s 4509 report in support of summary judgment. Merely filing the 4509 report was not enough, and designation was required.


The Eastland Court of Appeals recently held that the discovery rules apply in the summary judgment context. Appellant relied on Ersek, which held that the discovery rules as revised in 1999 set the deadlines for expert designation in the summary judgment context. The court agreed with the Ersek reasoning, and held that the trial court did not abuse its discretion in striking two expert affidavits in a legal malpractice action.

D. Witness Statements – Rule 192.3(h)


The failure of a party to disclose a witness statement, as defined by 192.3(h), does not result in an automatic exclusion of the witness at trial. The exclusion of such a witness may not be necessary to secure compliance with discovery rules, deter similar misconduct, or punish the board. Rather, the court may fashion other equitable remedies to remedy the discovery violation.

E. Rule 192.4 — Limitations on Scope of Discovery


Pursuant to Rule 192.4, pretrial discovery of an expert witness’s accounting and financial records, solely for the purpose of impeachment, may be denied. Courts should be reluctant to allow uncontrolled and unnecessary discovery of an expert’s federal income tax returns. The parties’ interests in obtaining discovery for impeachment must be weighed against the witness’ legitimate interest in protecting unrelated financial information.

Furthermore, in determining whether an expert should be required to disclose financial records, Rule 192.4 requires balancing the witness’s privacy interests, the burden in obtaining the information, and the impact on the willingness of reputable experts to provide expert testimony when needed. The witness in this case should only be required to testify to his hourly rate and provide an estimate, if he knows, of the percentage of his work that comes from litigation. The witness should not be required to review all his financial records for three years, gather financial information, and calculate a total and a percentage attributable to litigation work.

III. RULE 193 -- WRITTEN DISCOVERY

A. 193.2(a): Form and Time for Objections

Gudur v. Texas Dep’t of Health, No. 03-03-00752-CV, 2005 WL 2673670 (Tex. App.—Austin Oct. 21, 2005, no pet.).

In this case, the defendant produced a list of documents it was making available to the plaintiff in response to its requests for production—approximately 1000 pages. The district court denied plaintiff’s
motion to compel regarding each request for production. The appellate court held that the trial court had not abused its discretion in this ruling because plaintiff’s requests for production requested materials such as computer use history of thirty-four employees over the course of almost eight years, records concerning non-work related faxes sent by any employee during the same eight-year period, all documents concerning plaintiff’s applications for promotions during a four-year period, personnel files of any other employee who had filed a whistleblower suit against the defendant during a nine-year period, personnel documents of other employees who received jobs for which plaintiff applied, and other similar documents.

B. Rule 193.6 (a) and (b) Supplementation, Exclusion and the Good Cause Requirement


Under Rule 193.6(a)(1) and (2), a party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce into evidence the material or information that was not timely disclosed, absent a showing of good cause or lack of unfair surprise or prejudice to the requesting party. The party seeking to introduce the evidence has the burden of establishing good cause and lack of unfair surprise or prejudice, and the trial court decides in its discretion whether the party has established good cause. In this case, no information about a certain expert appeared in the initial response to a request for disclosure. A party’s initial response to a request for disclosure failed to include information about a certain expert. Later, that expert’s contact information was supplied along with a statement that the requested materials were available in the attorney’s office. However, this supplement did not comply with Rule 194 requiring disclosure of “the general substance of the expert’s mental impressions and opinions and a brief summary of the basis for them.” Because the supplement failed to include all the information requested under Rule 193.6(a), the trial court did not abuse its discretion by excluding the expert’s testimony.


A party may not introduce into evidence undisclosed expert opinions unless the court finds that there was good cause for the failure to disclose the matters in discovery or the failure will not unfairly surprise or prejudice the other party. See TEX. R. CIV. P. 193.6(a). Here, trial court found good cause to allow expert to testify regarding matters that may not have been disclosed. The Appellate court held that even if the trial court’s admission of the testimony were erroneous, it would have been harmless. When erroneously admitted evidence is cumulative, the error is harmless.

Also, error in the admission of testimony is waived if the objecting party subsequently permits the same or similar evidence to be introduced without objection.


Under Rule 193.6, if a party fails to make a discovery response in a timely manner, that party may not introduce into evidence the information that was not disclosed or offer the testimony of a witness who was not properly identified. The sanction is automatic. There is an exception when the party seeking to introduce the evidence shows good cause for the failure to timely respond and the failure to timely respond will not unfairly surprise or prejudice the other party. Determination of good cause is within the sound discretion of the trial court.


In response to discovery before trial, a party provided billing statements through a time period which included the trial court’s partial summary judgment. At subsequent trial set solely on attorney’s fees, the party’s attorney explained that the exhibit included a “small amount of fees since then.” The trial court admitted the exhibit, concluding there was no showing of surprise partially because the parties were aware there were ongoing attorney’s fees being incurred. The appellate concluded this was not an abuse of discretion.


In this case, the appellees did not dispute that they failed to formally disclose their witnesses within the applicable time frame, but instead asserted that the appellants were not unfairly surprised by the identity of the witnesses. While appellees did not formally disclose its list of witnesses until approximately two months after the deadline for discovery, the appellants were informed of the identity of the appellees’ witnesses more than twenty months prior to their testimony being given. Further, the appellants deposed each of the witnesses prior to trial and had even identified several of the witnesses as their own. Under these facts, the court concluded that there was no unfair surprise in the admission of the evidence.

In a medical malpractice case, a deceased patient’s daughter was required to designate all testifying experts under Rule 193.6 in order for the court to consider that testimony as summary judgment evidence. The plaintiff’s attorney failed to do so because of an alleged miscommunication between the attorney and his legal assistant. This did not constitute “good cause” for plaintiff’s failure to timely designate the expert, and the trial court could not consider the expert’s affidavit when ruling on defendant’s motion for summary judgment. Even though the defendant knew of the substance of the expert’s opinions, the non-designated expert was not permitted to testify because the defendant was not on notice that the witness would actually be called and, thus, could not adequately prepare.

An attorney’s misplaced reliance on an assistant does not constitute due diligence to obtain discovery sought, as would warrant granting continuance to allow the party to make, amend, or supplement its discovery response.


While Rule 193.5 relieves a party of its duty to supplement or amend discovery when the information sought has been made known through other discovery, identifying a witness in a Rule 194 response does not adequately identify him/her as a trial witness. In this case, the record showed that an interrogatory asked the opposing party to identify all persons who might testify at trial. The Rule 194 request for disclosure asked for persons with knowledge of relevant facts. The trial court had abused its discretion in finding that a trial witness and a person with knowledge of relevant facts were interchangeable for discovery purposes.


Surveillance videotape evidence was disclosed thirty-one days before the initial trial date. The trial court found the disclosure was not reasonably prompt, but it admitted the videotape into evidence while sanctioning the party and its attorneys. The trial court did not err in admitting the videotape because it would not unfairly prejudice the opposing party as they had sufficient time to prepare a rebuttal to the evidence (the trial was reset, and the opposing party was allowed to retain her own expert to fully examine the videotape).


Whether the failure to supplement information was intentional or inadvertent is not important; inadvertence of counsel, by itself, is not good cause. Failure to provide all information requested constitutes failure to respond, and triggers the automatic exclusion of testimony. In this case, the trial court correctly found that the witness was not adequately identified as a potential witness despite the fact that (1) counsel informed the opposing party that they intended to use as witnesses “all of the people who actually were living along the lane where the barn burned down,” and (2) the potential witness, and his knowledge of relevant facts, was discussed in a deposition.


The trial court abused its discretion by denying appellant’s motion for continuance because the record showed that appellee was aware an expert witness was necessary to appellant’s cause of action, and appellee was aware of the specific expert witness and the testimony the witness was to provide. Further, no trial date had been set and appellant immediately made a request for continuance and admitted fault. Thus, there was no unfair surprise or unfair prejudice to allowing appellant to amend her response and add the expert witness.


The trial court did not err in finding that a party’s failure to designate a witness as a person with relevant knowledge or as an expert resulted in exclusion of his report. The admittance of such report would have unfairly surprised or prejudiced the opposing party because he was not given an opportunity to cross-examine or depose the potential witness, and no reason for failing to designate the witness was given by the proponent.


The trial court did not abuse its discretion in refusing to exclude an expert’s untimely testimony on the valuation of a house or a document admitted as a summary of his testimony in a breach of fiduciary duty proceeding. The trial court concluded that the opposing party was not unfairly prejudiced or surprised by deficiencies in the disclosure concerning expert or personnel who assisted in work preparatory to his testifying. The expert was disclosed after sixty days, but within 30 days of trial, and disclosed his mental impressions and opinions as well as a summary of the
basis for his expert opinion. Also, it was disclosed that certain items were available for inspection and copying, but the opposing party intentionally bypassed their opportunity to discover what was necessary to be ready for trial.


When a party did not disclose the information required under Rule 194.2(f), the only explanation they offered for their failure to disclose was that the expert was not under their control because of a monetary dispute between them. The court held that this did constitute good cause for failure to disclose as a matter of law. It would have been a simple matter for the party to provide a discovery response: (1) identifying the person as an expert, (2) stating that he would provide expert testimony regarding the reasonable and necessary costs of repair, and (3) attaching the final bill as documentation to support the opinion.

Nonexclusive factors that are relevant in determining whether a trial court has abused its discretion by denying a continuance include: “the length of time the case has been on file, the materiality and purpose of the discovery sought, and whether the party seeking the continuance has exercised due diligence to obtain the discovery sought.”


Appellants argue that the trial court abused its discretion in excluding a witness’ testimony because the expedited nature of the temporary injunction hearing was good cause for the nondisclosure and further because the witness testimony was rebuttal testimony. These arguments were rejected because appellants could have listed the witness before the hearing when they obtained an affidavit from the witness two days before the hearing, but did not disclose their intention to call him as a witness until they sought to admit his testimony during their case-in-chief. Further, the record is devoid of any showing by appellants that the appellee would not be unfairly surprised or prejudiced by the witness’ testimony.


While requests for admissions were at one time unique in including an automatic sanction for untimely responses, failure to comply with any discovery requests now bear similar consequences under Rule 193.6(a). The Texas Supreme Court has held for all other forms of discovery that absent flagrant bad faith or callous disregard for the rules, due process bars merits-preclusive sanctions, and have applied this rule to depositions, interrogatories, requests for production, and requests for disclosure.

C. Continuances - Rule 193.6(c).

If a party fails to timely designate an expert, Rule 193.6(c) allows that party to move for a continuance to allow time to designate as long as good cause or the lack of unfair surprise or unfair prejudice is shown in the record.

Continuance. Even if the party seeking to introduce the evidence or call the witness fails to carry the burden under paragraph (b), the court may grant a continuance or temporarily postpone the trial to allow a response to be made, amended, or supplemented, and to allow opposing parties to conduct discovery regarding any new information presented by that response.

In Soto v. Drefke, No. 13-03-301-CV, 2005 WL 549506 (Tex. App.—Corpus Christi Mar. 10, 2005, no pet.), appellant failed to timely designate his expert in a medical malpractice action. After a no-evidence summary judgment was filed, appellant sought a continuance on the basis that there was no unfair surprise or prejudice to the appellee who knew that an expert was required in a medical malpractice case.

The appellate court concluded that the trial court had abused its discretion in denying the motion for continuance. Appellee was aware an expert was needed to prove the claim, was aware of the specific expert that would be used and, knew of the testimony the expert would provide. Also, there had been no trial date set so there was no prejudice to the appellee.

D. Protecting Privileged Communications – Inadvertent Disclosure

In In re GMAC Commercial Finance, L.L.C., 167 S.W.3d 940 (Tex. App.—Waco 2005, orig. proceeding), a party filed a motion to expunge the appellate record after the denial of a writ of mandamus because it had inadvertently included information in the record that was protected by the work product privilege. The appellate court that the document on its face was “core work product.”

The appellate court held that it had no authority to expunge the record, but could seal a privileged document inadvertently made part of the appellate record. The court then entered an order permanently sealing the document until the case file was permanently destroyed under the normal records retention schedule.

Relying on TEX. R. CIV. P. 193.3(d), the court also ordered the parties to the mandamus proceeding to return all copies of the privileged document to the disclosing party and to delete or destroy all copies in any computer file.

The dissent in this case which argued that the appellate court was not in a position to deal with this
situation and should have sent this issue to the trial court for resolution. The dissent also questioned whether there was a waiver issue that the appellate court had not resolved.

E. Rule 193.3 -- Asserting a Privilege

1. In re Living Ctrs. of Tex., Inc., 175 S.W.3d 253 (Tex. 2005).

A nursing home that asserted medical committee and peer review privileges to the disclosure of records and documents satisfied its burden of showing prima facie entitlement to privilege by providing a representative sample of the documents at issue for in camera inspection, together with a privilege log and supporting affidavit. See TEX. R. CIV. P. 193.3(a). Texas law recognizes that a party asserting privilege may initiate its claim and establish a prima facie case of privilege by submitting evidence short of tendering each and every document. If documents are not tendered, the privilege log should be thorough. A party should also consider affidavits to support the privilege log in the absence of documents produced for in camera review.


This case contains an excellent discussion of the procedures for asserting a privilege. Instead of objecting to discovery based on privilege, a party may withhold the privileged material and asset privileges. The party must state in the response (or any amended or supplement response) or in a separate document that: (1) information or material responsive to the request has been withheld, (2) the request to which the information or material relates, and (3) the privilege or privileges asserted. Then, the party seeking discovery may serve a written request that the withholding party identify the information and material withheld. Within fifteen days of service of the request, the withholding party must serve a response that: (1) describes the information or materials withheld that, without revealing the privileged information itself or otherwise waiving the privilege, enables other parties to assess the applicability of the privilege, and (2) asserts a specific privilege for each item or group of items withheld. Thus, the description of the information or material withheld must be specific enough that the requesting party can identify each document withheld and assess the applicability of that privilege. Any party may then request a hearing on a claim of privilege asserted. Because there is no presumption that documents are privileged, a party who seeks to limit discovery by asserting a privilege has the burden of proof.


A general objection made by a manufacturer to a discovery request in a products liability action, did not result in waiver of all of the manufacturer’s privileges as to requested documents where the manufacturer subsequently complied with the procedural rule by filing a timely withholding statement in which the manufacturer stated that it was withholding documents based on attorney-client privilege.


Under Rule 193.3, “after receiving a response indicating that material or information has been withheld from production, the party seeking discovery may serve a written request that the withholding party identify the information and material withheld.” The rules of procedure contemplate that the parties will itemize the documents claimed to be privileged, and then produce evidence regarding the documents claimed privileged if, based on the documents withheld, the proponent of the discovery desires to pursue an attempt to obtain the documents. In this case, the parties did not follow this procedure in asserting attorney work product privilege and work product issue was not properly before the trial court.


The party asserting privilege has the burden of proof and must present necessary evidence at the hearing by testimony or affidavit, served at least seven days before the hearing, to support the privilege. Only after the party asserting a privilege has made a prima facie case—provided the proper privilege log and presented evidence supporting the privilege at the hearing—does the requesting party have the burden to show the court which specific documents or groups of documents it believes require an in camera inspection.

F. Inadvertent Disclosure – Rule 193.3(d)

The Texas rules provide a procedure for handling inadvertent disclosures under TEX. R. CIV. P. 193.3(d).

A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response
to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

See Warrantech Corp. v. Computer Adapters Servs., Inc., 134 S.W.3d 516, 524 (Tex. App.—Fort Worth 2005, no pet.) (applying TEX. R. CIV. P. 193.3(d), the court found that there was not intentional waiver of the attorney client privilege and that the waiver had been inadvertent).

There is, however, no comparable rule under federal law and the inadvertent waiver issue is handled on a case by case basis. The issue of an inadvertent waiver in a federal case was addressed in Gandy v. U.S.A., No. 6:02CV124, 2005 WL 1324703 (E.D. Tex Mar. 29, 2005). The court reconsidered an order in which it found that the government had inadvertently disclosed a privileged document and that there had not been a waiver of the attorney-client privilege.

The court noted that there was no consensus among the federal courts on the effect of inadvertent disclosures of privileged information. While a few courts hold that a privilege is lost even if there is an unintentional or inadvertent disclosure of privilege information, the majority of federal courts have refused to follow this “strict responsibility” approach and have adopted an approach that takes into account the facts surrounding a particular disclosure. The court noted the Fifth Circuit’s decision in Alldread v. City of Grenada, 988 F.2d 1425, 1434 (5th Cir. 1993) which directs the courts to consider the circumstances of the disclosure on a case-by-case basis.

Here, the court reviewed the letter and found that it was clearly covered by the attorney-client privilege, finding that the government also has an attorney client privilege. It then looked at the circumstances of the disclosure.

G. Privilege Does Not Protect Life - Threatening Statements Regarding Lawyers

In Aviles v. State, 165 S.W.3d 437 (Tex. App. – Austin 2005, no pet.), the issue before the court was whether the attorney client privilege applied when a criminal defendant made a threat in the presence of a court-appointed interpreter.

The court did not reach the issue of whether the court-appointed interpreter was a representative of a lawyer under Rule 503 because the threatening statement was not a confidential communication made in furtherance of the rendition of professional legal services to a client. *Id.* at 439. A statement made to a lawyer of the client’s intent to commit a future crime is not made for the purpose of facilitating the rendition of legal services and is not a confidential communication. The threatening statement was not covered by the attorney-client privilege.

H. Hearings


Under Rule 193.4, any party may at any reasonable time request a hearing on an objection to a request for discovery. In this case, the record did not show that the plaintiff requested a hearing on defendant’s objection to his request for production or otherwise complained to the trial court of defendant’s refusal to produce until after the trial court had entered a final judgment. Moreover, plaintiff did not raise any complaint on appeal about the lack of production. The issue was waived for appellate purposes.


If neither party asks for a hearing on one of the parties’ objections to propounded discovery, the party who sent the request for discovery waives the requested discovery.

I. Document Self-Authentication—Rule 193.7


Where a party had knowledge of the potential use of an exhibit, when it was marked as an exhibit in the first trial, but failed to object to its authenticity within ten days pursuant to the procedures of Rule 193.7, it is deemed authentic as to the non-objecting party.

IV. RULE 194 – REQUESTS FOR DISCLOSURE

The majority of Rule 194 cases deal with the disclosure of persons with knowledge of relevant facts and testifying experts.

Rule 194.2(e) requires the disclosure of:

(e) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person’s connection with the case.

Rule 194(f) on testifying experts provides:

(f) for any testifying expert: (1) the expert’s name, address, and telephone number; (2) the subject matter on which the expert will testify; (3) the general substance of the expert’s mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;
A. Disclosures are Not Subject to Objections
The court conditionally granted a writ of mandamus in In re Morse, 153 S.W.3d 578 (Tex. App.—Amarillo 2004, no pet.) in which the trial court denied a motion to compel compliance with the disclosure requirements of Rule 194. Requests for disclosures had been served seeking the information provided by Rule 194.2(a) and information on potential parties was sought under Rule 194.2(b). The real parties in interest failed to respond and the trial court denied the motion to compel without any explanation or reason.

The appellate court held that Rule 194 “provides ready access to basic information without objection.” Id. at 581. The disclosure of the names and addresses of potential parties was covered by Rule 194 and denying the motion to compel was an abuse of discretion.

B. Disclose Expert and Fact Witnesses or Risk Exclusion

After a take-nothing judgment, appellants argued that the trial court abused its discretion by excluding expert testimony on the issue of the reasonableness and necessity of costs of repairs to their car. In response to a standard request for disclosure, appellants identified their repairmen as a person with knowledge of relevant facts, but failed to disclose him as a testifying expert under TEX. R. CIV. P. 194.2(f).

It was undisputed that the appellants failed to provide the name, address and telephone, subject matter and the general substance of the expert’s mental impressions and opinions. Their only explanation for failing to comply with the expert disclosure rule was that the expert was not under their control and they were fighting with him over the costs of repairs.

The appellate court agreed with the trial court, finding that this explanation did not constitute good cause. The appellants easily could have identified the expert and stated that he would provide expert testimony on the reasonable and necessary costs of repair and attached the final bill to support the opinion.


The court upheld the exclusion of the testimony of two fact witnesses. During discovery, a request for disclosure was served under TEX. R. CIV. P. 194.2(e) requesting the name, address, and telephone number of any person having knowledge of relevant facts and a brief statement of that person’s connection to the case. With respect to witness Compton Creel, the appellee identified him in interrogatory answers as “Compton Creel, Montgomery Road, Wharton, TX 77488.” These answers were not supplemented and the record shows that appellee gave incorrect information when answering because Creel’s full address at the time of initial disclosure was “1707 Montgomery Road, Wharton, TX 77488.” Appellee did not list the telephone number because they claimed they did not have it. Creel later moved and appellee failed to supplement. Appellee still did not supplement even after he learned of Creel’s new address “on the eve of trial.” The court upheld the trial court’s finding of bad faith because appellees had knowledge of Creel’s location, but did not supplement the discovery and did not inform their counsel of his whereabouts.

Witness John Schiefen’s testimony also was excluded because, while his name was mentioned in an expert’s report, this witness was not identified in response to the Rule 194 disclosure request or the interrogatories. Although this witness moved around and was hard to find, appellees still did not supplement discovery when they learned of his location.

3. In State Office of Risk Mgmt. v. Escalante, 162 S.W.3d 619 (Tex. App.—El Paso 2005, no pet.), the court upheld the exclusion of a physician witness because he had not been designated as a fact or expert witness.

4. In Daredia v. National Distributors, No. 05-04-00307-CV, 2005 WL 977828 (Tex. App. – Dallas Apr. 28, 2005, no pet.) the trial court allowed the testimony of a witness who had not been disclosed as a testifying witness at trial. It was undisputed that the appellee had not disclosed the witness in response to an interrogatory seeking the identity of trial witnesses. He had supplemented his Rule 194 disclosures to disclose the witness as a person with knowledge of relevant facts. The issue was whether this disclosure gave appellants adequate notice that the witness would testify at trial. The trial court found there was no surprise and allowed the testimony.

The appellate court overruled this decision and reversed and rendered judgment. It held that the rules of procedure distinguish between persons with knowledge of relevant facts and those intended to be trial witnesses. Because the witness was not
designated as a trial witness, there was no basis on which the court could have concluded a fact witness and trial witness were interchangeable and abused its discretion in finding no surprise.

C. Designating an Expert as Rebuttal Does Not Avoid Expert Disclosure Requirements

1. In Moore v. Mem’l Hermann Hospital System, 140 S.W.3d 870 (Tex. App. – Houston [14th Dist.] 2004, no pet.), appellant sought to avoid the disclosure requirements of Rule 194.2(f) by arguing that her expert was a rebuttal expert and was not a designated or retained expert; and as such, she argued she was not required to disclose the expert and had adequately complied with Rule 194.

The court rejected this argument, finding that once the appellee disclosed the opinions of its testifying expert, appellant could have reasonably anticipated the need to rebut the testimony. Appellee’s expert was an “ordinary rebuttal witness whose use reasonably could have been anticipated.” Such rebuttal witnesses are not exempt from the scope of the written discovery rules.

V. RULE 195 – DISCOVERY REGARDING TESTIFYING EXPERT WITNESSES

Rule 195.1 provides:

A party may request another party to designate and disclose information concerning testifying expert witnesses only through a request for disclosure under Rule 194 and through depositions and reports as permitted by this rule.

Despite the clear language of this rule, parties still try to obtain discovery on testifying experts through other means and the courts often refuse such discovery. In Santos v. Comm’n for Lawyer Discipline, 140 S.W.3d 397 (Tex. App.—Houston [14th Dist.] 2004, no pet.), the appellant attempted to obtain expert discovery regarding attorneys’ fees through requests for production. These requests were not proper under Rule 195. Courts provide some leeway to parties, but it is clear they intend for the rules to be followed.


The plaintiff in this insurance coverage case sought to require production by defendant of any reports and other tangible documents from its consulting experts, that had been reviewed by a testifying expert. Defendant’s sole objection was that the request exceeded the boundaries of expert discovery. The trial court overruled the objection. The appellate court affirmed the trial court’s ruling, holding that information regarding consulting experts is not governed exclusively by Rule 195.1, and that absent a further objection by defendant pursuant to Rule 192.4 that the request was duplicative of information disclosed under Rule 194.2, and defendant must comply.


An affidavit by a party’s expert cannot be considered as evidence for summary judgment purposes where the party failed to timely designate that expert and is unable to establish either good cause or lack of unfair surprise and prejudice.

Moreover, filing an expert report, as is statutorily required in medical malpractice cases, does not satisfy the procedural requirement for designating an expert.


The appellate court reviewed the trial court’s exclusion of an expert witness who was not designated during discovery under an abuse of discretion standard. The court held that the deadline for designating experts under Rule 195.2(a) applies to summary judgment proceedings. And as such, the expert’s affidavit properly excluded in a summary judgment proceeding held after the deadline for designating experts.


The affidavit of an expert not timely designated under Rule 195.2 was properly excluded where the record failed to show good cause for failure to designate or lack of unfair surprise or prejudice.


The plaintiff in this medical negligence suit failed to designate one of its experts within the time periods provided by Rule 195.2. In response to defendant’s no-evidence summary judgment motion, plaintiff requested a continuance to amend her responses to defendant’s designation request and add an expert witness. The trial court denied plaintiff’s request.

The appellate court reversed the trial court’s ruling, holding that where defendant was aware an expert witness was necessary to plaintiff’s cause of action, was aware of specific expert witness and testimony that witness was to provide, no trial date had yet been set, and plaintiff requested a motion for continuance, defendant would not be unfairly surprised or prejudiced by allowing amendment to allow designation of additional expert after deadline.
VI. RULE 196- REQUESTS FOR PRODUCTION AND INSPECTION

Although the new rules have been in place since 1999, the cases under Rule 196 show that the courts are still having to protect litigants who do not follow the rules in making objections.

A. In re Christus Health Southeast Tex., 167 S.W.3d 596 (Tex. App. – Beaumont 2005, no pet.).

The court conditionally granted mandamus to address the trial court compelling production of non-party medical records from a hospital defendant. Service of a request for production of medical records on non-parties, as required by Rule 196, need not be made where the identities of the non-party patients are redacted. However, while redaction may serve as an exception to the notice requirement of Rule 196, it is not an exception to the physician-patient privilege. As discussed in the Rule 509 section of this update, the court did not allow discovery of the medical records.


An objection on the basis that a request for production, made pursuant to Rule 196, was “beyond the scope” of discovery is sufficient to place the trial court on notice that the request failed to specify with reasonable particularity the documents to be produced.


Defendant’s response to plaintiff’s request for production included a general objection based on privileges. Although defendant’s objection was improper, as the rules specifically instruct counsel not to object to written discovery on the basis of privilege, such an objection will not waive a privilege. A party’s failure to include specific assertions of privilege in its initial responses to each production request did not waive all privileges in this case.

Caution: Other courts have found a waiver. This case gives solace to those who fail to follow Rule 193, but many courts require strict compliance with the rules.

VII. INTERROGATORIES – RULE 197 AND RULE 33

A. Motion to Compel Required to Determine Sufficiency of Answers


In a motion for summary judgment, the plaintiff in this case argued that defendant’s insufficient answers to interrogatories and requests for admission constituted deemed admissions. In response to the written interrogatories and requests for admission propounded by plaintiff, the defendant objected and provided answers. Despite the fact that plaintiff never sought a ruling on any of the objections, he argued, in his motion for summary judgment, that the subject matter of the unanswered discovery requests should be deemed admitted against the defendant. The court found that the rules require the party serving interrogatories or requests for admission to seek an order determining the sufficiency of objections or answers. See FED. R. CIV. P. 33(b)(5) and 36(a). Here, plaintiff failed to seek such an order, and therefore, the court found that it would be improper to penalize the defendant for standing on its objections.

B. Hearing Not Required on Objections to Interrogatories


When objections are made to interrogatories, Rule 33(b) requires that those objections be stated “with specificity” and that the party submitting the interrogatories may then move for a motion to compel under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory. FED. R. CIV. P. 33(b)(4)-(5). The Advisory Committee notes to Rule 33 state that a court need only “pass on the objections” after they are made and after the interrogating party makes a motion to compel under Rule 37(a). The rules do not require a hearing to be held in order for a court to pass on the legitimacy of objections to discovery. A court, could, if it so chose, rule on the moving papers alone with respect to a Rule 37(a) motion to compel. Parties do not have an entitlement to a hearing on their objections.

C. Parties Can Not Use Their Own Interrogatory Answers


A party may not offer as summary judgment evidence its own responses to requests for disclosure and interrogatory answers.


Rule 197 provides that answers to interrogatories may only be used against the responding party. A party cannot use his own interrogatory answers to defeat summary judgment. Id. at 156.

VIII. RULE 198 -- REQUESTS FOR ADMISSIONS

A. The Use of Admissions In Summary Judgment Motions

1. Admissions can be used to obtain summary judgment as demonstrated in Duong v. Bank One,
N.A., 169 S.W.3d 246 (Tex. App. – Fort Worth 2005, no pet.). In this conversion, negligence and fraud action, Bank One used admissions to establish its “faithless employee” defense which allowed it to obtain summary judgment on that claim.

Bank One served requests on one party concerning the authority of another person to supply information determining the names or addresses of payees of instruments issued in the party’s name. On appeal, the party argued that the trial court had improperly granted summary judgment on the claim because Bank One had used one party’s admissions to obtain summary judgment against another party. Admissions may only be used against the party who gave the admission, not another party. Thus, the faithless employee defense could not be established against one party using the admissions of another party.

B. Deemed Admissions Can Support Summary Judgment


Here, the appellate court confirmed that admissions are proper summary judgment evidence. The failure to file a timely response will result in deemed admissions that can be used to support summary judgment. Absent a showing of good cause, withdrawal of the admission will not prejudice the party relying on the admission, which the appellant did not establish in this case. The trial court properly granted summary judgment.

2. Reynolds v. Murphy, No. 2-03-294-CV, 2005 WL 1654992 (Tex. App.—Fort Worth July 14, 2005, no pet.).

Alleged deemed admissions could not support summary judgment in Reynolds. Here, a motion for protective order was filed within the 30-day response period challenging the 498 requests for admissions as burdensome and harassing. Objections on specific grounds were made to some of the requests. The court held that the trial court did not abuse its discretion by concluding that the requests were not deemed admitted and granting the objections made in the motion for protective order.

C. Admissions Must be in the Record to Support Summary Judgment

The trial court granted summary judgment on a promissory note in Williams v. Porter, No. 12-04-00079-CV, 2005 WL 1798293 (Tex. App– Tyler July 29, 2005, pet.). The pro se appellant challenged the summary judgment because the deemed admissions were not included in the summary judgment evidence. As such, the deemed admissions could not have been considered by the trial court in deciding the motion. The case was reversed.

D. Competing Admissions Will Not Support Summary Judgment


In Noons, the issue before the court was whether competing and diametrically opposed admissions could support summary judgment. Appellee served 34 requests for admissions, with 32 diametrically opposed requests for admissions such as:

a. Admit that the Plaintiffs had a right to a 90-day termination letter, indicating that the Defendant was terminating the Restaurant Lease Agreement...

b. Admit that the Plaintiffs did not have a right to a 90-day termination letter, indicating that the Defendant was terminating the Restaurant Lease Agreement...

Both were deemed automatically admitted as a matter of law on the day after the response was due when appellant failed to respond. These deemed admissions conclusively established the facts deemed admitted against the party, but the issue was whether they had any effect. The admissions established both the existence and non-existence of the same facts and did not conclusively prove anything.

Appellee then argued that appellant could not use their own deemed admissions to their advantage. However, the problem in this case was that the appellee had attached all of the diametrically opposed admissions, thus creating the problem in their own summary judgment record. The appellee raised material fact issues in their own summary judgment materials. Because the movant-appellee failed to meet his burden of showing that no material issues of fact existed, the burden never shifted to appellants to create genuine issues of material fact.

E. Actual Notice of Request Required to Deem Admissions


The issue on appeal in Etheredge was whether deemed admissions could be used to support summary judgment when the record established that the appellant had not received the requests for admissions or notice of the summary judgment proceedings. The requests for admissions sent via certified mail had been returned “unclaimed” as well as the notice of the summary judgment hearing. Appellant did not appear at the summary judgment hearing and judgment was entered against him.
Appellee argued that it had established proper service under TEX. R. CIV. P. 21(a) and was not required to show actual receipt of the requests. Even if appellee could argue constructive notice under Rule 21(a), the facts in the record showed that appellant had not received notice because the mailings were returned unclaimed. Appellee also had presented no evidence that the appellant had dodged or refused delivery of the certified mail. Thus, the deemed admissions were not properly used against appellant in the summary judgment proceedings.

F. Legal Admission v. Factual Admission
1. It is well-established that an admission constituting a legal conclusion is not binding on a court as an admission. Duong v. Bank One, N.A., 169 S.W.3d 246 (Tex. App. – Fort Worth 2005, no pet.). Cases often deal with the fine line between an admission that is a legal conclusion and an admission that simply applies law to a set of facts.

In Duong, the appellants argued that an admission could not be used for summary judgment purposes because it was a legal conclusion and the trial court had abused its discretion by denying their request to withdraw the admission. The request had asked if one of the parties had authority to “supply information determining the names and addresses of payees of instruments to be issued in the payee’s name.” The court found that although the language of the request of the admission tracked the language of the statute, the issue was factual. It simply asked about facts that one had to establish in proving the faithless employee defense. Id. at 251.

2. Neal v. Wis. Hard Chrome, Inc., 173 S.W.3d 891 (Tex. App.—Texarkana, 2005, no pet.) involved a legal conclusion in the form of an admission. In this personal injury lawsuit, the dispositive issue was the status of the employee who had been injured.

Here, the Workers Compensation Act used one definition of employee and the Texas Supreme Court, in construing the Act, had also discussed the definition of an employee. In ordinary cases, asking whether a person is an employee of a particular company is simply a request to admit a factual matter. Under these facts, which implicated liability under statute, the request for admission asked the employee to admit that “Neal had never been an employee for workers compensation purposes.” (emphasis added) As such, this was a pure legal conclusion, was not binding on the court, and could not be used to establish a claim or defense on summary judgment.

G. Good Cause – A More Lenient Standard With An Eye to Due Process
The standard for the withdrawal of deemed admission is clear (1) the party seeking to undeem the admissions must show good cause for the withdrawal and (2) the court must find that the parties relying upon the responses will not be unduly prejudiced and that the presentation on the merits will be subserved by permitting the party to withdraw the admissions. TEX. R. CIV. P. 198.3.

Good cause is established by showing the failure to timely respond was an accident or mistake and not intentional or the result of conscious indifference. Wheeler v. Green, 157 S.W.3d 439, 442 (Tex. 2005). A trial court’s decision is subject to the abuse of discretion standard and the establishment of good cause depends on the facts of the case. Oldfield v. Stockett, No. 07-03-0284-CV, 2005 WL 1241082 (Tex. App.–Amarillo May 25, 2005, no pet.).

1. The Supreme Court’s recent decision in Wheeler v. Green, recognizes the trial court’s broad discretion in handling deemed admissions, but notes the trend against the draconian automatic sanction for untimely responses to requests for admissions. The Supreme Court noted that in all other forms of discovery, “absent flagrant bad faith or callous disregard for the rules, due process bars merits-preclusive sanctions.” Id. at 442. The Supreme Court itself has applied this rule to depositions, interrogatories, requests for production, and requests for disclosure.

Because the record in Wheeler contained no evidence of flagrant bad faith or callous disregard for the rules and no prejudice to the other side, the trial court should have granted a new trial and allowed the deemed admissions to be withdrawn when it learned that the deemed admissions were only two days late.

2. Duong v. Bank One, N.A., 169 S.W.3d 246 (Tex. App. – Fort Worth 2005, no pet.) (party’s confusion as to the scope of a request for admission was not good cause to withdraw the admission).

3. Wheeler v. Green, 157 S.W.3d 439 (Tex. 2005) (good cause existed for withdrawing deemed admissions when response was filed two days after the due date because the wife in this custody suit was confused as to the actual due date).

4. Johnson v. Davis, No. 14-04-00206-CV, 2005 WL 1772075 (Tex. App. – Houston [14th Dist.] July 26 2005, no pet.) (good cause established when the responses were filed only two days past the due date).

6. Smith v. Baker, No. 10-04-00154-CV, 2005 WL 2589178 (Tex. App. – Waco Oct. 12, 2005, no pet.) (appeal court reversed judgment because good cause existed where there was a clerical error based on the secretary for counsel inadvertently faxing timely responses to one counsel, but not the other).

IX. FEDERAL ADMISSIONS – RULE 36
A. Trial Court has Broad Discretion

Requests for admission are deemed admitted, unless, within 30 days after service of the requests, the party to whom the requests are directed serves upon the party requesting the admissions a written answer or objection. FED. R. CIV. P. 36(a). In this case, the requests were not answered within 30 days, and therefore, they were deemed admitted. As a result, the plaintiff seeking a declaratory judgment could use the deemed admissions to conclusively establish the elements necessary to prevail in its declaratory judgment action.


In this case, plaintiffs failed to respond to requests for admission and the requests were deemed admitted. Plaintiffs then sought to have their admissions withdrawn. The court first noted that, since Rule 36 admissions, whether express or by default, are conclusive as to the matters admitted, they cannot be overcome at the summary judgment stage by contradictory affidavit testimony or other evidence in the summary judgment record. The court further found that a deemed admission can only be withdrawn or amended in accordance with Rule 36(b), which requires a trial court to find that withdrawal or amendment would:

1. serve the presentation of the case on the merits; and
2. not prejudice the party that obtained the admissions in the presentation of its case.

However, even when these two factors are established, a district court has the discretion to deny a request for leave to withdraw or amend an admission. As for the first element, when an admission is made inadvertently, or new evidence is discovered after the admission despite due diligence, withdrawal should be allowed. In this case, the plaintiffs, in their motion to withdraw, failed to present any evidence of the first element. With respect to the second element, the defendant showed that it would be prejudiced by a withdrawal of the admissions and plaintiffs failed to show that they were diligent. As a result, the court declined to allow plaintiffs to withdraw their deemed admissions.


Although lead plaintiff’s counsel in a case did not receive a copy of requests for admission (because lead counsel was moving offices at the time), the fact that co-counsel received the requests for admission allowed the court to conclude that the plaintiff was adequately served. Therefore, plaintiff’s failure to respond to the requests within 30 days of service resulted in the requests being deemed admitted. The court also found that, after the issue was brought to the attention of lead counsel, by defendant filing a motion for summary judgment, lead counsel failed to rectify the situation.

B. Admissions Apply Only to Pending Action

Any matter admitted pursuant to a request for admission is for purposes of the pending action only and may not be used against the admitting party in any other proceeding. FED. R. CIV. P. 36(b). Therefore, in this case, the court sustained defendant’s objection to plaintiff using defendant’s admissions from a prior case, even though the two cases involved the same parties.

X. RULE 199- DEPOSITIONS
A. Depositions Of Attorneys
1. In re Baptist Hospitals of Southeast Texas, 172 S.W.3d 136 (Tex. App.—Beaumont 2005, orig. proceeding) (per curiam), the court discussed the circumstances when one might depose an attorney of record in ongoing litigation. Here, the defendant sought to depose the attorney without specifying the areas that he sought to depose the attorney on and without a showing that the deposition would not cover privileged matters.

The court held if discovery from the attorney was to proceed, the discovering party had to first try to obtain the information through less intrusive sources or through written discovery. Written discovery did not require an attorney to make an immediate decision on whether a question involved a privilege and would not personally distract the attorney in the same manner as a deposition. If a deposition was required after less intrusive means were considered, it should proceed only if (1) the areas of questions are specified in the protective order; (2) the protective order protects against the disclosure of core work product or other privileged information. Id. at 145-46.
2. A defendant sought to depose an attorney in *In re Mason & Co. Property Management*, 172 S.W.3d 308 (Tex. App.—Corpus Christi 2005, orig. proceeding) after the attorney’s client testified that there was an oral extension of the lease at issue and that her attorney would have reached the agreement regarding the oral extension of the lease. The court allowed the deposition of the attorney on the sole issue of attorneys’ fees, but quashed the notice related to any other areas.

The appellate court conditionally granted the writ, finding that the court should have allowed the attorney’s deposition to proceed. Citing *Borden Inc. v. Valdez*, 773 S.W.2d 718, 720 (Tex. App. – Corpus Christi 1989, orig. proceeding), the court noted that that privileges were not intended to foreclose a deposition in its entirety. The mere fact that a deponent will assert a privilege in response to a particular question does not justify the quashing of a deposition notice. While there is no blanket authority against discovery, the court noted that the tactic of noticing an attorney’s deposition is disfavored because it had the potential to disrupt the adversarial system and to increase the time and costs of litigation. Despite this admonition, it was clear the testimony of the attorney was relevant on the extension issue and the defenses of the defendant in the case.

**B. Apex Depositions**


   Under the apex deposition doctrine, after it has been shown that a high level corporate representative does not have unique or superior personal knowledge of discoverable information, the trial court should not allow the deposition of the official without a showing, after a reasonable good faith effort to obtain the discovery through less intrusive means, that: (1) there is a reasonable indication that the official’s deposition is calculated to lead to the discovery of admissible evidence; and (2) the less intrusive means are unsatisfactory.

   The court found that if a party fails to file a notice of deposition under Rule 199.2(b)(1) to designate one or more witnesses to testify on its behalf, then the party will not have made a reasonable effort to obtain the information through less intrusive means of discovery. In this case, the party seeking the deposition also failed to demonstrate that the official had unique personal knowledge of discoverable information, as the official did not have knowledge of day to day operations and merely had knowledge of the financial aspects of the company which had little bearing on the issues at hand.


   Applying the apex deposition doctrine, the court found that an official who lacked knowledge of day to day operations did not have any unique personal knowledge of the discoverable information. The court further found that merely arguing that an official “knows about the operations, the value, [and] the way the [company] is run from an operations point of view,” without any evidence supporting the argument, will not suffice in establishing that an official has unique or superior knowledge.

   The court also found that a single deposition notice pursuant to Rule 199.2(b)(1), asking a corporation to designate a representative on its behalf, will not satisfy the requesting party’s burden of showing that it made a “reasonable” effort to obtain the information sought through less intrusive means.

**C. Deposition on Written Questions -- Rule 31**


   FED. R. CIV. P. 31 requires a party to obtain leave of court before conducting a deposition upon written questions of a person confined in prison. Failure to seek leave of court bars a party from deposing an inmate by written questions.

   Furthermore, solely because a party has proper objections to written deposition questions, the party is not necessarily entitled to quash a deposition on the basis of the objections. Objections to the written deposition questions serve the function of avoiding the waiver of any such error or irregularity, and it does not trigger a right to a hearing and to quash the deposition.

**D. Correcting Depositions -- Rule 30**


   In this case, plaintiff signed his deposition and an errata sheet amending his deposition testimony pursuant to Rule 30(e). Plaintiff’s errata sheet contained 111 changes to his deposition, 107 of which were substantive, and the reason for the changes were “typographical” and “clarification.” However, while some of the changes corrected typographical errors, most changes more substantively altered the original deposition testimony. For example, some of the answers were changed from a “no” response to a “yes” response. Defendant filed this motion to strike plaintiff’s deposition corrections.

   The court found that the language of Rule 30(e) places only two restrictions on changes made to depositions:
1. the changes must be made within 30 days after notification that the transcript is available for review; and
2. the deponent must give reasons for change “in form or substance.”

The defendants did not dispute the timeliness of the plaintiff’s corrections or argue that plaintiff did not give reasons for his changes. They argued that Rule 30(e) has implicit limits on the scope of correction.

The court noted that the Fifth Circuit has not addressed the scope of permissible substantive corrections to a deposition. Some circuits have interpreted Rule 30(e) broadly and others more narrowly. This court was persuaded by the broad interpretation of Rule 30(e), as a broad interpretation is consistent with the plain language of the Rule. Furthermore, the court found that there are two safeguards in applying the more narrow reading of Rule 30(e):

1. the original answer to the deposition questions will remain part of the record and can be read at trial; and
2. if changes made in the deposition pursuant to Rule 30(e) make the deposition incomplete or useless without further written testimony, the party who took the deposition can re-open the examination.

The court declined to strike plaintiff’s changes to his deposition testimony. In light of the substantive changes made to the deposition, the court reopened the deposition but limited its scope to the reasons for the changes and follow-up questions to the changed responses. The court also invited the defendants to submit an application for reasonable attorney’s fees.

XI. RULE 202- PRE-SUIT DISCOVERY

Under Rule 202, a person may petition a court for an order authorizing a deposition to perpetuate testimony or to investigate a potential claim or suit.

A. When is a Rule 202 Order An Appealable Order?


   Rule 202.1 allows a party to take depositions to perpetuate testimony “for use in an anticipated suit” or “investigate a potential claim or suit.” The court’s ruling on such a petition is a final, appealable order if the petition seeks discovery from a third party against whom a suit is not contemplated. Conversely, the ruling is interlocutory if discovery is sought from a person “against whom there is a suit pending or against whom a suit is specifically contemplated.” Id. at 746. Because discovery was sought from a person whom suit was being contemplated, the trial court’s order dismissing the petition was not a final, appealable order.


   The trial court’s denial of a party’s Rule 202 petition to take pre-suit discovery is not a final, appealable order where it is in aid of and incident to a pending or contemplated lawsuit.


   An appellate court lacks jurisdiction to review the trial court’s order denying a motion to transfer venue of a Rule 202 proceeding, as no statute provides for interlocutory appeal of venue rulings in proceedings filed under Rule 202. Moreover, an order granting a Rule 202 petition in anticipation of institution of suit is not appealable.

B. Jurisdiction of Trial Courts to Hear Rule 202 Cases

   City of Willow Park v. Squaw Creek Downs, L.P., 166 S.W.3d 336 (Tex. App. – Fort Worth 2005, no pet.).

   In this case of first impression, the court had to decide whether Rule 202 presuit discovery was allowed in a dispute over which the legislature had allegedly conferred exclusive jurisdiction on a municipality and administrative agency. Real estate owners sought to depose a certain county official regarding their decision to not provide water services because of unpaid water bills. The county filed a plea to the jurisdiction and the appeal followed. The county argued that this matter was exclusively within the province of the county and that the primary jurisdiction doctrine precluded the trial court’s exercise of jurisdiction. The appellate court rejected both arguments finding that the trial court had jurisdiction under Rule 202. Here the presuit discovery was sought to investigate the validity of the county’s lien was a question over which the trial court squarely had jurisdiction.

   The test for determining jurisdiction is whether the trial court would have jurisdiction of the underlying suit is a lawsuit is filed. Id. at 340.

XII. RULE 205 – DISCOVERY FROM NONPARTIES


   A discovery stay, before filing of an expert report, in medical malpractice actions restricts parties to no more than two depositions of the types permitted,
depositions on written questions under Rule 200 and of non parties under Rule 205.

XIII. RULE 215 – SANCTIONS

A. Standard for Review


The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's actions, but whether the court acted without reference to any guiding rules and principles.’ The trial court’s ruling should be revered only if it was arbitrary or unreasonable.

*Id.* at 662. See also *Hernandez v. Mid-Loop, Inc.*, 170 S.W.3d 138, 143 (Tex. App. – San Antonio 2005, no pet.).

B. Meeting the Sanctions Standard

There are always cases addressing the issue of whether the trial court properly imposed sanctions, especially death penalty sanctions, under the “just” standard of *TransAm. Natural Gas Corp. v. Powell*, 817 S.W.2d 913 (Tex. 1991) (orig. proceeding) -- whether the sanctions imposed relate directly to the abuse and are not excessive. *Aguilar v. Morales*, 161 S.W.3d 825, 832 (Tex. App. – El Paso 2005, pet. denied).

1. The imposition of death penalty sanctions was upheld in *Hansen v. Gilbert*, No. 01-03-00863-CV, 2005 WL 327158 (Tex. App.—Houston [1st Dist.] Feb. 10, 2005, no pet.).


   The appellate court upheld an award of sanctions for discovery abuse where the appellant was provided additional time to answer discovery, but still provided incomplete and evasive answers (after obtaining the extension), and only answered the discovery after a motion to compel was filed.


   Death penalty sanctions were properly imposed in a personal injury case for blatant discovery abuse. Three motions to compel were filed with appellant engaging in uncooperative and evasive conduct in his deposition and written discovery. The appellant claimed memory loss, but presented no evidence of such loss. He was argumentative and refused to answer deposition questions, telling counsel to “eat shit and die” when asked to produce his driver’s license. He refused to produce medical records and give information on prior accidents. The trial court tried lesser sanctions like fines, but the appellant was still uncooperative. The standards for imposing death penalty sanctions under *Transamerican* clearly were met.


   Death penalty sanctions were upheld where the appellant conduct was so egregious the appellee had to file four motions to compel and a motion to enforce a Rule 11 agreement. With each order, the trial had ordered appellant to meet new deadlines and required the payment of attorneys’ fees. While appellant paid the attorneys’ fees, she failed to appear for depositions, produce documents, meet deadlines, produce a required accounting or retain trust fund monies. The trial court’s prior sanctions were simply insufficient to require appellant’s compliance and supported the court’s conclusion that her defenses and counterclaim lacked merit.

   Based on this record, the appellate court rejected the argument lesser sanctions were required. Here, the trial court repeatedly reset schedules and assessed attorneys’ fees as sanctions against appellant’s repeated abuses of the discovery rules. Appellant’s actions made it impossible for appellees to prepare their case. The death penalty sanctions entered by the trial court established, as a matter of law, the findings dependent on evidence in appellant’s possession, which she repeatedly refused to produce. We hold that the sanctions were fully commensurate with appellant’s abuses of the litigation process.


   The trial court found that a party was not abusing the discovery process, but nevertheless imposed sanctions against the attorney for abuse of the discovery process pursuant to Rule 215.3. The appellate court held that, under Rule 215.3, a finding that the attorney abused the discovery process is not a basis for sanctions under Rule 215.3. Therefore, an award of sanctions against an attorney under Rule 215.3, without finding that a party abused the discovery process, was improper.
The Court held that imposing “death penalty” sanctions and striking a party’s pleadings with prejudice was appropriate after the party disregarded discovery from December 2002 to May 2003, violated court orders without good cause, and lesser sanctions had been ineffective. The court further found that the dismissal was “just,” because a direct relationship existed between the offensive conduct and the sanction, and the sanction was not excessive.

C. Waiver - Pretrial Objection Required to Obtain Discovery Sanctions

In Meyer v. Cathey, 167 S.W.3d 327 (Tex. 2005), the trial court granted a post-trial motion for discovery sanctions based on the defendant having given inaccurate information in his requests for admission and lying in his deposition. Because of these inaccuracies, the plaintiff had to put on additional evidence at trial. On appeal, appellant argued that the post-trial sanctions motion was untimely and that the appellee had waived its rights to sanctions by not filing it before trial.

Relying on its prior ruling in Remington Arms Co. v. Caldwell, 850 S.W.2d 167, 170 (Tex. 1993), the Texas Supreme Court held that the post-trial sanctions were improper. Here, the appellee clearly had notice of the sanctionable conduct prior to trial and the court rejected the argument that the appellant admitted lying for the first time at trial. Appellee had obtained pretrial depositions which showed the contradictions and other discovery responses showed the inconsistencies. “Conclusive evidence” was not required to move for sanctions. Id. at 332-33. Thus, the court reversed the imposition of some $25,978 in sanctions because the late-filing appellee had waived his claim for discovery abuse sanctions by filing the motion after the trial.

XIV. RULE 37 SANCTIONS

A. The Basics


Under Federal Rule of Civil Procedure 37, if a party fails to obey an order to provide or permit discovery, the district court has the authority to strike pleadings or render a judgment by default. Dismissal is authorized only when the failure to comply with the court’s order results from willfulness or bad faith, and where the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions. Smith v. Smith, 145 F.3d 335, 344 (5th Cir. 1998). There are four principles that guide the court’s determination if the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions, and if plaintiff’s failure to comply with the Court’s order results from willfulness or bad faith:

1. dismissal with prejudice is only appropriate if its deterrent value cannot be substantially achieved by use of less drastic sanctions;
2. if the refusal to comply results from honest confusion or sincere misunderstanding of the order, the inability to comply, or the nonfrivolous assertion of a constitutional privilege, dismissal is almost always an abuse of discretion;
3. in general, the court may resort to dismissal only if there is a clear record of delay or contumacious conduct by the plaintiff;
4. when the blame for disregard of the court’s order lies with the attorney, not the client, dismissal is usually too severe a sanction; and
5. if the other party’s preparation for trial has not been substantially prejudiced, dismissal may well be inappropriate.

In applying all of the factors, the court found that dismissal in this case was an appropriate sanction, given the “egregious conduct” by the plaintiffs’ attorney. The court found that the post-trial sanctions, plaintiffs’ attorney had failed to answer discovery, plaintiffs’ attorney had failed to provide a compelling reason for his inability to comply with the discovery orders, plaintiffs’ attorney had already been given prior discovery extensions, and some of the plaintiffs had failed to show for prior discovery hearings allegedly on the advice of the attorney.


Rule 37 provides that if a motion to compel is granted, the court may require the party whose conduct necessitated the motion to pay the reasonable expenses, including attorney’s fees, incurred in making the motion. FED. R. CIV. P. 37. Pursuant to this rule, plaintiff’s counsel sought its attorneys fees associated with filing its motion to compel. The plaintiff’s counsel sought $1,693.75, which included a total of 7.05 hours worked by the attorneys. The court found that, because the motion was straightforward, the defendant did not produce any documents that would require review, and defendant did not raise any defenses, and two hours would adequately compensate plaintiff’s counsel.


Federal Rule of Civil Procedure 37 permits a court to authorize sanctions for abuse of the discovery
process and failure to comply with discovery orders. However, Rule 37 requires sanctions to be just and the sanctions must relate to the claim at issue in the order to provide discovery. Further, to impose sanctions, the violation must be willful and a severe sanction is only allowed when a lesser sanction would not achieve the desired result. The court also recognized that it has the inherent power to issue sanctions. Roadway Express, Inc. v. Piper, 447 U.S. 752, 763 (1980). In this case, the court found that a sanction against defendant for attorney’s fees and costs, and a monetary sanction in the amount of $500,000 was appropriate because:

1. Defendant made repeated mis-representations to the court concerning the extent to which it searched for records and attempted to obtain records from third parties;
2. Defendant had made a conscious decision not to search its own records for documents which it should have produced more than eight months prior to the sanctions order;
3. Defendant made repeated mis-representations before the court in hearings regarding its relationship with a third party in the case;
4. Defendant’s conduct amounted to a conscious intent to evade the discovery orders of the court and violate the court’s orders;
5. The court had already issued lesser sanctions on two separate occasions in an effort to get the defendants to comply with the court’s rules;

In imposing the sanction, the court also noted that $500,000 was an appropriate sanction given that defendant generates hundreds of millions of dollars in revenues and that prior sanctions for attorneys’ fees had failed to correct defendant’s conduct.


The court recognized that repeated delays in discovery may justify dismissal with prejudice under Federal Rule 41(b). The court found, however, that dismissal with prejudice is inappropriate, except in the most “egregious of cases” where the court finds both a clear record of delay or contumacious conduct by the plaintiff, and that a lesser sanction would not better serve the best interests of justice. Court found that less drastic sanctions include fines, costs, damages, attorney disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings. Because the court found that plaintiff’s conduct of not responding to discovery did not rise to the level of “egregious conduct,” the court imposed a sanction requiring defendant to pay attorney’s fees.

B. Federal Courts will Impose Major Sanctions

Everyone needs a strong federal sanctions case in their arsenal. This can be found in FDIC v. Hurwitz, 384 F. Supp. 2d 1039 (S.D. Tex. 2005) where the court imposed one of the largest monetary sanctions seen in this circuit in a while. The government should have known it was in trouble when the court began its sanctions discussion with the following language:

The FDIC has been obstreperous in discovery throughout the case. It says that [Defendant’s] complaints about its obduracy are overblown. It says that [Defendant] has simply encountered ‘unique’ issues in discovery that arise when dealing with the United States. Apparently, mere citizens must learn to absorb the blows when they are administered by the mandarins of the regulatory state. This attitude is characteristic of the FDIC and its conduct of this litigation. Fortunately, the FDIC’s arrogance is transcended by our charter’s commitment to equal justice under the law.

Id. at 1095. The court went on to describe egregious misconduct by the FDIC including the fact that it knew the claims it had brought were without merit and had still pursued years of litigation. Discovery abuses included fighting the production of relevant documents for years, failing to disclose relevant documents, losing documents, placing different numbers on documents so they could not be tracked, and failing to provide information required by court order.

The court awarded sanctions for discovery abuses under Rule 37, for “the government’s continual flouting of orders, its evasive and false answers at depositions and in interrogatories, and its failure to produce or destruction of documents.” Id. at 1110. The court also used its inherent powers to reach all abuses of the judicial process in the case. Id. at 1111. After an extensive discussion, the court awarded attorneys fees of $72 million as a sanction. If the case was appealed and the appellate court only allowed the recovery of costs, the costs in the case were $15 million.

PRIVILEGES

XV. ATTORNEY CLIENT PRIVILEGE

A. State Definition

The attorney client privilege extends to all matters concerning litigation and business transactions, and protects from disclosure communications between a lawyer and client if the communications were confidential and made for the purpose of facilitating the rendition of legal services to the client. TEX. R. EVID. 503(b)(1); In re Mason & Co. Prop. Mgmt., 172
Because the trial court had conducted an in–camera non-specific identification of the withheld documents. Attorney client privilege because it contained “a rather log was insufficient to establish the existence of the documents. No other evidence was presented in support of the privilege, except the documents themselves which had been filed in-camera with the trial court.

The appellate court concluded that the privilege log was insufficient to establish the existence of the attorney client privilege because it contained “a rather non-specific identification of the withheld documents.” Because the trial court had conducted an in-camera review, the appellate court reviewed the documents to determine whether they were privileged. The appellate review demonstrated that the documents did not contain any confidential communications between the appellant and his attorneys. Because the documents did not involve the “rendition of professional legal services,” they were not covered by the privilege, and the trial court abused its discretion in withholding the documents.


The court held that defendants had not produced evidence sufficient to meet its burden of showing that documents listed in a privilege log were privileged. Defendant claimed that certain emails, memos, and notes were attorney work product and submitted a privilege log that identified the documents. Defendants did not tender the documents to the court for in-camera review. The court held that defendants had not met their burden because there was no evidence that the “primary motivating purpose” behind the creation of the emails, memos, and notes at issues was to aid in possible litigation.


This case demonstrates that courts will use privilege logs to go behind claims of privilege. The court was concerned that the FDIC had failed to produce a privilege log, even in the face of a court order. When a log was finally produced, the court used the government’s own log to show that the claims of attorney-client privilege and work product did not apply to the documents.

The log contained hundreds of documents. The government had used lawyers to investigate the defendant. The court found that these lawyers were acting as investigators and regulators and were not giving legal advice. Thus, these privileges did not apply to the documents. Id. at 1097.

XVI. WORK PRODUCT PRIVILEGE
A. State Definition – Rule 192.5
Rule 192.5 (a) and (b) defines work product as:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial by or for a party or a party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

B. Federal Definition – Rule 26(b)(3)
The federal work product doctrine, which is codified at FED. R. CIV. P. 26(b)(3), provides a qualified protection for documents and information prepared by or for party or that party’s representative in anticipation of litigation or trial.” Mims v. Dallas County, 230 F.R.D 479, 483-84 (N. D. Tex. 2005). The work product doctrine exists to encourage full disclosure of pertinent information between clients and attorneys.” In re Grand Jury Subpoena, 419 F.3d 329, 339 (5th Cir. 2005) (citations omitted).

C. Primary Motivating Purpose Test
Federal courts apply the “primary motivating purpose” test in determining the applicability of the
work product doctrine. While a document need not be generated in the course of an ongoing lawsuit, the “primary motivating purpose” behind the creation of the document must be to aid in future litigation. *Mims v. Dallas County*, 230 F.R.D. 479, 483-84 (N. D. Tex. 2005).

Federal courts look at several factors in determining the primary motivation behind the creation of a document, including “the retention of counsel and his involvement in the generation of the document and whether it was a routine practice to prepare that type of document or whether the document was instead prepared in response to a particular circumstance.” *Id.* at 483.

*Mims* provides an excellent analysis of the primary motivation approach to determining work product. At issue, was a consultant’s report on the adequacy of medical care of mentally ill inmates in Dallas County known as the HMA Report. In a Section 1983 action, inmates sought production of the report which the County argued was protected by the work product privilege. Dallas County argued that it anticipated a lawsuit at the time it hired the consultant to evaluate the health care services and programs in the jails and detention facilities.

The court agreed that litigation was one of the purposes in commissioning the report, but found that there was evidence which showed that the “primary motivating purpose” for the report was to assist Dallas County in formulating remedial measures to improve health care in the jails. This conclusion was supported by the fact that the report covered far more than the issues involved in the litigation, and the retention agreements showed that the County had a broader purpose than litigation. Nothing in the amendment to the agreement with the consultant showed that they were being retained solely for purposes of litigation or to provide legal analysis related to potential liability. *Id.* at 484-85.

D. Burden of Proof

The burden of proving work product is on the party asserting the privilege to show that the materials were prepared in anticipation of litigation or for trial. Once that burden is met, the party seeking discovery may seek to establish a “substantial need of the party” to obtain the substantial equivalent of the materials by other means. *Mims v. Dallas County*, 230 F.R.D 479, 484 (N. D. Tex. 2005); *Colindres v. Quietflex Mfg.*, 228 F.R.D. 567, 570 (S.D. Tex. 2005).

E. Expert Materials Are Not Work Product

Rule 26(b)(4) makes clear that the work product doctrine does not apply to the discovery of information obtained by or through testifying experts. The court addressed this issue in *Colindres v. Quietflex Mfg.*, 228 F.R.D. 567, 570 (S.D. Tex. 2005), in which a lawyer sought to protect as work product a series of emails exchanged with a testifying expert. During a class certification hearing, and in connection with the testimony of the testifying expert at issue, the court asked about certain payroll information relevant to the calculation of damages. The testifying expert submitted a supplemental report addressing the issues raised by the court, but had discussed the issue in emails with counsel prior to releasing the supplement. Counsel argued the emails were work product because the testifying expert was acting in a “consultative capacity” when he wrote them. *Id.* at 570. The expert allegedly did not consider the emails in his supplemental report and the lawyer argued that the emails would reveal his mental impressions.

The court rejected the work product argument finding that the emails were discoverable. The email addressed the testifying expert’s understanding of the payroll date and the ability to use the data to calculate back pay— an element of damages in the case.

The case law does not support defendant’s argument that the attorney work product protection protects the email from disclosure. Under the case law, information that the expert creates or reviews related to his or her role as a testifying expert must be produced. Documents that have no relation to the expert’s role as a testifying expert need not be produced, but ambiguity as to the role played by the expert in reviewing or generating documents are resolved in favor of the party seeking discovery.

*Id.* at 571. The court denied the motion for protective order and ordered the production of the emails. *Id.* at 572.

F. Work Product Privilege Does not Prevent Attorney Deposition


The issue in this mandamus proceeding was whether an attorney of record in the litigation could be deposed in light of his objections that all such testimony was covered by the work product or attorney client privilege.

The court first noted that compelling the testimony of the attorney of record in on-going litigation generally implicated the work product privilege. Drawing a contrast to *In re Texas Farmers Insurance Exchange*, 990 S.W.2d 337 (Tex. App. – Texarkana 1999, orig. proceeding [mand. denied]), the court found that this attorney had been involved in all actions leading up to the lawsuit and had actually
anticipated litigation. *Farmers* involved a situation in which the attorney was hired and functioned as an investigator for the insurance complaint, long before litigation was anticipated. The lawyer in this case was not a fact witness divorced from the litigation. His work in observing, monitoring, and evaluating the facts was reasonably related to and in furtherance of representing his client in the lawsuit. As such, his activities fell squarely within the work product definition of Rule 192.5

**G. Undue Burden and Substantial Hardship**

1. After the court found that work product had been established in *In re Baptist Hospitals of Southeast Texas*, 172 S.W.3d 136 (Tex. App.—Beaumont 2005, orig. proceeding) (per curiam), the defendant then sought to obtain discovery of the non-core work product under TEX. R. CIV. P. 192.5(b)(2) by showing substantial need and undue hardship. While the defendant had tried to depose the attorney, they had not tried to obtain the discovery through other means, such as interviews of the numerous contractors, consultants, and architects who were involved in the project. The party seeking discovery could not show that he could not acquire the information through other sources and less intrusive means.


   In a malicious prosecution claim against two defendants, plaintiffs filed subpoenas seeking discovery from the district attorney’s office, which filed motions to quash the subpoenas on the grounds that the mental impressions of the district attorneys are work product under Rule 192.5. The court found that the plaintiffs’ claim required a showing of whether certain information acquired by the district attorney’s office was material to the prosecution of the plaintiff. In this situation, the work-product privilege does not operate as a blanket privilege covering all decisions made by the district attorney, and the district attorney failed to show any basis to quash the subpoenas.

**XVII. RULE 508- IDENTITY OF INFORMER PRIVILEGE**

This privilege may only be asserted by “an appropriate representative of the public entity to which information was furnished.” TEX. R. EVID. 508(b). The privilege allows the State or United States to refuse to reveal the identity of persons who furnish information related to or assisting in an investigation or possible violation of law to a law enforcement officer. TEX. R. EVID. 508(a).

Defendants who seek the disclosure of the identity of persons protected by Rule 508 have the threshold burden of showing: (1) the informer may reasonably be able to give testimony necessary to a fair determination of the issues of guilt or innocence, or (2) information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible. TEX. R. EVID. 508(c)(2) and (3).

Cases dealing with the informer privilege in the last year include *State v. Soleto*, 164 S.W.3d 759 (Tex. App.—Corpus Christi 2005, no pet.), and *Oliveraz v. State*, 171 S.W.3d 283 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

In *Oliveraz*, the convicted defendant argued that the trial court erred by refusing to allow the disclosure of the identity of the confidential informant in a case for unlawful possession of a controlled substance — marijuana. The government had to show that the appellant exercised care, control and management over the marijuana and knew the substance was contraband. In this case, appellant did not meet the test of showing that the informer had information necessary to a determination of guilt or innocence. The informer was not present at the time of the arrest and the method by which the marijuana was distributed was not necessary to determine guilt or innocence.

The court in *Soleto* ordered the disclosure of the identity of the confidential informant in a case in which the appellee was arrested and indicted for possession of cocaine and marijuana. The appellate court reversed a finding that that appellee had not met this standard. The informer was not present at the time of the search, seizure, and arrest following the indictment, and that no evidence had been presented which showed a reasonable probability that the informer may have been able to give testimony necessary to a fair determination of the issues of guilt or innocence.

**XVIII. RULE 509 - PHYSICIAN-PATIENT PRIVILEGE**

**A. Texas Cases**

*In re Christus Health Southeast Texas*, 167 S.W.3d 596 (Tex. App. – Beaumont 2005, orig. proceeding) dealt with an issue regularly faced when information is sought from hospital or medical providers in negligence cases. Requests for production were served which sought medical records on non-parties related to triage codes and complaints of patients in the six emergency rooms when the plaintiff arrived at the hospital. The requests specially stated that:

Plaintiff does not request the identity of these patients and specifically requests that defendant redact the identities of the patients involved.
The hospital objected to each request as follows: “Objection-Physician/Patient privilege, hospital patient privilege, HIPPA privilege.” The court conditionally granted mandamus, overturning the trial court’s order that permitted discovery of the non-party medial files.

The court relied on prior Supreme Court cases in evaluating the physician-patient privilege – In re CI Host, Inc., 92 S.W.3d 514 (Tex. 2002) and R.K. v. Ramirez, 887 S.W.2d 836 (Tex, 1994) in outlining the procedures that must be followed in asserting the privilege, and whether a party relies on a medical or mental condition as part of a claim of defense in a lawsuit. When information is sought from non-parties, the court must always give consideration to the interests of the non-party and their interests in protecting the confidentiality of their records. The records of the non-party patients would be discoverable only if the medical conditions of the non-parties were a part of the plaintiff’s claims and not merely evidentiary or an intermediate issue of fact. The court could best determine this by conducting an in camera review of the medical information. Even if information is determined to be relevant after this type of review, information from the medical records of a non-party should be sufficiently limited to protected non-party confidentiality.

B. Federal Cases

There is no physician-patient privilege under federal common law. Merrill v. Waffle House, Inc., 227 F.R.D. 467, 469 (N. D. Tex. 2005), citing Whalen v. Roe, 429 U.S. 589 (1977). While there is a psychologist-patient privilege under federal common law that protects communications between the therapist and patient, it does not protect the names of health care providers, including psychiatrists, psychologists, counselors, therapists, and the dates of treatments. Id. at 471.

In Merrill, the court provided a useful discussion of when the psychologist-patient privilege is waived under federal law. Although it did not directly reach the issue, finding that there was no evidence in the record that documents existed responsive to the request, it did discuss the various approach courts used it determining when a waiver of the privilege had occurred. The Fifth Circuit had not addressed the waiver issue, but the court noted the four approaches used by the lower courts:

1. Under the broad approach, the privilege is waived in its entirety when a party makes a claim for emotional distress damages.
2. Under the narrow approach, waiver only occurs when the plaintiff introduces communications from the psychotherapist into evidence or calls the psychotherapist as a witness. In this line of cases, the privilege is waived only if put directly in issue by the client.
3. Under the implied approach, known as the implied approach, waiver occurs when the plaintiff takes the affirmative step of placing his diagnosis or treatment in issue by offering evidence of psychiatric treatment of medical expert testimony to establish a claim of emotional harm.
4. Under the middle approach, courts have held that a mere request for damages for garden variety claims of mental anguish or emotional distress did not place a party’s mental condition in issue, and the privilege is not waived. Id. at 474.

XIX. RULE 513 – COMMENT ON INFERENCE ON CLAIM OF PRIVILEGE

In In re Edge Capital Group, Inc., 161 S.W.3d 764 (Tex. App. – Beaumont 2005, orig. proceeding), the court addressed an issue faced by many practitioners when parallel civil and criminal proceedings are ongoing – whether discovery is properly stayed in the civil proceedings to protect a defendant’s rights in a criminal proceeding. In this case involving claims for breach of contract, conspiracy, negligence, and securities fraud, the defendant sought to stay all discovery in the civil case on the grounds that federal authorities were also investigating him on the same issues. He sought a postponement of all civil discovery until the federal investigation was resolved, and the court entered a broad protective order on that grounds without staying the trial or any other proceedings. Although requests for admissions, interrogatories, and a document request had been served on the defendant, he did not answer any of the discovery except to make a blanket request for the protective order.

In a mandamus proceeding, the plaintiff challenged the protective order on the basis that Texas law does not permit a blanket exemption from discovery on the basis of a possible criminal indictment. The court conditionally granted mandamus, holding that a general stay of discovery was improper. First, the defendant was required to produce some evidence in support of the protective order, and had not done so. Second, the record contained no evidence of the nature of the alleged indictment, how he knew the investigation was ongoing, what stage it was in or which agency was conducting an investigation. A protective order could be appropriate when sought in conjunction with the proper assertion of a privilege, but the defendant had not done so. The defendant was also required to assert the Fifth Amendment privilege with respect to specific discovery requests and had not done so.
Thus, when faced with parallel proceedings, a defendant must follow the requirements of Rule 193 in asserting the privilege, likely the Fifth Amendment, and make some showing as to the nature and scope of the alleged criminal proceedings or investigation.