Discovery Update

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PRESENTED TO:

NELA LUNCHEON

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BY

JUDGE MIKE ENGELHART, 151ST CIVIL DISTRICT COURT

HARRIS COUNTY, TEXAS

Purpose of Talk

- Discuss recent case law interpreting and applying the Texas Rules of Civil Procedure and Civil Practice and Remedies Code sections governing discovery in civil actions.

- Help you streamline the discovery process, save money for your clients, and, ultimately, if necessary, make better motions and responses when unresolvable discovery disputes arise.

Rule 169 – Expedited Actions

- Did you know? Rule 169 expedited actions are governed, in terms of discovery deadlines and limits, by TRCP 190.2. Tex. R. Civ. P. 169(d)(1).
  - All discovery must be conducted during the discovery period, which ends 180 days after the date of the first discovery request by any party. TRCP 190.2(b)(1).
  - 6 total deposition hours per side; 15 interrogatories per party, 15 RFPs, 15 RFAs, Disclosures plus all documents, electronic information, and tangible items … in its possession, custody or control and may use to support its claim s or defenses. TRCP 190.2(b)(2-6).

Rule 190.3 - Discovery Control Plan

- Continuance of the trial date did not reset the deadline for supplemental discovery where court made clear that deadlines remained in place after continuance. *Sprague v. Sprague*, 363 S.W.3d 788, 799-800 (Tex. App.--14th Dist. 2012, pet. denied).
- Rule 190.3 controls and sets discovery deadlines except when there is a docket control deadline, as in TRCP 190.4, entitled Discovery Control Plan-By Order (Level 3).

Rule 190.4 – Scheduling Order

- Scheduling order that required parties to designate experts and provide reports within specified time period supplanted general rule that parties had option to either produce expert report or tender the expert for designation. *Esty v. Beal Bank S.S.B.*, 298 S.W.3d 280, 296 (Tex. App.--Dallas 2009, no pet.).

Rule 190.6 – Certain Discovery Excepted

- Rule 190's limits on discovery do not apply to or include discovery conducted under Rule 202 (depositions before suit) or Rule 621a (post-judgment discovery).
- But Rule 202 cannot be used to circumvent the limitations of this Rule.

Rule 191.2 Conference

- Parties and their attorneys are expected to cooperate in discovery and to make any agreements reasonably necessary for the efficient disposition of the case.
- Certificate of conference requirement: that a reasonable effort has been made to resolve the dispute without the necessity of court intervention and the effort failed. Rule 191.2; *Union Carbide Corp. v. Martin*, 349 S.W.3d 137, 146 (Tex. App.--Dallas 2011, no pet.).
- The 151st's rules require a detailed certificate of conference, and failure to include a meaningful one will result in at least a call from the clerk, if not rescheduling or denial of your motion.

Rule 191.3(d), (e) – Signing Motions, etc.

- Effect of failure to sign - "If a request, notice, response or objection is not signed, it must be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, notice, response, or objection. A party is not required to take any action with respect to a request or notice that is not signed. TRCP 191.3(d).
- But see, TRCP 21(f)(7) (discussing electronic signatures, which may be merely a "/s/" and name typed where the signature would otherwise appear).
- 191.3(e): If the certification is false without substantial justification, the court may, upon motion, or own initiative, impose on the person who made the certification, or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under Chapter 10 of the CPRC.

Rule 192.1 – Forms of Discovery

- The state was NOT exempt from answering requests for admission in a sexually violent predator case. A civil commitment proceeding was subject to the rules of civil procedure. *In re Commitment of Young*, 410 S.W.3d 542, 547 (Tex. App.--Beaumont 2013, no pet.).

Rule 192.3 – Scope of Discovery

- Phrases "relevant to the subject matter" and "reasonably calculated to lead to admissible evidence" in Rule 193.3 are liberally construed to allow litigants to obtain the fullest knowledge of the facts and issues prior to trial. *In re Reassure America Life Ins. Co.*, 421 S.W.3d 165, 174 (Tex. App.--Corpus Christi 2013, orig. proceeding).

- A discovery request is not overbroad merely because it may call for some information of doubtful relevance so long as it is reasonably tailored to include only matters relevant to the case. *In re National Lloyds Ins. Co.*, 449 S.W.3d 486, 488 (Tex. 2014). Whether a request is broad is distinct from whether it is burdensome or harassing.
- CEO and president of medical center defendant did not need individual personal possession, custody or control to be required to produce medical center documents under the discovery rules. Rule only required that the defendant have either actual physical possession, or constructive possession, or the right to obtain possession from a third party such as an agent or representative, and defendant was the president and CEO of the medical center and thus had a right to possession of the requested documents. *In re Summersett*, 438 S.W.3d 74, 79-82 (Tex. App.--Corpus Christi 2013, orig. proceeding). Rule 192.3(b) states that a party must produce discoverable documents within his or her possession, custody or control. Possession, custody or control under Rule 192.7(b) means that the person either has physical possession of the item or has a right to possession of the item that is equal to or superior to the person who has physical possession of the item.
- CPRC 41.0105 limiting amount recoverable as to medical expenses to those amounts actually paid or incurred was basis for permissible discovery from dog bite victims health insurers to determine the amounts providers were required to accept and whether they were less than amounts actually billed. *In re Jarvis*, 431 S.W.3d 129, 136-37 (Tex. App.--Houston [14th Dist.] 2013, orig. proceeding).

Rule 193.2 – Objecting to Written Discovery

- Relevance is to be liberally construed. *In re HEB Grocery Co., L.P.*, 375 S.W.3d 497, 500 (Tex. App.—Houston [14th Dist.] 2012, orig. proceeding).
- The burden is on the objecting party. *In re Fisher & Paykel Appliances, Inc.*, 420 S.W.3d 842, 847 (Tex. App.—Dallas 2014, orig. proceeding).
- A party cannot answer discovery and merely reserve the right to make specific objections later after the deadline for responding. Waiver. *In re Park Cities Bank*, 409 S.W.3d 859, 878 (Tex. App.—Tyler 2013, orig. proceeding).

Rule 193.3 - Privilege

- Good discussion of mandamus requirements, withholding privileged material, privilege logs, and core work product. TRCP 193.3(a), (b), and (c). *In re Lumbermans Underwriting Alliance*, 421 S.W.3d 289, 291-96 (Tex. App.—Texarkana 2014, orig. proceeding).

Rule 193.4 - Hearing and Ruling on Objections and Assertions of Privilege

- When waive privilege (such as Fifth Am.), have to supplement deposition testimony. *Alief ISD v. Perry*, No. 14-12-00532-CV, 2013 WL 5861516, *8-9 (Tex. App.—Houston [14th Dist.] October 31, 2013, pet. denied). Otherwise, you could be barred from testifying.

Rule 193.5 – Amending or Supplementing Responses to Written Discovery

- The requirement of supplementing discovery (when previous responses to written discovery are incomplete or inaccurate) applies to both summary judgment and trial deadlines. *Beinar v. Deegan*, 432 S.W.3d 398, 405 (Tex. App.—Dallas 2014, no pet. h.).
- A party responding to discovery must supplement reasonably promptly. *In re Staff Care*, 422 S.W.3d 876, 882 (Tex. App.—Dallas 2014, orig. proceeding). What do you do?

Rule 193.6 – Failing to Timely Respond – Effect on Trial - 1/3

- **193.6(a) *Exclusion of Evidence and Exceptions.*** A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that:
  - **(1)** there was good cause for the failure to timely make, amend, or supplement the discovery response; or
  - **(2)** the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.
- **(b) *Burden of Establishing Exception.*** The burden of establishing good cause or the lack of unfair surprise or unfair prejudice is on the party seeking to introduce the evidence or call the witness. A finding of good cause or of the lack of unfair surprise or unfair prejudice must be supported by the record.
- The exception to the exclusion rule (193.6), showing no prejudice or lack of unfair surprise, must be supported by the record. *Rhey v. Redic*, 408 S.W.3d 440, 459 (Tex. App.—El Paso 2013, no pet.). The burden is on the party seeking to introduce the evidence or call the witness. *Id*.

Rule 193.6 – Failing to Timely Respond – Effect on Trial – 2/3

- Abuse of discretion standard. *May v. Ticor Title Ins.*, 422 S.W.3d 93, 105 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

- Do not reset discovery deadlines with continuance, necessarily. *Sprague v. Sprague*, 363 S.W.3d 788, 800 (Tex. App.--14th Dist. 2012, pet. denied). A specific court order in this case, as is common, said that the deadlines remain in effect after the continuance. A continuance does not nullify a scheduling order set by the court, necessarily.
- Court's exclusion of expert witness from testifying in proceeding to modify the parent-child relationship was not an impermissible "death penalty" sanction. Witness preclusion was automatic result of failure to properly disclose the witness before the expiration of the discovery deadline pursuant to TRCP 193.6, 215.2(b)(1). *In re T.K.D.-H*, 439 S.W.3d 473, 479 (Tex. App.--San Antonio 2014, no pet. h.). Evidence excluded as a result of failure to supplement may nevertheless be admitted if it satisfies the good cause or lack of unfair prejudice exception under Rule 193.6(a). The burden is on the proponent of the witness or evidence.

Rule 193.6 – Failing to Timely Respond – Effect on Trial – 3/3

- **Party** testimony can be excluded for not supplementing discovery. *Cornejo v. Jones,* No. 05-12-01256-CV, 2014 WL 316607, *2 (Tex. App.—Dallas January 29, 2014, no pet. h.).

- Trial court erred in admitting testimony of undisclosed corporate witness. Proponent failed to show lack of unfair surprise. Objecting party could not have been aware of substance of witnesses testimony before trial. *Gibs v. Bureaus Inv. Group Portfolio No. 14, LLC*, No. 08-12-00330-CV, 2014 WL 3650287, *4 (Tex. App.—El Paso July 22, 2014, no pet.).

- Expert exclusion automatic. *Pjetrovic v. Home Depot*, 411 S.W.3d 639, 646 (Tex. App.—Texarkana 2013, no pet.). Thus, expert could be excluded even in a case where the attorney withdrew on the eve of trial!

Rule 193.7 - Production of Documents Self Authenticating

- Party's production of document in response to written discovery authenticates the document, unless party objects within 10 days of actual notice of the opposing party's intent to use the document. TRCP 193.7.
- To use the self-authentication rule, you must give notice of intent to use. There may be a specificity requirement, or not. Read this case: *Merrell v. Wal-Mart Stores, Inc.*, 276 S.W.3d 117, 130-31 (Tex. App.—Texarkana 2008), *rev'd on other grounds, Wal-Mart Stores, Inc. v. Merrell*, 313 S.W.3d 837 (Tex. 2010).

Rule 194.2 – Content of Disclosures

- Must provide amount and calculation of economic damages. 194.2(d). *Heat Shrink Innovations, LLC v. Medical Extrusion Technologies-Texas, Inc.*, No. 02-12-00512-CV, 2014 WL 5307191, *4-6 (Tex. App.—Fort Worth October 16, 2014, pet. filed).
- Can't just give authorization to avoid duty to answer and amend or supplement discovery. TRCP 194.2(j); *Navarrete v. Williams*, 342 S.W.3d 116, 121-22 (Tex. App.—El Paso 2011, no pet.).
- Engineering firm's agreement to extend expert designation deadline dates beyond limitations period did not waive deadline for filing a certificate of merit arising out of professional's services where DCO made no mention of the separate certificate requirements. *Crosstex Energy Services, LP v. Pro Plus, Inc.*, 430 S.W.3d 384, 395 (Tex. 2014). Get it in writing!!!

Rule 195.1 – Expert Witnesses

- Discovery from experts was only permitted through a request for disclosure and through depositions and reports. *In re Commitment of Young*, 410 S.W.3d 542, 549 (Tex. App.—Beaumont 2013, orig. proceeding).
- Request for financial and business records for all cases that auto engineering experts' employers have used over period of 11 years for manufacturer of police cruiser that ran over plaintiff was overbroad, impermissible fishing expedition. It was not necessary for plaintiff to prove bias in products liability suit against manufacturer. *In re Ford Motor Co.*, 427 S.W.3d 396, 397-98 (Tex. 2014). Maybe 10 years?

Rule 196.3 – Production – 1/2

- Cannot compel a party to create indices or reduce information to tangible form in response to a RFP, cannot sanction a party for failing to organize responsive materials according to method its opponent prefers when the discovery response complies with an alternate method permitted under the rules. *Texas General Land Office v. Porretto*, 369 S.W.3d 276, 289-90 (Tex. App.--Houston [1st Dist.] 2011) *aff'd in part, rev'd in part, Porretto v. Texas General Land Office*, 448 S.W.3d 393 (Tex. 2014). But, Supreme Court held that Land Office's acknowledgment that it had more documents somewhere and had not made a search for them, was properly sanctionable. *Poretto*, 448 S.W.3d at 402-03.
- What is "ordinary course of business" in terms of producing documents? Is it boxing up documents and shipping them over? Is it opening up your filing cabinets?

Rule 196.3 – Production – 2/2

- Trial court may submit a spoliation instruction only if it finds that the spoliating party acted with intent to conceal discoverable evidence, or the spoliating party acted negligently and caused the nonspoliating party to be irreparably deprived of any meaningful ability to present a claim or defense. *Wackenhut Corp. v. Gutierrez*, No. 12-0136, 2015 WL 496301, *3-4 (Tex. February 6, 2015). On the heels of *Brookshire Brothers, Ltd. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014).
- Spoliation instruction was harmful, reversible error where liability was closely contested, motorist's attorney placed significant emphasis on instruction during closing arguments, and probative value of recordings was highly speculative given that collision took place on stormy evening with heavy rain. *Id*. at *4
- Plenty of evidence offset the lack of video and it did not deprive the motorist of a meaningful ability to present his personal injury claim by bus company's failure to preserve video. There were photos, testimony of motorist and bus driver, witness statements. *Id*. Stormy nighttime accident made probative value of the video "speculative." *Id*.

Rule 196.4 – Electronic Discovery

- Mandamus proper - trial court had ordered intrusive discovery into computer and network server hard drives in employment action. Corporate defendants had no adequate remedy at law, and order was too intrusive without procedural protections outlined in *In re Weekley Homes*. *In re Pinnacle Engineering, Inc.*, 405 S.W.3d 835, 847 (Tex. App.--Houston [1st Dist.] 2013, orig. proceeding).
- Trial court had put no limits on expert's examination of hard drives. *Id*. Good discussion on limitations under *In re Weekley*.

Rule 196.7 – Entry on Property

- Ps could not go into tire manufacturing plant to video manufacturing process where the recording the plaintiffs wanted to make would not document process actually used, not document conditions at time tire was manufactured, but 7 years later, there were different workers, and different machine and different tire model under different conditions. *In re Goodyear Tire & Rubber Co.,* 437 S.W.3d 923, 928 (Tex. App.—Dallas 2014, orig. proceeding.). Mandamus was appropriate - no adequate remedy by appeal.

Rule 198 - Admissions – 1/2

- RFAs not intended to require D to admit the validity of a plaintiff's claim or concede defenses. *Marino v. King*, 355 S.W.3d 629, 632-34 (Tex. 2011). The were designed to simplify trials. *Id*. Not supposed to grant MSJ based on legal contention admissions. Not supposed to preclude a presentation of the merits. Due process concerns. When deemed as discovery sanction to preclude a presentation of the merits, implicate same due process concerns as other case-ending discovery sanctions.
- *See also* Time Warner, Inc. v. Gonzalez, 441 S.W.3d 661, 669 (Tex. App.--San Antonio 2014, pet denied).
- Can't seek admissions from non parties. *Lynd v. Bass Pro Outdoor World, Inc.*, No. 05-12-00968-CV, 2014 WL 1010120, *9 (Tex. App.--Dallas March 12, 2014, pet. denied). President and CEO of defendant were not parties to suit.
- Admission of an issue of law is not binding on the court. Response to request for admission admitting a proposition of law is not binding on the court. *ReadyOne Industries, Inc. v. Flores*, No. 08-13-00161-CV, 2014 WL 6982275, *6 (Tex. App.—El Paso December 10, 2014, no pet. h.).

Rule 198 - Admissions – 2/2

- Denial of request for admission did not conclusively establish the matter's opposite or inverse. In re Estate of Dixon, No. 14-12-01052, 2014 WL 261020, *2 (Tex. App.--Houston [14th Dist.] January 23, 2014, pet. denied). So, denial of RFA that will was NOT found among testator's personal effects did not equate to establishing that it WAS neither missing nor revoked.
- Can withdraw RFA's that are merits preclusive unless party requesting withdrawal acted with flagrant bad faith or callous disregard of the rules. Bad faith is not simply bad judgment or negligence, but the conscious doing of a wrong for dishonest, discriminatory, or malicious purposes. TRCP 198.3; *Time Warner, Inc. v. Gonzalez*, 441 S.W.3d 661, 666 (Tex. App.—San Antonio 2014, pet. denied). Undue prejudice, as element for allowing withdrawal, depends on whether withdrawing admissions or filing late response will delay trial or significantly hamper the opposing party's ability to prepare for trial. When it's a merits-preclusive issue, burden is on party resisting withdrawal to prove bad faith. *Id*.

Rule 202 – Presuit Depositions – 1/2

- Pre suit depositions of governmental agencies under 202 are not totally barred by sovereign immunity - not all pre suit deposition proceedings involving governmental agencies are "suits" that seek to control state action. *Combs v. Texas Civil Rights Project*, 410 S.W.3d 529, 534 (Tex. App. Austin 2013, pet. denied). But, lack of standing, for example, could allow a trial court to deny a presuit deposition. *Id*. at 535.
- Can't take regular 202 full deposition where would only be entitled to Rule 120a deposition re jurisdiction. D should not have to choose defending pre suit discovery in forum where a claim cannot be prosecuted, and risking it will be used later in forum where can be sued. *In re Doe*, 444 S.W.3d 603, 610 (Tex. 2014) (5-4 decision).
- Can't use 202 discovery to circumvent exhaustion of remedies requirement. Any potential common law claims arose from same facts as retaliation claim. *In re Bailey-Newell*, 439 S.W.3d 428, 431-32 (Tex. App.--Houston [1st Dist.] 2014, orig. proceeding). Order allowing pre suit discovery is not final appealable order. *Id*. at 431 n.2.

Rule 202 – Presuit Depositions – 2/2

- Mandamus lies. *In re Reassure America Life Ins. Co.*, 421 S.W.3d 165, 171 (Tex. App.--Corpus Christi 2013, orig. proceeding).
- Prevent abuse of presuit discovery rules. Can't obtain by such order what would be denied in anticipated action. *In re PrairieSmarts LLC*, 421 S.W.3d 296, 305-06 (Tex. App.—Fort Worth 2014, orig. proceeding). So have to satisfy Rule 507 re trade secret discovery prior to taking presuit deposition re trade secrets, for example. *Id*. at 306.
- But, merits based (immunity) defense to potential lawsuit was not a valid objection to petition seeking presuit deposition. *In re East*, No. 13-14-00317-CV, 2014 WL 4248018, *5 (Tex. App.--Corpus Christi August 22, 2014, orig. proceeding). Lack of evidence supporting 202 petition is a valid defense, though. *Id*. at *6-7.
- Former employee failed to establish that 202 deposition, as part of former employer's presuit discovery to investigate potential claim of theft of intellectual property, actually would infringe upon the trade secrets of his current employer as necessary to preclude deposition by operation of trade secret privilege. Affidavit was conclusory about necessity of divulging trade secrets in deposition. *In re Cauley*, 437 S.W.3d 650, 657 (Tex. App.—Tyler 2014, orig. proceeding).
- Explicit finding that likely benefit of allowing presuit discovery outweighs the burden or expense of the procedure is required for presuit discovery. *Id*. at 658.

Rule 204 – Physical and Mental Examinations

- No automatic right to obtain physical or mental exam. Must be greater showing of need to obtain a physical or mental exam than to obtain other discovery. And there must be a showing that it is not possible to obtain the information sought by less intrusive means. *In re Ten Hagen Excavating, Inc.*, 435 S.W.3d 859, 868-69 (Tex. App.--Dallas 2014, orig. proceeding).
- Must show that both (1) good cause and (2) that the mental or physical condition of a party is in controversy, and these requirements may not be met with conclusory allegations in the movant's pleadings or by mere relevance to the case. *In re Click*, 442 S.W.3d 487, 491 (Tex. App.--Corpus Christi 2014, orig. proceeding).

Rule 215 - Sanctions

- Death penalty sanctions which adjudicate and preclude presentation of merits of case are harsh and may be imposed as an initial sanction only in the most egregious and exceptional cases when they are clearly justified and it is fully apparent that no lesser sanctions would promote compliance with the discovery rules. *Gunn v. Fuqua*, 397 S.W.3d 358, 374-75 (Tex. App.--Dallas 2013, pet. denied).
- Can be used to adjudicate merits of a party's claim when a party's hindrance of the discovery process justifies a presumption that its claims lack merit. In re Noble Drilling (Jim Thompson), LLC, 449 S.W.3d 625, 630 (Tex. App.--Houston [1st Dist.] 2014, orig. proceeding).
- Must be a direct relationship between offensive conduct and sanction imposed, and sanction must not be excessive. A direct relationship means that the sanction must be directed against the abuse and toward remedying the prejudice caused to the innocent party. *Cherry Peterson Landry Albert LLP v. Cruz*, 443 S.W.3d 441, 451-52 (Tex. App.--Dallas 2014, pet. filed).
- The trial court need not test the effectiveness of each available lesser sanction by actually imposing the lesser sanction on the party before issuing the death penalty. *Shops at Legacy (Inland) Ltd. Pp. v. Fine Autographs & Memorabilia Retails Stores, Inc.*, 418 S.W.3d 229, 233 (Tex. App.--Dallas 2013, no pet.). Rather, the trial court must analyze the available sanctions and offer a reasoned explanation as to the appropriateness of the sanction imposed. *Id*.

Trade Secret Statute – CPRC 134A.001 et seq. (TUTSA)

- Tex. Civ. Prac. & Rem. Code Ann. sec. 134A.006: Preservation of Secrecy. Applies to a misappropriation of a trade secret that was made after 9/1/13.

- "In an action under this chapter, a court shall preserve the secrecy of an alleged trade secret by reasonable means. There is a presumption in favor of granting protective orders to preserve the secrecy of trade secrets. Protective orders may include provisions limiting access to confidential information to only the attorneys and their experts, holding in camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval."
- Make sure your motion for protective order or your agreed order makes clear that you must comply with the requirements of TRCP 76a. Otherwise, I am going to write that in. You cannot mark documents as "sealed" or simply tell the clerk to seal them without going through those required steps. I can temporarily seal documents upon motion until you've had a chance to go through those steps, but again, that requires a motion.
- Rule 21c discusses protection of documents containing sensitive data. We have seen that rule abused. Sensitive data consists of: "(1) a driver's license number, passport number, social security number, tax identification number, or similar government-issued personal identification number; (2) a bank account number, credit card number, or other financial account number; and (3) a birth date, home address, and the name of any person who was a minor when the underlying suit was filed." Rule 21(f) says that "Documents that contain sensitive data in violation of this rule must not be posted on the Internet."

Net Worth Discovery for Exemplary Damages 1/2

- SB735 amends Ch. 41 of the Texas Civ. Prac. & Rem. Code.
- § 41.011: "*If a party requests net worth discovery under this section, the court shall presume that the requesting party has had adequate time for the discovery of facts relating to exemplary damages for purposes of allowing the party from whom net worth discovery is sought to move for summary judgment on the requesting party's claim for exemplary damages under Rule 166a(i), Texas Rules of Civil Procedure.*"

Net Worth Discovery for Exemplary Damages 2/2

- § 41.0115: On the motion of a party and after notice and a hearing, a trial court may authorize discovery of evidence of a defendant's net worth if the court finds in a written order that the claimant has demonstrated a substantial likelihood of success on the merits of a claim for exemplary damages
- Evidence submitted by a party to the court in support of or in opposition to a motion made under this subsection may be in the form of an affidavit or a response to discovery.
- If a trial court authorizes discovery under Subsection (a), the court's order may only authorize use of the least burdensome method available to obtain the net worth.
- Reviewing court may only consider the evidence submitted by either party with its motion or opposition.

Ideally . . . ?

- **1. <u>Confer *before* moving to compel.</u>** Parties must confer before filing a motion to compel. Tex. R. Civ. P. 191.2; Loc. Civ. R. 3.3.6. Sending threatening emails or letters without trying to talk to the other side is not good enough. Make every effort to narrow the issues by conferring beforehand.
- **2. <u>Offer an alternative date, time, and location in a motion to quash deposition.</u>** Parties objecting to time or place of discovery must provide an alternative time or place. Tex. R. Civ. P. 192.6(a). This applies to motions to quash depositions—even the ones filed within 3 days of service of the notice of deposition. At least 95% of the motions to quash depositions fail to provide the required alternative date, time, and location. I might find that lack of a COC means you haven't filed your motion within three days, thereby failing to automatically quash the deposition.
- **3. <u>Sanctions with the first motion to compel.</u>** Many motions to compel seeking to overrule discovery objections include requests for sanctions on the first attempt. Not likely in most cases. Absent truly egregious conduct, counsel should wait until there is a pattern of discovery abuse before seeking sanctions.
- **4. <u>Magnum Opuses. Opi?</u>** I am conflicted here. On one hand, I can usually tell what's discoverable, having read 500,000 interrogatories to date. OTOH, I like the interrogatories and objections to be discussed in the body, one at a time. Work on being concise, please. If several involve the same issue, you can list them, and make the argument once.
- **5. <u>Arguing the case in your briefs.</u>** I am not a jury, and jury arguments/over-the-top rhetoric don't work on me. Just cite the relevant facts briefly and get to the salient arguments about discoverability, please. A request for 5-10 years of records isn't genocide in every case.
- **6. <u>"[W]hat the facts reveal, not what the parties conceal."</u>** I get it. No more. Please. Really. Find a new quote.
- **7. <u>Orders, please.</u>** Please submit granulated orders that allow me to rule on each request and each objection. I can get those out faster.

The End

- Thank you.
- Questions?