

**A GUIDE TO THE 1999
TEXAS DISCOVERY RULES REVISIONS**

HON. NATHAN L. HECHT
JUSTICE
THE SUPREME COURT OF TEXAS

ROBERT H. PEMBERTON
RULES ATTORNEY
THE SUPREME COURT OF TEXAS

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NATHAN L. HECHT

Justice Nathan L. Hecht was elected to the Texas Supreme Court in 1988 and re-elected in 1994. Throughout his service on the Court he has been the Court's liaison to all committees involved in studying and revising rules of practice, procedure, and administration in Texas courts.

Judge Hecht began his judicial service in 1981 when he was appointed to the 95th District Court in Dallas County. He was elected to that bench in 1982 and re-elected in 1984. In 1986 he was elected to the Court of Appeals for the Fifth District of Texas at Dallas, where he served until taking office on the Supreme Court.

Before taking the bench, Nathan Hecht was a partner in the Dallas law firm of Locke Purnell Boren Laney & Neely (now Locke Purnell Rain Harrell). He joined that firm in 1976 and practiced mainly in the area of general business and commercial litigation.

Nathan Hecht received a B.A. degree with honors in philosophy from Yale University in 1971. He attended Southern Methodist University School of Law as a Hatton W. Sumners Scholar, and received his J.D. degree *cum laude* in 1974. He was elected to Order of the Coif and served as an editor for the *Southwestern Law Journal*. Following law school, he served as a law clerk to the Hon. Roger Robb, Circuit Judge, U.S. Court of Appeals for the District of Columbia Circuit. He also served in the U.S. Naval Reserve Judge Advocate General Corps, achieving the rank of Lieutenant. He was honorably discharged from military service in 1979.

Justice Hecht is licensed to practice in Texas and the District of Columbia, as well as the United States Supreme Court and many other federal courts. He is a member of the American Bar Association, the District of Columbia Bar Association, the State Bar of Texas, the Dallas Bar Association, and the Travis County Bar Association. He is also a member of the American Law Institute and a fellow in the American Bar Foundation, the Texas Bar Foundation, and the Dallas Bar Foundation. In 1984 he received the Outstanding Young Lawyer Award from the Dallas Association of Young Lawyers.

Justice Hecht is a member of the Texas Philosophical Society. Since 1971 he has been attended the Valley View Christian Church of Dallas, where he is an elder, teacher of an adult Sunday School class, and an organist and pianist.

ROBERT H. PEMBERTON

Robert H. (“Bob”) Pemberton is the Rules Attorney for the Texas Supreme Court. Mr. Pemberton is charged with overseeing the Court’s work on procedural rules, including the recent rewrite of the civil discovery rules and the ongoing recodification of the Texas Rules of Civil Procedure. He also advises the Court concerning implementation and interpretation of the new Texas Rules of Appellate Procedure, the Texas Rules of Evidence, and other court rules. Additionally, Mr. Pemberton serves as a liaison to various entities in state government and the bar with regard to matters concerning court rules.

Before joining the Supreme Court, Mr. Pemberton practiced law for four years in the Trial Section of Baker & Botts in Houston. Prior to working at Baker & Botts, Mr. Pemberton was a briefing attorney with Chief Justice Thomas R. Phillips of the Texas Supreme Court.

Mr. Pemberton is a member of the Litigation and Appellate sections of the State Bar of Texas and the Travis County Bar Association and serves on the Judicial Affairs, Bench-Bar, and CLE committees of the Austin Young Lawyers’ Association. Mr. Pemberton also is active in various community organizations outside of the legal profession, including the Aspiring Youth Program and the Austin Big Brother/Big Sister program.

Mr. Pemberton received his B.B.A. *summa cum laude* from Baylor University, where he was the top graduate in the Hankamer School of Business, and his J.D. with honors from Harvard Law School, where he was an editor of the Law Review. Mr. Pemberton is a sixth generation Texan, born in Waco and raised in Temple.

Table of Contents

I. Introduction	1
II. Background	
A. The Need for Discovery Reform	1
B. Discovery Reform in Texas	2
III. The New Discovery Rules	3
A. In General	3
1. <u>Structure and Organization</u>	3
2. <u>Notes and Comments</u>	4
3. <u>Effective Date</u>	4
B. Trial and Discovery Subpoenas (Rule 176)	4
C. Limitations on the Volume of Discovery (Rule 190)	5
1. <u>Level 1</u>	5
2. <u>Level 2</u>	6
3. <u>Level 3</u>	6
4. <u>Relationship to Other Rules</u>	7
D. Modification of Discovery Limits; Conference, Certification, and Filing (Rule 191)	7
1. <u>Modification Provision</u>	7
2. <u>Conference Requirement</u>	7
3. <u>Certification Requirement</u>	7
4. <u>Filing Requirements</u>	8
5. <u>Service Requirement</u>	8
E. Scope and Forms of Discovery (Rule 192)	8
1. <u>Forms of Discovery</u>	8
2. <u>General Subject Matter of Discovery</u>	8
3. <u>Proportionality</u>	9
4. <u>Work Product</u>	9
5. <u>Protective Orders</u>	10
F. Responses and Objections to Written Discovery; Assertions of Privileges (Rule 193)	10
1. <u>Affirmative Duty to Respond</u>	10
2. <u>New Procedures for Asserting Privileges</u>	11
3. <u>Elimination of Prophylactic Objections and Privilege Claims</u>	11
4. <u>Other Restrictions on Gamesmanship With Objections</u>	11
5. <u>New Inadvertent Disclosure and Supplementation Rules</u>	11
6. <u>Presumption of Authenticity</u>	12
G. Requests for Disclosure (Rule 194)	13
H. Discovery Regarding Testifying Expert Witnesses (Rule 195)	13
I. Requests for Production; Requests and Motion for Entry Upon Property (Rule 196)	14
J. Interrogatories to Parties (Rule 197)	15
K. Requests for Admissions (Rule 198)	15
L. Depositions Upon Oral Examination (Rule 199)	15
1. <u>Limitations on Deposition Conduct</u>	15
2. <u>Time Limits</u>	16
3. <u>Depositions By Telephone or Other Remote Electronic Means</u>	16
4. <u>Duty to Identify Representative of Organization Before Deposition</u>	16
5. <u>Reconciling of Deposition Document Request Rules With Other Rules</u>	16
M. Depositions Upon Written Questions (Rule 200)	16
N. Depositions in Foreign Jurisdictions for Use in Texas Proceedings;	

Depositions in Texas for Use in Foreign Proceedings (Rule 201)	16
O. Depositions Before Suit (Rule 202)	17
P. Signing, Certification and Use of Oral and Written Depositions (Rule 203) . . .	17
Q. Physical and Mental Examinations (Rule 204)	18
R. Discovery From Nonparties (Rule 205)	18

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Hon. Nathan L. Hecht
Justice
The Supreme Court of Texas

Robert H. Pemberton
Rules Attorney
The Supreme Court of Texas

I. Introduction

This paper is a guide to the background, text, and intent of the 1999 revisions to the Texas Rules of Civil Procedure pertaining to discovery.¹ A complete text of the revisions is available on the Supreme Court's website (www.supreme.courts.state.tx.us) and has been printed in the December 1998 issue of the *Texas Bar Journal*. Additional copies of this paper also are available on the Court's website.

The 1999 revisions to the Texas discovery rules are designed to achieve three principal goals. First, the revisions impose limits on the volume of discovery in an attempt to curb abuses and reduce cost and delay. Second, the rules also seek to modernize and streamline current discovery practice by eliminating many wasteful procedures and improving others. Finally, the revisions reorganize and reword a number of the current discovery rules — some of which derive their language from statutes enacted over a century ago — in an effort to improve clarity, accessibility, and understanding.

These changes are significant, but they do not “reinvent the wheel.” The beneficial features of the current discovery rules — for example, the forms and scope of discovery — are largely unchanged. Much existing case law will remain relevant. The 1999 discovery rules revisions are intended to be a refinement of current Texas discovery practice rather than a wholesale departure from it.

The 1999 discovery rules revisions are the latest in a series of similar procedural reforms that

the Texas Supreme Court has been implementing in recent years. Just over a year ago, the Supreme Court promulgated entirely new Rules of Appellate Procedure, which have streamlined and simplified appellate procedure, reducing cost and delay. About the same time the Supreme Court revised the summary judgment rule. This past spring, the Supreme Court and the Court of Criminal Appeals jointly promulgated a combined set of evidence rules for civil and criminal cases for the first time, replacing and reconciling separate sets of civil and criminal evidence rules. The discovery rules revisions are the first installment of an ongoing revision of all of the Texas Rules of Civil Procedure.

II. Background

A. The Need for Discovery Reform

Though discovery has become an integral part of our modern civil justice system, it is a relatively recent innovation, developed mostly in the last half century. For centuries, there generally were no formal procedures by which parties to litigation could obtain testimony or other evidence prior to trial, outside of a few very limited means of preserving evidence for trial that otherwise might not remain available. As a result, cases often were resolved based more on “trial by ambush” than the merits.

Because decisions are better made with adequate access to information than without, the Federal Rules of Civil Procedure were amended in 1938 to allow several forms of pretrial discovery, a fairly revolutionary development at the time. The federal rules became a pattern for Texas and other states. Discovery rules were premised on the idea that by enabling parties to exchange or obtain information about their claims or defenses prior to trial, justice would be enhanced by eliminating “trial by ambush,” causing

¹ Mindful of our responsibilities under the Code of Judicial Conduct, we intend no comment on pending or impending cases.

cases to be resolved on their merits, and by promoting settlements by giving parties information to evaluate accurately the strengths and weaknesses of their cases.

For four decades following adoption of the federal rules, discovery procedures were continually expanded. In the 1970's, however, it became apparent that unrestricted discovery could be used to undermine the cause of justice if litigants with resources and motive to do so could drive up the cost of litigation, effectively pricing their opponents out of court and delaying disposition. Innovations in computer word processing, facsimile transmissions, and photocopying quickly made it possible for litigants of even modest means to drive up litigation costs and by "burying" their opponents in voluminous "boilerplate" discovery requests or objections, often with little more than the touch of a button. Technological changes have greatly increased the volume of documents and things that can be discoverable in a lawsuit. These developments in discovery practice have been compounded by an unfortunate weakening of professional norms that in earlier times would have made misuse or abuse of discovery unthinkable.

All of these developments — unanticipated in a world of manual typewriters and carbon paper, more restricted travel and communications, a more cohesive bar, and simpler legal and commercial affairs in which the 1938 federal discovery rules were begotten — have motivated restrictions in discovery to obviate the problems of excess while retaining the original goals. Such restrictions have been incorporated in the federal rules since 1980, and in the rules of several states. In 1983, Rule 26 of the Federal Rules of Civil Procedure was amended to impose a duty on trial courts to ensure that the volume of discovery is proportionate to the nature of the action. *See* Fed. R. Civ. P. 26(b)(2). The 1993 revisions in the federal rules required discovery planning conferences, mandatory and automatic disclosure of basic discoverable information, and other measures designed to reduce discovery costs and delay. *See* Fed. R. Civ. P. 26(a), (d) & (f). The Civil Justice Reform Act of 1990 permitted individual judicial districts to experiment with innovative methods of reducing litigation costs and delay. Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471-82). As a result, federal courts began instituting a variety of novel measures to control discovery. For example, the Eastern District of

Texas, among others, implemented a discovery "tracking" scheme under which discovery is limited or regulated according to the size or nature of the case and the amount of discovery that is or should be required. Eastern District of Texas Local Rule CV-26(b). Other federal courts have imposed limitations of discovery through case law. In *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993), the court announced a series of limitations on lawyer objections, colloquy, and "coaching" of witnesses during oral depositions. Various federal courts substantially reformed deposition conduct, placing tight restrictions on "speaking" or "coaching" objections by lawyers. A number of states, including Illinois, Arizona and Colorado, also implemented their own versions of discovery reform.

B. Discovery Reform in Texas

In 1991, amidst discovery reform initiatives in several jurisdictions, the Supreme Court of Texas appointed a Task Force on Discovery, chaired by Justice David Keltner of Fort Worth, to study whether Texas discovery rules should be revised. The Task Force made its report to the Supreme Court Advisory Committee (SCAC), comprised of 36 leading Texas lawyers, judges, and academics from around the State, plus a number of *ex officio* members representing various elements of the bench, bar, and court staff. The Supreme Court has had such an advisory committee ever since the Legislature granted it procedural rule-making authority in 1939.² For over four years, the SCAC, chaired by Luke Soules of San Antonio — and in particular its Discovery Subcommittee, chaired by Steve Susman of Houston — spent thousands of hours studying discovery in Texas courts. Drawing on empirical data in various national studies, legal scholarship, the discovery reform experiences of the federal courts and other states, and the members' own considerable trial experience in Texas courts, the SCAC recommended discovery rules revisions in 1997.

The Court reviewed these recommendations and promulgated tentative revisions for comment in January 1998. In response to nearly a hundred

² For a discussion of the origins and nature of the Texas Supreme Court's rulemaking authority and the role of the SCAC, *see* "Texas Court Rules: History and Process," available on the Supreme Court's website.

comments, and in consultation with the Discovery Subcommittee, trial and appellate judges, the litigation-related sections of the State Bar, the State Bar Court Rules Committee, the Texas Trial Lawyers' Association, the Texas Association of Defense Counsel, and the State Bar Family Law Section, the Court issued a second tentative draft in June 1998 for additional comment. After reviewing additional comments and consulting further with the same groups, the Court formally promulgated proposed discovery rules for public comment on August 4, 1998. Misc. Docket No. 98-9136 (August 4, 1998), 61 Tex. Bar. J. 752 (Sept. 1998). In response to approximately 90 additional written comments, as well as input received at several continuing legal education programs in which the authors participated, the Court made a number of mostly clerical changes before issuing the final version of the discovery rules revisions on November 9, 1998. Misc. Docket No. 98-9196 (Nov. 9, 1998), 61 Tex. Bar. J. 1139 (Dec. 1998).

The 1999 Texas discovery rules revisions are thus a product not only of years of study by the task force and SCAC, but of very focused comments on specific drafts as well as the Court's own study. It is fair to say that no procedural rules ever promulgated in Texas, including the original Rules of Civil Procedure, have received such intense and prolonged study as these. For all of these reasons, the revisions to the discovery rules should be the best that possibly could be attained for providing ample access to information, reducing abuse and misuse, streamlining and simplifying procedures, fairly accommodating the diverse interests of all segments of the bench and bar in this State, and advancing the interest of justice for the people of Texas.

III. The New Discovery Rules

A. In General

1. Structure and Organization

In contrast to the former discovery rules, which were atomized into 24 separate provisions arranged in no logical order, the amendments are tightly organized in 16 rules and placed in a more rational sequence:

Rule 176: Trial and discovery subpoenas
Rule 190: Discovery volume limitations; tracking

Rule 191: Modification of discovery limitations; conference, certification, and filing rules
Rule 192: Scope and form of discovery; work product; protective orders; definitions
Rule 193: Procedures governing written discovery requests, responses, and objections
Rule 194: Requests for disclosure
Rule 195: Discovery regarding testifying experts
Rule 196: Requests for production and inspection; requests and motions for entry upon property
Rule 197: Interrogatories
Rule 198: Requests for admissions
Rule 199: Oral depositions
Rule 200: Depositions upon written questions
Rule 201: Depositions in foreign jurisdictions for use in Texas proceedings; depositions in Texas for use in foreign proceedings
Rule 202: Depositions before suit or to investigate claims
Rule 203: Signing and certification of oral and written depositions
Rule 204: Motions for physical and mental examinations
Rule 205: Discovery from nonparties

These rules will replace current rules 166b, 166c, 167, 167a, 168, 169, 176, 177, 177a, 178, 179, 187, 188, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, and 737.

In addition to these changes, Rule 215, the discovery sanctions rule, has been updated to be consistent with the revised discovery rules, as well as to incorporate former Rule 203. *See* Rule 215 & comment.³ The Court will consider further substantive changes to Rule 215 at a later date as it proceeds with recodifying the Rules of Civil Procedure.

Like the new Texas Rules of Appellate Procedure, the amended discovery rules are printed in a format designed to improve clarity and accessibility. Descriptive headings are used in

³ The substance of former Rules 215(4)(a) and 215(5) are covered by new Rules 198 and 193, respectively.

each rule and subdivision. Rules and subdivisions are numbered consistently and are indented.

2. Notes and Comments

The notes and comments to the amended discovery rules, some of which are quite extensive, are not merely advisory, but are intended to inform the construction and interpretation of the rules for both courts and practitioners. This continues and expands upon a practice, initiated by the Court in its promulgation of the new Rule 166a(i) and repeated in other recent rules enactments, which has proven to be very helpful to practitioners and lower courts.

In addition to notes and comments concerning specific rules, the Court also has included an Explanatory Note describing the general policy goals of the 1999 discovery rules revisions.

3. Effective Date

The revisions are to be effective January 1, 1999. As detailed in the Order promulgating the revisions, which precedes the rules, the revisions are to apply even in pending cases, subject to a few exceptions necessary to address practical difficulties in their implementation:

- C Rule 190, which imposes new aggregate limits on the time and amount of discovery, applies only to cases filed on or after January 1, 1999, but a court may order an appropriate discovery control plan in previously filed cases;
- C Rules 191.3 and 191.4 apply only to discovery conducted on or after January 1;
- C Rule 193 applies in cases pending on January 1, but parties are not required to update outstanding discovery responses, objections, or privilege assertions, or amendments or supplementations of discovery responses to comply with the new rule; and
- C Rule 195 applies in cases pending on January 1, but expert discovery initiated prior to that date should be answered and the new rule should not be applied to disrupt ongoing or impending expert discovery.

Furthermore, trial courts are directed to implement the revisions consistent with Rule 1 of the Rules of

Civil Procedure — to obtain a “just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law” — and with the overall purposes of the revisions to streamline discovery procedures and reduce costs and delay, and should not unduly prejudice any person on account of transition from the prior rules. Similar language in the Order promulgating the new Texas Rules of Appellate Procedure has helped facilitate a smooth transition to those rules. Misc. Docket No. 97-9139 (Aug. 15, 1997), at ¶ 8.

B. **Trial and Discovery Subpoenas (Rule 176)**

Rule 176 consolidates and clarifies the rules governing trial and discovery subpoenas, which formerly were scattered throughout Rules 176-79 and 201. This structure of this rule is based loosely on Fed. R. Civ. P. 45.

While Rule 176 is largely a nonsubstantive reorganization of the former rules governing trial and discovery subpoenas, it does effect some important substantive changes as well. Rule 176.3 reconciles the former rules governing subpoena range, Tex. R. Civ. P. 176 (100 miles of the courthouse where the suit is pending), with 1993 enactment of Tex. Civ. Prac. & Rem. Code § 22.002 (150 miles from the county where the suit is pending). Moreover, Rule 176.4(b) seeks to reduce costs associated with the issuance of subpoenas by enabling attorneys to issue both trial and discovery subpoenas.⁴ Rules 176.6 and 176.7 also impose a general duty on persons requesting subpoenas to avoid imposing undue burden and expense on the person served and clarify the procedures for objecting to or seeking protection from subpoenas. This includes a new provision

⁴ Also, Rule 176.4(c) expressly permits officers authorized to take depositions to serve the deposition notice along with the subpoena. This codifies the typical practice for noticing and serving subpoenas compelling depositions under the former rules. This practice, however, was not actually authorized by the former rules, which technically required the party seeking the subpoena to first notice the deposition and serve the officer with “proof of service” of the notice before the subpoena would issue. See former Rule 201(1).

expressly permitting not only the persons to whom the subpoena is directed, but any person affected by the subpoena, to seek a protective order under Rule 192.6(b).

Finally, Rule 176.2 defines the responsibilities of persons responding to subpoenas, which other rules — 199.2(b)(5), 200.1(b), and 205.3(d) — incorporate as the standards governing nonparties' responses to discovery. But Rule 176.3(b) clarifies that a subpoena cannot be used to circumvent the procedures and limitations governing discovery to the extent those procedures conflict with those in Rule 176. *See also* comment 2. In other words, even if, for example, discovery is served on a party with a subpoena,⁵ the procedures for responding, objecting, asserting privileges, supplementing, *etc.*, would be controlled by the rules governing discovery from parties and not by those set forth in Rule 176.

C. Limitations on the Volume of Discovery (Rule 190)

Rule 190 is a new provision that, for the first time in Texas state courts, introduces the concept of reasonable limits on the volume of discovery. It is intended both to compel parties to carefully consider the need for discovery before seeking it and to encourage courts to actively monitor discovery to reduce unnecessary cost and delay.

Rule 190 establishes three tiers of “discovery control plans” — “Level 1,” “Level 2,” or “Level 3” — and requires that each civil case be in one at all times. Rule 191.1 & comment 1.

While Rule 190.1 requires plaintiffs to state their intent that discovery be conducted under Level 1, 2 or 3, this is merely a notice requirement for the benefit of the court and other parties; it does not determine the operative discovery level, nor waive the application of a particular discovery level. Comment 1. Rather, as explained below, cases are assigned to Level 1 or Level 2 by operation of other provisions of Rule 190, and cases are assigned to Level 3 only by court order.

1. Level 1

“Level 1,” Rule 190.2, is designed for cases involving only monetary relief of \$50,000 or less, as well as divorces not involving children where the value of the marital estate is between zero and \$50,000. Level 1 is the most restrictive level of discovery. In addition to the limitations set by other rules, Level 1 presumptively limits each party to six hours in which to examine witnesses in oral depositions, which may be extended to ten hours by agreement. *See* Rule 190.2(c). Parties also are limited to a total of twenty-five interrogatories, which may be allocated among an unlimited number of sets, but this reduction is somewhat offset by the availability of the new discovery tool of disclosures, discussed below. *See* Rule 190.2(c)(3). Finally, discovery must be completed by thirty days before trial. *See* Rule 190.2(c)(1). As other rules make clear, parties must serve discovery requests sufficiently far in advance of the thirty-day deadline so that the response comes due prior to the deadline. *See* Rule 190, comment 4.

Level 1 is expressly designed as a “safe haven” enabling plaintiffs with smaller cases to avoid being overtaxed by their opponent’s discovery. But plaintiffs with smaller cases are not required to utilize Level 1 if they desire broader discovery. A plaintiff invokes Level 1 by affirmatively pleading that he or she seeks only monetary relief of \$50,000 or less or a divorce not involving children where the marital estate is greater than zero but no more than \$50,000. *See* Rule 190.2(a). This requirement is satisfied if the plaintiff states, *e.g.*, “Plaintiff affirmatively pleads that he seeks only monetary relief of \$50,000 or less, excluding costs, pre-judgment interest and attorneys’ fees. *See* Rule 190, comment 2. For this reason, Rule 190 does not conflict with other pleadings requirements. *Id.*

Even after invoking Level 1, the plaintiff may amend his or her petition to invoke Level 2 discovery (*see* below), or may seek additional discovery by agreement or court order. *See* Rule 190.2(b); *see also* Rule 191.1. To protect defendants from unfair surprise, however, plaintiffs are required to obtain leave of court to amend their pleadings to change discovery levels within 45 days of trial, which may be granted only if good cause for filing the amendment exceeds any prejudice to the defendant. *See* Rule 190.2(b). Also, where a timely filed pleading

⁵ Such a practice, of course, would be unnecessary and redundant. *See* Rules 196, 199.3, 200.2.

renders Level 1 inapplicable, discovery automatically reopens, discovery is to be governed by the applicable new discovery level, and any person previously deposed may be redeposed. *See* Rule 190.2(d). In those circumstances, trial courts should continue the trial date to complete discovery. *Id.*; *see also* Rule 190.5, discussed below. Defendants also may move a case out of Level 1 by court order or by asserting their own affirmative claim for relief that falls outside the scope of Level 1, subject to the same restrictions applicable to plaintiffs' right to amend. *See* Rule 190.2(b)(2) & (3).

2. Level 2

"Level 2" discovery, *see* Rule 190.3, is the basic "default" discovery track that will govern most cases — it applies in cases where the conditions for invoking Level 1 are not satisfied and the court has not entered a Level 3 discovery plan. Level 2 permits essentially the same amount of discovery allowed under the current Texas discovery rules, but with three significant limitations. First, discovery in cases other than those under the Family Code presumptively must be completed within a "discovery period" beginning nine months after the earlier of the date of the first oral deposition or due date of the first written discovery request served in the case, but no later than 30 days prior to trial. *See* Rule 190.3(b)(1)(B).⁶ This ensures that discovery does not linger indefinitely, driving up costs. The Court also believes that if parties are required to complete discovery in a timely fashion, trial courts will be encouraged to set and try cases faster. However, in recognition that a trial date close to nine months in the future may not presently be a realistic possibility in some venues, as well as of the more general problem of evidence changing after or around the close of the discovery period, Rule 190.5 allows some flexibility in obtaining additional discovery after the close of the discovery period. *See* Rule 190.5. Rule 190.5 applies at all discovery levels. *Id.*

The second important new limitation in Level 2 is an aggregate limit of 50 hours in which each "side" in a case may depose parties on opposing

⁶ The exception for Family Code cases recognizes that the size of the marital estate and the nature of the parties' circumstances are often in flux right up to the time of trial.

sides, experts retained by those parties, and persons subject to those parties' control. *See* Rule 190.3(b)(2). A "side" refers to all the litigants with generally common interests in the litigation. *Id.* & comment 6. The concept borrows from Rule 233, which governs the allocation of peremptory strikes, and from Fed. R. Civ. P. 30(a)(2). In most cases, there will be only two "sides" — plaintiffs and defendants — although there may be more than two "sides" in more complex cases, such as where there are multiple sets of defendants with conflicting interests. *See* Rule 190, comment 6. While these concepts admittedly are imprecise, litigants should keep in mind that discovery in more complex cases generally will be governed by Level 3, as explained below.

Finally, interrogatories are limited in the same manner as under Level 1. *See* Rule 190.3(b)(3).

3. Level 3

Level 3 is court-managed discovery similar to current federal court practice. It is designed for more complex cases that would not easily fit into the framework of Levels 1 or 2, although a party in any type of case may move the court to enter a Level 3 plan. *See* Rule 190.4(a). A court may also enter a Level 3 plan on its own initiative. *Id.*

A Level 3 plan must set forth a trial date or a date for a conference to determine a trial setting, a discovery period for either the entire case or an appropriate phase of it,⁷ appropriate limitations on the amount of discovery, and deadlines for joining additional parties, amending pleadings, or designating experts. *See* Rule 190.4(b). It may

⁷ This contemplates that, in appropriate cases, trial courts might enter Level 3 plans to control specialized discovery concerning discrete issues like venue, jurisdiction, forum non conveniens, or class action certification.

The deadline for completing discovery under a Level 3 plan, unlike the deadlines under Levels 1 and 2, may require either that discovery be served so as to come due before the cut-off date or that it merely be served before the cut-off date. *See* comment 4. This accommodates the current practice in counties, chiefly Harris, in which courts already are utilizing some type of court-ordered discovery control plan.

also address any issue concerning discovery, any limitation in the discovery rules, and any matter that may be addressed in a pretrial scheduling order under Rule 166a. *Id.*

Level 3 and its relationship with the other discovery levels is a good illustration of the process by which the 1999 discovery rules amendments as a whole were devised. As the amendments were being formulated, the SCAC advocated a rule-based discovery tracking scheme of the type that now appears in Levels 1 and 2. The State Bar Court Rules Committee, by contrast, advocated a federal-style scheme in which courts would enter discovery control orders tailor-made to each case. Eventually, the Court Rules Committee's proposal was rejected in the belief that Texas state courts, unlike their federal counterparts, did not have the resources to individually manage discovery in every case. However, the concept survived in the form of Level 3, under which courts manage discovery in cases where judicial involvement is particularly warranted or the parties desire it. Individual management is, of course, preferable if the courts and parties can afford it.

4. Relationship to Other Rules

The limits of Rule 190 complement, rather than replace, other limits specified in the discovery rules. If Rule 190 does not address a particular form of discovery, this indicates merely that the form is not restricted by Rule 190, not that the form is unavailable. *See* Rule 190.6 & comment 5.⁸

Rule 190 operates independently of former Rule 166a, which authorizes trial courts to enter pretrial scheduling orders, although the two rules overlap somewhat. While a Level 3 discovery control plan may include any matter that can be addressed by a Rule 166a scheduling order, a Rule 166a scheduling order also can be entered separately and at any discovery level. *See* Rule 190.4(b) & comment 7.

D. Modification of Discovery Limits; Conference, Certification, and Filing (Rule 191)

⁸ But forms of discovery not restricted by Rule 190 are not to be used to circumvent that rule. *See* Rule 190.6 & comment 5.

Rule 191 consists of five principal provisions.

1. Modification Provision

As was the case under the former discovery rules, parties are permitted, except where expressly prohibited, to modify any procedure or limitation in the rules by agreement. *See* Rule 191.1 & comment 1. Parties cannot modify a court order merely by agreement without the court's concurrence, of course, and parties in Level 1 cannot agree to permit more than ten hours of deposition per party. *Id.*, comment 1; Rule 190.2(c)(2). In addition to their power to enter Level 3 discovery control plans, courts also may modify any discovery procedure or limitation by order for good cause, subject to the court's duties under Level 3. *See* Rule 191.1 & comment 1. These provisions give parties and courts additional flexibility to apply Rule 190 to different circumstances. This is a general rule that applies throughout the discovery rules and is not repeated every time it applies.

2. Conference Requirement

Parties and their attorneys are admonished to cooperate in discovery and to make agreements as reasonably necessary for the efficient disposition of the case. All discovery motions or requests for hearings must contain a certificate that the party filing the motion made a reasonable attempt to resolve the dispute without court intervention and that effort failed. *See* Rule 191.2.

3. Certification Requirement

Lawyers (or the parties, if *pro se*) are required to sign each discovery request, response, objection, or their functional equivalents certifying that the document is, based on the best of the signer's knowledge, information or belief, formed after a reasonable inquiry, (1) is consistent with the rules of civil procedure and warranted by existing law or a good faith argument for the modification, extension or reversal of existing law; (2) has a good faith factual basis; (3) is not made for an improper purpose, such as to harass, delay, or increase costs; and (4) is not unreasonably or unduly burdensome, given the needs of the case, the amount in controversy, the parties' resources, and the importance of the issues at stake in the litigation. The failure to sign a request, response or objection is grounds for having the document struck, and a certification that is false or without

substantial justification is grounds for sanctions. See Rule 191.3 & comment 3.

4. Filing Requirements

Most discovery is no longer to be filed. See Rule 191.4. This is a response to the storage problems currently being encountered by Texas court clerks. But parties may file discovery in support or opposition to a motion, for other use in court proceedings, or for use on appeal. See Rule 191.4(c). As an additional safeguard against destruction of discovery in cases where it should be preserved, such as in cases involving Rule 76a issues, courts may order discovery to be filed, *id.*, and parties are required, unless otherwise ordered by the court, to retain discovery during the pendency of the case and any related appellate proceeding begun within six months after judgment is signed. See Rule 191.4(d). Rule 191.4(e) incorporates the former Rule 209 and the related order governing clerks' disposition of deposition transcripts and depositions on written questions.

5. Service Requirement

As was the case under the former rules, any discovery-related document required to be served on a person or party must also be served on all other parties of record. See Rule 191.5.

E. **Scope and Forms of Discovery (Rule 192)**

Rule 192 describes the available forms and subject matter of discovery.

1. Forms of Discovery

All of the forms of discovery available under the former discovery rules are retained, and a new one — disclosure — is added. See Rule 192.1. These discovery forms may be taken in any order or sequence and may be combined in the same document. See Rule 192.2.

2. General Subject Matter of Discovery

The general standard governing the permissible subject matter of discovery under the former rules is unchanged: a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the case, including inadmissible matters, so long as the request is reasonably calculated to lead to the

discovery of admissible evidence. See Rule 192.3(a). This standard, however, should be read and applied consistent with the Court's recent jurisprudence concerning scope of discovery under the former rules. Rule 193, comment 1 (incorporating *In re American Optical Corp., K-Mart v. Sanderson, Dillard Department Stores v. Hall, Texaco v. Sanderson, and Loftin v. Martin*).⁹

As was the case under the former rules, relevant documents and tangible things, persons with knowledge of relevant facts, testifying experts, consulting experts whose opinions have been reviewed by a testifying expert, certain indemnity, insuring and settlement agreements, and potential parties are expressly made discoverable. Rule 192.3(b), (c), (e), (f), (g) & (i); see also Rule 192.7(c) & (d), comment 4. The definition of documents and tangible things has been revised to clarify that things relevant to the subject matter of the action are discoverable regardless of their form. Rule 192.3(b) & comment 2. Also, Rule 192.3(c) attempts to clarify when experts must be identified as persons with knowledge of relevant facts. This provision is intended to be consistent with *Axelson v. McIlhany*, 798 S.W.2d 550 (Tex. 1990).

In the second tentative draft of the rules, the last sentence of Rule 192.3(f) stated that rule did not apply to an insurer's reservation of its right to contest coverage. The discoverability of such

⁹ In its first preliminary draft of the proposed discovery rules, the Court considered restricting the subject matter of document discovery available by request only to matters relevant to the claims and defenses of the parties, and permitting broader discovery only on motion and court order. Discovery Rules — Tentative Draft No. 1, Rule 3(2)(b) (Jan. 17, 1998). Similar proposals recently have been made by the Litigation Section of the American Bar Association and by the Federal Rules Advisory Committee. However, based on public comment opposing this proposed change, concerns that the change would overburden trial courts with motions to expand discovery, and the currently undeveloped nature of the concept of relevance to "claims and defenses," the Court ultimately elected not to alter the scope of document discovery.

information was thus left to the general provision, Rule 192.3(a). In response to concerns that the sentence might be construed to mean that such information was never discoverable, the sentence was omitted. But the omission does not mean that such information is always discoverable, only that discoverability must be determined by the courts.

Other matters are expressly made discoverable for the first time. This includes verbatim statements of persons with knowledge of relevant facts; the former “witness statement” exemption is eliminated. Rule 192.3(h).¹⁰ Parties are now entitled to obtain a brief statement explaining the relationship to the case — *e.g.*, “treating physician,” “eyewitness” — of every identified person with knowledge of relevant facts. Rule 192.3(c) & comment 3. Also, the name, address, and telephone numbers of trial witnesses are now expressly made discoverable. Rule 192.3(d). Finally, parties may obtain basic statements of other parties’ legal contentions and the factual bases for those contentions, but this does not require marshaling of evidence. Rule 192.3(j) & comment 5.

3. Proportionality

Rule 192.4 is a new provision, modeled on Rule 26(b)(2) of the Federal Rules of Civil Procedure, which gives a trial court power to limit the otherwise permissible scope of discovery if it determines, on motion or its own initiative and on reasonable notice, that the discovery sought is unreasonably cumulative or duplicative, is obtainable from some other source that is more convenient, less burdensome, or less expensive, or that the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. This limitation, however, is to be applied in a manner consistent with the broader policies underlying the 1999 discovery rules

¹⁰ But this does not mean that every witness statement necessarily is discoverable. Like any document, a witness statement, although exempted from the new work product protection, *see infra*, may be subject to the attorney-client privilege or be outside the scope of discovery. Comment 9.

amendments — to prevent unwarranted delay and expense, not to unreasonably restrict a party’s access to information through discovery. Rule 192, comment 7.

4. Work Product

Work product is defined for the first time in Rule 192.5. Generally speaking, work product subsumes and replaces the “attorney work product” and “party communications” discovery exemptions under the former discovery rules. Comment 8. Work product comprises (1) materials prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives; or (2) communications made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives. Rule 192.5(a).

Rule 192.5 also codifies standards for discovery of work product. “Core” work product — work product containing mental impressions, conclusions, opinions, or legal theories — is not discoverable. Rule 192.5(b)(1). Other types of work product are discoverable on a showing of substantial need and undue hardship, but the court, in ordering such discovery, must protect against disclosure of core work product to the extent possible. Rule 192.5(b)(2) & (4). However, it is not a violation of this rule if disclosure ordered under Rule 192.5(b)(1) discloses attorney mental processes by inference. Rule 192.5(b)(3).

Exceptions to the work product protections include information made discoverable under Rule 192.3 concerning experts, trial witnesses, witness statements, and contentions; trial exhibits; information concerning persons with knowledge of relevant facts; photographs or electronic images of underlying facts or that will be used as evidence; or work product created under circumstances within one of the exceptions to the attorney-client privilege under Rule 503(d) of the Texas Rules of Evidence. Rule 192.5(c).

In the second tentative draft, the last sentence of comment 8 stated that Rule 192.5(c)(1) does not deny protection to a party who is an expert or trial witness. In response to comments that the sentence was confusing, it was omitted in the final draft. The omission is thus not a statement on the issue one way or the other.

5. Protective Orders

Rule 192.6 governs protective orders. It is essentially identical to former Tex. R. Civ. P. 166b(7), but with two important modifications. First, a person seeking a protective order now has an affirmative duty to respond to the discovery request at issue to the extent protection is not sought unless it is unreasonable to do so before obtaining a ruling on the motion. Rule 192.6(a). If a person seeks protection regarding the time or place of discovery, the person must state a reasonable time and place for discovery with which the person will comply. *Id.* These are the same duties imposed on parties when objecting or asserting privileges in response to written discovery, and are discussed in greater detail in reference to those rules.

Second, Rule 192.6 clarifies that persons should not move for a protective order when an objection or assertion of privilege under other rules is appropriate. *Id.* However, to avoid creating a “trap” or breeding satellite litigation concerning when protective orders versus objections are appropriate, the rule provides that a motion for protective order does not waive an objection or assertion of privilege. *Id.*

In addition to these changes, Rule 192.6, in a manner similar to Rule 176.6(e), clarifies that any person affected by discovery, and not merely a person or party to whom discovery is directed, may seek a protective order.

F. Responses and Objections to Written Discovery; Assertions of Privileges (Rule 193)

Rule 193 significantly alters the former procedures governing responses to written discovery — requests for disclosure, requests for production, requests for entry onto property, interrogatories and requests for admissions¹¹ — in an effort to streamline procedures, reduce costs, and enhance the effectiveness of written discovery as a means of uncovering truth.

¹¹ See Rule 192.7. “Written discovery” does not include depositions, oral or written, or forms of discovery obtainable on motion.

1. Affirmative Duty to Respond

Unlike the case under the former discovery rules, a party has an affirmative duty to respond to written discovery requests within the time periods required by the rules governing that form of written discovery. Rule 193.1. This applies even if the party objects or asserts a privilege against the request. When objecting, a party must state the extent to which they are refusing to comply with the request and must comply with so much of the request as to which the party has made no objection unless it is unreasonable under the circumstances to do so before obtaining a ruling on the objection. Rule 193.2(a) & (b). Examples of circumstances where it would be unreasonable for a party to respond before obtaining a ruling on their objection include a grossly overbroad request like “all documents relevant to the lawsuit” or a request for exclusively privileged documents. Rule 193, comment 2. If a party objects to a request for documents from a remote time periods, the party should produce the documents from more recent, relevant periods unless that production would be burdensome and duplicative of the production that would be required if the objection later is overruled. *Id.*

If a party objects to the time or place of discovery, the party must state a reasonable time and place for complying with the request and must comply at such time or place without further request or order. Rule 193.2(b).

Also, consistent with this new duty to respond, parties are required to supplement discovery responses reasonably promptly after the need for supplementation is discovered. Rule 193.5(b). While supplementation within thirty days prior to trial is presumptively not made reasonably promptly, *id.*, this standard may require supplementation well before that deadline.

Failure to comply with the duties to respond or supplement may be grounds for exclusion of evidence. Rule 193.6(a), discussed below.

2. New Procedures for Asserting Privileges

To assert a privilege — which includes work product, *see* Rule 192.5(d) — against written discovery, parties no longer assert objections, but withhold the privileged materials from disclosure. Rule 193.2(f) & comment 3. When withholding

privileged materials or information, the responding party must state — in either the response to written discovery or a separate document — that (1) information or material responsive to the written request has been withheld; (2) the request to which the information or material relates; and (3) the privileges asserted. Rule 193.3(a). Upon written request of the party seeking discovery, the responding party must, within 15 days, serve a response (1) specifying the nature of 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. Rule 193.3(b). These disclosure and identification requirements, however, do not apply to attorney-client communications withheld from disclosure that concern the litigation in which the discovery is requested. Rule 193.3(c).¹²

3. Elimination of Prophylactic Objections and Privilege Claims

Under the former discovery rules, objections and privilege claims against a discovery request had to be asserted within the time for responding or else they were waived. This frequently led parties, out of an abundance of caution, to assert voluminous prophylactic objections that, as discovery progressed, often proved to be unnecessary and unfounded. These types of objections obscured the true state of facts underlying the objections and responses — thus defeating the purposes of discovery — and gave rise to unnecessary expense as parties had to seek hearings, enter Rule 11 agreements, or take other measures simply to discern which of their opponent's objections were "real." Rule 193 eliminates the perceived need for these practices by requiring parties to object or assert privileges only to the extent that a good faith factual and legal basis for the objection or privilege claim exists and could be ascertained after reasonable inquiry at the time the objection or claim is made

¹² But this does not bar a party from specifically requesting such communications if the party has a good faith basis for asserting that the materials are discoverable. An example would be material within the crime-fraud exception to the attorney-client privilege. Comment 3.

Rule 193.2(c) & comment 3; *see also* Rule 193.2(d) & comment 3 (permitting parties to amend or supplement objections or privilege claims to state bases that did not exist and could not have been ascertained with reasonable inquiry at time the initial objection or privilege claim was made).

4. Other Restrictions on Gamesmanship With Objections

The new restrictions on prophylactic objections, coupled with the affirmative duty to respond, will help eliminate the abuse of parties "burying" the truth behind an avalanche of all objections that conceivably could be applicable (and/or are available as forms on the party's word processing systems). To combat such tactics, moreover, Rule 193.2(e) provides that any objection obscured by numerous unfounded objections is automatically waived unless the court excuses the waiver for good cause shown.¹³

Furthermore, even if a party has asserted valid privileges in response to discovery, the party cannot use the withheld information or materials in a hearing or trial without first timely amending or supplementing their discovery responses to disclose the information and materials. Rule 193.4(c). All of these measures help eliminate modern day "trial by ambush" through tactical use of objections or privilege claims and reduce the need for parties to seek hearings to prevent it.

5. New Inadvertent Disclosure and Supplementation Rules

Rule 193 seeks to moderate or eliminate several "traps" in prior Texas discovery practice that have tended to elevate form over substance. For one, it liberalizes the former standards governing inadvertent disclosure¹⁴ by permitting parties who have inadvertently disclosed privileged information or materials to reclaim the privilege within ten days of discovering the disclosure, or such shorter time as the trial court may order. Rule 193.3(d). The focus is on the producing

¹³ An additional safeguard against parties asserting objections or privileges in bad faith or for harassment or delay is the Rule 191.3 certification requirement, discussed above.

¹⁴ *See, e.g., Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223 (Tex. 1992).

party's intent to waive the particular privilege, not his or her intent to produce the information or materials. *Id.* & comment 4. To avoid logistical problems or ambush at trial, a party seeking to use potentially privileged documents may serve the producing party with an exhibit list in advance of trial, thereby compelling the producing party to assert any applicable privilege claims within ten days. Rule 193.3(d) & comment 4. A trial court also may order this procedure. Comment 4.

Additionally, Rule 193 moderates the former rules' rigid exclusion of evidence not timely disclosed or supplemented in discovery in two ways. First, parties are not required to formally supplement materials or information requested in discovery, except for persons with knowledge of relevant facts, trial witnesses or experts, if the materials or information previously have been made known to other parties in writing, on the record during a deposition, or through other discovery responses. Rule 193.5(a). Second, where formal supplementation is required, late supplementation can be excused where *either* (1) there is good cause for the failure to disclose; *or* (2) the failure to timely disclose will not unfairly surprise or unfairly prejudice the other parties. Rule 193.6.

These changes to the supplementation requirement do not signal a retreat from the general principle that parties should timely supplement discovery. Indeed, parties now have a new affirmative duty to respond to discovery when due and are required to supplement reasonably promptly whenever the need for supplementation is required. Moreover, the burden to demonstrate good cause for late supplementation or lack of unfair surprise remains with the party seeking to call the witness or use the evidence. Rule 193.6(b). The changes to the supplementation requirements, rather, seek only to prevent the exclusion of witnesses or evidence on hypertechnical grounds where the information already has been disclosed or due to relatively minor and inadvertent errors in disclosure of witnesses' phone numbers or addresses.

Finally, Rule 193, along with Rule 197, resolves the vexing questions as to whether and when supplemental interrogatory responses have to be verified and the effects of failing to verify them. Rule 193.5(b) specifies that where responses to written discovery are required to be formally supplemented, the supplementation must

be in the same form that was required of the original response. Rule 193.5(b). This means that, among other things, supplemental responses to interrogatories must be verified if the original responses had to be verified. *Id.* But, contrary to former practice, Rule 197 does not require verification of all original interrogatory responses. See discussion of Rule 197 below. Furthermore, Rule 193.5(b) clarifies that failure to verify an amended or supplemental interrogatory response does not make the response untimely or require exclusion of evidence unless and until the formal defect is pointed out and the responding party fails to correct it within a reasonable time. This hopefully will eliminate wasteful satellite disputes in which parties attempt to exclude witnesses merely because the responding party did not verify the supplemental interrogatory response in which the witnesses were identified.

6. Presumption of Authenticity

A party's production of documents in response to written discovery presumptively authenticates that document for use against that party in a pretrial proceeding or at trial. Rule 193.7. This rule is designed to reduce the need for discovery merely to establish the often incontrovertible proposition that a document is what it appears to be.¹⁵

The producing party may object to the authenticity of a document within ten days (or such shorter time as the court may order) after the party obtains actual notice that the document will be used in a hearing or trial. Rule 193.7. Such an objection must be either on the record or in writing and must have a good faith factual or legal basis. *Id.* To prevent logistical problems or ambush at trial, a party seeking to use a document may, in manner similar to the practice under Rule 193.3(d), trigger the producing party's obligation to raise authenticity objections by serving an exhibit list. *Id.* & comment 7. A court also may order this procedure. Comment 7. If an authenticity objection is made, the party seeking to use the affected documents must be given a reasonable opportunity to establish authenticity.

¹⁵ Authentication, of course, is merely a condition precedent to admissibility and does not alone establish admissibility. See Tex. R. Evid. 901(a).

G Requests for Disclosure (Rule 194)

Rule 194 establishes a new discovery tool, requests for disclosure, whereby parties can obtain a “laundry list” of basic discoverable information without objection, work product claims,¹⁶ or unnecessary expense or inconvenience. This procedure is borrowed from the federal discovery rules. But, unlike federal-style disclosures, which are required in every case regardless whether the parties want them or not, Texas-style disclosures are obtainable only on request, thus avoiding unnecessary burden and expense in cases where they are not needed.

Among other materials and information that can be obtained through disclosures, parties may obtain the legal theories and, in general, the factual bases of the responding party’s claims or defenses, as well as basic damages theories. Rule 194.2. Responding parties are not required, however, to marshal evidence or brief legal issues, only to describe their basic liability and damages contentions. *Id.* & comment 2. To encourage parties to disclose and discuss their basic legal and factual assertions early in the case, Rule 194.6 provides that responses to disclosures concerning liability and damages contentions cannot be used as admissions if the responses are later changed by amendment or supplementation. Rule 194.6.

H. Discovery Regarding Testifying Expert Witnesses (Rule 195)

Rule 195 governs the methods for obtaining discovery regarding testifying expert witnesses. It thus does not address discovery of consulting experts whose opinions have been reviewed by testifying experts. Rule 195, comment 1.¹⁷

The exclusive tools for obtaining discovery concerning testifying expert witnesses are disclosures, depositions and reports. Rule 195.1,

¹⁶ Thus, the rule contemplates that, in some extraordinary instances, requests for disclosures might implicate constitutional or other privileges other than work product. In such cases, responding parties should comply with the procedures set forth in Rule 193 for asserting privileges against written discovery.

¹⁷ Information concerning purely consulting experts, of course, is not discoverable. *Id.*

195.4. Permissible requests for disclosure concerning testifying experts are those listed in Rule 194(f). As to any testifying expert, parties may obtain disclosure of the expert’s name, address, and telephone number and the subject matter on which the expert will testify. If the expert is retained by, employed by, or otherwise subject to the control of the responding party, the requesting party also may obtain disclosure of the general substance of the expert’s mental impressions, a brief summary of the bases for the opinions, all document and tangible things provided to, reviewed, or prepared by the expert in anticipation of their testimony, and the expert’s current resume and bibliography. Rule 194.2(f). For other types of experts, the requesting party must obtain these latter categories of information under Rule 176 and the nonparty discovery rule, Rule 205.

Rule 195.2 establishes a schedule for responding to requests for disclosures concerning testifying experts. Unless otherwise agreed or ordered, parties must furnish information requested under Rule 194.2(f) by the later of thirty days after service of the requests or (1) 90 days before the end of the discovery period, with regard to experts testifying for a party seeking affirmative relief; or (2) 60 days before the end of the discovery period, with regard to all other experts. Rule 195.2.

Rule 195.3 also establishes a schedule for depositions of testifying experts retained by, employed by, or otherwise subject to the control of a party. (Depositions of other experts are controlled by Rule 176, Rule 205 and the deposition rules. Rule 195, comment 2). As a general rule, the party seeking affirmative relief must designate and present their experts for deposition before the other parties have to designate their experts. Rule 195.3(a)(1). But if the party seeking affirmative relief produces a report when designating an expert, the burden shifts to the other parties to designate their experts testifying on the same subject before the party seeking affirmative relief has to tender their experts for deposition. Rule 195.3 & comment 3. This provision is a compromise designed to allow defendants to obtain sufficient information from plaintiffs to enable them to obtain appropriate experts, yet also prevent plaintiffs from being unfairly surprised or “sandbagged.”

While Rules 195.2 & 195.3 presumptively require the party seeking affirmative relief — usually the plaintiff — to designate and/or present their experts for deposition first, comment 3 recognizes that the trial court may alter this schedule under Rule 191. One instance in which such a modification might be appropriate is where one or more discrete contested issues on which expert testimony is required are raised by affirmative defenses rather than by primary liability claims.

Courts also may order preparation of expert reports, as was the case under the former discovery rules. Rule 195.5. These reports are a supplement to, not a replacement for, depositions. Rule 195.5.

The general supplementation requirements of Rule 193.5 apply to written discovery regarding testifying expert witnesses. If an expert is retained by, employed by, or otherwise under the control of a party, that party must also supplement the expert's deposition testimony or written report, but only with regard to the expert's mental impressions or opinions and the bases for them. Rule 195.6; *see also* Rule 193, comment 5.

Rule 195.7 specifies that where a party takes the oral deposition of an expert retained by, employed by, or otherwise under the control of a party, all reasonable fees charged by the expert for time spent in preparing for, giving, reviewing, and correcting the deposition must be paid by the party that retained the expert. During the various public comment periods, several practitioners who handled typically smaller cases expressed concern that this rule would create an incentive for their opponents to take long expert depositions simply to run up their costs. The Court, while being sensitive to these concerns, ultimately retained the rule in its current form in the belief that the deposition time limits of Rules 190 and 199, *see below*, the availability of protective orders under Rule 193.6, and the court's general power to modify discovery procedures and limitations under Rule 191.1 will be sufficient to prevent its abuse.

Practitioners should refer to these rules if their opponents attempt to misuse Rule 195.7.

I. Requests for Production; Requests and Motion for Entry Upon Property (Rule 196)

Rule 196 is substantively similar to former Rule 167, but with a few notable refinements. If the requesting party will sample or test the requested items, the means, manner and procedure for testing or sampling must be described with sufficient specificity in the request to inform the responding party of the means, manner and procedure for testing or sampling. Rule 196.1(b) & comment 2. Testing or sampling that is destructive or materially alters an item is not permitted without prior court approval. Rule 196.5.

There is a new notice requirement applicable to requests for a nonparty's medical or mental health records. Rule 196.1(c). This rule does not imply that such records are or should be discoverable in every case. Comment 8.

When responding to requests for production, parties must, in addition to the general requirements for responding to written discovery, state that (1) production and inspection will be permitted as requested; (2) the requested items are being served on the requesting party with the response; (3) production and inspection will take place at a designated time and place, if the responding party is objecting to the time or place of discovery; or (4) no items have been identified — after a diligent search — that are responsive to the request. Rule 196.2. Rules 192.3(b) and 192.7(b) clarify that parties are required to produce documents within their possession, custody or control, which means that the person has either actual physical possession of the documents or has a right to possession of the document that is equal or superior to that of the person with actual physical possession.

In response to the proliferation of reading rooms and other modern practicalities of document discovery, Rule 196.3(b) permits responding parties to produce copies in lieu of originals unless a question as to the authenticity of the documents is raised or under the circumstances it would be unfair to produce copies in lieu of originals. Rule 196.3(b).

Rule 196.4 is a new provision addressing discovery of electronic or magnetic data. Parties seeking discovery of such data must specify the form in which it should be produced, and the responding party must comply if the requested data and form is reasonably available to the responding party in its ordinary course of business.

The responding party may object if it cannot — through reasonable efforts — retrieve the information or produce it in the form requested. If the court orders the responding party to respond to the request, the court must also order the requesting party to pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

Rule 196.6 clarifies the allocation of expenses of document discovery. Unless otherwise ordered by the court, the expense of producing items will be borne by the requesting party and the expense of inspecting, sampling, testing, photographing, and copying items produced will be borne by the requesting party.

Rule 196.7 sets forth the procedures for obtaining entry upon property. If the landowner is a party, entry may be by request; if not, the party requesting entry must obtain a court order. Rule 196.7(a). To facilitate discovery on land owned by a nonparty who cannot be located, a new provision permits motions and orders permitting such discovery upon any form of notice permissible under Tex. R. Civ. P. 21a.

J. Interrogatories to Parties (Rule 197)

Rule 197 governs interrogatories. The key changes here include a new provision addressing contention interrogatories, which is similar to that in Rule 194. Rule 197.1 & comment 1. As was the case under Rule 194, responses to contention interrogatories that have been amended or supplemented may not be used for any purpose. Rule 197.3 & comment 1.

As noted above, the verification requirement has been changed in recognition of the practical reality that parties often do not have personal knowledge of much of the information in interrogatory responses to which they formerly were required to attest. Under Rule 197.2(d)(2), parties must verify all responses except those concerning persons with knowledge of relevant facts, trial witnesses and legal contentions. Also, where an interrogatory response is based on information obtained from other persons, the party may so state. Rule 197.2(d)(2). (When signing interrogatory responses under these rules, lawyers should be mindful of their obligations under Rule 191. Comment 2.) Finally, comment 2 clarifies that, as was the case with verification of

supplemental interrogatory responses, failure to sign or verify initial interrogatory responses is merely a formal defect that may be corrected within a reasonable time after it is pointed out — it is not tantamount to a failure to timely respond that may serve as a basis for exclusion of evidence.

K. Requests for Admissions (Rule 198)

This rule is a nonsubstantive recodification of former Rule 169. Except for a handful of individual lawyers who suggested that the Court abolish requests for admission entirely, there was virtually no support for substantively changing or limiting this rule.

Rule 198.3 incorporates the substance of former Rule 215(4)(a).

L. Depositions Upon Oral Examination (Rule 199)

This rule reforms, streamlines and clarifies oral deposition practice in several ways.

1. Limitations on Deposition Conduct

There are several new provisions that are designed to cut down on disputes in oral depositions, curtail dilatory and obstructive tactics by witnesses and their lawyers, and enable the deposing party to obtain the witness' testimony rather than that of the witness' lawyer. These rules are based in part on reforms previously instituted in federal courts.

Oral depositions are to be conducted the same manner as if the testimony were being obtained in court at trial. Rule 199.5(d). Counsel are admonished to be courteous to each other and the witness. *Id.* The witness is admonished not to be evasive or unduly delay the examination. *Id.* Private conferences between the witness and their lawyers are prohibited except for the purpose of determining whether a privilege should be asserted. *Id.* If the lawyers and the witnesses do not comply with these rules, the court may admit into evidence at trial statements, discussions and other occurrences that reflect upon the credibility of the witness or the testimony. *Id.*

“Coaching” objections and colloquy are strictly prohibited. Objections to questions during the deposition are limited to “objection: form” or

“objection: leading,” and objections to testimony are limited to “objection: nonresponsive.” Rule 199.5(e) & comment 4 (clarifying meaning of “form” objection). These objections are waived if not stated as phrased during the deposition. *Id.* However, the witness’ attorney may also instruct the witness not to answer a question if it calls for privileged information, is abusive or if any answer to the question would be misleading. Rule 199.5(f) & comment 4. The deposing party, however, may require the objecting party to give a short and concise explanation of the basis for the objection or instruction to enable them to rephrase the question. Rules 199.5(e) & (f). However, argumentative or suggestive objections or explanations are prohibited, waive the objection, and may be grounds for terminating the deposition. Rules 199.5(e) & (f).

As is the case with written discovery, an objection or instruction not to answer a question in an oral deposition must be made only if there is a good faith factual and legal basis for doing so at the time. Rule 199.5(h).

While the conduct of the defending lawyer is strictly limited, the lawyer taking the deposition also is under a corresponding duty not to ask questions solely to harass or mislead the witness, for any improper purpose, or without a good faith legal basis at the time. *Id.*

2. Time Limits

In addition to the aggregate time limits of Rule 190, Rule 199.5(c) limits each side to six hours to examine and cross-examine an individual witness in an oral deposition. Breaks do not count against this limitation. For purposes of this rule, each person designated as a corporate representative under Rule 199.2(b)(1) is a separate witness. Comment 2.

3. Depositions By Telephone or Other Remote Electronic Means

There are new rules setting forth procedures for taking depositions by telephone or other remote electronic means (*e.g.*, closed circuit television or the Internet) and permitting lawyers to attend the deposition through those means. Rules 199.1(b), 199.5(a)(2).

4. Duty to Identify Representative of Organization Before Deposition

If an organization is named as the witness in a deposition notice, the organization must — a reasonable time before the deposition — designate the persons who will testify on the organization’s behalf and identify the matters on which each person will testify. Rule 199.2(b)(1).

5. Reconciling of Deposition Document Request Rules With Other Rules

If a party serves a request for production of documents with a deposition notice to a party, the request, response, objections and privilege claims are governed by the requests for production rule, Rule 197 — including the deadline of thirty days for responding — as well as the general standards governing written discovery set forth in Rule 193. Rule 199.2(b)(5) & comment 1. If the witness is a nonparty, these matters are governed by the nonparty discovery rule, Rule 205. *Id.*

M. **Depositions Upon Written Questions (Rule 200)**

This rule clarifies the procedures governing depositions on written questions. Rule 200 incorporates the oral deposition rules governing notices, responses, depositions of organizations and requests for production of documents. Rule 200.1(b); *see* Rules 199.1(b), 199.2(b), 199.5(a)(3) & 199.2(b)(5).

Rule 200.3 specifies a detailed timetable for objecting to questions or serving responsive questions.

N. **Depositions in Foreign Jurisdictions for Use in Texas Proceedings; Depositions in Texas for Use in Foreign Proceedings (Rule 201)**

Rule 201.1 is a nonsubstantive rewrite of former Rule 188 that is designed to clarify the procedures for obtaining oral or written depositions in foreign jurisdictions. Comment 1 also clarifies the relationship between this rule and the law of foreign jurisdictions where the witnesses are located.

Rule 201.2 is a new provision that restates Section 20.002 of the Civil Practice and Remedies

Code. It was added to clarify and aid reference to the standards governing depositions in Texas for use in foreign jurisdictions.

O. Depositions Before Suit or to Investigate Claims (Rule 202)

Rule 202 is a rewrite of former Rule 187 that is broadened somewhat to expressly permit discovery depositions prior to suit and to investigate potential claims. To this extent, Rule 202 replaces and limits the “bill of discovery” of repealed Rule 737.

The Court fashioned Rule 202 in an attempt to accommodate competing concerns of plaintiffs and defense lawyers regarding the extent to which plaintiffs should be permitted to obtain pre-suit or investigatory depositions without notice to potential parties. Under former Rule 737, a person could bring an independent action to obtain an order authorizing a deposition of any other person to investigate a potential claim or anticipated lawsuit.¹⁸ The State Bar Court Rules Committee urged the repeal of Rule 737 on the grounds that some plaintiffs were using the rule to “set up” target defendants for later suit by obtaining one-sided depositions of key witnesses without notice to the target. While these depositions generally could not be used as evidence because the target did not have notice, they arguably had the same effect — because they could be used for impeachment, the deposition “pinned down” the witness’ testimony.

The Court Rules Committee proposed that Rule 737 be repealed but that former Rule 187, which authorized pre-suit depositions to perpetuate testimony, be broadened somewhat to permit pre-suit depositions in anticipation of suit.

Plaintiffs’ lawyers were strongly opposed to this proposal on several grounds. They contended that it effectively eliminated their ability to obtain pre-suit depositions to investigate a claim because (1) when merely investigating a claim, plaintiffs could not swear that they actually anticipated filing

suit, a requirement under the Court Rules Committee’s proposal; and (2) they could not give notice to all potential parties as required by Rule 187 and the Court Rules Committee proposal because they did not yet know who the parties might be. They urged that investigatory depositions under Rule 737 had proven to be a useful device by which plaintiffs could investigate a potential claim, a step that, they contended, has become increasingly necessary in an era of sanctions for frivolous lawsuits, “no evidence” summary judgment motions, and other heightened burdens on plaintiffs. Several practitioners commented that the results of bill of discovery depositions frequently lead them not to file suit or not to pursue a potential defendant, thereby reducing the numbers of lawsuits and overall litigation costs.

To address both sets of concerns, Rule 202 expressly permits pre-suit investigatory depositions but limits the extent to which they can be used in a subsequent lawsuit if an eventual party did not receive notice of the deposition. A Rule 202 deposition ordinarily can be used to the same extent as a sworn statement; that is, solely for impeaching the witness from whom the deposition was taken. But if a party attempts to use Rule 202 abusively and/or to circumvent deposition notice requirements — such as to “set up” a target rather than for good faith investigation of a potential claim — Rule 202.5 authorizes the trial court to forbid the use of the deposition for any purpose, including impeachment.

P. Signing, Certification and Use of Oral and Written Depositions (Rule 203)

This rule consolidates and clarifies the former rules governing signing and use of deposition transcripts. A key change is that the court reporter must certify the amount of time that each party spent during the deposition. Rule 203.2(e). This aids in the administration of the aggregate and per witness deposition time limits of Rules 190 and 199.

Q. Physical and Mental Examinations (Rule 204)

This rule is based largely on former Rule 167a. It clarifies and broadens somewhat the circumstances under which physical and mental examinations may be ordered and the types of

¹⁸ Another use of Rule 737 was to obtain postjudgment discovery. The need for such a procedure, however, has largely been eliminated by Rule 621a and by the Texas Turnover Statute, Tex. Civ. Prac. & Rem. Code § 31.002. This aspect of Rule 737 is not retained in the 1999 discovery rules revisions.

health care providers who can conduct such examinations.

R. Discovery From Nonparties (Rule 205)

Rule 205 is designed to aid reference to the various rules authorizing discovery from nonparties and to clarify the procedures for obtaining that discovery. Rules 205.1 & 205.2. It also establishes a new form of nonparty discovery — requests for production of documents — by which a party can obtain documents without need for a motion or deposition. Rule 205.3. A party requesting production of documents from a nonparty, however, must reimburse the nonparty's reasonable cost of production. Rule 205.3(f). The notice requirements concerning discovery of nonparty medical records (see discussion of Rule 196) also applies. Rule 205.3(c).