

**SUPPLEMENT TO “A GUIDE TO THE 1999
TEXAS DISCOVERY RULES REVISIONS”
REGARDING DECEMBER 31, 1998
TECHNICAL CORRECTIONS**

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Supplement to “A Guide to the 1999 Texas Discovery Rules Revisions” Regarding December 31, 1998 Technical Corrections

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I. Introduction

This paper summarizes and explains the December 31, 1998, technical corrections¹ that the Texas Supreme Court made to the discovery rules revisions that the Court promulgated on November 9, 1998.² A complete text of the Order promulgating the technical corrections is available on the Supreme Court’s website (www.courts.state.tx.us; go to “Supreme Court” and then “1997-98 Procedures and Rules”) and will be printed in the February 1999 issue of the *Texas Bar Journal*. The Court also has posted on its website (1) a copy of this paper; (2) a redlined version of the November 9 rules promulgation that illustrates the effects of the December 31 technical corrections; and (3) a “clean” updated version of the November 9 rules promulgation that incorporates the December 31 technical corrections.

This paper supplements “A Guide to the 1999 Texas Discovery Rules Revisions,” a discussion of the background, text and intent of the 1999 discovery rules revisions as they were promulgated on November 9. The Guide is available on the Court’s website, as are the November 9 rules promulgation and several prior drafts of the rules that the Court circulated for public comment.

II. Overview of the Technical Corrections³

¹ See Order in Misc. Docket No. 98-9224, dated December 31, 1998 [hereinafter “December 31 Order”].

² See Order in Misc. Docket No. 98-9196, dated November 9, 1998 [hereinafter “November 9 Order”].

³ Mindful of our responsibilities under the Code of Judicial Conduct, we intend no comment on

The Court promulgated the December 31 technical corrections primarily to correct some typographical errors, ambiguities, or similar minor technical problems in the November 9 rules promulgation that had come to its attention during the intervening weeks. See December 31 Order at ¶¶ 2, 5, 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26 & 28. Such inadvertent “glitches” or oversights are inevitable in a comprehensive rules promulgation like the 1999 discovery rules revisions.

But a few of the technical corrections may have important substantive implications. These corrections, as well as the more significant nonsubstantive clarifications, are:

- Paragraph 3 of the December 31 Order clarifies that the “discovery period” in cases filed prior to January 1, 1999, ends on the date the case is set for trial. Under the revised rules, the “discovery period” — the period during which discovery may be conducted — is defined by Rule 190 and differs according to the applicable discovery level determined by that rule. See Rules 190.2(c)(1), 190.3(b)(1) & 190.4(b)(2).⁴ But, as the November 9 Order provided, Rule 190 applies only to cases filed on or after January 1. See November 9 Order at ¶ 4. Thus, the rules and the November 9 Order left open the definition of “discovery period” in cases filed prior to January 1. Paragraph 3 of the December 31 Order remedies that oversight.
- Paragraph 4 of the December 31 Order resolves a broader issue concerning the manner in which the new rules are to be applied to cases

pending or impending cases.

⁴ See also Rule 190, comment 4 (clarifying that the discovery period ordinarily defines the period in which discovery may be conducted — i.e., responses made to come due — not merely the deadline by which discovery requests must be served).

filed prior to January 1, 1999. The November 9 Order provided that, as a general rule, all of the new rules apply to any pending case, whether filed on or after January 1. *See* November 9 Order at ¶ 4. Paragraphs 4 and 5 of the November 9 Order, however, carved out some exceptions to this general rule, making certain of the new rules effective only in cases filed on or after January 1. *See id.* at ¶¶ 4 & 5. Because the November 9 Order repealed all of the old discovery rules effective on January 1, *see id.* at ¶ 3, there arguably was a “gap” in the implementation of any procedure or limitation from the old rules that was intended to be carried over in the new rules — if the new rule governing the procedure or limitation was one of those made effective only to cases filed on or after January 1, there would be no rule governing that procedure or limitation in cases filed prior to January 1.⁵

To close any such gaps caused by the transition, the Court added a “grandfather” provision in paragraph 4 of the December 31 Order. It provides that if, by virtue of the exceptions in paragraphs 4 or 5 of the November 9 Order, a new rule is not applied to a case filed prior to January 1, the procedures and limitations otherwise governed by the new rule continue to be governed by the old rule that addressed those procedures and limitations.

- Paragraph 6 of the December 31 Order addresses the relationship between the discovery rules revisions and preexisting local rules. As a general rule, the revisions trump any irreconcilable local rules. However, the Court “grandfathers” preexisting local rules governing filing of discovery by providing that Rule 191.4 does not trump local filing rules. While Rule 191.4 in many respects goes farther than most local filing rules in alleviating the storage burdens on courts and clerks, the Court nonetheless preserved the local rules in order to minimize disruption in local filing practices. Of course, if any jurisdiction with local filing rules finds Rule 191.4’s approach preferable to its own, it can repeal or withdraw its local filing rules.

⁵ For example, the November 9 Order repealed, effective January 1, the numerical limits on interrogatories in former Rule 168(5), yet also made Rule 190, which governs numerical limits on interrogatories, applicable only to cases filed after January 1. This caused some practitioners to believe that there were no numerical limitation on interrogatories in cases filed prior to January 1 (and to plot steps to exploit this omission).

- Paragraph 7 of the December 31 Order conforms Rule of Evidence 801(e)(3) to the revised discovery rules. Rule 801(e)(3) formerly cross-referenced Rule of Civil Procedure 207; it has been updated to refer to Rule 203.6(b).
- Paragraph 9 of the December 31 Order clarifies the requirements for moving a case into Levels 1, 2 or 3 and their relationship to the notice requirement of Rule 190.1.
- Paragraph 10 of the December 31 Order amends Comment 2 to Rule 190 to clarify that in Level 1 cases, post-verdict amendments are permissible up to the limits of that discovery level. Previously, the comment suggested that no such amendments were permissible in a Level 1 case, even where the plaintiff initially pled damages below the Level 1 limits.
- Paragraph 25 of the December 31 Order applies a 10-day notice requirement to Rule 205.3 requests for production to nonparties — the subpoena compelling production must be served no less than ten days after the notice of the request is served. As promulgated on November 9, Rule 205 permitted simultaneous service of the notice and subpoena. This left open the possibility that a nonparty on whom a subpoena is served to compel production requested under Rule 205.3 might comply with the subpoena before any of the parties or affected persons who received notice of the request would have time to raise objections or privilege claims.⁶ By mandating a 10-day delay between the service of notice of the request and service of the subpoena, revised Rule 205.2 assures persons affected by the request a reasonable opportunity to protect their rights.⁷
- Paragraph 27 of the December 31 Order clarifies that while a notice of a Rule 205.3

⁶ A party seeking discovery from a nonparty must serve the form of notice required by the rule governing the form of discovery used (*e.g.*, Rule 199.2(b) for oral depositions, Rule 205.3 for request for production to a nonparty) on the nonparty and all parties of record. *See* Rule 191.5. Additionally, if the request implicates medical records of another nonparty, the requesting party must serve the notice on the affected nonparty. *See* Rule 205.3(c); *see also* Rules 199.2(b)(5) & 200.1(b) (incorporating Rule 205 with regard to document requests served with deposition notice to nonparty).

⁷ Not only parties but affected third parties may seek a protective order against discovery. *See* Rule 192.6.

request for production must be served on all parties of record and the nonparty to whom the request is directed, the subpoena to compel the production need be served only on the nonparty.