

**THE FIRST 100 DAYS UNDER THE NEW DISCOVERY
RULES: THE BIG ISSUES THUS FAR**

**ROBERT H. PEMBERTON
RULES ATTORNEY
THE SUPREME COURT OF TEXAS**

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ROBERT H. PEMBERTON

Robert H. (“Bob”) Pemberton is the Rules Attorney for the Texas Supreme Court. He helps oversee 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. Additionally, Mr. Pemberton assists Justice Nathan Hecht as liaison to various entities in state government and the bar with regard to court rules and assists individual lawyers and members of the public with their questions and concerns regarding court rules.

Mr. Pemberton has spoken and written extensively concerning the new discovery rules, including co-authoring *A Guide to the 1999 Texas Discovery Rules Revisions* and the supplement to that paper with Justice Nathan Hecht, as well as the treatise, *THE NEW RULES HANDBOOK: ANALYSIS WITH LEGISLATIVE HISTORY* (West 1999) with Supreme Court Advisory Committee members Professor Alex Albright and Charles Herring. Also, before joining the Supreme Court, Mr. Pemberton authored *A Guide to Recent Changes and New Challenges in Texas Prejudgment Interest Law*, 30 TEXAS TECH L. REV. 71 (1999).

Mr. Pemberton is active in the Austin Young Lawyers’ Association and the Travis County Bar Association. He co-chaired the 1999 Bench-Bar Conference program committee and will co-chair the entire 2000 conference. He also participates in the AYLA Aspiring Youth program for at-risk youth, serving as a basketball coach and speakers’ subcommittee chair, and is a member of the Judicial Affairs and CLE committees. Mr. Pemberton also is active in various civic and charitable endeavors outside of the legal profession, including Austin Big Brother/Big Sisters, Young Men’s Business League, and the Paramount Theatre.

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 for Chief Justice Thomas R. Phillips of the Texas Supreme Court.

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, where he was an All-District and All-Central Texas center and captain of the 1984 Temple Wildcats football team. These facts are important to emphasize in light of Bob’s more recent involvement in really nerdy matters like court rules and prejudgment interest.

The First 100 Days Under the New Discovery Rules: The Big Issues Thus Far

by Robert H. Pemberton
Rules Attorney
The Supreme Court of Texas

I. Introduction

The first 100 days under the new discovery rules have been challenging not only for lawyers and judges getting used to the new rules but also for the Texas Supreme Court's personnel — namely, Justice Hecht and me — who are charged with overseeing their implementation. Although implementation seems to be going fairly smoothly thus far, the new rules have understandably raised a lot of questions as people begin to read and understand them. Since the rules took effect, I have had the privilege — and challenge — of responding to hundreds of questions about the rules from Texas lawyers and judges.¹

This paper discusses some of the issues concerning the new rules that I have most frequently or persistently encountered. Please keep in mind that, as a representative of the Supreme Court, I cannot give advisory opinions or legal or tactical advice, and nothing in this paper should be construed as such or as a comment on any pending or impending case. My intent is to provide you with some guidance based solely on the text of the rules and their “legislative history.”

II. Transition Issues

A. General Principles

The vast majority of questions I have encountered have concerned whether or how the new discovery rules take effect in pending cases filed before January 1, 1999 (“pre-1999 cases”). Most of these questions can be answered by briefly reviewing the transition provisions of the two orders promulgating the rules, Order in Misc. Docket 98-9196, dated November 9, 1998, and the

“Technical Corrections” order, Order in Misc. Docket No. 98-9224, dated December 31, 1998.²

Paragraphs 3, 4 and 5 of the November 9 Order and paragraphs 3-6 of the Technical Corrections Order govern transition. The Supreme Court's basic philosophy in these provisions has been to apply the new discovery rules to all cases, regardless when filed and regardless whether discovery already has begun, except where precluded by logistical considerations or where doing so would undermine the larger goals of the new rules. In particular:

1. Effective January 1, 1999, the following new rules took effect in all cases -- regardless when the cases were filed or whether discovery had begun³:

²As most people are aware by now, the new discovery rules were promulgated in two orders, Order in Misc. Docket 98-9196, dated November 9, 1998 (the “November 9 Order”), *reprinted in* 61 TEX. B.J. 1139 (Dec. 1998), and Order in Misc. Docket 98-9224, dated December 31, 1998 (the “Technical Corrections” Order), *reprinted in* 62 TEX. B.J. 115 (Feb. 1999). A consolidated version of the new rules in both redline and clean format is available on the Supreme Court website (www.courts.state.tx.us; go to either (1) “supreme court” and then “rules”, or (2) “court rules and Texas law” and then “procedures and rules revisions.”). Both orders also have been incorporated in the 1999 West's TEXAS RULES OF COURT.

¹Perhaps to the surprise of some, most of these inquiries have been neither threatening nor obscene.

³See generally November 9 Order ¶ 4.

- C 176 (subpoenas). Thus, among other changes, lawyers can now issue subpoenas in all civil cases.⁴
 - C 191.1, 191.2 and 191.5 (modification, conference requirement, duty to agree, service). Thus, among other things, Rule 191.1's expansive power to modify discovery procedures and limitations by order or agreement applies in all cases.
 - C 192 (scope of discovery). Yes, this means that witness statements, regardless when taken, are no longer subject to the "witness statement" discovery exemption. *But see* Part III, below.
 - C 194 (requests for disclosures). Thus, parties can serve requests for disclosures in all cases, all other things being equal.⁵
 - C 196 (requests for production and entry onto property).
 - C 197 (interrogatories). But note that the rules governing numerical limits on interrogatories are in Rule 190, which does not apply to pre-1999 filed cases. *See* below.
 - C 198 (requests for admissions).
 - C 199 (oral depositions). Thus, the new deposition conduct rules and six-hour per-witness time limit apply in all cases. However, this time limit should not be confused with the aggregate deposition time limits in Rule 190, which do not apply to pre-1999 filed cases.
 - C 200 (depositions on written questions). Thus, the new 20-day notice period governs written depositions taken after January 1, regardless when filed.⁶
 - C 201 (foreign depositions).
 - C 203 (deposition certification). This includes the new timekeeping requirement.⁷
 - C 204 (physical and mental examinations).
 - C 205 (non-party discovery; document requests to non-parties). For example, document requests to non-parties are available in all cases.
 - C 215 (sanctions).
2. Other of the new discovery rules either do not apply to pre-1999 cases or apply subject to certain qualifications and limitations:
- C Rule 190, the new differential discovery tracking scheme, does not apply to pre-1999 cases.⁸ This reflects the difficulty of applying, *e.g.*, a nine-month discovery period or aggregate deposition time limits to cases in which discovery already is in progress.
- However, a court may enter a "Level 3" court-tailored plan in a pre-1999 case; because the court sets each discovery limitation in the plan, it can take into account prior discovery.⁹
- Absent a Level 3 plan, the discovery period in pre-1999 filed cases is deemed to end on the date set for trial.¹⁰
- C Rule 191.3, the new certification requirement, and Rule 191.4, which forbids filing of most discovery, do not apply to discovery filed or served prior to

⁴Rule 176.4(c).

⁵*See* Part II(B), below.

⁶Rule 200.1(a).

⁷Rule 203.2(e); *see* Part VIII, below.

⁸November 9 Order ¶ 4(b).

⁹*Id.*

¹⁰Technical Corrections Order ¶ 3.

January 1, 1999.¹¹ This merely means that discovery documents that parties signed prior to January 1 are not retroactively deemed certified in accordance with Rule 191.3. Likewise, discovery documents filed by parties before January 1 do not have to be “un-filed” to comply with Rule 191.4.

Another limitation on the applicability of Rule 191.4 is that if it irreconcilably conflicts with pre-1999 local rules governing filing of discovery, the local rules control.¹²

- C Rule 193, the new rule governing responses, objections, and privilege claims against written discovery, applies except to the extent that:

- (1) a response to a discovery request;
- (2) an objection to a discovery request;
- (3) an assertion of privilege; or
- (4) an amendment or supplementation of a discovery request

made prior to January 1 need not conform with the new rule. But responses, objections, assertions of privilege — and, importantly, supplementations and amendments of discovery responses — made after January 1 must comply with Rule 193. This aspect of the transition to Rule 193 has been misunderstood by some lawyers.¹³

¹¹November 9 Order ¶ 4(c).

¹²Technical Corrections Order ¶ 6.

¹³Some lawyers have construed the phrase “made before that date [(January 1, 1999)]” in paragraph 4(d) of the November 9 Order as modifying “response” in “amendment or supplementation to a discovery response made before that date.” This reading arguably would suggest that amendments or supplementations to pre-1999 discovery responses made after

- C Rule 195, the new rule limiting the timing and means of expert discovery, applies in all cases except to the extent it would disrupt expert discovery already in progress, impending, or scheduled by order or agreement of the parties.¹⁴ Moreover, if interrogatories concerning experts were served prior to January 1, 1999, those should be answered¹⁵; Rule 195.1 otherwise would make requests for disclosures the exclusive means of obtaining written discovery concerning experts.¹⁶

- C Rule 202, the new pre-suit deposition rule, applies only to cases filed after January 1, 1999.¹⁷ Obviously, a rule governing *pre*-suit depositions could not be applied to cases already filed. But courts may nonetheless look to Rule 202 with regard to whether pre-suit

January 1, 1999 are not governed by Rule 193. A reading of the entire paragraph 4(d), however, reveals that “made before that date” separately modifies “a response to a discovery request,” “an objection to a discovery request,” “an assertion of privilege,” and “an amendment or supplementation to a discovery response.” Thus, paragraph 4(d) “grandfathers” *pre*-1999 amendments and supplementations to discovery responses, not *all* amendments and supplementations to pre-1999 responses. Were it otherwise, paragraph 4(d)’s “grandfathering” of “a response to a discovery request,” “an objection to a discovery request,” and “an assertion of privilege” would not be limited by “made before that date” but would be perpetual, meaning that Rule 193 never would take effect as to original responses, objections, and privilege claims made after January 1, 1999.

¹⁴November 9 Order ¶ 4(e).

¹⁵November 9 Order ¶ 4(e).

¹⁶Rule 195.1.

¹⁷November 9 Order ¶ 4(f).

depositions taken under the former rules may be used in hearings or trial.¹⁸

- C In addition to the foregoing exceptions and qualifications concerning specific rules, the Court added a catch-all provision specifying that the application of the new rules to pre-1999 cases must be consistent with Rule 1 of the Rules of Civil Procedure, “must be consistent with the purposes of the revised rules to streamline discovery procedures and reduce costs and delays,” and “must be without undue prejudice to any person on account of the transition from the prior rules.”¹⁹

3. All of the old discovery rules are repealed effective January 1, 1999.²⁰ However, if a new rule that otherwise would replace a procedure or limitation from an old rule does not, by virtue of one of the exceptions or qualifications discussed in (2), apply to a pre-1999 case, the portion of any old rule governing that specific procedure or limitation remains in effect in that case.²¹

One specific instance when this occurs concerns numerical limits on interrogatories.²² Although former Rule 168 is repealed, new Rule 190, which governs numerical limits on interrogatories, applies only to cases filed on or after January 1, 1999. All other things being equal, this arguably would mean that there was no numerical limitation on interrogatories in pre-1999 cases.²³ To close this gap, the rules borrow the numerical limits from former Rule 168. In practical terms, this means that parties in pre-1999

cases may serve up to two sets of thirty interrogatories.

B. The Problem of Duplicative Disclosure Requests

A more difficult issue that warrants more detailed explanation concerns requests for disclosures that are duplicative of prior discovery. This has been a common problem. Upon learning that requests for disclosures could be served in pre-1999 cases, as discussed in Part II(A), many lawyers immediately fired off requests in all directions without much regard for whether they needed the information or not. As a result, these requests frequently overlapped with the subject matter of other forms of discovery — typically interrogatories.²⁴

Traditionally, parties would simply object to this sort of duplicative discovery and refuse to respond. But this is not an option with disclosures, as parties cannot object or assert a work product claim.²⁵ Thus, the issue has frequently arisen: what, if anything, can a party do to resist requests for disclosures that merely duplicate old outstanding discovery?

Parties in this situation should first consider whether the requests for disclosures are, in fact, duplicative of prior discovery. In other words, do the party’s outstanding discovery responses provide the same information they are required to provide in response to the disclosures? In many cases, the answer will be “no”; the old responses frequently will be buried in prophylactic or “boilerplate” objections or otherwise fall short of the standards of Rule 194 or even the new

¹⁸*Id.*, see Rule 202.5 & cmt. 2.

¹⁹November 9 Order ¶ 5.

²⁰November 9 Order ¶ 3.

²¹Technical Corrections Order ¶ 4.

²²And perhaps also regarding the supplementation requirements of Rule 193.5. See Part II(C), below.

²³*But see* November 9 Order ¶ 5.

²⁴This problem is unlikely to recur in cases filed on or after January 1, 1999. Particularly where parties are now limited to a total of 25 interrogatories in most cases, Rules 190.2(c)(3), 190.3(b)(3), they are unlikely to “waste” interrogatories by seeking the types of information obtainable through disclosures. See also Rule 195.1 (making disclosures, oral depositions and reports the exclusive means of obtaining discovery concerning testifying experts).

²⁵Rule 194.5 & cmt. 1.

standards governing written discovery generally in Rule 193. See Part II(C), below. If this is true, parties would be hard-pressed to argue that the requests for disclosures should not be answered fully.

But if a party truly has already provided the same information called for in disclosures in prior discovery responses, the party has at least one potential remedy. It is suggested by comment 1 to Rule 194.²⁶ Although cautioning that, in general, “to fail to respond fully to a request for disclosure would be an abuse of the discovery process,” comment 1 contemplates that there may be “extremely rare cases” where a party should be permitted to move for protection against a request for disclosure.²⁷

Arguably, if requests for disclosure are truly duplicative of prior discovery, this would be one of the “extremely rare cases” in which a protective order would be warranted. As noted above, paragraph 5 of the November 9 Order requires that the transition to the new rules must be “consistent with the purposes of the revised rules to streamline discovery procedures and reduce costs and delays,” and “must be without undue prejudice to any person on account of the transition from the prior rules.”²⁸ Requiring parties to answer disclosures that merely restate old discovery responses would conflict with these goals.²⁹

Finally, even though a protective order may be warranted, parties may actually want to

²⁶The notes and comments to the new discovery rules, unlike those accompanying prior rules promulgations, are intended to inform the construction and application of the rules by both courts and practitioners. November 9 Order ¶ 2.

²⁷Rule 194 cmt. 1.

²⁸November 9 Order ¶ 5.

²⁹See also Rule 192.4, which permits parties to seek an order limiting discovery otherwise “permitted by these rules” that is “unreasonably cumulative or duplicative.” But keep in mind that this remedy is not expressly referenced in Rule 194.

respond to duplicative requests for disclosure as a means of resolving thorny issues regarding supplementation of outstanding discovery requests. See Part II(C), below. If they do so, they can cross-reference their prior outstanding discovery responses if they do so specifically (e.g., “see response to interrogatory 5”, not “see defendant’s deposition”) and the information provided in the reference fully complies with the request for disclosure. This may alleviate some of the burden of potential duplication.

C. The Problem of Old Discovery Responses Made Inadequate By Rule Changes; Supplementation

New Rule 193 significantly changes the standards for responding to written discovery in several ways. Among other things:

- C Parties must now assert privileges by withholding rather than by objecting.³⁰
- C Prophylactic objections and privilege claims -- commonplace under the former rules -- are now forbidden.³¹ “Boilerplate” objections -- “numerous unfounded objections” -- are not only forbidden, but waive any valid objections they “obscure.”³²
- C There is now an affirmative duty to respond to written discovery, which applies even if a party has objected to a request, to the extent the party is not objecting to the request.³³ Likewise, parties cannot merely object to the time and place called for in a discovery request, but must state an alternative time and place and comply accordingly.³⁴

One of the practical implications of these changes is that many parties in pre-1999 cases will have outstanding discovery responses that, while

³⁰Rules 193.2(f), 193.3.

³¹Rule 193.2(c) & cmt. 3.

³²Rule 193.2(e).

³³Rule 193.1, 193.2(b) & cmt. 2.

³⁴Rule 193.2(b).

perhaps proper under the former rules, would be improper or incomplete under Rule 193.

A similar problem results from changes to the scope of discovery in Rule 192. Rule 192, among other things, eliminates the old “witness statement” exemption and clarifies that trial witnesses are discoverable. Thus, parties may have objected to requests for these sorts of information prior to January 1, although they could not do so today. But the objections, all other things being equal, would remain pending.

Many lawyers have inquired as to whether they are required to supplement or amend old discovery responses, objections or privilege claims that would be invalid or incomplete under Rule 193 to comply with that rule. The answer is “yes,” but it requires some explanation.

As noted above, paragraph 4(d) of the November 9 Order provides that responses, objections, privilege claims, or amendments or supplementations made prior to January 1, 1999, “need not comply with [Rule 193].” The Court intended this provision primarily to mean that old, pending privilege claims asserted through objections would not be retroactively be made subject to the Rule 193.3 withholding procedures. However, paragraph 4(d) also “grandfathers” old responses that would now be inadequate under Rule 193 and old prophylactic objections; these also “need not comply” with Rule 193. Of course, a party could voluntarily comply with Rule 193; paragraph 4(d) states merely that the party “need not” comply.

But, as suggested above, this “grandfather” clause speaks only to whether the original, pre-1999 response, objection, privilege claims, amendment or supplementation is considered valid — in other words, whether the requesting party could move to compel or for sanctions as concerning that response, objection, privilege claims, amendment or supplementation.³⁵ Any

³⁵It is less clear whether responses or objections rendered invalid or incomplete by changes to the scope of discovery (*e.g.*, objections based on the “witness statement” discovery exemption) could be the basis for a motion to compel. On one hand, the

responses, objections, privilege claims, amendments or supplementations made *after* January 1, again, are governed by Rule 193.

Parties are obligated to supplement their outstanding discovery responses, objections, privilege claims, amendments or supplementations in accordance with either Rule 193.5 — the supplementation provision of the new rules — or former Rule 166b.6. By providing that pre-1999 responses, objections and privilege claims “need not comply with [Rule 193],” the “grandfather” provision of paragraph 4(d) necessarily extends to Rule 193.5. Thus, parties “need not” supplement their outstanding, pre-1999 responses, objections, privilege claims, amendments or supplementations in accordance with Rule 193.5. However, they may do so voluntarily. If parties elect not to comply with Rule 193.5, the supplementation requirements of former Rule 166b.5 governs.³⁶

Thus, parties with outstanding, pre-1999 discovery responses, objections, or privilege claims can choose between the old and new supplementation rules. There are advantages and disadvantages to each:

- C The Rule 193.5 supplementation requirement is general and continual; it requires supplementation “reasonably promptly” after the need for supplementation is discovered.³⁷ By contrast, former Rule 166b.6 required continual supplementation (“as soon as practical”) only for expert discovery and

“grandfather” provision of paragraph 4(d) provides only that old responses, etc., “need not comply” with Rule 193. This may suggest that these old responses that failed to comply with Rule 192 might have been subject to a motion to compel as of January 1. On the other hand, even assuming this was true, in theory, the responding party would not necessarily have had an immediate duty to supplement their responses to comply with Rule 192. See below.

³⁶Technical Corrections Order ¶ 4; see Part II(A), above.

³⁷Rule 193.5(b).

supplementation 30 days prior to trial for other types of information.³⁸

- C Former Rule 166b.6 permitted late supplementation only upon a showing of “good cause.” Rule 193.5 permits late supplementation upon a showing of either “good cause” or lack of unfair surprise or unfair prejudice.³⁹
- C Former Rule 166b.6 required formal supplementation — filing or service of a document supplementing the original response — whenever supplementation was required. Rule 193.5 requires formal supplementation only of information concerning witnesses; as to other types of information, a party need not formally supplement as to other types of information if it has been provided through other forms of discovery or in a writing, such as a letter.⁴⁰
- C Rule 193, unlike former Rule 166b, expressly permits supplementation or amendment of objections or privilege claims.⁴¹

In sum, there is a good bit of complexity concerning whether and when outstanding, pre-1999 discovery responses, objections and privilege claims must or will be supplemented to comply with the new rules. This complexity is a problem for both requesting and responding parties. Requesting parties are entitled to obtain supplemental responses complying with the new rules, but may have to wait until 30 days before trial to receive them. Regardless of the time at which they elect to supplement, responding parties are faced with the problem of pouring over reams of old discovery responses and bringing them in compliance with the new rules.

A practical solution that has been advocated at several CLEs by members of both the plaintiffs and defense bar is to “wipe the slate clean” by

serving requests for disclosures and agreeing that the responses satisfy any obligation to supplement pre-1999 discovery concerning the subject matter of the disclosures. Alternatively, if the responding party elects to proceed under Rule 193.5, the party’s responses to disclosures would satisfy their supplementation obligations as to outstanding discovery requests for the same types of information, except with regard to requests concerning witnesses.⁴²

III. Witness Statements

As noted above in Part II(A), the “witness statement” discovery exemption has been eliminated in all cases, even if the statement was taken or made prior to January 1, 1999. The manner in which this change has been implemented has prompted two types of questions: (1) those that may be summed up simply as “Why???!?”; and (2) those concerning the interplay of other privileges, as contemplated by comment 9 to Rule 192.

In response to the first type of question, much of the debate in the Supreme Court Advisory Committee — the Court’s advisory body on procedural rules, who originally drafted the new discovery rules — centered on the idea that witnesses’ factual information should not be withheld from the parties based on the circumstance that one party managed to get to the witness first. Also, because witnesses can obtain their own statements, the Committee believed that there could be unfairness in a case if some witnesses were willing to obtain and disclose their statements to one party or another and others were not. After lengthy debate, the Committee was largely of the view that witness statements, as defined in the rule, should be discoverable.

Because procedural rules often affect pending cases and thus have retroactive application, the change regarding witness statements was not made prospective only. This is the same way that the Court implemented the recent change in the Texas Rules of Evidence adopting the “subject matter” test in place of the “control group” test for the attorney-client privilege.

³⁸Former Rule 166b.6(a) & (b).

³⁹Rule 193.6(a).

⁴⁰Rule 193.5(b).

⁴¹Rule 193.2(d) & cmt. 3.

⁴²Rule 193.5(a).

Regarding the second question, the elimination of the witness statement privilege does not, as comment 9 states, render all witness statements automatically discoverable.⁴³ Rule 192 merely omits an express “witness statement” exemption and further provides that witness statements are not work product.⁴⁴ The net effect of these changes is that witness statements no longer are protected by any of what were termed “investigatory privileges” under former Rule 166b(3).⁴⁵ But witness statements may be protected against disclosure by other types of privileges, including, most notably, the attorney-client privilege.

IV. Experts

There have been several common questions with respect to the implementation of the new rules governing discovery of testifying experts. Rule 195 provides that requests for disclosures, oral deposition and reports are the sole permissible means of discovery concerning testifying experts. It also sets forth a detailed time line for “designating” testifying experts and producing them for deposition.

A. Applying the New Timelines in Pre-1999 Cases

Several lawyers have asked whether or how they are to comply with the new timelines for “designating” experts (generally speaking, 90 days before the end of the discovery period for plaintiffs; 60 days for defendants) and presenting them for deposition in pre-1999 cases where expert discovery already has been initiated by interrogatories.

If no requests for disclosures concerning experts have been served on a party, the party is not subject to the timetables of Rule 195. The term “designate” experts, as the term is used in

Rule 195, means to respond to Rule 194.2(f) requests for disclosures concerning experts.⁴⁶ Thus, the time lines for “designating” experts governs only responses to disclosures and not interrogatories or other forms of discovery concerning experts. Likewise, because the schedule for presenting experts for deposition is based on the time of “designation,” it does not apply in the absence of disclosure requests.⁴⁷

If the party is served with requests for disclosures concerning experts, the party would, all other things being equal, be bound by the Rule 195 timetables. But the party might be able to resist the requests for disclosures, designations or deposition schedules if these duplicate or conflict with prior discovery. See Part II(B), above; see also November 9 Order ¶ 4(e).

B. Discoverable Matters Not Covered By Disclosures

The scope of Rule 194.2(f) requests for disclosures concerning testifying experts is narrower than the scope of discovery for experts generally. For example, Rule 192.3(e), the rule defining the scope of discovery concerning experts, authorizes discovery concerning “consulting plus” experts and bias. Rule 194.2(f) disclosures, by contrast, apply only to testifying experts and do not extend to bias. These distinctions have confused some lawyers.

These types of issues can be resolved by considering the relationship between Rule 192, the scope of the discovery rule, and Rule 195. Rule 192 defines the scope of discovery, including expert discovery. Succeeding rules define how and when this discovery can be obtained. Rule 195 is one of these rules. It limits the means of obtaining permissible discovery concerning testifying experts to disclosures, oral depositions, and reports. The permissible discovery concerning testifying experts that can’t be obtained by disclosures, in other words, must be obtained by oral depositions or reports.

⁴³Rule 192, comment 9.

⁴⁴Rule 192.5(c)(1).

⁴⁵Broadly speaking, the former “attorney work product” and “party communication” exemptions have been subsumed in the new “work product” exemption. Rule 192.5(a).

⁴⁶Rule 195.2.

⁴⁷Rule 195.3.

Rule 195, however, does not limit the means of obtaining discovery concerning “consulting plus” experts. Thus, this discovery can be obtained through any means permitted by the rules (interrogatories, requests for production, etc.) other than disclosures.

V. The New Response Period for Document Requests Served With Deposition Notices

The new rules provide that document requests served with a deposition notice — what were formerly called “subpoenas duces tecum” — are governed by the same rules as ordinary requests for production under Rule 197 or 205.⁴⁸ Importantly, this means that, with respect to a notice and document request served on a party, the party has 30 days to respond to the request.⁴⁹

A number of lawyers have inquired as to whether or how they should object to the production of documents in response to a deposition notice served on them less than 30 days before the deposition if they are a party. Because Rule 197 does not require a response or objections until 30 days after service, the responding party, in theory, has no obligation to do either until that time. But the party must show up at the deposition if the notice is otherwise valid.

In light of the Rule 191.2 duty to agree and confer, however, responding parties in this situation might be wise to inform the party noticing the deposition in advance of the deposition that they do not intend to comply with the document request at the deposition. In many instances, the party noticing the deposition will agree to postpone the deposition until after the documents can be obtained. Furthermore, the responding party would avoid the appearance of simply “jerking around” the opposing party — a factor that might become important if the opposing party later moved to compel production of the documents.

⁴⁸Rule 199.2(b)(5) & cmt. 1; Rule 200.1(b).

⁴⁹*Id.* Document requests served with a deposition notice to a nonparty must be complied with within a “reasonable time” stated in the notice. Rule 205.3(b)(2).

A related issue concerns whether the three-day period for objecting to the time and place of an oral deposition in Rule 199.4 applies to document requests served with an oral deposition. Rule 199.4 provides that a motion to quash or for protective order concerning the time or place of an oral deposition stays the deposition without need for court order if the motion is filed within 3 days after the notice is served. This requirement does not apply to objections to the time and place for compliance for document requests served with deposition notices, but only to those concerning the time and place of the deposition itself.

VI. Service of Discovery With Citation

The new discovery rules contemplate that, as was the case under the former rules, plaintiffs can have initial sets of discovery served with an original petition.⁵⁰ But some litigants have had problems when attempting to transmit discovery through court clerks to be served with the petition. Some court clerks, relying on new Rule 191.4, have refused to file or accept the discovery.

Some litigants have devised the practical solutions of attaching the discovery as an exhibit or appendix to the petition or incorporating the request into the petition. The Court also is taking steps to clarify the relationship between Rule 191.4 and rules permitting the service of discovery with the original petition. It may send a letter to court clerks explaining that while discovery need not be filed under the new rules, they should accept the discovery but not formally file it and transmit it to the constable for service along with the petition.

VII. Certification of Discovery Served By Court Reporters and Records Services

A large number of court reporting firms and records services have inquired as to whether, in light of the certification requirement of Rule 191.3, they may sign deposition notices or document

⁵⁰See Rules 194.3(a) (requests for disclosures), 196.2(a) (requests for production), 196.7(c)(1) (requests to enter property), 197.2(a) (interrogatories), 198.2(a) (requests for admission).

requests to nonparties. The new discovery rules contemplate that, as was the common practice under the former rules, court reporters or others qualified to take depositions may issue and serve subpoenas and serve discovery on a nonparty with the subpoena compelling response to that discovery.⁵¹ Under the former rules, these individuals typically would sign the discovery request as well.

Rule 191.3 provides that each discovery instrument must be signed “by an attorney” or, if none, the party, and that the signature constitutes certification that the instrument is consistent with the rules, has a good faith factual basis, is not interposed for any improper purpose, and is not unreasonable or unduly burdensome.⁵² Some court reporting and records firms have construed this rule to require them to obtain the actual signature of the attorney authorizing them to serve the discovery. This is quite a cumbersome procedure.

One solution may be that court reporting firms and records services need not obtain the actual signature of the authorizing attorney, but may themselves sign the discovery on behalf of the attorney if the attorney so authorizes. However, the authorizing attorney would still be bound by Rule 191.3 to the same extent as if he or she physically signed the discovery.

VIII. Timekeeping in Oral Depositions; Other Certification Requirements

As noted in Part II(A), above, deposition officers must keep track of and certify the time used by each party in all oral depositions taken on or after January 1. This rule change has prompted a number of questions concerning how the court reporter must keep time and whether or how they should decide disputes among parties concerning the tabulation of time or how the time should be credited against the various new limits.

⁵¹Rule 176.4(c).

⁵²The signer need not restate the matters that Rule 191.3 deems the signature to certify; rather, the signature alone constitutes certification of those matters.

To clarify these types of issues, the Court recently approved the following comment in the new *Uniform Format Manual for Texas Court Reporters*.⁵³ The comment also addressed other certification requirements in new Rule 203 and how these requirements apply when the deposition is recorded both stenographically and non-stenographically:

Comment Concerning Certification of Depositions, Timekeeping, and Other Duties of Deposition Officers

New Rule of Civil Procedure 203 sets forth the requirements governing presentment, signature, certification, and delivery of oral and written depositions. These requirements apply to any “deposition officer,” who, for purposes of the discovery rules, is defined as any person responsible for recording a deposition. There may be more than one “deposition officer” in an oral deposition. For example, if a party notices an oral deposition to be recorded non-stenographically, another party may notice the deposition to be recorded stenographically by a [certified stenographic reporter (CSR)]. See Tex. R. Civ. P. 199.1(c), 199.2(b)(3). In such a case, both the person responsible for recording the deposition non-stenographically and the person responsible for recording the deposition stenographically would be a “deposition officer” required to comply with Rule 203 with respect to the form of recording for which that person was responsible. . . .

A deposition officer responsible for a stenographic recording of an oral deposition must present the transcript for signature in accordance with Rule 203.1, although this requirement does not apply to non-stenographic recordings or depositions on written questions. See Tex. R. Civ. P. 203.1(c). Each deposition officer must also certify a deposition in accordance with Rule 203.2(a)-(g), although subparts (b), (c) and (e) obviously do not apply to depositions on written questions and subparts (b), (c) and (f) do not apply to non-stenographic recordings of oral depositions.

An important new certification requirement applicable to oral depositions, however recorded, is that deposition officers must certify the amount of time used by each party at the deposition. See Tex. R. Civ. P. 203.2(e). This

⁵³Order in Misc. Docket No. 99-9067, dated April 8, 1999. The manual, which is effective May 1, 1999, replaces the former Order Governing the Form of the Appellate Record in Civil Cases and Order Governing the Form of the Appellate Record in Criminal Cases, and, for the first time, regulates the format of freelance court reporter transcriptions like oral depositions.

requirement is intended to aid enforcement of new time limits on the examination and cross-examination of witnesses. *See* Tex. R. Civ. P. 190.2(c), 190.3(b)(2), 199.5(c). Although time-stamping . . . may facilitate the completion of this task, it is not required; rather, the deposition officer may simply use a stopwatch or other time-keeping device. The time credited to a party obviously should not include recesses or off-the record discussion, and it should not include protracted lapses, such as when a witness is reviewing a stack of documents. But the time would include ordinary pauses by the interrogator or the witness.

Nothing in the timekeeping requirement requires or even permits a deposition officer to referee attorney disagreements at depositions. If a dispute develops among counsel about how time is to be kept, the officer should not attempt to resolve it but should simply make a record of the disagreement so that it can be taken to the court if necessary. If an officer makes a mistake in keeping or certifying time, the court would treat it as any other mistake made by the officer and order any adjustments in discovery considered appropriate. Nothing in the rules requires an officer to keep track of the time remaining to an attorney during a deposition, nor should an officer cease recording the deposition if the officer or a party determines that the time limits have been exceeded. An officer's responsibility is to make an accurate record, not to police counsel or witnesses. Deposition officers should not allow themselves to be injected into counsel's disputes. If lawyers cannot agree on the peculiar details of counting time in a particular situation, they should make a record of their respective positions and let a judge sort it out.

IX. Non-Stenographic Depositions

A related issue concerns whether and when parties may have an oral deposition recorded non-stenographically (*e.g.*, audio or video tape), and who may make the recording. Rule 203 liberalizes somewhat the ability of parties to use non-stenographic deposition recordings in hearing or trial. Under the former rules, parties could use such recordings only if they also made a written transcription, unless otherwise ordered by the court.⁵⁴ Under the new rules, the opposite is the case — parties may use non-stenographic recordings to the same extent as stenographic recordings, unless otherwise ordered by the court.⁵⁵ But parties may record an oral deposition non-stenographically only if they comply with certain statutory conditions. These conditions, and their relationship to Rule 203, are explained in the

following comment in the *Uniform Format Manual for Texas Court Reporters*:

Comment Concerning Non-Stenographic Depositions

Whether and when an oral deposition can be recorded non-stenographically is governed primarily by statute. Section 52.021(f) of the Government Code generally requires that all depositions taken in this state must be recorded stenographically by a [certified stenographic reporter (CSR)]. Exceptions to this requirement, however, include depositions on written questions (which are governed by Section 21.001 of the Civil Practice and Remedies Code) and depositions recorded by a party to the action, their lawyer, or a full-time employee of either. *See* Tex. Govt. Code §§ 52.021(f), 52.033; Tex. Civ. Prac. & Rem. Code § 20.001. Thus, for example, a litigant or lawyer in a case may notice an oral deposition to be recorded non-stenographically and have their secretary record the proceeding by audiotape or videotape. *See Burr v. Shannon*, 593 S.W. 2d 677, 677-78 (Tex. 1980) (orig. proceeding) (predecessor statute). But so long as some party has an oral deposition recorded stenographically by a CSR, another party may have any person record the deposition non-stenographically. *See* Op. Tex. Att'y Gen. No. DM-339 (1995), at 2.

If a party arranges to have an oral deposition recorded non-stenographically by someone other than a CSR, the party must arrange to have the witness sworn by a notary or other person competent to administer oaths. *See* Tex. R. Civ. P. 199.5(b); *see also* Tex. Govt. Code § 52.025(b) (CSR is competent to administer oaths).

A non-stenographic recording of an oral deposition may be used in hearing or trial to the same extent as a traditional stenographic recording. *See* Tex. R. Civ. P. 203.6(a). Unlike the case under the former discovery rules, a party need not obtain a written transcription of a non-stenographic recording in order to use the deposition unless ordered by the court. *Id.*; *compare* Former Rule 202.1.e.

X. Shades of Gray

Finally, a number of questions have concerned concepts in the rules that are not necessarily capable of precise definition. Frequent examples have concerned the meaning of “side” in the time limits of Rules 190 and 199.5(c); the meaning of an “abusive” questions in Rule 199.5 and, more generally, when a party can instruct a deposition witness not to answer a question; and how thoroughly a party must respond to requests for disclosures concerning liability or damage contentions.

⁵⁴Former Rule 202.1.e.

⁵⁵Rule 203.6(a).

The new rules incorporate some of these types of concepts to provide needed flexibility for parties and courts to tailor discovery procedures and limitations to the needs of individual cases. Precisely how these concepts should be applied in myriad potential cases and fact scenarios must necessarily await further judicial explication and practical experience. No set of rules can anticipate every conceivable situation to which a rule might be applied. In an effort to guide application of the rules and the evolution of their practical meaning, however, the Court has provided, in addition to the text of the rules themselves, practice commentaries and statements of policy and intent in the notes and comments to the rules and in the Explanatory Statement Accompanying the 1999 Amendments to the Rules of Civil Procedure Governing Discovery. These statements of policy and intent are to guide the application of the rules to any “gray areas.”

XI. (Reserved for Expansion)