THE FIRST YEAR UNDER THE NEW DISCOVERY RULES: THE BIG ISSUES THUS FAR

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JANUARY 1, 2000

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Bob 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, *The First 100 Days Under the New Discovery Rules: The Big Issues Thus Far*, and TEXAS PRACTICE: HANDBOOK ON TEXAS DISCOVERY PRACTICE: THE NEW RULES GOVERNING DISCOVERY (West 1999) with Supreme Court Advisory Committee members Professor Alex Albright and Charles Herring. Also, before joining the Supreme Court, Bob wrote *A Guide to Recent Changes and New Challenges in Texas Prejudgment Interest Law*, 30 TEXAS TECH L. REV. 71 (1999).

Bob is active in the Austin Young Lawyers' Association and the Travis County Bar Association. He recently was elected to the AYLA Board of Directors for the 1999-2000 bar year and is co-chairing the 2000 Travis County Bench-Bar Conference. Additionally, Bob is active in numerous civic and charitable endeavors outside of the legal profession, including Austin Big Brothers/Big Sisters, Leadership Austin, Young Men's Business League, and various arts groups.

Before joining the Supreme Court, Bob practiced law for four years in the trial section of Baker & Botts in Houston. Prior to working at Baker & Botts, he was a briefing attorney for Chief Justice Thomas R. Phillips of the Texas Supreme Court.

Bob 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. He is a sixth generation Texan, born in Waco and raised in Temple.

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

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Introduction

This paper surveys the effects of the 1999 Texas discovery rules during their first year of implementation.[1] As Rules Attorney for the Texas Supreme Court, I — along with the Supreme Court Rules Advisory Committee and the State Bar Court Rules Committee, the two principal bodies that advise the Court regarding its rules — attempt to monitor how the new discovery rules, as well as other court rules, are affecting Texas practice. Additionally, I have served, and continue to serve, as a "hotline" for questions and comments from lawyers and other stakeholders in the Texas civil justice system concerning the new discovery rules, their origins and intent. This paper summarizes what I have heard and learned about the effects of the new discovery rules to date.

Part I relates the most common anecdotal general observations that our advisory committees and individual Texas lawyers and judges have shared with me concerning the effects of the new discovery rules. Part II discusses some of the specific issues and questions concerning the new rules that I or other Court personnel have most frequently encountered in phone calls, letters, or at CLEs. This portion of the paper is an update of *The First 100 Days Under the New Discovery Rules: The Big Issues Thus Far*, which originally was released in April 1999. Part III surveys the few reported appellate cases that have addressed issues arising under the new discovery rules.[2]

Please keep in mind that, as an employee 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 merely to relate what I have heard about the effects of the new rules and, where possible, provide you with some guidance based solely on the text of the rules, their "legislative history," and a purely factual recitation of the case law. Any opinions or observations expressed in this paper are my own.

Before proceeding with this discussion, however, I cannot emphasize enough that ***the Court encourages and values your input concerning the effects of the new discovery rules***. If these rules prove to be a success, it is due largely to the vast volume of helpful comments the Court and its advisory committees received while drafting them. Now that the rules have been implemented, the Court, if anything, has an even greater need for your comments and suggestions "from the trenches" to ensure that the rules are achieving their intended purposes. How are the new rules working? What problems have you experienced? Alternatively, what improvements have you seen? What are your thoughts regarding the issues discussed in this paper? Please send your comments in writing to:

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[1]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).

[2]Part III focuses only on cases that address issues unique to the new discovery rules. It does not address cases arising under the new rules that apply preexisting legal principles that are carried over unaltered from the former discovery rules.

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You may also email your comments to me at bob.pemberton@courts.state.tx.us. Any and all of your comments and suggestions will be promptly referred to the Rules Advisory Committee and the Court Rules Committee for study and recommendations for further action.

I. General Observations

The silence is unusually loud . . . .

Willie Nelson, *The Ghost* (1962)

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From the perspective of my job, the first year under the new Texas discovery rules — like the old saying about March weather — blew in like a lion and out like a lamb. During the first 3-4 months under the new discovery rules, I was receiving dozens of calls each day concerning the rules from a wide range of stakeholders in the Texas civil justice system — lawyers, judges, legal assistants, clerks, court reporters, and members of the general public. As might be expected with any new law or rule, the new discovery rules raised a lot of questions as people began to read and understand them.[3] Some lawyers — although not the majority who commented to the Court — also complained about the fact that the rules were being changed at all and expressed skepticism regarding the benefit of the changes.

To help smooth the transition to the new discovery rules, Justice Hecht and/or I spoke at dozens of CLE courses across Texas, wrote three papers — *A Guide to the 1999 Texas Discovery Rules Revisions*, a supplement to that paper, and *The First 100 Days Under the New Discovery Rules: The Big Issues Thus Far* — and made these papers, as well as copies of the rules themselves, available in the Supreme Court's Clerk's office and on the Court's website at www.courts.state.tx.us.[4] In addition to these efforts by the Court, numerous other commentators published articles and books providing guidance on the interpretation and application of the new rules. A list of some of these resources is attached as Appendix A.[5]

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[3]These tasks were made even more challenging by some initial, occasional confusion as to the correct text of the rules. As noted above, the new discovery rules were promulgated in two orders, the November 9 Order and the December 31 "Technical Corrections" Order. In addition to these two promulgations, the Court earlier had released three draft versions for comment. In the early months of 1999, some people mistakenly relied on one of the draft versions or only on the November 9 Order. *See also* Part II(A), below, discussing transition issues and the relationship between the November 9 Order and the Technical Corrections Order.

[4]We also made available redlined and clean copies of documents that consolidate the November 9 Order and the Technical Corrections Order, copies of each draft of the discovery rules that the Court released for comment, and derivation and distribution tables. These materials can be accessed two different ways from the Texas Judiciary home page at www.courts.state.tx.us: (1) click on "Supreme Court" and then "Rules"; or (2) click on "Court Rules and Texas Law" and then "Procedures and Rules Revisions."

The standard practice of the Court in recent years has been to post on the website all rules promulgations, as well as all drafts it has released for public comment.

[5]You are invited to submit citations to or copies of any other articles or CLE materials addressing the new discovery rules that are not yet included on this list.

This list does not include regularly published treatises or guides to Texas procedural rules, such as those of Professor Dorsaneo and Justice O'Connor. These commentators, among others, have published updated volumes that address the new discovery rules.

After those busy initial few months, however, the volume of questions I have received concerning the new discovery rules has decreased dramatically to an average of around 3-5 per week.[6]

Texas courthouses appear to be similarly silent with respect to issues and disputes under the new rules. While no definitive statistics are available, anecdotal accounts from judges and lawyers across Texas indicate that there have been few hearings under the new rules to date. Likewise, there have been only a handful of reported appellate cases under the new rules and less than ten mandamuses to the Supreme Court raising issues under the new rules — hardly the landslide that some predicted at the time the rules were implemented.

The following is some other common anecdotal feedback concerning the new discovery rules:

C The new deposition conduct rules,[7] initially one of the most controversial provisions in the new discovery rules,[8] are winning some acclaim. A number of lawyers have recounted instances where the new rules have greatly reduced time and expense, particularly in acrimonious cases where speaking objections and arguments on the record previously added hours or days to depositions.

C Requests for disclosure, in general, have proven to be a helpful tool for obtaining basic discoverable information quickly and efficiently. Also, the new limitations on objections to written discovery have, at a minimum, generally caused lawyers to consider more carefully whether their objections are well-grounded, thus curtailing "boilerplate" objections. But some lawyers still have encountered reticence and gamesmanship from responding parties, particularly with regard to contention disclosures. These types of problems, and some ways to address them, are discussed in Part II(I), below.

C In urban jurisdictions and in larger cases, courts are tending to enter their own Level 3 discovery control plans[9] or parties are seeking entry of such orders by agreement. But in smaller cases and in less urban jurisdictions, the majority of cases are "defaulting" into Level 2.[10] There seem to be few cases going into Level 1.

Whatever the discovery level, the new limits appear to be having their intended effect of causing parties to think about and plan discovery early in the case — and work together in this process. This tends to make discovery more efficient and less acrimonious.

C In addition to seeking agreed Level 3 discovery control plans, lawyers appear to be making widespread use of Rule 191.1 to tailor the new discovery rules to their cases or simply to "agree around" certain aspects of the new rules. For example, at least in the first few months of 1999, many lawyers used Rule 191.1 to "agree around" the new deposition conduct rules, preferring the less restrictive and more familiar former rules.

C A common reaction to the new rules has been one of pleasant surprise. Although many lawyers had an initial aversion to change, once they have taken the time to read the new rules and attempt to understand them, most either have endorsed the changes or have at least not opposed them or found them to be harmful.

Complaints regarding the new rules have been relatively rare. Those that have been raised

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[6]*Cf.* the Maytag repairman in the familiar television commercials.

[7]Tex. R. Civ. P. 199.5.

[8]*See* David C. Kent, *The Lawyer as "Potted Plant"*, TEXAS LAWYER, Aug. 24, 1998, at 24.

[9]Rule 190.4.

[10]Rule 190.3. This information is from the State Bar Court Rules Committee.

have most prominently concerned the following issues:

- *The discoverability of witness statements*. Probably the most controversial aspect of the new rules has concerned the discoverability of witness statements obtained prior to January 1, 1999. This issue is discussed below in Part II(B) and Part III(A). As explained in Part II(B), the State Bar Court Rules Committee currently is considering ways to simplify some of the rules impacting this issue.

- *Instructions not to answer.* Some lawyers have expressed concern that Rule 199 and its comment 4 allow or encourage lawyers to excessively instruct witnesses not to answer. Both the Rules Advisory Committee and the Court Rules Committee currently are studying the extent to which this is a widespread problem and whether or how Rule 199 should be amended to address it.

- *Requests for disclosure in family law cases*. Some family lawyers have maintained that the current requests for disclosure, as well as some of the deadlines in the rules, are not well suited for family law cases.[11] To address these concerns, the Supreme Court asked the Family Law Section of the State Bar to draft proposed requests for disclosures for use in family law cases.[12] The Section recently submitted such a proposal to the Rules Advisory Committee.

Overall, the transition to the new discovery rules seems to be going smoothly. The confusion or consternation initially expressed by some lawyers seems to have gradually been supplanted by general contentment and even pleasant surprise or support. Indeed, the anecdotal evidence suggests that the new discovery rules are generally fulfilling their intended purposes, "to clarify and streamline discovery procedures and to reduce costs and delays associated with discovery practice."[13] Where aspects of the rules have appeared to raise frequent complaints or concerns, the Supreme Court's rules advisory bodies have begun to address these areas.[14]

But, in fairness, it is still too early to draw any firm conclusions regarding many effects of the new discovery rules. It remains to be seen, for instance, whether the reduction in inquires to the Court and the dearth of discovery hearings and appellate court proceedings indicates that lawyers and judges are coming to understand the new rules — perhaps utilizing the growing array of CLE materials and other published reference sources — and that the rules are accomplishing their intended purposes, or is merely the "eye of the hurricane," a lull resulting from lawyers not yet understanding the rules well enough to pick fights about them or play games with them. A factor potentially contributing to such a lull is an apparent widespread use of Rule 191.1 to "agree around" aspects of the new rules that lawyers don't understand or that might otherwise give rise to disputes.

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[11] *See* Kenneth G. Raggio, *Discovery Rules Don't Work in Family Law Cases*, TEXAS LAWYER (Dec. 6, 1999), at 30.

[12] The input of the Family Law Section was invaluable as the new discovery rules were being drafted. For example, the separate Level 2 discovery period for family law cases, *see* Rule 190.3(b)(1)(A) (ending 30 days before the date the case is set for trial); *compare* Rule 190.3(b)(1)(B) (discovery period in other Level 2 cases ends 9 months after discovery is initiated), was based on a suggestion from this group and addresses the fact that the evidence in family law cases typically continues to evolve until trial. *See also* Letter from Cheryl L. Wilson to Chief Justice Thomas R. Phillips, Feb. 19, 1999 (conveying resolution from Family Law Section commending Supreme Court's receptiveness to Section's input) (on file with the Supreme Court of Texas).

[13] Explanatory Statement Accompanying the 1999 Amendments to the Rules of Civil Procedure Governing Discovery ¶ 1.

[14] In addition to the three issues identified above, *see also* Part II(E)(1), (I)(2), and J, below.

In sum, the impact of the new discovery rules one year after implementation has generally been "so far, so good," but we'll know more as time progresses.

II. Common Questions and Issues

A. Transition Issues

1. 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"). But these types of questions have become increasingly less common as the months have passed.

Most transition 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.[15]

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 begun[16]:

- 176 (subpoenas). Thus, among other changes, lawyers can now issue subpoenas in all civil cases.[17]
- 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.
- 192 (scope of discovery). This includes the changes to the scope of discovery affecting witness statements.
- 194 (requests for disclosures). Thus, parties can serve requests for disclosures in all cases, all other things being equal.[18]
- 196 (requests for production and entry onto property).
- 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* par. 2, below.
- 198 (requests for admissions).
- 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.
- 200 (depositions on written questions). Thus, the new 20-day notice period governs written depositions taken after January 1, regardless when the case was filed.[19]
- 201 (foreign depositions).
- 203 (deposition certification). This includes the new timekeeping requirement.[20]

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[15] *See* note 1, above.

[16] *See generally* November 9 Order ¶ 4.

[17] Rule 176.4(c).

[18] *But see* Part II(A)(2), below.

[19] Rule 200.1(a).

[20] Rule 203.2(e); *see* Part I(G), below.

- 204 (physical and mental examinations).

- 205 (nonparty discovery; document requests to nonparties). This means that document requests to nonparties may be used in all cases.

- 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:

- Rule 190, the new differential discovery tracking scheme, does not apply to pre-1999 cases.[21] 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 discovery control plan in a pre-1999 case; because the court sets each discovery limitation in the plan, it can take into account prior discovery.[22]

  Absent a Level 3 plan, the discovery period in pre-1999 filed cases is deemed to end on the date the case is set for trial.[23]

- 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 January 1, 1999.[24] 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.[25] Some specific issues that have arisen regarding this exception are discussed below in Part II(E)(2).

- 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.[26]

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[21]November 9 Order ¶ 4(b).

[22]*Id*.

[23]Technical Corrections Order ¶ 3.

[24]November 9 Order ¶ 4(c).

[25]Technical Corrections Order ¶ 6.

[26]The provision governing transition to Rule 193, paragraph 4(d) of the November 9 Order, provides:

> Rule 193 is effective January 1, 1999, except that a response to a discovery request, an objection to a discovery request, an assertion of privilege, or an amendment or supplementation to a discovery response made before that date need not comply with the new rule.

- 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.[27] Moreover, if interrogatories concerning experts were served prior to January 1, 1999, those should be answered[28]; Rule 195.1 otherwise would make requests for disclosures the exclusive means of obtaining written discovery concerning experts.[29]

- Rule 202, the new pre-suit deposition rule, applies only to cases filed after January 1, 1999.[30] 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 depositions taken under the former rules may be used in hearings or trial.[31]

- 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."[32]

3. All of the old discovery rules are repealed effective January 1, 1999.[33] 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.[34]

One specific instance when this occurs concerns numerical limits on interrogatories.[35]

Some lawyers have construed the phrase "made before that date" (January 1, 1999) as modifying only "discovery response" in "amendment or supplementation to a discovery response made before that date." Such a reading would suggest that amendments or supplementations to pre-1999 discovery responses made after January 1, 1999 are not governed by Rule 193. A reading of the entire paragraph 4(d), however, reveals that "made before that date" does not modify "discovery response" but instead 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 — as well as pre-1999 responses, objections, and privilege assertions. Were it otherwise, the phrase "made before that date" would not limit the preceding references to "a response to a discovery request," "an objection to a discovery request," and "an assertion of privilege," meaning that all responses, objections and privilege assertions, whenever made, would be perpetually "grandfathered" and never subject to Rule 193. Such a reading would render new Rule 193 a nullity.

[27] November 9 Order ¶ 4(e).

[28] November 9 Order ¶ 4(e).

[29] Rule 195.1.

[30] November 9 Order ¶ 4(f).

[31] *Id.*, *see* Rule 202.5 & cmt. 2.

[32] November 9 Order ¶ 5. This provision was construed in several cases addressing the discoverability of witness statements obtained prior to 1999. *See* Part III(A), below.

[33] November 9 Order ¶ 3.

[34] Technical Corrections Order ¶ 4.

[35] And perhaps also with regard to the supplementation requirements of Rule 193.5. *See* Part II(A)(3), below.

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 would be no numerical limitation on interrogatories in pre-1999 cases.[36] 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 still serve up to a total of two sets of thirty interrogatories.

2. The Problem of Duplicative Disclosure Requests

A more difficult transition 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, many lawyers immediately fired off requests for disclosure 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.[37]

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.[38] 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 standards governing written discovery generally in Rule 193. *See* Part II(A)(3), 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.[39] 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.[40]

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."[41] Requiring parties to answer disclosures that merely restate

[36] *But see* November 9 Order ¶ 5.

[37] This problem presumably should not recur in many 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).

[38] Rule 194.5 & cmt. 1.

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

[40] Rule 194 cmt. 1.

[41] November 9 Order ¶ 5.

old discovery responses would conflict with these goals.[42]

Finally, even though a protective order may be warranted, parties may actually want to respond to duplicative requests for disclosure as a means of resolving thorny issues regarding supplementation of outstanding discovery requests. *See* Part II(A)(3), 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.

3. 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:

- Parties must now assert privileges by withholding rather than by objecting.[43]
- Prophylactic objections and privilege claims — commonplace under the former rules — are now forbidden.[44] "Boilerplate" objections — "numerous unfounded objections" — are not only forbidden, but waive any valid objections they "obscure."[45]
- 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.[46] 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.[47]

One of the practical implications of these changes is that many parties in pre-1999 cases will have outstanding discovery responses that, while perhaps proper under the former rules, will 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 Rules 192 or 193 to comply with those rules. The answer 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]." This means that old, pending privilege claims asserted through objections are not retroactively made subject to the Rule 193.3 withholding procedures.[48] Also, old prophylactic objections and old responses that would now be inadequate under the more demanding Rule 193 duties to respond "need not comply" with Rule 193. This "grandfather" clause was included so parties would not have to

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[42] *See 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, unlike protective orders, is not expressly referenced in Rule 194 or its comments.

[43] Rules 193.2(f), 193.3.

[44] Rule 193.2(c) & cmt. 3.

[45] Rule 193.2(e).

[46] Rule 193.1, 193.2(b) & cmt. 2.

[47] Rule 193.2(b).

[48] Additionally, even under the new discovery rules, if a party has asserted a privilege by objecting rather than withholding, this is sufficient to preserve the privilege until the error is "pointed out." Rule 193.2(f).

review and rewrite reams of old discovery responses merely to bring them into technical compliance with Rule 193. Of course, a party could voluntarily comply with Rule 193; paragraph 4(d) states merely that the party "need not" comply. A court could also order a party to comply with the new rule. Rule 191.1.

But, as suggested above, paragraph 4(d) speaks only to whether the pre-1999 response, objection, privilege claim, amendment or supplementation is considered proper — any responses, objections, privilege claims, amendments or supplementations made *after* January 1 must comply with Rule 193. Rather, paragraph 4(d) merely provides that parties do not have a duty to supplement pre-1999 discovery responses, objections, privilege claims, and amendments or supplementations that were adequate under the former discovery rules for the sole purpose of bringing them into compliance with Rule 193's standards. But if the party has a duty to supplement deriving from some other rule, the party must supplement, and must do so in compliance with Rule 193. One example of such a rule is Rule 192.

In contrast to Rule 193, there is no "grandfather" clause for Rule 192. Thus, if the responding party made pre-1999 objections or privilege claims to requests that, due to changes to the scope of discovery, would now be proper, the party's pending response would be inadequate as of January 1 and the party would be required to supplement that response.

Another example where supplementation would be required would be if a pre-1999 response would have been inadequate or incomplete under the former rules, as well as under Rule 193. This would be the case if, for example, a party failed or refused to answer a pre-1999 discovery request, the response was otherwise incomplete or incorrect when made, or intervening events — other than the adoption of Rule 193 — made it incomplete or incorrect.

The issue then becomes the time at which the responding party must supplement their outstanding discovery responses. 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.[49]

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:

- The Rule 193.5 supplementation requirement is general and continual; it requires supplementation "reasonably promptly" after the need for supplementation is discovered.[50] By contrast, former Rule 166b.6 required continual supplementation ("as soon as practical") only for expert discovery and supplementation 30 days prior to trial for other types of information.[51]

- 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 writing, such as in a letter.[52]

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[49] Technical Corrections Order ¶ 4; *see* Part II(A), above.

[50] Rule 193.5(b).

[51] Former Rule 166b.6(a) & (b).

[52] Rule 193.5(b).

- Rule 193, unlike former Rule 166b, expressly permits supplementation or amendment of objections or privilege claims.[53]

Moreover, if parties opt to supplement in accordance with Rule 193.5, they would also avail themselves of Rule 193's standard governing late supplementation, which is set forth in Rule 193.6. This standard is more flexible than that under Former Rule 166b.6. Former Rule 166b.6 permitted late supplementation only upon a showing of "good cause." Rule 193.6 permits late supplementation upon a showing of either "good cause" ***or*** lack of unfair surprise or unfair prejudice.[54]

This discussion illustrates the 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 governing scope of discovery, 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 in many cases will be faced with the problem of pouring over reams of old discovery responses.

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, that rule's provisions for informal supplementation would enable the party to satisfy, via disclosure responses, its supplementation obligations as to outstanding discovery requests for the same types of information, except with regard to requests concerning witnesses.[55]

[53]Rule 193.2(d) & cmt. 3.

[54]Rule 193.6(a).

[55]Rule 193.5(a).

B. Witness Statements

As noted above in Part II(A)(1), the "witness statement" discovery exemption has been eliminated in all cases, even if the statement was obtained prior to January 1, 1999. This has been the single most controversial aspect of the new discovery rules and has already given rise to several reported appellate cases. 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 Rules Advisory Committee — which prepared the initial drafts of 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.

Regarding the second question, the elimination of the witness statement privilege does not, as comment 9 states, render all witness statements automatically discoverable.[56] Rule 192 merely omits an express "witness statement" exemption and further provides that witness

[56]Rule 192, cmt. 9.

statements are not work product.[57] 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).[58] But witness statements may be protected against disclosure by other types of privileges, including, most notably, the attorney-client privilege.

Once Texas lawyers began to understand this important distinction, they started advancing a number of sometimes novel theories in attempts to apply or extend the attorney-client privilege to witness statements obtained by non-lawyers, such as insurance adjusters or investigators. This trend already has bred disputes and case law, and is likely to continue to do so, all other things being equal.[59] A key contributing factor likely will be the yet largely undefined parameters of the new subject matter test under Texas law.

The State Bar Court Rules Committee currently is evaluating whether the subject matter test and/or Rule 192.3(h) can be amended to clarify the types of witness statements that are protected by the attorney client privilege. One concept being explored would be to identify categories of statements according to the identity of the person who obtained them and his or her relationship to the witness or the witness' lawyer, and then define whether statements within each category are privileged or not privileged.

C. Experts

There have been several common questions regarding 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.

1. 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.[60] Thus, the time lines for "designating" experts governs only responses to disclosure requests and not interrogatories or other forms of discovery concerning experts. Likewise, because the schedule for presenting experts for deposition is

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[57]Rule 192.5(c)(1) & cmt. 8.

[58]Broadly speaking, the former "attorney work product" and "party communication" exemptions have been subsumed in the new "work product" exemption. Rule 192.5(a).

[59]But some have suggested that insurers and others who regularly obtain witness statements will simply cease to take such statements and rely instead on notes from interviews, *see* Rule 192.3(h), or will attempt to shield future statements of parties under the attorney-client privilege by having lawyers take the statements. *But see In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340-41 (Tex. App. — Texarkana 1999, orig. proceeding) (distinguishing between communications to lawyers in their capacity of rendering legal services, which would be privileged, and those obtained while the lawyer was acting as an "investigator," which would not be privileged); *see also In re Monsanto*, 998 S.W.2d 917, 930 (Tex. App. — Waco 1999, orig. proceeding) (questioning whether all corporate communications to in-house lawyers would be privileged, even under the subject matter test, because "[w]e do not believe that it is necessary for the legal department to be advised of every development out in the field, no matter how minute"), discussed below in Part III(C)(2).

[60]Rule 195.2.

based on the time of "designation," it does not apply in the absence of disclosure requests.[61]

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(A)(2) , above; *see also* November 9 Order ¶ 4(e).

2. 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 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.

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, including interrogatories and requests for production.[62]

[61]Rule 195.3.

[62]But there are no requests for disclosure concerning "consulting plus" experts. Hence, this form of written discovery would be unavailable.

D. Changes to the Response Period for Document Requests Served With Deposition Notices

The new discovery 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.[63] 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.[64]

It is important not to confuse this rule change with the rules governing the deadlines for responding to subpoenas under Rule 176 (as distinguished from *subpoenas duces tecum*, the former term for document requests served with a deposition notice), document requests served on *nonparties* under Rule 205, and document requests served with deposition notices to *nonparties*.

- In contrast to Rule 197, there is no minimum response period specified in Rule 176.[65] This is true for both subpoenas served with discovery requests and trial subpoenas.

[63]Rule 199.2(b)(5) & cmt. 1; Rule 200.1(b).

[64]*Id*.

[65]*See generally* Rule 176. *See also* Rule 176.3(b) (subpoena may not be used for discovery in a manner or at a time other than as provided in the discovery rules). With discovery subpoenas, the effect of these rules is to make the discovery request served with the subpoena control as to the response time. Thus, Rule 205.3's "reasonable time" requirement would control where a document request is served on a nonparty with a subpoena. Also, these rules would prevent a party from attempting to circumvent the minimum response period in Rule 197 by serving a discovery subpoena requesting documents from a party requiring response in less than 30 days.

- Rule 205.3 is similar to Rule 197. It permits parties to serve a "stand-alone" document request on a nonparty without a deposition notice. A Rule 205.3 document request must be served with a subpoena under Rule 176. Unlike the case with a Rule 197 document request, however, a Rule 205.3 document request may require response within a "reasonable time" — there is no 30-day or other specific minimum response period.[66]

- As noted above, a party may also serve a document request with a deposition notice to a nonparty. Because Rule 199.2(b)(5) incorporates the rules governing an ordinary document request served on the nonparty, the nonparty could be compelled to respond within a "reasonable time."

A number of lawyers have inquired as to whether or how they should object to a document request with 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.

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.

E. Issues Relating to Filing of Discovery

1. 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.[67] But some litigants have had problems when attempting to transmit discovery through court clerks to be served with the petition. Some court clerks, purporting to rely 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 has asked its Rules Advisory Committee and the State Bar Court Rules Committee to study and make recommendations for clarifying the relationship between Rule 191.4 and rules permitting the service of discovery with the original petition.

2. Rule 191.4 and Local Filing Rules; Certificates of Written Discovery

As discussed above in Part II(A), the Court "grandfathered" local filing rules that predated Rule 191.4.[68] The Court did this at the request of some Tarrant County judges, whose jurisdiction had adopted local filing rules inconsistent with Rule 191.4 a few months before the new discovery rules took effect. These judges were concerned

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[66] Rule 205.3(a); *see* Rules 176.6 & Rule 205(d).

[67] *See* 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).

[68] *See* Technical Corrections Order ¶ 6.

that abruptly switching to yet another, different filing rule so soon after adopting their local rule would create chaos among their local lawyers and clerks. Thus, the Supreme Court agreed to give them and other similarly situated localities a period in which to prepare for an eventual transition to the uniform statewide rule.[69] Consistent with this policy, the Court will not approve proposed local filing rules submitted in the future that are inconsistent with Rule 191.4.[70]

A common question that arises in relation to Rule 191.4 and local filing rules concerns whether parties must file a "certificate of written discovery," or a similar document, when serving discovery requests or responses. Some local filing rules that predated Rule 191.4 required parties to file such a document. But Rule 191.4 contains no such requirement. Thus, unless the court in which the case is pending has local filing rules approved by the Supreme Court that require the filing of a certificate of written discovery, no such filing is required.

3. Rule 191.4 and Filing Requirements for Evidentiary Affidavits

Chapter 18 of the Texas Civil Practice and Remedies Code requires parties to file affidavits concerning costs and necessity of services in order to obtain an evidentiary presumption regarding those issues and to file a controverting affidavit to contest those issues, if another party has filed such an affidavit. Tex.. Civ. Prac. & Rem. Code § 18.001(d) & (e). Similarly, Texas Rule of Evidence 902(10) authorizes parties to file affidavits to prove up business records. Some clerks apparently have construed Rule 191.4 as prohibiting the filing of these affidavits and attachments. This is incorrect. Rule 191.4 governs only the filing and serving of discovery — it does not change the independent filing requirements of Chapter 18 and Rule 902(10). Moreover, Chapter 18 and Rule 902(10) concern *evidentiary* issues, not discovery.[71]

F. 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 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.[72] 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.[73] 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.

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[69]Some jurisdictions, such as Harris County, already have taken the initiative to amend their local filing rules to be consistent with Rule 191.4.

[70]All local rules must be approved by the Supreme Court. Tex. R. Civ. P. 3a.

[71]A similar issue might arise with respect to court orders requiring the filing of witness lists or deposition excerpts. Parties must comply with such orders. Rule 191.4(c)(1) permits courts to order any discovery filed. *See also* Rule 191.1.

[72]Rule 176.4(c).

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

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.

G. Timekeeping in Oral Depositions; Other Certification Requirements

As noted in Part I(A)(1), 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.

To provide guidance regarding these types of issues, the Court recently approved the following comment in the new *Uniform Format Manual for Texas Court Reporters*.[74] 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 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.

H. 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-

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[74] Order in Misc. Docket No. 99-9067, dated April 8, 1999. The manual, which was 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.

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.[75] 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.[76] 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.

I. Issues Concerning Requests for Disclosures

In addition to the issues regarding requests for disclosures that are discussed above, at least three other issues regarding disclosures have commonly arisen. First, some lawyers have questioned whether, or to what extent, requests for disclosures may vary from the language specified in Rule 194.1 or request matters not explicitly enumerated in the subparts to Rule 194.2. Second, some lawyers have questioned the extent to which defendants have to disclose their liability and damage contentions in response to a request for disclosure under Rule 194.2(c) or (d). Finally, some lawyers have complained that responding parties are failing or refusing to respond fully to requests for disclosure.

1. Modification of Disclosure Requests

Rule 194.1 prescribes the content of a request for disclosure as follows:

> "Pursuant to Rule 194, you are requested to disclose, within 30 days of service of this request, the information or materials described in Rule [state rule, e.g., 194.2, or 194.2(a), (c) and (f), or 194.2(d)-(g)]"

By placing this language in quotes, the Supreme Court intended that requests for disclosures precisely track this template. At most, disclosure requests must recite verbatim the applicable subpart of Rule 194.2 along with the Rule 194.1 language.

Requests for disclosures were designed to be a set of "form" requests for basic discoverable information that are not, and should not be, subject to objection or work product claims. The language of each subpart in Rule 194.2 was carefully tailored with that purpose in mind. If parties were permitted to depart from that language when serving disclosures, disputes invariably would arise concerning "how far" such departures could go without making the rule's ban on objections unjust. This is the same type of problem, frequently associated with interrogatories, which requests for disclosures were intended to eliminate.

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[75]Former Rule 202.1.e.

[76]Rule 203.6(a).

The State Bar Court Rules Committee has studied this issue and reached the same conclusion.

2. Defense Contentions

Some defendants apparently have attempted to respond to requests for disclosure calling for contentions by merely reurging a general denial or otherwise taking the position that because the plaintiff has the burden of proof, defendants are not obligated to respond. This is inadequate. At a minimum, the defendant must respond to contentions advanced by the plaintiffs in their pleadings or responses to the defendant's requests for disclosures. Comment 2 to Rule 194 elaborates on this requirement. It explains that, with reference to a hypothetical automobile accident, defendants would have to disclose their denial of a speeding allegation, if one was made, and any basis for contesting plaintiff's damage calculations, if plaintiffs made such calculations. This is consistent with the purposes of contention requests for disclosures — to require parties, both plaintiffs and defendants, to elaborate on their notice pleadings so as to enable better planning and targeting of discovery. This makes discovery more efficient.

Exactly how specifically defendants (or plaintiffs) must describe their contentions in response to requests for disclosures is admittedly difficult to define. *See* Part II(K), below. As a general rule, a defendant should divulge contentions that he or she intends to prove as part of his or her affirmative case and, of course, any affirmative defenses. But a defendant generally would not have to divulge specific facts he or she intends to elicit on cross-examination or otherwise marshal evidence. On the other hand, the mere fact that a defendant proves a defense *theory* primarily through evidence adduced through the plaintiff's witnesses would not obviate the requirement that the defendants disclose that theory. Going back to the car accident example in comment 2, the defendant would still be obligated to disclose his or her denial of the plaintiff's speeding allegation — as well as, for example, a theory that the plaintiff was speeding or otherwise acting negligently — even though this evidence might be adduced through the plaintiff's witnesses.

A rule of thumb suggested by some lawyers has been to divulge the contention if they would have divulged it in a federal court-style pretrial order.

3. Inadequacy of Response

There are a number of remedies available to a party seeking responses to requests for disclosure or other forms of written discovery. *See* Rules 191.3, 193.1, 194.3 & cmt. 1, 215. As a practical matter, the efficacy of these remedies, like those of any remedy, ultimately depends on the extent to which individual trial judges enforce the rules. This is where the "rubber hits the road" with these or any other rules. But the new discovery rules leave far less room for gamesmanship or recalcitrance in responding to discovery than was the case under the former rules.

The State Bar Court Rules Committee has addressed whether Rule 194 should be further strengthened to prevent or sanction inadequate responses. It concluded that the remedy of a motion to compel was sufficient and that no change was warranted.

J. Determining the Discovery Period and Expert Deadlines in Level 2

Some lawyers — in particular, some members of the State Bar Court Rules Committee — believe that determining the applicable discovery period in Level 2 non-family cases[77] is unnecessarily difficult and that this prompts disputes and gamesmanship with regard to both the end of the discovery period and the Rule 195 expert deadlines, which are based on the discovery period. The Committee currently is studying whether the "movable" nine-month discovery period in Level 2 non-family cases should be abandoned in favor of a more definite benchmark for either or both fact and expert discovery.

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[77] *See* Rule 190.3(b)(1)(B). In such cases, the discovery period ends the earlier of (1) 30 days before the date the case is set for trial; or (2) "nine months after the earlier of the date of the first oral deposition or the due date of the first response to written discovery." *Id*.

Leaving aside potential practical difficulties in determining the specific date of the event triggering the nine-month Level 2 discovery period, two specific technical issues have arisen.

1. What is a "Month?"

Several lawyers or legal assistants have inquired as to the meaning of "month" in Rule 190.3. What happens, for example, where the discovery period begins on December 31, where the ninth month, September, only has 30 days? Would the period end on the last day of September or is "month" a fixed period of 30 days?

The answer lies in the Code Construction Act.[78] Although not exclusive, the Code Construction Act is intended to serve as a set of general guidelines for construing codes.[79] But the Act applies not only to the construction of Texas codes, but also to construction of rules enacted under codes. Tex. Govt. Code § 311.002(4). The Texas discovery rules, like other procedural rules, are promulgated by the Supreme Court pursuant to Section 22.004 of the Government Code. Thus, the Code Construction Act guidelines may be utilized when construing the new discovery rules.

The Code Construction Act's provision governing "Computation of Time," Tex. Govt. Code § 311.014, provides:

> If a number of months is to be computed by counting the months from a particular day, the period ends on the same numerical day in the concluding month as the day of the month from which the computation is begun, unless there are not that many days in the concluding month, in which case the period ends on the last day of the month.

Tex. Govt. Code § 311.014(c). Thus, if the discovery period in a Level 2 non-family case began on December 31, the period would end on September 30, the last day of the ninth, concluding month, regardless of the number of days in the period.

2. The Effect of Extensions

The other technical issue that has arisen in the computation of the nine-month discovery period in Level 2 non-family cases concerns the effect of an extension of time for responding to the first set of written discovery in the case. The discovery period in such a case is triggered by either the date of the first oral deposition or the due date of the first written discovery in the case.[80] In cases where the first discovery is written and the parties agree to postpone the response date for the first set of written discovery, the issue arises as to whether this postponement likewise delays the commencement of the discovery period until the new response date. In such an instance, the start of the discovery period should be deemed to be postponed until the new response deadline.

Rule 190.3 defines the trigger date for the discovery period in Level 2 non-family cases as the "due date of the first response to written discovery." That date is determined by the party seeking discovery. If a party serves discovery requests, the discovery period begins on the date the responses are due. By the same token, if the requesting party agrees to postpone the response deadline, the clear meaning of "due date of the first response to written discovery" would appear to be the new response deadline.

This conclusion is consistent with the policies underlying the use of discovery due dates as the triggering event for the discovery period in Level 2 non-family cases. Rule 190.3 uses the "due date of the first response to written discovery" or the date of the first oral deposition as a means of balancing the interests of ensuring expeditious and efficient discovery — the purpose of discovery periods — with the desire not to cause parties to escalate discovery where they would not otherwise do so. Thus, rather than categorically imposing a

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[78] Tex. Govt. Code §§ 311.01, *et seq.*

[79] The general guidelines for construction of civil statutes, as distinguished from codes, are found in Chapter 312 of the Government Code.

[80] Rule 190.3(b)(1)(B)(ii).

discovery period triggered by the filing of suit or the answer date, Rule 190.3 allows parties in Level 2 non-family cases to control when discovery begins, allowing for settlement negotiations or, simply, a "cooling off" period without the time pressure of a discovery period. But once at least one party "fires the first shot," the interests underlying the imposition of a discovery period again take precedence.

Consistent with these policies, the postponement of the due date for the first written discovery in a Level 2 non-family case should also be deemed to postpone the beginning of the discovery period. If the parties have agreed to postpone the due date, their position is essentially the same as if the discovery had not been served. The postponement could allow for settlement negotiations, "cooling off," or simply a few days of "hold everything" while the parties contemplate whether to commence full-scale, time-pressured discovery.

To avoid potential confusion or doubt regarding the trigger date of the discovery period, however, parties might clarify that any agreement to postpone the due date of the first set of written discovery also postpones the commencement of the discovery period. Rule 191.1.

K. Shades of Gray; The Role of the Comments

Finally, a number of questions have concerned concepts in the rules that are not necessarily capable of precise definition. 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.

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. However, in an effort to guide application of the rules, the evolution of their practical meaning, and reduce the need for interpretive case law, the Court has provided 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 expressly intended to guide the application of the rules to any "gray areas."

L. Reserved for Expansion.

III. Cases Applying the New Discovery Rules

A. Discoverability of Witness Statements

Several of the reported cases under the new discovery rules to date have addressed issues relating to the discoverability of witness statements:

(1) Whether new Rule 192, which eliminates the "witness statement" exemption, applies to statements obtained prior to 1999.

(2) Whether particular witness statements are or can be shielded from discovery by privileges other than the "witness statement" or work product exemption.

(3) Whether particular statements fall within the definition of "witness statement" under Rule 192. This issue has increasing importance now that Rule 192 eliminates the former "witness statement" discovery exemption and provides that, unless another privilege applies, the statements are discoverable.[81]

[81] Rule 192.3(h), 192.5(c)(1).

The following cases have addressed some or all of these issues.

1. *In re W&G Trucking, Inc.*, 990 S.W.2d 473 (Tex. App. — Beaumont 1999, orig. proceeding).

This case addressed the discoverability of a 1998 statement given by a defendant, Jamison, to an investigator for his insurer before suit was filed. The trial court ordered it produced. Relators, defendants, made two arguments. First, they contended the statement was a privileged attorney-client communication. Second, relators argued that application of the new discovery rules to the statement — which would have the effect of revoking or stripping the "witness statement" discovery exemption, which had attached at the time the statement was obtained — would violate paragraph 5 of the November 9 Order. Paragraph 5 of the November 9 Order, again, provides:

> The application of these revised rules in pending cases. . . must be subject to 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 associated with discovery practice, and must be without undue prejudice to any person on account of the transition from the prior rules."[82]

Relators contended that because the investigator obtained the statement in the belief that it would remain protected under the witness statement exemption, eliminating the exemption would cause them "undue prejudice" on account of the transition to the new rules. Additionally, relators argued that elimination of the exemption would impair their vested rights, in violation of Rule of Civil Procedure 1.[83] The Ninth Court of Appeals rejected both these arguments.

The court first dismissed the argument that the statement was a privileged attorney-client communication as "not supported by the facts." "The record does not establish that Jamison was a "client" [of the insurance company], that the agent represented Jamison, or that the agent took Jamison's statement to facilitate rendering him legal services." *In re W&G Trucking, Inc.*, 990 S.W.2d at 475.

As for the second argument, the court acknowledged that "[a]s a general rule[,] procedural rules apply to suits filed before the effective date of the rules, provided no vested right is impaired,"[84] but concluded that no such rights would be impaired by application of the new discovery rules to compel production of the statement. It reasoned:

> In this instance the repeal of Rule 166b and the adoption of Rule 192 have not deprived relators of a defense or other substantive right. Even under the old rules, the investigator was not assured that the statement would not be subject to discovery because Rule 166b allowed trial courts to disregard its exemptions upon a showing of substantial need and undue hardship. Accordingly, we hold that Rule 192 is applicable to cases pending on January 1, 1999 and that its application in this case has neither violated nor caused relators undue prejudice.

Id. at 475-76.

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[82]November 9 Order ¶ 5; *see* Part II(A)(1), above.

[83]Rule 1 provides, in relevant part:

> The proper objective of rules of civil procedure is to obtain a just, fair, equitable, and impartial adjudication of the rights of litigants under established principles of substantive law.

[84]*See id.* at 475 (citing *Wilson v. Work*, 122 Tex. 545, 62 S.W.2d 490 (1933), and court of appeals cases).

2. *In re Team Transport, Inc.*, 996 S.W.2d 256 (Tex. App. — Houston [14th Dist.] 1999, orig. proceeding).

In this mandamus proceeding, relator complained that the trial court abused its discretion in ordering relator to produce a 1998 letter from two of its employees to its insurance carrier. The first paragraph of the letter contained a description by one of relator's employees, Johnnie McIlveen, of a warehouse accident out of which the lawsuit arose. The second paragraph contained commentary by one of relator's vice presidents, Robert Eagleton, concerning procedures used at the warehouse, as they related to the accident as recounted by Mr. McIlveen. In April 1999, respondent moved to compel production of investigative reports concerning the accident. Relator asserted that the letter was shielded from discovery as work product and submitted affidavits proving up the letter as having been obtained in anticipation of litigation. On May 3, 1999, the trial court ordered the letter produced as a witness statement.

Relator asserted two arguments before the court of appeals. First, while "all but conced[ing]" that the first paragraph of the letter, McIlveen's statement, was a "witness statement," relator contended that the second paragraph, Eagleton's commentary, was work product that was not a witness statement.[85] Relator relied on the fact that Eagleton, unlike McIlveen, did not actually witness the accident. Second, in a manner similar to the relator in *W&G Trucking*, relator argued that application of the new discovery rules to compel production of the pre-1999 witness statement was unduly prejudicial and violated its due process right under the federal and state constitutions, which in turn violated paragraph 5 of the November 9 Order and Rule 1. *In re Team Transport, Inc.*, 996 S.W.2d at 259-60.

The court of appeals rejected both arguments. It found no abuse of discretion in the trial court's determination that the Eagleton paragraph was a witness statement:

> Eagleton relates the normal procedures for warehousemen such as [plaintiff], used at the Michelin warehouse. Because those procedures pertain to the accident, they were included as a follow-up to McIlveen's witness statement. They are part and parcel of that statement.

Id. at 259. The court added:

> Without citation of authority, relator argues the Eagleton paragraph could not be a witness statement because Eagleton was not a witness to the accident. The rules do not mandate such a requirement. A person with knowledge of relevant facts need not have personal knowledge of the facts. *See* TEX. R. CIV. P. 192.3(c). Further, the statement of *any* person with knowledge of relevant facts is discoverable. *See* TEX. R. CIV. P. 192.5(h) (emphasis added).

Id.

The court of appeals then relied on *W&G Trucking* in rejecting the second argument, holding that because the letter might have been discovered under the former discovery rules through the substantial need and undue hardship exception, application of the new rules did not deprive relator of a defense or substantive right. *Id.* at 259-60.

3. *In re Jimenez.*, 4 S.W.2d 894 (Tex. App. — Houston [1st Dist.] 1999, orig. proceeding).

Plaintiffs in an auto wreck case served requests for disclosures in January 1999 seeking, among other things, witness statements.[86]

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[85] Relator added that the plaintiffs failed to demonstrate the "substantial need or "undue hardship" necessary to obtain discovery of work product. *See* Rule 192.5(b)(2). Besides finding that the letter was a discoverable witness statement, the court rejected the "substantial need" and "undue hardship" argument because relator had not provided the reporter's record from the motion to compel hearing. *In re Team Transport, Inc.*, 996 S.W.2d at 259.

[86] *See* Rule 194.2(i).

Defendant purported to withhold his own recorded statement under the work product privilege[87] Plaintiffs then moved to compel production of the statement. The trial court denied the motion, ordering that plaintiffs were not entitled to obtain "the witness statements of Defendant, related to this case, as they are not discoverable." *In re Jimenez*, 4 S.W.2d at 894. Plaintiffs sought mandamus.

Neither party disputed that the new discovery rules governed the dispute or that the statement in question was a witness statement under the definition in Rule 192.3(h). *Id.* at 895 & n.2. Plaintiffs argued that the trial court abused its discretion because (1) Rules 192.3(h) and 194.2(i) make witness statements discoverable, regardless when made; (2) witness statements are expressly exempted from the work product privilege under Rule 192.5(c); and (3) under Rule 194.5, no objection or work product assertion is permitted against a request for disclosure. *Id.* at 895. Defendant responded that his statement, made to his insurance carrier, was work product, was made in anticipation of litigation, and was not discoverable. He relied in part on comment 9 to Rule 192, which, again, provides:

> Elimination of the "witness statement" exemption does not render all witness statements automatically discoverable but subjects them to the same rules concerning the scope of discovery and privileges applicable to other documents and things.

Defendant argued that because witness statements were "subject[] . . . to the same rules concerning the scope of discovery and privileges applicable to other documents and things," they were protected by the work product privilege and that, therefore, comment 9 effectively trumped the exception for witness statements under Rule 192.5. *Id.*

The court of appeals conditionally granted mandamus. It observed that, as plaintiffs argued, witness statements are expressly exempted from the work product privilege under Rule 192.5(c). *Id.* at 896. The court then rejected defendant's argument concerning comment 9:

> In circumstances like these, when the only privilege asserted is "work product" and when rule 192.5(c) plainly states that a witness statement, even if made in anticipation of litigation, is not work product protected from discovery, the Court rejects [defendant's] arguments.

Id.

B. Discovery Concerning Bias of Experts

In re Doctors' Hospital of Laredo, 2 S.W.2d 504 (Tex. App. — San Antonio 1999, orig. proceeding)

Rule 192.3, the rule defining the scope or permissible subject matter of discovery, entitles parties to discovery concerning testifying experts or "consulting plus" experts including, among other things, "any bias of the witness." Tex. R. Civ. P. 192.3(g).[88] No express entitlement to discovery of an expert's bias appeared in the former discovery rules. In *In re Doctors' Hospital of Laredo*, 2 S.W.2d 504 (Tex. App. — San Antonio 1999, orig. proceeding), the Fourth Court of Appeals addressed whether this provision overruled or superseded *Russell v. Young*, 452 S.W.2d 434 (Tex. 1970), which held that income tax schedules and calendars of nonparty witnesses generally are not discoverable to show bias.

The dispute arose in the context of a medical malpractice action. After Doctors' Hospital designated Dr. Herbert Grossman as a testifying expert, plaintiffs Enedelia and Humberto Martinez noticed the doctor's deposition and subpoenaed his income tax schedules and personal calendar.[89]

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[87] *See* Rule 193.3(a).

[88] *See also* Tex. R. Civ. P. 192.7(c) & (d).

[89] The Martinezes also sought the deposition and income tax records of a second defense expert, Dr. John Seals, which the trial court ordered produced. The court of appeals held that the trial court abused its discretion because the Hospital had de-designated Dr. Seals

The hospital moved to quash. Relying on Rule 192.3(e)(5), the Martinezes argued that they were entitled to the documents to show Dr. Grossman's bias. The trial court ordered the documents produced.

A majority of the Fourth Court of Appeals — Green and Angelini, JJ. — held that Rule 192.3(e)(5) did not overrule *Russell v. Young* and that the trial court abused its discretion. The majority observed that evidence of a witness' bias has long been relevant, admissible, and discoverable, although books and financial records of a nonparty witness — due in part to privacy concerns — have, under *Russell*, generally been held not to be discoverable to show bias. *Id.* at 506. It then reasoned: "We have found no historical commentary that would suggest that the rule drafters intended to overrule *Russell* and its progeny. The majority concluded: "We therefore read the rule to permit discovery of bias evidence, other than the personal financial records and appointment books of nonparty witnesses." *Id.* at 506-07.

Chief Justice Hardberger concurred in the ruling but disputed whether it was necessary for the majority to address the discoverability of Dr. Grossman's personal financial records. He would have found that the trial court abused its discretion by failing to consider whether the information was available from a less intrusive source. *Id.* at 507-08 (Hardberger, C.J., concurring). Hardberger also expressed reservations that the majority "could be incorrect" about Rule 192.3, pointing out that one commentator had suggested that Rule 192.3 "probably may" overrule *Russell*. *Id.* (quoting MICHOL O'CONNOR, ET. AL., O'CONNOR'S TEXAS RULES CIVIL TRIALS 309 (1999)).

C. Proving Up Objections and Privileges; In General

1. *In re Union Pacific Resources Co.*, ___ S.W.2d ___, 43 Tex. S.Ct. J. 145 (Tex. Dec. 2, 1999) (orig. proceeding) (not yet released for publication).

from a testifying to consulting expert. *Id.*

In this case, the Texas Supreme Court addresses whether a party objecting to discovery on the basis of relevance must adduce evidence to support its objection. Union Pacific sued Continental, its excess insurer, for defense costs and payments Union Pacific made on liability claims arising from a Corpus Christi refinery that it formerly owned. Continental served discovery requesting information pertaining to Union Pacific's settlement of separate litigation with other insurers over a California waste disposal site. Continental claimed that the information was within the scope of discovery because it might include releases from the California litigation that extend to the Corpus Christi claims and could show that the California settlements had already compensated Union Pacific for its claims against Continental. Union Pacific objected on the basis that the requested discovery was not relevant[90] to the Corpus Christi coverage dispute and Continental moved to compel. Neither side produced evidence in the hearing, nor did either side tender the agreements to the trial court for an in camera review.

The trial court ordered Union Pacific to produce the California settlement agreements with the dollar amounts of the settlements redacted. Continental again moved to compel, arguing that the dollar amounts were relevant. The trial court denied Continental's motion and Continental sought mandamus. The Tenth Court of Appeals conditionally granted relief, holding that the trial court abused its discretion by not ordering full disclosure where Union Pacific had not offered evidence that the requested information was irrelevant. 990 S.W.2d 941, 944 (Tex. App. — Waco 1999, orig. proceeding).

Distinguishing earlier cases in which it required evidence to prove privileges or exemptions from discovery,[91] the Supreme Court held that the court of appeals abused its discretion

[90] *See* Rule 192.3(g) (permitting discovery of "the existence and contents of any relevant portions of a settlement agreement").

[91] (Citing *Peeples v. Honorable Fourth Supreme Judicial District*, 701 S.W.2d 635 (Tex. 1985), and *Weisel Enter, Inc. v. Curry*, 718 S.W.2d 56 (Tex. 1986) (per curiam)).

because no evidence was necessary for the trial court to determine the discoverability of the California settlement agreements.

> Indeed, it is not clear what evidence could have been produced on the issue. The question was simply whether the settlement dollar amounts are pertinent to the issues in the current litigation. Continental's sole argument was that the information concerning Union Pacific's internal allocation and budgeting of settlement proceeds from the California litigation might show that it considered some of the funds attributable to the Corpus Christi litigation. The district court could determine without hearing evidence that the purpose for payment of the settlement proceeds was determined by the terms of the agreements, which had already been produced for Continental, and not by Union Pacific's internal bookkeeping.

The Court opined that Rule 193.4, which governs hearings concerning written discovery, contemplated such a practice.

> Neither Peeples nor Weisel requires evidence in support of an assertion relating to discovery when evidence is unnecessary to decide the matter. We made this clear in Former Rule 166b(4) of the Texas Rules of Civil Procedure, which required that "a party seeking to exclude any matter from discovery on the basis of an exemption or immunity from discovery . . . shall produce any evidence necessary to support such claim." The same provision has been carried over into current Rule 193.4(a), which states: "The party making the objection or asserting the privilege must present an evidence necessary to support the objection or privilege. As the rule recognizes, evidence may not always be necessary to support a claim of protection from discovery.

Id.

2. *In re Monsanto Co.*, 998 S.W.2d 917 (Tex. App. — Waco 1999, orig. proceeding).

This mandamus proceeding, which arose out of a suit by farming concerns against a seed manufacturer, illustrates the application of the new "subject matter" attorney-client privilege,[92] the new work product privilege of Rule 192.5, and the new procedures for asserting privileges under Rule 193.3. The parties agreed that these new rules were applicable. *In re Monsanto*, 998 S.W.2d at 924.[93]

Monsanto had claimed either or both the attorney-client and work product privileges as to several hundred documents by following the procedures in Rule 193 — it served a withholding statement; then, upon request, a privilege log; and then sought to prove up the privileges by affidavits at a hearing. The trial court also inspected the documents in camera. The court of appeals noted that, ironically, Monsanto was not required to follow these procedures as to [m]any of the documents claimed as privileged" because, in its view, they fell within Rule 193.3(c)'s exception to the withholding requirements for case-specific attorney-client communications and attorney work product.[94] However, because Monsanto had already listed the documents in the privilege logs and had provided proof, the court concluded that "this exception has no applicability here," *id.* at 924 & n.6, and proceeded to evaluate the privilege claims under the general Rule 193 procedures.

Generally speaking, there are three parts to *In re Monsanto*: (1) the court's general discussion of the new subject matter attorney-client privilege, new Rule 192.5 work product privilege, and Rule

[92] *See* Tex. R. Evid. 503(b).

[93] The court of appeals also noted that Monsanto had invoked new Rule 193.3(d) to reclaim two inadvertently produced documents, and that plaintiffs had complied. The court, however, ultimately held that Monsanto failed to prove a privilege with respect to those documents and ordered them produced. *In re Monsanto*, 998 S.W.2d at 921 n.2.

[94] Rule 193.3(c).

193.3 procedures; (2) the court's application of the Rule 193.3 procedures; and (3) the court's application of the attorney-client privilege and work product in its review of the trial court's in camera inspection.

a. General Discussion.

The court first reviewed at length the subject matter attorney-client privilege, the new Rule 192.5 work product privilege, and the new procedures of Rule 193. Among its other observations:

- The court characterized Rule 192.5 as incorporating the former attorney-client privilege and "party communication" privileges, while deleting the "subsequent to occurrence" and "particular . . . pending suit" limitations. *Id.* at 923 n.3.

- The court summarized the requirements of Rule 193.3 as follows:

  > Relators had the burden to claim the privilege(s) in a response or separate document . . . . [Tex. R. Civ. P.] 193.3(a). They had to claim a specific privilege and identify each document in such a way as to allow the Plaintiffs to assess the applicability of that privilege and establish proof of the privilege at the hearing. *Id.* 193.3(b).

  Id. at 925.

- Later, the court described the subject matter test for attorney-client privilege as "very broad" but not unlimited:

  > We recognize that it might be argued that all communications between corporate representatives could be claimed as privileged on the basis that "the legal department can better represent us if we keep them informed." We reject that assertion. We do not believe that it is necessary for the legal department to be advised of every development out in the field, no matter how minute.

  Id. at 930. But the court acknowledged that once litigation is anticipated, events in the field might have more significance such that the work product privilege could apply. *Id.*

b. Application of Rule 193.3; Privilege Logs.

The court then addressed whether Monsanto had complied with the requirements of Rule 193 as to four separate privilege logs of documents, labeled "PR-RS," "PR-DS," "PR-INV," and "PR-AS." It first rejected an argument that Monsanto had waived privileges as to certain of the documents by referencing some of their contents during the hearing. "Although Relator's oral description of the contents of the documents gave, in some instances, more information than they had listed on the corresponding privilege log, we do not believe that the description was a significant part of the privileged matter." *Id.* at 925-26 (citing Tex. R. Evid. 511).

The court also rejected an argument that the affidavits were not properly before the court because they were never formally offered into evidence during the hearing. It dismissed this assertion because "the record of the hearing indisputably shows that the parties and the court undisputably considered the affidavits. Although formal admission into evidence would be better, we have held under these circumstances no formal offer into evidence is necessary." *Id.* at 926 (citing *Osborne v. Johnson*, 954 S.W.2d 180, 186 (Tex. App. — Waco 1997, orig. proceeding).

The court next rejected an assertion that the affidavits were invalid because they were not based on the personal knowledge of the affiants. First, the court pointed out, there was no ruling on plaintiffs' objections to the affidavits in the record. Second, the court concluded that the affidavits did, in fact, establish the personal knowledge of the affiants. The court rejected the argument that some of the affidavits predated the date of privilege logs to which they referred. It reasoned that "[i]t is the documents themselves, not the privilege log listing the documents, which contain the privileged material and about which the affiant has personal knowledge. *Id.* & n.11.

The court then examined each of the affidavits to determine if they proved the facts supporting the claims of privilege asserted as to each of the documents listed on the privilege log. It determined that the affidavits of two Monsanto attorneys, which recited the elements of the attorney-client privilege and work product privilege, and where these facts were not controverted, made a prima facie case of attorney-client privilege and "core" work product privilege as to the documents listed on the PR-RS and PR-DS logs, respectively. *Id.* at 927-29. However, it held that because the affidavits submitted to prove the privileges asserted as to the PR-INV and PR-AS logs referenced only a few of the documents listed in those logs, Monsanto failed to make a prima facie showing of privilege as to the other documents listed in those logs. *Id.* at 928.

c. Application of Privileges; In Camera Inspection.

Although stating that the results of the hearing could have ended the trial court's inquiry, the court of appeals noted that "[t]he rules . . . allowed Respondent to determine whether an in-camera inspection of any or all of the documents was necessary." *Id.* at 928-29. It then reviewed the trial court's in camera inspection of the documents by exercising its discretion to conduct its own in camera inspection. When so doing, it sought to (1) ascertain whether the documents matched their descriptions in the privilege logs; (2) determine, with respect to the PR-RS and PR-DS logs (for which a prima facie showing of privilege was made), whether any document so contradicted the affidavits as to destroy the claim of privilege as to that document; and (3) determine, with respect to the documents listed in the PR-INV and PR-AS logs (for which a prima facie showing of privilege was not made), whether any document, in conjunction with the other proof presented,[95] established a privilege as to that document. *Id.*[96]

As for its first inquiry, the court determined that the privilege logs fairly described the documents, thus complying with Rule 193.3(b). *Id.* at 930. Turning to the second inquiry, the court held that none of the documents listed in the PR-DS log so contradicted the supporting affidavits as to destroy the claimed privileges, but that some of the documents in the PR-RS log did. In particular, it held that two documents showing recipients that

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[95]The court observed that "[b]ecause Relators adduced evidence in the form of affidavits, we need not decide whether the current rules still allow a claim of privilege to be based only on the disputed information or material itself. *Id.* at 929 n.15 (citing *Weisel Enter., Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex. 1986) (orig. proceeding)).

[96]The court described the process by which it conducted its in camera inspection:

> The justices assembled in the courtroom and examined the disputed documents, one document at a time, and discussed those necessary to our decision. We considered each document, in light of the affidavits, on our own. We did not use information contained in one document to "bootstrap" a privilege to another document. In other words, one document to which a privilege was established or asserted was not considered as evidence to establish a privilege asserted to another document. Additionally, we did not consider any information listed on the privilege logs as evidence. The logs were not incorporated into any affidavits and thus the information contained in the logs is no more than an unproven assertion like any other pleading.

Id.

were not proven to be Monsanto "representatives of the client" were not "confidential communications" falling within the attorney-client privilege. *Id.* at 930-31.[97] The court also held that three documents contained in the PR-RS materials that were not listed on that group's log would be disclosed, as the issue of whether they were privileged was not properly preserved. *Id.* at 931.[98]

As for the third inquiry, the court determined that many of the documents on the PR-AS and PR-INV logs that appeared to have been circulated between and among Monsanto employees and their lawyers were privileged attorney-client communications or work product. However, it determined that other documents on those logs, which failed to show either or both that the authors were Monsanto employees, lawyers or representatives, or who the recipients were, did not show that Monsanto was entitled to claim a specific privilege as to those documents. The court also held that a memo to all employees on the PR-AS log "exceeds the scope of the asserted privilege." *Id.*

* * *

Based on the foregoing analysis, the court of appeals concluded that all but approximately 20 of the documents at issue were established to be privileged.[99]

D. Application of New Supplementation Rules

Rutledge v. Staner, __ S.W.2d __, 1999 WL 1272944 (Tex. App. — Tyler Dec. 30, 1999, orig. proceeding) (not yet released for publication)

Former Rule 166b.6 permitted late supplementation only upon a showing of "good cause." Rule 193.6, on the other hand, permits late supplementation upon a showing of either "good cause" ***or*** lack of unfair surprise or unfair prejudice.[100]

In *Rutledge v. Staner*, the Twelfth Court of Appeals, applying Rule 193.6's more flexible standard for late supplementation, held that the trial court erred in refusing to allow late designation of a fact witness.

Rutledge was a declaratory judgment action arising out of a dispute between two adjacent landowner over the use of a road. Staner had listed Joe Chaffin, Anderson County

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[97] By contrast, while some of the documents on the PR-DS log had an outside public relations firm as a recipient, the court held that these documents did not destroy the attorney-client privilege where uncontroverted affidavit testimony stated that the recipients were agents or representatives of Monsanto. *Id*. The court cautioned, however, that there might be instances in which disclosure to an outside firm is so unrelated to a privilege as to constitute waiver. *Id*. at 931 n.21.

[98] The court also addressed the status of certain reports in the PR-RS group written by Monsanto attorneys with no designated recipient. It characterized these reports as core work product but noted that Monsanto asserted on the privilege log only attorney-client privilege and not work product as to these documents. The court, however, ruled that these documents did not destroy the privilege because (1) one of the affidavits characterized the documents on the PR-RS log as either "communications" or work product; and (2) Monsanto had argued that the reports in question were "communicated" within the meaning of Rule 503. *Id*.

[99] The court rejected a claim that the privileged documents could be discovered through the crime-fraud exception to the attorney-client privilege. Plaintiffs offered as proof an affidavit of one of their lawyers purporting to show that Monsanto knowingly made false statements when selling cotton seed to s. The court concluded that the affidavit did not establish that legal services were obtained to commit or perpetuate fraud and failed to establish a relationship between the documents for which the privilege is asserted and the claim of fraud. *Id*. at 934.

[100] Rule 193.6(a).

Commissioner, as a fact witness; however, Rutledge did not list him.[101] At trial, Rutledge attempted to call Chaffin but Staner objected. The trial court sustained this objection, holding that Rutledge had not shown good cause for late supplementation. Rutledge then reurged that Chaffin should be permitted to testify in light of new Rule 193.6 because Staner, having himself designated Chaffin as a fact witness, could not have been "unfairly surprised" or "unfairly prejudiced" when Rutledge attempted to call him. The trial court, however, again refused to let Chaffin testify because it did not believe good cause had been shown.

The Twelfth Court held, without elaboration, that "the trial court erred when it refused to allow the witness to testify under Tex. R. Civ. P. 193.6(a)(2)." However, it ultimately held that the trial court's failure to permit Chaffin to testify was harmless error.

E. Issues Relating to Rule 202 Depositions

***Valley Baptist Medical Center*, __ S.W.2d __, 1999 WL 1001102 (Tex. App. — Corpus Christi Nov. 4, 1999, orig. proceeding) (not yet released for publication)**

New Rule 202 combines Former Rule 187, which governed depositions to perpetuate testimony, and Former Rule 737, the bill of discovery, into a single rule governing all pre-suit depositions.[102] Under Former Rule 187, orders granting depositions to perpetuate testimony were not independently appealable because they were ancillary to an existing or anticipated suit.[103] But orders granting bill of discovery depositions could be appealable depending on the circumstances in which they were granted. Where a bill of discovery was deemed ancillary to or essentially part of another suit, whether ongoing or contemplated, the bill was held to be an interlocutory discovery order and not appealable.[104] But where the bill of discovery was a separate suit having its sole object the obtaining of the information requested, the order was considered final for appeal.[105]

In *Valley Baptist Medical Center*, the Corpus Christi Court of Appeals evaluated whether an order granting a Rule 202 deposition that purportedly had been sought to investigate a claim was appealable. Plaintiff Esther Gonzalez brought a petition for a Rule 202 deposition of Valley Baptist Medical Center and Dr. Erwin Mierisch. Gonzalez purported to seek the depositions to investigate potential claims — as opposed to obtaining testimony for an anticipated suit — against the unknown manufacturer of a fetal extraction device used by Valley Baptist and Dr. Mierisch in delivering Gonzalez's son. Gonzalez did not purport to anticipate a suit against Valley Baptist or Dr. Mierisch or to desire to investigate potential claims against them. But, in her petition seeking the Rule 202 deposition, she listed both as persons who may have interests adverse to hers in any anticipated suit.[106]

The trial court granted the petition, permitting Gonzalez to depose both Dr. Mierisch and a corporate representative of Valley Baptist. Valley Baptist filed both a notice of appeal and a petition for mandamus in the court of appeals

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[101]Although the opinion does not expressly state, it seems implicit from the context that both parties served discovery on each other requesting identification of persons with knowledge of relevant facts. But the opinion does not elaborate as to whether these requests were interrogatories or requests for disclosure.

[102]*See* Nathan L. Hecht & Robert H. Pemberton, *A Guide to the 1999 Texas Discovery Rules Revisions* (1998), at 17.

[103]*See, e.g., Office Employees Int'l Union Local 227 v. Southwestern Drug Corp.*, 391 S.W.2d 404, 406-07 (Tex. 1965).

[104]*See* McDONALD TEXAS CIVIL PRACTICE § 12:6[c] (1992 & Supp. 1999).

[105]*See id.*

[106]*See* Rule 202.2(f)(1). This procedure is required only if the petitioner anticipates a suit, as opposed to merely desiring to investigate a potential claim. *Id.*

challenging the order on a number of grounds. The court of appeals first stayed the depositions pending resolution of the mandamus and then denied the mandamus without opinion. Subsequently, Valley Baptist sought mandamus with the Texas Supreme Court, which denied relief without written opinion.

After the Supreme Court denied mandamus, the court of appeals again stayed the depositions. Gonzalez subsequently filed a motion to dismiss the still-pending appeal for want of jurisdiction, contending that the order authorizing the depositions was interlocutory and not appealable. In *Valley Baptist*, the court of appeals agreed. Applying prior case law addressing the appealability of bills of discovery, it reasoned:

> Whether a bill of discovery proceeding is ancillary to or essentially a part of a "primary" suit is not always clear. When a subsequent action is filed against the party from whom discovery was ordered, clearly the pre-suit discovery was ancillary to the suit. We believe that direct appeal [from the order granting the deposition to investigate claims] should be limited to situations where the discovery order sought is clearly a separate action against a third party.
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> In the instant case, Gonzalez seeks discovery of information related to the birth and delivery of the baby from the hospital and doctor who performed the delivery. The reason is to investigate claims for damages for injuries that occurred during the delivery. We hold that this pre-suit discovery proceeding is incident and ancillary to a contemplated suit against Valley Baptist and/or the doctor. Accordingly, this court is without jurisdiction to hear this appeal.

The court of appeals rejected the argument that the order granting the depositions was a separate, independent action because Gonzalez purported to be investigating claims against only a third party — the unnamed manufacturer of the fetal vacuum extractor — and not claims against either of the deponents. In so doing, it looked beyond the express assertions in the petition to what it viewed as the substance of the claims and their practical relationship to the underlying facts:

> While Gonzalez only seeks information related to the fetal vacuum system used in delivering Michael Jr., the suit contemplated is one to recover injuries which occurred during the birth. Gonzalez named the doctor and the hospital in her petition as persons who may have interests adverse to hers in any anticipated suit. Even though Gonzalez targets only the manufacturer of the fetal extraction device, it is difficult to imagine that the doctor who performed the delivery and the hospital where the delivery was performed would not also be contemplated defendants in such an action. If Gonzalez had stated that this bill of discovery was intended to seek information regarding the potential liability of the hospital and doctor, rather than the manufacturer of the medical device, the law is clear that interlocutory appeal would not be an available remedy for an order granting discovery under Rule 202. We see no meaningful difference where the defendants from whom discovery is sought are clearly contemplated defendants in a subsequent proceeding under the particular facts of the case, regardless of the petitioner's express statements in the petition.

Id. at *3. The court of appeals additionally observed that Rule 202 contained a number of protections for the parties being deposed and that mandamus was available to remedy any clear abuses of discretion by the trial court. For example, the court of appeals suggested, the trial court might require the petitioner to post a bond to cover the deponent's costs "when it appears possible that plaintiff has used the procedure for improper purposes or to require plaintiff to bear the risk of deposing an entirely innocent potential defendant." *Id.* at *4.

The court of appeals concluded that the normal protections against discovery abuse, such as protective orders and motions to quash, were "more appropriate" than direct appeal. *Id*. "In recognizing that the Rule 202 procedure generally benefits potential defendants overall by allowing plaintiffs to weed out unmeritorious claims through discovery without having to file suit, we find that the slight risk of harm that may occur is properly borne by defendants for situations where a bill was improvidently granted by the trial court but the circumstances of its granting are not egregious enough to warrant mandamus relief and where a later suit does not follow." *Id*.

F. Reserved for Expansion

APPENDIX A: NEW DISCOVERY RULES REFERENCE MATERIALS

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