IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 98- 9196

FINAL APPROVAL OF REVISIONS TO THE TEXAS RULES OF CIVIL PROCEDURE

ORDERED that:

1. The revisions to the Texas Rules of Civil Procedure promulgated by Order in Misc. Docket No. 98-9136, dated August 4, 1998, 61 Tex. Bar. J. 752 (Sept. 1998), and Rule 215 are modified to reflect public comments and are adopted as attached.

2. The notes and comments appended to these revisions, unlike some other notes and comments in the rules, are intended to inform the construction and application of these rules by both courts and practitioners.

3. Rules 166b, 166c, 167, 167a, 168, 169, 176, 177, 177a, 178, 179, 187, 188, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, and 737 are repealed, and Rule 215 is amended, effective January 1, 1999.

4. Rules 176, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, and 215, and the headings in Section 9 are adopted as attached, effective as follows:

   a. Rules 176, 192, 194, 196, 197, 198, 199, 200, 201, 203, 204, 205, and 215 are effective January 1, 1999;

   b. Rule 190 applies to all cases filed on or after January 1, 1999, but a court may adopt an appropriate discovery control plan in previously filed cases;

c. Rule 191 is effective January 1, 1999, except that Rules 191.3 and 191.4 apply only to discovery conducted on or after that date;

d. 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;

e. Rule 195 is effective January 1, 1999, except that: interrogatories that have been served but not answered as of that date and request information pertaining to experts should be answered; and the rule should not be applied to disrupt expert discovery that is in progress or impending, or that has been scheduled by order or by agreement of the parties; and

f. Rule 202 applies to all such proceedings filed on or after January 1, 1999, but a court may use the rule for guidance in previously filed proceedings.

5. The application of these revised rules in pending cases, as provided by paragraph 3 of this Order, 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 to 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.

6. In accordance with Section 22.004(c) of the Texas Government Code, a statute is repealed as follows: Tex. Bus. & Com. Code § 17.57, to the extent that it conflicts with Rule 176.3(a).

7. The Clerk is directed promptly to file a certified copy of this Order with the Secretary of State and to cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*.

SIGNED AND ENTERED this 9th day of November, 1998.

Thomas R. Phillips, Chief Justice

Raul A. Gonzalez, Justice

Nathan L. Hecht, Justice

Craig T. Enoch, Justice

Rose Spector, Justice

Priscilla R. Owen, Justice

James A. Baker, Justice

Greg Abbott, Justice

Deborah G. Hankinson, Justice

SECTION 9. EVIDENCE AND DISCOVERY

EXPLANATORY STATEMENT ACCOMPANYING THE 1999 AMENDMENTS TO THE RULES OF CIVIL PROCEDURE GOVERNING DISCOVERY

The rules pertaining to discovery have been substantively revised and reorganized to clarify and streamline discovery procedures and to reduce costs and delays associated with discovery practice. The notes and comments appended to the rules, unlike most other notes and comments in the Rules of Civil Procedure, are intended to inform their construction and application by both courts and practitioners.

Discovery in civil cases is founded on the principle that justice is best served when litigants may obtain information not in their possession to prosecute and defend claims. Discovery provides access to that information, but at a price. Recent years' experience has shown that discovery may be misused to deny justice to parties by driving up the costs of litigation until it is unaffordable and stalling resolution of cases. As any litigant on a budget knows, the benefits to be gained by discovery in a particular case must be weighed against its costs. The rules of procedure must provide both adequate access to information and effective means of curbing discovery when appropriate to preserve litigation as a viable, affordable, and expeditious dispute resolution mechanism.

These revisions recognize the importance of discovery as well as the necessity for reasonable limits. The scope of discovery, always broad, is unchanged. All the forms of discovery under the prior rules are retained, and a new one — disclosure — is added. Disclosure is not required unless requested and thus does not burden cases in which it is not sought. When requested, it provides ready access to basic information without objection. At the same time, the necessity of a discovery control plan in each case, whether by rule or by order, is intended to focus courts and parties on both the need for discovery and its costs in each case. The Level 1 plan allows a party seeking recovery of no more than $50,000 to insist that discovery be minimal. The Level 2 plan will provide adequate discovery in most cases, and Level 3 is available for cases needing special attention. No single set of rules can address so diverse and changing a practice as discovery, and thus the rules maintain the ability of parties by agreement and courts by order to tailor discovery to individual cases.

Presentation of objections and assertions of privilege are streamlined under these rules. A party who objects to only part of a discovery request must usually comply with the rest of the request. Assertions of privilege are not to be made prophylactically against the threat of waiver, but only when information is actually withheld. Documents produced in discovery are now presumed to be authentic for use against the party producing them, thus avoiding the cost of proving authentication when there is no dispute. Procedures for oral depositions are revised to encourage focused examination by imposing time limits and to discourage colloquy between counsel.

An important aspect of these revisions has been the regrouping of provisions in a more logical sequence and the elimination of archaic and confusing language.

A. EVIDENCE

RULE 176. SUBPOENAS

176.1 Form. Every subpoena must be issued in the name of "The State of Texas" and must:

(a) state the style of the suit and its cause number;

(b) state the court in which the suit is pending;

(c) state the date on which the subpoena is issued;

(d) identify the person to whom the subpoena is directed;

(e) state the time, place, and nature of the action required by the person to whom the subpoena is directed, as provided in Rule 176.2;

(f) identify the party at whose instance the subpoena is issued, and the party's attorney of record, if any;

(g) state the text of Rule 176.8(a); and

(h) be signed by the person issuing the subpoena.

176.2 Required Actions. A subpoena must command the person to whom it is directed to do either or both of the following:

(a) attend and give testimony at a deposition, hearing, or trial;

(b) produce and permit inspection and copying of designated documents or tangible things in the possession, custody, or control of that person.

176.3 Limitations.

(a) ***Range.*** A person may not be required by subpoena to appear or produce documents or other things in a county that is more than 150 miles from where the person resides or is served. However, a person whose appearance or production at a deposition may be compelled by notice alone under Rules 199.3 or 200.2 may be required to appear and produce documents or other things at any location permitted under Rules 199.2(b)(2).

(b) ***Use for discovery.*** A subpoena may not be used for discovery to an extent, in a manner, or at a time other than as provided by the rules governing discovery.

176.4 Who May Issue. A subpoena may be issued by:

(a) the clerk of the appropriate district, county, or justice court, who must provide the party requesting the subpoena with an original and a copy for each witness to be completed by the party;

(b) an attorney authorized to practice in the State of Texas, as an officer of the court; or

(c) an officer authorized to take depositions in this State, who must issue the subpoena immediately on a request accompanied by a notice to take a deposition under Rules 199 or 200, or a notice under Rule 205.3, and who may also serve the notice with the subpoena.

176.5 Service.

(a) ***Manner of service.*** A subpoena may be served at any place within the State of Texas by any sheriff or constable of the State of Texas, or any person who is not a party and is 18 years of age or older. A subpoena must be served by delivering a copy to the witness and tendering to that person any fees required by law. If the witness is a party and is represented by an attorney of record in the proceeding, the subpoena may be served on the witness's attorney of record.

(b) ***Proof of service.*** Proof of service must be made by filing either:

(1) the witness's signed written memorandum attached to the subpoena showing that the witness accepted the subpoena; or

(2) a statement by the person who made the service stating the date, time, and manner of service, and the name of the person served.

176.6 Response.

(a) ***Compliance required.*** Except as provided in this subdivision, a person served with a subpoena must comply with the command stated therein unless discharged by the court or by the party summoning such witness. A person commanded to appear and give testimony must remain at the place of deposition, hearing, or trial from day to day until discharged by the court or by the party summoning the witness.

(b) ***Organizations.*** If a subpoena commanding testimony is directed to a corporation, partnership, association, governmental agency, or other organization, and the matters

on which examination is requested are described with reasonable particularity, the organization must designate one or more persons to testify on its behalf as to matters known or reasonably available to the organization.

(c) ***Production of documents or tangible things.*** A person commanded to produce documents or tangible things need not appear in person at the time and place of production unless the person is also commanded to attend and give testimony, either in the same subpoena or a separate one. A person must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the demand. A person may withhold material or information claimed to be privileged but must comply with Rule 193.3. A nonparty's production of a document authenticates the document for use against the nonparty to the same extent as a party's production of a document is authenticated for use against the party under Rule 193.7.

(d) ***Objections.*** A person commanded to produce and permit inspection or copying of designated documents and things may serve on the party requesting issuance of the subpoena — before the time specified for compliance — written objections to producing any or all of the designated materials. A person need not comply with the part of a subpoena to which objection is made as provided in this paragraph unless ordered to do so by the court. The party requesting the subpoena may move for such an order at any time after an objection is made.

(e) ***Protective orders.*** A person commanded to appear at a deposition, hearing, or trial, or to produce and permit inspection and copying of designated documents and things, and any other person affected by the subpoena, may move for a protective order under Rule 192.6(b) — before the time specified for compliance — either in the court in which the action is pending or in a district court in the county where the subpoena was served. The person must serve the motion on all parties in accordance with Rule 21a. A person need not comply with the part of a subpoena from which protection is sought under this paragraph unless ordered to do so by the court. The party requesting the subpoena may seek such an order at any time after the motion for protection is filed.

(f) ***Trial subpoenas.*** A person commanded to attend and give testimony, or to produce documents or things, at a hearing or trial, may object or move for protective order before the court at the time and place specified for compliance, rather than under paragraphs (d) and (e).

176.7 Protection of Person from Undue Burden and Expense. A party causing a subpoena to issue must take reasonable steps to avoid imposing undue burden or expense on the person served. In ruling on objections or motions for protection, the court must provide a person served with a subpoena an adequate time for compliance, protection from disclosure of

privileged material or information, and protection from undue burden or expense. The court may impose reasonable conditions on compliance with a subpoena, including compensating the witness for undue hardship.

176.8 Enforcement of Subpoena.

(a) ***Contempt.*** Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued or a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both.

(b) ***Proof of payment of fees required for fine or attachment.*** A fine may not be imposed, nor a person served with a subpoena attached, for failure to comply with a subpoena without proof by affidavit of the party requesting the subpoena or the party's attorney of record that all fees due the witness by law were paid or tendered.

Notes and Comments

Comments to 1999 change:

1. This rule combines the former rules governing subpoenas for trial and discovery. When a subpoena is used for discovery, the protections from undue burden and expense apply, just as with any discovery.

2. Rule 176.3(b) prohibits the use of a subpoena to circumvent the discovery rules. Thus, for example, a deposition subpoena to a party is subject to the procedures of Rules 196, 199, and 200, and a deposition subpoena to a nonparty is subject to the procedures of Rule 205.

[No change in Rules 180-185.]

B. DISCOVERY

RULE 190. DISCOVERY LIMITATIONS

190.1 Discovery Control Plan Required. Every case must be governed by a discovery control plan as provided in this Rule. A plaintiff must allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under Level 1, 2, or 3 of this Rule.

190.2 Discovery Control Plan — Suits Involving $50,000 or Less (Level 1).

(a) ***Application.*** This subdivision applies to:

(1) any suit in which all plaintiffs affirmatively plead that they seek only monetary relief aggregating $50,000 or less, excluding costs, pre-judgment interest and attorneys' fees, and

(2) any suit for divorce not involving children in which a party pleads that the value of the marital estate is more than zero but not more than $50,000.

(b) ***Exceptions.*** This subdivision does not apply if:

(1) the parties agree that Rule 190.3 should apply;

(2) the court orders a discovery control plan under Rule 190.4; or

(3) any party files a pleading or an amended or supplemental pleading that seeks relief other than that to which this subdivision applies.

A pleading, amended pleading (including trial amendment), or supplemental pleading that renders this subdivision no longer applicable may not be filed without leave of court less than 45 days before the date set for trial. Leave may be granted only if good cause for filing the pleading outweighs any prejudice to an opposing party.

(c) ***Limitations.*** Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations:

(1) *Discovery period.* All discovery must be conducted during the discovery period, which begins when the suit is filed and continues until 30 days before the date set for trial.

(2) *Total time for oral depositions.* Each party may have no more than six hours in total to examine and cross-examine all witnesses in oral depositions. The parties may agree to expand this limit up to ten hours in total, but not more except by court order. The court may modify the deposition hours so that no party is given unfair advantage.

(3) *Interrogatories.* Any party may serve on any other party no more than 25 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory.

(d) ***Reopening discovery.*** When the filing of a pleading or an amended or supplemental pleading renders this subdivision no longer applicable, the discovery period reopens,

and discovery must be completed within the limitations provided in Rules 190.3 or 190.4, whichever is applicable. Any person previously deposed may be redeposed. On motion of any party, the court should continue the trial date if necessary to permit completion of discovery.

190.3 Discovery Control Plan — By Rule (Level 2).

(a) ***Application.*** Unless a suit is governed by a discovery control plan under Rules 190.2 or 190.4, discovery must be conducted in accordance with this subdivision.

(b) ***Limitations.*** Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations:

(1) *Discovery period.* All discovery must be conducted during the discovery period, which begins when suit is filed and continues until:

(A) 30 days before the date set for trial, in cases under the Family Code; or

(B) in other cases, the earlier of

(i) 30 days before trial, or

(ii) nine months after the earlier of the date of the first oral deposition or the due date of the first response to written discovery.

(2) *Total time for oral depositions.* Each side may have no more than 50 hours in oral depositions to examine and cross-examine parties on the opposing side, experts designated by those parties, and persons who are subject to those parties' control. "Side" refers to all the litigants with generally common interests in the litigation. If one side designates more than two experts, the opposing side may have an additional six hours of total deposition time for each additional expert designated. The court may modify the deposition hours and must do so when a side or party would be given unfair advantage.

(3) *Interrogatories.* Any party may serve on any other party no more than 25 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory.

190.4 Discovery Control Plan — By Order (Level 3).

(a) ***Application.*** The court must, on a party's motion, and may, on its own initiative, order that discovery be conducted in accordance with a discovery control plan tailored to the circumstances of the specific suit. The parties may submit an agreed order to the court for its consideration. The court should act on a party's motion or agreed order under this subdivision as promptly as reasonably possible.

(b) ***Limitations.*** The discovery control plan ordered by the court may address any issue concerning discovery or the matters listed in Rule 166, and may change any limitation on the time for or amount of discovery set forth in these rules. The discovery limitations of Rule 190.2, if applicable, or otherwise of Rule 190.3 apply unless specifically changed in the discovery control plan ordered by the court. The plan must include:

(1) a date for trial or for a conference to determine a trial setting;

(2) a discovery period during which either all discovery must be conducted or all discovery requests must be sent, for the entire case or an appropriate phase of it;

(3) appropriate limits on the amount of discovery; and

(4) deadlines for joining additional parties, amending or supplementing pleadings, and designating expert witnesses.

190.5 Modification of Discovery Control Plan. The court may modify a discovery control plan at any time and must do so when the interest of justice requires. The court must allow additional discovery:

(a) related to new, amended or supplemental pleadings, or new information disclosed in a discovery response or in an amended or supplemental response, if:

(1) the pleadings or responses were made after the deadline for completion of discovery or so nearly before that deadline that an adverse party does not have an adequate opportunity to conduct discovery related to the new matters, and

(2) the adverse party would be unfairly prejudiced without such additional discovery;

(b) regarding matters that have changed materially after the discovery cutoff if trial is set or postponed so that the trial date is more than three months after the discovery period ends.

190.6 Certain Types of Discovery Excepted. This rule's limitations on discovery do not apply to or include discovery conducted under Rule 202 ("Depositions Before Suit or to Investigate Claims"), or Rule 621a ("Discovery and Enforcement of Judgment"). But Rule 202 cannot be used to circumvent the limitations of this rule.

Notes and Comments

Comments to 1999 change:

1. This rule establishes three tiers of discovery plans and requires that every case be in one at all times. Whether a case is in Level 1 is determined by the pleadings. To be in Level 3, the court must order a specific plan for the case, either on a party's motion or on the court's own initiative. The plan may be one agreed to by the parties and submitted as an agreed order. A Level 3 plan may simply adopt Level 1 or Level 2 restrictions. Separate Level 3 plans for phases of the case may be appropriate. Until a Level 3 plan is ordered, a case that is not in Level 1 is in Level 2. The initial pleading required by Rule 190.1 is merely to notify the court and other parties of the plaintiff's intention; it does not bind the court or other parties. A plaintiff's failure to state in the initial pleading that the case should be in Level 1 does not waive application of Rule 190.2.

2. Rule 190.2 does not apply to suits for injunctive relief or divorces involving children. The requirement of an affirmative pleading of limited relief (*e.g.*: "Plaintiff affirmatively pleads that he seeks only monetary relief aggregating $50,000 or less, excluding costs, pre-judgment interest and attorneys' fees") does not conflict with other pleading requirements, such as Rule 47 and Tex. Rev. Civ. Stat. Ann. art. 4590i, § 5.01. In a suit to which Rule 190.2 applies, the relief awarded cannot exceed the relief pleaded because the purpose of the rule, unlike Rule 47, is to bind the pleader to a maximum claim. Thus, the rule in *Greenhalgh v. Service Lloyds Ins. Co.*, 787 S.W.2d 938 (Tex. 1990), does not apply.

3. "Discrete subparts" of interrogatories are counted as single interrogatories, but not every separate factual inquiry is a discrete subpart. *See* Fed. R. Civ. P. 33(a). While not susceptible of precise definition, *see Braden v. Downey*, 811 S.W.2d 922, 927-928 (Tex. 1991), a "discrete subpart" is, in general, one that calls for information that is not logically or factually related to the primary interrogatory. The number of sets of interrogatories is no longer limited to two.

4. As other rules make clear, unless otherwise ordered or agreed, parties seeking discovery must serve requests sufficiently far in advance of the end of the discovery period that the deadline for responding will be within the discovery period. The court may order a deadline for sending discovery requests in lieu of or in addition to a deadline for completing discovery.

5. Use of forms of discovery other than depositions and interrogatories, such as requests for disclosure, admissions, or production of documents, are not restricted in Levels 1 and 2. But depositions on written questions cannot be used to circumvent the limits on interrogatories.

6. The concept of "side" in Rule 190.3(b)(2) borrows from Rule 233, which governs the allocation of peremptory strikes, and from Fed. R. Civ. P. 30(a)(2). In most cases there are only two sides — plaintiffs and defendants. In complex cases, however, there may be more than two sides, such as when defendants have sued third parties not named by plaintiffs, or when defendants have sued each other. As an example, if P1 and P2 sue D1, D2, and D3, and D1 sues D2 and D3, Ps would together be entitled to depose Ds and others permitted by the rule (*i.e.*, Ds' experts and persons subject to Ds' control) for 50 hours, and Ds would together be entitled to depose Ps and others for 50 hours. D1 would also be entitled to depose D2 and D3 and others for 50 hours on matters in controversy among them, and D2 and D3 would together be entitled to depose D1 and others for 50 hours.

7. Any matter listed in Rule 166 may be addressed in an order issued under Rule 190.4. A pretrial order under Rule 166 may be used in individual cases regardless of the discovery level.

8. For purposes of defining discovery periods, "trial" does not include summary judgment.

RULE 191. MODIFYING DISCOVERY PROCEDURES AND LIMITATIONS; CONFERENCE REQUIREMENT; SIGNING DISCLOSURES, DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS; FILING REQUIREMENTS

191.1 Modification of Procedures. Except where specifically prohibited, the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit by the agreement of the parties or by court order for good cause. An agreement of the parties is enforceable if it complies with Rule 11 or, as it affects an oral deposition, if it is made a part of the record of the deposition.

191.2 Conference. Parties and their attorneys are expected to cooperate in discovery and to make any agreements reasonably necessary for the efficient disposition of the case. All discovery motions or requests for hearings relating to discovery must contain a certificate by the party filing the motion or request that a reasonable effort has been made to resolve the dispute without the necessity of court intervention and the effort failed.

191.3 Signing of Disclosures, Discovery Requests, Notices, Responses, and Objections.

(a) ***Signature required.*** Every disclosure, discovery request, notice, response, and objection must be signed:

(1) by an attorney, if the party is represented by an attorney, and must show the attorney's State Bar of Texas identification number, address, telephone number, and fax number, if any; or

(2) by the party, if the party is not represented by an attorney, and must show the party's address, telephone number, and fax number, if any.

(b) ***Effect of signature on disclosure.*** The signature of an attorney or party on a disclosure constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(c) ***Effect of signature on discovery request, notice, response, or objection.*** The signature of an attorney or party on a discovery request, notice, response, or objection constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, notice, response, or objection:

(1) is consistent with the rules of civil procedure and these discovery rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) has a good faith factual basis;

(3) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(4) is not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

(d) ***Effect of failure to sign.*** If a request, notice, response, or objection is not signed, it must be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, notice, response, or objection. A party is not required to take any action with respect to a request or notice that is not signed.

(e) ***Sanctions.*** If the certification is false without substantial justification, the court may, upon motion or its own initiative, impose on the person who made the certification, or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under Chapter 10 of the Civil Practice and Remedies Code.

191.4 Filing of Discovery Materials.

(a) ***Discovery materials not to be filed.*** The following discovery materials must not be filed:

(1) discovery requests, deposition notices, and subpoenas required to be served

only on parties;

(2) responses and objections to discovery requests and deposition notices, regardless on whom the requests or notices were served;

(3) documents and tangible things produced in discovery; and

(4) statements prepared in compliance with Rule 193.3(b) or (d).

(b) ***Discovery materials to be filed.*** The following discovery materials must be filed:

(1) discovery requests, deposition notices, and subpoenas required to be served on nonparties;

(2) motions and responses to motions pertaining to discovery matters; and

(3) agreements concerning discovery matters, to the extent necessary to comply with Rule 11.

(c) ***Exceptions.*** Notwithstanding paragraph (a) —

(1) the court may order discovery materials to be filed;

(2) a person may file discovery materials in support of or in opposition to a motion or for other use in a court proceeding; and

(3) a person may file discovery materials necessary for a proceeding in an appellate court.

(d) ***Retention requirement for persons.*** Any person required to serve discovery materials not required to be filed must retain the original or exact copy of the materials during the pendency of the case and any related appellate proceedings begun within six months after judgment is signed, unless otherwise provided by the trial court.

(e) ***Retention requirement for courts.*** The clerk of the court shall retain and dispose of deposition transcripts and depositions upon written questions as directed by the Supreme Court.

191.5 Service of Discovery Materials. Every disclosure, discovery request, notice, response, and objection required to be served on a party or person must be served on all parties of record.

Notes and Comments

Comments to 1999 change:

1. Rule 191.1 preserves the ability of parties by agreement and trial courts by order to adapt discovery to different circumstances. That ability is broad but not unbounded. Parties cannot merely by agreement modify a court order without the court's concurrence. Trial courts cannot simply "opt out" of these rules by form orders or approve or order a discovery control plan that does not contain the matters specified in Rule 190.4, but trial courts may use standard or form orders for providing discovery plans, scheduling, and other pretrial matters. In individual instances, courts may order, or parties may agree, to use discovery methods other than those prescribed in these rules if appropriate. Because the general rule is stated here, it is not repeated in each context in which it applies. Thus, for example, parties can agree to enlarge or shorten the time permitted for a deposition and to change the manner in which a deposition is conducted, notwithstanding Rule 199.5, although parties could not agree to be abusive toward a witness.

2. Rule 191.2 expressly states the obligation of parties and their attorneys to cooperate in conducting discovery.

3. The requirement that discovery requests, notices, responses, and objections be signed also applies to documents used to satisfy the purposes of such instruments. An example is a statement that privileged material or information has been withheld, which may be separate from a response to the discovery request but is nevertheless part of the response.

RULE 192. PERMISSIBLE DISCOVERY: FORMS AND SCOPE; WORK PRODUCT; PROTECTIVE ORDERS; DEFINITIONS

192.1 Forms of Discovery. Permissible forms of discovery are:

(a) requests for disclosure;
(b) requests for production and inspection of documents and tangible things;
(c) requests and motions for entry upon and examination of real property;
(d) interrogatories to a party;
(e) requests for admission;
(f) oral or written depositions; and
(g) motions for mental or physical examinations.

192.2 Sequence of Discovery. The permissible forms of discovery may be combined in the same document and may be taken in any order or sequence.

192.3 Scope of Discovery.

(a) ***Generally.*** In general, a party may obtain discovery regarding any matter that is not

privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(b) ***Documents and tangible things.*** A party may obtain discovery of the existence, description, nature, custody, condition, location, and contents of documents and tangible things (including papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, data, and data compilations) that constitute or contain matters relevant to the subject matter of the action. A person is required to produce a document or tangible thing that is within the person's possession, custody, or control.

(c) ***Persons with knowledge of relevant facts.*** A party may obtain discovery of the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case. A person has knowledge of relevant facts when that person has or may have knowledge of any discoverable matter. The person need not have admissible information or personal knowledge of the facts. An expert is "a person with knowledge of relevant facts" only if that knowledge was obtained first-hand or if it was not obtained in preparation for trial or in anticipation of litigation.

(d) ***Trial witnesses.*** A party may obtain discovery of the name, address, and telephone number of any person who is expected to be called to testify at trial. This paragraph does not apply to rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial.

(e) ***Testifying and consulting experts.*** The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable. A party may discover the following information regarding a testifying expert or regarding a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert:

(1) the expert's name, address, and telephone number;

(2) the subject matter on which a testifying expert will testify;

(3) the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was acquired;

(4) the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them;

(5) any bias of the witness;

(6) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony;

(7) the expert's current resume and bibliography.

(f) ***Indemnity and insuring agreements.*** Except as otherwise provided by law, a party may obtain discovery of the existence and contents of any indemnity or insurance agreement under which any person may be liable to satisfy part or all of a judgment rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the indemnity or insurance agreement is not by reason of disclosure admissible in evidence at trial.

(g) ***Settlement agreements.*** A party may obtain discovery of the existence and contents of any relevant portions of a settlement agreement. Information concerning a settlement agreement is not by reason of disclosure admissible in evidence at trial.

(h) ***Statements of persons with knowledge of relevant facts.*** A party may obtain discovery of the statement of any person with knowledge of relevant facts — a "witness statement" — regardless of when the statement was made. A witness statement is (1) a written statement signed or otherwise adopted or approved in writing by the person making it, or (2) a stenographic, mechanical, electrical, or other type of recording of a witness's oral statement, or any substantially verbatim transcription of such a recording. Notes taken during a conversation or interview with a witness are not a witness statement. Any person may obtain, upon written request, his or her own statement concerning the lawsuit, which is in the possession, custody or control of any party.

(i) ***Potential parties.*** A party may obtain discovery of the name, address, and telephone number of any potential party.

(j) ***Contentions.*** A party may obtain discovery of any other party's legal contentions and the factual bases for those contentions.

192.4 Limitations on Scope of Discovery. The discovery methods permitted by these rules should be limited by the court if it determines, on motion or on its own initiative and on reasonable notice, that:

(a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or

(b) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

192.5 Work Product.

(a) ***Work product defined.*** Work product comprises:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

(b) ***Protection of work product.***

(1) *Protection of core work product — attorney mental processes.* Core work product — the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories — is not discoverable.

(2) *Protection of other work product.* Any other work product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means.

(3) *Incidental disclosure of attorney mental processes.* It is not a violation of subparagraph (1) if disclosure ordered pursuant to subparagraph (2) incidentally discloses by inference attorney mental processes otherwise protected under subparagraph (1).

(4) *Limiting disclosure of mental processes.* If a court orders discovery of work product pursuant to subparagraph (2), the court must — insofar as possible — protect against disclosure of the mental impressions, opinions, conclusions,

or legal theories not otherwise discoverable.

(c) **Exceptions.** Even if made or prepared in anticipation of litigation or for trial, the following is not work product protected from discovery:

(1) information discoverable under Rule 192.3 concerning experts, trial witnesses, witness statements, and contentions;

(2) trial exhibits ordered disclosed under Rule 166 or Rule 190.4;

(3) the name, address, and telephone number of any potential party or any person with knowledge of relevant facts;

(4) any photograph or electronic image of underlying facts (*e.g.*, a photograph of the accident scene) or a photograph or electronic image of any sort that a party intends to offer into evidence; and

(5) any work product created under circumstances within an exception to the attorney-client privilege in Rule 503(d) of the Rules of Evidence.

(d) ***Privilege.*** For purposes of these rules, an assertion that material or information is work product is an assertion of privilege.

192.6 Protective Orders.

(a) ***Motion.*** A person from whom discovery is sought, and any other person affected by the discovery request, may move within the time permitted for response to the discovery request for an order protecting that person from the discovery sought. A person should not move for protection when an objection to written discovery or an assertion of privilege is appropriate, but a motion does not waive the objection or assertion of privilege. If a person seeks protection regarding the time or place of discovery, the person must state a reasonable time and place for discovery with which the person will comply. A person must comply with a request to the extent protection is not sought unless it is unreasonable under the circumstances to do so before obtaining a ruling on the motion.

(b) ***Order.*** To protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may — among other things — order that:

(1) the requested discovery not be sought in whole or in part;

(2) the extent or subject matter of discovery be limited;

(3) the discovery not be undertaken at the time or place specified;

(4) the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court;

(5) the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a.

192.7 Definitions. As used in these rules —

(a) *Written discovery* means requests for disclosure, requests for production and inspection of documents and tangible things, requests for entry onto property, interrogatories, and requests for admission.

(b) *Possession, custody, or control* of an item means that the person either has physical possession of the item or has a right to possession of the item that is equal or superior to the person who has physical possession of the item.

(c) A *testifying expert* is an expert who may be called to testify as an expert witness at trial.

(d) A *consulting expert* is an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert.

Notes and Comments

Comments to 1999 change:

1. While the scope of discovery is quite broad, it is nevertheless confined by the subject matter of the case and reasonable expectations of obtaining information that will aid resolution of the dispute. The rule must be read and applied in that context. *See In re American Optical Corp.*, ___ S.W.2d ___ (Tex. 1998) (per curiam); *K-Mart v. Sanderson*, 937 S.W.2d 429 (Tex. 1996) (per curiam); *Dillard Dept. Stores v. Hall*, 909 S.W.2d 491 (Tex. 1995) (per curiam); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813 (Tex. 1995) (per curiam); *Loftin v. Martin*, 776 S.W.2d 145, 148 (Tex. 1989).

2. The definition of documents and tangible things has been revised to clarify that things relevant to the subject matter of the action are within the scope of discovery regardless of their form.

3. Rule 192.3(c) makes discoverable a "brief statement of each identified person's connection with the case." This provision does not contemplate a narrative statement of the facts the person knows, but at most a few words describing the person's identity as relevant to the lawsuit.

For instance: "treating physician," "eyewitness," "chief financial officer," "director," "plaintiff's mother and eyewitness to accident." The rule is intended to be consistent with *Axelson v. McIlhany*, 798 S.W.2d 550 (Tex. 1990).

4. Rule 192.3(g) does not suggest that settlement agreements in other cases are relevant or irrelevant.

5. Rule 192.3(j) makes a party's legal and factual contentions discoverable but does not require more than a basic statement of those contentions and does not require a marshaling of evidence.

6. The sections in former Rule 166b concerning land and medical records are not included in this rule. They remain within the scope of discovery and are discussed in other rules.

7. The court's power to limit discovery based on the needs and circumstances of the case is expressly stated in Rule 192.4. The provision is taken from Rule 26(b)(2) of the Federal Rules of Civil Procedure. Courts should limit discovery under this rule only to prevent unwarranted delay and expense as stated more fully in the rule. A court abuses its discretion in unreasonably restricting a party's access to information through discovery.

8. Work product is defined for the first time, and its exceptions stated. Work product replaces the "attorney work product" and "party communication" discovery exemptions from former Rule 166b.

9. 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 or tangible things.

RULE 193. WRITTEN DISCOVERY: RESPONSE; OBJECTION; ASSERTION OF PRIVILEGE; SUPPLEMENTATION AND AMENDMENT; FAILURE TO TIMELY RESPOND; PRESUMPTION OF AUTHENTICITY

193.1 Responding to Written Discovery; Duty to Make Complete Response. A party must respond to written discovery in writing within the time provided by court order or these rules. When responding to written discovery, a party must make a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made. The responding party's answers, objections, and other responses must be preceded by the request to which they apply.

193.2 Objecting to Written Discovery.

(a) ***Form and time for objections.*** A party must make any objection to written discovery

in writing — either in the response or in a separate document — within the time for response. The party must state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request.

(b) ***Duty to respond when partially objecting; objection to time or place of production.*** A party must comply with as much of the request to which the party has made no objection unless it is unreasonable under the circumstances to do so before obtaining a ruling on the objection. If the responding party objects to the requested time or place of production, the responding party must state a reasonable time and place for complying with the request and must comply at that time and place without further request or order.

(c) ***Good faith basis for objection.*** A party may object to written discovery only if a good faith factual and legal basis for the objection exists at the time the objection is made.

(d) ***Amendment.*** An objection or response to written discovery may be amended or supplemented to state an objection or basis that, at the time the objection or response initially was made, either was inapplicable or was unknown after reasonable inquiry.

(e) ***Waiver of objection.*** An objection that is not made within the time required, or that is obscured by numerous unfounded objections, is waived unless the court excuses the waiver for good cause shown.

(f) ***No objection to preserve privilege.*** A party should not object to a request for written discovery on the grounds that it calls for production of material or information that is privileged but should instead comply with Rule 193.3. A party who objects to production of privileged material or information does not waive the privilege but must comply with Rule 193.3 when the error is pointed out.

193.3 Asserting a Privilege. A party may preserve a privilege from written discovery in accordance with this subdivision.

(a) ***Withholding privileged material or information.*** A party who claims that material or information responsive to written discovery is privileged may withhold the privileged material or information from the response. The party must state — in the response (or an amended or supplemental response) or in a separate document — that:

(1) information or material responsive to the request has been withheld,

(2) the request to which the information or material relates, and

(3) the privilege or privileges asserted.

(b) ***Description of withheld material or information.*** After receiving a response indicating that material or information has been withheld from production, the party seeking discovery may serve a written request that the withholding party to identify the information and material withheld. Within 15 days of service of that request, the withholding party must serve a response that:

(1) describes the information or materials withheld that, without revealing the privileged information itself or otherwise waiving the privilege, enables other parties to assess the applicability of the privilege, and

(2) asserts a specific privilege for each item or group of items withheld.

(c) ***Exemption.*** Without complying with paragraphs (a) and (b), a party may withhold a privileged communication to or from a lawyer or lawyer's representative or a privileged document of a lawyer or lawyer's representative —

(1) created or made from the point at which a party consults a lawyer with a view to obtaining professional legal services from the lawyer in the prosecution or defense of a specific claim in the litigation in which discovery is requested, and

(2) concerning the litigation in which the discovery is requested.

(d) ***Privilege not waived by production.*** A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if — within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made — the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

193.4 Hearing and Ruling on Objections and Assertions of Privilege.

(a) ***Hearing.*** Any party may at any reasonable time request a hearing on an objection or claim of privilege asserted under this rule. The party making the objection or asserting the privilege must present any evidence necessary to support the objection or privilege. The evidence may be testimony presented at the hearing or affidavits served at least seven days before the hearing or at such other reasonable time as the court permits. If the court determines that an *in camera* review of some or all of the requested discovery is necessary, that material or information must be segregated and produced to the court in a sealed wrapper within a reasonable time following the

hearing.

(b) ***Ruling.*** To the extent the court sustains the objection or claim of privilege, the responding party has no further duty to respond to that request. To the extent the court overrules the objection or claim of privilege, the responding party must produce the requested material or information within 30 days after the court's ruling or at such time as the court orders.

(c) ***Use of material or information if no ruling.*** A party need not request a ruling on that party's own objection or assertion of privilege to preserve the objection or privilege, but a party may not use — at any hearing or trial — material or information withheld from discovery under a claim of privilege without timely amending or supplementing the party's response to that discovery.

193.5 Amending or Supplementing Responses to Written Discovery.

(a) ***Duty to amend or supplement.*** If a party learns that the party's response to written discovery was incomplete or incorrect when made, or, although complete and correct when made, is no longer complete and correct, the party must amend or supplement the response:

(1) to the extent that the written discovery sought the identification of persons with knowledge of relevant facts, trial witnesses, or expert witnesses, and

(2) to the extent that the written discovery sought other information, unless the additional or corrective information has been made known to the other parties in writing, on the record at a deposition, or through other discovery responses.

(b) ***Time and form of amended or supplemental response.*** An amended or supplemental response must be made reasonably promptly after the party discovers the necessity for such a response. Except as otherwise provided by these rules, it is presumed that an amended or supplemental response made less than 30 days before trial was not made reasonably promptly. An amended or supplemental response must be in the same form as the initial response and must be verified by the party if the original response was required to be verified by the party, but the failure to comply with this requirement does not make the amended or supplemental response untimely unless the party making the response refuses to correct the defect within a reasonable time after it is pointed out.

193.6 Failing to Timely Respond — Effect on Trial.

(a) ***Exclusion of evidence and exceptions.*** A party who fails to make, amend, or

supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that:

(1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or

(2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.

(b) ***Burden of establishing exception.*** The burden of establishing good cause or the lack of unfair surprise or unfair prejudice is on the party seeking to introduce the evidence or call the witness. A finding of good cause or of the lack of unfair surprise or unfair prejudice must be supported by the record.

(c) ***Continuance.*** Even if the party seeking to introduce the evidence or call the witness fails to carry the burden under paragraph (b), the court may grant a continuance or temporarily postpone the trial to allow a response to be made, amended, or supplemented, and to allow opposing parties to conduct discovery regarding any new information presented by that response.

193.7 Production of Documents Self-Authenticating. A party's production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial unless — within ten days or a longer or shorter time ordered by the court, after the producing party has actual notice that the document will be used — the party objects to the authenticity of the document, or any part of it, stating the specific basis for objection. An objection must be either on the record or in writing and must have a good faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity.

Notes and Comments

Comments to 1999 change:

1. This rule imposes a duty upon parties to make a complete response to written discovery based upon all information reasonably available, subject to objections and privileges.

2. An objection to written discovery does not excuse the responding party from complying with the request to the extent no objection is made. But a party may object to a request for "all documents relevant to the lawsuit" as overly broad and not in compliance with the rule

requiring specific requests for documents and refuse to comply with it entirely. *See Loftin v. Martin*, 776 S.W.2d 145 (Tex. 1989). A party may also object to a request for a litigation file on the ground that it is overly broad and may assert that on its face the request seeks only materials protected by privilege. *See National Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993). A party who objects to production of documents from a remote time period should produce documents from a more recent period unless that production would be burdensome and duplicative should the objection be overruled.

3. This rule governs the presentation of all privileges including work product. It dispenses with objections to written discovery requests on the basis that responsive information or materials are protected by a specific privilege from discovery. Instead, the rule requires parties to state that information or materials have been withheld and to identify the privilege upon which the party relies. The statement should not be made prophylactically, but only when specific information and materials have been withheld. The party must amend or supplement the statement if additional privileged information or material is found subsequent to the initial response. Thus, when large numbers of documents are being produced, a party may amend the initial response when documents are found as to which the party claims privilege. A party need not state that material created by or for lawyers for the litigation has been withheld as it can be assumed that such material will be withheld from virtually any request on the grounds of attorney-client privilege or work product. However, the rule does not prohibit a party from specifically requesting the material or information if the party has a good faith basis for asserting that it is discoverable. An example would be material or information described by Rule 503(d)(1) of the Rules of Evidence.

4. Rule 193.3(d) is a new provision that allows a party to assert a claim of privilege to material or information produced inadvertently without intending to waive the privilege. The provision is commonly used in complex cases to reduce costs and risks in large document productions. The focus is on the intent to waive the privilege, not the intent to produce the material or information. A party who fails to diligently screen documents before producing them does not waive a claim of privilege. This rule is thus broader than Tex. R. Evid. 511 and overturns *Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223 (Tex. 1992), to the extent the two conflict. The ten-day period (which may be shortened by the court) allowed for an amended response does not run from the production of the material or information but from the party's first awareness of the mistake. To avoid complications at trial, a party may identify prior to trial the documents intended to be offered, thereby triggering the obligation to assert any overlooked privilege under this rule. A trial court may also order this procedure.

5. This rule imposes no duty to supplement or amend deposition testimony. The only duty to supplement deposition testimony is provided in Rule 195.6(b).

6. Any party can request a hearing in which the court will resolve issues brought up in objections or withholding statements. The party seeking to avoid discovery has the burden of proving the objection or privilege.

7. The self-authenticating provision is new. Authentication is, of course, but a condition precedent to admissibility and does not establish admissibility. *See* Tex. R. Evid. 901(a). The ten-day period allowed for objection to authenticity (which period may be altered by the court in appropriate circumstances) does not run from the production of the material or information but from the party's actual awareness that the document will be used. To avoid complications at trial, a party may identify prior to trial the documents intended to be offered, thereby triggering the obligation to object to authenticity. A trial court may also order this procedure. An objection to authenticity must be made in good faith.

RULE 194. REQUESTS FOR DISCLOSURE

194.1 Request. A party may obtain disclosure from another party of the information or material listed in Rule 194.2 by serving the other party — no later than 30 days before the end of any applicable discovery period — the following request: "Pursuant to Rule 194, you are requested to disclose, within 30 days of service of this request, the information or material described in Rule [state rule, *e.g.*, 194.2, or 194.2(a), (c), and (f), or 194.2(d)-(g)]."

194.2 Content. A party may request disclosure of any or all of the following:

(a) the correct names of the parties to the lawsuit;

(b) the name, address, and telephone number of any potential parties;

(c) the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial);

(d) the amount and any method of calculating economic damages;

(e) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case;

(f) for any testifying expert:

(1) the expert's name, address, and telephone number;

(2) the subject matter on which the expert will testify;

(3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;

(4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:

(A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and

(B) the expert's current resume and bibliography;

(g) any discoverable indemnity and insuring agreements;

(h) any discoverable settlement agreements;

(i) any discoverable witness statements;

(j) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;

(k) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party.

194.3 Response. The responding party must serve a written response on the requesting party within 30 days after service of the request, except that:

(a) a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request, and

(b) a response to a request under Rule 194.2(f) is governed by Rule 195.

194.4 Production. Copies of documents and other tangible items ordinarily must be served with the response. But if the responsive documents are voluminous, the response must state a reasonable time and place for the production of documents. The responding party must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them.

194.5 No Objection or Assertion of Work Product. No objection or assertion of work product is permitted to a request under this rule.

194.6 Certain Responses Not Admissible. A response to requests under Rule 194.2(c) and (d)

that has been changed by an amended or supplemental response is not admissible and may not be used for impeachment.

Notes and Comments

Comments to 1999 change:

1. Disclosure is designed to afford parties basic discovery of specific categories of information, not automatically in every case, but upon request, without preparation of a lengthy inquiry, and without objection or assertion of work product. In those extremely rare cases when information ordinarily discoverable should be protected, such as when revealing a person's residence might result in harm to the person, a party may move for protection. A party may assert any applicable privileges other than work product. Otherwise, to fail to respond fully to a request for disclosure would be an abuse of the discovery process.

2. Rule 194.2(c) and (d) permit a party further inquiry into another's legal theories and factual claims than is often provided in notice pleadings. So-called "contention interrogatories" are used for the same purpose. Such interrogatories are not properly used to require a party to marshal evidence or brief legal issues. Paragraphs (c) and (d) are intended to require disclosure of a party's basic assertions, whether in prosecution of claims or in defense. Thus, for example, a plaintiff would be required to disclose that he or she claimed damages suffered in a car wreck caused by defendant's negligence in speeding, and would be required to state how loss of past earnings and future earning capacity was calculated, but would not be required to state the speed at which defendant was allegedly driving. Paragraph (d) does not require a party, either a plaintiff or a defendant, to state a method of calculating non-economic damages, such as for mental anguish. In the same example, defendant would be required to disclose his or her denial of the speeding allegation and any basis for contesting the damage calculations.

3. Responses under Rule 194.2(c) and (d) that have been amended or supplemented are inadmissible and cannot be used for impeachment, but other evidence of changes in position is not likewise barred.

RULE 195. DISCOVERY REGARDING TESTIFYING EXPERT WITNESSES

195.1 Permissible Discovery Tools. A party may request another party to designate and disclose information concerning testifying expert witnesses only through a request for disclosure under Rule 194 and through depositions and reports as permitted by this rule.

195.2 Schedule for Designating Experts. Unless otherwise ordered by the court, a party must designate experts — that is, furnish information requested under Rule 194.2(f) — by the later of the following two dates: 30 days after the request is served, or —

(a) with regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery period;

(b) with regard to all other experts, 60 days before the end of the discovery period.

195.3 Scheduling Depositions.

(a) ***Experts for party seeking affirmative relief.*** A party seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition as follows:

(1) *If no report furnished.* If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is not produced when the expert is designated, then the party must make the expert available for deposition reasonably promptly after the expert is designated. If the deposition cannot — due to the actions of the tendering party — reasonably be concluded more than 15 days before the deadline for designating other experts, that deadline must be extended for other experts testifying on the same subject.

(2) *If report furnished.* If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is produced when the expert is designated, then the party need not make the expert available for deposition until reasonably promptly after all other experts have been designated.

(b) ***Other experts.*** A party not seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition reasonably promptly after the expert is designated and the experts testifying on the same subject for the party seeking affirmative relief have been deposed.

195.4 Oral Deposition. In addition to disclosure under Rule 194, a party may obtain discovery concerning the subject matter on which the expert is expected to testify, the expert's mental impressions and opinions, the facts known to the expert (regardless of when the factual information was acquired) that relate to or form the basis of the testifying expert's mental impressions and opinions, and other discoverable matters, including documents not produced in disclosure, only by oral deposition of the expert and by a report prepared by the expert under this rule.

195.5 Court-Ordered Reports. If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert have not been recorded and reduced to tangible form, the court may order these matters reduced to tangible form and produced in addition to the deposition.

195.6 Amendment and Supplementation. A party's duty to amend and supplement written discovery regarding a testifying expert is governed by Rule 193.5. If an expert witness is retained by, employed by, or otherwise under the control of a party, that party must also supplement the expert's deposition testimony or written report, but only with regard to the expert's mental impressions or opinions and the basis for them.

195.7 Cost of Expert Witnesses. When a party takes the oral deposition of an expert witness retained by the opposing party, all reasonable fees charged by the expert for time spent in preparing for, giving, reviewing, and correcting the deposition must be paid by the party that retained the expert.

Notes and Comments

Comments to 1999 change:

1. This rule does not limit the permissible methods of discovery concerning consulting experts whose mental impressions or opinions have been reviewed by a testifying expert. *See* Rule 192.3(e). Information concerning purely consulting experts, of course, is not discoverable.

2. This rule and Rule 194 do not address depositions of testifying experts who are not retained by, employed by, or otherwise subject to the control of the responding party, nor the production of the materials identified in Rule 192.3(e)(5) and (6) relating to such experts. Parties may obtain this discovery, however, through Rules 176 and 205.

3. In scheduling the designations and depositions of expert witnesses, the rule attempts to minimize unfair surprise and undue expense. A party seeking affirmative relief must either produce an expert's report or tender the expert for deposition before an opposing party is required to designate experts. A party who does not wish to incur the expense of a report may simply tender the expert for deposition, but a party who wishes an expert to have the benefit of an opposing party's expert's opinions before being deposed may trigger designation by providing a report. Rule 191.1 permits a trial court, for good cause, to modify the order or deadlines for designating and deposing experts and the allocation of fees and expenses.

RULE 196. REQUESTS FOR PRODUCTION AND INSPECTION TO PARTIES; REQUESTS AND MOTIONS FOR ENTRY UPON PROPERTY

196.1 Request for Production and Inspection to Parties.

(a) ***Request.*** A party may serve on another party — no later than 30 days before the end of the discovery period — a request for production or for inspection, to inspect, sample, test, photograph and copy documents or tangible things within the scope of discovery.

(b) ***Contents of request.*** The request must specify the items to be produced or inspected, either by individual item or by category, and describe with reasonable particularity each item and category. The request must specify a reasonable time (on or after the date on which the response is due) and place for production. If the requesting party will sample or test the requested items, the means, manner and procedure for testing or sampling must be described with sufficient specificity to inform the producing party of the means, manner, and procedure for testing or sampling.

(c) ***Requests for production of medical or mental health records regarding nonparties.***

(1) *Service of request on nonparty.* If a party requests another party to produce medical or mental health records regarding a nonparty, the requesting party must serve the nonparty with the request for production under Rule 21a.

(2) *Exceptions.* A party is not required to serve the request for production on a nonparty whose medical records are sought if:

(A) the nonparty signs a release of the records that is effective as to the requesting party;

(B) the identity of the nonparty whose records are sought will not directly or indirectly be disclosed by production of the records; or

(C) the court, upon a showing of good cause by the party seeking the records, orders that service is not required.

(3) *Confidentiality.* Nothing in this rule excuses compliance with laws concerning the confidentiality of medical or mental health records.

196.2 Response to Request for Production and Inspection.

(a) ***Time for response.*** The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request.

(b) ***Content of response.*** With respect to each item or category of items, the responding party must state objections and assert privileges as required by these rules, and state, as appropriate, that:

(1) production, inspection, or other requested action will be permitted as requested;

(2) the requested items are being served on the requesting party with the response;

(3) production, inspection, or other requested action will take place at a specified time and place, if the responding party is objecting to the time and place of production; or

(4) no items have been identified — after a diligent search — that are responsive to the request.

196.3 Production.

(a) ***Time and place of production.*** Subject to any objections stated in the response, the responding party must produce the requested documents or tangible things within the person's possession, custody or control at either the time and place requested or the time and place stated in the response, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them.

(b) ***Copies.*** The responding party may produce copies in lieu of originals unless a question is raised as to the authenticity of the original or in the circumstances it would be unfair to produce copies in lieu of originals. If originals are produced, the responding party is entitled to retain the originals while the requesting party inspects and copies them.

(c) ***Organization.*** The responding party must either produce documents and tangible things as they are kept in the usual course of business or organize and label them to correspond with the categories in the request.

196.4 Electronic or Magnetic Data. To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot — through reasonable efforts — retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

196.5 Destruction or Alteration. Testing, sampling or examination of an item may not destroy or materially alter an item unless previously authorized by the court.

196.6 Expenses of Production. Unless otherwise ordered by the court for good cause, the expense of producing items will be borne by the responding party and the expense of inspecting, sampling, testing, photographing, and copying items produced will be borne by the requesting party.

196.7 Request or Motion for Entry Upon Property.

(a) ***Request or motion.*** A party may gain entry on designated land or other property to inspect, measure, survey, photograph, test, or sample the property or any designated object or operation thereon by serving — no later than the earlier of 30 days before the end of the discovery period or 30 days before trial —

(1) a request on all parties if the land or property belongs to a party, or

(2) a motion and notice of hearing on all parties and the nonparty if the land or property belongs to a nonparty. If the identity or address of the nonparty is unknown and cannot be obtained through reasonable diligence, the court must permit service by means other than those specified in Rule 21a that are reasonably calculated to give the nonparty notice of the motion and hearing.

(b) ***Time, place, and other conditions.*** The request for entry upon a party's property, or the order for entry upon a nonparty's property, must state the time, place, manner, conditions, and scope of the inspection, and must specifically describe any desired means, manner, and procedure for testing or sampling, and the person or persons by whom the inspection, testing, or sampling is to be made.

(c) ***Response to request for entry.***

(1) *Time to respond.* The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request.

(2) *Content of response.* The responding party must state objections and assert privileges as required by these rules, and state, as appropriate, that:

(A) entry or other requested action will be permitted as requested;

(B) entry or other requested action will take place at a specified time and place, if the responding party is objecting to the time and place of production; or

(C) entry or other requested action cannot be permitted for reasons stated

in the response.

(d) ***Requirements for order for entry on nonparty's property.*** An order for entry on a nonparty's property may issue only for good cause shown and only if the land, property, or object thereon as to which discovery is sought is relevant to the subject matter of the action.

Notes and Comments

Comments to 1999 change:

1. "Document and tangible things" are defined in Rule 192.3(b).

2. A party requesting sampling or testing must describe the procedure with sufficient specificity to enable the responding party to make any appropriate objections.

3. A party requesting production of magnetic or electronic data must specifically request the data, specify the form in which it wants the data produced, and specify any extraordinary steps for retrieval and translation. Unless ordered otherwise, the responding party need only produce the data reasonably available in the ordinary course of business in reasonably usable form.

4. The rule clarifies how the expenses of production are to be allocated absent a court order to the contrary.

5. The obligation of parties to produce documents within their possession, custody or control is explained in Rule 192.3(b).

6. Parties may request production and inspection of documents and tangible things from nonparties under Rule 205.3.

7. Rule 196.3(b) is based on Tex. R. Evid. 1003.

8. Rule 196.1(c) is merely a notice requirement and does not expand the scope of discovery of a nonparty's medical records.

RULE 197. INTERROGATORIES TO PARTIES

197.1 Interrogatories. A party may serve on another party — no later than 30 days before the end of the discovery period — written interrogatories to inquire about any matter within the scope of discovery except matters covered by Rule 195. An interrogatory may inquire whether a party makes a specific legal or factual contention and may ask the responding party to state the legal theories and to describe in general the factual bases for the party's claims or

defenses, but interrogatories may not be used to require the responding party to marshal all of its available proof or the proof the party intends to offer at trial.

197.2 Response to Interrogatories.

(a) ***Time for response.*** The responding party must serve a written response on the requesting party within 30 days after service of the interrogatories, except that a defendant served with interrogatories before the defendant's answer is due need not respond until 50 days after service of the interrogatories.

(b) ***Content of response.*** A response must include the party's answers to the interrogatories and may include objections and assertions of privilege as required under these rules.

(c) ***Option to produce records.*** If the answer to an interrogatory may be derived or ascertained from public records, from the responding party's business records, or from a compilation, abstract or summary of the responding party's business records, and the burden of deriving or ascertaining the answer is substantially the same for the requesting party as for the responding party, the responding party may answer the interrogatory by specifying and, if applicable, producing the records or compilation, abstract or summary of the records. The records from which the answer may be derived or ascertained must be specified in sufficient detail to permit the requesting party to locate and identify them as readily as can the responding party. If the responding party has specified business records, the responding party must state a reasonable time and place for examination of the documents. The responding party must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them.

(d) ***Verification required; exceptions.*** A responding party must sign the answers under oath except that:

(1) when answers are based on information obtained from other persons, the party may so state, and

(2) a party need not sign answers to interrogatories about persons with knowledge of relevant facts, trial witnesses, and legal contentions.

197.3 Use. Answers to interrogatories may be used only against the responding party. An answer to an interrogatory inquiring about matters described in Rule 194.2(c) and (d) that has been amended or supplemented is not admissible and may not be used for impeachment.

Notes and Comments

Comments to 1999 change:

1. Interrogatories about specific legal or factual assertions — such as, whether a party claims a breach of implied warranty, or when a party contends that limitations began to run — are proper, but interrogatories that ask a party to state all legal and factual assertions are improper. As with requests for disclosure, interrogatories may be used to ascertain basic legal and factual claims and defenses but may not be used to force a party to marshal evidence. Use of the answers to such interrogatories is limited, just as the use of similar disclosures under Rule 194.6 is.

2. Rule 191's requirement that a party's attorney sign all discovery responses and objections applies to interrogatory responses and objections. In addition, the responding party must sign some interrogatory answers under oath, as specified by the rule. Answers in amended and supplemental responses must be signed by the party under oath only if the original answers were required to be signed under oath. The failure to sign or verify answers is only a formal defect that does not otherwise impair the answers unless the party refuses to sign or verify the answers after the defect is pointed out.

RULE 198. REQUESTS FOR ADMISSIONS

198.1 Request for Admissions. A party may serve on another party — no later than 30 days before the end of the discovery period — written requests that the other party admit the truth of any matter within the scope of discovery, including statements of opinion or of fact or of the application of law to fact, or the genuineness of any documents served with the request or otherwise made available for inspection and copying. Each matter for which an admission is requested must be stated separately.

198.2 Response to Requests for Admissions.

(a) ***Time for response.*** The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request.

(b) ***Content of response.*** Unless the responding party states an objection or asserts a privilege, the responding party must specifically admit or deny the request or explain in detail the reasons that the responding party cannot admit or deny the request. A response must fairly meet the substance of the request. The responding party may qualify an answer, or deny a request in part, only when good faith requires. Lack of information or knowledge is not a proper response unless the responding party states that a reasonable inquiry was made but that the information known or easily obtainable is insufficient to enable the responding party to admit or deny. An

assertion that the request presents an issue for trial is not a proper response.

(c) ***Effect of failure to respond.*** If a response is not timely served, the request is considered admitted without the necessity of a court order.

198.3 Effect of Admissions; Withdrawal or Amendment. Any admission made by a party under this rule may be used solely in the pending action and not in any other proceeding. A matter admitted under this rule is conclusively established as to the party making the admission unless the court permits the party to withdraw or amend the admission. The court may permit the party to withdraw or amend the admission if:

(a) the party shows good cause for the withdrawal or amendment; and

(b) the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved by permitting the party to amend or withdraw the admission.

RULE 199. DEPOSITIONS UPON ORAL EXAMINATION

199.1 Oral Examination; Alternative Methods of Conducting or Recording.

(a) ***Generally.*** A party may take the testimony of any person or entity by deposition on oral examination before any officer authorized by law to take depositions. The testimony, objections, and any other statements during the deposition must be recorded at the time they are given or made.

(b) ***Depositions by telephone or other remote electronic means.*** A party may take an oral deposition by telephone or other remote electronic means if the party gives reasonable prior written notice of intent to do so. For the purposes of these rules, an oral deposition taken by telephone or other remote electronic means is considered as having been taken in the district and at the place where the witness is located when answering the questions. The officer taking the deposition may be located with the party noticing the deposition instead of with the witness if the witness is placed under oath by a person who is present with the witness and authorized to administer oaths in that jurisdiction.

(c) ***Nonstenographic recording.*** Any party may cause a deposition upon oral examination to be recorded by other than stenographic means, including videotape recording. The party requesting the nonstenographic recording will be responsible for obtaining a person authorized by law to administer the oath and for assuring that the recording will be intelligible, accurate, and trustworthy. At least five days prior to the deposition, the party must serve on the witness and all parties a notice, either

in the notice of deposition or separately, that the deposition will be recorded by other than stenographic means. This notice must state the method of nonstenographic recording to be used and whether the deposition will also be recorded stenographically. Any other party may then serve written notice designating another method of recording in addition to the method specified, at the expense of such other party unless the court orders otherwise.

199.2 Procedure for Noticing Oral Deposition.

(a) ***Time to notice deposition.*** A notice of intent to take an oral deposition must be served on the witness and all parties a reasonable time before the deposition is taken. An oral deposition may be taken outside the discovery period only by agreement of the parties or with leave of court.

(b) ***Content of notice.***

(1) *Identity of witness; organizations.* The notice must state the name of the witness, which may be either an individual or a public or private corporation, partnership, association, governmental agency, or other organization. If an organization is named as the witness, the notice must describe with reasonable particularity the matters on which examination is requested. In response, the organization named in the notice must — a reasonable time before the deposition — designate one or more individuals to testify on its behalf and set forth, for each individual designated, the matters on which the individual will testify. Each individual designated must testify as to matters that are known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized by these rules.

(2) *Time and place.* The notice must state a reasonable time and place for the oral deposition. The place may be in:

(A) the county of the witness's residence;

(B) the county where the witness is employed or regularly transacts business in person;

(C) the county of suit, if the witness is a party or a person designated by a party under Rule 199.2(b)(1);

(D) the county where the witness was served with the subpoena, or within 150 miles of the place of service, if the witness is not a resident of Texas or is a transient person; or

(E) subject to the foregoing, at any other convenient place directed by the court in which the cause is pending.

(3) *Alternative means of conducting and recording.* The notice must state whether the deposition is to be taken by telephone or other remote electronic means and identify the means. If the deposition is to be recorded by nonstenographic means, the notice may include the notice required by Rule 199.1(c).

(4) *Additional attendees.* The notice may include the notice concerning additional attendees required by Rule 199.5(a)(3).

(5) *Request for production of documents.* A notice may include a request that the witness produce at the deposition documents or tangible things within the scope of discovery and within the witness's possession, custody, or control. If the witness is a nonparty, the request must comply with Rule 205 and the designation of materials required to be identified in the subpoena must be attached to, or included in, the notice. The nonparty's response to the request is governed by Rules 176 and 205. When the witness is a party or subject to the control of a party, document requests under this subdivision are governed by Rules 193 and 196.

199.3 Compelling Witness to Attend. A party may compel the witness to attend the oral deposition by serving the witness with a subpoena under Rule 176. If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the notice of oral deposition upon the party's attorney has the same effect as a subpoena served on the witness.

199.4 Objections to Time and Place of Oral Deposition. A party or witness may object to the time and place designated for an oral deposition by motion for protective order or by motion to quash the notice of deposition. If the motion is filed by the third business day after service of the notice of deposition, an objection to the time and place of a deposition stays the oral deposition until the motion can be determined.

199.5 Examination, Objection, and Conduct During Oral Depositions.

(a) ***Attendance.***

(1) *Witness.* The witness must remain in attendance from day to day until the deposition is begun and completed.

(2) *Attendance by party.* A party may attend an oral deposition in person, even if the deposition is taken by telephone or other remote electronic means. If

a deposition is taken by telephone or other remote electronic means, the party noticing the deposition must make arrangements for all persons to attend by the same means. If the party noticing the deposition appears in person, any other party may appear by telephone or other remote electronic means if that party makes the necessary arrangements with the deposition officer and the party noticing the deposition.

(3) *Other attendees.* If any party intends to have in attendance any persons other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the oral deposition, that party must give reasonable notice to all parties, either in the notice of deposition or separately, of the identity of the other persons.

(b) ***Oath; examination.*** Every person whose deposition is taken by oral examination must first be placed under oath. The parties may examine and cross-examine the witness. Any party, in lieu of participating in the examination, may serve written questions in a sealed envelope on the party noticing the oral deposition, who must deliver them to the deposition officer, who must open the envelope and propound them to the witness.

(c) ***Time limitation.*** No side may examine or cross-examine an individual witness for more than six hours. Breaks during depositions do not count against this limitation.

(d) ***Conduct during the oral deposition; conferences.*** The oral deposition must be conducted in the same manner as if the testimony were being obtained in court during trial. Counsel should cooperate with and be courteous to each other and to the witness. The witness should not be evasive and should not unduly delay the examination. Private conferences between the witness and the witness's attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during agreed recesses and adjournments. If the lawyers and witnesses do not comply with this rule, the court may allow in evidence at trial statements, objections, discussions, and other occurrences during the oral deposition that reflect upon the credibility of the witness or the testimony.

(e) ***Objections.*** Objections to questions during the oral deposition are limited to "Objection, leading" and "Objection, form." Objections to testimony during the oral deposition are limited to "Objection, nonresponsive." These objections are waived if not stated as phrased during the oral deposition. All other objections need not be made or recorded during the oral deposition to be later raised with the court. The objecting party must give a clear and concise explanation of an objection if requested by the party taking the oral deposition, or the objection is waived. Argumentative or suggestive objections or explanations waive objection and may be grounds for

terminating the oral deposition or assessing costs or other sanctions. The officer taking the oral deposition will not rule on objections but must record them for ruling by the court. The officer taking the oral deposition must not fail to record testimony because an objection has been made.

(f) ***Instructions not to answer.*** An attorney may instruct a witness not to answer a question during an oral deposition only if necessary to preserve a privilege, comply with a court order or these rules, protect a witness from an abusive question or one for which any answer would be misleading, or secure a ruling pursuant to paragraph (g). The attorney instructing the witness not to answer must give a concise, nonargumentative, nonsuggestive explanation of the grounds for the instruction if requested by the party who asked the question.

(g) ***Suspending the deposition.*** If the time limitations for the deposition have expired or the deposition is being conducted or defended in violation of these rules, a party or witness may suspend the oral deposition for the time necessary to obtain a ruling.

(h) ***Good faith required.*** An attorney must not ask a question at an oral deposition solely to harass or mislead the witness, for any other improper purpose, or without a good faith legal basis at the time. An attorney must not object to a question at an oral deposition, instruct the witness not to answer a question, or suspend the deposition unless there is a good faith factual and legal basis for doing so at the time.

199.6 Hearing on Objections. Any party may, at any reasonable time, request a hearing on an objection or privilege asserted by an instruction not to answer or suspension of the deposition; provided the failure of a party to obtain a ruling prior to trial does not waive any objection or privilege. The party seeking to avoid discovery must present any evidence necessary to support the objection or privilege either by testimony at the hearing or by affidavits served on opposing parties at least seven days before the hearing. If the court determines that an *in camera* review of some or all of the requested discovery is necessary to rule, answers to the deposition questions may be made in camera, to be transcribed and sealed in the event the privilege is sustained, or made in an affidavit produced to the court in a sealed wrapper.

Notes and Comments

Comments to 1999 change:

1. Rule 199.2(b)(5) incorporates the procedures and limitations applicable to requests for production or inspection under Rule 196, including the 30-day deadline for responses, as well as the procedures and duties imposed by Rule 193.

2. For purposes of Rule 199.5(c), each person designated by an organization under Rule

199.2(b)(1) is a separate witness.

3. The requirement of Rule 199.5(d) that depositions be conducted in the same manner as if the testimony were being obtained in court is a limit on the conduct of the lawyers and witnesses in the deposition, not on the scope of the interrogation permitted by Rule 192.

4. An objection to the form of a question includes objections that the question calls for speculation, calls for a narrative answer, is vague, is confusing, or is ambiguous. Ordinarily, a witness must answer a question at a deposition subject to the objection. An objection may therefore be inadequate if a question incorporates such unfair assumptions or is worded so that any answer would necessarily be misleading. A witness should not be required to answer whether he has yet ceased conduct he denies ever doing, subject to an objection to form (*i.e.*, that the question is confusing or assumes facts not in evidence) because any answer would necessarily be misleading on account of the way in which the question is put. The witness may be instructed not to answer. Abusive questions include questions that inquire into matters clearly beyond the scope of discovery or that are argumentative, repetitious, or harassing.

RULE 200. DEPOSITIONS UPON WRITTEN QUESTIONS

200.1 Procedure for Noticing Deposition Upon Written Questions.

(a) ***Who may be noticed; when.*** A party may take the testimony of any person or entity by deposition on written questions before any person authorized by law to take depositions on written questions. A notice of intent to take the deposition must be served on the witness and all parties at least 20 days before the deposition is taken. A deposition on written questions may be taken outside the discovery period only by agreement of the parties or with leave of court. The party noticing the deposition must also deliver to the deposition officer a copy of the notice and of all written questions to be asked during the deposition.

(b) ***Content of notice.*** The notice must comply with Rules 199.1(b), 199.2(b), and 199.5(a)(3). If the witness is an organization, the organization must comply with the requirements of that provision. The notice also may include a request for production of documents as permitted by Rule 199.2(b)(5), the provisions of which will govern the request, service, and response.

200.2 Compelling Witness to Attend. A party may compel the witness to attend the deposition on written questions by serving the witness with a subpoena under Rule 176. If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the deposition notice upon the party's attorney has the same effect as a subpoena served on the witness.

200.3 Questions and Objections.

(a) ***Direct questions.*** The direct questions to be propounded to the witness must be attached to the notice.

(b) ***Objections and additional questions.*** Within ten days after the notice and direct questions are served, any party may object to the direct questions and serve cross-questions on all other parties. Within five days after cross-questions are served, any party may object to the cross-questions and serve redirect questions on all other parties. Within three days after redirect questions are served, any party may object to the redirect questions and serve recross questions on all other parties. Objections to recross questions must be served within five days after the earlier of when recross questions are served or the time of the deposition on written questions.

(c) ***Objections to form of questions.*** Objections to the form of a question are waived unless asserted in accordance with this subdivision.

200.4 Conducting the Deposition Upon Written Questions. The deposition officer must: take the deposition on written questions at the time and place designated; record the testimony of the witness in response to the questions; and prepare, certify, and deliver the deposition transcript in accordance with Rule 203. The deposition officer has authority when necessary to summon and swear an interpreter to facilitate the taking of the deposition.

Notes and Comments

Comments to 1999 change:

1. The procedures for asserting objections during oral depositions under Rule 199.5(e) do not apply to depositions on written questions.

2. Section 20.001 of the Civil Practice and Remedies Code provides that a deposition on written questions of a witness who is alleged to reside or to be in this state may be taken by a clerk of a district court, a judge or clerk of a county court, or a notary public of this state.

RULE 201. DEPOSITIONS IN FOREIGN JURISDICTIONS FOR USE IN TEXAS PROCEEDINGS; DEPOSITIONS IN TEXAS FOR USE IN FOREIGN PROCEEDINGS

201.1 Depositions in Foreign Jurisdictions for Use in Texas Proceedings.

(a) ***Generally.*** A party may take a deposition on oral examination or written questions of any person or entity located in another state or a foreign country for use in proceedings in this State. The deposition may be taken by:

(1) notice;

(2) letter rogatory, letter of request, or other such device;

(3) agreement of the parties; or

(4) court order.

(b) ***By notice.*** A party may take the deposition by notice in accordance with these rules as if the deposition were taken in this State, except that the deposition officer may be a person authorized to administer oaths in the place where the deposition is taken.

(c) ***By letter rogatory.*** On motion by a party, the court in which an action is pending must issue a letter rogatory on terms that are just and appropriate, regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter must:

(1) be addressed to the appropriate authority in the jurisdiction in which the deposition is to be taken;

(2) request and authorize that authority to summon the witness before the authority at a time and place stated in the letter for examination on oral or written questions; and

(3) request and authorize that authority to cause the witness's testimony to be reduced to writing and returned, together with any items marked as exhibits, to the party requesting the letter rogatory.

(d) ***By letter of request or other such device.*** On motion by a party, the court in which an action is pending, or the clerk of that court, must issue a letter of request or other such device in accordance with an applicable treaty or international convention on terms that are just and appropriate. The letter or other device must be issued regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter or other device must:

(1) be in the form prescribed by the treaty or convention under which it is issued, as presented by the movant to the court or clerk; and

(2) must state the time, place, and manner of the examination of the witness.

(e) ***Objections to form of letter rogatory, letter of request, or other such device.*** In issuing a letter rogatory, letter of request, or other such device, the court must set a time for objecting to the form of the device. A party must make any objection to the

form of the device in writing and serve it on all other parties by the time set by the court, or the objection is waived.

(f) ***Admissibility of evidence.*** Evidence obtained in response to a letter rogatory, letter of request, or other such device is not inadmissible merely because it is not a verbatim transcript, or the testimony was not taken under oath, or for any similar departure from the requirements for depositions taken within this State under these rules.

(g) ***Deposition by electronic means.*** A deposition in another jurisdiction may be taken by telephone, videoconference, teleconference, or other electronic means under the provisions of Rule 199.

201.2 Depositions in Texas for Use in Proceedings in Foreign Jurisdictions. If a court of record of any other state or foreign jurisdiction issues a mandate, writ, or commission that requires a witness's oral or written deposition testimony in this State, the witness may be compelled to appear and testify in the same manner and by the same process used for taking testimony in a proceeding pending in this State.

Notes and Comments

Comments to 1999 change:

1. Rule 201.1 sets forth procedures for obtaining deposition testimony of a witness in another state or foreign jurisdiction for use in Texas court proceedings. It does not, however, address whether any of the procedures listed are, in fact, permitted or recognized by the law of the state or foreign jurisdiction where the witness is located. A party must first determine what procedures are permitted by the jurisdiction where the witness is located before using this rule.

2. Section 20.001 of the Civil Practice and Remedies Code provides a nonexclusive list of persons who are qualified to take a written deposition in Texas and who may take depositions (oral or written) in another state or outside the United States.

3. Rule 201.2 is based on Section 20.002 of the Civil Practice and Remedies Code.

RULE 202. DEPOSITIONS BEFORE SUIT OR TO INVESTIGATE CLAIMS

202.1 Generally. A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either:

(a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or

(b) to investigate a potential claim or suit.

202.2 Petition. The petition must:

(a) be verified;

(b) be filed in a proper court of any county:

(1) where venue of the anticipated suit may lie, if suit is anticipated; or

(2) where the witness resides, if no suit is yet anticipated;

(c) be in the name of the petitioner;

(d) state either:

(1) that the petitioner anticipates the institution of a suit in which the petitioner may be a party; or

(2) that the petitioner seeks to investigate a potential claim by or against petitioner;

(e) state the subject matter of the anticipated action, if any, and the petitioner's interest therein;

(f) if suit is anticipated, either:

(1) state the names of the persons petitioner expects to have interests adverse to petitioner's in the anticipated suit, and the addresses and telephone numbers for such persons; or

(2) state that the names, addresses, and telephone numbers of persons petitioner expects to have interests adverse to petitioner's in the anticipated suit cannot be ascertained through diligent inquiry, and describe those persons;

(g) state the names, addresses and telephone numbers of the persons to be deposed, the substance of the testimony that the petitioner expects to elicit from each, and the petitioner's reasons for desiring to obtain the testimony of each; and

(h) request an order authorizing the petitioner to take the depositions of the persons named in the petition.

202.3 Notice and Service.

(a) ***Personal service on witnesses and persons named.*** At least 15 days before the date of the hearing on the petition, the petitioner must serve the petition and a notice of the hearing — in accordance with Rule 21a — on all persons petitioner seeks to depose and, if suit is anticipated, on all persons petitioner expects to have interests adverse to petitioner's in the anticipated suit.

(b) ***Service by publication on persons not named.***

(1) *Manner.* Unnamed persons described in the petition whom the petitioner expects to have interests adverse to petitioner's in the anticipated suit, if any, may be served by publication with the petition and notice of the hearing. The notice must state the place for the hearing and the time it will be held, which must be more than 14 days after the first publication of the notice. The petition and notice must be published once each week for two consecutive weeks in the newspaper of broadest circulation in the county in which the petition is filed, or if no such newspaper exists, in the newspaper of broadest circulation in the nearest county where a newspaper is published.

(2) *Objection to depositions taken on notice by publication.* Any interested party may move, in the proceeding or by bill of review, to suppress any deposition, in whole or in part, taken on notice by publication, and may also attack or oppose the deposition by any other means available.

(c) ***Service in probate cases.*** A petition to take a deposition in anticipation of an application for probate of a will, and notice of the hearing on the petition, may be served by posting as prescribed by Section 33(f)(2) of the Probate Code. The notice and petition must be directed to all parties interested in the testator's estate and must comply with the requirements of Section 33(c) of the Probate Code insofar as they may be applicable.

(d) ***Modification by order.*** As justice or necessity may require, the court may shorten or lengthen the notice periods under this rule and may extend the notice period to permit service on any expected adverse party.

202.4 Order.

(a) ***Required findings.*** The court must order a deposition to be taken if, but only if, it finds that:

(1) allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit; or

(2) the likely benefit of allowing the petitioner to take the requested deposition

to investigate a potential claim outweighs the burden or expense of the procedure.

(b) ***Contents.*** The order must state whether a deposition will be taken on oral examination or written questions. The order may also state the time and place at which a deposition will be taken. If the order does not state the time and place at which a deposition will be taken, the petitioner must notice the deposition as required by Rules 199 or 200. The order must contain any protections the court finds necessary or appropriate to protect the witness or any person who may be affected by the procedure.

202.5 Manner of Taking and Use. Except as otherwise provided in this rule, depositions authorized by this rule are governed by the rules applicable to depositions of nonparties in a pending suit. The scope of discovery in depositions authorized by this rule is the same as if the anticipated suit or potential claim had been filed. A court may restrict or prohibit the use of a deposition taken under this rule in a subsequent suit to protect a person who was not served with notice of the deposition from any unfair prejudice or to prevent abuse of this rule.

Notes and Comments

Comments to 1999 change:

1. This rule applies to all discovery before suit covered by former rules governing depositions to perpetuate testimony and bills of discovery.

2. A deposition taken under this rule may be used in a subsequent suit as permitted by the rules of evidence, except that a court may restrict or prohibit its use to prevent taking unfair advantage of a witness or others. The bill of discovery procedure, which Rule 202 incorporates, is equitable in nature, and a court must not permit it to be used inequitably.

RULE 203. SIGNING, CERTIFICATION AND USE OF ORAL AND WRITTEN DEPOSITIONS

203.1 Signature and Changes.

(a) ***Deposition transcript to be provided to witness.*** The deposition officer must provide the original deposition transcript to the witness for examination and signature. If the witness is represented by an attorney at the deposition, the deposition officer must provide the transcript to the attorney instead of the witness.

(b) ***Changes by witness; signature.*** The witness may change responses as reflected in

the deposition transcript by indicating the desired changes, in writing, on a separate sheet of paper, together with a statement of the reasons for making the changes. No erasures or obliterations of any kind may be made to the original deposition transcript. The witness must then sign the transcript under oath and return it to the deposition officer. If the witness does not return the transcript to the deposition officer within 20 days of the date the transcript was provided to the witness or the witness's attorney, the witness may be deemed to have waived the right to make the changes.

(c) ***Exceptions.*** The requirements of presentation and signature under this subdivision do not apply:

(1) if the witness and all parties waive the signature requirement;

(2) to depositions on written questions; or

(3) to nonstenographic recordings of oral depositions.

203.2 Certification. The deposition officer must file with the court, serve on all parties, and attach as part of the deposition transcript or nonstenographic recording of an oral deposition a certificate duly sworn by the officer stating:

(a) that the witness was duly sworn by the officer and that the transcript or nonstenographic recording of the oral deposition is a true record of the testimony given by the witness;

(b) that the deposition transcript, if any, was submitted to the witness or to the attorney for the witness for examination and signature, the date on which the transcript was submitted, whether the witness returned the transcript, and if so, the date on which it was returned.

(c) that changes, if any, made by the witness are attached to the deposition transcript;

(d) that the deposition officer delivered the deposition transcript or nonstenographic recording of an oral deposition in accordance with Rule 203.3;

(e) the amount of time used by each party at the deposition;

(f) the amount of the deposition officer's charges for preparing the original deposition transcript, which the clerk of the court must tax as costs; and

(g) that a copy of the certificate was served on all parties and the date of service.

203.3 Delivery.

(a) ***Endorsement; to whom delivered.*** The deposition officer must endorse the title of the action and "Deposition of (name of witness)" on the original deposition transcript (or a copy, if the original was not returned) or the original nonstenographic recording of an oral deposition, and must return:

(1) the transcript to the party who asked the first question appearing in the transcript, or

(2) the recording to the party who requested it.

(b) ***Notice.*** The deposition officer must serve notice of delivery on all other parties.

(c) ***Inspection and copying; copies.*** The party receiving the original deposition transcript or nonstenographic recording must make it available upon reasonable request for inspection and copying by any other party. Any party or the witness is entitled to obtain a copy of the deposition transcript or nonstenographic recording from the deposition officer upon payment of a reasonable fee.

203.4 Exhibits. At the request of a party, the original documents and things produced for inspection during the examination of the witness must be marked for identification by the deposition officer and annexed to the deposition transcript or nonstenographic recording. The person producing the materials may produce copies instead of originals if the party gives all other parties fair opportunity at the deposition to compare the copies with the originals. If the person offers originals rather than copies, the deposition officer must, after the conclusion of the deposition, make copies to be attached to the original deposition transcript or nonstenographic recording, and then return the originals to the person who produced them. The person who produced the originals must preserve them for hearing or trial and make them available for inspection or copying by any other party upon seven days' notice. Copies annexed to the original deposition transcript or nonstenographic recording may be used for all purposes.

203.5 Motion to Suppress. A party may object to any errors and irregularities in the manner in which the testimony is transcribed, signed, delivered, or otherwise dealt with by the deposition officer by filing a motion to suppress all or part of the deposition. If the deposition officer complies with Rule 203.3 at least one day before the case is called to trial, with regard to a deposition transcript, or 30 days before the case is called to trial, with regard to a nonstenographic recording, the party must file and serve a motion to suppress before trial commences to preserve the objections.

203.6 Use.

(a) ***Nonstenographic recording; transcription.*** A nonstenographic recording of an oral deposition, or a written transcription of all or part of such a recording, may be used to the same extent as a deposition taken by stenographic means. However, the court, for good cause shown, may require that the party seeking to use a nonstenographic recording or written transcription first obtain a complete transcript of the deposition recording from a certified court reporter. The court reporter's transcription must be made from the original or a certified copy of the deposition recording. The court reporter must, to the extent applicable, comply with the provisions of this rule, except that the court reporter must deliver the original transcript to the attorney requesting the transcript, and the court reporter's certificate must include a statement that the transcript is a true record of the nonstenographic recording. The party to whom the court reporter delivers the original transcript must make the transcript available, upon reasonable request, for inspection and copying by the witness or any party.

(b) ***Same proceeding.*** All or part of a deposition may be used for any purpose in the same proceeding in which it was taken. If the original is not filed, a certified copy may be used. "Same proceeding" includes a proceeding in a different court but involving the same subject matter and the same parties or their representatives or successors in interest. A deposition is admissible against a party joined after the deposition was taken if:

(1) the deposition is admissible pursuant to Rule 804(b)(1) of the Rules of Evidence, or

(2) that party has had a reasonable opportunity to redepose the witness and has failed to do so.

(c) ***Different proceeding.*** Depositions taken in different proceedings may be used as permitted by the Rules of Evidence.

RULE 204. PHYSICAL AND MENTAL EXAMINATIONS

204.1 Motion and Order Required.

(a) ***Motion.*** A party may — no later than 30 days before the end of any applicable discovery period — move for an order compelling another party to:

(1) submit to a physical or mental examination by a qualified physician or a mental examination by a qualified psychologist; or

(2) produce for such examination a person in the other party's custody, conservatorship or legal control.

(b) ***Service.*** The motion and notice of hearing must be served on the person to be examined and all parties.

(c) ***Requirements for obtaining order.*** The court may issue an order for examination only for good cause shown and only in the following circumstances:

(1) when the mental or physical condition (including the blood group) of a party, or of a person in the custody, conservatorship or under the legal control of a party, is in controversy; or

(2) except as provided in Rule 204.4, an examination by a psychologist may be ordered when the party responding to the motion has designated a psychologist as a testifying expert or has disclosed a psychologist's records for possible use at trial.

(d) ***Requirements of order.*** The order must be in writing and must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

204.2 Report of Examining Physician or Psychologist.

(a) ***Right to report.*** Upon request of the person ordered to be examined, the party causing the examination to be made must deliver to the person a copy of a detailed written report of the examining physician or psychologist setting out the findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery of the report, upon request of the party causing the examination, the party against whom the order is made must produce a like report of any examination made before or after the ordered examination of the same condition, unless the person examined is not a party and the party shows that the party is unable to obtain it. The court on motion may limit delivery of a report on such terms as are just. If a physician or psychologist fails or refuses to make a report the court may exclude the testimony if offered at the trial.

(b) ***Agreements; relationship to other rules.*** This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance with the provisions of any other rule.

204.3 Effect of No Examination. If no examination is sought either by agreement or under this subdivision, the party whose physical or mental condition is in controversy must not comment to the court or jury concerning the party's willingness to submit to an examination, or on the right or failure of any other party to seek an examination.

204.4 Cases Arising Under Titles II or V, Family Code. In cases arising under Family Code Titles II or V, the court may — on its own initiative or on motion of a party — appoint:

(a) one or more psychologists or psychiatrists to make any and all appropriate mental examinations of the children who are the subject of the suit or of any other parties, and may make such appointment irrespective of whether a psychologist or psychiatrist has been designated by any party as a testifying expert;

(b) one or more experts who are qualified in paternity testing to take blood, body fluid, or tissue samples to conduct paternity tests as ordered by the court.

204.5 Definition. For the purpose of this rule, a psychologist is a person licensed or certified by a state or the District of Columbia as a psychologist.

RULE 205. DISCOVERY FROM NONPARTIES

205.1 Forms of Discovery; Subpoena Requirement. A party may compel discovery from a nonparty — that is, a person who is not a party or subject to a party's control — only by obtaining a court order under Rules 196.7, 202, or 204, or by serving a subpoena compelling:

(a) an oral deposition;

(b) a deposition on written questions;

(c) a request for production of documents or tangible things, pursuant to Rule 199.2(b)(5) or Rule 200.1(b), served with a notice of deposition on oral examination or written questions; and

(d) a request for production of documents under this rule.

205.2 Notice. A party seeking discovery by subpoena from a nonparty must serve, on the nonparty and all parties, a copy of the form of notice required under the rules governing the applicable form of discovery. This notice must be served before or at the same time that the subpoena is served.

205.3 Production of Documents Without Deposition.

(a) ***Notice; subpoena.*** A party may compel production of documents from a nonparty by serving on the nonparty and all parties — a reasonable time before the response is due but no later than 30 days before the end of any applicable discovery period — the notice required in Rule 205.2 and a subpoena compelling production or inspection of documents or tangible things.

(b) ***Contents of notice.*** The notice must state:

(1) the name of the person from whom production or inspection is sought to be compelled;

(2) a reasonable time and place for the production or inspection; and

(3) the items to be produced or inspected, either by individual item or by category, describing each item and category with reasonable particularity, and, if applicable, describing the desired testing and sampling with sufficient specificity to inform the nonparty of the means, manner, and procedure for testing or sampling.

(c) ***Requests for production of medical or mental health records of other nonparties.*** If a party requests a nonparty to produce medical or mental health records of another nonparty, the requesting party must serve the nonparty whose records are sought with the notice required under this rule. This requirement does not apply under the circumstances set forth in Rule 196.1(c)(2).

(d) ***Response.*** The nonparty must respond to the notice and subpoena in accordance with Rule 176.6.

(e) ***Custody, inspection and copying.*** The party obtaining the production must make all materials produced available for inspection by any other party on reasonable notice, and must furnish copies to any party who requests at that party's expense.

(f) ***Cost of production.*** A party requiring production of documents by a nonparty must reimburse the nonparty's reasonable costs of production.

Notes and Comments

Comments to 1999 change: Under this rule, a party may subpoena production of documents and tangible things from nonparties without need for a motion or oral or written deposition.

RULE 215. ABUSE OF DISCOVERY; SANCTIONS

215.1 Motion for Sanctions or Order Compelling Discovery. A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows:

(a) ***Appropriate court.*** On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any district

court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, an application for an order will be made to the court in which the action is pending.

(b) ***Motion.***

(1) If a party or other deponent which is a corporation or other entity fails to make a designation under Rules 199.2(b)(1) or 200.1(b); or

(2) if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails:

(A) to appear before the officer who is to take his deposition, after being served with a proper notice; or

(B) to answer a question propounded or submitted upon oral examination or upon written questions; or

(3) if a party fails:

(A) to serve answers or objections to interrogatories submitted under Rule 197, after proper service of the interrogatories; or

(B) to answer an interrogatory submitted under Rule 197; or

(C) to serve a written response to a request for inspection submitted under Rule 196, after proper service of the request; or

(D) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 196;

the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by Rule 215.2(b) without the necessity of first having obtained a court order compelling such discovery.

When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order

as it would have been empowered to make on a motion pursuant to Rule 192.6.

(c) ***Evasive or incomplete answer.*** For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(d) ***Disposition of motion to compel: award of expenses.*** If the motion is granted, the court shall, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

In determining the amount of reasonable expenses, including attorney fees, to be awarded in connection with a motion, the trial court shall award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or in opposing a motion which is denied.

(e) ***Providing person's own statement.*** If a party fails to comply with any person's written request for the person's own statement as provided in Rule 192.3(h), the person who made the request may move for an order compelling compliance. If the motion is granted, the movant may recover the expenses incurred in obtaining the order, including attorney fees, which are reasonable in relation to the amount of work reasonably expended in obtaining the order.

215.2 Failure to Comply with Order or with Discovery Request.

(a) ***Sanctions by court in district where deposition is taken.*** If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(b) ***Sanctions by court in which action is pending.*** If a party or an officer, director, or managing agent of a party or a person designated under Rules 199.2(b)(1) or 200.1(b) to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under Rules 204 or 215.1, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

(1) an order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(3) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(6) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(7) when a party has failed to comply with an order under Rule 204 requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.

(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

(c) ***Sanction against nonparty for violation of Rules 196.7 or 205.3.*** If a nonparty fails to comply with an order under Rules 196.7 or 205.3, the court which made the order may treat the failure to obey as contempt of court.

215.3 Abuse of Discovery Process in Seeking, Making, or Resisting Discovery. If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after notice and hearing, impose any appropriate sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of Rule 215.2(b). Such order of sanction shall be subject to review on appeal from the final judgment.

215.4 Failure to Comply with Rule 198.

(a) ***Motion.*** A party who has requested an admission under Rule 198 may move to determine the sufficiency of the answer or objection. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of Rule 198, it may order either that the matter is admitted or that an amended answer be served. The provisions of Rule 215.1(d) apply to the award of expenses incurred in relation to the motion.

(b) ***Expenses on failure to admit.*** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 198 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 193, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

215.5 Failure of Party or Witness to Attend or to Serve Subpoena; Expenses.

(a) ***Failure of party giving notice to attend.*** If the party giving the notice of the taking of an oral deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.

(b) ***Failure of witness to attend.*** If a party gives notice of the taking of an oral deposition of a witness and the witness does not attend because of the fault of the party giving the notice, if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.

215.6 Exhibits to Motions and Responses. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.

Notes and Comments

Comments to 1999 change: This references in this rule to other discovery rules are changed to reflect the revisions in those rules, and former Rule 203 is added as Rule 215.5 in place of the former provision, which is superseded by Rule 193.6.

THE SUPREME COURT OF TEXAS

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November 13, 1998

Ms. Kelley King, Editor
The Texas Bar Journal
State Bar of Texas
1515 Colorado Street
Austin, Texas 78701

RE: Order of the Supreme Court of Texas No. 98-9196, November 9, 1998.

Pursuant to the order of the Court, I am forwarding the attached copy of the referenced order for publication in the Texas Bar Journal as soon as possible.

Sincerely,

SIGNED

John T. Adams
Clerk

Encl.

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

November 13, 1998

Office of the Secretary
of State
Statutory Filings Division
1019 Brazos Street
Austin, Texas 78701

RE: Order of the Supreme Court of Texas No. 98-9196, November 9, 1998.

Pursuant to the order of the Court, I am forwarding the attached certified copy of the referenced order for filing as apporpriate.

Sincerely,

SIGNED
John T. Adams
Clerk

Encl.

I, **JOHN T. ADAMS**, Clerk of the Supreme Court of Texas, do hereby certify that the attached sixty-one (61) pages contain a true and correct copy of the FINAL APPROVAL OF REVISIONS TO THE TEXAS RULES OF CIVIL PROCEDURE (Misc. Docket No. 98-9196), promulgated by the Supreme Court of Texas on November 9, 1998, as the original of said document appears of record on file in this office.

IN TESTIMONY WHEREOF, witness my hand and the

SEAL OF THE SUPREME COURT OF TEXAS

at the City of Austin

this the 13th day of November, 1998.

SIGNED

John T. Adams, Clerk