AGENDA
JULY 15-16, 1994
SCAC MEETING

INDEX

MISKO, HOWIE & SWEENEY
ATTORNEYS AND COUNSELORS

TURTLE CREEK CENTRE, SUITE 1900
3811 TURTLE CREEK BOULEVARD
DALLAS, TEXAS 75219
(214) 443-8000

PAULA SWEENEY

BOARD CERTIFIED
PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

TELECOPIER
(214) 443-8083

July 13, 1994

TO: SEE ATTACHED ADDRESSEE LIST

RE: Supreme Court Advisory Committee

Dear Folks:

Attached is the final approved draft of our work product on Rules 226-279. We voted on these at our last meeting, but you have not seen them in final format.

Best regards,

Paula Sweeney

PS/dsa
Attachment

Alejandro Acosta, Jr.
Kemp, Smith, Duncan & Hammond
2000 State National Plaza
P.O. Drawer 2800
El Paso, Texas 79999-2800

Prof. Alexandra W. Albright
The University of Texas School of Law
727 E. 26th Street
Austin, Texas 78705-3299

Charles L. Babcock
Jackson & Walker
1100 Louisiana Street
Suite 4200
Houston, Texas 77210-4771

Pamela Stanton Baron
2403 Indian Trail
Austin, Texas 78703

David J. Beck
Beck, Redden & Secrest
1331 Lamar
Suite 1570
Houston, Texas 77010

Honorable Scott A. Brister
Judge 234th District Court
301 Fannin Street
Houston, Texas 77002

Prof. Elaine A. Carlson
South Texas College of Law
1303 San Jacinto Street
Suite 755
Houston, Texas 77002-7006

Charles F. Herring, Jr.
Jones Day Reavis & Pogue
301 Congress Avenue
Suite 1200
Austin, Texas 78701

Honorable Ann Tyrrell Cochran
Judge 270th District Court
301 Fannin Street
Houston, Texas 77002

Prof. William V. Dorsaneo, III
Southern Methodist University
School of Law
130 Storey Hall
Dallas, Texas 75275-0016

Sarah B. Duncan
123 Kennedy
San Antonio, Texas 78209

Michael T. Gallagher
Fisher, Gallagher & Lewis
1000 Louisiana Street, 70th Floor
Houston, Texas 77002

Anne L. Gardner
Shannon, Gracey, Ratliff & Miller
201 Main Street, Suite 2200
Ft. Worth, Texas 76102-9990

Honorable Clarence A. Guittard
Guittard, Hyden & Guittard
4849 Greenville Avenue, Suite 680
Dallas, Texas 75206

Michael A. Hatchell
Ramey, Flock, Jeffus, Crawford,
Harper & Collins
500 First City Place, 5th Floor
Tyler, Texas 75710-0629

Tommy Jacks
Mithoff & Jacks
111 Congress, Suite 1010
Austin, Texas 78701

Donald M. Hunt
Carr Evans Fouts & Hunt
1001 Texas Avenue
Lubbock, Texas 79408-2585

Franklin Jones, Jr.
Jones Jones Curry & Roth
201 W. Houston Street
Marshall, Texas 75670

David E. Keltner
Haynes & Boone
801 Cherry Street, Suite 1300
Ft. Worth, Texas 76102-4706

Joseph Latting
Liddell Sapp Zivley Hill & LaBoon
700 Lavaca, Suite 800
Austin, Texas 78701

Thomas S. Leatherbury
Vinson & Elkins, L.L.P.
2001 Ross Avenue, Suite 3800
Dallas, Texas 75201

Harriett E. Miers
Locke Purnell Rain Harrell
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-6776

Richard R. Orsinger
1616 Tower Life Building
San Antonio, Texas 78205

Honorable David Peeples
Justice Court of Appeals
Fourth District
3200 Justice Center
San Antonio, Texas 78205-3037

David L. Perry
Perry & Haas
802 N. Carancahua, Suite 2300
Corpus Christi, Texas 78403-1500

Gilbert I. Low
Orgain Bell & Tucker
470 Orleans Street
Beaumont, Texas 77701

John H. Marks, Jr.
Liddell Sapp Zivley Hill & LaBoon
1200 Texas Commerce Tower
Dallas, Texas 75201

Honorable F. Scott McCown
Judge 345th District Court
1000 Guadalupe Street
P.O. Box 1748
Austin, Texas 78767

Russell H. McMains
McMains & Constant
2600 Shoreline Plaza
Corpus Christi, Texas 78403

Robert E. Meadows
Sewell & Riggs
333 Clay Avenue, Suite 800
Houston, Texas 77002-4086

Luther H. Soules, III
Soules & Wallace
100 West Houston, Suite 1500
San Antonio, Texas 78205

Stephen D. Susman
Susman Godfrey
1000 Louisiana, Suite 5100
Houston, Texas 77002-5096

Stephen Yelenosky
Legal Aid Society of Central Texas
611 E. 6th Street, Suite 300
Austin, Texas 78701

Anthony J. Sadberry
Oldenettel & Sadberry
2350 Cigan Tower
1360 Post Oak Blvd.
Houston, Texas 77056

RULE 226. OATH TO JURY PANEL

Before the parties or their attorneys begin the examination of the jury panel, the jurors shall be sworn by the court or under its direction as follows: "Do you solemnly swear or affirm that you will give true answers to all questions concerning your qualifications as a juror?"

RULE 226a. INSTRUCTIONS TO JURY PANEL AND JURY

The judge shall give the following instructions to the jury panel and to the jury. If the case is tried to a six-person jury, the references to ten or eleven jurors in these instructions should be changed to read "five."

PART 1 - JURY PANEL

After the members of the panel have been sworn as provided in Rule 226 and before the voir dire examination, the judge shall read to the jury panel the following instructions, with such modifications as the circumstances of the particular case may require:

Members of the Jury Panel: The case that is now on trial is _____ *v.* _____. *This is a civil lawsuit that will be tried before a jury. Your duty as jurors will be to decide the disputed facts. It is my duty as judge to see that the case is tried in accordance with the rules of law. It is very important that you follow carefully all instructions that I give you now and later during the trial. If you do not obey these instructions, it may become necessary for another jury to retry this case with all of the resulting waste of your time here and the expense to the litigants and the taxpayers of this county for another trial. Your initial instructions are as follows:*

1. Do not mingle or talk with the parties, the lawyers, the witnesses, or any other person who might be connected with or interested in this case, except for casual greetings. You may not even have casual conversation about things completely unrelated to this lawsuit with any of these people.

2. Do not accept any favors from these people, and do not give them any favors. You must avoid even slight favors, such as rides, food, or refreshments.

3. Do not discuss this case with anyone, including your spouse. Do not let anyone discuss the case in your hearing. If anyone tries to talk about the case with you or in your hearing, tell me or the bailiff immediately.

4. The attorneys will now have an opportunity to talk with you about the case and the people involved, and to ask you some questions about your backgrounds, experiences, attitudes, and opinions. In questioning you, they are not meddling in your personal affairs, but are trying to select a fair and impartial jury free from any bias or prejudice in this particular

case. Listen to the questions and give true and complete answers. Do not conceal information. If you cannot hear or understand the questions, please let me know.

5. If a questions is asked of the whole panel or part of the panel that requires an answer from you, please raise your hand and keep it raised long enough for everyone to make a quick note of those who responded. Counsel you may proceed.

PART 2 - JURY

Immediately after the jurors are selected and have been sworn as provided in Rule 236, the judge shall give each juror a copy of the following written instructions and then read them to the jury:

By your oath, you are now officials of this court, and active participants in the administration of justice. It is essential to the administration of fair and impartial justice that you follow these instructions:

1. You must continue to obey the instructions I gave you earlier. Do not talk about the case with anyone, and do not have any contact with the parties, attorneys, witnesses, or other interested persons outside the courtroom.

2. Do not even discuss the case among yourselves until you have heard all of the evidence, the court's charge, the attorneys' arguments, and I have sent you to the jury room to begin your deliberations.

3. You are the judges of the facts of this case. It is your duty to listen to and consider carefully the evidence admitted under my rulings, and to answer the specific questions about the facts that I will submit to you in writing.

4. In answering these questions, you can consider only the evidence admitted during the trial. Do not make any investigation about the facts of this case. Do not seek out any information contained in documents, books, or records that are not in

evidence. Do not make personal inspections or observations outside the courtroom. Do not let anyone else do any of these things for you. This avoids a trial based upon secret evidence.

5. The law is determined by the legislature and courts of this state. You are obligated to follow my instructions about the law, regardless of whether you think the law is right or wrong.

6. During the presentation of evidence, the attorneys may make legal objections. If an objection to a question is sustained, disregard the question, and do not speculate about why it was asked or what the answer might have been. If an objection to a witness's answer is

sustained, disregard that answer. It is not in evidence, and should not be considered. Do not speculate about or consider for any reason the objections or my rulings on them.

I stress again that it is imperative that you follow these instructions, as well as any others that I may give you later. If you do not obey these instructions, then it may become necessary for another jury to retry this case with all of the resulting waste of your time here and the expense to the litigants and the taxpayers of this county for another trial. Keep your copy of these instructions, and refer to them should any questions arise about the rules that govern your conduct during the trial. A violation of any instruction must be reported to me or the bailiff as soon as possible.

PART 3 - COURT'S CHARGE

The judge shall give the following written instructions to the jury, with such modifications as the circumstances of the particular case may require, as part of the charge:

1. This case is submitted to you by asking questions about the facts. Your answers must be based only upon the evidence, including exhibits, admitted during the trial.

2. In considering the evidence, you must follow the law set forth in this charge, as well as all instructions concerning jurors' conduct that I have given you.

3. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony.

4. Do not let bias, prejudice, or sympathy play any part in your deliberations.

5. Do not become a secret witness by telling other jurors about other incidents, experiences, or lawsuits. Do not tell other jurors about any special knowledge, information, or expertise you may have. You must confine your deliberations to the evidence presented in the courtroom. This avoids a trial based upon secret evidence.

6. Do not discuss or consider attorneys' fees. [Omit when attorneys' fees are in issue.]

7. Do not discuss or consider whether any party has insurance. [Omit when insurance is admissible.]

8. This charge includes the legal instructions and definitions that you should use in reaching your verdict. If no definition is given, the normal meaning of words applies. Do not look up any information in law books or dictionaries.

9. Every answer required by the charge is important.

10. Do not decide who think should win and then try to answer the questions accordingly. Simply answer the questions; and do not concern yourselves with the effect of your answers.

11. Do not decide a question by any method of chance.

12. If a question calls for a numerical answer, the figure should be one agreed to by the jurors, not one reached by adding together each juror's figure and then dividing by the number of jurors to get an average.

13. Do not do any trading on your answers. That is , one juror must not agree to answer one questions a certain way if other jurors will agree to answer another question a certain way.

14. After you retire to the jury room, you will select a presiding juror. You will then deliberate upon your answers.

15. It is the duty of that presiding juror:

a. to preside during the deliberations to maintain order and compliance with all instructions given you;
b. to write, sign and deliver to the bailiff any communication to me;
c. to conduct the vote; and
d. to write your answers in the spaces provided.

16. You may render your verdict on the vote of ten or more members of the jury, but the same ten or more must agree upon each and every answer made.

17. If the verdict is reached by unanimous agreement, the presiding juror will sign the verdict on the certificate page for the entire jury.

18. If the verdict is less than unanimous, the ten or eleven jurors who agree to each and every answer will sign the verdict individually on the certificate page.

19. If you observe a violation of my instructions outside the jury room, by either a juror or any other person, you must report that to me or the bailiff.

20. During your deliberations, any juror who observes a violation of my instructions shall point out the violation to the offending juror and caution that juror not to violate the instruction again.

21. You must not discuss the case with anyone, not even with other members of the jury, unless all of the jurors are in the jury room. If anyone other than a juror tries to talk to you about the case before you reach a verdict, tell me or the bailiff immediately.

22. When you have answered all applicable questions and signed the verdict, you should inform the bailiff before returning to the courtroom with your verdict.

[Instructions, definitions and questions to be placed here.]

Certificate

We , the jury have answered the questions as shown and return these answers to court as our verdict.

Signature of presiding juror, if unanimous. [One signature line here.]

Signatures of jurors voting for the verdict, if not unanimous. [Eleven signatures lines here.]

PART 4 - JURY RELEASE

The judge shall give the jury the following oral instructions after accepting the verdict and then release them:

I earlier instructed you to observe strict secrecy during the trial, and not to discuss this case with anyone except other jurors while you were deliberating. I am now about to discharge you. Once I have discharged you, you are released from secrecy and from all the other orders that I gave you. You will be completely free to discuss anything about this case with anyone. You will be just as free to decline to talk about the case if that is your decision.

[Judge's commendation of jurors and the important service they have performed may be added here.]

RULE 236. JUROR'S OATH

The jury shall be sworn by the court or under its direction as follows: "Do you solemnly swear or affirm that you will return a true verdict, according to the law stated in the court's charge and the evidence submitted to you under the rulings of this court?"

RULE 271. CHARGE TO THE JURY

The trial court shall prepare a written charge to the jury. The court shall provide counsel with written copies of the proposed charge, and shall provide a reasonable opportunity for the parties to prepare their requests and objections and to present them on the record outside the presence of the jury after the conclusion of the evidence and before the charge is read to the jury. After the requests and objections are made and ruled upon and any modifications to the charge are made, the court shall read the charge to the jury in open court in the precise words

in which it is written. The court shall deliver one or more copies of the written charge to the jury. The charge shall be signed by the court and filed with the clerk.

RULE 272. STANDARDS FOR THE JURY CHARGE

1. General Standards

a. Pleading Required. A party who has the burden of pleading a matter shall not be entitled to the submission of a question, instruction, or definition regarding that matter unless if the matter is affirmatively raised by the party's pleading.

b. Comment on the Evidence. The court shall not directly comment on the weight of the evidence or advise the jury of the effect of their answers, but an otherwise proper question, instruction, or definition shall not be objectionable on the ground that it incidentally comments on the weight of the evidence or advises the jury of the effect of their answers.

2. Questions

a. In General. The court shall submit questions about the disputed material factual issues raised by the pleadings and the evidence.

b. Broad Form Submission. The court shall, whenever feasible, submit the case by broad form questions.

c. Conditional Submission. The court may predicate the jury's consideration of one or more questions upon specified answers to another question or questions on which the materiality of the predicated question or questions depends.

d. Disjunctive Submission. The court may submit a question disjunctively when the evidence shows that only one of the matters inquired about necessarily exists. A proper disjunctive question is not an impermissible inferential rebuttal submission.

e. Inferential Rebuttal. Inferential rebuttal questions shall not be submitted.

3. Instructions and Definitions

a. In General. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict.

b. Burden of Proof. The placing of the burden of proof may be accomplished by instructions or by inclusion in the questions.

RULE 273. REPEALED.

RULE 274. PRESERVATION OF APPELLATE COMPLAINTS

1. Requests. A party may not assign as error the failure to give a question, definition, or instruction on a contention which that party was required to plead unless the record reflects that, after the conclusion of the evidence and before or at the time of objecting, the party tendered such question, definition, or instruction to the judge in writing. Defects in a requested question, definition, or instruction shall not constitute a waiver of error if the request provides the trial court reasonable guidance in fashioning a correct question, definition, or instruction. If a request has been filed and bears the judge's signature, if shall be presumed, unless otherwise noted in the record, that the request was tendered at the proper time.

2. Objections. A party may not assign as error the giving or the failure to give a question, definition, or instruction unless that party objects thereto before the charge is read to the jury, stating distinctly the matter objected to and the grounds of the objection. An objection must identify that portion of the charge to which complaint is made and is specific enough to enable the trial court to make an informed ruling on the objection. Objections shall be in writing or shall be made orally in the presence of the court, the court reporter, and opposing counsel. It shall be presumed, unless otherwise noted in the record, that a party making objections did so at the proper time.

3. Obscured or Concealed Objections or Requests. When an objection or request is obscured or concealed by voluminous unfounded objections or requests, minute differentiations or numerous unnecessary objections or requests, such objection or request shall not preserve appellate complaint. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only. A judgment shall not be reversed because of the failure of the court to submit different shades of the same question, definition, or instruction.

4. Rulings. The court shall announce its rulings on objections on the record before reading the charge to the jury. In the absence of an express ruling, any objection not cured by the charge is deemed overruled.

5. Evidentiary Sufficiency Complaints. A claim that there is no evidence to support the submission of a question, or that the answer to the question is established as a matter of law, may be made for the first time after the verdict. A claim that there is factually insufficient evidence to support the jury's answer to a question, or that the answer to a question is against the great weight and preponderance of the evidence, may be made only after the verdict. Such claims may be made regardless of whether the submission of the question was requested by the complainant.

RULE 275. REPEALED.

RULE 276. REPEALED.

RULE 277. REPEALED.

RULE 278. REPEALED.

RULE 279. OMISSIONS FROM THE CHARGE

1. Omission of Entire Ground. Any independent ground of recovery or defense which is not conclusively established under the evidence and all elements of which are omitted from the charge without preservation of appellate complaint by the party relying thereon is waived.

2. Omission of One or More Elements. When an independent ground of recovery or defense consists of more than one element, and one or more of the elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, is submitted to and found by the jury, and one or more of such elements is omitted from the charge, the court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted element or elements, if the party aggrieved by the findings has failed to preserve appellate complaint with respect to the omitted elements. If no such written findings are made, the omitted elements shall be deemed found by the court in such manner as to support the judgment if such deemed findings are supported by legally and factually sufficient evidence. The legal and factual sufficiency of the evidence to support express findings made under this rule may be challenged in the same manner as challenges to express findings in nonjury cases.

July 13, 1994

7-12-94
4543.001
cc: LHS
nhd

MEMORANDUM

TO: Supreme Court Advisory Committee

FROM: Discovery Subcommittee, by Alex Wilson Albright

DATE: July 11, 1994

RE: Meeting of July 15-16, 1994

Attached is a red-lined draft of the discovery rules approved by the Discovery Subcommittee. The red-lines show changes from the draft you received before the May meeting. I have also attached another copy of my memo of 5/16/94 that generally explains the subcommittee's proposed discovery rules. **Bring this packet to the meeting of this week, 7/15-16.**

The changes, other than minor nonsubstantive changes, from the 5/16/94 draft are as follows:

1. Each rule is now numbered so it can be more easily referenced.

2. Rules 167 and 168 no longer allow service of discovery requests with service of citation. Instead, parties may serve discovery requests on defendants only 10 days after the defendant's answer date. Rule 166d(2). A party may request another party to preserve certain documents or electronic data information, however, at any time. Rule 166d(3). Under this rule, a plaintiff cannot serve discovery requests with the petition, and thereby open the discovery window 50 days later. Thus, the rule seeks to promote discussion between the parties concerning when the discovery period will begin, and still allow parties to give early notice that certain documents and electronic data information should be preserved for future discovery.

3. All references to the form of objections to requests under Rules 167 and 168 were deleted from those rules. The Subcommittee will draft a new rule that addresses the form of objections and the procedure for determining them that applies to all discovery at a later meeting.

4. The reference to experts was removed from Rule 166f, "Standard Requests", because discovery of expert witnesses is taken care of in Rule 170. Rule 170 has been changed to include consulting experts whose opinions and mental impressions have been reviewed by a testifying expert. Also, upon designation, one must provide, in addition to the "general substance" of the expert's mental impressions and opinions, "a brief summary of the basis thereof." Rule 170 also now has a supplementation provision that was omitted from the original draft.

Rule 37: Additional Parties

Additional parties may be brought in without leave of court before the commencement of the discovery period provided for in Rule ___ and during the first three (3) months of the discovery period. Thereafter, parties may be brought in only with leave of court or upon the agreement of the parties. Leave shall be granted unless there is insufficient time to complete discovery that would be made necessary by adding the party, in which case leave shall be denied or the discovery period extended. Leave shall not be granted if it would unreasonably delay the trial.

Rule 38: Third Party Practice

(a) When Defendant May Bring in Third Party. Subject to Rule 37, a defending party, as a third-party plaintiff, may cause a citation and petition to be served upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. The person served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim under the rules applicable to the defendant, and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 97. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the same transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses and his counterclaims and cross-claims. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or who may be liable to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant.

(b) When the Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

****

Rule 63: Amendments and Responsive Pleadings

Parties may amend and supplement their pleadings and respond to other parties' pleadings without leave of court before the commencement of the discovery period provided for in Rule ___ and during the first three (3) months of the discovery period. Thereafter, parties may file pleadings that amend, supplement, or respond only with leave of court or upon the agreement of the parties. Leave shall be granted unless there is insufficient time to complete discovery that would be made necessary by the amendment, supplement, or response, in which case leave shall be denied or the discovery period extended. Leave shall not be granted if it would unreasonably delay the trial.

Rule 166: Pretrial Conference

1. **Conference.** When appropriate, the court may order the attorneys for the parties and the parties or their duly authorized agents to appear before it for a pretrial conference. There may be more than one pretrial conference. The court may consider any matter than may aid in the disposition of the action, including:

a. The settlement of the case;

b. Referral of the case to alternate dispute resolution;

c. Development of a scheduling order, including discovery;

d. Determination of uncontested and contested issues of law and fact; and

e. Trial procedure, including exchange of fact witnesses, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial, exchange of expert witnesses, exchange of proposed jury charges or findings of fact and conclusions of law, and exchange of exhibits.

2. **Order.** The court shall make an order that recites the action taken at the pretrial conference. This order shall control the subsequent course of action, unless modified to prevent manifest injustice.

RULE 166c——. Modification Of Discovery Procedure and Limitations By Agreement and By Court Order.

1. **Modification by Agreement.** The parties may by written agreement modify the procedures and limitations set forth in these rules. An agreement affecting an oral deposition is enforceable if the agreement is recorded in the deposition transcript.

2. **Modification by Court Order.** The procedures and limitations set forth in these rules or by agreement of the parties may be modified by the court for good reason.

820 - 1015

1650

RULE 166d—— Discovery Period —

1. **Discovery Period.** All discovery shall be conducted during the discovery period. The discovery period shall begin on the date of the first oral deposition or the date on which the first documents are produced upon the request of any party to the action, whichever is earlier, and shall continue for no more than six months. Any party added as a defendant or third-party defendant pursuant to Rules 37 and 38—— within the first three months of the discovery period shall be entitled to a full six-month discovery period. Neither the addition of a party nor ~~after the first three months of the discovery period,~~ the amendment of a pleading after the first three months of the discovery period., nor the a party's intervention ~~by a party~~ shall effect the duration of the discovery period.

2. **Time for Discovery Requests.** No party may serve discovery requests pursuant to Rules 167, 168 or 200 ~~on any defendant~~ until ten (10) days following the date upon which that defendant is required to appear and answer. Discovery requests must be made at such time that the response required by these Rules can be made during the Discovery Period.

3. **Request for Preservation of Documents.** At any time, any party may serve on any other party a request that certain documents or electronic data information be preserved for future discovery. The Request shall set forth the items to be preserved, either by individual item or category, and describe each item and category with reasonable particularity. The party upon whom the Request is served is under the same duty to preserve the documents or electronic data information covered by the request as if the party had received a Request pursuant to Rule 167.

Rule 166e~~—~~; Response, Amendment, and Supplementation to Discovery Requests

1. Duty to Respond. When responding to discovery requests made under Rules 167 and 168~~—[mandatory disclosure, interrogatories, request for production]~~, a party shall make a complete response, based upon all information reasonably available to the responding party ~~or~~ its attorney at the time the response is made. An objection to the form of a discovery request relieves the objecting party from any further duty to respond. An objection on the basis of a specific immunity or exemption from discovery relieves the objecting party only of the duty to respond with information or material specifically subject to the objection. The relief provided by an objection continues until the court overrules the objection.

2. Duty to Amend Discovery Responses. A party is under a duty to amend its prior responses to discovery requests made under Rules 167 and 168~~—[same as above]~~ when it learns that a prior response was incorrect or incomplete when made, and if the corrective or additional information has not otherwise been made known to the other parties in discovery or in writing. The amendment shall be in the same form as the original response.

3. Duty to Supplement Discovery Responses. A party is under a duty to supplement its prior responses to discovery requests made under Rules 167 and 168~~—[same as above]~~ 60 days before trial if the party learns that a prior response, although correct and complete when made is no longer complete and correct and if the additional or corrective information has not otherwise been made known to the other parties in discovery or in writing. The supplement shall be in the same form as the original response.

4. Additional Discovery After Supplementation. The opposing parties may initiate discovery within 10 days of receiving the [amendment or]supplement in the form of document requests under Rule 167 , interrogatories under Rule 168 , and depositions under Rules 200 and 204~~—~~ , although a party must respond to written discovery under Rules 167 and 168 not less than 20 days after the date of service, and each side is ~~the opposing parties together are~~ allowed only five (5) additional hours of deposition time. Such discovery shall be limited to matters related to any new information disclosed in the amendment or supplement.

5. Failure to Provide Discovery.

(a) Exclusion. If a party deliberately or with conscious indifference to its duty under these rules fails to disclose information in discovery, the court may exclude the information not timely disclosed. Exclusion is not a favored remedy and shall only be done when the circumstances clearly warrant.

(b) Continuance and expenses. When exclusion is not an appropriate remedy, but a failure to disclose as required by these rules may create a significant risk of an erroneous fact finding, the court shall continue the hearing to allow the opposing party to prepare to confront or to prepare to use the previously undisclosed information. When appropriate, the court may impose the expense of the delay, including attorney's fees and any difference between prejudgment and postjudgment interest, on the party that failed to disclose.

Note: Subparts 1,2, and 3~~(a), (b), and (c)~~ do not apply to depositions. For subdivisions 2~~(b)~~ and 3~~(c)~~, information obtained in a deposition is obtained "in discovery" and need not be given again in a formal supplementation.

Rule 166f——: Standard Requests.

1. Disclosure of standard information. The following matters are subject to disclosure by a party upon request through a request for production under Rule 167 or an interrogatory under Rule 168 from any other party:

a. A statement of the correct names of the parties to the lawsuit.

b. The identity and location of ~~information specified in Rule 166b(2)(d) regarding~~ potential parties and persons with knowledge of relevant facts specified in Rule 166b(2)(d);

~~*c. The information specified in Rule 166b(2)(e)(1) regarding expert witnesses and consulting experts whose opinions or impressions have been provided to or reviewed by a testifying expert;*~~

cd. The information and documents specified in Rule 166b(2)(f) regarding indemnity, insuring and settlement agreements;

de. A party's own statement as set forth in Rule 166b(2)(g);

ef. 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:

(1) are reasonably related to the injuries or damages asserted; and

(2) are in the actual possession of the responding party or party's attorney; and

fg. A copy of any written instrument upon which a claim or defense is based.

2. By Interrogatory. An interrogatory asking for standard information under this rule does not count against the interrogatory limit.

3. By Production Request. A response to a request for production asking for standard information does not begin the discovery period.

Rule 167. Requests For Production and Inspection

1. **Requests.** ~~At any time prior to thirty (30) days before the end of the discovery period, a~~Any party may serve upon any other party a Request for Production and/or for Inspection, to inspect, sample, test, photograph and/or copy any designated documents, electronic data information or tangible things which constitute or contain matters within the scope of Rule 166b that are in the possession, custody or control of the party upon whom the Request is served. The term "electronic data information" includes, but is not limited to, all computerized systems, including floppy disks, hard drives, all back up systems, and archived tapes.

2. **Contents of Request for Production.** The Request shall set forth the items to be produced or inspected, either by individual item or by category, and describe each item and category with reasonable particularity. A party seeking production of electronic data information must specifically set forth the type of electronic data information the producing party is to produce. The Request shall specify a reasonable time (not less than 30 days after service of the written Request) and place for production. The Request shall also state the manner of inspection or copying of the requested items. If the requesting party intends to sample or test the requested items, the desired testing and sampling shall be described with sufficient specificity to inform the producing party of the means, manner, and procedure for testing or sampling.

3. **Production of Documents or Things.** The producing party shall produce the documents, electronic data information, or tangible things at the time and place requested, as follows:

a. Copies. The responding party may, at its option, produce copies only if the party has no originals or the originals remain available for inspection at the requesting party's request on no less than 10 days' written notice. If originals are produced, the producing party is entitled to retain the originals while the requesting party inspects and copies them.

b. Organization. The producing party shall produce documents, electronic data information, and things as they are kept in the usual course of business, or shall organize and label them to correspond with the categories in the Request.

4. **Objections and Responses.**

a. Objections to manner of production. The responding party may make objections to the time, place, or manner of production, testing, inspection, or sampling. Such an objection must be made within ten (10) days after service of the request and shall state when, where, and how the responding party proposes to comply with the request. A party who makes an objection to the time, place, or manner of production, testing, inspection, or sampling nonetheless must file within thirty (30) days of service of the request a response that~~which~~ describes any documents, electronic data information, or tangible things responsive to the request. The response also shall give notice of the number of such documents,

electronic data information, or tangible things and where they are located.

b. Objections to substance of request. The responding party also may object to the substance of the request in compliance with Rule ___, ~~whole or in part and shall specifically state the reasons why such request should not be allowed. Objections to the substance of a request must be made within thirty (30) days after service of the request. A party who makes an objection to the substance of a request nonetheless must within thirty (30) days after service of the request produce any documents, electronic data information, or tangible things responsive to any portion of the request for which no objection has been filed.~~

5. **Destruction or Alteration.** Testing, sampling or examination shall not extend to destruction or material alteration of an article without notice, hearing, and a prior order of the court.

6. **Expenses of Production.** Unless otherwise ordered by the court, the expense of producing a documents, electronic data information, or tangible things will be borne by the producing party. The expense of inspecting, sampling, testing, photographing, and/or copying the documents, electronic data information, or tangible things produced will be borne by the requesting party.

Rule 168: Interrogatories to Parties.

1. **Availability.** Any party may file with the court and serve upon any other party written interrogatories to be answered by the party served, or, if the party served is a public or private corporation or a partnership or association, or governmental agency, by an officer or agent who shall furnish such information as is available to the party. Interrogatories that ask another party only to identify or authenticate specific documents as contemplated by Article IX of the Texas Rules of Civil Evidence or that require no more than a yes or no answer shall be unlimited in number. Other interrogatories shall not exceed 30 in number, including discrete subparts. ~~Interrogatories may be served upon the plaintiff after commencement of the action and upon any other party with or after the service of the citation and petition upon that party.~~

2. **Answers and Objections.**

a. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for the objection and shall answer to the extent the interrogatory is not objectionable. Answers and objections shall be preceded by the interrogatory to which they respond.

b. The answers shall be signed and verified by the party making them, and the objections shall be signed by the attorney making them. The provisions of Rule 14 shall not apply.

c. The party upon whom the interrogatories have been served shall file with the court and serve a copy of the answers, and objections, if any, within ~~not less than~~ 30 days after the service of the interrogatories~~, except that, if the interrogatories accompany citation, a defendant may serve answers within 50 days after service of the citation and petition upon that defendant~~.

~~*d.* All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.~~

3. **Scope, Use at Trial.** Interrogatories may relate to any matters that can be inquired into under Rule 166b, but the answers, subject to any objections as to admissibility, may be used only against the party answering the interrogatories. It is not ground for objection that an interrogatory involves an opinion or contention that relates to fact or the application of law to fact.

4. **Contention interrogatories.** A party can use contention interrogatories ~~that require more than a yes or no answer~~ only to request another party to state the ~~factual and~~ legal theories upon which that party bases ~~particular allegations~~. The answer to such an interrogatory shall provide information sufficient to apprise the requesting party of the ~~positions~~ the answering party will ~~take~~ at trial. A party need not marshall its proof to answer the interrogatory, but need only disclose more precisely the basis of its pleadings.

5. **Option to Produce Records.** Where the answer to an interrogatory may be derived or ascertained from public records or from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and, if applicable, to provide to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. The specification of records provided shall include sufficient detail to permit the interrogating party to locate and to identify as readily as can the party served, the records from which the answers may be ascertained, and shall specify a reasonable time and place at which the documents can be examined not to exceed 10 days after the date the interrogatory answer is filed.

Note: Open-ended contention interrogatories may be used only to secure information that would be provided if the other party were required to plead more particularly. Parties seeking to obtain disclosure of facts supporting or rebutting particular allegations should use other discovery devices.

RULE 170. Expert Witnesses.

1. **Designation of Expert Witnesses.** The plaintiff shall designate experts, including any witness who is expected to offer expert testimony at trial and any consulting expert whose opinions or mental impressions have been reviewed by a testifying expert, no later than sixty (60) days before the end of the discovery period. The defendant shall designate experts, including any witness who is expected to offer expert testimony at trial and any consulting expert whose opinions or mental impressions have been reviewed by a testifying expert, no later than forty-five (45) days before the end of the discovery period. Failure to timely designate an expert ~~expected to testify at trial~~ shall be grounds for exclusion of ~~the witness's~~ expert testimony.

2. **Disclosure of General Information.** At the time a party designates expert witnesses, the party shall disclose the following information with respect to each expert designated:

a. *Identity.* The expert's name, address, and telephone number.

b. *Background.* The expert's background, including a current resume and bibliography.

c. *Subject Matter.* The subject matter on which the expert is expected to testify.

d. *General Substance.* The general substance of the expert's mental impressions and opinions and a brief summary of the basis thereof.

e. *Documents and Tangible Things.* Any document or tangible thing prepared by, provided to, or reviewed by the expert in anticipation of the expert's testimony must be provided to the other side at the time of designation.

fe. *Dates.* Two dates within ~~the~~ forty-five (45) days following the date of designation on which the expert will be available to testify by deposition.

~~3. *Production of Documents and Tangible Things.* Any document or tangible thing prepared by, provided to, or reviewed by the expert in anticipation of the expert's testimony must be provided to the other side at the time of designation. Any document or tangible thing subsequently prepared by, provided to, or reviewed by the expert must be provided to the expert as soon as it is available unless the expert designation is or has been withdrawn.~~

4. **Additional Discovery.** A party may obtain additional discovery regarding the mental impressions and opinions held by the expert and the facts provided to the expert only by oral deposition of the expert.

5. **Expert Depositions**. A party's experts may be deposed during the forty-five

(45) day period immediately following the designation of the experts. The deposition testimony of only two experts designated by any side shall count against the deposition testimony limitation set forth in Rule ___. If any side designates more than two experts, the opposing side shall be allowed an additional six (6) hours ~~of deposition testimony~~ to depose each additional expert designated.

6. **Supplementation.** A party is under a duty to amend or supplement its expert designation, disclosure of general information, and any other discovery provided by its experts (including deposition testimony) when it learns that a prior response was incorrect or incomplete when made or, although correct and complete when made, is no longer correct and complete and if the corrective or additional information has not otherwise been made known to the other parties in discovery or in writing. Any document or tangible thing subsequently prepared by, provided to, or reviewed by the expert must be provided to the other side~~expert~~ as soon as it is available unless the expert designation is or has been withdrawn. Within 10 days of receiving amending or supplementing information, a party may initiate additional discovery limited to matters related to any new information disclosed in the amendment or supplement under Rule 166e(4).

~~5~~6. **Failure to Use Expert Testimony.** If a case goes to trial, the court may upon the request of a party require an opposing party to reimburse the costs, including attorney's fees, of deposing any expert designated by such opposing party whose testimony is not used during trial.

RULE 200. Depositions Upon Oral Examination

1. **When Depositions May Be Taken.** During the discovery period provided for in Rule ___, any party may take the testimony of any person, including a party, by deposition upon oral examination, which, unless taken pursuant to Rule 202(1), will be recorded stenographically by any officer authorized to take depositions.[1]

2. **Notice.**

a. A party proposing to take a deposition upon oral examination must give reasonable notice in writing to every other party. The notice shall state the name of the deponent, the time and the place of the taking of the deposition, and if the production of documents or tangible things is desired, a designation of the items to be produced by the deponent that complies with Rule 167. If the deponent is a party, or a party's agents, employees, or persons subject to a party's control, the procedure of Rule 167 shall apply. The notice shall also state the identity of persons who will attend the deposition other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the deposition. If any party intends to have any other persons attend, that party must give reasonable notice to all parties of the identify of such other persons.

b. A party may in the notice name as the deponent a public or private corporation, partnership, association, governmental agency, or other organization .and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The subdivision does not preclude taking a deposition by any other procedure authorized by these rules.[2]

---

[1] This requires a CSR certified under Gov't Code 52.021, unless Rule 202 is followed.

[2] The present Texas rule regarding depositions of organizations has been replaced with the Federal Rule, which is clearer and has developed a body of interpretative cases that can be referred to for guidance. The provisions of the Federal Rule can be found in this rule and Rule 204 concerning subpoenas.

Rule 201. Compelling Appearance; Production of Documents and Things; Deposition of Organization

Any person may be compelled to appear and give testimony by deposition in a civil action.

1. **Subpoena.** Upon proof of service of a notice to take a deposition, written or oral, the clerk or any officer authorized to take depositions and any certified shorthand reporter shall immediately issue and cause to be served upon the witness a subpoena directing him to appear before an officer at the time and place stated in the notice for the purpose of giving his deposition.

2. **Production.** A witness may be compelled by subpoena duces tecum to produce items or things designated in the notice according to Rule 200(2)(a) and within his care, custody or control. The subpoena will be subject to the provisions of Rules 177a and 166b.

3. **Party.** When the deponent is a party, service of the notice upon the party's attorney shall have the same effect as a subpoena served on the party. If the deponent is an agent, employee, or persons subject to the control of a party, notice to take the deposition served upon the party's attorney shall have the same effect as a subpoena served on the deponent.

4. **Organizations.** When the deponent named in the subpoena or notice is a public or private corporation, partnership, association, governmental entity, or other organization, and the notice describes the matters on which examination is requested in accordance with Rule 200(2)(b), the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The person so designated shall testify as to matters known or reasonably available to the organization.

5. **Time and Place.** The time and place designated for the deposition shall be reasonable. The place shall be in the county of the witness' residence or, where he is employed or regularly transacts business in person or at such other convenient place as may be directed by the court in which the cause is pending; provided, however, the deposition of a party or the person or persons designated by a party under paragraph 4 above may be taken in the county of suit subject to the provisions of Rule 166b(5). A nonresident or transient person may be required to attend in the county where he is served with a subpoena, or within one hundred fifty miles from the place of service, or at such other convenient place as the court may direct. The witness shall remain in attendance from day to day until such deposition is begun and completed.

Rule 202. Non-Stenographic Recording; Deposition by Telephone

1. **Non-stenographic Recording.** Any party may cause the testimony and other available evidence at a deposition upon oral examination to be recorded by other than stenographic means, including videotape recordings, without leave of court, and the non-stenographic recording may be presented at trial in lieu of reading from a stenographic transcription of the deposition, subject to the following rules:

a. Any party intending to make a non-stenographic recording shall give reasonable prior notice to the deponent and other parties, either in the deposition notice or in writing, of the method by which the testimony will be recorded and whether or not a certified court reporter will be present. The party requesting the non-stenographic recording will be responsible for taking, preserving, and filing the non-stenographic recording and assuring that the recorded testimony will be intelligible, accurate and trustworthy. Any transcription of the non-stenographic recording may be used as evidence only if it complies with the provisions of Rules 205 and 206.

b. Any party may designate another method to record the deponent's testimony in addition to the method specified. The additional record or transcript shall be made at the expense of the designating party, unless the court otherwise orders.

c. After notice of the non-stenographic recording is given, any party may move for a protective order under Rule 166b. If a hearing is not held prior to the taking of the deposition, the non-stenographic recording shall be made subject to the court's ruling at a later time.

d. Any party shall have reasonable access to the original non-stenographic recording and may obtain a duplicate copy at its own expense.

e. The side initiating the non-stenographic recording shall bear the expense of the non-stenographic recording, subject to an order of the court, upon motion and notice, at the conclusion of the case, taxing the expense as court costs.

2. **Deposition by Telephone.** Any party may give reasonable prior notice that a deposition will be taken by telephone or other remote electronic means, subject to subsection 1(b) of this rule. For the purposes of this rule and Rules 201, 215-1a and 215-2a, a deposition taken by telephone is taken in the district and at the place where the deponent is to answer the questions asked. The officer taking the deposition may be located with the deposing parties instead of with the witness if the identification of the witness is substantiated and the witness does not waive examination and signature of the transcribed deposition.

Rule 204. Examination, Cross-Examination and Objections

1. **Oath; Examination.** Every person whose deposition is taken upon oral examination shall be first cautioned and sworn to testify the truth, the whole truth and nothing but the truth by an officer authorized to do so.[3] The parties may orally examine and cross-examine the deponent. Any party, in lieu of participating in the oral examination, may serve written questions in a sealed envelope on the party proposing to take the deposition who shall transmit them to the officer who shall propound them to the witness. ~~The proceedings shall be recorded at the time it is given and thereafter transcribed by the officer taking the deposition, or by some person under that person's personal supervision.~~[4]

2. **Time Limitation.** Each side, the plaintiffs and the defendants, have 50 hours to examine and cross-examine deponents other than their own expert witnesses. Third-party defendants share the defendants' 50 hours with regard to issues common to the defendants, however, third-party defendants have an additional 10 hours for examination regarding issues upon which they oppose the defendants. Breaks during depositions do not count against any party's deposition time limitation. The officer taking the deposition shall state as part of the certificate required by Rule 206 the amount time each examiner used to examine the deponent.

3. **Conduct during the deposition.** The oral deposition shall be conducted as if the testimony were being obtained in court during trial. Counsel are expected to cooperate with and be courteous to each other and the deponents. All statements, objections and discussions conducted during the oral deposition may, upon leave of court, be presented to the jury during trial.

4. **Instructions not to answer.** Instructions to the deponent not to answer a question are improper except *(a)* to preserve a privilege against disclosure, *(b)* to enforce a limitation on evidence directed by the court, *(c)* to protect a witness from an abusive question, or *(d)* to ~~present~~ a motion under paragraph 5. Should a court later order the deponent to answer a question to which the deponent was instructed not to answer, the court may order that the reconvened deposition shall not count against the deposition time of the party taking the deposition.

5. **Terminating the deposition.** ~~At any time during a deposition,~~ A party or the deponent may move to terminate or limit the deposition ~~on the ground that~~ it is being conducted or defended in bad faith or in such a manner as to unreasonably annoy, embarrass, or oppress the party or the deponent. Upon demand of the ~~objecting~~ party or deponent, the deposition shall be suspended for the time necessary to secure a ruling. ~~Should a court rule that the deposition should not have been terminated, the court may order that the reconvened deposition shall not count against the deposition time of the party taking the deposition.~~

---

[3] This language is verbatim from current Rule 204(2), except the last phrase has been added.

[4] This language is from current Rule 204(3).