AGENDA
JULY 21-22, 1995
SCAC MEETING

INDEX

6-5-95
4543.001
cc: LH.

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July 3, 1995

To: All Members of the Supreme Court Advisory Committee

Enclosed please find the following documents for your review prior to our meeting on July 21 and 22, 1995:

1. Copies of the revised discovery rules reflecting changes made at the full committee's May meeting and additional changes made by the discovery sub-committee in June. This version is double spaced and is redlined to show changes made since the May meeting;

2. A clean copy of the revised rules which has been formatted to fit a fewer number of pages;

3. A disposition table prepared by Alex Albright showing the disposition of the discovery rules as they are currently numbered versus the numbers they received in the enclosed draft.

Pursuant to Luther Soules' letter, I would ask that any suggested changes to these rules be submitted to me and Luther Soules in writing prior to July 18, 1995. All changes to these rules that are submitted to me in writing will be circulated to all members of the committee prior to our meeting on July 21st and 22nd.

If there are any questions, please do not hesitate to give me, or Trey Peacock (in my office, 713/653-7808) or Alex Albright (at the UT Law School 512/471-1340) a call.

Sincerely,

Stephen D. Susman
SDS-120269-njs
Enclosures

Supreme Court Advisory Committee

Discovery Subcommittee

Proposed Rules of Discovery

JUNE 30, 1995 DRAFT

FOR JULY 21, 1995 MEETING

(Red-lined from draft presented at May meeting)

Preface: Comments to the Proposed Rules

The Subcommittee recognizes that this draft of the proposed rules contains inconsistencies in its format, numbering, and use of some words. The Subcommittee will go through the rules and resolve these inconsistencies after the working draft is approved by the Advisory Committee, and before the final draft is presented to the Supreme Court.

In drafting these proposed rules, the Subcommittee proposes, in some instances, to rely upon comments to illustrate or explain the intended application of a particular rule. Some comments have been drafted; others will be added later. Should the full Supreme Court Advisory Committee or the Court decide that the reliance upon comments is inappropriate, some rules may require minor revisions to account for the removal of the comments.

The proposed rules concerning discovery vehicles require parties to "file" and "serve" their requests for discovery and responses thereto. The Subcommittee presumes that there will be a general rule requiring parties to file with the clerk and serve on all other parties pursuant to Rules 21, 21a, and 74.

RULE 1. Discovery Limitations (revised 6/21//95)

1. Suits containing cClaims seeking $50,000 or less.

a. Applicability. If in any suit the plaintiff's pleadings affirmatively seek only monetary recovery of $50,000 or less, excluding costs, pre-judgmentprejudgment interest and attorneys' fees, discovery shall be limited as provided in this section, unless governed by a Discovery Control Plan. No amendment bringing the amount of recovery above $50,000 shall be allowed at such time as to unduly prejudice the opposing party and in no event later than 30 days before trial. If by a claim, amendment, or supplement filed more than 30 days before trial, any party seeks relief other than monetary recovery or in excess of $50,000, excluding costs, pre-judgmentprejudgment interest and attorneys' fees, this section shall no longer apply to the suit. When a timely filed pleading renders this section no longer applicable, discovery shall be reopened and completed within the limitations provided in section 2 or 3 of this rule and any person previously deposed may be redeposed.

b. Limitations. In addition to the limitations provided elsewhere in these rules:

(1) Discovery Period. All discovery shall be conducted during the discovery period. The discovery period shall begin when the suit commences and shall continue until 30 days before trial.

(21) Total time for oral depositions. Each party may have no more than 6 hours in total to examine and cross-examine any and all witnesses in oral depositions. The parties may agree to expand this limit up to 10 hours in total, but not more except by court order. The court may modify the deposition hours so that no side or party is given unfair advantage.

(32) Interrogatories. Any party may serve on any other party no more than 15 written interrogatories, including discrete subparts. Interrogatories asking a party only to identify or authenticate specific documents ~~as contemplated by Article IX of the Rules of Civil Evidence~~, however, are unlimited in number.

~~c. *Limitation upon modification by agreement.* The parties may not agree to allow any party more than 10 hours to examine and cross-examine witnesses in oral depositions under this section except by court order.~~

2. Discovery Control Plan Suits.

a. Applicability. In any suit, the parties may agree and submit for court approval or the court may order that discovery be conducted in accordance with a Discovery Control Plan tailored to the circumstances of the specific suit.

b. Limitations. A Discovery Control Plan may address any issue concerning discovery or the matters listed in Rule 166, and may change any discovery limitation set forth in these rules. The discovery limitations applicable to section 3 of this Rule, however, shall apply unless specifically changed in the Discovery Control Plan. The following provisions must be included in a Discovery Control Plan,~~, may not be excluded from a Discovery Control Plan by agreement of the parties,~~ and as to parts a and c.1 below, once~~once~~ set forth in the Discovery Control Plan, may not be modified except by court order:

a. A trial date~~, if by court order, or a requested trial date, if by agreement~~;

b. A discovery period during which all discovery shall be conducted~~, ending no later than 30 days prior to the trial date or requested trial date~~

c. Deadlines for :

1. Joinder of additional parties;
2. Amending or supplementing pleadings;
3. Disclosing expert witnesses pursuant to Rule 10~~;~~

3. All other suits.

a. Applicability. Unless the suit falls within section 1 of this rule~~,~~ or is governed by a Discovery Control Plan, discovery shall be conducted in accordance with this section.

b. Limitations. In addition to the other discovery limitations set forth in these rules:

(1) Discovery Period. All discovery shall be conducted during the discovery period. The discovery period shall begin on the earliest of (a) the date of the first oral deposition, or (b) the date the first response to written discovery other than a Request for Standard Disclosure is due, and shall continue for ~~no more than~~ 9 months or until 30 days before trial, whichever is earlier. The parties may agree to a longer or shorter Discovery Period, but they may not agree to a Discovery Period of more than 12 months unless the suit is governed by a Discovery Control Plan under section 2 of this rule.

(2) Total time for oral depositions. During the discovery period, each side, the plaintiffs and the defendants, shall have no more than 50 hours to examine and cross-examine in oral depositions opposing parties and experts designated by opposing parties and persons who are subject to the opposing party's control. Third party defendants shall 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. The oral deposition testimony of only two experts designated by any side shall count against any limitation of that side's total deposition testimony ~~applicable under Rule 1~~. If any side designates more than two experts pursuant to Rule 10, the opposing side shall be allowed an additional six hours to depose each additional expert designated. The court may modify the deposition hours so that no side or party is given unfair advantage.

(3) Interrogatories. During the discovery period, any party may serve on any other party no more than 30 written interrogatories, including discrete subparts. Interrogatories asking a party only to identify or authenticate specific documents ~~as contemplated by Article IX of the Rules of Civil Evidence~~, however, are unlimited in number.

~~c. *Limitation on modification by agreement.* The parties may not agree to extend the discovery period beyond a 12 month period except under a Discovery Control Plan.~~

Comment:

Section 1 does not apply to suits seeking injunctive relief, or orders concerning divorce or, child custody.

RULE 2. Modification of Discovery Procedures and Limitations; Conference Required (revised 6/21/95)

1. Modification of Procedures. Except where specifically prohibited, the procedures and limitations set forth in these rules may be modified in any suit (1) by the agreement of the parties, or (2) by ~~the~~ court order for good reason.

2. Conference. All discovery motions or requests for hearings on discovery shall contain a certificate by the party filing same that efforts to resolve the dispute without the necessity of court intervention have been attempted and failed.

RULE 3. Permissible Discovery: Forms and Scope (revised 6/21/95)

1. Forms of Discovery. Permissible forms of discovery are (a) requests for standard disclosure, (b) requests for production of documents and tangible things, (c) interrogatories to a party, (d) requests for admissions, (e) oral or written depositions, (f) motions for a mental or physical examination of a party or person under the legal control of a party, and (g) motions for entry upon and examination of real property. "Written discovery" as used elsewhere in these Rules means requests for standard disclosure, ~~requests for designation of, and information regarding, expert witnesses,~~ requests for production of documents and tangible things, interrogatories to a party, and requests for admissions. Unless otherwise specified in these Rules, the permissible forms of discovery may be combined within the same instrument and may be taken in any order or sequence.

2. Scope of Discovery.

a. In General. Parties may obtain discovery regarding any matter that is relevant to the subject matter in 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 ground for objection that the information sought will be inadmissible at the 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 any and all documents and tangible things (including but not limited to 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. If a person does not have actual physical possession, but has a superior right to compel the production from a third party, the person has possession, custody or control.

c. *Persons With Knowledge of Relevant Facts.* A party may obtain discovery of the identity and location (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 information need not be admissible to satisfy the requirements of this subsection and personal knowledge is not required.

d. *Trial Witnesses.* A party may obtain discovery of the identity and location (name, address, telephone number) of persons who are expected to be called to testify at trial, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before the time of trial.[1]

e. *Expert Witnesses.* A party may obtain discovery of the identity of and information concerning expert witnesses only pursuant to Rule 10.

f. *Indemnity and Insuring ~~and Settlement~~ Agreements.* A party may obtain discovery of ~~the following:~~

~~(1)~~ The existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

~~(2)~~

g. *Settlement Agreements.* A party may obtain discovery of ~~T~~the existence and contents of any settlement agreement. Information concerning the settlement agreement is not by reason of disclosure admissible in evidence at trial.

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[1] Language from current Rule 166.

hg. Witness statements. A witness statement, regardless of when made, is discoverable, unless privileged. 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' oral statement, or any substantially verbatim transcription of such a recording. A lawyer's notes taken during a conversation or interview with a witness is not a "witness statement." Any person may obtain, upon written request, his or her own witness statement concerning the lawsuit, that is in the possession, custody or control of any party.

i.~~(h)~~ Potential Parties. A party may obtain discovery of the identity and location (name, address and telephone number) of any potential party.

Comments:

1. The definition of documents and tangible things has been revised to make clear that everything, regardless of its form, is within the scope of discovery if it relevant to the subject matter of the action, and properly requested by an appropriate discovery device.

2. Subdivision c. requires parties to make a "brief statement of each identified person's connection with the case." This provision does not require 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".

3. The sections in current 166b concerning land, experts, and medical records are deleted from this rule, but it is not intended that these areas are now exempt from discovery. They are clearly within the scope of discovery, and are discussed in the specific discovery vehicles intended for their disclosure. See Rule 9(2)(f)&(g)(medical records) ; Rule 23 (land) and Rule 10 (experts).

RULE 4. Privileges and Work Product~~Exemptions from Discovery~~. (revised 6/21/95)

1. Privileges. A party may not discover any matter protected from disclosure by any privilege.

2. Work Product:

a. Scope. The following is not discoverable:

(1) General. Anything made or prepared in anticipation of litigation or for trial by or for a party or a party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) is not discoverable except 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 factual information contained therein by other means. Even if the required showing is made, the court shall protect against disclosure of the mental impressions, opinions, conclusions, or legal theories concerning the litigation, and limit disclosure to the extent possible to the needed facts.

(2) Attorney's mental processes. The mental impressions, opinions, conclusions, and legal theories of an attorney or attorney's representative prepared in anticipation of litigation or for trial are not discoverable except when necessarily disclosed when responding to discovery concerning witnesses, exhibits, expert witnesses, or contentions as provided for in these Rules.

(3) Consulting experts. A consulting expert's identity, mental impressions, and opinions are not discoverable. A consulting expert is an expert who has been informally consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, and will not be called to testify as an expert, and whose mental impressions and opinions have not been reviewed by a testifying expert.

b. Exceptions. The following is discoverable, even if prepared in anticipation of litigation or for trial:

(1) Experts. The information concerning experts that is discoverable under Rule 10.

(2) *Witness Statements.* Witness statements that are discoverable under Rule 3(h).

(3) *Photographs.* Any photographic or electronic image of underlying facts (*e.g.*, a photograph of the accident scene) is discoverable. A photographic or electronic image of something other than underlying facts may be privileged (*e.g.*, a consulting expert's video of an experiment). A photographic or electronic image of any sort that a party intends to offer into evidence, however, is discoverable.

(4) *Facts.* The relevant facts, however acquired, within the knowledge of any party or its representatives, including the identity of persons with knowledge of relevant facts. Although a communication or document containing relevant facts may be privileged under this rule, this rule does not prevent discovery of the facts contained therein by means other than the discovery of the communication or document.

(5) *Texas Rule of Evidence 503(d).* If there is no attorney-client privilege under Texas Rule of Evidence 503(d), work product is discoverable.

RULE 5. Response to Written Discovery Requests; Supplementation and Amendment (revised 6/21/95)

1. Duty to Respond. When responding to requests for written discovery, 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. If the requesting party has served on the responding party a ~~readable~~ computer readable file~~disk~~ setting out the discovery requests, the responding party's answers, objections and other responses shall be preceded by the request to which they respond; otherwise, the responding party is under no obligation to restate the request when responding.

2. Duty to Amend or Supplement Discovery Responses. A party is under a duty reasonably promptly to amend or supplement its prior responses or document productions responsive to written discovery requests if the party learns that a prior response or production was incomplete or incorrect when made, or, although complete and correct when made, is no longer complete and correct. ~~An amendment or supplement filed or documents produced less than thirty days before trial is presumptively made without reasonable promptness.~~ An~~The~~ amendment or supplement shall be in writing, filed and served, ~~with the clerk,~~ and need not be verified. Amendment or supplementation is required when amending or supplementing a response to a written discovery request seeking the identification of persons with knowledge of relevant facts, trial witnesses or expert witnesses. Amendment or supplementation is not required for other responses if the additional or corrective information or documents have otherwise been made known to the other parties in discovery or in writing. Except as otherwise provided by these rules, amended or supplementary responses or productions served less than thirty days before trial are presumptively made without reasonable promptness.

3. Additional Discovery After Amendment or Supplementation. If the amendment, supplement or document production occurs during any applicable Discovery Period, the opposing party may seek from the other party or the court departures from the discovery

limitations imposed under Rule 1 upon a showing that the opposing party is unable to complete discovery relating to any new information disclosed in the amendment or supplement within the Discovery Period. If the amendment, supplement, or document production occurs after any applicable Discovery Period, the opposing party may reopen discovery. A party must respond to reopened written discovery served under this Rule the day before trial or within 20 days after the date of service, whichever is earlier. The reopening side is allowed five (5) hours of deposition time in addition to that provided in Rule 1. Such discovery shall be limited to matters related to any new information disclosed in the amendment or supplement. The court may allow additional discovery as needed.

Comment:

This rule imposes a duty upon parties to make a complete response to written discovery based upon all information reasonably available.

RULE 6. Effect on Trial for of Failure to Provide Timely Discovery (Revised 6/20/95)

1. Exclusion or continuance. If a party fails to timely disclose information during discovery, and is unable to show that such failure did not cause the opposing party to be unprepared in a way that may eaffect the outcome of the trial, then the court shall either exclude the information not timely disclosed or continue the trial to allow the opposing party to prepare to confront or use the previously undisclosed information. If the failure to disclose does not cause the opposing party to be unprepared in a way that may affect the outcome of the trial, the court may admit the evidence and proceed with the trial. The party who failed to timely disclose has the burden of showing that the opposing party is not unprepared in a way that may affect the outcome of the trial. Nothing in this rule limits the court's authority to grant a continuance.

2. Costs and expenses. If the court continues the case, the court may impose anythe expense caused byof the delay, including attorney's fees and any difference between pre-judgmentprejudgment and post-judgmentpostjudgment interest, on the party that failed to timely disclose.

Note to the Sanctions Committee:

The Discovery Committee has not addressed sanctions for failure to timely disclose information in accordance with Rule 5, and leaves that issue for the Sanctions Committee to address. The Discovery Committee, however, does recommend that some sanction be imposed on parties that fail to provide discovery "reasonably promptly," even if provided more than 30 days before trial.

RULE 7. Presentation of Privileges and Objections to Written Discovery (revised 6/20/95)

1. Objections. A party shall not object to an otherwise proper request on grounds that it calls for specific materials or information that are subject to a privilege pursuant to Rule 4, but shall withhold the privileged materials or information pursuant to section 2 of this rule. If a written discovery request is otherwise objectionable, the responding party shall object specifically in writing within the time required for the response by stating the basis of the objection and the extent to which the party is refusing to comply with the request. A party should comply with so much of the request as to which the party has made no objection, unless ~~that party has determined that~~ it is unreasonable under the circumstances to do so before obtaining a ruling on the objection. Objections shall be made only if a good faith factual and legal basis for the objection exists at the time the objection is made. Any objection not specifically stated within the time required or obscured by numerous unfounded objections is waived unless the court excuses the waiver for good cause shown.

2. Withholding Privileged Information and Materials.

A party may preserve a privilege from written discovery only in accordance with this section.

(a) Asserting a Privilege. ~~A party may preserve a privilege from discovery only in accordance with this section.~~ If materials or information responsive to a request are privileged, the party shall withhold the privileged materials or information from the response. If a request ~~is both objectionable and~~ calls for privileged materials or information in response, but is also otherwise objectionable, the responding party shall first object pursuant to section 1 of this rule, and only upon compliance with the request or any part thereof, withhold responsive privileged materials or information pursuant to this section. When a party actually withholds specific information and materials responsive to a request on grounds of privilege, ~~either~~ when making the original response and~~or~~ thereafter if~~when~~ making an amended or supplemental response, that party shall file a withholding statement, as part of the response to the discovery request or

separately, stating that information or materials responsive to the request have been withheld and the privilege(s) relied upon.

(b) Description of Withheld Materials or Information. After receiving a withholding statement, the party seeking discovery may file and serve upon the withholding party a request that the withholding party identify the information and materials withheld. Within 15 days of service of that request, the withholding party shall file and serve a description of the information and materials withheld that makes the claim of privilege expressly and describes the nature of the information or materials withheld in such a manner that, without revealing the privileged information itself, will enable other parties to assess the applicability of the privilege.[2]

(c) Exemption from Withholding Statement~~Trial Preparation Materials~~. Privileged communications to or from a lawyer or lawyer's representative or privileged documents 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,

need not be included in a withholding statement or description except upon court order for good reason. ~~Withheld information or materials created by trial counsel in preparation for the litigation in which the discovery is requested need not be included in a withholding statement or description except upon court order in appropriate circumstances.~~

3. Hearing. Any party may at any reasonable time request a hearing on an objection or privilege asserted in accordance with this rule. ~~At or before the hearing, t~~The party seeking to avoid discovery shall present~~produce~~ any evidence necessary to support the objection or withholding statement either by testimony at the hearing or by affidavits served upon opposing parties at least seven days before the hearing ~~or live testimony~~. If the judge determines that an in

[2] This language is from federal rule 26(b)

camera reviewinspection of some or all of the requested discovery is necessary to rule on the objection or privilege, the requested discovery shall be segregated and produced thereafter to the judge in a sealed wrapper. Evidence necessary to support a privilege for information or materials created by trial counsel in preparation for the litigation in which the discovery is requested shall be produced only upon court order in appropriate circumstances.

4. Ruling. To the extentIf after a hearing the court sustains the objection or claim of privilegewithholding statement, the objecting party has no further duty to respond to that request. If the court overrules the objection or claim of privilegewithholding statement, the objecting party shall respond to the request within thirty (30) days after the court's action, or at such time as the court orders. If the suit proceeds to trial without a hearing on properly asserted objections and privileges, the objection or privilege is deemed sustained, unless during trial the judge determines that the objection or privilege must be overruled to prevent a miscarriage of justice.

Comments:

1. This rule provides for objections to the form of a written discovery request. The responding party specifically objects to the request, and states whether the party intends to comply with the request as specifically modified or not comply at all for specified reasons. If a party receives a request for "all documents relevant to the lawsuit," the requesting party can object to the request as an overly broad request that does not comply with the rule requiring specific requests for documents, and refuse to comply with its 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 broadborad and on its face it seeks only materials protected by privilege. See National Union Fire Ins. Co. v. Valdez, 863 S.W.2d 458 (Tex. 1993). If a request seeks specific documents from 1980 to the present, the party may object that the documents from 1980 to 1990 are irrelevant, and that it is overly burdensome to produce them. In such case, the party may produce the documents from 1990 to the present, or refuse to produce any until the court resolves the objection if producing according to a modified request will require a burdensome and duplicative search if the court should overrule the objection.

2. The new rule dispenses with objections to written discovery requests on the basis that responsive information or materials are protected by a specific privilege or immunity from discovery. Instead, the rule requires parties that withhold such information or materials state that they have been intentionally withheld, and identify the privilege upon which the party relies.

A party need not make a withholding statement if the only materials responsive to the request that are being withheld are information and materials created by or for lawyers~~for trial counsel~~ for the litigation, as it can be assumed that such information or materials will be withheld from virtually any request on the grounds of attorney-client privilege or work-product. The withholding statement should not be made prophylactically, but only when specific information and materials have been withheld. Should additional privileged information or materials be found subsequent to the initial response, an amendment or supplement to the discovery response can include a withholding statement.

3~~4~~. 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, as under the current rules.

4. This Rule governs the presentation of all privileges, including work product, set out in Rule 4 (now Rule 166b(3)).

RULE 8. Protective Orders

Any person against or from whom discovery is sought may move within the time required to respond to the discovery request for an order protecting that person from the discovery sought, except that ~~A~~any party may move for such an order when an objection pursuant to Rule 7 is not appropriate. The court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights, including but to limited to the following:

1. ordering that the requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified;

2. ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court;

3. ordering for good cause shown that the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a.

RULE 9. Standard Requests For ~~Standard~~ Disclosure

1. Request. At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first, any party may file and serve~~eerve~~ upon any other party a Standard Request for Disclosure as set forth in this rule. The Request for Standard Disclosure shall state:

"Pursuant to Rule 9, you are requested to make the following disclosures within 30 days of service of this request:

[add specific subsections of part 2~~3~~ of this rule under which disclosure is requested]."

A standard request for disclosure made pursuant to these rules is presumptively not objectionable under Rule 7(1).

2~~4~~. Content~~Standard Requests for Disclosure~~. A party may make any or all of the following standard requests for disclosure:

a. Provide the correct names of the parties to the lawsuit.

b. Provide the information ~~set forth in Rule 3(2)(c)~~ pertaining to persons with knowledge of relevant facts set forth in Rule 3(2)(c);

c. ~~-~~ Produce the indemnity and~~,~~ insuring ~~and settlement~~ agreements discoverable under Rule 3(2)(f);

d. Produce the settlement agreements discoverable under Rule 3(2)(g);

e~~d~~. Produce the witness statements discoverable under Rule 3(2)(h~~g~~);

f~~e~~. In a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, produce 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;

g~~f~~. In a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, produce all medical records and bills obtained by virtue of an authorization furnished by the requesting party;

hg. Produce any written instrument upon which a claim or defense is based;

i. Provide the information pertaining to expert witnesses set forth in Rule 10(2) and (3).

~~*h*. Identify each expert discoverable under Rule 10(1);~~

~~*i*. State the subject on which each expert identified in response to section h above is expected to testify;~~

~~*j*. State the general substance of the mental impressions and opinions held by each expert identified in response to section h above and a brief summary of the basis thereof;~~

~~*k*. Produce all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by or prepared by or for each expert identified in response to section h above in anticipation of the expert's testimony and discoverable under Rule 10(1)(e);~~

~~*l*. The current resume and bibliography of each expert identified in response to section h above ;~~

~~*m*. At least 2 dates upon which each expert identified in response to section h above will be available to testify by oral deposition.~~

32. Response. Except as provided for expert witnesses in Rule 10, a~~A~~ party served with a Standard Request for Disclosure shall file and serve a written response making the requested disclosures within thirty (30) days after service of the request (fifty [50] days if the request accompanies citation), ~~except that, if the request accompanies citation, a defendant may serve its response within 50 days after service of the citation and petition upon that defendant.~~ unless the time to serve a response is extended in the Request or by agreement or court order. ~~A party served with a request for disclosure concerning experts under parts h through m of section 3 of this Rule need not respond until the time set forth in Rule 10.~~ If the response provides information, as opposed to documents, it shall be verified in the manner required by Rule 12.

43. ~~Responsive~~ Documents. Copies of the documents responsive to requests under section 3 of this Rule ordinarily shall be served with the response; however, if the responsive documents

are voluminous . the response shall specify a reasonable time and place for the production of documents, not more than 7 days from the date of the response.

RULE 10. Expert Witnesses

1. Request. A party may request another party to designate and disclose information concerning expert witnesses only through athe Sstandard Rrequests for Ddisclosure pursuant trouble 9.4.h-m ~~oral deposition, and court-ordered reports pursuant to~~as set forth in this rRule. An "expert witness" subject to discovery pursuant to~~under~~ this rule is an expert who may be called as an expert witness at trial, and an expert used for consultation and who is not expected to be called as an expert witness at trial, but whose opinions and impressions have been reviewed by a testifying expert. If the expert has personal knowledge of relevant facts, a party also may obtain discovery as provided elsewhere in these rules.

2. Designatingon of Expert Witnesses.

a. Request. A party may make the following Standard Request for Disclosure pursuant to Rule 9: Identify (name, address and phone number) each expert discoverable under Rule 10(1) and state the subject upon which each identified expert is expected to testify. ~~discover the identity (name, address and telephone number) of another party's expert witness and the subject upon which the expert is expected to testify through a standard request for disclosure under Rule 9.4.h and i. The responding party shall comply with~~

b. Response. The response shall be made within thirty (30) days after service of the request (fifty [50] days if the request accompanies citation). ~~Rule 5 in responding to the request~~If such response is amended or supplemented, the presumption of Rule 5(2) that any change is made without "reasonable promptness" begins (a) ~~F~~for experts testifying about issues upon which the responding party seeks affirmative relief, the earlier of~~supplementation or amendment of the response is presumptively made without reasonable promptness if made less than~~ 75 days before the end of any applicable Discovery Period or 75 days before trial; or (b) ~~whichever occurs first. F~~for opposing experts, the earlier of~~supplementation or amendment of the response is presumptively made without reasonable promptness if made less than~~ 45 days before the end of any applicable Discovery Period or 45 days before trial~~, whichever occurs first~~.

3. Additional Disclosures ~~of General Information~~

a. Request. A party may make any or all of the following Standard Requests for Disclosure pursuant to Rule 9:

(1) State the general substance of the mental impressions and opinions held by each identified expert and a brief summary of the basis thereof;

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

(3) Produce the current resume and bibliography of each identified expert;

(4) State at least two dates upon which each identified expert will be available to testify by oral deposition.

~~For each expert designated, a party may obtain additional information through the standard requests set forth in Rule 9.4.j through m.~~

b. Response. A party seeking affirmative relief must respond to the requests upon the later of (1) 30 days after service of the request; or (2) the earlier of 75 days before the end of any applicable Discovery Period or 75 days before trial~~, whichever occurs first, or (2) 30 days after service of the request~~. A party who has designated opposing experts must respond to the requests upon the later of (1) 30 days after service of the request; or (2) the earlier of 45 days before the end of any applicable Discovery Period or 45 days before trial~~; whichever occurs first, or (2) 30 days after service of the request~~.

For experts not retained or employed or otherwise in control of the designating party, ~~however,~~ the designating party must~~need not~~ respond to ~~the~~ Sstandard Rrequests (1) ~~set forth in Rule 9.4.l or m, and need only respond to the standard request set forth in Rule 9.4.k.~~ with documents within the possession, custody or control of the designating party, and need not respond to Standard Requests (2), (3) and (4). Nothing in this rule shall prevent the requesting

party from obtaining this discovery directly from such an expert by subpoena commanding production under Rule 24.

4. ~~Additional discovery through o~~Oral deposition. A party may obtain other discovery of 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 only by oral deposition of the expert, unless the court orders the expert to prepare a report pursuant to this ~~r~~Rule.

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 or in lieu of the deposition as is appropriate. A court may not compel production of such a report before the date upon which the designating party must respond to additional Standard Requests for Disclosure ~~disclose general information concerning its designated experts pursuant to~~under part 3 of this ~~r~~Rule.

6. Supplementation after disclosure of general information. ~~A party that has disclosed general information concerning its designated experts under part 3 of this rule shall supplement and amend such discovery with reasonable promptness if the discovery was incomplete or incorrect when made, or, although complete and correct when made, is no longer complete and correct.~~ A party's duty to supplement and amend discovery provided pursuant to this rule is governed by Rule 5, except that the duty also extends to the oral deposition testimony of an expert that is retained or employed by or otherwise within the control of that party concerning the expert's mental impressions or opinions or the basis thereof.

~~**8. Discovery of Expert Witnesses.** Discovery of the identity of and information concerning witnesses who are expected to offer expert testimony at trial may be obtained only as~~

~~provided in this rule unless the witness has personal knowledge of relevant facts, in which case a party may obtain discovery as provided elsewhere in these rules.~~

Comment:

The Discovery Subcommittee has not considered the effect of the 1995 medical malpractice legislation upon this rule.

RULE 11. Requests For Production and Inspection [revised 6/22/95]

1. Requests. At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first, any party may file and serve upon any other party a Request for Production and/~~or~~ for Inspection, to inspect, sample, test, photograph and/~~or~~ copy any designated documents or tangible things that constitute or contain matters within the scope of Rule 3(2). ~~A person is required to produce a document or tangible thing that is within the person's possession, custody or control.~~

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. The request shall specify a reasonable time (on or after the date on which the response is due) and place for production. 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. Response.

~~*a. Written Response.*~~ The party upon whom the request is served shall file and serve a written response within 30 days after service of the written request (fifty [50] days if the request, ~~except that, if the request for production~~ accompanies citation), ~~a defendant may serve its written response within 50 days after service of citation and petition upon that defendant.~~ The response shall state, with respect to each item or category of items, that production, inspection, or other requested action will be permitted as requested, or shall state an objection to the request pursuant to Rule 7(1) ~~(objection rule)~~.

~~*b. Objections to the time, place, or manner of production.* In the response, the responding party may make objections to the time, place, or manner of production, testing, inspection, or sampling, stating specific reasons why such discovery should not be allowed and the circumstances under which the party will comply with the request.~~ If the responding party

objects to the time and place of production, the objection shall also state when and where the party will comply with the request.

4. Documents~~Production~~. Subject to any objections stated in the response, the responding party shall 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 set forth in the response, as follows:

a. Copies. The responding party may 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 responding party is entitled to retain the originals while the requesting party inspects and copies them.

b. Organization. The responding party shall produce documents 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.

c. Privileged Information and Materials. The responding party shall assert its privileges, if any, pursuant to Rule 7(2) ~~(objection rule), if any,~~ at the time documents or things actually are withheld from production.

5. Electronic or magnetic data. To obtain electronic or magnetic data or the information contained therein the requesting party must specifically request it and specify the form in which it wants it produced. In response, the responding party shall produce the electronic or magnetic data responsive to the request that is reasonably available to the responding party in the ordinary course of its business. If the responding party determines that it cannot reasonably retrieve the data requested or produce it in the form requested, it shall follow the procedures of Rule 7(1). After a hearing, the court may order the responding party to comply with the request provided that the requesting party pay the reasonable expenses for any extraordinary steps required for retrieval and~~/or~~ production.

6. **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.

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

Comments:

1. "Document and tangible things" are defined in Rule 3.

2. The proposed rule is very similar to the existing rule. The proposed rule makes clear that a party that seeks to sample or test the produced documents or things, must describe the procedure so that the responding party may make any appropriate objections. The proposed rule also addresses for the first time the production of magnetic or electronic data. The requesting party must specifically request the data, specify the form in which it wants the data produced, and specify any extraordinary steps for retrieval and translation. Otherwise, the responding party need only produce the data available in the ordinary course of business in reasonably usable form. ~~*The responding party may object to the form of a request or the time, place and manner of production, but must comply with the request to the extent no objected to unless it explains to the court why it cannot so comply.*~~ *The rule requires production at the time and place specified in the request or the response, and allows the production of copies if the originals are made available upon request. The rule also clarifies how the expenses of production are to be allocated absent a court order to the contrary.*

RULE 12. Interrogatories to Parties (Last revised 6/22/95)

1. Request~~Availability~~. At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first, any party may file and serve upon any other party written interrogatories to be answered by the party served.

2. Content. A party may use interrogatories to inquire about any discoverable matter and the contentions and defenses of another party, provided that contention interrogatories may only request another party to state the legal theories and to describe in general the factual bases for the claims or defenses of that party. Contention interrogatories may not be used to require another party to marshal all of its available proof or proof it intends to offer at trial to answer the interrogatory.

32. Response.

~~*a.*~~ The party upon whom the interrogatories have been served shall file and serve answers and objections, if any, to the interrogatories within 30 days after the service of the interrogatories (fifty [50] days if the request accompanies citation)~~. except that, if the interrogatories accompany citation, a defendant may file answers and objections within 50 days after service of citation and petition upon that defendant.~~

~~*b.*~~ Each interrogatory shall be answered separately and fully in writing~~ under oath~~, unless the party states an objection to the request or asserts a privilege pursuant to Rule 7~~ (objection rule)~~.

~~*c.*~~ The answers shall be signed under oath~~and verified~~ by the party making them, and the objections shall be signed by the attorney making them. ~~The provisions of Rule 14[current TRCP] shall not apply.~~

~~*d. The responding party shall assert its privileges pursuant to Rule 7 (objection rule), if any, at the time it files its answers and objections.*~~

~~**3. Scope of Interrogatories.** A party may use interrogatories to inquire about any discoverable matter within the scope of discovery under Rule 3(2) and the contentions and~~

~~defenses of another party, provided that contention interrogatories may only request another party to state the legal theories and to describe in general the factual bases for the claims or defenses of the other party. Contention interrogatories may not be used to require another party to marshall all of its available proof or proof it intends to offer at trial to answer the interrogatory.~~

~~**4. Use at Trial.** Answers to interrogatories, subject to any objections as to admissibility, may be used only against the party answering the interrogatory.~~

45. 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 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 such ~~the~~ records ~~from which the answer may be derived or ascertained~~ and, if applicable, to produce the records, or compilation, abstract or summary thereof, in compliance with Rule 11 ~~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.

5. Use. Answers to interrogatories may be used only against the party answering the interrogatory.

Comment:

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 13. Requests for Admissions [revised 6/22/95]

1. Request ~~for Admission~~. At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first, a party may file and serve upon any other party a written request for an~~the~~ admission.

2. Content. ~~. for purposes of the pending action only,~~ A party may request the admission of the truth of any matters within the scope of Rule 3(b) ~~rule 166b set forth in the request that relate to~~ including statements or opinions of fact or of the application of law to fact, ~~including~~ or the genuineness of any documents served with ~~described~~ ~~in~~ the request or otherwise made available for inspection and copying. Each matter of which an admission is requested shall be ~~separately~~ set forth separately. ~~Copies of the documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Whenever a party is represented by an attorney of record, service of a request for admissions shall be made on his attorney unless service on the party himself is ordered by the court.~~

3~~2~~. Response. ~~The matter is admitted without necessity of a court order unless, within thirty days after service of the request t~~The party to whom the request is directed shall file and serves its response thereto within 30 days after service of the request (fifty [50] if the request accompanies citation). Subject to objections and privileges raised pursuant to Rule 7, ~~upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of fifty days after service of the citation and petition upon that defendant. Unless objection is made~~, the response shall specifically admit or deny the request~~matter~~ or set forth in detail the reasons any request ~~that the answering party~~ cannot ~~truthfully~~ be admitted or denied~~y the matter~~. A response~~denial~~ shall ~~fairly~~ meet fairly the substance of the requested admission, qualifying an answer or denying only a part ~~and~~ when good faith requires ~~that a party qualify his answer or deny only a part of the~~

~~matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give~~ Lack of information or knowledge or a claim that the request presents a genuine issue for trial is not a proper response ~~as a reason for failure to admit or deny~~ unless the objection~~party~~ states that a reasonable inquiry has been made and that the information known or easily obtainable is insufficient to enable the party to admit or deny. ~~A party who considers that a matter of which an admission is requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of paragraph 3 of Rule 215, deny the matter or set forth reasons why the party cannot admit or deny it.~~ If no response is timely served, the request is admitted without the necessity of a court order.

~~42.~~ **Use~~Effect of Admission~~.** Any matter admitted under this rule is conclusively established as to the party making the admission unless the court on motion permits withdrawal or amendment ~~of the admission. Subject to the provisions of Rule 166 governing amendment of a pre-trial order, and Rule 5 governing the duty to supplement discovery responses,~~ t~~T~~he court may permit withdrawal or amendment ~~of responses and deemed admissions~~ upon a showing of good cause for such withdrawal or amendment if 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 thereby. Any admission made by a party under this rule is for the purpose of the pending action only and ~~neither constitutes an admission by him for any other purpose nor~~ may not be used ~~against him~~ in any other proceeding.

RULE 14. Depositions Upon Oral Examination [revised 6/27/95]

~~1. When Depositions May Be Taken. At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first, any party may take the testimony of any person, including a party, by deposition upon oral examination, which, unless taken pursuant to Rule 16, will be recorded stenographically by any officer authorized to take depositions as provided by law. A party may take a deposition prior to the appearance date of any defendant only upon leave of court, granted with or without notice.~~

12. Notice; ~~Subpoena~~.

~~a.~~ At any time during any applicable Discovery Period or 30 days before trial, whichever occurs first, a party may notice the deposition upon oral examination of any person or entity to be taken before any officer authorized by law to take depositions. A reasonable time before the deposition, a party shall file and serve a ~~proposing to take a deposition upon oral examination must give reasonable~~ notice stating the ~~to every other party. The notice shall state the~~ name of the deponent and the time and the place of ~~the taking of~~ the deposition~~, and shall be filed and served~~. When the deponent is a party or subject to the control of a party, service of the notice upon the party's attorney shall have the same effect as a subpoena served on the deponent. ~~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.~~

2. Content.

a. 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 the witness 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 3. below may be taken in the county of suit. A nonresident or transient person may be required to attend in the county where that person 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.

b. Other attendees. If any party intends to have any other persons attend, that party must give reasonable notice to all parties of the identity of such other persons. ~~If a subpoena commanding production under Rule 24 is to be served on the person to be examined, the designation of materials to be produced as set forth in the subpoena shall be attached to or included in, the notice.~~

~~– b~~*c. Depositions of Organizations.* 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 response, the organization so named shall designate one or more persons to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The person so designated shall testify as to matters known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized by these rules.

d3. Documents~~**Production.**~~ A deponent ~~witness also~~ may be compelled ~~by subpoena commanding production under Rule 24~~ to produce at the deposition documents or tangible things within the scope of discovery ~~Rule 3~~ and within the witness' care, custody or control. If a subpoena commanding production under Rule 24 is to be served on the person to be examined, the designation of materials to be produced as set forth in the subpoena shall be attached to or included in, the notice. When the deponent is a party or subject to the control of a party, the procedures of Rule 11, including the 30 day time for response, shall apply to such request.

~~4. **Party.** When the deponent is a party, or a person subject to the control of a party,[3] service of the notice upon the party's attorney shall have the same effect as a subpoena served on the deponent. The notice to such a deponent may be accompanied by a request made in compliance with Rule 11 for the production of documents and tangible things at the deposition. The procedure of Rule 11, including the 30 days notice requirement, shall apply to the request and the response, and it shall be considered a written request for discovery subject to the provisions of Rule 5.~~

~~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 the witness 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 2.b. above may be taken in the county of suit. A nonresident or transient person may be required to attend in the county where a witness 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.~~

*e*6. ***Deposition by Telephone.*** Any party may give reasonable prior written notice that a deposition will be taken by telephone or other remote electronic means. For the purposes of these rules~~is rule and Rules 14, 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 witness is placed under oath by a person present with the witness who is authorized, in that jurisdiction, to administer oaths.

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[3] Comment: This Rule applies to some experts as well as a party's other employees and agents. For example, a retained expert is ordinarily within the control of a party. A treating physician who is testifying as an expert witness may not be in the control of a party, however.

37. **Protective order.** A party or deponent may include in a motion for protective order pursuant to Rule 8 an objection to the time and place designated for a deposition. If the movant had less than ten (10) days notice of the deposition, the filing of the motion excuses compliance with the notice or subpoena until the motion is overruled. If the movant had at least 10 days notice of the deposition, the movant must comply with the notice or subpoena unless the motion is granted, or the movant demonstrates that it was unable to obtain a ruling on the motion despite its good faith efforts to do so pursuant to any applicable local rules.

RULE 15. Examination, Objection, and Conduct During Oral Depositions [revised 6/21/95]

1. Oath; Examination. Every person whose deposition is taken upon oral examination shall first be placed under oath. 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 deposition officer who shall open the envelope and propound them to the witness.

2. Time Limitation. The time a party takes to examine and cross-examine deponents upon oral examination shall be limited.

a. Time per deposition. Each side may conduct one deposition that is subject to no per deposition time limit. For all other depositions, no side shall examine or cross-examine a single fact witness for more than three (3) hours or a single expert witness for more than six (6) hours. If a witness has been deposed as a fact witness and is thereafter designated as an expert, the witness may be redeposed for the time remaining within the 6 hour limit. Third-party defendants may examine a single witness regarding issues upon which they oppose defendants for no more than 1 additional hour.

b. Record of deposition time. 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 of time each examiner used to examine the deponent.

3. Conduct during the deposition. The oral deposition shall be conducted in the same manner 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. Private conferences between deponents and their attorneys 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 statements, objections and discussions conducted

during the oral deposition that reflect upon the veracity of the testimony to be introduced in evidence at trial

4. Objections to testimony. Objections during the oral deposition are improper except the following objections to the form of the question or the responsiveness of the answer. "Objection, leading;" "Objection, form;" and "Objection, non-responsive." These objections shall be stated as phrased and will be waived if not made at the taking of the deposition. A narrative objection will not preserve the objection for the court's later determination. Upon request, the objecting party shall explain the grounds of the objection clearly and concisely, in a non-argumentative and non-suggestive manner. Objections or explanations that are argumentative or suggest answers to or otherwise coach the deponent are not permitted and can be grounds for termination of the deposition pursuant to this Rule.

~~5~~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 ~~make~~ a ~~motion~~ secure a ruling pursuant to ~~under~~ paragraph 6. Upon request, the instructing party shall explain the grounds for the instruction clearly and concisely, in a non-argumentative and non-suggestive manner. Should a court later order the deponent to answer a question to which the deponent was instructed not to answer, the court may impose an appropriate sanction for discovery abuse pursuant to Rule 215.

6. **Suspending ~~Terminating~~ the deposition.** ~~A party or the deponent may move to terminate or limit the deposition w~~When the time limitations for the deposition have expired or when the deposition is being conducted or defended in violation of ~~not in accordance with~~ these rules, ~~upon~~~~rules. Upon~~ demand ~~of the moving party or deponent~~, the deposition ~~may~~shall be suspended for the time necessary to ~~file a motion for protective order and~~ secure a ruling. ~~The~~~~ruling thereon. Should a court rule that the deposition should not have been terminated, the~~

The court may impose an appropriate sanction for discovery abuse pursuant to Rule 215 if the suspension of the deposition was not justified.

~~6. **Objections to testimony.** Objections during the oral deposition are improper except the following objections to the form of the question or the responsiveness of the answer: "Objection, leading;" "Objection, form;" and "Objection, nonresponsive." These objections shall be stated as phrased and will be waived if not made at the taking of the deposition. A narrative objection will not preserve the objection for the court's later determination. Upon request, the objecting party shall explain the grounds of the objection clearly and concisely, in a non-argumentative and non-suggestive manner. Objections or explanations that are argumentative or suggest answers to or otherwise coach the deponent are not permitted and can be grounds for termination of the deposition pursuant to this Rule.~~

Comment: *Section 3 of this rule refers only to the conduct of the lawyers and deponents in the deposition. It is not meant to limit the scope of the interrogation to the scope allowed at trial. See Rule 3.*

RULE 186. Non-Stenographic Recording [revised 6/27/95]

1. ~~Non-stenographic Recording~~Notice. Any party may cause a ~~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 file and serve ~~give~~ reasonable prior written notice ~~in writing~~ to the deponent and other parties, either in the ~~deposition~~ notice given pursuant to Rule 14 or otherwise, of the non-stenographic method by which the testimony will be recorded and whether ~~or not~~ a certified court reporter also will be used~~present to record and transcribe the testimony~~. Any other party may then file and serve written notice designating another method of recording in addition to the method specified, at the expense of the designating party unless the court orders otherwise.

2. **Conducting the Deposition.** A non-stenographic deposition must be conducted in accordance with Rule 15. The party requesting the non-stenographic recording will be responsible ~~If a certified court reporter will not be present, the person recording the testimony (the "recorder") must arrange for the presence of a notary public~~ for obtaining a person authorized by law to administer the oath, ~~who can administer the oath to the deponent. The party requesting the non-stenographic recording will be responsible for taking~~ for assuring that the recording will be intelligible, accurate, and trustworthy, and for ~~preserving, and~~ maintaining the original non-stenographic recording, ~~and assuring that the recorded testimony will be intelligible, accurate and trustworthy.~~

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

d. The party 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.

32. Signing, Certification, and Deliverye. The non-stenographic recording and exhibits thereto must be prepared and delivered in accordance with Rule 16 to the party who requested the non-stenographic recording (rather than the party who asked the first question), except that the recording is not submitted to the witness for signature or changes. The recorder shall make a duly sworn certificate that accompanies the original recording that shall state the following:

a. that the witness was duly sworn;

b. that the recording is an accurate and complete recording of the testimony given by the witness;

c. the amount of charges for the recorder's preparation of the recording and any copies of exhibits;

d. that the original recording, together with copies of all exhibits, if any, is in the possession and custody of the party who requested the non-stenographic recording;

e. That a copy of the certificate was filed and served on all parties pursuant to Rule 21a.

3. **Delivery.** The recorder, after certification, shall securely seal the original recording and copies of all exhibits in a wrapper endorsed with the title of the action and marked "Deposition of (here insert name of witness)," and shall thereafter deliver, or mail in a postpaid, properly addressed wrapper, certified with return receipt requested, such deposition recording and copies of all exhibits, if any, to the party who requested the non-stenographic recording, and shall give notice of delivery to all parties. The custodial party shall, upon reasonable request, make the original deposition recording available for inspection or copying by any other party to

~~the suit. Upon payment of reasonable charges therefor, the recorder shall furnish a certified copy of the deposition recording and accompanying exhibits to any party or to the deponent.~~

~~**4. Exhibits.** If a certified court reporter is not present, the recorder shall, upon the request of a party, mark and annex to the original deposition recording original documents and things produced for inspection during the examination of the witness. The person producing the materials may (a) offer copies to be marked for identification and annexed to the deposition recording and to serve thereafter as originals if the party affords to all other parties fair opportunity at the deposition to verify the copies by comparison with the originals, or (b) offer the originals to be marked for identification, in which event the materials may then be used in the same manner as if annexed to the deposition recording. In the event that original exhibits rather than copies are marked for identification, the recorder shall make copies of all original exhibits to be annexed to the original deposition recording for delivery, and shall thereafter return the originals of the exhibits to the witness or party producing them, or if the witness or party is represented by an attorney at the deposition, to the attorney, who shall thereafter maintain and preserve the original exhibits and shall produce any such original exhibits for hearing or trial upon seven (7) days notice from any party. Copies annexed to the original deposition recording may be used for all purposes.~~

45. Use Depositions Recorded Only by Non-stenographic means.

a. At trial or summary judgment. A ~~Any part or all of a~~ non-stenographic recording or transcript of a ~~non-stenographic recording of a~~ deposition ~~that was~~ recorded only by non-stenographic~~nonstenographic~~ means can be used at the trial or ~~supporting or opposing a motion~~ for summary judgment ~~under the circumstances set forth in Rule 20(1)~~ only if the party intending to use it~~the deposition~~ has obtained a complete transcript of the deposition recording from a certified court reporter. The ~~certified~~ court reporter shall obtain the original or a certified copy of the deposition recording, shall transcribe it, and shall comply with the provisions of Rule

198 ~~shall apply and the provisions of Rule 19 shall apply~~ to the extent applicable.[4] The ~~certified~~ court reporter's ~~shall include in the~~ certificate shall include a statement that the transcript was made from the original or certified copy of the deposition recording and that the transcript is a true record of the recording. If the deposition is to be used as evidence at the trial, the complete transcript must be served on all parties at least 30 days before the trial, or ~~If the deposition is to be used as evidence supporting or opposing a motion~~ for summary judgment, ~~the complete transcript must be served on all parties~~ at the time the deposition must be filed with~~is presented to~~ the court ~~as summary judgment evidence~~.

b. At any other hearing[5]. A~~ny part or all of a~~ non-stenographic recording or transcript of a deposition recorded only by non-stenographic means can be used at any hearing of a motion or an interlocutory proceeding (other than a summary judgment motion) ~~under the circumstances set forth in Rule 20(1)~~ only if the party intending to use it~~the deposition~~ has obtained a transcript of that portion of the deposition recording by a certified court reporter, transcribed and certified in accordance with part a above. In addition, ~~in accordance with this rule. A~~at least 20 days before the date set for the hearing in which the deposition is to be used, the party seeking to use the deposition must file and serve a written designation specifying (1) the name of the deponent whose deposition the party intends to use; (2) the name and address of the certified court reporter that the party has asked to transcribe all or part of the deposition recording; and (3) the portions of the deposition recording that the party has requested to be included in a transcript. If the party has designated only a part of the deposition testimony, any other party may request the named court reporter to transcribe additional parts of the deposition recording at that party's own expense within 10 days of service of the designation. The deposition can be used only if the transcript is completed at least 3 days before the date of the hearing. ~~The provisions of Rule 18 shall not apply and the provisions of Rule 19 shall apply only to the extent appropriate. The~~

[4] The provisions concerning certification of swearing in the witness and that the transcript is a true record of the testimony, as well as the provisions concerning marking exhibits will not apply.

[5] Judge Brister would leave this section out. I have left it in as proposed by the Discovery Subcommittee.

~~certified court reporter shall include in the certificate a statement that the transcript was made from the original or certified copy of the deposition recording and that the transcript is a true record of the recording.~~

c. Certified copy. A certified copy of the non-stenographic~~deposition~~ recording is any copy of the original or another certified copy of the deposition recording that is accompanied by a duly sworn certificate of the person who made the copy, stating that the copy is accurate and complete.

RULE 17. Deposition Upon Written Questions [revised 6/27/95]

1. ~~Serving Questions;~~ Notice. At any time during ~~no later than 30 days before the end of~~ any applicable Discovery Period or 30 days before trial, whichever occurs first, any party may take the testimony of any person or entity~~, including a party,~~ by deposition upon written questions. ~~A party may take a deposition prior to the appearance date of any defendant only upon leave of court, granted with or without notice. The attendance of witnesses and the production of designated items may be compelled as provided in Rule 20.~~

~~**2. Notice; written questions.**~~

~~*a.* A party proposing to take a deposition upon written questions must give n~~Notice thereof must be filed and served on all ~~to every other~~ parties~~y~~ at least 20 days~~20days~~ before the deposition is ~~to be~~ taken, unless the time is shortened by agreement of the parties or court order.

2. Content. The content of the notice shall comply with Rule 14. In addition, the direct questions to be propounded to the witness shall be attached to the notice.

~~state the name and if known, the address of the deponent, and the time and place of the taking of the deposition, and shall be filed and served. The notice shall also state the identity of persons who will attend 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 identity of such other persons. If a subpoena commanding production under Rule 24 is to be served on the person being examined, the designation of materials to be produced as set forth in the subpoena shall be attached to or included in the notice.~~

~~*b.* party may in his notice name as the witness a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In response,, the organization so named shall designate one or more persons to testify on its behalf, and may set forth, for each person~~

~~designated the matters on which the person will testify. The person so designated shall testify as to matters known or reasonably available to the organization. This paragraph does not preclude taking a deposition by any other procedure authorized in these rules.~~

2. ~~Cross-Questions, Redirect~~ Additional Questions, ~~Recross Questions~~ and ~~Formal~~ Objections. Any party may serve cross-questions upon all other parties within ten days after the notice and direct questions are served. Within five days after being served with cross-questions a party may serve redirect questions upon all other parties. Within three days after being served with redirect questions a party may serve recross questions upon all other parties. Objections to the form of written questions are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within five days after service of the last questions authorized. ~~The court may for cause shown enlarge or shorten the time.~~

3. Conducting the Deposition~~Deposition Officer; Interpreter~~. The party noticing the deposition shall deliver copies of the notice and of all questions served to the deposition officer. Any person authorized to administer oaths ~~including notaries public~~ (whether or not the person is a certified shorthand reporter)~~.~~ is an officer who is authorized to issue a subpoena or subpoena ~~commanding production~~ under Rule 24 for a written deposition, and is an officer before whom a written deposition may be taken. Such~~An~~ officer ~~who is authorized to take a written deposition~~ shall have authority~~,~~ when necessary~~the officer deems it expedient,~~ to summon and swear an interpreter to facilitate the taking of the deposition. Such officer shall take the deposition on written questions at the time and place designated, shall record the testimony of the witness in response to the questions, and thereafter prepare, certify and deliver the deposition transcript pursuant to Rule 16.

~~**4. Officer to Take Responses and Prepare Record.** A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly to administer an oath to the witness in the manner~~

~~provided in paragraph 1 of Rule 15, to record the testimony of the witness in response to the questions at the time the testimony is given, and thereafter to transcribe the testimony, or personally to supervise another who transcribes the testimony, and to prepare, certify and deliver the deposition transcript, in the manner provided by Rules 18 and 23, attaching thereto the copy of the notice and questions.~~

Rule 1~~8~~68. ~~Submission to Witness; Changes;~~ Signing, Certification, and Use of Depositions.

1. **Signature and Changes.** Unless signature is waived by the witness and the parties. ~~When deposition testimony is fully transcribed,~~ the deposition officer shall provide the original deposition transcript to the witness, or if the witness is represented by an attorney at the deposition, to such~~the~~ attorney ~~representing the witness~~, for ~~the witness'~~ examination and signature, ~~before any officer authorized to administer an oath, unless such examination and signature are waived by the witness and by the parties.~~ No erasures or obliterations of any kind are to be made to the original ~~testimony as transcribed by the~~ deposition transcript~~officer~~. Any changes that the witness desires to make shall be stated in writing~~furnished to the deposition officer by the witness~~, together with a statement of the reasons ~~given by the witness~~ for making such changes. ~~The changes and the statement of the reasons for the changes shall be attached to the deposition by the deposition officer.~~ The witness shall then sign the ~~deposition~~ transcript ~~and any changes shall then be subscribed by the witness~~ under oath, ~~before any officer authorized to administer an oath, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the witness does not sign and return the original deposition transcript~~ and return it to the deposition officer within twenty days ~~of its submission to him or his counsel of record, the deposition officer shall sign a true copy of the transcript and state on the record the fact of the waiver of examination and signature or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor. The copy of the deposition transcript may then be used as fully as though signed, unless on motion to suppress, made as provided in Rule 207, the Court determines that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.~~

~~**Rule 19. Certification by Officer; Exhibits; Copies; Notice of Delivery.**~~

2~~1~~. **Certification**. The deposition officer shall file with the court, serve on all parties and attach as part of the deposition transcript a certificate duly sworn by such officer stating~~which shall state the following~~;

(i) that the witness was duly sworn by the officer and;

~~(ii)~~ that the transcript is a true record of the testimony given by the witness;

~~(iii) the amount of charges for the officer's preparation of the completed deposition transcript and any copies of exhibits;~~

(iiv) that the deposition transcript was submitted on a specified date to the witness or to the attorney forof ~~record for a party who was~~ the witness for examination and, signature, and that the witness returned or did not ~~and~~ return the transcript ~~to the officer~~ by a specified date;

(iiiv) that changes, if any made by the witness, in the transcript and otherwise are attached thereto ~~or incorporated therein~~;

~~(vi) that the witness returned or did not return the transcript;~~

(ivii) that the ~~original~~ deposition transcript was delivered in accordance with section 3 of this rule ~~or a copy thereof in event the original was not returned to the officer, together with copies of all exhibits, is in the possession and custody of the attorney or party who asked the first question appearing in the transcript for safekeeping and use at trial~~;

(v) the amount of the deposition officer's charges;

(viii) that a copy of the certificate was served on all parties ~~pursuant to Rule 21a~~.

The ~~officer shall file with the court in which the cause is pending a copy of said certificate, and the~~ clerk of the court ~~where such certification is filed~~ shall tax as costs the charges for preparing the original deposition transcript ~~and making and attaching copies of all exhibits to the original deposition~~.

32. Delivery. ~~Unless otherwise requested or agreed to by the parties on the record in the deposition transcript, t~~The deposition officer shall deliver, or mail ~~in a postpaid, properly addressed wrapper,~~ certified with return receipt requested, the original~~such~~ deposition transcript (or copy if the original was not returned) endorsed with the title of the action and "Deposition of (name of witness)" to the ~~and copies of all exhibits to party~~ attorney who asked the first question appearing in the transcript, ~~and shall give notice of delivery to all parties.~~ Such~~The custodial~~

attorney shall, ~~upon reasonable request,~~ make the original deposition transcript available upon reasonable request for inspection and~~or~~ ~~photo~~copying by any other party to the suit. ~~Upon payment of reasonable charges therefor,~~ The officer shall furnish a copy of the deposition transcript to any party or to the deponent upon payment of reasonable charges therefor.

~~4~~3. **Exhibits.** Original documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the deposition transcript. The person producing the materials may produce the originals, or copies to serve thereafter as originals if the party ~~and may be inspected and copied by any party, except that the person producing the materials may (a) offer copies to be marked for identification and annexed to the deposition transcript and to serve thereafter as originals if the party~~ affords to all other parties fair opportunity at the deposition to verify the copies by comparison with the originals, ~~or (b) offer the originals to be marked for identification, in which event the materials may then be used in the same manner as if annexed to the deposition transcript.~~ In the event that the originals ~~exhibits~~ rather than copies are offered, ~~marked for identification,~~ the deposition officer shall make copies ~~of all original exhibits~~ to be attached~~annexed~~ to the original deposition transcript ~~for delivery~~, and then~~shall thereafter~~ return the originals ~~of the exhibits~~ to the person~~witness or party~~ producing them, who ~~and such witness or party~~ shall ~~thereafter maintain and~~ preserve the originals ~~exhibits~~ and shall produce there for hearing or trial upon seven (7) days notice from any party. Copies annexed to the original deposition transcript may be used for all purposes.

5. **Motion to Suppress.** If the deposition officer delivers the deposition transcript and serves notice thereof at least one day before the case is called for trial (30 days if the deposition was recorded by non-stenographic means), errors and irregularities in the manner in which the testimony is transcribed, signed, delivered, or otherwise dealt with by the deposition officer are waived, unless a motion to suppress all or part thereof is made and is filed and served before the trial commences.

6. Use.[9] Any part or all of a deposition may be used for any purpose in the same proceeding in which it was taken. The Texas Rules of Evidence shall be applied to each question and answer as though the witness were then present and testifying. "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 (1) if that party has an interest similar to that of any party present or represented at the taking of the deposition or who had reasonable notice thereof; or (2) if the party has had a reasonable opportunity, after becoming a party, to redepose the deponent, and has failed to exercise that opportunity. Depositions taken in different proceedings may be used subject to the provisions of the Texas Rules of Evidence. Depositions shall include (1) the original or a certified copy of a transcript of a stenographic recording complying with Rule 19, (2) the original or a certified copy of a transcript of a non-stenographic recording complying with Rule 16(5), or (3) the original or a certified copy of a non-stenographic recording of the deposition, if the applicable provisions of Rule 16(5) have been satisfied.

~~**Rule 19. Certification by Officer; Exhibits; Copies; Notice of Delivery.**~~

~~1. Certification. The officer shall attach as part of the deposition transcript a certificate duly sworn by such officer which shall state the following:~~

~~(i) that the witness was duly sworn by the officer;~~

~~(ii) that the transcript is a true record of the testimony given by the witness;~~

~~(iii) the amount of charges for the officer's preparation of the completed deposition transcript and any copies of exhibits;~~

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[9] This is the Discovery Subcommittee version of this section. Judge Brister's version differs, and is as follows:

> Any part of all of a deposition may be used for any purpose in the same proceeding in which it was taken. "Same proceeding" includes a proceeding in a different court but involving the same subject matter and the same parties or their privies. A deposition is admissible against a party joined after the deposition was taken only if that party has had a reasonable opportunity to redepose the deponent and has failed to exercise that opportunity.

(v) that the deposition transcript was submitted on a specified date to the witness or to the attorney of record for a party who was the witness for examination, signature and return to the officer by a specified date;

(vi) that changes, if any made by the witness in the transcript and otherwise are attached thereto or incorporated therein;

(vii) that the witness returned or did not return the transcript;

(viii) that the original deposition transcript, or a copy thereof in event the original was not returned to the officer together with copies of all exhibits is in the possession and custody of the attorney or party who asked the first question appearing in the transcript for safekeeping and use at trial;

(viii) that a copy of the certificate was served on all parties pursuant to Rule 21a.

The officer shall file with the court in which the cause is pending a copy of said certificate and the clerk of the court where such certification is filed shall tax as costs the charges for preparing the original deposition transcript and making and attaching copies of all exhibits to the original deposition.

2. **Delivery.** Unless otherwise requested or agreed to by the parties on the record in the deposition transcript, the officer, after certification, shall securely seal the original deposition transcript or a copy thereof in the event the original is not returned to the officer and copies of all exhibits in a wrapper endorsed with the title of the action and marked "Deposition of (here insert name of witness)," and shall thereafter deliver or mail in a postpaid, properly addressed wrapper, certified with return receipt requested, such deposition transcript and copies of all exhibits to party who asked the first question appearing in the transcript, and shall give notice of delivery to all parties. The custodial attorney shall, upon reasonable request, make the original deposition transcript available for inspection or photocopying by any other party to the suit. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition transcript to any party or to the deponent.

3. Exhibits. Original documents and things produced for inspection during the examination of the witness shall upon the request of a party be marked for identification and annexed to the deposition transcript and may be inspected and copied by any party, except that the person producing the materials may (a) offer copies to be marked for identification and annexed to the deposition transcript and to serve thereafter as originals if the party affords to all other parties fair opportunity at the deposition to verify the copies by comparison with the originals, or (b) offer the originals to be marked for identification, in which event the materials may then be used in the same manner as if annexed to the deposition transcript. In the event that original exhibits rather than copies are marked for identification, the deposition officer shall make copies of all original exhibits to be annexed to the original deposition transcript for delivery, and shall thereafter return the originals of the exhibits to the witness or party producing them, and such witness or party shall thereafter maintain and preserve the original exhibits and shall produce any such original exhibits for hearing or trial upon seven (7) days notice from any party. Copies annexed to the original deposition transcript may be used for all purposes.

4. Motion to Suppress.

a. *Depositions recorded stenographically.* When a transcript of a deposition that has been recorded stenographically has been delivered by the deposition officer pursuant to Rule 18 and notice of delivery given at least one entire day before the day on which the case is called for trial, errors and irregularities in the notice of delivery, and errors in the manner in which the testimony is transcribed or the deposition transcript is prepared, signed, certified, sealed, endorsed, delivered, or otherwise dealt with by the deposition officer under Rules 18 and 19 are waived, unless a motion to suppress the deposition transcript or some part thereof is made and notice of the written objections made in the motion is given to every other party before the trial commences.

b. *Depositions recorded only by non-stenographic means.* When a transcript of a deposition that has been recorded only by non-stenographic means has been delivered by the

certified certified, pursuant to Rule 16(d) and notice of delivery given at least 30 days before the day on which the case is called for trial, errors and irregularities in the notice of delivery and errors in the manner in which the testimony is recorded or transcribed or the deposition transcript is prepared, signed, certified, sealed, endorsed, delivered or otherwise dealt with by the deposition officer under Rule 16 are waived, unless a motion to suppress the deposition transcript or recording or some part thereof is made and notice of the written objections made in the motion is given to every other party before the trial commences.

~~Rule 26. Use of Deposition Transcripts in Court Proceedings. [redlined from current Rule 207] (paragraph 1 & 2 have been moved to paragraph 8 of Rule 14; paragraph 3 has been moved to Rule 19(3)) [revised 6-21-95]~~

~~**1. Use of Depositions in Same Proceeding.**~~

~~*a. Use of deposition transcripts or recordings.*~~ 8. Use. ~~At the trial or upon the hearing of a motion or an interlocutory proceeding, a~~Any part or all of a deposition ~~taken in the same proceeding, insofar as admissible under the Texas Rules of Civil Evidence,~~ may be ~~used by any person~~ for any purpose in the same proceeding in which it was taken. ~~"Same~~against any ~~party who was present or represented at the taking of deposition or who had reasonable notice thereof. Further,~~ 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. ~~The Texas Rules of Civil Evidence shall be applied to each question and answer as though the witness were then present and testifying. Unavailability of the deponent is not a requirement for admissibility. Depositions shall include (1) the original or a certified copy of a transcript of a stenographic recording complying with Rule 19, (2) the original or a certified copy of a transcript of a non-stenographic recording complying with Rule 16(5), or (3) the original or a certified copy of a nonstenographic recording of the deposition, if the applicable provisions of Rule 16(5) have been satisfied.~~

~~*b. "Same proceeding."* Substitution of parties pursuant to these rules does not affect the right to use depositions previously taken; and, when a suit has been brought in a court of the United States or of this or any other state and another suit involving the same subject matter is brought between the same parties or their representatives or successors in interest, all depositions lawfully taken in each suit may be used in the other suit(s) as if originally taken therefor.~~

~~*c. Parties joined after deposition taken.* However, a deposition is admissible against a party joined after the deposition was taken if that party~~ If one becomes a party after the

deposition is taken and [illegible] described in *a.* or *b.* above, the deposition is admissible against that party only or if thethat party has had a reasonable opportunity, after becoming a party, to redepose the deponent, and has failed to exercise that opportunity. A deposition taken in a different proceeding may be used subject to the provisions and requirements of the Texas Rules of Evidence. Depositions shall include (1) the original or a certified copy of a transcript of a stenographic recording complying with Rule 19, (2) the original or a certified copy of a transcript of a non-stenographic recording complying with Rule 16(5), or (3) the original or a certified copy of a non-stenographic recording of the deposition if the applicable provisions of Rule 16(5) have been satisfied.

2. Use of Depositions Taken in Different Proceeding. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in a different proceeding may be used subject to the provisions and requirements of the Texas Rules of Civil Evidence. Further, the Texas Rules of Civil Evidence shall be applied to each question and answer as though the witness were then present and testifying.

3. Motion to Suppress.

a. Depositions recorded stenographically. When a transcript of a deposition that has been recorded stenographically has been delivered by the deposition officer pursuant to Rule 206 and notice of delivery given at least one entire day before the day on which the case is called for trial, errors and irregularities in the notice of delivery, and errors in the manner in which the testimony is transcribed or the deposition transcript is prepared, signed, certified, sealed, endorsed, delivered, or otherwise dealt with by the deposition officer under Rules 18 and 19 are waived, unless a motion to suppress the deposition transcript or some part thereof is made and notice of the written objections made in the motion is given to every other party before the trial commences.

~~*b. Depositions recorded only by non-stenographic means.* When a transcript of a deposition that has been recorded only by non-stenographic means has been delivered by the certified court reporter pursuant to Rule 16(3) and notice of delivery given at least 30 days before the day on which the case is called for trial, errors and irregularities in the notice of delivery, and errors in the manner in which the testimony is recorded or transcribed or the deposition transcript is prepared, signed, certified, sealed, endorsed, delivered, or otherwise dealt with by the deposition officer under Rule 16 are waived, unless a motion to suppress the deposition transcript or recording or some part thereof is made and notice of the written objections made in the motion is given to every other party before the trial commences.~~

Rule 21: Compelling Production from Nonparty. [revised 6/25/95]

1. When production may be compelled. At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first, any party may have issued and served upon any ~~person not a~~ non-party to the suit a subpoena under Rule 24 compelling production of documents or tangible things for inspection and copying within the scope of Rule 3 and within the non-party's~~person's~~ care, custody, or control.

2. Notice, subpoena. A party proposing to compel production from a nonparty must give reasonable notice to every other party. The notice shall state the name of the nonparty from whom production is sought to be compelled, the time and place for the production, and shall be filed and served. The notice 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. 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 nonparty of the means, manner, and procedure for testing or sampling.

3. Time and place. The time and place designated for the production shall be reasonable. The place shall be in the county of the nonparty's residence ~~or~~, where the nonparty is employed or regularly transacts business in person, or at some other convenient place as may be directed by the court in which the cause is pending. A nonresident or transient person may be required to produce documents and things in the county where served with a subpoena or within 150 miles from the place of service.

4. Custody, Inspection & Copying. The party obtaining the production shall mark for identification all materials produced pursuant to the subpoena, retain custody of any copies furnished or made, and produce those copies for inspection upon 7 days notice from any party. Upon request and at the requesting party's cost, the party obtaining production shall furnish copies of the materials to the requesting party within 20 days.

RULE 22. Physical and Mental Examinations

1. Order for Examination. At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first, 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, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or psychologist or to produce for examination the person in his custody, conservatorship or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. Except as provided in subparagraph 4 of this rule, an examination by a psychologist may be ordered only when the party responding to the motion has identified a psychologist as an expert who will testify.

2. Report of Examining Physician or Psychologist.

a. If requested by the party against whom an order is made under this rule or the person examined, the party causing the examination to be made shall deliver to the requesting party~~him~~ a copy of a detailed written report of the examining physician or psychologist setting out the~~his~~ findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician or psychologist fails or refuses to make a report the court may exclude the~~his~~ testimony if offered at the trial.

b. 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.

3. Effect of No Examination. If no examination is sought either by agreement or under the provisions of this rule, the party whose mental or physical condition is in controversy shall not comment to the court or jury on that party's~~his~~ willingness to submit to an examination, on the right of any other party to request an examination or move for an order, or on the failure of such other party to do so.

4.s Arising Under Title II, Family Code. In cases arising under Title II, Family Code, on the court's own motion or on the motion of a party, the court may appoint:

a. one or more psychologists to make any and all appropriate mental examinations of the children who are the subject of the suit or any other parties irrespective of whether a psychologist has been listed by any party as an expert who will testify.

b. non-physician experts who are qualified in paternity testing to take blood, body fluid or tissue samples and to conduct such tests as ordered by the court.

5. Definitions. 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 23. Motion for Entry Upon Property

1. Motion. At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first, the court in which the action is pending may order any person, including a person not a party to the pending suit, to allow entry upon designated land or other property for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon when the land or property is relevant to the subject matter of the action. The order may be made only on motion for good cause shown and shall specify the time, place, manner, conditions, scope of the inspection, and a description of any desired testing or sampling, sufficient to inform the person of the means, manner and procedure for testing or sampling, and the persons or persons by whom the inspection, testing or sampling is to be made.

2. Service. A true copy of the motion and order setting hearing shall be served on the person in possession or control of the property and all parties. If the person in possession or control of the property is not a party to the action, service shall be made in the same manner as service of citation as provided by Rule 106.

RULE 24: Subpoena [revised 5/26/95]

1. **Form; Issuance.**

a. The style of every subpoena shall be "The State of Texas." Every subpoena shall

(1) state the style of the suit, its cause number, the court in which the suit is pending, the date of its issuance, and the party at whose instance the witness is summoned;

(2) command the person to whom it is directed to

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

(b) produce and permit inspection and copying of designated documents or tangible things in the possession, custody or control of that person, at a time and place therein specified, and produce such documents as they are kept in the usual course of business or organized and labeled to correspond with the designated categories. A person commanded under this subsection need not appear in person at the place of production or inspection unless a command to attend and give testimony at a deposition, hearing or trial is joined with a command under this subsection or issued and served separately.

b. The subpoena shall issue from the court in which the suit is pending, except that a subpoena for a deposition in a sister state or foreign country shall be issued pursuant to Rule 188.

c. The clerk of the district or county court, or justice of the peace shall issue the subpoena and a copy thereof for each witness subpoenaed to a party requesting it, who shall complete it before service. An attorney authorized to practice in the State of Texas, as an officer of the court, may also issue and sign a subpoena on behalf of the court. Any officer authorized to take depositions and any certified short-hand reporter may issue and sign a subpoena for a deposition or production, and shall do so immediately upon proof of service of a notice to take a deposition under Rule 14 or 17, or a notice to compel production under Rule 21.

2. **Service.**

a. Any sheriff or constable of the State of Texas or any person who is not a party and is not less than 18 years of age may serve a subpoena by delivering a copy to the witness and tendering to that person any fees required by law.

[D. Perry's suggested alternative.

a. Any sheriff or constable of the State of Texas or any person who is not a party and is not less than 18 years of age may serve a subpoena by delivering a copy to the witness and tendering to that person any fees required by law, except that when the witness is a party, or a person subject to the control of a party, service of a copy upon the party's attorney shall have the same effect as service upon the witness.-]

b. Subject to the provisions of applicable law, a subpoena may be served at any place within the State of Texas. The subpoena may direct a witness to appear for a deposition or produce records at any place authorized by Rules 14, 17 or 21, and may direct a witness to appear for a hearing or trial if [the witness is a party to the suit],[7] or is represented to reside within 150 miles of the courthouse of the county in which the suit is pending or who may be found within such distance at the time of trial.

c. Proof of service shall be made by filing the witness' signed written memorandum attached to the subpoena showing acceptance thereof or a statement of the date and manner of service and the names of the person served, certified by the person who made the service.

d. A subpoena for appearance at a deposition, or for the production of documents or tangible things at the time and place other than at trial or a hearing in open court shall be issued only after service of a notice for the deposition required under Rule 14 or 17, or after service of a notice to compel production under Rule 21.

3. Protection of Nonparties Subject to Subpoenas

a. A party responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense upon a nonparty subject to that subpoena.

[7] The bracketed language is David Perry's suggestion that is different from current CPRC 22.002.

b. Subject to paragraph (4d)(b2) of this rule, a nonparty commanded to produce and permit inspection and copying of designated documents and things, within 10 days after service of the subpoena or before the time specified for compliance if such time is less than 10 days after service, may serve upon the party at whose instance the witness is summoned written objection to inspection or copying of any or all of the designated materials. If objection is made, the party at whose instance the witness is summoned shall not be entitled to inspect and copy the materials except pursuant to court order. At any time after an objection is made, the party serving the subpoena may, upon notice to the person commanded to produce, move for an order to compel the production.

c. Within 10 days after service of the subpoena or before the time specified for compliance if such time is less than 10 days after service, the person served with the subpoena may, upon notice to the party at whose instance the witness is summoned, move for a protective order in the court in which the action is pending or a district court in the county in which the subpoena was served. The court shall make such orders in the interests of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights.

d. If the subpoena directs the nonparty to attend and give testimony or to produce documents or things at a hearing or trial less than 10 days after the date of service, the nonparty may make its objections or motion for protective order to the court at the time specified for compliance.

e. When a party serves a subpoena upon any custodian of records concerning a non-party that are protected from disclosure by a rule, regulation, or statute, the party serving the subpoena shall also serve a copy of the subpoena upon the non-party to whom the records pertain or, if the non-party is represented by an attorney, upon the attorney. The non-party may make any objection or motion for protective order in the same manner as the records custodian served with the subpoena. If the party serving the subpoena does not serve it in accordance with this rule,

then the records custodian upon whom it is served shall serve it upon the non-party and compliance shall be delayed to give the non-party an opportunity to seek relief.

~~e. If the party seeks production of patient records from a physician or professional as defined in Rules 509 or 510 of the Texas Rule of Civil Evidence, the party shall serve a copy of the subpoena upon the patient or, if the patient is a party represented by an attorney, upon the attorney. The patient may make any objection or motion for protective order in the same manner as the person served with the subpoena.~~

4. Duties of Nonparties in Responding to Subpoenas

a. A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

b. When information or materials subject to a subpoena is withheld on a claim that it is privileged from discovery, the person subpoenaed shall withhold the privileged materials or information from the response and make a withholding statement, stating that information or materials responsive to the subpoena have been withheld and the privileges(s) relied upon. The party serving the subpoena may thereafter request a description of the withheld materials, and within 15 days of service of that request, the subpoenaed person shall describe the nature of the documents, communications, or things not produced sufficient to enable the demanding party to contest the claim.

c. If a subpoena commanding testimony is directed to a public or private corporation, partnership, association, governmental agency, or other organization, and the matters on which examination is requested are described with reasonable particularity, the organization so named shall designate one or more persons to testify on its behalf as to matters known or reasonably available to the organization.

5. 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.

Part Two. Pretrial Conference

RULE 166. Pretrial Conference [current rule 166 has been substituted for the subcommittees previously recommended language] [revised 6/26/95]

In an appropriate action, to assist in the disposition of the case without undue expense or burden to the parties, the court may in its discretion direct the attorneys for the parties and the parties or their duly authorized agents to appear before it for a conference to consider:

(a) All pending dilatory pleas, motions and exceptions;

(b) The necessity or desirability of amendments to the pleadings;

(c) A discovery schedule;

(d) Requiring written statements of the parties' contentions;

(e) Contested issues of fact and the simplification of the issues;

(f) The possibility of obtaining stipulations of fact;

(g) The identification of legal matters to be ruled on or decided by the court;

(h) The exchange of a list of direct fact witnesses, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before the time of trial, who will be called to testify at trial, stating their address and telephone number, and the subject of the testimony of each such witness;

(i) The exchange of a list of expert witnesses who will be called to testify at trial, stating their address and telephone number, and the subject of the testimony and opinions that will be proffered by each expert witness;

(j) Agreed applicable propositions of law and contested issues of law;

(k) Proposed jury charge questions, instructions, and definitions for a jury case or proposed findings of fact and conclusions of law for a nonjury case;

(l) The marking and exchanging of all exhibits that any party may use at trial and stipulation to the authenticity and admissibility of exhibits to be used at trial;

(m) Written trial objections to the opposite party's exhibits, stating the basis for each objection;

(n) The advisability of a preliminary reference of issues to a master or auditor for findings to be used as evidence when the trial is to be by jury;

(o) The settlement of the case, and to aid such consideration, the court may encourage settlement;

(p) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the pretrial conference, the amendments allowed to the pleadings, the time within which same may be filed, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions, agreements of counsel, or rulings of the court; and such order when issued shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or extend it to all actions.

~~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 a Discovery Control Plan;~~

~~*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.~~

Part Three. Other Rules Affected By Subcommittee Proposals

RULE 63. Amendments and Responsive Pleadings

Parties may amend and supplement their pleadings and respond to other parties' pleadings without leave of court no later than sixty (60) days before the end of any applicable~~the~~ Ddiscovery Pperiod or five (5) days after receipt of notice of the first trial setting, whichever is later. 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.

These pleading rules need to be considered.

RULE 66. TRIAL AMENDMENT. [CURRENT RULE]

--If evidence is objected to at the trial on the ground that it is not within the issues made by the pleading, or if during the trial any defect, fault or omission in a pleading, either of form or substance, is called to the attention of the court, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the allowance of such amendment would prejudice him in maintaining his action or defense upon the merits. The court may grant a postponement to enable the objecting party to meet such evidence.

RULE 67. AMENDMENTS TO CONFORM TO ISSUES TRIED WITHOUT OBJECTION. [CURRENT RULE]

--When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. In such case such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made by leave of court upon motion of any party at any time up to the submission of the case to the Court or jury, but failure so to amend shall not affect the result of the trial of these issues; provided that written pleadings, before the time of submission, shall be necessary to the submission of questions, as is provided in Rules 277 and 279.

RULE 70. PLEADING: SURPRISE: COST. [CURRENT RULE]

When either a supplemental or amended pleading is of such character and is presented at such time as to take the opposite party by surprise, the court may charge the continuance of the cause, if granted, to the party causing the surprise if the other party satisfactorily shows that he is not ready for trial because of the allowance of the filing of such supplemental or amended pleading, and the court may, in such event, in its discretion require the party filing such pleading to pay to the surprised party the amount of reasonable costs and expenses incurred by the other party as a result of the continuance, including attorney fees, or make such other order with respect thereto as may be just.

Supreme Court Advisory Committee
Discovery Subcommittee

Proposed Rules of Discovery

JUNE 30, 1995 DRAFT
FOR JULY 21, 1995 MEETING
(Red-lined from draft presented at May meeting)

Preface: Comments to the Proposed Rules

The Subcommittee recognizes that this draft of the proposed rules contains inconsistencies in its format, numbering, and use of some words. The Subcommittee will go through the rules and resolve these inconsistencies after the working draft is approved by the Advisory Committee, and before the final draft is presented to the Supreme Court.

In drafting these proposed rules, the Subcommittee proposes, in some instances, to rely upon comments to illustrate or explain the intended application of a particular rule. Some comments have been drafted; others will be added later. Should the full Supreme Court Advisory Committee or the Court decide that the reliance upon comments is inappropriate, some rules may require minor revisions to account for the removal of the comments.

The proposed rules concerning discovery vehicles require parties to "file" and "serve" their requests for discovery and responses thereto. The Subcommittee presumes that there will be a general rule requiring parties to file with the clerk and serve on all other parties pursuant to Rules 21, 21a, and 74.

RULE 1. Discovery Limitations (revised 6/21//95)

1. Suits containing claims seeking $50,000 or less.

a. Applicability. If in any suit the plaintiff's pleadings affirmatively seek only monetary recovery of $50,000 or less, excluding costs, pre-judgment interest and attorneys' fees, discovery shall be limited as provided in this section, unless governed by a Discovery Control Plan. No amendment bringing the amount of recovery above $50,000 shall be allowed at such time as to unduly prejudice the opposing party and in no event later than 30 days before trial. If by a claim, amendment, or supplement filed more than 30 days before trial, any party seeks relief other than monetary recovery or in excess of $50,000, excluding costs, pre-judgment interest and attorneys' fees, this section shall no longer apply to the suit. When a timely filed pleading renders this section no longer applicable, discovery shall be reopened and completed within the limitations provided in section 2 or 3 of this rule and any person previously deposed may be redeposed.

b. Limitations. In addition to the limitations provided elsewhere in these rules:

(1) Discovery Period. All discovery shall be conducted during the discovery period. The discovery period shall begin when the suit commences and shall continue until 30 days before trial.

(2) Total time for oral depositions. Each party may have no more than 6 hours in total to examine and cross-examine any and all witnesses in oral depositions. The parties may agree to expand this limit up to 10 hours in total, but not more except by court order. The court may modify the deposition hours so that no side or party is given unfair advantage.

(3) Interrogatories. Any party may serve on any other party no more than 15 written interrogatories, including discrete subparts. Interrogatories asking a party only to identify or authenticate specific documents, however, are unlimited in number.

2. Discovery Control Plan Suits.

a. Applicability. In any suit, the parties may agree and submit for court approval or the court may order that discovery be conducted in accordance with a Discovery Control Plan tailored to the circumstances of the specific suit.

b. Limitations. A Discovery Control Plan may address any issue concerning discovery or the matters listed in Rule 166, and may change any discovery limitation set forth in these rules. The discovery limitations applicable to section 3 of this Rule, however, shall apply unless specifically changed in the Discovery Control Plan. The following provisions must be included in a Discovery Control Plan, and as to parts a and c.1 below, once set forth in the Discovery Control Plan, may not be modified except by court order:

a. A trial date;

b. A discovery period during which all discovery shall be conducted;

c. Deadlines for :

1. Joinder of additional parties;
2. Amending or supplementing pleadings;
3. Disclosing expert witnesses pursuant to Rule 10.

3. All other suits.

a. Applicability. Unless the suit falls within section 1 of this rule or is governed by a Discovery Control Plan, discovery shall be conducted in accordance with this section.

b. Limitations. In addition to the other discovery limitations set forth in these rules:

(1) Discovery Period. All discovery shall be conducted during the discovery period. The discovery period shall begin on the earlier of (a) the date of the first oral deposition, or (b) the date the first response to written discovery other than a Request for Standard Disclosure is due, and shall continue for 9 months or until 30 days before trial, whichever is earlier. The parties may agree to a longer or shorter Discovery Period, but they may not agree to a Discovery Period of more than 12 months unless the suit is governed by a Discovery Control Plan under section 2 of this rule.

(2) Total time for oral depositions. During the discovery period, each side, the plaintiffs and the defendants, shall have no more than 50 hours to examine and cross-examine in oral depositions opposing parties and experts designated by opposing parties and

persons who are subject to the opposing party's control. Third party defendants shall 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. The oral deposition testimony of only two experts designated by any side shall count against any limitation of that side's total deposition testimony. If any side designates more than two experts pursuant to Rule 10, the opposing side shall be allowed an additional six hours to depose each additional expert designated. The court may modify the deposition hours so that no side or party is given unfair advantage.

(3) Interrogatories. During the discovery period, any party may serve on any other party no more than 30 written interrogatories, including discrete subparts. Interrogatories asking a party only to identify or authenticate specific documents, however, are unlimited in number.

Comment:
Section 1 does not apply to suits seeking injunctive relief, or orders concerning divorce or, child custody.

RULE 2. Modification of Discovery Procedures and Limitations; Conference Required (revised 6/21/95)

1. Modification of Procedures. Except where specifically prohibited, the procedures and limitations set forth in these rules may be modified in any suit (1) by the agreement of the parties, or (2) by court order for good reason.

2. Conference. All discovery motions or requests for hearings on discovery shall contain a certificate by the party filing same that efforts to resolve the dispute without the necessity of court intervention have been attempted and failed.

RULE 3. Permissible Discovery: Forms and Scope (revised 6/21/95)

1. Forms of Discovery. Permissible forms of discovery are (a) requests for standard disclosure, (b) requests for production of documents and tangible things, (c) interrogatories to a party, (d) requests for admissions, (e) oral or written depositions, (f) motions for a mental or physical examination of a party or person under the legal control of a party, and (g) motions for entry upon and examination of real property. "Written discovery" as used elsewhere in these Rules means requests for standard disclosure, requests for production of documents and tangible things, interrogatories to a party, and requests for admissions. Unless otherwise specified in these Rules, the permissible forms of discovery may be combined within the same instrument and may be taken in any order or sequence.

2. Scope of Discovery.

a. In General. Parties may obtain discovery regarding any matter that is relevant to the subject matter in 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 ground for objection that the information sought will be inadmissible at the 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 any and all documents and tangible things (including but not limited to 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. If a person does not have actual physical possession, but has a superior right to compel the production from a third party, the person has possession, custody or control.

c. Persons With Knowledge of Relevant Facts. A party may obtain discovery of the identity and location (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 information need not be admissible to satisfy the requirements of this subsection and personal knowledge is not required.

d. Trial Witnesses. A party may obtain discovery of the identity and location (name, address, telephone number) of persons who are expected to be called to testify at trial, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before the time of trial.

e. Expert Witnesses. A party may obtain discovery of the identity of and information concerning expert witnesses only pursuant to Rule 10.

f. Indemnity and Insuring Agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

g. Settlement Agreements. A party may obtain discovery of the existence and contents of any settlement agreement. Information concerning the settlement agreement is not by reason of disclosure admissible in evidence at trial.

h. Witness statements. A witness statement, regardless of when made, is discoverable, unless privileged. 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' oral statement, or any substantially verbatim transcription of such a recording. A lawyer's notes taken during a conversation or interview with a witness is not a "witness statement." Any person may obtain, upon written request, his or her own witness statement concerning the lawsuit, that is in the possession, custody or control of any party.

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

Comments:

1. The definition of documents and tangible things has been revised to make clear that everything, regardless of its form, is within the scope of discovery if it relevant to the subject matter of the action, and properly requested by an appropriate discovery device.

2. Subdivision c. requires parties to make a "brief statement of each identified person's connection with the case." This provision does not require 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".

3. The sections in current 166b concerning land, experts, and medical records are deleted from this rule, but it is not intended that these areas are now exempt from discovery. They are clearly within the scope of discovery, and are discussed in the specific discovery vehicles intended for their disclosure. See Rule 9(2)(f)&(g)(medical records) ; Rule 23 (land) and Rule 10 (experts).

RULE 4. Privileges and Work Product. (revised 6/21/95)

1. Privileges. A party may not discover any matter protected from disclosure by any privilege.

2. Work Product:

a. Scope. The following is not discoverable:

(1) General. Anything made or prepared in anticipation of litigation or for trial by or for a party or a party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) is not discoverable except 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 factual information contained therein by other means. Even if the required showing is made, the court shall protect against disclosure of the mental impressions, opinions, conclusions, or legal theories concerning the litigation, and limit disclosure to the extent possible to the needed facts.

(2) Attorney's mental processes. The mental impressions, opinions, conclusions, and legal theories of an attorney or attorney's representative prepared in anticipation of litigation or for trial are not discoverable except when necessarily disclosed when responding to discovery concerning witnesses, exhibits, expert witnesses, or contentions as provided for in these Rules.

(3) Consulting experts. A consulting expert's identity, mental impressions, and opinions are not discoverable. A consulting expert is an expert who has been informally consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, and will not be called to testify as an expert, and whose mental impressions and opinions have not been reviewed by a testifying expert.

b. Exceptions. The following is discoverable, even if prepared in anticipation of litigation or for trial:

(1) Experts. The information concerning experts that is discoverable under Rule 10.

(2) Witness Statements. Witness statements that are discoverable under Rule 3(h).

(3) Photographs. Any photographic or electronic image of underlying facts (*e.g.*, a photograph of the accident scene) is discoverable. A photographic or electronic image of something other than underlying facts may be privileged (*e.g.*, a consulting expert's video of an experiment). A photographic or electronic image of any sort that a party intends to offer into evidence, however, is discoverable.

(4) Facts. The relevant facts, however acquired, within the knowledge of any party or its representatives, including the identity of persons with knowledge of relevant facts. Although a communication or document containing relevant facts may be privileged under this rule, this rule does not prevent discovery of the facts contained therein by means other than the discovery of the communication or document.

(5) Texas Rule of Evidence 503(d). If there is no attorney-client privilege under Texas Rule of Evidence 503(d), work product is discoverable.

RULE 5. Response to Written Discovery Requests; Supplementation and Amendment (revised 6/21/95)

1. Duty to Respond. When responding to requests for written discovery, 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. If the requesting party has served on the responding party a computer readable file setting out the discovery requests, the responding party's answers, objections and other responses shall be preceded by the request to which they respond; otherwise, the responding party is under no obligation to restate the request when responding.

2. Duty to Amend or Supplement Discovery Responses. A party is under a duty reasonably promptly to amend or supplement its prior responses or document productions responsive to written discovery requests if the party learns that a prior response or production was incomplete or incorrect when made, or, although complete and correct when made, is no longer complete and correct. An amendment or supplement shall be in writing, filed and served, and need not be verified. Amendment or supplementation is required when amending or supplementing a response to a written discovery request seeking the identification of persons with knowledge of relevant facts, trial witnesses or expert witnesses. Amendment or supplementation is not required for other responses if the additional or corrective information or documents have otherwise been made known to the other parties in discovery or in writing. Except as otherwise provided by these rules, amended or supplementary responses or productions served less than thirty days before trial are presumptively made without reasonable promptness.

3. Additional Discovery After Amendment or Supplementation. If the amendment, supplement or document production occurs during any applicable Discovery Period, the opposing party may seek from the other party or the court departures from the discovery limitations imposed under Rule 1 upon a showing that the opposing party is unable to complete discovery relating to any new information disclosed in the amendment or supplement within the Discovery Period. If the amendment, supplement, or document production occurs after any applicable Discovery Period, the opposing party may reopen discovery. A party must respond to reopened written discovery served under this Rule the day before trial or within 20 days after the date of service, whichever is earlier. The reopening side is allowed five (5) hours of deposition time in addition to that provided in Rule 1. Such discovery shall be limited to matters related to any new information disclosed in the amendment or supplement. The court may allow additional discovery as needed.

Comment:

This rule imposes a duty upon parties to make a complete response to written discovery based upon all information reasonably available.

RULE 6. Effect on Trial of Failure to Provide Timely Discovery (Revised 6/20/95)

1. Exclusion or continuance. If a party fails to timely disclose information during discovery, and is unable to show that such failure did not cause the opposing party to be unprepared in a way that may affect the outcome of the trial, then the court shall either exclude the information not timely disclosed or continue the trial to allow the opposing party to prepare to confront or use the previously undisclosed information. If the failure to disclose does not cause the opposing party to be unprepared in a way that may affect the outcome of the trial, the court may admit the evidence and proceed with the trial. The party who failed to timely disclose has the burden of showing that the opposing party is not unprepared in a way that may affect the outcome of the trial. Nothing in this rule limits the court's authority to grant a continuance.

2. Costs and expenses. If the court continues the case, the court may impose any expense caused by the delay, including attorney's fees and any difference between pre-judgment and post-judgment interest, on the party that failed to timely disclose.

Note to the Sanctions Committee:
The Discovery Committee has not addressed sanctions for failure to timely disclose information in accordance with Rule 5, and leaves that issue for the Sanctions Committee to address. The Discovery Committee, however, does recommend that some sanction be imposed on parties that fail to provide discovery "reasonably promptly," even if provided more than 30 days before trial.

RULE 7. Presentation of Privileges and Objections to Written Discovery (revised 6/20/95)

is otherwise objectionable, the responding party shall object specifically in writing within the time required for the response by stating the basis of the objection and the extent to which the party is refusing to comply with the request. A party should comply with so much of the request as 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. Objections shall be made only if a good faith factual and legal basis for the objection exists at the time the objection is made. Any objection not specifically stated within the time required or obscured by numerous unfounded objections is waived unless the court excuses the waiver for good cause shown.

2. Withholding Privileged Information and Materials.

A party may preserve a privilege from written discovery only in accordance with this section.

(a) Asserting a Privilege. If materials or information responsive to a request are privileged, the party shall withhold the privileged materials or information from the response. If a request calls for privileged materials or information in response, but is also otherwise objectionable, the responding party shall first object pursuant to section 1 of this rule, and only upon compliance with the request or any part thereof, withhold responsive privileged materials or information pursuant to this section. When a party actually withholds specific information and materials responsive to a request on grounds of privilege, when making the original response and thereafter if making an amended or supplemental response, that party shall file a withholding statement, as part of the response to the discovery request or separately, stating that information or materials responsive to the request have been withheld and the privilege(s) relied upon.

(b) Description of Withheld Materials or Information. After receiving a withholding statement, the party seeking discovery may file and serve upon the withholding party a request that the withholding party identify the information and materials withheld. Within 15 days of service of that request, the withholding party shall file and serve a description of the information and materials withheld that makes the claim of privilege expressly and describes the nature of the information or materials withheld in such a manner that, without revealing the privileged information itself, will enable other parties to assess the applicability of the privilege. A party shall not object t

(c) Exemption from Withholding Statement. Privileged communications to or from a lawyer or lawyer's representative or privileged documents 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,

need not be included in a withholding statement or description except upon court order for good reason.

3. Hearing. Any party may at any reasonable time request a hearing on an objection or privilege asserted in accordance with this rule. The party seeking to avoid discovery shall present any evidence necessary to support the objection or withholding statement either by testimony at the hearing or by affidavits served upon opposing parties at least seven days before the hearing. If the judge determines that an in camera review of some or all of the requested discovery is necessary to rule on the objection or privilege, the requested discovery shall be segregated and produced to the judge in a sealed wrapper. Evidence necessary to support a privilege for information or materials created by trial counsel in preparation for the litigation in which the discovery is requested shall be produced only upon court order in appropriate circumstances.

4. Ruling. To the extent the court sustains the objection or claim of privilege, the objecting party has no further duty to respond to that request. If the court overrules the objection or claim of privilege, the objecting party shall respond to the request within thirty (30) days after the court's action, or at such time as the court orders.

Comments:

1. This rule provides for objections to the form of a written discovery request. The responding party specifically objects to the request, and states whether the party intends to comply with the request as specifically modified or not comply at all for specified reasons. If a party receives a request for "all documents relevant to the lawsuit," the requesting party can object to the request as an overly broad request that does not comply with the

rule requiring specific requests for documents, and refuse to comply with its 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 on its face it seeks only materials protected by privilege. See National Union Fire Ins. Co. v. Valdez, 863 S.W.2d 458 (Tex. 1993). If a request seeks specific documents from 1980 to the present, the party may object that the documents from 1980 to 1990 are irrelevant, and that it is overly burdensome to produce them. In such case, the party may produce the documents from 1990 to the present, or refuse to produce any until the court resolves the objection if producing according to a modified request will require a burdensome and duplicative search if the court should overrule the objection.

2. The new rule dispenses with objections to written discovery requests on the basis that responsive information or materials are protected by a specific privilege or immunity from discovery. Instead, the rule requires parties that withhold such information or materials state that they have been intentionally withheld, and identify the privilege upon which the party relies. A party need not make a withholding statement if the only materials responsive to the request that are being withheld are information and materials created by or for lawyersfor the litigation, as it can be assumed that such information or materials will be withheld from virtually any request on the grounds of attorney-client privilege or work-product. The withholding statement should not be made prophylactically, but only when specific information and materials have been withheld. Should additional privileged information or materials be found subsequent to the initial response, an amendment or supplement to the discovery response can include a withholding statement.

3. 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, as under the current rules.

4. This Rule governs the presentation of all privileges, including work product, set out in Rule 4 (now Rule 166b(3)).

RULE 8. Protective Orders

Any person against or from whom discovery is sought may move within the time required to respond to the discovery request for an order protecting that person from the discovery sought, except that any party may move for such an order when an objection pursuant to Rule 7 is not appropriate. The court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights, including but to limited to the following:

1. ordering that the requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified;

2. ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court;

3. ordering for good cause shown that the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a.

RULE 9. Standard Requests For Disclosure

1. Request. At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first, any party may file and serve upon any other party a Standard Request for Disclosure as set forth in this rule. The Request for Standard Disclosure shall state:

> "Pursuant to Rule 9, you are requested to make the following disclosures within 30 days of service of this request:
> [add specific subsections of part 2 of this rule under which disclosure is requested]."

A standard request for disclosure made pursuant to these rules is presumptively not objectionable under Rule 7(1).

2. Content. A party may make any or all of the following standard requests for disclosure:

a. Provide the correct names of the parties to the lawsuit.

b. Provide the information pertaining to persons with knowledge of relevant facts set forth in Rule 3(2)(c);

c. Produce the indemnity and insuring agreements discoverable under Rule 3(2)(f);

d. Produce the settlement agreements discoverable under Rule 3(2)(g);

e. Produce the witness statements discoverable under Rule 3(2)(h);

f. In a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, produce 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;

g. In a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, produce all medical records and bills obtained by virtue of an authorization furnished by the requesting party;

h. Produce any written instrument upon which a claim or defense is based;

i. Provide the information pertaining to expert witnesses set forth in Rule 10(2) and (3).

3. Response. Except as provided for expert witnesses in Rule 10, a party served with a Standard Request for Disclosure shall file and serve a written response making the requested disclosures within thirty (30) days after service of the request (fifty [50] days if the request accompanies citation), unless the time to serve a response is extended in the Request or by agreement or court order. If the response provides information, as opposed to documents, it shall be verified in the manner required by Rule 12.

4. Documents. Copies of the documents responsive to requests under section 3 of this Rule ordinarily shall be served with the response; however, if the responsive documents are voluminous , the response shall specify a reasonable time and place for the production of documents, not more than 7 days from the date of the response.

RULE 10. Expert Witnesses

1. Request. A party may request another party to designate and disclose information concerning expert witnesses only through a Standard Request for Disclosure pursuant trouble 9.. An "expert witness" subject to discovery pursuant to this rule is an expert who may be called as an expert witness at trial, and an expert used for consultation and who is not expected to be called as an expert witness at trial, but whose opinions and impressions have been reviewed by a testifying expert. If the expert has personal knowledge of relevant facts, a party also may obtain discovery as provided elsewhere in these rules.

2. Designating Expert Witnesses.

a. Request. A party may make the following Standard Request for Disclosure pursuant to Rule 9: Identify (name, address and phone number) each expert discoverable under Rule 10(1) and state the subject upon which each identified expert is expected to testify.

b. Response. The response shall be made within thirty (30) days after service of the request (fifty [50] days if the request accompanies citation). If such response is amended or supplemented, the presumption of Rule 5(2) that any change is made without "reasonable promptness" begins (a) for experts testifying about issues upon which the responding party seeks affirmative relief, the earlier of 75 days before the end of any applicable Discovery Period or 75 days before trial; or (b) for opposing experts, the earlier of 45 days before the end of any applicable Discovery Period or 45 days before trial.

3. Additional Disclosures

a. Request. A party may make any or all of the following Standard Requests for Disclosure pursuant to Rule 9:

(1) State the general substance of the mental impressions and opinions held by each identified expert and a brief summary of the basis thereof;

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

(3) Produce the current resume and bibliography of each identified expert;

(4) State at least two dates upon which each identified expert will be available to testify by oral deposition.

b. Response. A party seeking affirmative relief must respond to the requests upon the later of (1) 30 days after service of the request; or (2) the earlier of 75 days before the end of any applicable Discovery Period or 75 days before trial. A party who has designated opposing experts must respond to the requests upon the later of (1) 30 days after service of the request; or (2) the earlier of 45 days before the end of any applicable Discovery Period or 45 days before trial.

For experts not retained or employed or otherwise in control of the designating party, the designating party must respond to Standard Request (1) with documents within the possession, custody or control of the designating party, and need not respond to Standard Requests (2), (3) and (4). Nothing in this rule shall prevent the requesting party from obtaining this discovery directly from such an expert by subpoena commanding production under Rule 24.

4. Oral deposition. A party may obtain other discovery of 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 only by oral deposition of the expert, unless the court orders the expert to prepare a report pursuant to this rule.

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 or in lieu of the deposition as is appropriate. A court may not compel production of such a report before the date upon which the designating party must respond to additional Standard Requests for Disclosure pursuant to part 3 of this rule.

6. Supplementation after disclosure of general information. A party's duty to supplement and amend discovery provided pursuant to this rule is governed by Rule 5, except that the duty also extends to the oral deposition testimony of an expert that is retained or employed by or otherwise within the control of that party concerning the expert's mental impressions or opinions or the basis thereof.

Comment:
The Discovery Subcommittee has not considered the effect of the 1995 medical malpractice legislation upon this rule.

RULE 11. Requests For Production and Inspection [revised 6/22/95]

1. Request. At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first, any party may file and serve upon any other party a Request for Production and for Inspection, to inspect, sample, test, photograph and copy any designated documents or tangible things that constitute or contain matters within the scope of Rule 3(2).

2. Content 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. The request shall specify a reasonable time (on or after the date on which the response is due) and place for production. 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. Response. The party upon whom the request is served shall file and serve a written response within 30 days after service of the written request (fifty [50] days if the request, accompanies citation). The response shall state, with respect to each item or category of items, that production, inspection, or other requested action will be permitted as requested, or shall state an objection to the request pursuant to Rule 7(1). If the responding party objects to the time and place of production, the objection shall also state when and where the party will comply with the request.

4. Documents. Subject to any objections stated in the response, the responding party shall 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 set forth in the response, as follows:

a. Copies. The responding party may 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 responding party is entitled to retain the originals while the requesting party inspects and copies them.

b. Organization. The responding party shall produce documents 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.

c. Privileged Information and Materials The responding party shall assert its privileges, if any, pursuant to Rule 7(2) at the time documents or things actually are withheld from production.

5. Electronic or magnetic data. To obtain electronic or magnetic data or the information contained therein the requesting party must specifically request it and specify the form in which it wants it produced. In response, the responding party shall produce the electronic or magnetic data responsive to the request that is reasonably available to the responding party in the ordinary course of its business. If the responding party determines that it cannot reasonably retrieve the data requested or produce it in the form requested, it shall follow the procedures of Rule 7(1). After a hearing, the court may order the responding party to comply with the request provided that the requesting party pay the reasonable expenses for any extraordinary steps required for retrieval and production.

6. 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.

7. Expenses of Production. Unless otherwise ordered by the court, the expense of producing documents, data, data compilations, or tangible things will be borne by the responding party. The expense of inspecting, sampling, testing, photographing, and copying the documents, data, data compilations, or tangible things produced will be borne by the requesting party.

Comments:

1. "Document and tangible things" are defined in Rule 3.

2. The proposed rule is very similar to the existing rule. The proposed rule makes clear that a party that seeks to sample or test the produced documents or things, must describe the procedure so that the responding party may make any appropriate objections. The proposed rule also addresses for the first time the production of magnetic or electronic data. The requesting party must specifically request the data, specify the form in which it wants the data produced, and specify any extraordinary steps for retrieval and translation. Otherwise, the responding party need only produce the data available in the

ordinary course of business in reasonably usable form. The rule requires production at the time and place specified in the request or the response, and allows the production of copies if the originals are made available upon request. The rule also clarifies how the expenses of production are to be allocated absent a court order to the contrary.

RULE 12. Interrogatories to Parties (Last revised 6/22/95)

1. Request. At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first, any party may file and serve upon any other party written interrogatories to be answered by the party served.

2. Content. A party may use interrogatories to inquire about any discoverable matter and the contentions and defenses of another party, provided that contention interrogatories may only request another party to state the legal theories and to describe in general the factual bases for the claims or defenses of that party. Contention interrogatories may not be used to require another party to marshal all of its available proof or proof it intends to offer at trial to answer the interrogatory.

3. Response. The party upon whom the interrogatories have been served shall file and serve answers and objections, if any, to the interrogatories within 30 days after the service of the interrogatories (fifty [50] days if the request accompanies citation) Each interrogatory shall be answered separately and fully in writing, unless the party states an objection to the request or asserts a privilege pursuant to Rule 7. The answers shall be signed under oath by the party making them, and the objections shall be signed by the attorney making them.

4. 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 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 such records and, if applicable, to produce the records, or compilation, abstract or summary thereof, in compliance with Rule 11.. 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.

5. Use. Answers to interrogatories may be used only against the party answering the interrogatory.

Comment:

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 13. Requests for Admissions [revised 6/22/95]

1. **Request.** At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first, a party may file and serve upon any other party a written request for an admission.

2. **Content.** A party may request the admission of the truth of any matters within the scope of Rule 3(b) including statements or opinions 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 of which an admission is requested shall be set forth separately .

3. **Response.** The party to whom the request is directed shall file and serve its response thereto within 30 days after service of the request (fifty [50] if the request accompanies citation). Subject to objections and privileges raised pursuant to Rule 7, the response shall specifically admit or deny the request or set forth in detail the reasons any request cannot be admitted or denied. A response shall meet fairly the substance of the requested admission, qualifying an answer or denying only a part when good faith requires. Lack of information or knowledge or a claim that the request presents a genuine issue for trial is not a proper response unless the objection states that a reasonable inquiry has been made and that the information known or easily obtainable is insufficient to enable the party to admit or deny. If no response is timely served, the request is admitted without the necessity of a court order.

4. **Use.** Any matter admitted under this rule is conclusively established as to the party making the admission unless the court on motion permits withdrawal or amendment. The court may permit withdrawal or amendment upon a showing of good cause for such withdrawal or amendment if 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 thereby. Any admission made by a party under this rule is for the purpose of the pending action only and may not be used in any other proceeding.

RULE 14. Depositions Upon Oral Examination [revised 6/27/95]

1. Notice. At any time during any applicable Discovery Period or 30 days before trial, whichever occurs first, a party may notice the deposition upon oral examination of any person or entity to be taken before any officer authorized by law to take depositions. A reasonable time before the deposition, a party shall file and serve a notice stating the name of the deponent and the time and the place of the deposition. When the deponent is a party or subject to the control of a party, service of the notice upon the party's attorney shall have the same effect as a subpoena served on the deponent.

2. Content.

a. 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 the witness 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 3. below may be taken in the county of suit. A nonresident or transient person may be required to attend in the county where that person 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.

b. Other attendees. If any party intends to have any other persons attend, that party must give reasonable notice to all parties of the identity of such other persons. ***c. Depositions of Organizations.*** 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 response, the organization so named shall designate one or more persons to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The person so designated shall testify as to matters known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized by these rules.

d. Documents. A deponent may be compelled to produce at the deposition documents or tangible things within the scope of discovery and within the witness' care, custody or control. If a subpoena commanding production under Rule 24 is to be served on the person to be examined, the designation of materials to be produced as set forth in the subpoena shall be attached to or included in, the notice. When the deponent is a party or subject to the control of a party, the procedures of Rule 11, including the 30 day time for response, shall apply to such request.

e. Deposition by Telephone. Any party may give reasonable prior written notice that a deposition will be taken by telephone or other remote electronic means. For the purposes of these rules, 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 witness is placed under oath by a person present with the witness who is authorized, in that jurisdiction, to administer oaths.

3. Protective order. A party or deponent may include in a motion for protective order pursuant to Rule 8 an objection to the time and place designated for a deposition. If the movant had less than ten (10) days notice of the deposition, the filing of the motion excuses compliance with the notice or subpoena until the motion is overruled. If the movant had at least 10 days notice of the deposition, the movant must comply with the notice or subpoena unless the motion is granted, or the movant demonstrates that it was unable to obtain a ruling on the motion despite its good faith efforts to do so pursuant to any applicable local rules.

RULE 15. Examination, Objection, and Conduct During Oral Depositions [revised 6/21/95]

1. Oath; Examination. Every person whose deposition is taken upon oral examination shall first be placed under oath. 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 deposition officer who shall open the envelope and propound them to the witness.

2. Time Limitation. The time a party takes to examine and cross-examine deponents upon oral examination shall be limited.

a. Time per deposition. Each side may conduct one deposition that is subject to no per deposition time limit. For all other depositions, no side shall examine or cross-examine a single fact witness for more than three (3) hours or a single expert witness for more than six (6) hours. If a witness has been deposed as a fact witness and is thereafter designated as an expert, the witness may be redeposed for the time remaining within the 6 hour limit. Third-party defendants may examine a single witness regarding issues upon which they oppose defendants for no more than 1 additional hour.

b. Record of deposition time. 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 of time each examiner used to examine the deponent.

3. Conduct during the deposition. The oral deposition shall be conducted in the same manner 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. Private conferences between deponents and their attorneys 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 statements, objections and discussions conducted during the oral deposition that reflect upon the veracity of the testimony to be introduced in evidence at trial.

4. Objections to testimony. Objections during the oral deposition are improper except the following objections to the form of the question or the responsiveness of the answer: "Objection, leading;" "Objection, form;" and "Objection, non-responsive." These objections shall be stated as phrased and will be waived if not made at the taking of the deposition. A narrative objection will not preserve the objection for the court's later determination. Upon request, the objecting party shall explain the grounds of the objection clearly and concisely, in a non-argumentative and non-suggestive manner. Objections or explanations that are argumentative or suggest answers to or otherwise coach the deponent are not permitted and can be grounds for termination of the deposition pursuant to this Rule.

5. 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 secure a ruling pursuant to paragraph 6. Upon request, the instructing party shall explain the grounds for the instruction clearly and concisely, in a non-argumentative and non-suggestive manner. Should a court later order the deponent to answer a question to which the deponent was instructed not to answer, the court may impose an appropriate sanction for discovery abuse pursuant to Rule 215.

6. **Suspending the deposition.** When the time limitations for the deposition have expired or when the deposition is being conducted or defended in violation of these rules, on demand, the deposition may be suspended for the time necessary to secure a ruling. The court may impose an appropriate sanction for discovery abuse pursuant to Rule 215 if the suspension of the deposition was not justified.

Comment: *Section 3 of this rule refers only to the conduct of the lawyers and deponents in the deposition. It is not meant to limit the scope of the interrogation to the scope allowed at trial. See Rule 3.*

RULE 18. Non-Stenographic Recording [revised 6/27/95]

1. Notice. Any party may cause a deposition upon oral examination to be recorded by other than stenographic means, including videotape recordings. Any party intending to make a non-stenographic recording shall file and serve reasonable prior written notice to the deponent and other parties, either in the notice given pursuant to Rule 14 or otherwise, of the non-stenographic method by which the testimony will be recorded and whether a certified court reporter also will be used. Any other party may then file and serve written notice designating another method of recording in addition to the method specified, at the expense of the designating party unless the court orders otherwise.

2. Conducting the Deposition. A non-stenographic deposition must be conducted in accordance with Rule 15. The party requesting the non-stenographic recording will be responsible for obtaining a person authorized by law to administer the oath, for assuring that the recording will be intelligible, accurate, and trustworthy, and for maintaining the original non-stenographic recording.

3. Signing, Certification, and Delivery. The non-stenographic recording and exhibits thereto must be prepared and delivered in accordance with Rule 16 to the party who requested the non-stenographic recording (rather than the party who asked the first question), except that the recording is not submitted to the witness for signature or changes.

4. Use Depositions Recorded Only by Non-stenographic means.

a. At trial or summary judgment. A non-stenographic recording or transcript of a deposition recorded only by non-stenographic means can be used at the trial or for summary judgment only if the party intending to use it has obtained a complete transcript of the deposition recording from a certified court reporter. The court reporter shall obtain the original or a certified copy of the deposition recording, shall transcribe it, and shall comply with the provisions of Rule 16 to the extent applicable.[1] The court reporter's certificate shall include a statement that the transcript was made from the original or certified copy of the deposition recording and that the transcript is a true record of the recording. If the deposition is to be used as evidence at the trial, the complete transcript must be served on all parties at least 30 days before the trial, or for summary judgment, at the time the deposition must be filed with the court.

b. At any other hearing[2]. Anon-stenographic recording or transcript of a deposition recorded only by non-stenographic means can be used at any hearing of a motion or an interlocutory proceeding (other than a summary judgment motion) only if the party intending to use it has obtained a transcript of that portion of the deposition recording by a certified court reporter, transcribed and certified in accordance with part a above. In addition, at least 20 days before the date set for the hearing in which the deposition is to be used, the party seeking to use the deposition must file and serve a written designation specifying (1) the name of the deponent whose deposition the party intends to use; (2) the name and address of the certified court reporter that the party has asked to transcribe all or part of the deposition recording; and (3) the portions of the deposition recording that the party has requested to be included in a transcript. If the party has designated only a part of the deposition testimony, any other party may request the named court reporter to transcribe additional parts of the deposition recording at that party's own expense within 10 days of service of the designation. The deposition can be used only if the transcript is completed at least 3 days before the date of the hearing.

c. Certified copy. A certified copy of the non-stenographic recording is any copy of the original or another certified copy of the deposition recording that is accompanied by a duly sworn certificate of the person who made the copy, stating that the copy is accurate and complete.

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[1] The provisions concerning certification of swearing in the witness and that the transcript is a true record of the testimony, as well as the provisions concerning marking exhibits will not apply.

[2] Judge Brister would leave this section out. I have left it in as proposed by the Discovery Subcommittee.

RULE 17. Deposition Upon Written Questions [revised 6/27/95]

1. Notice. At any time during any applicable Discovery Period or 30 days before trial, whichever occurs first, any party may take the testimony of any person or entity by deposition upon written questions. Notice thereof must be filed and served on all parties at least 20 days before the deposition is taken, unless the time is shortened by agreement of the parties or court order.

2. Content. The content of the notice shall comply with Rule 14. In addition, the direct questions to be propounded to the witness shall be attached to the notice.

cis **2. Additional Questions and Objections.** Any party may serve cross-questions upon all other parties within ten days after the notice and direct questions are served. Within five days after being served with cross-questions a party may serve redirect questions upon all other parties. Within three days after being served with redirect questions a party may serve recross questions upon all other parties. Objections to the form of written questions are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within five days after service of the last questions authorized. .

3. Conducting the Deposition. The party noticing the deposition shall deliver copies of the notice and of all questions served to the deposition officer. Any person authorized to administer oaths (whether or not the person is a certified shorthand reporter) is an officer who is authorized to issue a subpoena or subpoena under Rule 24 for a written deposition, and is an officer before whom a written deposition may be taken. Such officer shall have authority when necessary to summon and swear an interpreter to facilitate the taking of the deposition. Such officer shall take the deposition on written questions at the time and place designated, shall record the testimony of the witness in response to the questions, and thereafter prepare, certify and deliver the deposition transcript pursuant to Rule 16.

Rule 18. Signing, Certification, and Use of Depositions.

1. Signature and Changes. Unless signature is waived by the witness and the parties, the deposition officer shall provide the original deposition transcript to the witness, or if the witness is represented by an attorney at the deposition, to such attorney, for examination and signature. No erasures or obliterations of any kind are to be made to the original deposition transcript. Any changes that the witness desires to make shall be stated in writing, together with a statement of the reasons for making such changes. The witness shall then sign the transcript under oath, and return it to the deposition officer within twenty days

2. Certification. The deposition officer shall file with the court, serve on all parties and attach as part of the deposition transcript a certificate duly sworn by such officer stating;

(i) that the witness was duly sworn by the officer and that the transcript is a true record of the testimony given by the witness;

(ii) that the deposition transcript was submitted on a specified date to the witness or to the attorney for the witness for examination and signature, and that the witness returned or did not return the transcript by a specified date;

(iii) that changes, if any made by the witness, in the transcript and otherwise are attached thereto;

(iv) that the deposition transcript was delivered in accordance with section 3 of this rule ;

(v) the amount of the deposition officer's charges;

(viii) that a copy of the certificate was served on all parties.

The clerk of the court shall tax as costs the charges for preparing the original deposition transcript.

3. Delivery. The deposition officer shall deliver or mail certified with return receipt requested, the original deposition transcript (or copy if the original was not returned) endorsed with the title of the action and "Deposition of (name of witness)" to the attorney who asked the first question appearing in the transcript Such attorney shall make the original deposition transcript available upon reasonable request for inspection and copying by any other party to the suit. The officer shall furnish a copy of the deposition transcript to any party or to the deponent upon payment of reasonable charges therefor. .

4. Exhibits. Original documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the deposition transcript. The person producing the materials may produce the originals, or copies to serve thereafter as originals if the party affords to all other parties fair opportunity at the deposition to verify the copies by comparison with the originals. In the event that the originals rather than copies are offered, the deposition officer shall make copies to be attached to the original deposition transcript, and then return the originals to the person producing them, who shall preserve the originals and shall produce there for hearing or trial upon seven (7) days notice from any party. Copies annexed to the original deposition transcript may be used for all purposes.

5. Motion to Suppress. If the deposition officer delivers the deposition transcript and serves notice thereof at least one day before the case is called for trial (30 days if the deposition was recorded by non-stenographic means), errors and irregularities in the manner in which the testimony is transcribed, signed, delivered, or otherwise dealt with by the deposition officer are waived, unless a motion to suppress all or part thereof is made and is filed and served before the trial commences.

6. Use.[3] Any part or all of a deposition may be used for any purpose in the same proceeding in which it was taken. The Texas Rules of Evidence shall be applied to each question and answer as though the witness were then present and testifying. "Same proceeding" includes a proceeding in a different court, but involving the same subject matter and the same parties or their representatives

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[3] This is the Discovery Subcommittee version of this section. Judge Brister's version differs, and is as follows:

> Any part of all of a deposition may be used for any purpose in the same proceeding in which it was taken. "Same proceeding" includes a proceeding in a different court but involving the same subject matter and the same parties or their privies. A deposition is admissible against a party joined after the deposition was taken only if that party has had a reasonable opportunity to redepose the deponent and has failed to exercise that opportunity.

or successors in interest. A deposition is admissible against a party joined after the deposition was taken (1) if that party has an interest similar to that of any party present or represented at the taking of the deposition or who had reasonable notice thereof; or (2) if the party has had a reasonable opportunity, after becoming a party, to redepose the deponent, and has failed to exercise that opportunity. Depositions taken in different proceedings may be used subject to the provisions of the Texas Rules of Evidence. Depositions shall include (1) the original or a certified copy of a transcript of a stenographic recording complying with Rule 19, (2) the original or a certified copy of a transcript of a non-stenographic recording complying with Rule 16(5), or (3) the original or a certified copy of a non-stenographic recording of the deposition, if the applicable provisions of Rule 16(5) have been satisfied.

Rule 21: Compelling Production from Nonparty. [revised 6/25/95]

1. When production may be compelled. At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first, any party may have issued and served upon any non-party to the suit a subpoena under Rule 24 compelling production of documents or tangible things for inspection and copying within the scope of Rule 3 and within the non-party's care, custody, or control.

2. Notice, subpoena. A party proposing to compel production from a nonparty must give reasonable notice to every other party. The notice shall state the name of the nonparty from whom production is sought to be compelled, the time and place for the production, and shall be filed and served. The notice 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. 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 nonparty of the means, manner, and procedure for testing or sampling.

3. Time and place. The time and place designated for the production shall be reasonable. The place shall be in the county of the nonparty's residence, where the nonparty is employed or regularly transacts business in person, or at some other convenient place as may be directed by the court in which the cause is pending. A nonresident or transient person may be required to produce documents and things in the county where served with a subpoena or within 150 miles from the place of service.

4. Custody, Inspection & Copying. The party obtaining the production shall mark for identification all materials produced pursuant to the subpoena, retain custody of any copies furnished or made, and produce those copies for inspection upon 7 days notice from any party. Upon request and at the requesting party's cost, the party obtaining production shall furnish copies of the materials to the requesting party within 20 days.

RULE 22. Physical and Mental Examinations

1. Order for Examination. At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first, 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, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or psychologist or to produce for examination the person in his custody, conservatorship or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. Except as provided in subparagraph 4 of this rule, an examination by a psychologist may be ordered only when the party responding to the motion has identified a psychologist as an expert who will testify.

2. Report of Examining Physician or Psychologist.

a. If requested by the party against whom an order is made under this rule or the person examined, the party causing the examination to be made shall deliver to the requesting party 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 the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician or psychologist fails or refuses to make a report the court may exclude the testimony if offered at the trial.

b. 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.

3. Effect of No Examination. If no examination is sought either by agreement or under the provisions of this rule, the party whose mental or physical condition is in controversy shall not comment to the court or jury on that party's willingness to submit to an examination, on the right of any other party to request an examination or move for an order, or on the failure of such other party to do so.

4. Arising Under Title II, Family Code. In cases arising under Title II, Family Code, on the court's own motion or on the motion of a party, the court may appoint:

a. one or more psychologists to make any and all appropriate mental examinations of the children who are the subject of the suit or any other parties irrespective of whether a psychologist has been listed by any party as an expert who will testify.

b. non-physician experts who are qualified in paternity testing to take blood, body fluid or tissue samples and to conduct such tests as ordered by the court.

5. Definitions. 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 23. Motion for Entry Upon Property

1. **Motion.** At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first, the court in which the action is pending may order any person, including a person not a party to the pending suit, to allow entry upon designated land or other property for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon when the land or property is relevant to the subject matter of the action. The order may be made only on motion for good cause shown and shall specify the time, place, manner, conditions, scope of the inspection, and a description of any desired testing or sampling, sufficient to inform the person of the means, manner and procedure for testing or sampling, and the persons or persons by whom the inspection, testing or sampling is to be made.

2. Service. A true copy of the motion and order setting hearing shall be served on the person in possession or control of the property and all parties. If the person in possession or control of the property is not a party to the action, service shall be made in the same manner as service of citation as provided by Rule 106.

RULE 24: Subpoena [revised 5/26/95]

1. **Form; Issuance.**

a. The style of every subpoena shall be "The State of Texas." Every subpoena shall:

(1) state the style of the suit, its cause number, the court in which the suit is pending, the date of its issuance, and the party at whose instance the witness is summoned;

(2) command the person to whom it is directed to

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

(b) produce and permit inspection and copying of designated documents or tangible things in the possession, custody or control of that person, at a time and place therein specified, and produce such documents as they are kept in the usual course of business or organized and labeled to correspond with the designated categories. A person commanded under this subsection need not appear in person at the place of production or inspection unless a command to attend and give testimony at a deposition, hearing or trial is joined with a command under this subsection or issued and served separately.

b. The subpoena shall issue from the court in which the suit is pending, except that a subpoena for a deposition in a sister state or foreign country shall be issued pursuant to Rule 188.

c. The clerk of the district or county court, or justice of the peace shall issue the subpoena and a copy thereof for each witness subpoenaed to a party requesting it, who shall complete it before service. An attorney authorized to practice in the State of Texas, as an officer of the court, may also issue and sign a subpoena on behalf of the court. Any officer authorized to take depositions and any certified short-hand reporter may issue and sign a subpoena for a deposition or production, and shall do so immediately upon proof of service of a notice to take a deposition under Rule 14 or 17, or a notice to compel production under Rule 21.

2. **Service.**

a. Any sheriff or constable of the State of Texas or any person who is not a party and is not less than 18 years of age may serve a subpoena by delivering a copy to the witness and tendering to that person any fees required by law.

[D. Perry's suggested alternative:

a. Any sheriff or constable of the State of Texas or any person who is not a party and is not less than 18 years of age may serve a subpoena by delivering a copy to the witness and tendering to that person any fees required by law, except that when the witness is a party, or a person subject to the control of a party, service of a copy upon the party's attorney shall have the same effect as service upon the witness.]

b. Subject to the provisions of applicable law, a subpoena may be served at any place within the State of Texas. The subpoena may direct a witness to appear for a deposition or produce records at any place authorized by Rules 14, 17 or 21, and may direct a witness to appear for a hearing or trial if [the witness is a party to the suit],[4] or is represented to reside within 150 miles of the courthouse of the county in which the suit is pending or who may be found within such distance at the time of trial.

c. Proof of service shall be made by filing the witness' signed written memorandum attached to the subpoena showing acceptance thereof or a statement of the date and manner of service and the names of the person served, certified by the person who made the service.

d. A subpoena for appearance at a deposition, or for the production of documents or tangible things at the time and place other than at trial or a hearing in open court shall be issued only after service of a notice for the deposition required under Rule 14 or 17, or after service of a notice to compel production under Rule 21.

3. **Protection of Nonparties Subject to Subpoenas**

a. A party responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense upon a nonparty subject to that subpoena.

b. Subject to paragraph (4)(b) of this rule, a nonparty commanded to produce and permit inspection and copying of designated documents and things, within 10 days after service of the subpoena or before the time specified for compliance if such time is less than 10 days after service, may serve upon the party at whose instance the witness is summoned written objection to inspection or copying of any or all of the designated materials. If objection is made, the party at whose instance the witness is summoned shall not be entitled to inspect

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[4] The bracketed language is David Perry's suggestion that is different from current CPRC 22.002.

and copy the materials except pursuant to court order. At any time after an objection is made, the party serving the subpoena may, upon notice to the person commanded to produce, move for an order to compel the production.

c. Within 10 days after service of the subpoena or before the time specified for compliance if such time is less than 10 days after service, the person served with the subpoena may, upon notice to the party at whose instance the witness is summoned, move for a protective order in the court in which the action is pending or a district court in the county in which the subpoena was served. The court shall make such orders in the interests of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights.

d. If the subpoena directs the nonparty to attend and give testimony or to produce documents or things at a hearing or trial less than 10 days after the date of service, the nonparty may make its objections or motion for protective order to the court at the time specified for compliance.

e. When a party serves a subpoena upon any custodian of records concerning a non-party that are protected from disclosure by a rule, regulation, or statute, the party serving the subpoena shall also serve a copy of the subpoena upon the non-party to whom the records pertain or, if the non-party is represented by an attorney, upon the attorney. The non-party may make any objection or motion for protective order in the same manner as the records custodian served with the subpoena. If the party serving the subpoena does not serve it in accordance with this rule, then the records custodian upon whom it is served shall serve it upon the non-party and compliance shall be delayed to give the non-party an opportunity to seek relief.

4. Duties of Nonparties in Responding to Subpoenas

a. A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

b. When information or materials subject to a subpoena is withheld on a claim that it is privileged from discovery, the person subpoenaed shall withhold the privileged materials or information from the response and make a withholding statement, stating that information or materials responsive to the subpoena have been withheld and the privileges(s) relied upon. The party serving the subpoena may thereafter request a description of the withheld materials, and within 15 days of service of that request, the subpoenaed person shall describe the nature of the documents, communications, or things not produced sufficient to enable the demanding party to contest the claim.

c. If a subpoena commanding testimony is directed to a public or private corporation, partnership, association, governmental agency, or other organization, and the matters on which examination is requested are described with reasonable particularity, the organization so named shall designate one or more persons to testify on its behalf as to matters known or reasonably available to the organization.

5. 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.

Part Two. Pretrial Conference

RULE 166. Pretrial Conference [current rule 166 has been substituted for the subcommittees previously recommended language] [revised 6/26/95]

In an appropriate action, to assist in the disposition of the case without undue expense or burden to the parties, the court may in its discretion direct the attorneys for the parties and the parties or their duly authorized agents to appear before it for a conference to consider:

(a) All pending dilatory pleas, motions and exceptions;

(b) The necessity or desirability of amendments to the pleadings;

(c) A discovery schedule;

(d) Requiring written statements of the parties' contentions;

(e) Contested issues of fact and the simplification of the issues;

(f) The possibility of obtaining stipulations of fact;

(g) The identification of legal matters to be ruled on or decided by the court;

(h) The exchange of a list of direct fact witnesses, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before the time of trial, who will be called to testify at trial, stating their address and telephone number, and the subject of the testimony of each such witness;

(i) The exchange of a list of expert witnesses who will be called to testify at trial, stating their address and telephone number, and the subject of the testimony and opinions that will be proffered by each expert witness;

(j) Agreed applicable propositions of law and contested issues of law;

(k) Proposed jury charge questions, instructions, and definitions for a jury case or proposed findings of fact and conclusions of law for a nonjury case;

(l) The marking and exchanging of all exhibits that any party may use at trial and stipulation to the authenticity and admissibility of exhibits to be used at trial;

(m) Written trial objections to the opposite party's exhibits, stating the basis for each objection;

(n) The advisability of a preliminary reference of issues to a master or auditor for findings to be used as evidence when the trial is to be by jury;

(o) The settlement of the case, and to aid such consideration, the court may encourage settlement.

(p) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the pretrial conference, the amendments allowed to the pleadings, the time within which same may be filed, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions, agreements of counsel, or rulings of the court; and such order when issued shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or extend it to all actions.

Part Three. Other Rules Affected By Subcommittee Proposals

RULE 63. Amendments and Responsive Pleadings

Parties may amend and supplement their pleadings and respond to other parties' pleadings without leave of court no later than sixty (60) days before the end of any applicable Discovery Period or five (5) days after receipt of notice of the first trial setting, whichever is later. 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.

These pleading rules need to be considered.

RULE 66. TRIAL AMENDMENT. [CURRENT RULE]

If evidence is objected to at the trial on the ground that it is not within the issues made by the pleading, or if during the trial any defect, fault or omission in a pleading, either of form or substance, is called to the attention of the court, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the allowance of such amendment would prejudice him in maintaining his action or defense upon the merits. The court may grant a postponement to enable the objecting party to meet such evidence.

RULE 67. AMENDMENTS TO CONFORM TO ISSUES TRIED WITHOUT OBJECTION. [CURRENT RULE]

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. In such case such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made by leave of court upon motion of any party at any time up to the submission of the case to the Court or jury, but failure so to amend shall not affect the result of the trial of these issues; provided that written pleadings, before the time of submission, shall be necessary to the submission of questions, as is provided in Rules 277 and 279.

RULE 70. PLEADING: SURPRISE: COST.
[CURRENT RULE]

When either a supplemental or amended pleading is of such character and is presented at such time as to take the opposite party by surprise, the court may charge the continuance of the cause, if granted, to the party causing the surprise if the other party satisfactorily shows that he is not ready for trial because of the allowance of the filing of such supplemental or amended pleading, and the court may, in such event, in its discretion require the party filing such pleading to pay to the surprised party the amount of reasonable costs and expenses incurred by the other party as a result of the continuance, including attorney fees, or make such other order with respect thereto as may be just.

Proposed Discovery Rules
June 30, 1995
Disposition Table

Current Rule		Proposed Rule
166b(1)	Forms of Discovery	3(1)
166b(2)	Scope of Discovery	3(2)
	a. general	a.
	b. documents & things	b.
	c. land	23
	d. potential parties & witnesses	3(2) c.d.i.
	e. experts	3(2) e; 10
	f. indemnity, insuring, settlement agreements	3(2) f.g.
	g. statements	3(2) h.
	h. medical records, authorizations	9(2) f.g.
166b(3)	Privileges	4
166b(4)	Presentation of Objections	7
166b(5)	Protective Orders	8
166b(6)	Duty to Supplement	5
166b(7)	Discovery Motions	2(2)
166c	Stipulations	TRCP 13
167	Production of Documents & Things	11
167a	Mental & Physical Exams	22
168	Interrogatories	12
169	Requests for Admissions	13
*171	Master in Chancery	NA
*172	Audit	NA
*173	Guardian Ad Litem	NA
*174	Consolidation; Separate Trials	NA
*175	Issue of Law; Dilatory Pleas	NA
176	Witness Subpoenaed	24
177	Form of Subpoena	24
177a	Subpoena for Production of Documentary Evidence	24

178	Service of Subpoenas	24
179	Witness Shall Attend	24
180	Refusal to Testify	24
181	Party as Witness	24
*183	Interpreters	NA
*185	Suit on Account	NA
187	Deposition to Perpetuate Testimony	NA
188	Deposition in Foreign Jurisdictions	NA
200	Deposition Upon Oral Examination	14
201	Compelling Appearance	14
202	Non-Stenographic Recording	18
	Deposition by Telephone	14
*203	Failure of Party to Attend or Serve Subpoena	NA
204	Examination, Cross-Examination	15
205	Submission to Witness, Signing	16
206	Certification by Officer	16
207	Use of Deposition Transcripts	16
208	Depositions upon Written Questions	17
*209	Retention and Disposition of Transcripts	NA

* These rules were not addressed by the Discovery Subcommittee.

SUPREME COURT ADVISORY COMMITTEE

Discovery Rules Subcommittee

Draft of July 19, 1995

from: Cary L. Nickelson

1. Discovery Cut-Off: - Rule 1

Community assets and liabilities continue to fluctuate until a divorce case is tried. Imposing a rule which prevents discovery between a mandatory cut-off date and the trial date undermines an attorney's ability to present accurate information about the parties' community estate. Similarly, in suits affecting the parent-child relationship, critical information relating to the best interests of the children involved accrues throughout the pendency of a case.

I anticipate that if the proposed hiatus on discovery is imposed in family law cases, lawyers will be forced to conduct discovery during the course of their final trial, thus increasing the length, complexity and expense of family law trials. In addition, forcing attorneys to focus their attention on completing formal discovery early in a case discourages settlement negotiations and limits opportunities for alternative dispute resolution, and increasing the cost to the parties.

from: Alex Wilson Albright

The current rules:

Our current draft of Rule 1.1.a. says that no amendment that increases damages above the $50,000 limit shall be allowed at any time that will "unduly prejudice" the opposing party and in no event later than 30 days before trial. This appears to be a limitation upon Rule 63. The current draft of Rule 63 requires leave of court to amend pleadings within 60 days of the end of the Discovery Period, or 5 days after notice of receipt of the first trial setting (this was from our draft that had a discovery window that ended 30 days before the first setting). The court is to allow the amendment unless there is insufficient time to complete discovery needed as a result of the amendment. If the court makes a finding that there is insufficient time to complete discovery, the court must deny leave or extend the discovery period. It cannot grant leave and extend the discovery period, however, if it will "unreasonably delay" the trial.

In a Tier 1 case, the discovery period extends until 30 days before trial. Should a party seek an amendment that increases the damages, I suppose the court would consider whether the amendment was made within 30 days of trial (then it automatically would not be allowed); whether the amendment "unduly prejudices" the opponent; and whether allowing it would unreasonably delay the trial. This seems unduly complicated and I'm not sure it really gets us where we want to be. I think a major problem is that we have not focused upon the amendment rule since very early in our work.

Even in Tier 2 or 3 cases, our draft Rule 63 doesn't work well. Extending the discovery period doesn't always solve the problem -- the party may need additional deposition hours. Also, should not having enough time to complete discovery be the only standard for not allowing an amendment? I don't think so. There may be situations where the amendment should not be allowed for some other reason. Also, while there is a standard for denying leave to amend, there is no standard for ruling on a motion to strike before the

time for seeking leave arises. The time periods set out are confusing because they do not apply to our current scheme.

My revision:

My proposed Rule 63 works much like the current rule, but has a longer time period where leave of court must be obtained for filing new pleadings, and adds a standard that takes needed discovery into account. The rule allows new pleadings anytime, so long as any new discovery can be completed within the applicable discovery limitations or the new pleading does not prejudice the opponent. (The language regarding "prejudice" was taken from current trial amendment rule, Rule 66. Current Rule 63 uses the word "surprise," but I think the Rule 66 language better conveys our meaning. The cases really make no distinction between the two.) Leave of court must be obtained if the amendment is offered within 60 days of the end of the discovery period; otherwise, it can be filed subject to a Motion to Strike. If the court finds that discovery cannot be completed or the new pleading will otherwise prejudice the opponent, the court can either (1) not allow the amendment (by not granting leave or granting the motion to strike) or (2) allowing the amendment and also allowing specific additional discovery IF it will not unduly delay the trial. Thus, the court must take the real trial date into account in determining whether to allow the amendment.

Rule 66 is left as is. It seems to be working. Rule 67 is left alone as well. It works with this proposed system just as it works now. I don't like the language, but I don't think this is the time to consider amendments. Rule 70 should be incorporated with Rule 63. It is a sanctions rule, however, so rather than considering it now, I have written a note to the Sanctions Subcommittee.

I have also changed Rule 1 so that in a Tier 1 case, where a pleading was offered that increased the amount of damages, the court would go through the Rule 63 analysis, BUT if the amendment is offered within 30 days of trial, it is presumptively prejudicial to the party opposing the amendment under Rule 63. Therefore, the burden is put on the party offering the amendment rather than the person opposing the amendment to show why the amendment should be allowed.

Drafts Attached

Attached is a redlined draft of my proposed changes, redlined from the 6/30/95 draft that is currently being distributed, as well as a non-redlined draft of my proposed Rules 1.1.a. and Rule 63.

RULE 1.1.

a. Applicability. If in any suit the plaintiff's pleadings affirmatively seek only monetary recovery of $50,000 or less, excluding costs, pre-judgment interest and attorneys' fees, discovery shall be limited as provided in this section, unless governed by a Discovery Control Plan. ~~No amendment bringing the amount of recovery above $50,000 shall be allowed at such time as to unduly prejudice the opposing party and in no event later than 30 days before trial.~~ If by a claim, amendment, or supplement filed ~~more than 30 days before trial~~timely pursuant to Rule 63, any party seeks relief other than monetary recovery or in excess of $50,000, excluding costs, pre-judgment interest and attorneys' fees, this section shall no longer apply to the suit. ~~When a timely filed pleading renders this section no longer applicable,~~ discovery shall be reopened and completed within the limitations provided in section 2 or 3 of this rule, and any person previously deposed may be redeposed. However, any amendment bringing the amount of recovery above $50,000 that is offered for filing later than 30 days before trial presumptively prejudices the party opposing the amendment in maintaining its action or defense upon the merits within the meaning of Rule 63.

RULE 1.1.

a. Applicability. If in any suit the plaintiff's pleadings affirmatively seek only monetary recovery of $50,000 or less, excluding costs, pre-judgment interest and attorneys' fees, discovery shall be limited as provided in this section, unless governed by a Discovery Control Plan. If by a claim, amendment, or supplement filed timely pursuant to Rule 63, any party seeks relief other than monetary recovery or in excess of $50,000, excluding costs, pre-judgment interest and attorneys' fees, this section shall no longer apply to the suit, discovery shall be reopened and completed within the limitations provided in section 2 or 3 of this rule, and any person previously deposed may be redeposed. However, any amendment bringing the amount of recovery above $50,000 that is offered for filing later than 30 days before trial presumptively prejudices the party opposing the amendment in maintaining its action or defense upon the merits within the meaning of Rule 63.

from: Scott A. Brister

Rule 1. Discovery Limitations

¶ 1(a) Change the "30 days before trial" to "timely pursuant to Rule 63." Besides the difference between the two time periods, the provision in Rule 1 seems to me unnecessary. If the amendment is less than 60 days before trial, and there is insufficient time to complete discovery under the new Tier 2 limits, the court must either refuse the amendment or allow more time for discovery under Rule 63.

¶ 1(a) When a new claim > $50,000 bounces a case out of Tier 1, then the discovery window in Tier 2 applies. But this window may already be closed. 46% of Harris County county court cases (jurisdiction< $100,000) are not disposed until > 18 months old.

from: Scott A. Brister

Rule 2. Modification of Discovery Procedures and Limitations

¶ 1 Move "Except where specifically prohibited" to follow "parties." While the parties are specifically prohibited from making certain agreements, the court can make any changes by a Discovery Control Plan.

from: Scott A. Brister

Rule 3. Permissible Discovery

¶ 1 — Drop the second sentence defining "written discovery" as I would drop such distinction (see cover letter).

¶ 2(c) — Drop the last sentence. It is duplicative of the definition given of discoverable matters in ¶ 2(a).

¶ 2(f)(2) — Replace "any settlement agreement" with "any relevant settlement agreement or part thereof." Unrelated settlements, or discovery of the amount an opponent usually settles similar cases for, are not discoverable. *Palo Duro Pipeline v. Cochran*, 785 S.W.2d 455 (Tex.App.--Houston [14th Dist.] 1990, o.p.).

¶ 3(e) — Insert the definition of an "expert witness" from Rule 10 and of a "consulting expert" from Rule 4 (2)(a)(3).

Memorandum

To: Steve Susman (via fax)

From: Alex Wilson Albright

Date: July 14, 1995 [DRAFT]

Subject: Rule 4: Privileges

Scott McCown, Lee Parsley and I met on July 13 with some family lawyers to discuss some of their concerns about the proposed discovery rules. It was a good meeting, and at the end they seemed to think their concerns were alleviated, primarily by Rule 2.

Scott, Lee and I also discussed Rule 4, based upon the Supreme Court's recent decision in *Occidental Chemical Corp. v. Banales*, 88 Tex. S. Ct. J. 880 (June 15, 1995). That opinion makes a distinction between materials that directly reveal an attorney's thought processes, which are "absolutely" privileged, and those that are a "mechanical compilation of information" that "reveals the attorney's thought processes," which is not absolutely protected. We have made the same distinction in this version of Rule 4.

CC (via fax): Luke Soules, David Keltner, Robert Meadows, David Perry, Paul Gold, David Jackson, John Marks, Hon. Scott McCown, Richard Orsinger, Hon. Scott Brister, Lee Parsley

RULE 4. DISCOVERY PRIVILEGES

1. **Privileges.** Any matter protected from disclosure by any privilege is not discoverable.

2. **Work Product Privilege.**

(a) Work Product Defined. Work product is any communication made or material prepared in anticipation of litigation or for trial by or for a party or a party's representative, including the party's attorney, consultant, surety, indemnitor, insurer, or agent. The relevant facts within the knowledge of any party or the party's representative, however acquired, are not work product.

(b) Protection of Attorney Mental Processes. A judge may not order discovery of the work product of an attorney or an attorney's representative that contains the attorney's mental impressions, opinions, conclusions, and legal theories. A judge may, however, order discovery of attorney work product that is merely a compilation of the facts of the case even if the mental impressions, opinions, conclusions, and legal theories of an attorney may be inferred from the discovered material, if the party seeking discovery shows that the party has substantial need of the materials in the preparation of that party's case and the party is unable without undue hardship to obtain the substantial equivalent of the factual information contained therein by other means.

(c) Protection of Other Work Product. A judge may not order discovery of any other work product except on a showing that the party seeking discovery has substantial need of the materials in the preparation of that party's case and the party is unable without undue hardship to obtain the substantial equivalent of the factual information contained therein by other means.

(d) Limiting Disclosure. If a judge orders discovery of work product pursuant to paragraph (b) or (c) of this Rule, the judge shall, to the extent possible, protect against the disclosure of mental impressions, opinions, conclusions, or legal theories, and shall limit disclosure to the needed facts.

(e) Protection of Consulting Experts. A consulting expert's identity, mental impressions, and opinions are not discoverable. A consulting expert is an expert who has been informally consulted, retained, or specifically employed by a party in anticipation of litigation or in preparation for trial, who will not be called to testify as an expert, and whose mental impressions and opinions have not been reviewed by a testifying expert.

(f) Exceptions. The following are discoverable, even if made or prepared in anticipation of litigation or for trial:

(1) Experts. The information concerning experts discoverable under Rule 10.

(2) Trial Witnesses. Trial witnesses discoverable under Rule 3.2(d).

(3) Witness Statements. Witness statements discoverable under Rule 3.2(h).

(4) Trial Exhibits. Trial exhibits if their disclosure is ordered pursuant to Rule 166.

(5) Contentions. A party's contentions regarding legal theories or the factual bases for the claims or defenses of that party discoverable under Rule 12.2.

(6) Photographs. Any photograph or electronic image of underlying facts (*e.g.* a photograph of the accident scene) is discoverable. A photograph or electronic image of something other than underlying facts may be privileged (*e.g.* a consulting expert's video of an experiment). A photograph or electronic image of any sort that a party intends to offer into evidence, however, is discoverable.

(7) Texas Rule of Evidence 503(d). If the circumstances are such that there is no attorney-client privilege under Texas Rule of Evidence 503(d), work product is discoverable.

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June 27, 1995

Mr. Stephen Susman
Susman & Godfrey
1000 Louisiana Street
Suite 5100
Houston, Texas 77002-5096

Re: Supreme Court Advisory Committee/Discovery Sub-Committee

Dear Mr. Susman:

I have recently been supplied a copy of the proposed Rule 4, regarding "privileges and work product".

I strongly ask you to reconsider the adoption of this Rule.

The potential problems and misuse of the Rule are so great that they surely outweigh the benefit. I know there has been a concerted effort to not have a segregated set of rules for family law practice. However, our practice is different than that of the general practitioner involved in civil litigation, due to the very nature of the family relationships, including child custody cases. We should be free to communicate with our client, document our file and "memo" our staff without fear of any outside publication. Allowing this information to fall into the hands of anyone, including the trial judge, is an abhorrent thought.

I consider this to be a highly offensive invasion of the attorney client privilege.

Sincerely yours,

Jim Loveless

JL/jr

from: Scott A. Brister

Rule 5. Response to Discovery Requests; Supplementation

¶¶ 1 & 2 — Drop the phrases limiting Rule 5 to written discovery (see cover letter). Shouldn't a party have a "Duty to Respond" to any discovery?

¶ 3 — Change "the day before trial or within 20 days after the date of service, whichever is earlier" to "within forty-eight hours" (or some similarly short time). I do not see why a party that we presume has *not* acted reasonably promptly should be given a leisurely 20 days when it has created a potentially big problem.

from: Scott A. Brister

Rule 10. Expert Witnesses

¶ 1 — Move the second sentence, the definition of "an expert witness," to Rule 3 (e), as that is where discovery subjects and their scope are defined. Change "an expert used for consultation and who is not expected to be called as an expert witness at trial" to "a consulting expert" (defined elsewhere).

¶¶ 2 & 3 — Drop the distinction between designation and "additional disclosures" about experts. As a practical matter, almost everybody requests both, and this avoids creating malpractice problems for those who forget to. This can be done by combining these paragraphs.

¶ 3 (b) — Drop the second paragraph beginning with "For experts not retained ..." This will create satellite litigation about who is or is not in a party's control. If this paragraph applies mainly to treating doctors, I cannot imagine that most plaintiff's attorneys (1) can't get them, or (2) want the defense attorney contacting the doctor to discuss resumes, depo dates, and ... whatever else may come up.

¶ 4 — Shorten this paragraph by 50% to read "A party may obtain further discovery of the expert's impressions and opinions and the basis thereof only by oral deposition of the expert, unless the court orders the expert to prepare a report pursuant to this Rule," and move it to ¶ 1 where this limitation is also discussed.

¶ 5 — Drop the last sentence. If in a particularly complex case a court needs to order reports more than 75/45 days before trial, this should be allowed.

¶ 6 — Drop this paragraph and apply Rule 5 to all discovery (see above).

Rule 6. Failure to Provide Discovery

General — I prefer the Sanctions Task Force proposals on the issue of sanctions for failure to disclose for several reasons:

(1) a firm drop-dead date is better than the "reasonably promptly" standard, which will create satellite litigation about what opposing counsel knew and when (*cf.* "as soon as is practical");

(2) excusing late or no supplementation if one can show opposing counsel is not "unprepared" also encourages satellite litigation, creating hearings on the extraordinary question of how opposing counsel ought to spend their trial preparation time; and

(3) excusing late or no supplementation if it will not effect "the outcome of the trial" suggests that the foregoing satellite hearings be expanded to included expert testimony about the effect of various information on a jury's verdict.

The advantage of a rule that allows no exceptions other than those beyond the control of the litigants (e.g., death of a witness) is that the standard is clear and there is very little room for satellite litigation. The advantage of a rule that provides continuance as the only remedy for failure to disclose is that it allows a judge to balance directly the need for the information with the need to get to trial, issues that may be hard to decide but don't require extensive evidentiary hearings.

However, assuming adoption of the Subcommittee's draft, I have the following suggestions:

¶ 1 — Change "to timely disclose." First, it's a split infinitive. Second, is this the same as "reasonably promptly"? A supplement is not "timely" according to the required response date, but may still be "reasonably prompt."

¶ 1 — Drop "in a way that may effect the outcome of the trial." If I understand this correctly, it allows a party supplementing late to do so by showing that what they want to add will not make any difference. But if it won't make any difference, why are we even talking about it? If information will not effect the outcome of the trial, there is an easy answer as to whether we should hold satellite hearings, re-open discovery, and so on--"No. Period."

¶ 2 — Change "If the court continues the case," to "If a party fails to disclose timely." Even if the case is not continued, late supplementation causes extra costs (e.g., daily copy rates to court reporters, higher airline rates, and overtime for secretaries).

from: Scott A. Brister

Rule 6. Failure to Provide Discovery

1. Exclusion or continuance. If a party fails to timely disclose information during discovery, and is unable to show that such failure did not cause the opposing party to be unprepared in a way that may affect the outcome of the trial, then the court shall either exclude the information not timely disclosed or continue the trial to allow the opposing party to prepare to confront or use the previously undisclosed information. If the failure to disclose does not cause the opposing party to be unprepared in a way that may affect the outcome of the trial, the court may admit the evidence and proceed with the trial. The party who failed to timely disclose has the burden of showing that the opposing party is not unprepared in a way that may affect the outcome of the trial. Nothing in this rule limits the court's authority to grant a continuance.

2. Costs and expenses. If the court continues the case, the court may impose any expense caused by the delay, including attorney's fees and any difference between prejudgment and postjudgment interest, on the party that failed to timely disclose.

Rule 6. Failure to Provide Discovery

1. Exclusion or continuance. Unless the court makes a finding of good cause, a party who fails to make or supplement a discovery response in a timely manner shall not be entitled to present evidence that the party was under a duty to provide, or to offer the testimony of a witness other than a named party, who has not been properly designated. The burden of establishing good cause is upon the party offering the evidence or witness, and good cause must be shown in the record. Notwithstanding the foregoing, the court may, in its discretion, grant a continuance to allow a response to be made or supplemented.

2. Costs and expenses. If a party fails to disclose timely, the court may impose any expense caused by the delay, including attorney's fees and any difference between prejudgment and postjudgment interest, on the party that failed to timely disclose.

from: Scott A. Brister

Rule 7. Presentation of Privileges and Objections

General — I cannot recall why Rule 7 and Rule 8 are separate rules, with the former limited to written discovery and the latter anything else. After all, there is very little else (see cover letter). The procedure for objections to depositions is covered in detail in Rules 14 and 15, so Rule 8 seems redundant if that is its only purpose. Additionally, the protective order described in Rule 8 is exactly the same as one that would be issued regarding objections or privileges raised under Rule 7. I would make Rule 7 applicable to all discovery (unless otherwise specified in the deposition rules), and merge it with Rule 8.

¶ 2 — Move the second sentence to the end of the section, and clarify it to read "the responding party shall make its objection within the time required for the response, and file a withholding statement upon compliance with the request, whether voluntary (pursuant to section 1) or involuntary (pursuant to section 4)."

Rule 8. Protective Orders

General — I would move this entire rule into Rule 7, as discussed above.

Rule 7. Presentation of Privileges and Objections to Written Discovery

1. **Objections.** (no differences except adds "written" discovery).

2. **Withholding Privileged Information and Materials.**

A party may preserve a privilege from discovery only in accordance with this section.

(a) Asserting a Privilege. If materials or information responsive to a request are privileged, the party shall withhold the privileged materials or information from the response. If a request calls for privileged materials or information in response, but is also otherwise objectionable, the responding party shall first object pursuant to section 1 of this rule, and only upon compliance with the request or any part thereof, withhold responsive privileged materials or information pursuant to this section. When a party actually withholds specific information and materials responsive to a request on grounds of privilege, when making the original response and thereafter if making an amended or supplemental response, that party shall file a withholding statement, as part of the response to the discovery request or separately, stating that information or materials responsive to the request have been withheld and the privilege(s) relied upon.

(b) Description of Withheld Materials or Information. (no differences).

(c) Exemption from Withholding Statement. (no differences).

3. **Hearing.** (no differences).

4. **Ruling.** To the extent the court sustains the objection or claim of privilege, the objecting party has no further duty to respond to that request. If the court overrules the objection or claim of privilege, the objecting party shall respond to the request within thirty (30) days after the court's action, or at such time as the court orders.

Rule 7. Presentation of Privileges and Objections

1. **Objections.** (no differences except drop "written" discovery).

2. **Withholding Privileged Information and Materials.**

A party may preserve a privilege from discovery only in accordance with this section.

(a) Asserting a Privilege. If materials or information responsive to a request are privileged, the party shall withhold the privileged materials or information from the response. When a party actually withholds specific information and materials responsive to a request on grounds of privilege, when making the original response and thereafter if making an amended or supplemental response, that party shall file a withholding statement, as part of the response to the discovery request or separately, stating that information or materials responsive to the request have been withheld and the privilege(s) relied upon. If a request calls for privileged materials or information in response, but is also otherwise objectionable, the responding party shall make its objection within the time required for the response, and file a withholding statement upon compliance with the request, whether voluntary (pursuant to section 1) or involuntary (pursuant to section 4).

(b) Description of Withheld Materials or Information. (no differences).

(c) Exemption from Withholding Statement. (no differences).

3. **Hearing.** (no differences).

4. **Ruling.** To the extent the court sustains the objection or claim of privilege, the objecting party has no further duty to respond to that request, and the court may enter a protective order protecting that person from the discovery sought, including but to limited to the following:

1. ordering that the requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified;

2. ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court;

3. ordering for good cause shown that the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a.

If the court overrules the objection or claim of privilege, the objecting party shall respond to the request within thirty (30) days after the court's action, or at such time as the court orders.

from: Scott A. Brister

Rule 7. Presentation of Privileges and Objections

General — I cannot recall why Rule 7 and Rule 8 are separate rules, with the former limited to written discovery and the latter anything else. After all, there is very little else (see cover letter). The procedure for objections to depositions is covered in detail in Rules 14 and 15, so Rule 8 seems redundant if that is its only purpose. Additionally, the protective order described in Rule 8 is exactly the same as one that would be issued regarding objections or privileges raised under Rule 7. I would make Rule 7 applicable to all discovery (unless otherwise specified in the deposition rules), and merge it with Rule 8.

¶ 2 — Move the second sentence to the end of the section, and clarify it to read "the responding party shall make its objection within the time required for the response, and file a withholding statement upon compliance with the request, whether voluntary (pursuant to section 1) or involuntary (pursuant to section 4)."

Rule 8. Protective Orders

General — I would move this entire rule into Rule 7, as discussed above.

Rule 8. Protective Orders

Any person against or from whom discovery is sought may move within the time required to respond to the discovery request for an order protecting that person from the discovery sought, except that any party may move for such an order when an objection pursuant to Rule 7 is not appropriate. The court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights, including but to limited to the following:

1. ordering that the requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified;

2. ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court;

3. ordering for good cause shown that the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a.

from: Scott A. Brister

Rule 9. Requests for Standard Disclosure

¶ 2 (g) I would drop this provision. The universal practice is to request these records by depo on written questions with notice to all parties, who can then obtain copies from the court reporter for cost. A party that is too lazy to say "yes" to the court reporter, or to go look at their own records, should not be able to demand that the other side do this for them. If the section is not complied with, we will have the bizarre situation where injured parties ask to exclude medical records in their own possession (either actually or due to superior right to obtain) about their own treatment.

¶ 2 (h) I would drop this provision. The main complaint about the federal mandatory disclosure rules relate to the duty to disclose "relevant" documents (FRCP 26 [a][1][B]). Attorneys always dispute what is relevant, and shouldn't be sanctioned for not agreeing with their opponent's definition. Instruments "upon which a claim or defense is based" is not as broad, but has the same problems.

Rule 9. Requests For Standard Disclosure

1. **Request.** (no differences).

2. **Content.** A party may make any or all of the following standard requests for disclosure:

a. Provide the correct names of the parties to the lawsuit.

b. Provide the information pertaining to persons with knowledge of relevant facts set forth in Rule 3(2)(c);

c. Produce the indemnity and insuring agreements discoverable under Rule 3(2)(f);

d. Produce the settlement agreements discoverable under Rule 3(2)(g);

e. Produce the witness statements discoverable under Rule 3(2)(h);

f. In a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, produce 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;

g In a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, produce all medical records and bills obtained by virtue of an authorization furnished by the requesting party;

h. Produce any written instrument upon which a claim or defense is based:

i. Provide the information pertaining to expert witnesses set forth in Rule 10(2).

3. **Response.** (no differences)

4. **Documents.** (no differences)

Rule 9. Requests For Standard Disclosure

1. **Request.** (no differences)

2. **Content.** A party may make any or all of the following standard requests for disclosure:

a. Provide the correct names of the parties to the lawsuit.

b. Provide the information pertaining to persons with knowledge of relevant facts set forth in Rule 3(2)(c);

c. Produce the indemnity and insuring agreements discoverable under Rule 3(2)(f);

d. Produce the settlement agreements discoverable under Rule 3(2)(g);

e. Produce the witness statements discoverable under Rule 3(2)(h);

f. In a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, produce 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;

g. Provide the information pertaining to expert witnesses set forth in Rule 10(2).

3. **Response.** (no differences)

4. **Documents.** (no differences)

from Scott A. Brister

Rule 10. Expert Witnesses

¶ 1 — Move the second sentence, the definition of "an expert witness," to Rule 3 (e), as that is where discovery subjects and their scope are defined. Change "an expert used for consultation and who is not expected to be called as an expert witness at trial" to "a consulting expert" (defined elsewhere).

¶¶ 2 & 3 — Drop the distinction between designation and "additional disclosures" about experts. As a practical matter, almost everybody requests both, and this avoids creating malpractice problems for those who forget to. This can be done by combining these paragraphs.

¶ 3 (b) — Drop the second paragraph beginning with "For experts not retained ..." This will create satellite litigation about who is or is not in a party's control. If this paragraph applies mainly to treating doctors, I cannot imagine that most plaintiff's attorneys (1) can't get them, or (2) want the defense attorney contacting the doctor to discuss resumes, depo dates, and ... whatever else may come up.

¶ 4 — Shorten this paragraph by 50% to read "A party may obtain further discovery of the expert's impressions and opinions and the basis thereof only by oral deposition of the expert, unless the court orders the expert to prepare a report pursuant to this Rule," and move it to ¶ 1 where this limitation is also discussed.

¶ 5 — Drop the last sentence. If in a particularly complex case a court needs to order reports more than 75/45 days before trial, this should be allowed.

¶ 6 — Drop this paragraph and apply Rule 5 to all discovery (see above).

ule 10. Expert Witnesses

1. Request. A party may request another party to designate and disclose standard information concerning expert witnesses only through Standard Request for Disclosure pursuant to Rule 9, oral deposition, id court-ordered reports pursuant to this Rule. If the expert has ersonal knowledge of relevant facts, a party may also obtain discovery as provided elsewhere in these rules

2. Designating Expert Witnesses.

a. Request. A party may make the following Standard Request for isclosure pursuant to Rule 9: Identify (name, address, and phone number) each expert under Rule 10(1) and state the subject on which ach identified expert witness is expected to testify.

b. Response. The response shall be made within thirty (30) days ter service of the request (fifty [50] days if the request accompanies citation). If such response is amended or supplemented, the presumption of Rule 5 (2) that any change is made without "reasonable romptness" begins (a) for experts testifying about issues upon which ie responding party seeks affirmative relief, the earlier of 75 days before the end of any applicable Discovery Period or 75 days before trial; or (b) for opposing experts, the earlier of 45 days before the end of ıy applicable Discovery Period or 45 days before trial.

3. Additional Disclosures

a. Request. A party may make any or all of the following Standard Request for Disclosure pursuant to Rule 9:

(1) State the general substance of the mental impressions and ɔinions held by each expert witness and a brief summary of the basis ıereof;

(2) Produce all documents, tangible things, reports, models, or ıta compilations that have been provided to, reviewed by or prepared ' or for each expert witness in anticipation of the expert's testimony;

(3) Produce the current resume and bibliography of each expert witness; and

(4) State at least 2 dates upon which each expert witness will : available for oral deposition.

b. Response. A party seeking affirmative relief must respond to the requests upon the later of (1) 30 days after service of the request; or (2) the earlier of 75 days before the end of any applicable Discovery :riod or 75 days before trial. A party who has designated opposing :perts must respond to the requests upon the later of (1) 30 days after service of the request; or (2) the earlier of 45 days before the end of any anplicable Discovery Period or 45 days before trial.

For experts not retained or employed or otherwise in control of the :signating party, the designating party must respond to the Standard Requests (1) with documents within the possession, custody or control of the designating party, and need not respond to Standard Requests (2), ;) and (4). Nothing in this rule shall prevent the requesting party from ɔtaining this discovery directly from such an expert by subpoena commanding production under Rule 24.

4. Oral deposition. A party may obtain other discovery of the ıbject matter on which the expert is expected to testify, the expert's ental 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 ɔinions only by oral deposition of the expert, unless the court orders :e expert to prepare a report pursuant to this rule.

5. Court-Ordered Reports. If the discoverable factual observations, tests, supporting data, calculations, photographs, or ɔinions of an expert have not been recorded and reduced to tangible ·rm, the court may order these matters reduced to tangible form and ɔ.oduced in addition to or in lieu of the deposition as is appropriate. A court may not compel production of such a report before the date upon ·hich the designating party must respond to additional Standard equests for Disclosure pursuant to part 3 of this Rule.

6. Supplementation after disclosure of general information. A party's duty to supplement and amend discovery provided pursuant to his rule is governed by rule 5, except that the duty also extends to the al deposition testimony of an expert that is retained or employed by or herwise within the control of that party concerning the expert's mental impressions or opinions or the basis thereof.

Rule 10. Expert Witnesses

1. Request. A party may request another party to designate and disclose standard information concerning expert witnesses only through a Standard Request for Disclosure pursuant to Rule 9. A party may obtain further discovery of the expert's impressions and opinions and the basis thereof only by oral deposition of the expert, unless the court orders the expert to prepare a report pursuant to this Rule. If an expert witness also has personal knowledge of relevant facts, a party may obtain discovery thereof as provided elsewhere in these rules.

2. Content. A party may request any or all of the following pursuant to Rule 9:

a. Identify (name, address, and telephone number) each expert witness;

b. State the subject on which each expert witness is expected to testify;

c. State the general substance of the mental impressions and opinions held by each expert witness and a brief summary of the basis thereof;

d. Produce all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by or prepared by or for each expert witness in anticipation of the expert's testimony;

e. Produce the current resume and bibliography of each expert witness; and

f. State at least 2 dates upon which each expert witness will be available for oral deposition.

3. Response. A party served with a Standard Request pertaining to expert witnesses shall make its response pursuant to Rule 9. If such response must be amended or supplemented, the presumption of Rule 5 (2) that such changes are made without reasonable promptness begins (a) for experts testifying about issues upon which the responding party seeks affirmative relief, the earlier of 75 days before the end of any applicable Discovery Period or 75 days before trial; (b) for opposing experts, the earlier of 45 days before the end of any applicable Discovery Period or 45 days before trial. The responding party shall comply with Rule 5 in responding to the request.

4. 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 or in lieu of the deposition as is appropriate.

from: Scott A. Brister

Rule 13. Requests for Admissions

¶ 3 Why was the phrase struck providing that the response could be signed by a party or its attorney?

from: Scott A. Brister

Rule 14. Depositions Upon Oral Examination

¶ 2(b) Reinsert definition of who may attend without special notice.

¶ 2(d) Change this paragraph by:

(1) changing the first phrase from "The deponent may be compelled to produce" to "A party may in the notice request production," as the section is dealing with what can be in a notice (and for parallelism);

(2) dropping the second sentence, as the requirements for subpoenas should be in Rule 24; and

(3) dropping "When the deponent is a party or subject to the control of a party" to give non-parties the same protections enjoyed by parties (see discussion of Rule 24 below).

Rule 14. Depositions Upon Oral Examination

1. Notice. (no differences).
2. **Content.**

a. Time and Place. (no differences).

b. Other Attendees. If any party intends to have any other persons attend, that party must give reasonable notice to all parties of the identity of such other persons.

c. Depositions of Organizations. (no differences).

d. Documents. The deponent may be compelled to produce at the deposition documents or tangible things within the scope of discovery and within the witness' care, custody or control. If a subpoena commanding production under Rule 24 is to be served on the person to be examined, the designation of materials to be produced as set forth in the subpoena shall be attached to or included in the notice. When the deponent is a party or subject to the control of a party, the procedures of Rule 11, including the 30 day time for response, shall apply to such request..

e. Deposition by Telephone. (no differences).

3. Protective Order. (no differences).

Rule 14. Depositions Upon Oral Examination

1. Notice. (no differences).
2. **Content.**

a. Time and Place. (no differences).

b. Other Attendees. If any party intends to have persons attend other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the deposition, that party must give reasonable notice to all parties of the identity of such other persons.

c. Depositions of Organizations. (no differences).

d. Documents. A party may in the notice request production at the deposition documents or tangible things within the scope of discovery and within the witness' care, custody or control. If a subpoena commanding production under Rule 24 is to be served on the person to be examined, the designation of materials to be produced as set forth in the subpoena shall be attached to or included in the notice. The procedures of Rule 11, including the 30 day time for response, shall apply to such request..

e. Deposition by Telephone. (no differences).

3. Protective Order. (no differences).

from: Scott A. Brister

Rule 15. Examination, Objection, and Conduct During Oral Depositions

¶ 3 I would drop the 3rd and 4th sentences that bar attorney/client conferences during the deposition, for the following reasons:

(1) lawyers are far more careful in their use of words than layman, most of whom need a lawyer to warn them about craftily worded questions,

(2) testimony "molding" will not be stopped by this rule, but merely moved to precede the deposition, and

(3) there are logistical problems with this prohibition--to determine whether counsel and the deponent are whispering about a privilege (proper) or something else (improper), we will have to invade the attorney/client privilege itself.

¶ 4 I would drop the first sentence, and substitute the last sentence in its place. This draconian limitation is a huge change in Texas law, and I would rather try the hortatory approach first.

Rule 15. Examination, Objection, and Conduct During Oral Depositions

1. **Oath; Examination.** (no differences).

2. **Time Limitation.** (no differences).

3. **Conduct during the deposition.** The oral deposition shall be conducted in the same manner 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. Private conferences between deponents and their attorneys 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 statements, objections and discussions conducted during the oral deposition that reflect upon the veracity of the testimony to be introduced in evidence at trial.

4. **Objections to testimony.** Objections during the oral deposition are improper except the following objections to the form of the question or the responsiveness of the answer: "Objection, leading;" "Objection, form;" and "Objection, nonresponsive." These objections shall be stated ·s phrased and will be waived if not made at the taking of the eposition. A narrative objection will not preserve the objection for the court's later determination. Upon request, the objecting party shall explain the grounds of the objection clearly and concisely, in a non-argumentative and non-suggestive manner. Objections or explanations that are argumentative or suggest answers to or otherwise coach the deponent are not permitted and can be grounds for termination of the deposition pursuant to this Rule.

5. Instructions not to answer. (no differences).

6. Suspending the deposition. (no differences).

Rule 15. Examination, Objection, and Conduct During Oral Depositions

1. **Oath; Examination.** (no differences).

2. **Time Limitation.** (no differences).

3. **Conduct during the deposition.** The oral deposition shall be conducted in the same manner 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. If the lawyers and witnesses do not comply with this rule, the court may allow statements, objections and discussions conducted during the oral deposition that reflect upon the veracity of the testimony to be introduced in evidence at trial.

4. **Objections to testimony.** Objections or explanations that are argumentative or suggest answers to or otherwise coach the deponent are not permitted and can be grounds for termination of the deposition pursuant to this Rule. Objections to the form of a question or the responsiveness of the answer are waived if not made at the taking of the deposition. A narrative objection will not preserve the objection for the court's later determination. Upon request, the objecting party shall explain the grounds of the objection clearly and concisely, in a non-argumentative and non-suggestive manner.

5. **Instructions not to answer.** (no differences).

6. Suspending the deposition. (no differences).

2. Deposition Time Limits: - Rule 15

Family law cases are unique in that they frequently include elements of real estate, partnerships, agency trusts, corporate, tax, estate planning and personal injury law, to name only a few. Experts who perform complicated tracing and characterization analysis routinely take many hours to outline their opinions in deposition. In a long marriage, it is reasonable to expect spouses' depositions to be lengthy as well. The proposed time limits on depositions will impede attorney's ability to adequately prepare for complex family law cases.

Family law cases make up a substantial percentage of the state-wide trial docket. The Supreme Court Advisory Committee has done an excellent job in revising the rules to streamline discovery in general civil trials. If those rules are applied to family law cases, however, they will adversely affect trial court dockets and will make it more difficult for the parties to settle their cases. An increase in appeals can also be reasonably anticipated. This is not to imply that family law cases are better or worse than other civil trials, but rather to recognize that, because they involve children and estates which constantly evolve, they are different.

I urge the members of the Advisory committee to build in provisions which exempt cases brought under the Family Code from the proposed discovery rules, or will permit trial judges to alter those restrictions and limitations by local rule or standing order. The State Bar of Texas Family Law Section has developed the attached proposal for discovery rules relating to family law matters. I endorse this proposal and ask that you take the appropriate steps to see that they are implemented.

My observations of this special dilemma is based upon my 21 years of practice and the last ten years exclusively in the practice of Family Law.

Thank you for your attention in this matter.

Sincerely yours,

Gary L. Nickelson

GLN/mdj
enclosure

cc: Stephen D. Susman
Prof. Alexandria Wilson Albright

from: Scott A. Brister

Rule 16. Signing, Certification, and Use of Depositions

¶ 2 Add as part of the certificate "(v) the amount of time used by each party at the deposition" to comply with Rule 15.

¶ 5 Drop the parenthetical regarding non-stenographic depos. The specifics for such depos are covered in Rule 18, and there is no reason to treat differently the court-reporter transcripts from either.

¶ 6 As footnoted on the Subcommittee Draft, I would:

(1) drop the second and fifth sentences, as it is unnecessary to say that the rules of evidence apply to evidentiary questions;

(2) drop the requirement that after-joined parties must have a similar interest to someone at the deposition. This creates satellite litigation, and if they have the right to redepose, who cares?

3) drop the last sentence. I don't think this definition is necessary.

Rule 16. Signing, Certification, and Use of Depositions

1. Signature and changes. (no differences).

2. Certification. The deposition officer shall file with the court, serve on all parties, and attach as part of the deposition transcript a certificate duly sworn by such officer stating;

(i) (no differences);
(ii) (no differences);
(iii) (no differences);
(iv) (no differences);
(v) the amount of the deposition officer's charges; and
(vii) that a copy of the certificate was served on all parties.

The clerk of the court shall tax as costs the charges for preparing the original deposition transcript.

3. Delivery. (no differences);.

4. Exhibits. (no differences);.

5. Motion to Suppress. If the deposition officer delivers the deposition transcript and serves notice thereof at least one day before the case is called for trial (30 days if the deposition was recorded by non-stenographic means), errors and irregularities in the manner in which the deposition is transcribed, signed, certified, delivered, or otherwise dealt with by the deposition officer are waived unless a motion to suppress all or part thereof is made and notice thereof is given to every other party before the trial commences.

6. Use. Any part or all of a deposition may be used for any purpose in the same proceeding in which it was taken. The Texas Rules of Civil Evidence shall be applied to each question and answer as though the witness were then present and testifying. "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 (1) if that party as an interest similar to that of any party present or represented at the taking of the deposition or who had reasonable noticee thereof, or (2) if the party has had a reasonable opportunity to redepose the deponent and has failed to exercise that opportunity. Depositions taken in different proceedings may be used subject to the provisions of the Texas Rules of Evidence. Depositions shall include (1) the original or a certified copy of a transcript of a stenographic recording complying with Rule 19, (2) the original or a certified copy of a transcript of a non-stenographic recording complying with Rule 16(5), or (3) the original or a certified copy of a nonstenographic recording of the deposition, if the applicable provisions of Rule 16(5) have been satisfied.

Rule 16. Signing, Certification, and Use of Depositions

1. Signature and changes. (no differences).

2. Certification. (The deposition officer shall file with the court, serve on all parties, and attach as part of the deposition transcript a certificate duly sworn by such officer stating;

(i) (no differences);
(ii) (no differences);
(iii) (no differences);
(iv) (no differences);
(v) the amount of time used by each party at the deposition;
(vi) the amount of the deposition officer's charges; and
(vii) that a copy of the certificate was served on all parties.

The clerk of the court shall tax as costs the charges for preparing the original deposition transcript.

3. Delivery. (no differences);.

4. Exhibits. (no differences);.

5. Motion to Suppress. If the deposition officer delivers the deposition transcript and serves notice thereof at least one day before the case is called for trial, errors and irregularities in the manner in which the deposition is transcribed, signed, certified, delivered, or otherwise dealt with by the deposition officer are waived unless a motion to suppress all or part thereof is made and notice thereof is given to every other party before the trial commences.

6. Use. Any part or all of a deposition may be used for any purpose in the same proceeding in which it was taken. "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. However, a deposition is admissible against a party joined after the deposition was taken only if that party has had a reasonable opportunity to redepose the deponent and has failed to exercise that opportunity.

from: Scott A. Brister

Rule 17. Deposition Upon Written Questions

¶ 4 Drop the phrase about Rule 24 subpoenas--it is redundant of that rule.

Rule 17. Deposition Upon Written Questions

1. Notice. (no differences).

2. Content. (no differences).

3. Additional Questions and Objections. (no differences).

4. Conducting the Deposition. The party noticing the deposition shall deliver copies of the notice and of all questions served to the deposition officer. Any person authorized to administer oaths (whether or not the person is a certified shorthand reporter) is an officer who is authorized to issue a subpoena or subpoena under Rule 24 for a written deposition, and is an officer before whom a written deposition may be taken. Such officer shall have authority when necessary to summon and swear an interpreter to facilitate the taking of the deposition. Such officer shall take the deposition on written questions at the time and place designated, shall record the testimony of the witness in response to the questions, and thereafter prepare, certify and deliver the deposition transcript pursuant to Rule 16.

Rule 17. Deposition Upon Written Questions

1. Notice. (no differences).

2. Content. (no differences).

3. Additional Questions and Objections. (no differences).

4. Conducting the Deposition. The party noticing the deposition shall deliver copies of the notice and of all questions served to the deposition officer. Any person authorized to administer oaths (whether or not the person is a certified shorthand reporter) is an officer before whom a written deposition may be taken. Such officer shall have authority when necessary to summon and swear an interpreter to facilitate the taking of the deposition. Such officer shall take the deposition on written questions at the time and place designated, shall record the testimony of the witness in response to the questions, and thereafter prepare, certify and deliver the deposition transcript pursuant to Rule 16.

from: Scott A. Brister

Rule 18. Non-Stenographic Recording

¶ 4 This is probably the least used discovery device in Texas, and accordingly the rule should not be one of the longest. I would:

(1) drop the unnecessary words in the second sentence of ¶ 1;

(2) shorten 4 (a) by dropping unnecessary words;

(3) drop 4 (b) and require complete transcripts in all cases. As the Appellate Rules Subcommittee discussed, there are big problems with designating only part of a non-stenographic recording;

(3) change "the deposition" on the last line of 4(a) to "the other evidence." It makes no sense to say that the depo should be filed when the depo should be filed; and

(4) drop ¶ 4 (c). It adds nothing to say that a certified coy is any copy that is certified.

Rule 18. Non-Stenographic Recording

Notice. Any party may cause a deposition upon oral examination to e recorded by other than stenographic means, including videotape recordings. Any party intending to make a non-stenographic recording shall file and serve reasonable prior written notice to the deponent and other parties, either in the deposition notice given pursuant to Rule 14 or otherwise, of the non-stenographic method by which the testimony will be recorded and whether a certified court reporter also will be used. 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.

2. **Conducting the Deposition.** (no differences).

3. **Signing, Certification, and Delivery.** (no differences).

4. **Use Depositions Recorded Only by Non-stenographic means.**

a. At trial or summary judgment. A non-stenographic recording or transcript of a deposition recorded only by non-stenographic means can be used at the trial or formotion for summary judgment only if the party intending to use it has obtained a complete transcript of the deposition recording from a certified court reporter. The court reporter shall obtain the original or a certified copy of the deposition recording, shall transcribe it, and shall comply with Rule to the extent applicable. The court reporter's certificate shall include a statement that the transcript was made from the original or certified copy of the deposition recording and that the transcript is a true record of the recording. If the deposition is to be used as evidence at the trial, the complete transcript must be served on all parties at least 30 days before the trial, or for summary judgment, the complete transcript must be served on all parties at the time the deposition must be filed with the court.

b. At any other hearing. A non-stenographic recording or transcript of a deposition recorded only by non-stenographic means can be used at any hearing of a motion or an interlocutory proceeding (other han a summary judgment motion) only if the party intending to use it has obtained a transcript of that portion of the deposition recording by a certified court reporter, transcribed and certified in accordance with part a above. In addition, at least 20 days before the date set for the hearing in which the deposition is to be used, the party seeking to use the deposition must file and serve a written designation specifying (1) the name of the deponent whose deposition the party intends to use; (2) the name and address of the certified court reporter that the party has asked to transcribe all or part of the deposition recording; and (3) the portions of the deposition recording that the party has requested to be included in a transcript. If the party has designated only a part of the deposition testimony, any other party may request the named court reporter to transcribe additional parts of the deposition recording at that party's own expense within 10 days of service of the designation. The deposition can be used only if the transcript is completed at least 3 days before the date of the hearing.

c. Certified copy. A certified copy of the non-stenographic recording is any copy of the original or another certified copy of the deposition recording that is accompanied by a duly sworn certificate of the person who made the copy, stating that the copy is accurate and complete.

Rule 18. Non-Stenographic Recording of Depositions

1. Notice. Any party may cause a deposition upon oral examination to be recorded by other than stenographic means, including videotape recordings. The notice must comply with Rule 14, and in addition must indicate the method of non-stenographic recording, and whether a certified court reporter also will be used. 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.

2. **Conducting the Deposition.** (no differences).

3. **Signing, Certification, and Delivery.** (no differences).

4. **Use.** A non-stenographic recording or transcript of a deposition can be used only if the party intending to use it has obtained a complete transcript of the deposition recording from a certified court reporter. The court reporter shall obtain the original or a certified copy of the deposition recording, shall transcribe it to the extent applicable in accordance with the provisions of Rule 16. The court reporter's certificate shall include a statement that the transcript is a true record of the non-stenographic recording. The complete transcript must be served on all parties at least 30 days before any trial, or for summary judgment at the time other evidence must be filed with the court.

from: Scott A. Brister

Rule 21. Compelling Production from Nonparty.

All — I would eliminate this rule and combine it with Rule 24. Otherwise, the two are redundant. To obtain production of records from a non-party, they must be subpoenaed. I see no reason to prescribe the form, time, etc. in both rules.

Rule 21: Compelling Production from Nonparty.

1. When production may be compelled. At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first, any party may have issued and served upon any person not a party to the suit a subpoena under Rule 24 compelling production of documents or tangible things within the scope of Rule 3 and within the person's care, custody, or control.

2. Notice, subpoena. A party proposing to compel production from a nonparty must give reasonable notice to every other party. The notice shall state the name of the nonparty from whom production is sought to be compelled, the time and place for the production, and shall be filed and served. The notice 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. 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 nonparty of the means, manner, and procedure for testing or sampling.

3. Time and place. The time and place designated for the production shall be reasonable. The place shall be in the county of the nonparty's residence or, where the nonparty is employed or regularly transacts business in person or at some other convenient place as may be directed by the court in which the cause is pending. A nonresident or transient person may be required to produce documents and things in the county where served with a subpoena or within 150 miles from the place of service.

from: Scott A. Brister

Rule 22. Physical and Mental Examinations

All

I suggest the following substantive changes:

(1) change this rule from a court-order-only system to a request-and-response system (see cover letter);

(2) allow an IME by a psychologist if the other side plans to call a psychologist as a witness *or* introduce a psychologist's records; and

(3) make delivery of the IME doctor's report (a) mandatory (rather than upon request), and (b) within 15 days (rather than no time specified)--or whatever period the Committee thinks is reasonable.

Rule 22. Physical and Mental Examinations

1. Order for Examination. At any time no later than 30 days before ıe end of any applicable Discovery Period or 30 days before trial, whichever occurs first, 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, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or psychologist or to produce for examination the person in his custody, conservatorship or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. Except as provided in subparagraph 4 of this rule, an examination by a psychologist may be ordered only when the party responding to the motion has identified a psychologist as an expert who will testify.

2. Report of Examining Physician or Psychologist.

a. If requested by the party against whom an order is made under this rule or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician or psychologist setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician or psychologist fails or refuses to make a report the court may exclude his testimony if offered at the trial.

b. This subdivision applies to examinations made by agreement of ıe 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.

3. Effect of No Examination. If no examination is sought either by agreement or under the provisions of this rule, the party whose mental or physical condition is in controversy shall not comment to the court or jury on his willingness to submit to an examination, on the right of any other party to request an examination or move for an order, or on the failure of such other party to do so.

4. Cases Arising Under Title II, Family Code. In cases arising under Title II, Family Code, on the court's own motion or on the motion of a party, the court may appoint:

a. one or more psychologists to make any and all appropriate mental examinations of the children who are the subject of the suit or any other parties irrespective of whether a psychologist has been listed by any party as an expert who will testify.

b. non-physician experts who are qualified in paternity testing to take blood, body fluid or tissue samples and to conduct such tests as ordered by the court.

5. Definitions. 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 22. Physical and Mental Examinations

1. Request. At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first, any party may file and serve upon any other party a Request for Physical and Mental Examination by a licensed physician or psychologist of a person whose physical or mental condition is in controversy.

2. Content. The request shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. Examination by a psychologist may be requested only when the party responding to the motion has identified a psychologist or a psychologist's records that may be used at trial. In addition, in cases arising under Title II of the Family Code, a party may request mental examinations irrespective of whether a psychologist or a psychologist's records may be used by any other party at trial, and may request testing by qualified non-physician experts to take blood, body fluid or tissue samples.

3. Response. The party upon whom the request is served shall file and serve a written response within 30 days after service of the written request (fifty [50] days if the request accompanies citation) stating that examination will be permitted as requested, or stating pursuant to Rule 7 an objection to the request and the circumstances under which the party will comply with the request. If the responding party objects to the date and time of the examination, the objection shall state sufficient alternative dates and times to allow scheduling of the examination by agreement.

4. Report. Within fifteen (15) days after the examination, the party requesting the examination shall deliver to all other parties a copy of a detailed written report of the examining physician or psychologist setting out findings, test results, diagnoses and conclusions. If a physician or psychologist fails or refuses to make a report, the court may exclude any evidence based upon such examination at trial. 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.

5. Use. The report provided in section 4 is admissible in evidence upon offer by any party. No party may comment on the failure to request, the willingness to submit to, or the objections raised in response to a request for an examination pursuant to this rule.

from: Scott A. Brister

Rule 23. Entry Upon Property

All — Change this rule from a court-order-only system to a request-and-response system (see cover letter).

SCOTT A. BRISTER
JUDGE, 234TH DISTRICT COURT
CIVIL COURTS BUILDING
HOUSTON, TEXAS 77002
(713)755-6262
July 13, 1995

Mr. Stephen Susman
Susman Godfrey L.L.P.
1000 Louisiana, Suite 5100
Houston, Texas 77002-5096

Dear Steve,

Enclosed please find my comments and suggestions regarding the Discovery Subcommittee's draft discovery rules. On the more extensive ones, I have also enclosed a side-by-side version, with the Subcommittee's version on the left, and my suggestions on the right.

While I hope all of the suggestions will be considered, I want to emphasize two. I think IME's and entry on property should be changed from a court-order-only system to the request-and-response system used with every other discovery device because (1) they are routinely handled in this manner already, (2) requiring a court order only makes them more cumbersome and expensive, and (3) attorneys will be facing many new rules, and it might ease the blow if they know that they all work in about the same way.

The second is that I would drop the artificial distinction between "written discovery" and "all other discovery." The only items that aren't written discovery appear to be (1) IME's (if my suggestion above is adopted, IME's would become "written discovery"), (2) motions to enter and inspect property (ditto), and (3) depositions. If the reason for this distinction is to eliminate the need to supplement deposition answers, I think that's a bad idea. There <u>should</u> be a duty to supplement <u>critical</u> deposition answers, even if it is "indirect" supplementation as allowed by the Subcommittee's Rule 5(2). As to non-critical details, the Subcommittee's Rule 6 does not require supplementation even with written discovery, so there is no reason to make a distinction.

I hope these will be of some help. Please call me if you have any questions about them. I hope to see you at the subcommittee meeting in Austin on July 21st.

Very truly yours,

Hon. Scott A. Brister
Judge, 234th District Court

Rule 23. Motion for Entry Upon Property

1. Motion. At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first, the court in which the action is pending may order any person, including a person not a party to the pending suit, to allow entry upon designated land or other property for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon when the land or property is relevant to the subject matter of the action. The order may be made only on motion for good cause shown and shall specify the time, place, manner, conditions, scope of the inspection, and a description of any desired testing or sampling, sufficient to inform the person of the means, manner and procedure for testing or sampling, and the persons or persons by whom the inspection, testing or sampling is to be made.

2. Service. A true copy of the motion and order setting hearing shall be served on the person in possession or control of the property and all parties. If the person in possession or control of the property is not a party to the action, service shall be made in the same manner as service of citation as provided by Rule 106.

Rule 23. Motion for Entry Upon Property

1. Request. At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first, any party may file and serve upon any person or entity, including a non-party, a Request for Entry upon designated land or other property for the purpose of inspection, measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon. If the person in possession or control of the property is not a party, service shall be made in the manner provided for service of citation in Rule 106.

2. Content. The request shall specify the time, place, manner, conditions, and scope of the inspection, a description of any desired testing or sampling sufficient to inform the person of the means, manner and procedure for testing or sampling, and the persons or persons by whom the inspection, testing or sampling is to be made.

3. Response. The person or entity upon whose property request for entry is sought shall file and serve a written response within 30 days after service of the written request (fifty [50] days if the request accompanies citation) stating that entry will be permitted as requested, or stating pursuant to Rule 7 an objection to the request and the circumstances under which entry will be allowed. If the respondent objects to the date and time of the entry, the objection shall state sufficient alternative dates and times to allow scheduling by agreement.

from: Scott A. Brister

Rule 24. Subpoena

¶¶ 1, 3, & 4 Most of these paragraphs and of Rule 21 appear to be repetitious of the requirements found in other Rules. For example:

Rule 24 (4)(a) is identical to Rule 11 (4)(b)
Rule 24 (4)(b) is very similar to Rule 7 (2)(b)
Rule 24 (4)(c) is very similar to Rule 14 (2)(c)
Rule 21 (1) is very similar to Rule 11 (1)
Rule 21 (2) is very similar to Rule 11 (2)
Rule 21 (3) is identical to Rule 14 (2)(a)

The rule is a lot shorter and simpler if it incorporates other rules by reference.

¶ 2 I would drop the subparts. Each sentence does not need its own paragraph.

¶ 3 (e) I would drop this provision. There are scores of statutes and regulations protecting various matters and providing procedures governing disclosure. Unless someone has researched all of them, we shouldn't draft a rule that ends up in conflict with some. For example, Art. 342-705 requires a party subpoenaing bank records to give the account holder 10 days notice; the Subcommittee draft would allow less.

¶ 3 I would eliminate the differences in the treatment between parties and non-parties. The only significant differences appear to be:

(1) the 30 days for parties to object to production of documents is cut for non-parties to 10 days, or even less so long as it is "reasonable." Why should a person who is not involved, has not retained an attorney, and knows nothing of the proceedings have less time to object than a party?

(2) the duty on parties to respond to production requests to the extent there is no objection also disappears. Non-parties should have the same duty to comply in good faith.

Rule 21. Compelling Production from Nonparty.

All I would eliminate this rule and combine it with Rule 24. Otherwise, the two are redundant. To obtain production of records from a non-party, they must be subpoenaed. I see no reason to prescribe the form, time, etc. in both rules.

Rule 24: Subpoena

1. Form; Issuance.

a. The style of every subpoena shall be "The State of Texas." Every subpoena shall:

(1) state the style of the suit, its cause number, the court in which the suit is pending, the date of its issuance, and the party at whose instance the witness is summoned;

(2) command the person to whom it is directed to

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

(b) produce and permit inspection and copying of designated documents or tangible things in the possession, custody or control of that person, , at a time and place therein specified, and produce such documents as they are kept in the usual course of business or organized and labeled to correspond with the designated categories. A person commanded under this subsection need not appear in person at the place of production or inspection unless a command to attend and give testimony at a deposition, hearing or trial is joined with a command under this subsection or issued and served separately.

b. The subpoena shall issue from the court in which the suit is pending, except that a subpoena for a deposition in a sister state or foreign country shall be issued pursuant to Rule 188.

c. The clerk of the district or county court, or justice of the peace shall issue the subpoena and a copy thereof for each witness subpoenaed to a party requesting it, who shall complete it before service. An attorney authorized to practice in the State of Texas, as an officer of the court, may also issue and sign a subpoena on behalf of the court. Any officer authorized to take depositions and any certified short-hand reporter may issue and sign a subpoena for a deposition or production, and shall do so immediately upon proof of service of a notice to take a deposition under Rule 14 or 17, or a notice to compel production under Rule 21.

2. Service.

a. Any sheriff or constable of the State of Texas or any person who is not a party and is not less than 18 years of age may serve a subpoena by delivering a copy to the witness and tendering to that person any fees required by law.

b. Subject to the provisions of applicable law, a subpoena may be served at any place within the State of Texas.

c. Proof of service shall be made by filing the witness' signed written memorandum attached to the subpoena showing acceptance thereof or a statement of the date and manner of service and the names of the person served, certified by the person who made the service.

3. Protection of Nonparties Subject to Subpoenas

a. A party responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense upon a nonparty subject to that subpoena.

b. Subject to paragraph (4)(b) of this rule, a nonparty commanded to produce and permit inspection and copying of designated documents and things, within 10 days after service of the subpoena or before the time specified for compliance if such time is less than 10 days after service, may serve upon the party at whose instance the witness is summoned written objection to inspection or copying of any or all of the designated materials. If objection is made, the party at whose instance the witness is summoned shall not be entitled to inspect and copy the materials except pursuant to court order. At any time after an objection is made, the party serving the subpoena may, upon notice to the person commanded to produce, move for an order to compel the production.

c. Within 10 days after service of the subpoena or before the time specified for compliance if such time is less than 10 days after service, the person served with the subpoena may, upon notice to the party at whose instance the witness is summoned, move for a protective order in the court in which the action is pending or a district court in the county in which the subpoena was served. The court shall make such orders in the interests of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights.

Rule 24: Subpoena

1. Issuance. A subpoena shall issue from the court in which the suit is pending, except that a subpoena for a deposition in a sister state or foreign country shall be issued pursuant to Rule 188. The clerk of the district or county court, or justice of the peace shall issue the subpoena and a copy thereof for each witness subpoenaed to a party requesting it, who shall complete it before service. An attorney authorized to practice in the State of Texas, as an officer of the court, may also issue and sign a subpoena on behalf of the court. Any officer authorized to take depositions and any certified shorthand reporter may issue and sign a subpoena for a deposition or production.

2. Content. The style of every subpoena shall be "The State of Texas." Every subpoena shall state the style of the suit, its cause number, the court in which it is pending, the date of issuance, and the party at whose instance the witness is summoned. The subpoena shall command the person to whom it is directed to attend and give testimony for a deposition, hearing or trial, or produce and permit inspection and copying of designated documents or tangible things. A subpoena for a person to appear and give testimony at a deposition must meet the notice, content, and other requirements of Rule 14. A subpoena to produce documents must meet the request and content requirements of Rule 11, as well as the time and place requirements of Rule 14.

3. Service. Any sheriff or constable of the State of Texas or any person who is not a party and is not less than 18 years of age may serve a subpoena by delivering a copy to the witness and tendering to that person any fees required by law. Subject to the provisions of applicable law, a subpoena may be served at any place within the State of Texas. Proof of service shall be made by filing the witness' signed written memorandum attached to the subpoena showing acceptance thereof or a statement of the date and manner of service and the name of the person served, certified by the person who made the service.

4. Response. A person served with a subpoena to produce documents must respond to the subpoena pursuant to Rule 11, including objecting or asserting privileges pursuant to Rule 7. Such person need not appear in person at the place of production or inspection unless subpoenaed for deposition as well. A person served with a subpoena to give a deposition must comply with Rules 14 and 15. A person served with a subpoena to give testimony at a hearing or trial may make its objections to the court at the time specified for compliance.

5. 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.

from: Alex Wilson Albright

The current rules:

Our current draft of Rule 1.1.a. says that no amendment that increases damages above the $50,000 limit shall be allowed at any time that will "unduly prejudice" the opposing party and in no event later than 30 days before trial. This appears to be a limitation upon Rule 63. The current draft of Rule 63 requires leave of court to amend pleadings within 60 days of the end of the Discovery Period, or 5 days after notice of receipt of the first trial setting (this was from our draft that had a discovery window that ended 30 days before the first setting). The court is to allow the amendment unless there is insufficient time to complete discovery needed as a result of the amendment. If the court makes a finding that there is insufficient time to complete discovery, the court must deny leave or extend the discovery period. It cannot grant leave and extend the discovery period, however, if it will "unreasonably delay" the trial.

In a Tier 1 case, the discovery period extends until 30 days before trial. Should a party seek an amendment that increases the damages, I suppose the court would consider whether the amendment was made within 30 days of trial (then it automatically would not be allowed); whether the amendment "unduly prejudices" the opponent; and whether allowing it would unreasonably delay the trial. This seems unduly complicated and I'm not sure it really gets us where we want to be. I think a major problem is that we have not focused upon the amendment rule since very early in our work.

Even in Tier 2 or 3 cases, our draft Rule 63 doesn't work well. Extending the discovery period doesn't always solve the problem -- the party may need additional deposition hours. Also, should not having enough time to complete discovery be the only standard for not allowing an amendment? I don't think so. There may be situations where the amendment should not be allowed for some other reason. Also, while there is a standard for denying leave to amend, there is no standard for ruling on a motion to strike before the

time for seeking leave arises. The time periods set out are confusing because they do not apply to our current scheme.

My revision:

My proposed Rule 63 works much like the current rule, but has a longer time period where leave of court must be obtained for filing new pleadings, and adds a standard that takes needed discovery into account. The rule allows new pleadings anytime, so long as any new discovery can be completed within the applicable discovery limitations or the new pleading does not prejudice the opponent. (The language regarding "prejudice" was taken from current trial amendment rule, Rule 66. Current Rule 63 uses the word "surprise," but I think the Rule 66 language better conveys our meaning. The cases really make no distinction between the two.) Leave of court must be obtained if the amendment is offered within 60 days of the end of the discovery period; otherwise, it can be filed subject to a Motion to Strike. If the court finds that discovery cannot be completed or the new pleading will otherwise prejudice the opponent, the court can either (1) not allow the amendment (by not granting leave or granting the motion to strike) or (2) allowing the amendment and also allowing specific additional discovery IF it will not unduly delay the trial. Thus, the court must take the real trial date into account in determining whether to allow the amendment.

Rule 66 is left as is. It seems to be working. Rule 67 is left alone as well. It works with this proposed system just as it works now. I don't like the language, but I don't think this is the time to consider amendments. Rule 70 should be incorporated with Rule 63. It is a sanctions rule, however, so rather than considering it now, I have written a note to the Sanctions Subcommittee.

I have also changed Rule 1 so that in a Tier 1 case, where a pleading was offered that increased the amount of damages, the court would go through the Rule 63 analysis, BUT if the amendment is offered within 30 days of trial, it is presumptively prejudicial to the party opposing the amendment under Rule 63. Therefore, the burden is put on the party offering the amendment rather than the person opposing the amendment to show why the amendment should be allowed.

Drafts Attached

Attached is a redlined draft of my proposed changes, redlined from the 6/30/95 draft that is currently being distributed, as well as a non-redlined draft of my proposed Rules 1.1.a. and Rule 63.

RULE 63. Amendments and Responsive Pleadings

Parties may file new pleadings, amend and supplement their pleadings and respond to other parties' pleadings at any time unless discovery made necessary by the new pleading cannot be completed within the applicable discovery limitations or the new pleading will otherwise prejudice the opposing party in maintaining its action or defense upon the merits. ~~without l~~Leave of court is required before filing however, if the new pleading is offered for filing within ~~sixty~~no later than sixty (60) days of~~before~~ the end of any applicable~~the~~ Ddiscovery Pperiod. ~~or five (5) days after receipt of notice of the first trial setting, whichever is later. 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~~If ~~there is insufficient time to complete~~ discovery ~~that would be~~ made necessary by the new pleading cannot be completed within the applicable discovery limitations, or if the new pleading will otherwise prejudice the opposing party in maintaining its action or defense upon the merits, ~~amendment, supplement, or response, in which case~~ either (1) the pleading shall not be allowed ~~leave shall be denied~~ or (2) specific additional discovery shall be allowed ~~the discovery period extended. Leave shall not be granted~~ if it will~~would~~ not unreasonably delay the trial.

Note to Sanctions Subcommittee

This is a sanctions rule, so the Discovery Subcommittee has made no changes. It should probably be incorporated into Rule 63. The Sanctions Subcommittee should consider the appropriate sanction that might be imposed if the late amendment requires additional discovery or a delay in trial under Rule 63.

RULE 63. Amendments and Responsive Pleadings

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from: Alex Wilson Albright

My revision:

My proposed Rule 63 works much like the current rule, but has a longer time period where leave of court must be obtained for filing new pleadings, and adds a standard that takes needed discovery into account. The rule allows new pleadings anytime, so long as any new discovery can be completed within the applicable discovery limitations or the new pleading does not prejudice the opponent. (The language regarding "prejudice" was taken from current trial amendment rule, Rule 66. Current Rule 63 uses the word "surprise," but I think the Rule 66 language better conveys our meaning. The cases really make no distinction between the two.) Leave of court must be obtained if the amendment is offered within 60 days of the end of the discovery period; otherwise, it can be filed subject to a Motion to Strike. If the court finds that discovery cannot be completed or the new pleading will otherwise prejudice the opponent, the court can either (1) not allow the amendment (by not granting leave or granting the motion to strike) or (2) allowing the amendment and also allowing specific additional discovery IF it will not unduly delay the trial. Thus, the court must take the real trial date into account in determining whether to allow the amendment.

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RULE 66. TRIAL AMENDMENT. [CURRENT RULE]

_____–If evidence is objected to at the trial on the ground that it is not within the issues ~~made by the~~ pleading~~g~~, or if during the trial any defect, fault or omission in a pleading, either of form or substance, is called to the attention of the court, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the allowance of such amendment would prejudice that party~~him~~ in maintaining its~~his~~ action or defense upon the merits. The court may grant a postponement to enable the objecting party to meet such evidence.

from: Alex Wilson Albright

My revision:

My proposed Rule 63 works much like the current rule, but has a longer time period where leave of court must be obtained for filing new pleadings, and adds a standard that takes needed discovery into account. The rule allows new pleadings anytime, so long as any new discovery can be completed within the applicable discovery limitations or the new pleading does not prejudice the opponent. (The language regarding "prejudice" was taken from current trial amendment rule, Rule 66. Current Rule 63 uses the word "surprise," but I think the Rule 66 language better conveys our meaning. The cases really make no distinction between the two.) Leave of court must be obtained if the amendment is offered within 60 days of the end of the discovery period; otherwise, it can be filed subject to a Motion to Strike. If the court finds that discovery cannot be completed or the new pleading will otherwise prejudice the opponent, the court can either (1) not allow the amendment (by not granting leave or granting the motion to strike) or (2) allowing the amendment and also allowing specific additional discovery IF it will not unduly delay the trial. Thus, the court must take the real trial date into account in determining whether to allow the amendment.

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RULE 67. AMENDMENTS TO CONFORM TO ISSUES TRIED WITHOUT OBJECTION. [CURRENT RULE]

_____–When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. In such case such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made by leave of court upon motion of any party at any time up to the submission of the case to the Court or jury, but failure so to amend shall not affect the result of the trial of these issues; provided that written pleadings, before the time of submission, shall be necessary to the submission of questions, as is provided in Rules 277 and 279.

from: Alex Wilson Albright

My revision:

My proposed Rule 63 works much like the current rule, but has a longer time period where leave of court must be obtained for filing new pleadings, and adds a standard that takes needed discovery into account. The rule allows new pleadings anytime, so long as any new discovery can be completed within the applicable discovery limitations or the new pleading does not prejudice the opponent. (The language regarding "prejudice" was taken from current trial amendment rule, Rule 66. Current Rule 63 uses the word "surprise," but I think the Rule 66 language better conveys our meaning. The cases really make no distinction between the two.) Leave of court must be obtained if the amendment is offered within 60 days of the end of the discovery period; otherwise, it can be filed subject to a Motion to Strike. If the court finds that discovery cannot be completed or the new pleading will otherwise prejudice the opponent, the court can either (1) not allow the amendment (by not granting leave or granting the motion to strike) or (2) allowing the amendment and also allowing specific additional discovery IF it will not unduly delay the trial. Thus, the court must take the real trial date into account in determining whether to allow the amendment.

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RULE 70. PLEADING: SURPRISE: COST. [CURRENT RULE]

_____–When either a supplemental or amended pleading is of such character and is presented at such time as to take the opposite party by surprise, the court may charge the continuance of the cause, if granted, to the party causing the surprise if the other party satisfactorily shows that he is not ready for trial because of the allowance of the filing of such supplemental or amended pleading, and the court may, in such event, in its discretion require the party filing such pleading to pay to the surprised party the amount of reasonable costs and expenses incurred by the other party as a result of the continuance, including attorney fees, or make such other order with respect thereto as may be just.

7-18-95

RULE 13. EFFECT OF PRESENTING PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS

(a) Presenting pleadings, motions, and other papers. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, motion, or other paper, an attorney or unrepresented party is certifying that to the best of the presenter's knowledge, information, and belief, formed after reasonable inquiry:

(1) the pleading, motion, or other paper is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or by the establishment of new law;

(3) the allegations and other factual contentions in the pleading, motion, or other paper have evidentiary support, or, for specifically identified allegations or factual contentions, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) each denial in a pleading, motion, or other paper of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief; provided however, that the filing of a general denial under Rule 92 does not violate this provision.

(b) Motion for sanctions. A party seeking sanctions under this rule shall file a motion for sanctions separately from other motions or requests, and shall describe the specific conduct alleged to violate paragraph (a) of this rule. The motion shall be served at least twenty-one (21) days before being filed or presented to the court; if the challenged pleading, motion, or other paper is withdrawn or corrected within that twenty-one (21) day period, the motion shall not be filed or presented to the court. The court may award to a part prevailing on a motion under this rule the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

(c) Court's initiative. The court on its own initiative may enter an order describing the specific conduct that appears to violate paragraph (a) of this rule and directing the alleged violator to show cause why the conduct has not violated the rule.

(d) Sanctions. A court that determines that a person has presented a motion, pleading, or other paper in violation of paragraph (a) of this rule may impose a sanction on the person, a party represented by the person, or both. Any sanction shall be limited to what

is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated. A sanction may include any of the following:

(1) an order directing the violator to perform, or refrain from performing, an act;

(2) an order to pay a penalty into court;

(3) an order to pay the other party the amount of the reasonable expenses incurred by the other party because of the presentation of the pleading, motion, or other paper, including reasonable attorney's fees; and

(4) an award of an appropriate amount of costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation.

The court may not award monetary sanctions against a represented party for a violation of paragraph (a)(2). The court may not award monetary sanctions on its own initiative unless the court issues its show-cause order before a voluntary dismissal or voluntary settlement of the claims made by or against the party or the party's attorney against whom sanctions are proposed.

An order under this rule shall contain written findings, or be supported by oral findings on the record, stating specifically (1) the conduct meriting sanctions, and (2) why a lesser sanction would be ineffective.

Except with respect to motions, pleadings, and other papers involving post-judgment discovery under Rule 162a, the trial court may grant relief under this rule only while the court has plenary jurisdiction.

(e) Exception. This rule is inapplicable to discovery requests, responses and objections.

RULE 166d. FAILURE TO MAKE OR COOPERATE IN DISCOVERY: REMEDIES

1. **Procedure.**

(a) Motion. Any person affected by a failure of another person to respond to or supplement discovery, or by an abuse of the discovery process in seeking or resisting discovery, may file a motion specifically describing the violation. The motion shall be filed in the court in which the action is pending, except that a motion involving a person or entity who is not a party shall be filed in any district court in the district where the discovery is to take place. Nonparties affected by the motion shall be served as if parties. The motion shall contain a certificate that the movant (or the movant's counsel) has spoken with the opposing party (or the opposing party's counsel if represented by counsel) in person or by telephone to try to resolve the discovery dispute, or has made diligent attempts to do so, and that such efforts have failed.

(b) Hearing. No oral hearing is required for motions requesting relief under paragraph 2. Oral hearing is required for motions requesting sanctions under paragraph 3, unless waived by those involved.

(c) Order. An order under this rule may compel, limit or deny discovery, award expenses pursuant to paragraph 2, and impose sanctions pursuant to paragraph 3. The order shall be in writing. An order granting relief or imposing sanctions shall be against the party, attorney, law firm, or other person or entity whose actions necessitated the motion. An order imposing sanctions under paragraph 3 of this rule shall contain written findings, or be supported by oral findings on the record, stating specifically (1) the conduct meriting sanctions, and (2) why a lesser sanction would be ineffective.

2. **Expenses for compelling, limiting, or denying discovery.** The court may make an award of expenses, including attorney's fees, in connection with a motion made pursuant to paragraph 1 or a written response to such a motion, only if the court finds that: (a) the amount of expenses, including attorney's fees, incurred in connection with the prosecution or defense of the motion, is unreasonably burdensome on the party seeking relief, and (b) the party against whom relief is sought was not reasonably justified in seeking or resisting the discovery at issue.

3. **Sanctions.**

(a) Sanctionable conduct. In addition to or in lieu of the relief provided above, the court may impose one or more of the sanctions set forth in subparagraph (b) below if the court finds that:

(i) a person subject to a discovery order, other than a Discovery Control Plan under Rule 1, has failed to comply with the order; or

(ii) a party, a party's attorney, or a person under the control of a party: (A) has disregarded a rule, a Discovery Control Plan, or subpoena repeatedly or in bad faith; (B) has destroyed evidence in bad faith or engaged in other conduct that an order compelling, denying, or limiting discovery cannot effectively remedy; or (C) has repeatedly made discovery responses that are untimely, clearly inadequate or made for purposes of delay or discovery requests or objections to discovery that are not reasonably justified; or (D) has otherwise abused the discovery process in seeking, making or resisting discovery.

(b) *Sanctions.* A court may impose any of the following sanctions that are just under the circumstances:

(1) Reprimanding the offender;
(2) Disallowing further discovery in whole or in part;
(3) Assessing discovery or trial expenses, including attorney's fees caused by the sanctionable conduct;
(4) Deeming certain facts or matters to be established for the purposes of the action;
(5) Barring introduction of evidence supporting or opposing designated claims or defenses;
(6) Striking pleadings or portions thereof, staying further proceedings until an order is obeyed, dismissing with or without prejudice the action or any part thereof, or rendering a default judgment;
(7) Granting the movant a monetary award in addition to or in lieu of actual expenses; or
(8) Making such other orders as are just.

4. **Time for Compliance.** Orders under this rule shall be operative at such time as directed by the court. If a party contends that monetary award precludes access to the court, the district judge must either (i) provide that the award is payable only at a date that coincides with or follows entry of a final order terminating the litigation or (ii) makes written findings or oral findings on the record after a hearing that the award does not preclude access to the court.

5. **Review.** An order under this rule shall be subject to review on appeal from the final judgment by any person or entity affected by the order.

Comment. Paragraph (5) does not change or address the availability of mandamus relief in sanctions proceedings. *See, e.g., Walker v. Packer, 827 S.W.2d 833 (Tex. 1992).*

[??] *Nature of Hearing and Evidence.* Due process requires that, before sanctions are imposed, the alleged offender be afforded fair notice and an opportunity to be heard. The procedure employed may vary with the circumstances, provided that due process requirements are satisfied. The court, in its discretion, shall determine whether to hold a

hearing on sanctions under consideration, as well as the type of evidence to be considered. See [Rule on Hearings, Task Force on Revision of the Texas Rules of Civil Procedure]. A hearing is ordinarily required prior to the issuance of any sanction that is based upon a finding of bad faith on the part of the alleged offender. A hearing is appropriate whenever it would assist the court in its consideration of the sanctions issue or would significantly assist the alleged offender in the presentation of his or her defense.

RULE 4. DISCOVERY PRIVILEGES

1. **Privileges.** Any matter protected from disclosure by any privilege is not discoverable.

2. **Work Product Privilege.**

(a) Work Product Defined. Work product is any communication made or material prepared in anticipation of litigation or for trial by or for a party or a party's representative, including the party's attorney, consultant, surety, indemnitor, insurer, or agent.

(b) Protection of Work Product.

(1) Protection of Attorney Mental Processes. A judge may not order discovery of the work product of an attorney or an attorney's representative that contains the attorney's mental impressions, opinions, conclusions, and legal theories.

(2) Protection of Other Work Product. A judge may not order discovery of any other work product except on a showing that the party seeking discovery has substantial need of the materials in the preparation of that party's case and 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. Notwithstanding subdivision (1), disclosure ordered pursuant to subdivision (2) may incidentally disclose by inference attorney mental processes otherwise protected under subdivision (1). In such a circumstance, the judge shall protect against the incidental disclosure of attorney mental processes to the extent possible.

(4) Limiting Disclosure of Mental Processes. If a judge orders discovery of work product pursuant to this Rule, the judge shall, to the extent possible, protect against the disclosure of mental impressions, opinions, conclusions, or legal theories.

(c) Protection of Consulting Experts. A consulting expert's identity, mental impressions, and opinions are not discoverable. A consulting expert is an expert who has been informally consulted, retained, or specifically employed by a party in anticipation of litigation or in preparation for trial, who will not be called to testify as an expert, and whose mental impressions and opinions have not been reviewed by a testifying expert.

(d) Exceptions. The following are discoverable, even if made or prepared in anticipation of litigation or for trial:

(1) Experts. The information concerning experts discoverable under Rule 10.

(2) Trial Witnesses. Trial witnesses discoverable under Rule 3.2(d).

(3) Witness Statements. Witness statements discoverable under Rule 3.2(h).

(4) Trial Exhibits. Trial exhibits if their disclosure is ordered pursuant to Rule 166.

(5) Facts. The relevant facts, however required, within the knowledge of any party or its representatives, including the identity of persons with knowledge of relevant facts. Although a communication or document containing relevant facts may be privileged under this rule, this rule does not prevent discovery of the facts contained therein by means other than the discovery of the communication or document.

(6) Contentions. A party's contentions regarding legal theories or the factual bases for the claims or defenses of that party discoverable under Rule 12.2.

(7) Photographs. 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.

(8) Matters Within an Exception to the Attorney-Client Privilege. Any work product created under circumstances within exceptions to the attorney-client privilege in Texas Rule of Civil Evidence 503(d).

Rule 3(2)(e)

e. Expert Witnesses: A party may obtain discovery of the identity of testifying expert witnesses and information relating to those witnesses as provided in Rule 10, including facts known, mental impressions and opinions of the expert which were acquired or developed in preparation for trial or in anticipation of litigation of the case.

(1) Testifying Expert: A testifying expert is an expert who may be called to testify by a party or an expert whose mental impressions or opinions have been reviewed by an expert who may be called to testify at trial.

(2) Consulting Expert: A consulting expert is an expert who has been informally consulted, retained or specially employed by a party in anticipation of litigation or in preparation for trial; but, who will not be called to testify. A consulting expert's identity, mental impressions, and opinions are not discoverable, pursuant to Rule 4(

(3) Expert Witness With Knowledge or Relevant Facts: When a testifying or consulting expert has acquired knowledge of relevant facts not in preparation for trial or in anticipation of litigation, the identity, location and a brief statement of the expert's connection with the case are discoverable from the party retaining the expert. The facts known by the expert, not acquired in preparation for trial or in anticipation of litigation, are discoverable by deposition from the expert.

(4) Determination of Status: A party must designate testifying experts in accordance with the provisions of Rules 9 and 10.

Rule 25 Medical Records of Non-Party

Before requesting production of medical records of a non-party and before serving a subpoena upon any custodian of records seeking the medical records of a non-party, the party seeking the records shall first serve the non-party with a copy of the subpoena. A request or subpoena which seeks medical records without identifying specific individuals and which seeks only records redacted of any individual-identifying information is not subject to this requirement. Any other exception to the requirement of this rule may be made only by court order for good cause shown. Nothing in this rule excuses compliance with laws concerning the confidentiality of medical records.

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August 14, 1995

Honorable Scott A. Brister
234th District Court
Room 206
301 Fannin Street
Houston, TX 77002

Mr. Stephen Yelenosky
Advocacy, Incorporated
7800 Shoal Creek Boulevard
Suite 171-E
Austin, TX 78757

Re: Court Rules Committee

Gentlemen:

Following is my recommendation with respect to the production of the medical records of non-parties:

> "When the production of medical records of a non-party is sought and the non-party has not signed a medical authorization the party seeking such production shall do so by oral or written deposition. The non-party whose records are sought shall be served with notice of deposition in the same manner as required under these rules for service of notice to a party unless otherwise ordered by the Court upon a showing of good cause by the party seeking such records. However, if the identity of the non-party whose records are being sought is not directly or indirectly being disclosed by production of such records notice pursuant to this rule shall not be required."