SCAC MEETING AGENDA (3rd AMENDED)
Friday, September 16 thru Saturday, September 17, 2016
9:00 a.m.

Location: **Texas Associations of Broadcasters**
502 E. 11th Street, #200
Austin, Texas 78701
(512) 322-9944

1. **WELCOME (Babcock)**

2. **STATUS REPORT FROM CHIEF JUSTICE HECHT**

   Chief Justice Hecht will report on Supreme Court actions and those of other courts related to the Supreme Court Advisory Committee since the June 2016 meeting.

3. **TEXAS RULE OF CIVIL PROCEDURE 183**

   523-734 Sub-Committee Members:
   Mr. Carl Hamilton – Chair
   Mr. L. Hayes Fuller – Vice
   Mr. Eduardo Rodriguez
   Mr. Roger Hughes
   Ms. Trish McAllister
   Ms. Briana Stone
   Ms. Cathryn Ibarra

   (a) Proposed TRCP 183
   (b) Interpreter Qualification
   (c) Report TRCP 183 FINAL
   (d) Language Access Statute Cheat Sheet FINAL
   (e) ABA Standard 2.3
   (f) Executive Order 13166
   (g) DOJ 2002 Guidelines
   (h) DOJ's Fact on Language Access Plans
   (i) 28 CFR 42.104
   (j) Tex. S. Ct. and OCA's Language Access Plans

4. **TEXAS RULE OF APPELLATE PROCEDURE 49**

   Appellate Sub-Committee Members:
   Prof. Bill Dorsaneo – Chair
   Ms. Pamela Baron – Vice
   Hon. Bill Boyce
   Hon. Brett Busby
   Prof. Elaine Carlson
   Mr. Frank Gilstrap
   Mr. Charles Watson
   Mr. Evan Young
   ***Mr. Scott St*olley**

   (k) Rule 49 (First Alternative)

(l) Rule 49 (Second Alternative)

5. **DISCOVERY RULES**

171-205 Sub-Committee Members:

Mr. Robert Meadows - Chair
Hon. Tracy Christopher – Vice
Prof. Alexandra Albright
Hon. Jane Bland
Hon. Harvey Brown
Mr. David Jackson
Ms. Cristina Rodriguez
Hon. Ana Estevez
Mr. Kent Sullivan

(m) 2016-6-8 Email from R. Meadows to the SCAC
(n) 2016-6-5 Full Text Comparison; TRCP and FRCP
(o) 2016-6-5 Matched Comparison; TRCP and FRCP
(p) 2016-9-13 Letter of R. Meadows to C. Babcock
(q) Discovery Subcommittee Proposed Amendments (FINAL)
(r) Discovery Subcommittee Future Issues (FINAL)

6. **PROPOSED APPELLATE SEALING RULE AND RULE 76a**

Appellate Sub-Committee Members:

Prof. Bill Dorsaneo – Chair
Ms. Pamela Baron – Vice
Hon. Bill Boyce
Hon. Brett Busby
Prof. Elaine Carlson
Mr. Frank Gilstrap
Mr. Charles Watson
Mr. Evan Young
***Mr. Scott St*olley**

(s) Rule 9 – REDRAFT (August 31, 2016)
(t) Rule 193.4 (September 7, 2016 DRAFT)
(u) Tex. R. Civ. P. 76a (Suggested Revisions-September 7, 2016)

PROPOSED Texas Rule of Civil Procedure 183

183. Interpreters and Translators

(a) *Appointed by the court.* **When needed for effective communication or when required by law**, the court must appoint a qualified interpreter or translator for court proceedings involving a party or witness with a **communication disability** or **with** limited English proficiency.[1]

(b) *Definitions*.

(1) *Court proceeding*. Court proceeding includes the proceedings listed in §57.001(7) of the Texas Government Code.

(2) *Communication Disability*. Communication disability means a disability that inhibits the individual's comprehension of the proceedings or communication with others.[2]

(3) *Limited English Proficiency.* Limited English proficiency means that the person does not speak English as a primary language or has a limited ability to read, write, speak, or understand English.[3]

(4) Qualified. **Qualified means a competent interpreter or translator who is licensed or certified when [available or] required by law. When the court may appoint an interpreter or translator who is not licensed or certified, the interpreter or translator must**

a. **qualify as an expert under the Texas Rules of Evidence;**[4]

b. **be at least 18 years of age;**

c. **not be a party; and,**

d. **unless agreed by all parties and approved by the court, not be a witness, a relative of a party or witness, or a counsel in the proceeding.**

(c) *Payment of Fees*.

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[1] Proposed Rule 183 covers interpreters (translating oral communication) and translation (translating written materials). Currently, Tex. R. Evid. 1009(g) may appoint a translator "if necessary" and tax the reasonable value of the translator's services as court costs. Rule 1009(g) may need revision to conform to the proposed Tex. R. Civ. P. 183. A similar rule should be added to the Justice Court rules, which currently do not address interpreters or translators. Rule 183 would be a separate basis to appoint to avoid inadvertently repealing Tex. Gov't Code §57.002 under Tex. Gov't Code §22.004. §57.002 requires appointment on motion. The proposed amendment would require proof the interpreter is needed for "effective communication," but §57.002 has no such requirement.

[2] See Tex. Gov't Code §57.001(4). Disability is preferred to the term "impaired."

[3] Definition is derived from the Department of Justice's "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Person." 67 Fed. Reg. 41455 (6/18/2002).

[4] This proposal attempts to reconcile the use of licensed or certified interpreters with practical reality such interpreters may not be readily available. Tex. R. Evid. 604 and 1004 require interpreters and translators (respectively) be "qualified," but leave the qualifications undefined. Fed. R. Evid. 604 requires interpreters be qualified as an expert under Fed. R. Evid. 702. 28 U.S.C. §1827(a) requires federal court use O.C.A. certified interpreters when reasonably available. Tex. Gov't Code §57.002 requires licensed or certified interpreters; they must be at least 18 years of age. Section 57.002 permits uncertified/unlicensed interpreters in counties under 50,000 in population, in larger counties if no interpreter is available within 75 miles, or when allowed by Tex. Civ. Prac. & Rem. Code §21.021. The other restrictions are based on anecdotal information that some court have permitted family members of parties to interpreter, e.g., in domestic cases a person charged with abuse has been permitted to testify for the victim.

(1) *Reasonable Compensation*. When appointing an interpreter or translator, the court shall determine a reasonable fee for the interpreter's or translator's services.

(2) *Fees Taxed as Costs.* At the request of the clerk or on motion of any party or on the court's own motion, the court may tax as court costs the reasonable fee of any interpreter or translator utilized during court proceedings**. Fees for interpretation or translation services provided though the court or otherwise paid for with public funds must not be taxed as costs.**

(3) *When Fees May Not be Taxed as Costs*. In no case shall the court tax these fees as costs against:

i. A party with a communication disability if the services were needed for effective communication;[5]

ii. A party unable to afford payment of costs under Rule 145;

iii. A party with limited English proficiency, unless the court finds in writing the party can easily afford the costs and the costs will not impede the party's access to the judicial process;[6] or

iv. *A party who can otherwise not easily afford the costs and the costs may impede the party's access to the judicial process.*[7]

(d) *Services Provided Free of Charge*. **The Court shall not tax or assess the fees for interpretation or translation services to individuals listed in (c)(3)**.

(e) *No Delay of Case*. Except on motion by a party with a communication disability or limited English proficiency, the court may not delay a court proceeding until a party pays for translation or interpretation services.[8]

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[5] Charging a person with a disability for an interpreter or other auxiliary aid or service that she needs for effective communication is prohibited by the Americans with Disabilities Act and Chapter 121 of the Texas Human Resources Code.

[6] "DOJ Guidance makes clears that court proceedings are among the most important activities conduct by recipients of federal funds, and emphasizes the need to provide interpretation free of cost. Courts that charge interpreter costs to the parties be arranging for the interpreter's presence, but they are not "providing" the interpreter. DOJ expects that, when meaningful access requires interpretation, courts will provide interpreters at no costs to the persons involved." Language Access Guidance Leter to State Courts from Assistant Attorney General Thomas E. Perez, Aug. 16, 2010.

[7] The ad hoc committee was divided about Section (iv), which appears to excuse English-speaking, unimpaired parties that are low-income. Inclusion was based on construing the ABA standard:
"Courts should avoid placing the burden of paying for language access disproportionately on LEP individuals in a matter than discourages access to court by LEP persons or inhibits requests for for language services necessary to enable LEP person to participate fully in proceedings. In considering whether to provide an interpreter without charge, courts should be mindful that the poverty/indigency threshold is unrealistically low. For that reason, any effort by a court to impose fees on particular persons and litigants should take into consideration that the cost of interpreter services will burden most people of modest or even "middle class" means, and of many small or moderate-size businesses. Litigants in those categories will not be treated on a par with persons who do not require language services and will effectively be denied access to justice, if they are unable or dissuaded from using the courts, because they are subject to up-front fees or know that they will be assessed fees under an after-the-fact recoupment mechanism." ABA Standards for Language Access in Courts, Standard 2.3, Responsibility for costs of language services.

[8] This is based on anecdotal information that some courts have postponed hearings indefinitely until an LEP person pays for an interpreter or dismisses for want of prosecution because the person has not paid for interpreter to appear.

Alternative (e) *No Delay of Case*. The court may not delay a court proceeding because the translator or interpreter cannot be present, unless a person with a communication disability or limited English proficiency requests a continuance and explains why the interpret or translator is unable to attend.[9]

[9] This alternative was suggested because of difficult issues of securing outside interpreters or translators. Courts may be unable to locate third-party professionals for some languages willing to appear for free; parties may be unable to pay. The court should not have to decide who must pay, when, and how much before scheduling a hearing or trial; however, the party needing such services should be able to request a continuance.
Both alternatives leave unresolved what the court may do when a translator or interpreter are needed, but cannot provide the service and the party cannot afford to pay.

To: SCAC
Fm: Roger Hughes
Date: 14 Sept 16

Interpreter Qualifications

Discussion

The final definition on "qualified" melds Tex. R. Evid. 604, 702 and1004 with Tex. Gov't Code §57.002.

I initially thought the default on qualification should be Tex. R. Evid. 604, based on Goode, Wellborn, and Sharlot, COURTROOM HANDBOOK ON TEXAS EVIDENCE, Rule 604, *Authors Comments*, and Goode, Wellborn, and Sharlot, TEXAS PRACTICE SERIES: GUIDE TO TEXAS RULES OF EVIDENCE, §604.1. They construed Rule 604 to treat the interpreter's qualifications as an expert competency issue under Rule 702; this normally would incorporate the standards for use of licensed or certified translators under Government Code §57.002. Outside §57.002, qualifications were addressed to the judge's discretion to determine like other expert witness questions.

Then I read the treatise's authorities. All of them were criminal cases involving Code of Criminal Procedure arts. 38.30, -.31. I did not reach their conclusion. The Criminal Code does not mandate use of licensed or certified interpreters. Qualification/competency are addressed to the judge's discretion based on the level of competency needed to ensure the accused can communicate with the court and confront the witnesses. *Linton v. State*, 275 S.W.3d 493, 501 (Tex. Crim. App. 2009); *Shu Guo Kan v. State*, 4 S.W.3d 38, 41 (Tex. App.–San Antonio 1999, no pet.). There is a split in authority whether art. 38.30 requires use of certified/licensed interpreters. *Ridge v. State*, 205 S.W.3d 591 (Tex. App.–Waco 2006, pet. ref'd)(opinion would require

licensed/certified interpreters, but recognizes split).

I believe Profs. Goode, et al., borrowed from Fed. R. Evid. 604, which has different language. Borrowing from the federal practice is not entirely satisfactory because it does not parallel Texas law. Federal Rule 604 expressly treats qualification under the Rule 702 standard for experts; Texas Rule 604 does not. Moreover, there is a statutory overlay. 28 U.S.C. §1827(a), the federal O.C.A. prescribes requirements for interpreter certification and oversees the program. Under §1827(d) the judge must appoint a "the most available certified interpreter" if the party or a testifying witness either

(a) speaks only or primarily a language other than English, or

(b) suffers from a hearing impairment

so as to inhibit understanding of the proceeding, communication with the court, or presenting the testimony. If a certified interpreter is not "reasonably available," then the judge will select an "otherwise qualified interpreter." 28 U.S.C. §1827(a)(2). The OCA provides guidelines to select "otherwise qualified interpreters" to ensure the highest standards of accuracy in court cases. *Id*. Where §1827(d) applies, the courts absorb the fees. If §1827(d) does not mandate appointment, then court may make interpreters available at the requesting party's expense. 28 U.S.C. §1872(b)(4).

Tex. Gov't Code §57.002(e) provided that when the court may appoint an uncertified, unlicensed interpreter, the person must qualify as an expert under the Texas Rules of Evidence. Otherwise, §57.002 requires use of licensed or certified interpreters, who must also be an adult capable of giving the oath. Unlicensed/uncertified may be

appointed (1) in counties with less than 50,000 people, (2) in larger counties for languages other than Spanish if no licensed interpreters are within 75 miles, or (3) when allowed by Texas Civil Practices and Remedies Code, §21.021.

Report to the Supreme Court of Texas
On Proposed Revisions to Texas Rule of Civil Procedure 183
Regarding Interpreters

Submitted by the Texas Access to Justice Commission
September 14, 2016

I. INTRODUCTON

The Supreme Court of Texas established the Texas Access to Justice Commission (Commission) in 2001 to serve as the statewide umbrella organization for all efforts to expand access to justice in civil legal matters for the poor. It is the role of the Commission to assess national and statewide trends on access to justice issues facing the poor, and to develop initiatives that increase access and reduce barriers to the justice system.[1]

The Commission has a Rules and Legislation Committee (Committee)[2] with a subcommittee that focuses on language access issues. Language access is an increasingly critical issue in Texas and across the nation.[3] The Commission has received complaints about the lack of access for litigants with limited English proficiency (LEP) for many years.[4] In response to requests from legal aid and pro bono organizations, the State Bar of Texas created the Language Access Fund (LAF) in 2013 to expand language access for legal aid and pro bono LEP clients.[5] Over the years, these entities have provided the Commission additional anecdotal information on the barriers faced by LEP litigants and witnesses as well as the legal community's lack of knowledge about law and policy governing language access in courts. Laws and policy are inconsistently applied from county to county and court to court.

[1] Supreme Court of Texas Misc. Docket 01-9065, Order Establishing the Texas Access to Justice Commission, April 26, 2001.

[2] Members are: Justice Brett Busby (chair), Judge Karin Crump, Judge Maria Salas-Mendoza, Judge Jennifer Rymell, Judge Jason Pulliam, Lewis Kinard, Orrin Harrison, Juan Alcala, Marcy Greer, Lisa Hobbs, Marisa Secco, Lonny Hoffman, Julie Balovich, Nelson Mock, Jane Perrieras-Horta, Veronica Carbajal, Brenda Willett, Alissa Gomez, and Jonathan Vickery.

[3] The Department of Justice has been focused on the issue for years, as discussed in this report and the access to justice community across the country are increasingly focusing on language access, which is routinely highlighted at national and local access to justice conferences.

[4] In fact, there has been litigation and at least one Department of Justice complaint brought by Texas legal aid providers on this issue in the recent past. *See Claudia P. Tovar v.321st District Court of Smith County, Texas; Smith County, Texas; and State of Texas Office of Judicial Administration,* DOJ Complaint No. 356592 (Sep. 11, 2010), http://www.lonestarlegal.org/tovar%20complaint.pdf *(last visited Sep.14, 2016)* and *Doe v. Harris County*, 4:10-cv-02181, (S.D. Tex. June 17, 2010).

[5] The Language Access Fund provides legal aid and pro bono programs in Texas with funds for interpreter and document translation services for low-income clients.

Coincidentally, not long after the Commission convened the Language Access Subcommittee,[6] the Texas Supreme Court asked its Supreme Court Advisory Committee (SCAC) to study and make recommendations on Texas Rule of Civil Procedure 183, which governs the appointment of interpreters.[7] The Commission learned that proposed modifications to the rule were discussed at the June 2016 SCAC meeting and subsequently asked the subcommittee members if we could meet with them to further discuss the proposed rule. We are deeply grateful for the SCAC subcommittee's willingness to meet with us and incorporate suggestions as they worked to revise TRCP 183. Their thoughtful approach to addressing language access as both a legal obligation and a critical component of providing equal access to justice in Texas Courts is a view we share and is the guiding principle behind our recommendations.

II. RESEARCH AND METHODOLOGY

In developing our recommendations, we:

- Researched Federal and State law and policy;
- Met with legal aid advocates;
- Had discussions with the Texas Access to Justice Commission Rules and Legislation Committee and Language Access Subcommittee;
- Had two teleconferences with the SCAC subcommittee working on the rule;
- Spoke with Department of Justice Coordination and Compliance Section staff;
- Reviewed information and polices from other states;
- Spoke with a licensed court interpreter and former OCA language access coordinator;
- Reviewed case law; and
- Spoke with language access coordinators and other stakeholders from other states.

Throughout the process, the Subcommittee was mindful of the balance between the revenue needs of counties and the consequences to litigants and witnesses who need interpreter services to have meaningful access the judicial process.

III. RECOMMENDATIONS AND RATIONALE

A. DOJ Policy

The underlying question in the Court's charge on Rule 183 is whether it violates federal civil right laws to charge a party for the cost of an interpreter. Put simply, the answer is yes.

Title VI of the Civil Rights Act of 1964, as amended, and the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Safe Streets Act), both prohibit national origin discrimination by recipients of federal financial assistance.[8] Title VI and Safe Streets Act regulations prohibit discriminatory

[6] Members are: Juan Alcala (Chair), Justice Brett Busby, Nelson Mock, Judge Jennifer Rymell, Judge Maria Salas-Mendoza, Brenda Willet, and Veronica Carbajal.

[7] Letter re Referral of Rules Issues from Chief Justice Hecht to Mr. Chip Babcock, Chair, Supreme Court Advisory Committee (April 18, 2016), http://jwclientservices.jw.com/sites/scac/Document%20Library2/1/SCAC-April%2018,%202016%20Referral%20Letter%20with%20Attachments.pdf (last visited Sep 12, 2016).

[8] 42 U.S.C. § 2000, *et seq*; 42 U.S.C. § 3789d(c).

conduct such as providing a service or benefit that is different, or provided in a different manner from, what is provided to others under the program or that restricts in any way the enjoyment of any advantage or privilege enjoyed by others under the program based on national origin.[9] The regulations also prohibit administering programs in a manner that has the *effect* of discriminating in those ways or "substantially impairing accomplishment of the objectives of the program" based on national origin.[10] In *Lau v. Nichols,* the U.S. Supreme Court held that Title VI prohibits conduct that has a disproportionate effect on LEP individuals because such conduct constitutes national origin discrimination.[11]

In 2000, Executive Order 13166 directed federal agencies to publish guidance for recipients of federal financial assistance regarding their obligation to provide meaningful access to LEP individuals.[12] On June 18, 2002, the Department of Justice (DOJ) issued its final guidance regarding the prohibition against discrimination against LEP persons.[13] The DOJ's Guidance was especially attentive to courts and the critical importance of access to justice for LEP individuals.

According to the DOJ, courts must "ensure that LEP parties and witnesses receive competent language services … At a minimum, every effort should be taken to ensure competent interpretation for LEP individuals during all hearings, trials, and motions during which the LEP individual must and/or may be present."[14] The Guidance also states that recipients should provide interpreters free of cost and says, "this is particularly true in a courtroom, administrative hearing, pre- and post-trial proceedings, situations in which health, safety, or access to important benefits and services are at stake, or when credibility and accuracy are important to protect an individual's rights and access to important services."[15]

Charging parties for language services provides a service or benefit "which is different, or is provided in a different manner, from that provided to others" and restricts the "enjoyment of [an] advantage or privilege enjoyed by others" in the program.[16] In the case of courts, the accomplishment of the objective of the program is also substantially impaired when a party, witness, or other interested person cannot understand or communicate with the court. Their inability to participate in the proceedings denies the LEP person equal access to justice and the judicial process. At the same time, when an LEP person cannot communicate with the court, the judge or jury is prevented from gathering all of the necessary information to render a just decision. It is a lose-lose proposition.

The DOJ emphasizes the importance of providing language services free of charge in courts whenever it addresses the topic. For example, in a 2008 letter to the National Center for State Courts regarding its *Model Judges Bench Book on Court Interpreting*, the DOJ said it

> has noted a disturbing number of courts and court systems engaging in a practice of charging LEP persons for interpretation costs—a practice which implicates national origin discrimination

[9] 28 C.F.R. § 42.104(b)(1) (Aug. 26, 2003).
[10] 28 C.F.R. §§ 42.104(b)(2), 42.203(e).
[11] 414 U.S. 563 (1974).
[12] 65 Fed. Reg. 50,121 (Aug. 16, 2000).
[13] 67 Fed. Reg. 41,455 (June 18, 2002).
[14] *Id.* at 41,471.
[15] *Id.* at 41,462.
[16] 28 C.F.R. § 42.104(b)(1).

> concerns. DOJ's Guidance focuses on a huge range of types of recipients. The consequences of lack of access to some of these programs is much greater than others … In this context, nearly every encounter an LEP person has with a court is of great importance or consequence to the LEP person. Thus, the Guidance emphasizes the need for courts to provide language services free of cost to LEP persons.[17]

The letter further explains:

> We therefore think that the legally sound approach to providing access to LEP persons can be found in states in which courts are providing interpretation free of cost to all LEP persons encountering the system (including parents of non-LEP minors), whether it be in a criminal or civil setting. In addition, courts should be providing translation of vital documents and signage.[18]

Another example arose in 2009 when the DOJ wrote to the Indiana Division of State Court Administration in response to an Indiana Supreme Court case holding that an LEP defendant was not entitled to a free interpreter unless indigent. In that letter, the DOJ restated its expectation that courts provide interpreters free of charge to all LEP persons in criminal and civil settings, and added that free interpretation is also necessary "in important interactions with court personnel."[19] For illustrative purposes, the DOJ attached a copy of its Memorandum of Understanding with Maine's Judicial Branch signed just a few months prior to the letter after the DOJ investigated a Tile VI complaint concerning Maine's courts. The MOU included an order "ensuring that interpreters will be provided at court cost to all LEP witnesses and parties in all court proceedings."[20]

The DOJ's 2010 letter to Chief Justices and Administrators of state courts is perhaps the clearest explanation of the prohibition against court policies or practices that have the effect of discriminating against LEP person.[21] In it, the DOJ lamented that, "Despite efforts to bring courts into compliance, some state court system policies and practices significantly and unreasonably impede, hinder, or restrict participation in court proceedings and access to court operations based upon a person's English language ability."[22] The second of the four "examples of particular concern" highlighted in the letter was "charging interpreter costs to one of more parties." It went on to explain that:

> Many courts that ostensibly provide qualified interpreters for covered court proceedings require or authorize one or more of the persons involved in the case to be charged with the cost of the interpreter. Although the rules or practices vary, and may exempt indigent parties, their

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[17] Letter from DOJ Coordination and Review Section Chief Merrily Friedlander to the National Center of State Courts regarding the *Model Judges Bench Book on Court Interpreting* (Feb. 21, 2008), pg. 3, https://www.lep.gov/guidance/cor_feb_21_2008_letter_to_ncsc.pdf (last visited Sep. 10, 2016).

[18] *Id.* at pg. 4

[19] Letter from Coordination and Review Section Chief Merrily Friedlander to Indiana Div. of State Court Administration re *Arrieta v. State* (Feb. 4, 2009), pg. 2, https://www.lep.gov/whats_new/IndianaCourtsLetterfromMAF2009.pdf (last visited Sep. 12, 2016).

[20] *Id.*; Memorandum of Understanding Between the United States of America and The State of Maine Judicial Branch, Department of Justice Number 171-34-8 (2008), pg. 2, https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/Maine_MOA.pdf (last visited Sep 10, 2016).

[21] Letter to State Courts from Assistant Attorney General Thomas E. Perez re Language Access Guidance (Aug. 16, 2010), https://www.lep.gov/final_courts_ltr_081610.pdf (last visited Sep. 12, 2016).

[22] *Id.* at pg. 2.

> common impact is either to subject some individuals to a surcharge based upon a party's or witness' English language proficiency, or to discourage parties from requesting or using a competent interpreter. Title VI and its regulations prohibit practices that have the effect of charging parties, impairing their participation in proceedings, or limiting presentation of witnesses based upon national origin. As such, the DOJ Guidance makes clear that court proceedings are among the most important activities conducted by recipients of federal funds, and emphasizes the need to provide interpretation free of cost. Courts that charge interpreter costs to the parties may be arranging for an interpreter's presence, but they are not "providing" the interpreter. DOJ expects that, when meaningful access requires interpretation, courts will provide interpreters at no cost to the persons involved.[23]

The DOJ's 2010 letter ushered in a new era of Title VI enforcement and collaboration with state courts aimed at increasing meaningful access to court for LEP persons. The DOJ investigated Title VI complaints around the country and worked with several states to reform their policies to comply with Title VI and Safe Streets regulations and DOJ Guidance. Like the 2008 MOU with Maine, the agreements reached in those cases included assurances or revised policies like the one memorialized in the letter concluding the DOJ's "formal engagement" with the Judiciary of the State of Hawai'i:

> The Hawai'i State Judiciary is committed to providing meaningful access to court processes and services to persons with limited English proficiency. In all case types, the Judiciary shall reasonably provide, free of charge and in a timely manner, competent court interpreters for parties, witnesses and individuals with a substantial interest in a case. It shall also provide language assistance services at points of contact with the Judiciary, including over-the-counter and over-the-telephone encounters for all Judiciary-related business. The Judiciary shall notify the public of the Judiciary's language assistance commitment.[24]

Although "DOJ acknowledges that it takes time to create systems that ensure competent interpretation in all court proceedings and to build a qualified interpreter corps,"[25] it also expects that states are working diligently to "make progress toward full compliance in policy and practice."[26] As discussed, in this case, "full compliance in policy and practice" means providing interpreters and

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[23] *Id.*

[24] Letter and Agreement re Language assistance services in Hawai'i state courts closing DOJ Complaint 171-21-5 (March 24, 2015), pg. 2-3, https://www.lep.gov/resources/Hawaii_Closure_ltr(3%2024%2015).pdf (last visited Sep. 12, 2016). *See also* Letter and Agreement re Complaint No. 171-8-23, *Castaneda v. Superior Court of Arizona, Mohave County* (May 11, 2015), pg. 2, https://www.lep.gov/resources/MohaveAZ_Ltr_FINAL(5.11.15).pdf (last visited Sep. 12, 2016); Letter to Colorado State Court Administrator re closing Complaint # DJ 171-13-63 (June 21, 2016), https://www.justice.gov/opa/file/868651/download (last visited Sep. 12, 2016); Memorandum from Judge John Smith, Director, North Carolina Administrative Office of the Courts to All Judicial ranch Elected and Appointed Officials (Aug. 16, 2012), http://www.nccourts.org/LanguageAccess/Documents/Foreign_Language_Access_and_Interpreting_Services_Memo.pdf (last visited Sep. 12, 2016); Letter to Supreme Court of Rhode Island re Complaint DJ # 171-66-2 (April 21, 2016), https://www.lep.gov/resources/RI_Jud_Closure_42116.pdf (last visited Sep. 12, 2016); Letter to King County Superior Court, Washington re closing Complaint DOJ # 171-82-22 (Dec. 1, 2015), https://www.lep.gov/resources/20151201_KCSC_Letter_of_Resolution.pdf (last visited Sep. 12, 2016).

[25] Letter to State Courts from Assistant Attorney General Thomas E. Perez re Language Access Guidance (Aug. 16, 2010), pg. 4, https://www.lep.gov/final_courts_ltr_081610.pdf (last visited Sep. 12, 2016)

[26] *Id.*

other necessary language services to LEP parties, witnesses, and other interested individuals free of charge.

B. Current TRCP 183

TRCP 183 currently allows courts to tax interpreter costs against parties. However, when required for LEP persons to have meaningful access to the courts and the judicial process, language services such as interpreters must be provided free of charge. Consequently, the rule needs revision to comply with law.

C. Proposed Revision of TRCP 183

Because the proposed revision of TRCP 183 is effectively a rewrite, this report addresses each section in turn.

1. **TRCP 183. Interpreters and Translators**

We suggest clarifying that Rule 183 applies to interpreters and translators by changing the rule header to "183. Interpreters and Translators," and by consistently referencing interpreters and translators throughout the rule. Just as there may be times when oral interpretation is necessary in order for LEP litigants or witnesses to participate in court proceedings, there may also be times when the translation of documents is necessary for the same purpose, though the need for translation will be rarer.

Additionally, courts, like all recipients, are required to translate vital documents.[27] The DOJ intends for recipients to do their own self-evaluation to determine which of its documents are "vital," but court orders are among the examples given.[28] There may also be times when translation is needed for an LEP witness to review a document in English or when a foreign language document is crucial evidence as contemplated in Texas Rules of Evidence 1009(g).

2. **Section (a), *Appointed by the court.* When needed for effective communication or when required by law, the court must appoint a qualified interpreter or translator for court proceedings involving a party or witness with a communication disability or with limited English proficiency.**

a. Target Group: The first question the Subcommittee considered was whether the rule applied solely to situations involving a limited English proficient persons or whether it should also apply to those with disabilities who are covered under the American with

[27] 67 Fed. Reg. 41,464.

[28] Language Access Planning and Technical Assistance Tool for Courts (February 2014), pg. 13, https://www.lep.gov/resources/courts/022814_Planning_Tool/February_2014_Language_Access_Planning_and_Technical_Assistance_Tool_for_Courts_508_Version.pdf (last visited Sep. 12, 2016).

Disabilities Act. The Subcommittee believes that the rule should apply to both LEP individuals and persons with disabilities because the current rule 183 applies broadly to the appointment of any interpreter, including ASL interpreters. LEP individuals and persons with disabilities are also the groups most likely to need interpreters. Specifying these groups within the rule itself encourages courts, lawyers, and others to consider whether an interpreter is needed when a case involves LEP individuals or persons with disabilities. In other words, making the rule specific in this way helps sensitize the legal community to the issue of access to the judicial process for LEP individuals and persons with disabilities.

b. Parties and Witnesses: The Subcommittee also looked at whether the rule applied only to parties or if it also applied to witnesses. We believe the regulations and DOJ Guidance make it clear that interpreter services should be provided to both parties and witnesses.[29] We recommend that the rule state its applicability to parties and witnesses to clarify the issue for parties and judges. Making this aspect of the rule clear will help minimize problems and will help self-represented litigants understand the rule better.

c. Effective Communication: The committee thought it would be helpful to parties and judges to have guidance about when an interpreter is necessary. "Effective communication" is a commonsense standard that is easy for parties and judges to understand, and it is the language that the DOJ uses when describing when a person with a disability is entitled to use an auxiliary aid or service such as interpreter or CART.[30] It has also been used in the context of Title VI.[31] Because the use of sign language interpreters has become commonplace in Texas courts, we believe including the "effective communication" standard will help judges and parties determine when they need to use an interpreter.

d. "May" vs. "Must": In situations where an interpreter is needed for effective communication, it is clear that the appointment of an interpreter is mandatory, not permissive, and we feel that this requirement should be reflected in Rule 183. For example, the ADA has long required government entities, including courts, to use interpreters to ensure access to courts for people with disabilities.[32] With respect to LEP individuals, as discussed, the DOJ regulations require that "every effort should be taken to ensure competent interpretation for LEP individuals during all hearings, trials, and motions," including administrative court proceedings. The DOJ expects that, when meaningful access requires interpretation, courts will provide interpreters at no cost to the persons involved.[33] Again, to avoid confusion amongst courts and parties, including self-represented litigants, the rule should be clear that courts have an obligation to appoint an interpreter when an

[29] 67 Fed. Reg. 41,471.
[30] 28 C.F.R. Part 35, § 35.160 (January 26, 1992).
[31] *See, e.g.* 67 Fed. Reg. 41,466, 41,468-41,469, and 41,471.
[32] 28 C.F.R. Part 35, § 35.160(b)(1).
[33] Letter to State Courts from Assistant Attorney General Thomas E. Perez re Language Access Guidance (Aug. 16, 2010), pg. 2, https://www.lep.gov/final_courts_ltr_081610.pdf (last visited Sep. 12, 2016).

LEP person or person with a disability needs one to communicate effectively and have equal access to the judicial process.

e. Required by Law: The Subcommittee wanted to ensure that any revision of TRCP would not diminish any rights under state or federal law. For example, §57.002 of the Texas Government Code addresses when a court must appoint a licensed court interpreter and the Americans with Disabilities Act imposes its own requirements. Including "required by law" here makes it clear that courts may be subject to other legal requirements with respect to the appointment of interpreters and that this rule is not intended to negate those in any way. Further, should the law in this area change, including "required by law" allows the rule to automatically expand to include those changes without requiring repeated revisions.

3. **Section (b), *Definitions*.**

(1) *Court proceeding*. Court proceeding includes the proceedings listed in §57.001(7) of the Texas Government Code.

The Legislature included this definition in the statute governing appointment of interpreters. The broad definition of court proceedings is also consistent with DOJ guidance indicating that equal access for LEP individuals and people with disabilities also includes contact with the judicial process that take place outside the courtroom, including all court-annexed and court-mandated activities.[34]

(2) *Communication disability.* Communication disability means a disability that inhibits the individual's comprehension of the proceedings or communication with others.

Using the term "communication disability" places a reasonable limit on the types of disabilities that might cause a person to need an interpreter for effective communication. It is the terminology used by the DOJ when discussing the obligation to provide auxiliary aids and services such as interpreters under the ADA.[35]

(3) *Limited English proficiency.* Limited English proficiency means that the person does not speak English as a primary language or has a limited ability to read, write, speak, or understand English.

[34] 67 Fed. Reg. 41,471; *Id.* at 41,459, n. 5; Letter to State Courts from Assistant Attorney General Thomas E. Perez re Language Access Guidance (Aug. 16, 2010), pg. 2, https://www.lep.gov/final_courts_ltr_081610.pdf (last visited Sep. 12, 2016).
[35] 28 C.F.R. Part 35, §35.160.

This definition is from the DOJ's 2002 Guidance.[36] Including it will help judges determine who is entitled to an interpreter.

(4) *Qualified*. Qualified means a competent interpreter or translator who is licensed or certified when available or required by law. When the court may appoint an interpreter or translator who is not licensed or certified, the interpreter or translator must

- ***a.*** **qualify as an expert under the Texas Rules of Evidence;**
- ***b.*** **be at least 18 years of age;**
- ***c.*** **not be a party; and,**
- ***d.*** **unless agreed by all parties and approved by the court, not be a witness, a relative of a party or witness, or a counsel in the proceeding.**

The DOJ Guidance is clear that competent language service providers are required to provide meaningful access to LEP individuals.

> When providing oral assistance, recipients should ensure competency of the language service provider … Competency requires more than self-identification as bilingual. Some bilingual staff and community volunteers, for instance, may be able to communicate effectively in a different language when communicating information directly in that language, but not be competent to interpret in and out of English. Likewise, they may not be able to do written translations … When using interpreters, recipients should ensure that they: Demonstrate proficiency in and ability to communicate information accurately in both English and in the other language and identify and employ the appropriate mode of interpreting (e.g., consecutive, simultaneous, summarization, or sight translation); Have knowledge in both languages of any specialized terms or concepts peculiar to the entity's program or activity and of any particularized vocabulary and phraseology used by the LEP person; and understand and follow confidentiality and impartiality rules to the same extent the recipient employee for whom they are interpreting and/or to the extent their position requires[;] Understand and adhere to their role as interpreters without deviating into a role as counselor, legal advisor, or other roles (particularly in court, administrative hearings, or law enforcement contexts).[37]

The DOJ guidance also recognizes that competence is context specific and favors certified interpreters in certain settings such as courts: "Where individual rights depend on precise, complete, and accurate interpretation or translations, particularly in the contexts of courtrooms and custodial or other police interrogations, the use of certified interpreters is strongly encouraged."[38] Requiring courts to use a licensed court interpreter when one is

[36] 67 Fed. Reg. 41,459.
[37] 67 Fed. Reg. 41,461.
[38] *Id.*

available helps provide meaningful access to Texas courts for LEP persons consistent with DOJ guidance.

Additionally, there are times when existing law requires appointment of a licensed or certified interpreter. For example, current Texas law requires that sign language interpreters who interpret in Texas courts be certified.[39] Similarly, §57.002 of the Texas Government Code requires appointment of licensed interpreters in certain situations.[40] Adding the provision that courts use licensed or certified interpreters "when required by law" will help avoid a conflict with existing law or the diminishment of any rights LEP individuals or people with disabilities already enjoy. It will also allow for the rule to incorporate changes in the law without requiring an immediate revision.

In situations where a licensed or certified interpreter is not required by law and is not available, minimum standards of competence are needed to provide meaningful access to the courts for LEP persons and to comply with DOJ Guidance.[41] Including the minimum standards in (4)b helps protect an LEP person's right to competent interpretation. In fact, (4)b.i-iii are the existing minimum requirements for unlicensed interpreters in Texas courts pursuant to §57.002(e). Unfortunately, many lawyers, judges, and self-represented litigants are not aware of these minimum requirements and are appointing interpreters who do not meet the minimum standards in §57.002(e). Including these minimum requirements in the rule will help ensure that courts are appointing competent interpreters.

The Commission also learned that courts are using children, opposing parties, and various types of bystanders as interpreters without regard for their qualifications or impartiality. The inclusion of (4)b.iv would help avoid some of the most egregious situations while still preserving the court's discretion if the parties agreed to allow one of the listed individuals interpret.

5. Section (c), *Payment of Fees*.

(1) *Reasonable Compensation*. When appointing an interpreter or translator, the court shall determine a reasonable fee for the interpreter's or translator's services.

This is in the current rule.

(2) *Fees Taxed as Costs.* At the request of the clerk or on motion of any party or on the court's own motion, the court may tax as court costs the reasonable fee of an

[39] Tex. Civ. Prac. & Rem. Code § 21.003.
[40] Tex. Gov. Code §57.002. *See also* Texas Attorney General Opinion No. JC-0584 (Nov. 26, 2002), https://texasattorneygeneral.gov/opinions/opinions/49cornyn/op/2002/htm/jc0584.htm (last visited Sep. 12, 2016) ("[s]ection 57.002 clearly modifies the authority of a court to determine the qualifications of an interpreter.")
[41] 67 Fed. Reg. 41,461.

appointed or privately retained interpreter or translator utilized during court proceedings. Fees of interpretation or translation services provided through the court or otherwise paid for with public funds must not be taxed as costs.

The ability to tax interpreter fees as costs is in the current rule.

(3) ***When Fees May Not be Taxed as Costs*****. In no case shall the court tax these fees as costs against:**

i. A party with a communication disability when the services were needed for effective communication;

The Americans with Disabilities Act and Chapter 121 of the Texas Human Resources Code prohibit charging a person with a disability for an interpreter or other auxiliary aid or service that she needs for effective communication. [42]

ii. A party unable to afford payment of costs under Rule 145;

Texas Rule of Civil Procedure 145 prohibits the court from taxing costs against a person who is unable to afford the payment of fees and has filed a Statement of Inability to Afford Payment of Court Costs.[43] However, over the years there has been a lot of confusion over what costs are included in the waiver of fees under TRCP 145, so it is important to be very clear that these costs will not be taxed against these individuals.[44]

iii. A party with limited English proficiency, unless the court finds in writing the party can easily afford the costs and the costs will not impede the party's access to the judicial process; or

As discussed earlier in this report, Title VI, the Safe Streets Act, and their implementing regulations, as well as DOJ Guidance are clear that interpreters and other necessary language services must be provided to LEP persons free of charge. This section departs from the DOJ's mandate that LEP parties not be charged and allows costs to be taxed against LEP parties as long as that party is easily able to afford it and it does not compromise the party's ability to access the courts.

iv. ***A party who can otherwise not easily afford the costs and the costs may impede the party's access to the judicial process.***

[42] 28 C.F.R. Part 35, §35.130(f); Tex. Hum. Res. Code § 121.003(d)(3). *See also* Tex. Civ. Prac. & Rem. Code § 21.006(c).
[43] Tex. R. Civ. Proc. 145(a) (including "fees for a court-appointed professional" in the "costs" that are waived for qualifying parties who file a Statement of Inability to Afford Payment of Court Costs).
[44] See, e.g., *Campbell v. Wilder*, 487 S.W.3d 146, 151 (2016).

This provision is intended to address the barrier that the cost of language services can create even for non-LEP litigants of modest means. According to the ABA,

> the poverty/indigency threshold is unrealistically low. For that reason, any effort by a court to impose fees on particular persons and litigants should take into consideration that the cost of interpreter services will burden most people of modest or even "middle class" means, and of many small or moderate-size businesses. Litigants in those categories will not be treated on a par with persons who do not require language services and will effectively be denied access to justice, if they are unable or dissuaded from using the courts, because they are subject to up-front fees or know that they will be assessed fees under an after-the-fact recoupment mechanism.[45]

Without this provision, non-LEP litigants who are low-income but do not meet the TCRP 145 threshold would be required to pay the interpretation costs for their LEP witnesses – for example, the parent of a non-LEP juvenile – even if these costs would impede their access to the judicial system. Conversely, non-LEP litigants who qualify under TRCP 145 would not be required to pay these costs.

In many cases, inability to pay for an interpreter will prevent a modest means individual from presenting their LEP witnesses. If their LEP witness is key to the case, the inability to present their LEP witnesses could prevent them from even pursuing their case or from being able to mount a vigorous defense.

In these circumstances, requiring payment of language services would impermissibly affect the "presentation of witnesses based upon national origin" and could deny the LEP parent of a non-LEP juvenile, for example, the ability to participate in a proceeding where his or her child is a party. The modest means litigant would be denied equal access to justice and the judicial process, and the court would be denied access to the information needed to render a just decision.

Any of these outcomes is not consistent with providing meaningful access to the judicial process for LEP persons. The DOJ's position is clear: "Courts that charge interpreter costs to the parties may be arranging for an interpreter's presence, but they are not "providing" the interpreter. DOJ expects that, when meaningful access requires interpretation, courts will provide interpreters at no cost to the

[45] ABA Standards for Language Access in Courts (Feb. 2012), Standard 2.3 Commentary, pg. 33, http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.authcheckdam.pdf (last visited Sep. 12, 2016).

persons involved."[46] This provision is a necessary step toward "full compliance in policy and practice." [47]

6. **Section (d), *Services Provided Free of Charge*. The Court shall not tax or assess the fees for interpretation or translation services to individuals listed in (c)(3).**

   The Commission heard from attorneys whose indigent clients had been required to pay for interpreters in other ways besides the bill of costs. This provision makes it clear that individuals listed in (c)(3) must not be charged by taxing the costs or by any other method.

7. **Section (e), No *Delay of Case*. Except on motion by a party with a communication disability or LEP individual, the court may not delay a court proceeding by requiring a party to pay for interpretation or translation services in advance.**

   The Commission heard from attorneys whose indigent clients' cases were delayed because they could not pay an interpreter fee in advance of the proceeding. In at least one case, an indigent party was threatened with dismissal of her case if she did not pay the interpreter in advance. This provision makes it clear that courts may not refuse to schedule a proceeding, threaten dismissal, or frustrate the progress of a case by any other means in order to secure payment of interpreter fees in advance of a proceeding.

IV. ADDITIONAL RECOMMENDATION – JUSTICE COURTS

The requirement to provide meaningful access to LEP persons applies in all courts, including justice courts. A revised TRCP 183 will not apply in justice courts unless it is specified in the justice court rules.[48] We recommend including a provision in the justice court rules stating that TRCP 183 applies in justice courts or repeating the final text of the revised TRCP 183 in the justice court rules.

V. CONCLUSION

The Language Access Subcommittee of the Texas Access to Justice Commission believes that revising TRCP 183 in this way is a substantial step toward full compliance with Title VI regulations and DOJ policy. More importantly, it will help to provide meaningful access to Texas courts for LEP persons.

We welcome the opportunity to discuss these issues with you further or to answer any questions that you have. Thank you for your work on this issue and for your commitment to increasing language access in Texas courts.

[46] Letter to State Courts from Assistant Attorney General Thomas E. Perez re Language Access Guidance (Aug. 16, 2010), pg. 2, https://www.lep.gov/final_courts_ltr_081610.pdf (last visited Sep. 12, 2016).
[47] *Id.*at pg. 4.
[48] Tex. R. Civ. Proc. 500.3(e).

Language Access Statute Cheat Sheet

- Texas Government Code, Ch. 57 –
    - **Subchapter A** addresses appointment of court interpreters upon a party's motion, a witness' request, or the court's own motion.
        - **57.001(7)** defines court proceedings to include an arraignment, deposition, mediation, court-ordered arbitration, or other form of alternative dispute resolution.
        - **57.002** describes when a court must use a licensed use a licensed or certified interpreter, when they can use an unlicensed or uncertified one, and what criteria an unlicensed or uncertified interpreter must meet.
    - **Subchapter B** establishes the program for certifying court interpreters for deaf individuals at the Department of Assistive and Rehabilitative Services.
- Texas Government Code, Ch. 157 - Establishes the program for licensing court interpreters for spoken languages at the Judicial Branch Certification Commission.
- Texas Civil Practice and Remedies Code - **Chapter 21** addresses interpreters for signed and spoken languages.
    - SUBCHAPTER A. INTERPRETERS FOR THE DEAF
    - SUBCHAPTER B. SPANISH LANGUAGE INTERPRETERS IN CERTAIN BORDER COUNTIES
    - SUBCHAPTER C. INTERPRETERS FOR COUNTY COURTS AT LAW
    - SUBCHAPTER D. INTERPRETER FEE
- Texas Rules of Civil Procedure - **Rule 183** addresses appointment and compensation of an interpreter.

    "The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court."
- Texas Rules of Evidence - **Rule 604** states, "An interpreter must be qualified and must give an oath or affirmation to make a true translation."
- Texas Code of Criminal Procedure, Art. 38.30 - Addresses appointment of an interpreter in a criminal proceeding when a person charged or a witness does not understand and speak English.
- Texas Code of Criminal Procedure, Art. 38.31 - Addresses appointment of an interpreter in a criminal case when a defendant or witness is deaf.
- 28 C.F.R. Part 35, §35.160 –Requires a public entity to take steps to ensure that communication with members of the public with disabilities are as effective as communications with others.
- Texas Attorney General Opinion No. JC-0584 (2002) re the relationship between TRCP 183 and Chapter 57.

DOJ Guidance and Position:

- 2010 Letter from the Department of Justice Civil Rights Division to all Chief Justices and State Court Administrators
    - DOJ expects that, when meaningful access requires interpretation, courts will provide interpreters at no cost to the persons involved.
- 67 Fed. Reg.
    - **At 41461**: Competent interpretation should be provided; competency requires more than just self-identification as bilingual. Strong encouragement to use formally licensed or certified interpreters in court proceedings.

- **At 41462**: use of informal interpreters "in place of or as a supplement to the free language services expressly offered" should not be relied on because in many circumstances, they are "not competent to provide quality and accurate interpretations" when credibility and accuracy are important to protect a person's rights.
- **At 41459, n. 5**: "As used in this guidance, the word "court" or "courts" includes administrative adjudicatory systems or administrative hearings"
- **At 41464**: The following actions will be considered strong evidence of compliance with the recipient's written-translation obligations:

  (a) The DOJ recipient provides written translations of vital documents for each eligible LEP language group that constitutes five percent or 1,000, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered. Translation of other documents, if needed, can be provided orally; or

  (b) If there are fewer than 50 persons in a language group that reaches the five percent trigger in (a), the recipient does not translate vital written materials but provides written notice in the primary language of the LEP language group of the right to receive competent oral interpretation of those written materials, free of cost.
- **At 41471**: Every effort should be taken to ensure competent interpretation for LEP individuals during all hearings, trials, and motions.
  - Where certification is available, courts should consider carefully the qualifications of interpreters who are not certified.
  - In a courtroom or administrative hearing setting, the use of informal interpreters, such as family members, friends, and caretakers, would not be appropriate.

- Commonly Asked Questions and Answers Regarding Limited English Proficient (LEP) Individuals, DOJ

  Question: When developing plans and guidance regarding translation of documents, how do we determine which documents must be translated?

  Answer: It is important to ensure that written materials routinely provided in English also are provided in regularly encountered languages other than English. It is particularly important to ensure that vital documents are translated into the non-English language of each regularly encountered LEP group eligible to be served or likely to be affected by the program or activity. A document will be considered vital if it contains information that is critical for obtaining federal services and/or benefits, or is required by law.

- Language Access Planning Technical Assistance Tool for Courts, February 2014
  - Pg. 13: Examples of vital documents for courts include, but are not limited to,
    - Consent forms
    - Complaint forms
    - Pro se materials
    - Notices of rights
    - Summonses
    - Subpoenas
    - Case filing forms

- Notices of language service availability
- Orders

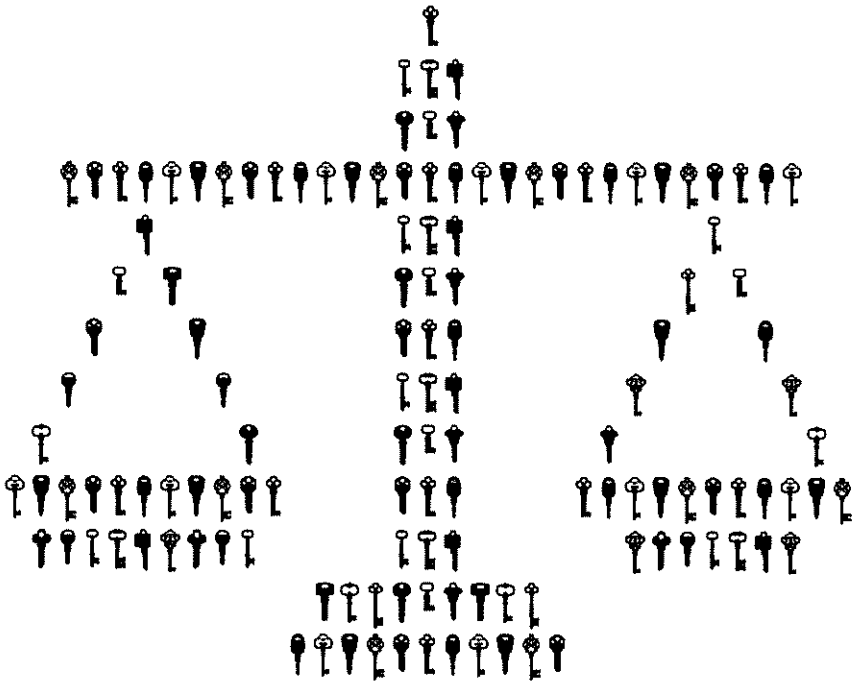
ABA Standards for Language Access in Courts

STANDARD 7: TRANSLATION
Courts should establish a process for providing access to translated written information to persons with limited English proficiency to ensure meaningful access to all court services.

7.1 Courts should establish a system for prioritizing and translating documents that determines which documents should be translated, selects the languages for translation, includes alternative measures for illiterate and low literacy individuals, and provides a mechanism for regular review of translation priorities.

7.2 To ensure quality in translated documents, courts should establish a translation protocol that includes: review of the document prior to translation for uniformity and plain English usage; selection of translation technology, document formats, and glossaries; and, utilization of both a primary translator and a reviewing translator.

American Bar Association



Standards *for* Language Access *in* Courts

Standing Committee on Legal Aid and Indigent Defendants

FEBRUARY 2012

2.3 Courts should provide language access services without charge, and may assess or recoup the cost of such services only in a manner that is consistent with principles of fairness, access to justice and integrity of the judicial process, and that comports with legal requirements.

Commentary

Language access services ensure that all persons have equal access to justice and that information essential for the efficiency and integrity of legal proceedings can be understood by both English speakers and those who are LEP. Many states and courts, as well as the federal government, have endorsed these principles by passing laws and promulgating rules and guidance that expressly require the provision of language access services in both civil and criminal cases regardless of indigency.[12] See Standard 1 for a full examination of these principles and relevant law and jurisprudence.

Courts should avoid placing the burden of paying for language access disproportionately on LEP individuals in a manner that discourages access to court by LEP persons or inhibits requests for language services necessary to enable LEP persons to participate fully in proceedings. The cost of language services, if imposed, should not unduly impact LEP persons. The court may assess or recoup those costs from a well-resourced party who has the ability to pay, as appropriate and where allowed by law. Whatever test the court applies to determine if costs should be assessed or recouped, it cannot have a chilling effect on the rights of the LEP person to access the court system. In all cases, the court has an institutional interest in having adequate language services to capture evidence accurately and determine cases fairly on the merits.

Best Practices

There is broad agreement that justice cannot be achieved in any adjudicatory setting (whether civil or criminal) when persons affected by the proceedings do not comprehend them, when persons with information that is essential to a fair outcome cannot convey that information, when the judge or jury do not have an accurate understanding of relevant evidence, or when persons are subject to a different outcome or penalty, or are denied an otherwise available option or treatment, based only on their language ability. Because language services are essential to the fair and efficient operation of the courts, expenses associated with providing those services should be considered routine, necessary expenses and included in budget requests for judicial

12. See Fn. 2, Laura Abel, Language Access in State Courts (2009), pp. 67-68 (identifying Idaho, Kansas, Kentucky, Maine, Minnesota, Nebraska, New Jersey, New York, Oregon and Wisconsin as states in which the courts pay for interpreters without imposing a means test and without assessing interpreter costs on the parties), available at www.brennancenter.org; Colo. Ch. J. Dir. 06-03, (June 2011); COSCA White Paper Appendix A.; DOJ Guidance and Letter from Thomas E. Perez, Assistant Attorney General, to Chief Justices and State Court Administrators 2 (Aug. 16, 2010), http://www.justice.gov/crt/lep/final_courts_ltr_081610.pdf [hereinafter "Letter to Chief Justices and State Court Administrators"].

administration and as part of other court efforts seeking adequate funds for court operations. Courts may seek necessary increases in funding of judicial budgets, or grants from the federal government or other sources.[13] Courts may include the cost of language access services in the calculation for determining filing fees for all users.

Recognizing that adequate funding might not be immediately available, implementation of these Standards in all tribunals and proceedings may need to be phased over a period of time, and priority should be given to providing interpreter services without charge to low and moderate income persons and unrepresented litigants. Assessment or recoupment of the cost of interpreter services, where allowed by law, should be limited to well-resourced parties who have the ability to pay such costs, because fees imposed upon LEP persons have the strong potential to chill recourse to the courts and inhibit the use of language access services that are necessary or beneficial to the fair administration of justice.

An example of a situation where a court may, where allowed by law, assess or recoup the cost of language access services would be when, in a specific civil proceeding, language access services are provided for the benefit of a well-resourced non-LEP individual or corporate party. In such a situation, the cost of language services can be imposed on that individual/corporation without chilling court access or disproportionately burdening LEP individuals and most would agree that it is fair to require that party to bear the costs, for example, of presenting the testimony of an LEP expert witness. If the well-resourced party was himself/herself LEP, the court would need to evaluate the circumstances to ensure that any assessment of costs would be consistent with the principles articulated in this Standard.

In considering whether to provide an interpreter without charge, courts should be mindful that the poverty/indigency threshold is unrealistically low. For that reason, any effort by a court to impose fees on particular persons and litigants should take into consideration that the cost of interpreter services will burden most people of modest or even "middle class" means, and of many small or moderate-size businesses. Litigants in those categories will not be treated on a par with persons who do not require language services and will effectively be denied access to justice, if they are unable or dissuaded from using the courts, because they are subject to up-front fees or know that they will be assessed fees under an after-the-fact recoupment mechanism.

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13. See, e.g., Colorado Judicial Branch, FY 2010-11, Joint Budget Committee Hearing Agenda (Nov. 18, 2010), p. 3 (showing interpreter costs as 2% of the judiciary's general fund allocation); http://www.courts.state.co.us/userfiles/file/Administration/Financial_Services/Judicial%20 2012%20Hearing%20Agenda%20-%20FINAL.pdf; Wisconsin Court System, Biennial Budget Summary: Court-Related Items (July 1, 2011), p. 16 (allocating a portion of the Justice Information Systems Surcharge for court interpreter costs), http://www.wicourts.gov/courts/overview/docs/budgetsummary.pdf; Texas Courts Online, Remote Interpreter Project, (describing use of federal Violence Against Women Act funding for remote interpretation project), http://www.courts.state.tx.us/oca/dvra/trip.asp.

Federal Register

Wednesday,
August 16, 2000

Part V

The President

Executive Order 13166—Improving Access to Services for Persons With Limited English Proficiency

Department of Justice

Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons With Limited English Proficiency; Notice

Federal Register
Vol. 65, No. 159
Wednesday, August 16, 2000

Presidential Documents

Title 3—

The President

Executive Order 13166 of August 11, 2000

Improving Access to Services for Persons With Limited English Proficiency

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to improve access to federally conducted and federally assisted programs and activities for persons who, as a result of national origin, are limited in their English proficiency (LEP), it is hereby ordered as follows:

Section 1. *Goals.*

The Federal Government provides and funds an array of services that can be made accessible to otherwise eligible persons who are not proficient in the English language. The Federal Government is committed to improving the accessibility of these services to eligible LEP persons, a goal that reinforces its equally important commitment to promoting programs and activities designed to help individuals learn English. To this end, each Federal agency shall examine the services it provides and develop and implement a system by which LEP persons can meaningfully access those services consistent with, and without unduly burdening, the fundamental mission of the agency. Each Federal agency shall also work to ensure that recipients of Federal financial assistance (recipients) provide meaningful access to their LEP applicants and beneficiaries. To assist the agencies with this endeavor, the Department of Justice has today issued a general guidance document (LEP Guidance), which sets forth the compliance standards that recipients must follow to ensure that the programs and activities they normally provide in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of title VI of the Civil Rights Act of 1964, as amended, and its implementing regulations. As described in the LEP Guidance, recipients must take reasonable steps to ensure meaningful access to their programs and activities by LEP persons.

Sec. 2. *Federally Conducted Programs and Activities.*

Each Federal agency shall prepare a plan to improve access to its federally conducted programs and activities by eligible LEP persons. Each plan shall be consistent with the standards set forth in the LEP Guidance, and shall include the steps the agency will take to ensure that eligible LEP persons can meaningfully access the agency's programs and activities. Agencies shall develop and begin to implement these plans within 120 days of the date of this order, and shall send copies of their plans to the Department of Justice, which shall serve as the central repository of the agencies' plans.

Sec. 3. *Federally Assisted Programs and Activities.*

Each agency providing Federal financial assistance shall draft title VI guidance specifically tailored to its recipients that is consistent with the LEP Guidance issued by the Department of Justice. This agency-specific guidance shall detail how the general standards established in the LEP Guidance will be applied to the agency's recipients. The agency-specific guidance shall take into account the types of services provided by the recipients, the individuals served by the recipients, and other factors set out in the LEP Guidance. Agencies that already have developed title VI guidance that the Department of Justice determines is consistent with the LEP Guidance shall examine their existing guidance, as well as their programs and activities, to determine if additional guidance is necessary to comply with this order. The Department of Justice shall consult with the agencies in creating their guidance and, within 120 days of the date of this order,

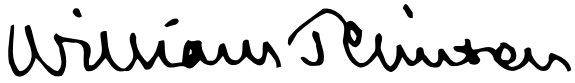
each agency shall submit its specific guidance to the Department of Justice for review and approval. Following approval by the Department of Justice, each agency shall publish its guidance document in the **Federal Register** for public comment.

Sec. 4. *Consultations.*

In carrying out this order, agencies shall ensure that stakeholders, such as LEP persons and their representative organizations, recipients, and other appropriate individuals or entities, have an adequate opportunity to provide input. Agencies will evaluate the particular needs of the LEP persons they and their recipients serve and the burdens of compliance on the agency and its recipients. This input from stakeholders will assist the agencies in developing an approach to ensuring meaningful access by LEP persons that is practical and effective, fiscally responsible, responsive to the particular circumstances of each agency, and can be readily implemented.

Sec. 5. *Judicial Review.*

This order is intended only to improve the internal management of the executive branch and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers or employees, or any person.



THE WHITE HOUSE,
August 11, 2000.

[FR Doc. 00–20938
Filed 8–15–00; 8:45 am]
Billing code 3195–01–P

DEPARTMENT OF JUSTICE

Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons With Limited English Proficiency; Policy Guidance

AGENCY: Civil Rights Division, Department of Justice.

ACTION: Policy guidance document.

SUMMARY: This Policy Guidance Document entitled ''Enforcement of Title VI of the Civil Rights Act of 1964 '' National Origin Discrimination Against Persons with Limited English Proficiency (LEP Guidance)'' is being issued pursuant to authority granted by Executive Order 12250 and Department of Justice Regulations. It addresses the application of Title VI's prohibition on national origin discrimination when information is provided only in English to persons with limited English proficiency. This policy guidance does not create new obligations, but rather, clarifies existing Title VI responsibilities. The purpose of this document is to set forth general principles for agencies to apply in developing guidelines for services to individuals with limited English proficiency. The Policy Guidance Document appears below.

DATES: Effective August 11, 2000.

ADDRESSES: Coordination and Review Section, Civil Rights Division, P.O. Box 66560, Washington, D.C. 20035–6560.

FOR FURTHER INFORMATION CONTACT: Merrily Friedlander, Chief, Coordination and Review Section, Civil Rights Division, (202) 307–2222.

Helen L. Norton,

Counsel to the Assistant Attorney General, Civil Rights Division.

Office of the Assistant Attorney General

Washington, D.C. 20530

August 11, 2000.

TO: Executive Agency Civil Rights Officers

FROM: Bill Lann Lee, Assistant Attorney General, Civil Rights Division

SUBJECT: Policy Guidance Document: *Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons With Limited English Proficiency* (''LEP Guidance'')

This policy directive concerning the enforcement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq., as amended*, is being issued pursuant to the authority granted by Executive Order No. 12250 [1] and Department of Justice regulations.[2] It addresses the application to recipients of federal financial assistance of Title VI's prohibition on national origin discrimination when information is provided only in English to persons who do not understand English. This policy guidance does not create new obligations but, rather, clarifies existing Title VI responsibilities.

Department of Justice Regulations for the Coordination of Enforcement of Non-discrimination in Federally Assisted Programs (Coordination Regulations), 28 C.F.R. 42.401 *et seq.*, direct agencies to ''publish title VI guidelines for each type of program to which they extend financial assistance, where such guidelines would be appropriate to provide detailed information on the requirements of Title VI.'' 28 CFR § 42.404(a). The purpose of this document is to set forth general principles for agencies to apply in developing such guidelines for services to individuals with limited English proficiency (LEP). It is expected that, in developing this guidance for their federally assisted programs, agencies will apply these general principles, taking into account the unique nature of the programs to which they provide federal financial assistance.

A federal aid recipient's failure to assure that people who are not proficient in English can effectively participate in and benefit from programs and activities may constitute national origin discrimination prohibited by Title VI. In order to assist agencies that grant federal financial assistance in ensuring that recipients of federal financial assistance are complying with their responsibilities, this policy directive addresses the appropriate compliance standards. Agencies should utilize the standards set forth in this Policy Guidance Document to develop specific criteria applicable to review the programs and activities for which they offer financial assistance. The Department of Education [3] already has established policies, and the Department of Health and Human Services (HHS) [4] has been developing guidance in a manner consistent with Title VI and this Document, that applies to their specific programs receiving federal financial assistance.

Background

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal financial assistance from discriminating against or otherwise excluding individuals on the basis of race, color, or national origin in any of their activities. Section 601 of Title VI, 42 U.S.C. § 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The term ''program or activity'' is broadly defined. 42 U.S.C. § 2000d–4a.

Consistent with the model Title VI regulations drafted by a Presidential task force in 1964, virtually every executive agency that grants federal financial assistance has promulgated regulations to implement Title VI. These regulations prohibit recipients from ''restrict[ing] an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program'' and ''utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination'' or have ''the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.''

In *Lau* v. *Nichols*, 414 U.S. 563 (1974), the Supreme Court interpreted these provisions as requiring that a federal financial recipient take steps to ensure that language barriers did not exclude LEP persons from effective participation in its benefits and services. *Lau* involved a group of students of Chinese origin who did not speak English to whom the recipient provided the same services—an education provided solely in English—that it provided students who did speak English. The Court held that, under these circumstances, the school's practice violated the Title VI prohibition against discrimination on

[1] 42 U.S.C. § 2000d–1 note.

[2] 28 C.F.R. § 0.51.

[3] Department of Education policies regarding the Title VI responsibilities of public school districts with respect to LEP children and their parents are reflected in three Office for Civil Rights policy documents: (1) the May 1970 memorandum to school districts, ''Identification of Discrimination and Denial of Services on the Basis of National Origin,'' (2) the December 3, 1985, guidance document, ''The Office for Civil Rights' Title VI Language Minority Compliance Procedures,'' and (3) the September 1991 memorandum, ''Policy Update on Schools Obligations Toward National Origin Minority Students with Limited English Proficiency.'' These documents can be found at the Department of Education website at www.ed.gov/office/OCR.

[4] The Department of Health and Human Services is issuing policy guidance titled: ''Title VI Prohibition Against National Origin Discrimination As It Affects Persons With Limited English Proficiency.'' This policy addresses the Title VI responsibilities of HHS recipients to individuals with limited English proficiency.

the basis of national origin. The Court observed that ''[i]t seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination banned by'' the Title VI regulations.[5] Courts have applied the doctrine enunciated in *Lau* both inside and outside the education context. It has been considered in contexts as varied as what languages drivers' license tests must be given in or whether material relating to unemployment benefits must be given in a language other than English.[6]

Link Between National Origin And Language

For the majority of people living in the United States, English is their native language or they have acquired proficiency in English. They are able to participate fully in federally assisted programs and activities even if written and oral communications are exclusively in the English language.

The same cannot be said for the remaining minority who have limited English proficiency. This group includes persons born in other countries, some children of immigrants born in the United States, and other non-English or limited English proficient persons born in the United States, including some Native Americans. Despite efforts to learn and master English, their English language proficiency may be limited for some time.[7] Unless grant recipients take steps to respond to this difficulty, recipients effectively may deny those who do not speak, read, or understand English access to the benefits and services for which they qualify.

Many recipients of federal financial assistance recognize that the failure to provide language assistance to such persons may deny them vital access to services and benefits. In some instances, a recipient's failure to remove language barriers is attributable to ignorance of the fact that some members of the community are unable to communicate in English, to a general resistance to change, or to a lack of awareness of the obligation to address this obstacle.

In some cases, however, the failure to address language barriers may not be simply an oversight, but rather may be attributable, at least in part, to invidious discrimination on the basis of national origin and race. While there is not always a direct relationship between an individual's language and national origin, often language does serve as an identifier of national origin.[8] The same sort of prejudice and xenophobia that may be at the root of discrimination against persons from other nations may be triggered when a person speaks a language other than English.

> Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility * * *. It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.[9]

While Title VI itself prohibits only intentional discrimination on the basis of national origin,[10] the Supreme Court has consistently upheld agency regulations prohibiting unjustified discriminatory effects.[11] The Department of Justice has consistently adhered to the view that the significant discriminatory effects that the failure to provide language assistance has on the basis of national origin, places the treatment of LEP individuals comfortably within the ambit of Title VI and agencies' implementing regulations.[12] Also, existing language barriers potentially may be rooted in invidious discrimination. The Supreme Court in *Lau* concluded that a recipient's failure to take affirmative steps to provide ''meaningful opportunity'' for LEP individuals to participate in its programs and activities violates the recipient's obligations under Title VI and its regulations.

All Recipients Must Take Reasonable Steps To Provide Meaningful Access

Recipients who fail to provide services to LEP applicants and beneficiaries in their federally assisted programs and activities may be discriminating on the basis of national origin in violation of Title VI and its implementing regulations. Title VI and its regulations require recipients to take reasonable steps to ensure ''meaningful'' access to the information and services they provide. What constitutes reasonable steps to ensure meaningful access will be contingent on a number of factors. Among the factors to be considered are the number or proportion of LEP persons in the eligible service population, the frequency with which LEP individuals come in contact with the program, the importance of the service provided by the program, and the resources available to the recipient.

(1) Number or Proportion of LEP Individuals

Programs that serve a few or even one LEP person are still subject to the Title VI obligation to take reasonable steps to provide meaningful opportunities for access. However, a factor in determining the reasonableness of a recipient's efforts is the number or proportion of people who will be excluded from the benefits or services absent efforts to remove language barriers. The steps that are reasonable for a recipient who serves one LEP person a year may be different than those expected from a recipient that serves several LEP persons each day. But even those who serve very few LEP persons on an infrequent basis should utilize this balancing analysis to determine whether reasonable steps are

[5] 414 U.S. at 568. Congress manifested its approval of the *Lau* decision requirements concerning the provision of meaningful education services by enacting provisions in the Education Amendments of 1974, Pub. L. No. 93–380, §§ 105, 204, 88 Stat. 503–512, 515 codified at 20 U.S.C. 1703(f), and the Bilingual Education Act, 20 U.S.C. 7401 *et seq*., which provided federal financial assistance to school districts in providing language services.

[6] For cases outside the educational context, *see, e.g.*, *Sandoval* v. *Hagan*, 7 F. Supp. 2d 1234 (M.D. Ala. 1998), *affirmed*, 197 F.3d 484, (11th Cir. 1999), *rehearing and suggestion for rehearing en banc denied*, 211 F.3d 133 (11th Cir. Feb. 29, 2000) (Table, No. 98–6598–II), *petition for certiorari filed* May 30, 2000 (No. 99–1908) (giving drivers' license tests only in English violates Title VI); and *Pabon* v. *Levine*, 70 F.R.D. 674 (S.D.N.Y. 1976) (summary judgment for defendants denied in case alleging failure to provide unemployment insurance information in Spanish violated Title VI).

[7] Certainly it is important to achieve English language proficiency in order to fully participate at every level in American society. As we understand the Supreme Court's interpretation of Title VI's prohibition of national origin discrimination, it does not in any way disparage use of the English language.

[8] As the Supreme Court observed, ''[l]anguage permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond.'' *Hernandez* v. *New York,* 500 U.S. 352, 370 (1991) (plurality opinion).

[9] *Id*. at 371 (plurality opinion).

[10] *Alexander* v. *Choate,* 469 U.S. 287, 293 (1985).

[11] Id. at 293–294; *Guardians Ass'n* v. *Civil Serv. Comm'n,* 463 U.S. 582, 584 n.2 (1983) (White, J.), 623 n.15 (Marshall, J.), 642–645 (Stevens, Brennan, Blackmun, JJ.); *Lau* v. *Nichols,* 414 U.S. at 568; *id.* at 571 (Stewart, J., concurring in result). In a July 24, 1994, memorandum to Heads of Departments and Agencies that Provide Federal Financial Assistance concerning ''Use of the Disparate Impact Standard in Administrative Regulations Under Title VI of the Civil Rights Act of 1964,'' the Attorney General stated that each agency ''should ensure that the disparate impact provisions of your regulations are fully utilized so that all persons may enjoy equally the benefits of federally financed programs.''

[12] The Department's position with regard to written language assistance is articulated in 28 CFR § 42.405(d)(1), which is contained in the Coordination Regulations, 28 CFR Subpt. F, issued in 1976. These Regulations ''govern the respective obligations of Federal agencies regarding enforcement of title VI.'' 28 CFR § 42.405. Section 42.405(d)(1) addresses the prohibitions cited by the Supreme Court in *Lau*.

possible and if so, have a plan of what to do if a LEP individual seeks service under the program in question. This plan need not be intricate; it may be as simple as being prepared to use one of the commercially available language lines to obtain immediate interpreter services.

(2) Frequency of Contact with the Program

Frequency of contacts between the program or activity and LEP individuals is another factor to be weighed. For example, if LEP individuals must access the recipient's program or activity on a daily basis, *e.g.*, as they must in attending elementary or secondary school, a recipient has greater duties than if such contact is unpredictable or infrequent. Recipients should take into account local or regional conditions when determining frequency of contact with the program, and should have the flexibility to tailor their services to those needs.

(3) Nature and Importance of the Program

The importance of the recipient's program to beneficiaries will affect the determination of what reasonable steps are required. More affirmative steps must be taken in programs where the denial or delay of access may have life or death implications than in programs that are not as crucial to one's day-to-day existence. For example, the obligations of a federally assisted school or hospital differ from those of a federally assisted zoo or theater. In assessing the effect on individuals of failure to provide language services, recipients must consider the importance of the benefit to individuals both immediately and in the long-term. A decision by a federal, state, or local entity to make an activity compulsory, such as elementary and secondary school attendance or medical inoculations, serves as strong evidence of the program's importance.

(4) Resources Available

The resources available to a recipient of federal assistance may have an impact on the nature of the steps that recipients must take. For example, a small recipient with limited resources may not have to take the same steps as a larger recipient to provide LEP assistance in programs that have a limited number of eligible LEP individuals, where contact is infrequent, where the total cost of providing language services is relatively high, and/or where the program is not crucial to an individual's day-to-day existence. Claims of limited resources from large entities will need to be well-substantiated.[13]

Written vs. Oral Language Services

In balancing the factors discussed above to determine what reasonable steps must be taken by recipients to provide meaningful access to each LEP individual, agencies should particularly address the appropriate mix of written and oral language assistance. Which documents must be translated, when oral translation is necessary, and whether such services must be immediately available will depend upon the factors previously mentioned.[14] Recipients often communicate with the public in writing, either on paper or over the Internet, and written translations are a highly effective way of communicating with large numbers of people who do not speak, read or understand English. While the Department of Justice's Coordination Regulation, 28 CFR § 42.405(d)(1), expressly addresses requirements for provision of written language assistance, a recipient's obligation to provide meaningful opportunity is not limited to written translations. Oral communication between recipients and beneficiaries often is a necessary part of the exchange of information. Thus, a recipient that limits its language assistance to the provision of written materials may not be allowing LEP persons ''effectively to be informed of or to participate in the program'' in the same manner as persons who speak English.

In some cases, ''meaningful opportunity'' to benefit from the program requires the recipient to take steps to assure that translation services are promptly available. In some circumstances, instead of translating all of its written materials, a recipient may meet its obligation by making available oral assistance, or by commissioning written translations on reasonable request. It is the responsibility of federal assistance-granting agencies, in conducting their Title VI compliance activities, to make more specific judgments by applying their program expertise to concrete cases.

Conclusion

This document provides a general framework by which agencies can determine when LEP assistance is required in their federally assisted programs and activities and what the nature of that assistance should be. We expect agencies to implement this document by issuing guidance documents specific to their own recipients as contemplated by the Department of Justice Coordination Regulations and as HHS and the Department of Education already have done. The Coordination and Review Section is available to assist you in preparing your agency-specific guidance. In addition, agencies should provide technical assistance to their recipients concerning the provision of appropriate LEP services.

[FR Doc. 00–20867 Filed 8–15–00; 8:45 am]

BILLING CODE 4410–13–P

[13] Title VI does not require recipients to remove language barriers when English is an essential aspect of the program (such as providing civil service examinations in English when the job requires person to communicate in English, *see Frontera* v. *Sindell,* 522 F.2d 1215 (6th Cir. 1975)), or there is another ''substantial legitimate justification for the challenged practice.'' *Elston* v. *Talladega County Bd. of Educ.,* 997 F.2d 1394, 1407 (11th Cir. 1993). Similar balancing tests are used in other nondiscrimination provisions that are concerned with effects of an entity's actions. For example, under Title VII of the Civil Rights Act of 1964, employers need not cease practices that have a discriminatory effect if they are ''consistent with business necessity'' and there is no ''alternative employment practice'' that is equally effective. 42 U.S.C. § 2000e–2(k). Under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, recipients do not need to provide access to persons with disabilities if such steps impose an undue burden on the recipient. *Alexander* v. *Choate,* 469 U.S. at 300. Thus, in situations where all of the factors identified in the text are at their nadir, it may be ''reasonable'' to take no affirmative steps to provide further access.

[14] Under the four-part analysis, for instance, Title VI would not require recipients to translate documents requested under a state equivalent of the Freedom of Information Act or Privacy Act, or to translate all state statutes or notices of rulemaking made generally available to the public. The focus of the analysis is the nature of the information being communicated, the intended or expected audience, and the cost of providing translations. In virtually all instances, one or more of these criteria would lead to the conclusion that recipients need not translate these types of documents.

local, tribal, and foreign law enforcement agencies; Federal/State probation and judicial offices; Congress; contract and consulting physicians, including hospitals; and attorneys for claimants.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

The Attorney General has exempted this system from subsections (c)(3) and (4), (d), (e)(2), (e)(3), (e)(4)(H), (e)(8), (f) and (g) of the Privacy Act pursuant to 5 U.S.C. 552a(j). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553(b), (c) and (e) and have been published in the **Federal Register** and codified at 28 CFR 16.97(a) and (b).

[FR Doc. 02–15299 Filed 6–17–02; 8:45 am]
BILLING CODE 4410–05–P

DEPARTMENT OF JUSTICE

Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons

AGENCY: Department of Justice.

ACTION: Policy guidance document.

SUMMARY: The Department of Justice (DOJ) adopts final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons (DOJ Recipient LEP Guidance). The DOJ Recipient LEP Guidance is issued pursuant to Executive Order 13166, and supplants existing guidance on the same subject originally published at 66 FR 3834 (January 16, 2001).

DATES: Effective June 12, 2002.

FOR FURTHER INFORMATION CONTACT: Merrily A. Friedlander, Chief, Coordination and Review Section, Civil Rights Division, 950 Pennsylvania Avenue, NW–NYA, Washington, DC 20530. Telephone 202–307–2222; TDD: 202–307–2678.

SUPPLEMENTARY INFORMATION: Under DOJ regulations implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, *et seq.* (Title VI), recipients of Federal financial assistance have a responsibility to ensure meaningful access to their programs and activities by persons with limited English proficiency (LEP). *See* 28 CFR 42.104(b)(2). Executive Order 13166, reprinted at 65 FR 50121 (August 16, 2000), directs each Federal agency that extends assistance subject to the requirements of Title VI to publish guidance for its respective recipients clarifying that obligation. Executive Order 13166 further directs that all such guidance documents be consistent with the compliance standards and framework detailed in DOJ Policy Guidance entitled "Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency." *See* 65 FR 50123 (August 16, 2000).

Initial guidance on DOJ recipients' obligations to take reasonable steps to ensure access by LEP persons was published on January 16, 2001. *See* 66 FR 3834. That guidance document was republished for additional public comment on January 18, 2002. *See* 67 FR 2671. Based on public comments filed in response to the January 18, 2002 republication, DOJ published revised draft guidance for public comment on April 18, 2002. *See* 67 FR 19237.

DOJ received 24 comments in response to its April 18, 2002 publication of revised draft guidance on DOJ recipients' obligations to take reasonable steps to ensure access to programs and activities by LEP persons. The comments reflected the views of individuals, organizations serving LEP populations, organizations favoring the use of the English language, language assistance service providers, and state agencies. While many comments identified areas for improvement and/or revision, the overall response to the draft DOJ Recipient LEP Guidance was favorable. Taken together, a majority of the comments described the draft guidance as incorporating "reasonable standards" or "helpful provisions" providing "useful suggestions instead of mandatory requirements" reflecting "common sense" and a "more measured tone" over prior LEP guidance documents.

Two of the comments urged withdrawal of the draft guidance as unsupported by law. In response, the Department notes here as it did in the draft Recipient LEP Guidance published on April 18, 2002 that the Department's commitment to implement Title VI through regulations reaching language barriers is long-standing and is unaffected by recent judicial action precluding *individuals* from bringing judicial actions seeking to enforce those agency regulations. See 67 FR at 19238–19239. This particular policy guidance clarifies existing statutory and regulatory requirements for LEP persons by providing a description of the factors recipients should consider in fulfilling their responsibilities to LEP persons.

Of the remaining 22 comments, three supported adoption of the draft guidance as published, and 19, while supportive of the guidance and the Department's leadership in this area, suggested modifications which would, in their view, either (1) clarify the application of the flexible compliance standard incorporated by the draft guidance to particular areas or situations, or (2) provide a more definitive statement of the minimal compliance standards in this area. Several areas were raised in more than one comment. In the order most often raised, those common areas of comment were (1) recipient language assistance plans, (2) use of informal interpreters, (3) written translation safe harbors, and (4) cost considerations. The comments in each of these area are summarized and discussed below.

Recipient Language Assistance Plans. A large number of comments recommended that written language assistance plans (LEP Plans) be required of all recipients. The Department is cognizant of the value of written LEP plans in documenting a recipient's compliance with its obligation to ensure meaningful access by LEP persons, and in providing a framework for the provision of reasonable and necessary language assistance to LEP persons. The Department is also aware of the related training, operational, and planning benefits most recipients would derive from the generation and maintenance of an updated written language assistance plan for use by its employees. In the large majority of cases, the benefits flowing from a written language assistance plan has caused or will likely cause recipients to develop, with varying degrees of detail, such written plans. Even small recipients with limited contact with LEP persons would likely benefit from having a plan in place to assure that, when the need arises, staff have a written plan to turn to—even if it is only how to access a telephonic or community-based interpretation service—when determining what language services to provide and how to provide them.

However, the fact that the vast majority of the Department's recipients already have or will likely develop a written LEP plan to reap its many benefits does not necessarily mean that every recipient, however small its staff, limited its resources, or focused its services, will realize the same benefits and thus must follow an identical path. Without clear evidence suggesting that the absence of written plans for every single recipient is impeding accomplishment of the goal of meaningful access, the Department elects at this juncture to strongly recommend but not require written language assistance plans. The

Department stresses in this regard that neither the absence of a requirement of written LEP plans in all cases nor the election by an individual recipient against drafting a plan obviates the underlying obligation on the part of each recipient to provide, consistent with Title VI, the Title VI regulations, and the DOJ Recipient LEP Guidance, reasonable, timely, and appropriate language assistance to the LEP populations each serves.

While the Department continues to believe that the Recipient LEP Guidance strikes the correct balance between recommendations and requirements in this area, the Department has revised the introductory paragraph of Section VII of the Recipient LEP Guidance to acknowledge a recipient's discretion in drafting a written LEP plan yet to emphasize the many benefits that weigh in favor of such a written plan in the vast majority of cases.

Informal Interpreters. As in the case of written LEP plans, a large number of the comments urged the incorporation of more definitive language strongly discouraging or severely limiting the use of informal interpreters such as family members, guardians, caretakers, friends, or fellow inmates or detainees. Some recommended that the draft guidance be revised to prohibit the use of informal interpreters except in limited or emergency situations. A common sub-theme running through many of these comments was a concern regarding the technical and ethical competency of such interpreters to ensure meaningful and appropriate access at the level and of the type contemplated under the DOJ Recipient LEP Guidance.[1]

As in the case of written LEP plans, the Department believes that the DOJ Recipient LEP Guidance provides sufficient guidance to allow recipients to strike the proper balance between the many situations where the use of informal interpreters is inappropriate, and the few situations where the transitory and/or limited use of informal interpreters is necessary and appropriate in light of the nature of a service or benefit being provided and the factual context in which that service or benefit is being provided. Nonetheless, the Department concludes that the potential for the inappropriate use of informal interpreters or, conversely, its unnecessary avoidance, can be minimized through additional clarifications in the DOJ Recipient LEP Guidance. Towards that end, the subsection titled "Use of Family Members, Friends, Other Inmates, or Other Detainees as Interpreters' of Section VI.A. of the DOJ Recipient LEP Guidance has been revised to include guardians and caretakers among the potential class of informal interpreters, to note that beneficiaries who elect to provide their own informal interpreter do so at their own expense, to clarify that reliance on informal interpreters should not be part of any recipient LEP plan, and to expand the discussion of the special considerations that should guide a recipient's limited reliance on informal interpreters.

Safe Harbors. Several comments focused on safe harbor and vital documents provisions of the written translations section of the DOJ Recipient LEP Guidance.[2] A few comments observed that the safe harbor standard set out in the Recipient LEP Guidance was too high, potentially permitting recipients to avoid translating several critical types of vital documents (*e.g.*, notices of denials of benefits or rights, leases, rules of conduct, *etc.*). In contrast, another comment pointed to this same standard as support for the position that the safe harbor provision was too low, potentially requiring a large recipient to incur extraordinary fiscal burdens to translate all documents associated with the program or activity.

The decision as to what program-related documents should be translated into languages other than English is a difficult one. While documents generated by a recipient may be helpful in understanding a program or activity, not all are critical or vital to ensuring meaningful access by beneficiaries generally and LEP persons specifically. Some documents may create or define legally enforceable rights or responsibilities on the part of individual beneficiaries (*e.g.*, leases, rules of conduct, notices of benefit denials, *etc.*). Others, such as application or certification forms, solicit important information required to establish or maintain eligibility to participate in a Federally-assisted program or activity. And for some programs or activities, written documents may be the core benefit or service provided by the program or activity. Moreover, some programs or activities may be specifically focused on providing benefits or services to significant LEP populations. Finally, a recipient may elect to solicit vital information orally as a substitute for written documents. For example, many state unemployment insurance programs are transitioning away from paper-based application and certification forms in favor of telephone-based systems. Also, certain languages (*e.g.*, Hmong) are oral rather than written, and thus a high percentage of such LEP speakers will likely be unable to read translated documents or written instructions since it is only recently that such languages have been converted to a written form. Each of these factors should play a role in deciding what documents should be translated, what target languages other than English are appropriate, or even whether more effective alternatives to a continued reliance on written documents to obtain or process vital information exist.

As has been emphasized elsewhere, the Recipient LEP Guidance is not intended to provide a definitive answer governing the translation of written documents for all recipients applicable in all cases. Rather, in drafting the safe harbor and vital documents provisions of the Recipient LEP Guidance, the Department sought to provide one, but not necessarily the only, point of reference for when a recipient should consider translations of documents (or the implementation of alternatives to such documents) in light of its particular program or activity, the document or information in question, and the potential LEP populations served. In furtherance of this purpose, the safe harbor and vital document provisions of the Recipient LEP Guidance have been revised to clarify the elements of the flexible translation standard, and to acknowledge that distinctions can and should be made between frequently-encountered and less commonly-encountered languages when identifying languages for translation.

Costs Considerations. A number of comments focused on cost considerations as an element of the Department's flexible four-factor analysis for identifying and addressing the language assistance needs of LEP

[1] A few comments urged the Department to incorporate language detailing particular interpretation standards or approaches. The Department declines to set, as part of the DOJ Recipient LEP Guidance, professional or technical standards for interpretation applicable to all recipients in every community and in all situations. General guidelines for translator and interpreter competency are already set forth in the guidance. Technical and professional standards and necessary vocabulary and skills for court interpreters and interpreters in custodial interrogations, for instance, would be different from those for emergency service interpreters, or, in turn, those for interpreters in educational programs for correctional facilities. Thus, recipients, beneficiaries, and associations of professional interpreters and translators should collaborate in identifying the applicable professional and technical interpretation standards that are appropriate for particular situations.

[2] One comment pointed out that current demographic information based on the 2000 Census or other data was not readily available to assist recipients in identifying the number or proportion of LEP persons and the significant language groups among their otherwise eligible beneficiaries. The Department is aware of this potential difficulty and is, among other things, working with the Census Bureau, among other entities, to increase the availability of such demographic data.

persons. While none urged that costs be excluded, some comments expressed concern that a recipient could use cost as a basis for avoiding otherwise reasonable and necessary language assistance to LEP persons. In contrast, a few comments suggested that the flexible fact-dependent compliance standard incorporated by the DOJ Recipient LEP Guidance, when combined with the desire of most recipients to avoid the risk of noncompliance, could lead some large, state-wide recipients to incur unnecessary or inappropriate fiscal burdens in the face of already strained program budgets. The Department is mindful that cost considerations could be inappropriately used to avoid providing otherwise reasonable and necessary language assistance. Similarly, cost considerations could be inappropriately ignored or minimized to justify the provision of a particular level or type of language service where less costly equally effective alternatives exist. The Department also does not dismiss the possibility that the identified need for language services might be quite costly for certain types of recipients in certain communities, particularly if they have not been keeping up with the changing needs of the populations they serve over time.

The potential for possible abuse of cost considerations by some does not, in the Department's view, justify its elimination as a factor in all cases when determining the appropriate "mix" of reasonable language assistance services determined necessary under the DOJ Recipient LEP Guidance to ensure meaningful access by LEP persons to Federally assisted programs and activities. The Department continues to believe that costs are a legitimate consideration in identifying the reasonableness of particular language assistance measures, and that the DOJ Recipient LEP Guidance identifies the appropriate framework through which costs are to be considered.

In addition to the four larger concerns noted above, the Department has substituted, where appropriate, technical or stylistic changes that more clearly articulate, in the Department's view, the underlying principle, guideline, or recommendation detailed in the Guidance. In addition, the Guidance has been modified to expand the definition of "courts" to include administrative adjudications conducted by a recipient; to acknowledge that English language instruction is an important adjunct to (but not substitute for) the obligation to ensure access to Federally assisted programs and activities by all eligible persons; and to clarify the Guidance's application to activities undertaken by a recipient either voluntarily or under contract in support of a Federal agency's functions.

After appropriate revision based on a careful consideration of the comments, with particular focus on the common concerns summarized above, the Department adopts final "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons." The text of this final guidance document appears below.

It has been determined that this Guidance, which supplants existing Guidance on the same subject previously published at 66 FR 3834 (January 16, 2001), does not constitute a regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. 553.

Dated: June 12, 2002.

R. Alexander Acosta,

Principal Deputy Assistant Attorney General, Civil Rights Division.

I. Introduction

Most individuals living in the United States read, write, speak and understand English. There are many individuals, however, for whom English is not their primary language. For instance, based on the 2000 census, over 26 million individuals speak Spanish and almost 7 million individuals speak an Asian or Pacific Island language at home. If these individuals have a limited ability to read, write, speak, or understand English, they are limited English proficient, or "LEP." While detailed data from the 2000 census has not yet been released, 26% of all Spanish-speakers, 29.9% of all Chinese-speakers, and 28.2% of all Vietnamese-speakers reported that they spoke English "not well" or "not at all" in response to the 1990 census.

Language for LEP individuals can be a barrier to accessing important benefits or services, understanding and exercising important rights, complying with applicable responsibilities, or understanding other information provided by Federally funded programs and activities. The Federal Government funds an array of services that can be made accessible to otherwise eligible LEP persons. The Federal Government is committed to improving the accessibility of these programs and activities to eligible LEP persons, a goal that reinforces its equally important commitment to promoting programs and activities designed to help individuals learn English. Recipients should not overlook the long-term positive impacts of incorporating or offering English as a Second Language (ESL) programs in parallel with language assistance services. ESL courses can serve as an important adjunct to a proper LEP plan. However, the fact that ESL classes are made available does not obviate the statutory and regulatory requirement to provide meaningful access for those who are not yet English proficient. Recipients of Federal financial assistance have an obligation to reduce language barriers that can preclude meaningful access by LEP persons to important government services.[1]

In certain circumstances, failure to ensure that LEP persons can effectively participate in or benefit from Federally assisted programs and activities may violate the prohibition under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d and Title VI regulations against national origin discrimination. The purpose of this policy guidance is to assist recipients in fulfilling their responsibilities to provide meaningful access to LEP persons under existing law. This policy guidance clarifies existing legal requirements for LEP persons by providing a description of the factors recipients should consider in fulfilling their responsibilities to LEP persons.[2] These are the same criteria DOJ will use in evaluating whether recipients are in compliance with Title VI and Title VI regulations.

The Department of Justice's role under Executive Order 13166 is unique. The Order charges DOJ with responsibility for providing LEP Guidance to other Federal agencies and for ensuring consistency among each agency-specific guidance. Consistency among Departments of the Federal government is particularly important. Inconsistency or contradictory guidance could confuse recipients of Federal funds and needlessly increase costs without rendering the meaningful access for LEP persons that this

[1] DOJ recognizes that many recipients had language assistance programs in place prior to the issuance of Executive Order 13166. This policy guidance provides a uniform framework for a recipient to integrate, formalize, and assess the continued vitality of these existing and possibly additional reasonable efforts based on the nature of its program or activity, the current needs of the LEP populations it encounters, and its prior experience in providing language services in the community it serves.

[2] The policy guidance is not a regulation but rather a guide. Title VI and its implementing regulations require that recipients take responsible steps to ensure meaningful access by LEP persons. This guidance provides an analytical framework that recipients may use to determine how best to comply with statutory and regulatory obligations to provide meaningful access to the benefits, services, information, and other important portions of their programs and activities for individuals who are limited English proficient.

Guidance is designed to address. As with most government initiatives, this requires balancing several principles. While this Guidance discusses that balance in some detail, it is important to note the basic principles behind that balance. First, we must ensure that Federally-assisted programs aimed at the American public do not leave some behind simply because they face challenges communicating in English. This is of particular importance because, in many cases, LEP individuals form a substantial portion of those encountered in Federally-assisted programs. Second, we must achieve this goal while finding constructive methods to reduce the costs of LEP requirements on small businesses, small local governments, or small non-profits that receive Federal financial assistance.

There are many productive steps that the Federal government, either collectively or as individual grant agencies, can take to help recipients reduce the costs of language services without sacrificing meaningful access for LEP persons. Without these steps, certain smaller grantees may well choose not to participate in Federally assisted programs, threatening the critical functions that the programs strive to provide. To that end, the Department plans to continue to provide assistance and guidance in this important area. In addition, DOJ plans to work with representatives of law enforcement, corrections, courts, administrative agencies, and LEP persons to identify and share model plans, examples of best practices, and cost-saving approaches. Moreover, DOJ intends to explore how language assistance measures, resources and cost-containment approaches developed with respect to its own Federally conducted programs and activities can be effectively shared or otherwise made available to recipients, particularly small businesses, small local governments, and small non-profits. An interagency working group on LEP has developed a Web site, *www.lep.gov,* to assist in disseminating this information to recipients, Federal agencies, and the communities being served.

Many commentators have noted that some have interpreted the case of *Alexander* v. *Sandoval,* 532 U.S. 275 (2001), as impliedly striking down the regulations promulgated under Title VI that form the basis for the part of Executive Order 13166 that applies to Federally assisted programs and activities. We have taken the position that this is not the case, and will continue to do so. Accordingly, we will strive to ensure that Federally assisted programs and activities work in a way that is effective for all eligible beneficiaries, including those with limited English proficiency.

II. Legal Authority

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, provides that no person shall "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 602 authorizes and directs Federal agencies that are empowered to extend Federal financial assistance to any program or activity "to effectuate the provisions of [section 601] * * * by issuing rules, regulations, or orders of general applicability." 42 U.S.C. 2000d–1.

Department of Justice regulations promulgated pursuant to section 602 forbid recipients from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin." 28 CFR 42.104(b)(2).

The Supreme Court, in *Lau* v. *Nichols,* 414 U.S. 563 (1974), interpreted regulations promulgated by the former Department of Health, Education, and Welfare, including a regulation similar to that of DOJ, 45 CFR 80.3(b)(2), to hold that Title VI prohibits conduct that has a disproportionate effect on LEP persons because such conduct constitutes national-origin discrimination. In *Lau,* a San Francisco school district that had a significant number of non-English speaking students of Chinese origin was required to take reasonable steps to provide them with a meaningful opportunity to participate in Federally funded educational programs.

On August 11, 2000, Executive Order 13166 was issued. "Improving Access to Services for Persons with Limited English Proficiency," 65 FR 50121 (August 16, 2000). Under that order, every Federal agency that provides financial assistance to non-Federal entities must publish guidance on how their recipients can provide meaningful access to LEP persons and thus comply with Title VI regulations forbidding funding recipients from "restrict[ing] an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program" or from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin."

On that same day, DOJ issued a general guidance document addressed to "Executive Agency Civil Rights Officers" setting forth general principles for agencies to apply in developing guidance documents for recipients pursuant to the Executive Order. "Enforcement of Title VI of the Civil Rights Act of 1964 National Origin Discrimination Against Persons With Limited English Proficiency," 65 FR 50123 (August 16, 2000) ("DOJ LEP Guidance").

Subsequently, Federal agencies raised questions regarding the requirements of the Executive Order, especially in light of the Supreme Court's decision in *Alexander* v. *Sandoval,* 532 U.S. 275 (2001). On October 26, 2001, Ralph F. Boyd, Jr., Assistant Attorney General for the Civil Rights Division, issued a memorandum for "Heads of Departments and Agencies, General Counsels and Civil Rights Directors." This memorandum clarified and reaffirmed the DOJ LEP Guidance in light of *Sandoval.*[3] The Assistant Attorney General stated that because *Sandoval* did not invalidate any Title VI regulations that proscribe conduct that has a disparate impact on covered groups—the types of regulations that form the legal basis for the part of Executive Order 13166 that applies to Federally assisted programs and activities—the Executive Order remains in force.

Pursuant to Executive Order 13166, DOJ developed its own guidance document for recipients and initially

[3] The memorandum noted that some commentators have interpreted *Sandoval* as impliedly striking down the disparate-impact regulations promulgated under Title VI that form the basis for the part of Executive Order 13166 that applies to Federally assisted programs and activities. *See, e.g., Sandoval,* 532 U.S. at 286, 286 n.6 ("[W]e assume for purposes of this decision that section 602 confers the authority to promulgate disparate-impact regulations; * * * We cannot help observing, however, how strange it is to say that disparate-impact regulations are 'inspired by, at the service of, and inseparably intertwined with ' Sec. 601 * * * when Sec. 601 permits the very behavior that the regulations forbid."). The memorandum, however, made clear that DOJ disagreed with the commentators' interpretation. *Sandoval* holds principally that there is no private right of action to enforce Title VI disparate-impact regulations. It did not address the validity of those regulations or Executive Order 13166 or otherwise limit the authority and responsibility of Federal grant agencies to enforce their own implementing regulations.

issued it on January 16, 2001. "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons," 66 FR 3834 (January 16, 2001) ("LEP Guidance for DOJ Recipients"). Because DOJ did not receive significant public comment on its January 16, 2001 publication, the Department republished on January 18, 2002 its existing guidance document for additional public comment. "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons," 67 FR 2671 (January 18, 2002). The Department has since received substantial public comment.

This guidance document is thus published pursuant to Executive Order 13166 and supplants the January 16, 2001 publication in light of the public comment received and Assistant Attorney General Boyd's October 26, 2001 clarifying memorandum.

III. Who Is Covered?

Department of Justice regulations, 28 CFR 42.104(b)(2), require all recipients of Federal financial assistance from DOJ to provide meaningful access to LEP persons.[4] Federal financial assistance includes grants, training, use of equipment, donations of surplus property, and other assistance. Recipients of DOJ assistance include, for example:

- Police and sheriffs' departments
- Departments of corrections, jails, and detention facilities, including those recipients that house detainees of the Immigration and Naturalization Service
- Courts[5]
- Certain non profit agencies with law enforcement, public safety, and victim assistance missions;
- Other entities with public safety and emergency service missions.

Subrecipients likewise are covered when Federal funds are passed through from one recipient to a subrecipient.

Coverage extends to a recipient's entire program or activity, *i.e.*, to all parts of a recipient's operations. This is true even if only one part of the recipient receives the Federal assistance.[6]

Example: DOJ provides assistance to a state department of corrections to improve a particular prison facility. All of the operations of the entire state department of corrections—not just the particular prison—are covered.

Finally, some recipients operate in jurisdictions in which English has been declared the official language. Nonetheless, these recipients continue to be subject to Federal non-discrimination requirements, including those applicable to the provision of Federally assisted services to persons with limited English proficiency.

IV. Who Is a Limited English Proficient Individual?

Individuals who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English can be limited English proficient, or "LEP," entitled to language assistance with respect to a particular type of service, benefit, or encounter.

Examples of populations likely to include LEP persons who are encountered and/or served by DOJ recipients and should be considered when planning language services include, but are not limited to:

- Persons who are in the custody of the recipient, including juveniles, detainees, wards, and inmates.
- Persons subject to or serviced by law enforcement activities, including, for example, suspects, violators, witnesses, victims, those subject to immigration-related investigations by recipient law enforcement agencies, and community members seeking to participate in crime prevention or awareness activities.
- Persons who encounter the court system.
- Parents and family members of the above.

V. How Does a Recipient Determine the Extent of Its Obligation To Provide LEP Services?

Recipients are required to take reasonable steps to ensure meaningful access to their programs and activities by LEP persons. While designed to be a flexible and fact-dependent standard, the starting point is an individualized assessment that balances the following four factors: (1) The number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and (4) the resources available to the grantee/recipient and costs. As indicated above, the intent of this guidance is to suggest a balance that ensures meaningful access by LEP persons to critical services while not imposing undue burdens on small business, small local governments, or small nonprofits.

After applying the above four-factor analysis, a recipient may conclude that different language assistance measures are sufficient for the different types of programs or activities in which it engages. For instance, some of a recipient's activities will be more important than others and/or have greater impact on or contact with LEP persons, and thus may require more in the way of language assistance. The flexibility that recipients have in addressing the needs of the LEP populations they serve does not diminish, and should not be used to minimize, the obligation that those needs be addressed. DOJ recipients should apply the following four factors to the various kinds of contacts that they have with the public to assess language needs and decide what reasonable steps they should take to ensure meaningful access for LEP persons.

(1) The Number or Proportion of LEP Persons Served or Encountered in the Eligible Service Population

One factor in determining what language services recipients should provide is the number or proportion of LEP persons from a particular language group served or encountered in the eligible service population. The greater the number or proportion of these LEP persons, the more likely language services are needed. Ordinarily, persons "eligible to be served, or likely to be directly affected, by" a recipient's program or activity are those who are served or encountered in the eligible service population. This population will be program-specific, and includes persons who are in the geographic area that has been approved by a Federal grant agency as the recipient's service area. However, where, for instance, a precinct serves a large LEP population, the appropriate service area is most likely the precinct, and not the entire population served by the department. Where no service area has previously been approved, the relevant service area may be that which is approved by state or local authorities or designated by the

[4] Pursuant to Executive Order 13166, the meaningful access requirement of the Title VI regulations and the four-factor analysis set forth in the DOJ LEP Guidance are to additionally apply to the programs and activities of Federal agencies, including the Department of Justice.

[5] As used in this guidance, the word "court" or "courts" includes administrative adjudicatory systems or administrative hearings administered or conducted by a recipient.

[6] However, if a Federal agency were to decide to terminate Federal funds based on noncompliance with Title VI or its regulations, only funds directed to the particular program or activity that is out of compliance would be terminated. 42 U.S.C. 2000d–1.

recipient itself, provided that these designations do not themselves discriminatorily exclude certain populations. Appendix A provides examples to assist in determining the relevant service area. When considering the number or proportion of LEP individuals in a service area, recipients should consider LEP parent(s) when their English-proficient or LEP minor children and dependents encounter the legal system.

Recipients should first examine their prior experiences with LEP encounters and determine the breadth and scope of language services that were needed. In conducting this analysis, it is important to include language minority populations that are eligible for their programs or activities but may be underserved because of existing language barriers. Other data should be consulted to refine or validate a recipient's prior experience, including the latest census data for the area served, data from school systems and from community organizations, and data from state and local governments.[7] Community agencies, school systems, religious organizations, legal aid entities, and others can often assist in identifying populations for whom outreach is needed and who would benefit from the recipients' programs and activities were language services provided.

(2) The Frequency With Which LEP Individuals Come in Contact With the Program

Recipients should assess, as accurately as possible, the frequency with which they have or should have contact with an LEP individual from different language groups seeking assistance. The more frequent the contact with a particular language group, the more likely that enhanced language services in that language are needed. The steps that are reasonable for a recipient that serves an LEP person on a one-time basis will be very different than those expected from a recipient that serves LEP persons daily. It is also advisable to consider the frequency of different types of language contacts. For example, frequent contacts with Spanish-speaking people who are LEP may require certain assistance in Spanish. Less frequent contact with different language groups may suggest a different and less intensified solution. If an LEP individual accesses a program or service on a daily basis, a recipient has greater duties than if the same individual's program or activity contact is unpredictable or infrequent. But even recipients that serve LEP persons on an unpredictable or infrequent basis should use this balancing analysis to determine what to do if an LEP individual seeks services under the program in question. This plan need not be intricate. It may be as simple as being prepared to use one of the commercially-available telephonic interpretation services to obtain immediate interpreter services. In applying this standard, recipients should take care to consider whether appropriate outreach to LEP persons could increase the frequency of contact with LEP language groups.

(3) The Nature and Importance of the Program, Activity, or Service Provided by the Program

The more important the activity, information, service, or program, or the greater the possible consequences of the contact to the LEP individuals, the more likely language services are needed. The obligations to communicate rights to a person who is arrested or to provide medical services to an ill or injured inmate differ, for example, from those to provide bicycle safety courses or recreational programming. A recipient needs to determine whether denial or delay of access to services or information could have serious or even life-threatening implications for the LEP individual. Decisions by a Federal, State, or local entity to make an activity compulsory, such as particular educational programs in a correctional facility or the communication of Miranda rights, can serve as strong evidence of the program's importance.

(4) The Resources Available to the Recipient and Costs

A recipient's level of resources and the costs that would be imposed on it may have an impact on the nature of the steps it should take. Smaller recipients with more limited budgets are not expected to provide the same level of language services as larger recipients with larger budgets. In addition, "reasonable steps" may cease to be reasonable where the costs imposed substantially exceed the benefits.

Resource and cost issues, however, can often be reduced by technological advances; the sharing of language assistance materials and services among and between recipients, advocacy groups, and Federal grant agencies; and reasonable business practices. Where appropriate, training bilingual staff to act as interpreters and translators, information sharing through industry groups, telephonic and video conferencing interpretation services, pooling resources and standardizing documents to reduce translation needs, using qualified translators and interpreters to ensure that documents need not be "fixed" later and that inaccurate interpretations do not cause delay or other costs, centralizing interpreter and translator services to achieve economies of scale, or the formalized use of qualified community volunteers, for example, may help reduce costs.[8] Recipients should carefully explore the most cost-effective means of delivering competent and accurate language services before limiting services due to resource concerns. Large entities and those entities serving a significant number or proportion of LEP persons should ensure that their resource limitations are well-substantiated before using this factor as a reason to limit language assistance. Such recipients may find it useful to be able to articulate, through documentation or in some other reasonable manner, their process for determining that language services would be limited based on resources or costs.

This four-factor analysis necessarily implicates the "mix" of LEP services required. Recipients have two main ways to provide language services: Oral interpretation either in person or via telephone interpretation service (hereinafter "interpretation") and written translation (hereinafter "translation"). Oral interpretation can range from on-site interpreters for critical services provided to a high volume of LEP persons to access through commercially-available telephonic interpretation services. Written translation, likewise, can range from translation of an entire document to translation of a short description of the document. In some cases, language services should be made available on an expedited basis while in others the LEP individual may be referred to another office of the recipient for language assistance.

The correct mix should be based on what is both necessary and reasonable in light of the four-factor analysis. For

[7] The focus of the analysis is on lack of English proficiency, not the ability to speak more than one language. Note that demographic data may indicate the most frequently spoken languages other than English and the percentage of people who speak that language who speak or understand English less than well. Some of the most commonly spoken languages other than English may be spoken by people who are also overwhelmingly proficient in English. Thus, they may not be the languages spoken most frequently by limited English proficient individuals. When using demographic data, it is important to focus in on the languages spoken by those who are not proficient in English.

[8] Small recipients with limited resources may find that entering into a bulk telephonic interpretation service contract will prove cost effective.

instance, a police department in a largely Hispanic neighborhood may need immediate oral interpreters available and should give serious consideration to hiring some bilingual staff. (Of course, many police departments have already made such arrangements.) In contrast, there may be circumstances where the importance and nature of the activity and number or proportion and frequency of contact with LEP persons may be low and the costs and resources needed to provide language services may be high—such as in the case of a voluntary general public tour of a courthouse—in which pre-arranged language services for the particular service may not be necessary. Regardless of the type of language service provided, quality and accuracy of those services can be critical in order to avoid serious consequences to the LEP person and to the recipient. Recipients have substantial flexibility in determining the appropriate mix.

VI. Selecting Language Assistance Services

Recipients have two main ways to provide language services: oral and written language services. Quality and accuracy of the language service is critical in order to avoid serious consequences to the LEP person and to the recipient.

A. Oral Language Services (Interpretation)

Interpretation is the act of listening to something in one language (source language) and orally translating it into another language (target language). Where interpretation is needed and is reasonable, recipients should consider some or all of the following options for providing competent interpreters in a timely manner:

Competence of Interpreters. When providing oral assistance, recipients should ensure competency of the language service provider, no matter which of the strategies outlined below are used. Competency requires more than self-identification as bilingual. Some bilingual staff and community volunteers, for instance, may be able to communicate effectively in a different language when communicating information directly in that language, but not be competent to interpret in and out of English. Likewise, they may not be able to do written translations.

Competency to interpret, however, does not necessarily mean formal certification as an interpreter, although certification is helpful. When using interpreters, recipients should ensure that they:

Demonstrate proficiency in and ability to communicate information accurately in both English and in the other language and identify and employ the appropriate mode of interpreting (*e.g.*, consecutive, simultaneous, summarization, or sight translation);

Have knowledge in both languages of any specialized terms or concepts peculiar to the entity's program or activity and of any particularized vocabulary and phraseology used by the LEP person;[9] and understand and follow confidentiality and impartiality rules to the same extent the recipient employee for whom they are interpreting and/or to the extent their position requires.

Understand and adhere to their role as interpreters without deviating into a role as counselor, legal advisor, or other roles (particularly in court, administrative hearings, or law enforcement contexts).

Some recipients, such as courts, may have additional self-imposed requirements for interpreters. Where individual rights depend on precise, complete, and accurate interpretation or translations, particularly in the contexts of courtrooms and custodial or other police interrogations, the use of certified interpreters is strongly encouraged.[10] Where such proceedings are lengthy, the interpreter will likely need breaks and team interpreting may be appropriate to ensure accuracy and to prevent errors caused by mental fatigue of interpreters.

While quality and accuracy of language services is critical, the quality and accuracy of language services is nonetheless part of the appropriate mix of LEP services required. The quality and accuracy of language services in a prison hospital emergency room, for example, must be extraordinarily high, while the quality and accuracy of language services in a bicycle safety class need not meet the same exacting standards.

Finally, when interpretation is needed and is reasonable, it should be provided in a timely manner. To be meaningfully effective, language assistance should be timely. While there is no single definition for "timely" applicable to all types of interactions at all times by all types of recipients, one clear guide is that the language assistance should be provided at a time and place that avoids the effective denial of the service, benefit, or right at issue or the imposition of an undue burden on or delay in important rights, benefits, or services to the LEP person. For example, when the timeliness of services is important, such as with certain activities of DOJ recipients providing law enforcement, health, and safety services, and when important legal rights are at issue, a recipient would likely not be providing meaningful access if it had one bilingual staffer available one day a week to provide the service. Such conduct would likely result in delays for LEP persons that would be significantly greater than those for English proficient persons. Conversely, where access to or exercise of a service, benefit, or right is not effectively precluded by a reasonable delay, language assistance can likely be delayed for a reasonable period.

Hiring Bilingual Staff. When particular languages are encountered often, hiring bilingual staff offers one of the best, and often most economical, options. Recipients can, for example, fill public contact positions, such as 911 operators, police officers, guards, or program directors, with staff who are bilingual and competent to communicate directly with LEP persons in their language. If bilingual staff are also used to interpret between English speakers and LEP persons, or to orally interpret written documents from English into another language, they should be competent in the skill of interpreting. Being bilingual does not necessarily mean that a person has the ability to interpret. In addition, there may be times when the role of the bilingual employee may conflict with the role of an interpreter (for instance, a bilingual law clerk would probably not be able to perform effectively the role of a courtroom or administrative hearing interpreter and law clerk at the same time, even if the law clerk were a qualified interpreter). Effective management strategies, including any appropriate adjustments in assignments and protocols for using bilingual staff, can ensure that bilingual staff are fully and appropriately utilized. When bilingual staff cannot meet all of the language service obligations of the recipient, the recipient should turn to other options.

[9] Many languages have "regionalisms," or differences in usage. For instance, a word that may be understood to mean something in Spanish for someone from Cuba may not be so understood by someone from Mexico. In addition, because there may be languages which do not have an appropriate direct interpretation of some courtroom or legal terms and the interpreter should be so aware and be able to provide the most appropriate interpretation. The interpreter should likely make the recipient aware of the issue and the interpreter and recipient can then work to develop a consistent and appropriate set of descriptions of these terms in that language that can be used again, when appropriate.

[10] For those languages in which no formal accreditation or certification currently exists, courts and law enforcement agencies should consider a formal process for establishing the credentials of the interpreter.

Hiring Staff Interpreters. Hiring interpreters may be most helpful where there is a frequent need for interpreting services in one or more languages. Depending on the facts, sometimes it may be necessary and reasonable to provide on-site interpreters to provide accurate and meaningful communication with an LEP person.

Contracting for Interpreters. Contract interpreters may be a cost-effective option when there is no regular need for a particular language skill. In addition to commercial and other private providers, many community-based organizations and mutual assistance associations provide interpretation services for particular languages. Contracting with and providing training regarding the recipient's programs and processes to these organizations can be a cost-effective option for providing language services to LEP persons from those language groups.

Using Telephone Interpreter Lines. Telephone interpreter service lines often offer speedy interpreting assistance in many different languages. They may be particularly appropriate where the mode of communicating with an English proficient person would also be over the phone. Although telephonic interpretation services are useful in many situations, it is important to ensure that, when using such services, the interpreters used are competent to interpret any technical or legal terms specific to a particular program that may be important parts of the conversation. Nuances in language and non-verbal communication can often assist an interpreter and cannot be recognized over the phone. Video teleconferencing may sometimes help to resolve this issue where necessary. In addition, where documents are being discussed, it is important to give telephonic interpreters adequate opportunity to review the document prior to the discussion and any logistical problems should be addressed.

Using Community Volunteers. In addition to consideration of bilingual staff, staff interpreters, or contract interpreters (either in-person or by telephone) as options to ensure meaningful access by LEP persons, use of recipient-coordinated community volunteers, working with, for instance, community-based organizations may provide a cost-effective supplemental language assistance strategy under appropriate circumstances. They may be particularly useful in providing language access for a recipient's less critical programs and activities. To the extent the recipient relies on community volunteers, it is often best to use volunteers who are trained in the information or services of the program and can communicate directly with LEP persons in their language. Just as with all interpreters, community volunteers used to interpret between English speakers and LEP persons, or to orally translate documents, should be competent in the skill of interpreting and knowledgeable about applicable confidentiality and impartiality rules. Recipients should consider formal arrangements with community-based organizations that provide volunteers to address these concerns and to help ensure that services are available more regularly.

Use of Family Members, Friends, Other Inmates, or Other Detainees as Interpreters. Although recipients should not plan to rely on an LEP person's family members, friends, or other informal interpreters to provide meaningful access to important programs and activities, where LEP persons so desire, they should be permitted to use, at their own expense, an interpreter of their own choosing (whether a professional interpreter, family member, friend, other inmate, other detainee) in place of or as a supplement to the free language services expressly offered by the recipient. LEP persons may feel more comfortable when a trusted family member, friend, or other inmate acts as an interpreter. In addition, in exigent circumstances that are not reasonably foreseeable, temporary use of interpreters not provided by the recipient may be necessary. However, with proper planning and implementation, recipients should be able to avoid most such situations.

Recipients, however, should take special care to ensure that family, legal guardians, caretakers, and other informal interpreters are appropriate in light of the circumstances and subject matter of the program, service or activity, including protection of the recipient's own administrative or enforcement interest in accurate interpretation. In many circumstances, family members (especially children), friends, other inmates or other detainees are not competent to provide quality and accurate interpretations. Issues of confidentiality, privacy, or conflict of interest may also arise. LEP individuals may feel uncomfortable revealing or describing sensitive, confidential, or potentially embarrassing medical, law enforcement (*e.g.*, sexual or violent assaults), family, or financial information to a family member, friend, or member of the local community.[11] In addition, such informal interpreters may have a personal connection to the LEP person or an undisclosed conflict of interest, such as the desire to protect themselves or another perpetrator in a domestic violence or other criminal matter. For these reasons, when oral language services are necessary, recipients should generally offer competent interpreter services free of cost to the LEP person. For DOJ recipient programs and activities, this is particularly true in a courtroom, administrative hearing, pre- and post-trial proceedings, situations in which health, safety, or access to important benefits and services are at stake, or when credibility and accuracy are important to protect an individual's rights and access to important services.

An example of such a case is when police officers respond to a domestic violence call. In such a case, use of family members or neighbors to interpret for the alleged victim, perpetrator, or witnesses may raise serious issues of competency, confidentiality, and conflict of interest and is thus inappropriate. While issues of competency, confidentiality, and conflict of interest in the use of family members (especially children), friends, other inmates or other detainees often make their use inappropriate, the use of these individuals as interpreters may be an appropriate option where proper application of the four factors would lead to a conclusion that recipient-provided services are not necessary. An example of this is a voluntary educational tour of a courthouse offered to the public. There, the importance and nature of the activity may be relatively low and unlikely to implicate issues of confidentiality, conflict of interest, or the need for accuracy. In addition, the resources needed and costs of providing language services may be high. In such a setting, an LEP person's use of family, friends, or others may be appropriate.

If the LEP person voluntarily chooses to provide his or her own interpreter, a recipient should consider whether a record of that choice and of the recipient's offer of assistance is appropriate. Where precise, complete,

[11] For example, special circumstances of confinement may raise additional serious concerns regarding the voluntary nature, conflicts of interest, and privacy issues surrounding the use of inmates and detainees as interpreters, particularly where an important right, benefit, service, disciplinary concern, or access to personal or law enforcement information is at stake. In some situations, inmates could potentially misuse information they obtained in interpreting for other inmates. In addition to ensuring competency and accuracy of the interpretation, recipients should take these special circumstances into account when determining whether an inmate or detainee makes a knowing and voluntary choice to use another inmate or detainee as an interpreter.

and accurate interpretations or translations of information and/or testimony are critical for law enforcement, adjudicatory, or legal reasons, or where the competency of the LEP person's interpreter is not established, a recipient might decide to provide its own, independent interpreter, even if an LEP person wants to use his or her own interpreter as well. Extra caution should be exercised when the LEP person chooses to use a minor as the interpreter. While the LEP person's decision should be respected, there may be additional issues of competency, confidentiality, or conflict of interest when the choice involves using children as interpreters. The recipient should take care to ensure that the LEP person's choice is voluntary, that the LEP person is aware of the possible problems if the preferred interpreter is a minor child, and that the LEP person knows that a competent interpreter could be provided by the recipient at no cost.

B. Written Language Services (Translation)

Translation is the replacement of a written text from one language (source language) into an equivalent written text in another language (target language).

What Documents Should be Translated? After applying the four-factor analysis, a recipient may determine that an effective LEP plan for its particular program or activity includes the translation of vital written materials into the language of each frequently-encountered LEP group eligible to be served and/or likely to be affected by the recipient's program.

Such written materials could include, for example:

- Consent and complaint forms
- Intake forms with the potential for important consequences
- Written notices of rights, denial, loss, or decreases in benefits or services, parole, and other hearings
- Notices of disciplinary action
- Notices advising LEP persons of free language assistance
- Prison rule books
- Written tests that do not assess English language competency, but test competency for a particular license, job, or skill for which knowing English is not required
- Applications to participate in a recipient's program or activity or to receive recipient benefits or services.

Whether or not a document (or the information it solicits) is "vital" may depend upon the importance of the program, information, encounter, or service involved, and the consequence to the LEP person if the information in question is not provided accurately or in a timely manner. For instance, applications for bicycle safety courses should not generally be considered vital, whereas applications for drug and alcohol counseling in prison could be considered vital. Where appropriate, recipients are encouraged to create a plan for consistently determining, over time and across its various activities, what documents are "vital" to the meaningful access of the LEP populations they serve.

Classifying a document as vital or non-vital is sometimes difficult, especially in the case of outreach materials like brochures or other information on rights and services. Awareness of rights or services is an important part of "meaningful access." Lack of awareness that a particular program, right, or service exists may effectively deny LEP individuals meaningful access. Thus, where a recipient is engaged in community outreach activities in furtherance of its activities, it should regularly assess the needs of the populations frequently encountered or affected by the program or activity to determine whether certain critical outreach materials should be translated. Community organizations may be helpful in determining what outreach materials may be most helpful to translate. In addition, the recipient should consider whether translations of outreach material may be made more effective when done in tandem with other outreach methods, including utilizing the ethnic media, schools, religious, and community organizations to spread a message.

Sometimes a document includes both vital and non-vital information. This may be the case when the document is very large. It may also be the case when the title and a phone number for obtaining more information on the contents of the document in frequently-encountered languages other than English is critical, but the document is sent out to the general public and cannot reasonably be translated into many languages. Thus, vital information may include, for instance, the provision of information in appropriate languages other than English regarding where a LEP person might obtain an interpretation or translation of the document.

Into What Languages Should Documents be Translated? The languages spoken by the LEP individuals with whom the recipient has contact determine the languages into which vital documents should be translated. A distinction should be made, however, between languages that are frequently encountered by a recipient and less commonly-encountered languages. Many recipients serve communities in large cities or across the country. They regularly serve LEP persons who speak dozens and sometimes over 100 different languages. To translate all written materials into all of those languages is unrealistic. Although recent technological advances have made it easier for recipients to store and share translated documents, such an undertaking would incur substantial costs and require substantial resources. Nevertheless, well-substantiated claims of lack of resources to translate all vital documents into dozens of languages do not necessarily relieve the recipient of the obligation to translate those documents into at least several of the more frequently-encountered languages and to set benchmarks for continued translations into the remaining languages over time. As a result, the extent of the recipient's obligation to provide written translations of documents should be determined by the recipient on a case-by-case basis, looking at the totality of the circumstances in light of the four-factor analysis. Because translation is a one-time expense, consideration should be given to whether the upfront cost of translating a document (as opposed to oral interpretation) should be amortized over the likely lifespan of the document when applying this four-factor analysis.

Safe Harbor. Many recipients would like to ensure with greater certainty that they comply with their obligations to provide written translations in languages other than English. Paragraphs (a) and (b) outline the circumstances that can provide a "safe harbor" for recipients regarding the requirements for translation of written materials. A "safe harbor" means that if a recipient provides written translations under these circumstances, such action will be considered strong evidence of compliance with the recipient's written-translation obligations.

The failure to provide written translations under the circumstances outlined in paragraphs (a) and (b) does not mean there is non-compliance. Rather, they provide a common starting point for recipients to consider whether and at what point the importance of the service, benefit, or activity involved; the nature of the information sought; and the number or proportion of LEP persons served call for written translations of commonly-used forms into frequently-encountered languages other than English. Thus, these paragraphs merely provide a guide for recipients that would like greater certainty of compliance than can be

provided by a fact-intensive, four-factor analysis.

Example: Even if the safe harbors are not used, if written translation of a certain document(s) would be so burdensome as to defeat the legitimate objectives of its program, the translation of the written materials is not necessary. Other ways of providing meaningful access, such as effective oral interpretation of certain vital documents, might be acceptable under such circumstances.

Safe Harbor. The following actions will be considered strong evidence of compliance with the recipient's written-translation obligations:

(a) The DOJ recipient provides written translations of vital documents for each eligible LEP language group that constitutes five percent or 1,000, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered. Translation of other documents, if needed, can be provided orally; or

(b) If there are fewer than 50 persons in a language group that reaches the five percent trigger in (a), the recipient does not translate vital written materials but provides written notice in the primary language of the LEP language group of the right to receive competent oral interpretation of those written materials, free of cost.

These safe harbor provisions apply to the translation of written documents only. They do not affect the requirement to provide meaningful access to LEP individuals through competent oral interpreters where oral language services are needed and are reasonable. For example, correctional facilities should, where appropriate, ensure that prison rules have been explained to LEP inmates, at orientation, for instance, prior to taking disciplinary action against them.

Competence of Translators. As with oral interpreters, translators of written documents should be competent. Many of the same considerations apply. However, the skill of translating is very different from the skill of interpreting, and a person who is a competent interpreter may or may not be competent to translate.

Particularly where legal or other vital documents are being translated, competence can often be achieved by use of certified translators. Certification or accreditation may not always be possible or necessary.[12] Competence can often be ensured by having a second, independent translator "check" the work of the primary translator. Alternatively, one translator can translate the document, and a second, independent translator could translate it back into English to check that the appropriate meaning has been conveyed. This is called "back translation."

Translators should understand the expected reading level of the audience and, where appropriate, have fundamental knowledge about the target language group's vocabulary and phraseology. Sometimes direct translation of materials results in a translation that is written at a much more difficult level than the English language version or has no relevant equivalent meaning.[13] Community organizations may be able to help consider whether a document is written at a good level for the audience. Likewise, consistency in the words and phrases used to translate terms of art, legal, or other technical concepts helps avoid confusion by LEP individuals and may reduce costs. Creating or using already-created glossaries of commonly-used terms may be useful for LEP persons and translators and cost effective for the recipient. Providing translators with examples of previous accurate translations of similar material by the recipient, other recipients, or Federal agencies may be helpful.

While quality and accuracy of translation services is critical, the quality and accuracy of translation services is nonetheless part of the appropriate mix of LEP services required. For instance, documents that are simple and have no legal or other consequence for LEP persons who rely on them may use translators that are less skilled than important documents with legal or other information upon which reliance has important consequences (including, e.g., information or documents of DOJ recipients regarding certain law enforcement, health, and safety services and certain legal rights). The permanent nature of written translations, however, imposes additional responsibility on the recipient to ensure that the quality and accuracy permit meaningful access by LEP persons.

VII. Elements of Effective Plan on Language Assistance for LEP Persons

After completing the four-factor analysis and deciding what language assistance services are appropriate, a recipient should develop an implementation plan to address the identified needs of the LEP populations they serve. Recipients have considerable flexibility in developing this plan. The development and maintenance of a periodically-updated written plan on language assistance for LEP persons ("LEP plan") for use by recipient employees serving the public will likely be the most appropriate and cost-effective means of documenting compliance and providing a framework for the provision of timely and reasonable language assistance. Moreover, such written plans would likely provide additional benefits to a recipient's managers in the areas of training, administration, planning, and budgeting. These benefits should lead most recipients to document in a written LEP plan their language assistance services, and how staff and LEP persons can access those services. Despite these benefits, certain DOJ recipients, such as recipients serving very few LEP persons and recipients with very limited resources, may choose not to develop a written LEP plan. However, the absence of a written LEP plan does not obviate the underlying obligation to ensure meaningful access by LEP persons to a recipient's program or activities. Accordingly, in the event that a recipient elects not to develop a written plan, it should consider alternative ways to articulate in some other reasonable manner a plan for providing meaningful access. Entities having significant contact with LEP persons, such as schools, religious organizations, community groups, and groups working with new immigrants can be very helpful in providing important input into this planning process from the beginning.

The following five steps may be helpful in designing an LEP plan and are typically part of effective implementation plans.

(1) Identifying LEP Individuals Who Need Language Assistance

The first two factors in the four-factor analysis require an assessment of the number or proportion of LEP individuals eligible to be served or

[12] For those languages in which no formal accreditation currently exists, a particular level of membership in a professional translation association can provide some indicator of professionalism.

[13] For instance, there may be languages which do not have an appropriate direct translation of some courtroom or legal terms and the translator should be able to provide an appropriate translation. The translator should likely also make the recipient aware of this. Recipients can then work with translators to develop a consistent and appropriate set of descriptions of these terms in that language that can be used again, when appropriate. Recipients will find it more effective and less costly if they try to maintain consistency in the words and phrases used to translate terms of art and legal or other technical concepts. Creating or using already-created glossaries of commonly used terms may be useful for LEP persons and translators and cost effective for the recipient. Providing translators with examples of previous translations of similar material by the recipient, other recipients, or Federal agencies may be helpful.

encountered and the frequency of encounters. This requires recipients to identify LEP persons with whom it has contact.

One way to determine the language of communication is to use language identification cards (or "I speak cards"), which invite LEP persons to identify their language needs to staff. Such cards, for instance, might say "I speak Spanish" in both Spanish and English, "I speak Vietnamese" in both English and Vietnamese, etc. To reduce costs of compliance, the Federal government has made a set of these cards available on the Internet. The Census Bureau "I speak card" can be found and downloaded at *http://www.usdoj.gov/crt/cor/13166.htm*. When records are normally kept of past interactions with members of the public, the language of the LEP person can be included as part of the record. In addition to helping employees identify the language of LEP persons they encounter, this process will help in future applications of the first two factors of the four-factor analysis. In addition, posting notices in commonly encountered languages notifying LEP persons of language assistance will encourage them to self-identify.

(2) Language Assistance Measures

An effective LEP plan would likely include information about the ways in which language assistance will be provided. For instance, recipients may want to include information on at least the following:

- Types of language services available.
- How staff can obtain those services.
- How to respond to LEP callers.
- How to respond to written communications from LEP persons.
- How to respond to LEP individuals who have in-person contact with recipient staff.
- How to ensure competency of interpreters and translation services.

(3) Training Staff

Staff should know their obligations to provide meaningful access to information and services for LEP persons. An effective LEP plan would likely include training to ensure that:

- Staff know about LEP policies and procedures.
- Staff having contact with the public (or those in a recipient's custody) are trained to work effectively with in-person and telephone interpreters.

Recipients may want to include this training as part of the orientation for new employees. It is important to ensure that all employees in public contact positions (or having contact with those in a recipient's custody) are properly trained. Recipients have flexibility in deciding the manner in which the training is provided. The more frequent the contact with LEP persons, the greater the need will be for in-depth training. Staff with little or no contact with LEP persons may only have to be aware of an LEP plan. However, management staff, even if they do not interact regularly with LEP persons, should be fully aware of and understand the plan so they can reinforce its importance and ensure its implementation by staff.

(4) Providing Notice to LEP Persons

Once an agency has decided, based on the four factors, that it will provide language services, it is important for the recipient to let LEP persons know that those services are available and that they are free of charge. Recipients should provide this notice in a language LEP persons will understand. Examples of notification that recipients should consider include:

- Posting signs in intake areas and other entry points. When language assistance is needed to ensure meaningful access to information and services, it is important to provide notice in appropriate languages in intake areas or initial points of contact so that LEP persons can learn how to access those language services. This is particularly true in areas with high volumes of LEP persons seeking access to certain health, safety, or law enforcement services or activities run by DOJ recipients. For instance, signs in intake offices could state that free language assistance is available. The signs should be translated into the most common languages encountered. They should explain how to get the language help.[14]
- Stating in outreach documents that language services are available from the agency. Announcements could be in, for instance, brochures, booklets, and in outreach and recruitment information. These statements should be translated into the most common languages and could be "tagged" onto the front of common documents.
- Working with community-based organizations and other stakeholders to inform LEP individuals of the recipients' services, including the availability of language assistance services.
- Using a telephone voice mail menu. The menu could be in the most common languages encountered. It should provide information about available language assistance services and how to get them.
- Including notices in local newspapers in languages other than English.
- Providing notices on non-English-language radio and television stations about the available language assistance services and how to get them.
- Presentations and/or notices at schools and religious organizations.

(5) Monitoring and Updating the LEP Plan

Recipients should, where appropriate, have a process for determining, on an ongoing basis, whether new documents, programs, services, and activities need to be made accessible for LEP individuals, and they may want to provide notice of any changes in services to the LEP public and to employees. In addition, recipients should consider whether changes in demographics, types of services, or other needs require annual reevaluation of their LEP plan. Less frequent reevaluation may be more appropriate where demographics, services, and needs are more static. One good way to evaluate the LEP plan is to seek feedback from the community.

In their reviews, recipients may want to consider assessing changes in:

- Current LEP populations in service area or population affected or encountered.
- Frequency of encounters with LEP language groups.
- Nature and importance of activities to LEP persons.
- Availability of resources, including technological advances and sources of additional resources, and the costs imposed.
- Whether existing assistance is meeting the needs of LEP persons.
- Whether staff knows and understands the LEP plan and how to implement it.
- Whether identified sources for assistance are still available and viable.

In addition to these five elements, effective plans set clear goals, management accountability, and opportunities for community input and planning throughout the process.

VIII. Voluntary Compliance Effort

The goal for Title VI and Title VI regulatory enforcement is to achieve voluntary compliance. The requirement to provide meaningful access to LEP persons is enforced and implemented by DOJ through the procedures identified in the Title VI regulations. These procedures include complaint

[14] The Social Security Administration has made such signs available at http://www.ssa.gov/multilanguage/langlist1.htm. These signs could, for example, be modified for recipient use.

investigations, compliance reviews, efforts to secure voluntary compliance, and technical assistance.

The Title VI regulations provide that DOJ will investigate whenever it receives a complaint, report, or other information that alleges or indicates possible noncompliance with Title VI or its regulations. If the investigation results in a finding of compliance, DOJ will inform the recipient in writing of this determination, including the basis for the determination. DOJ uses voluntary mediation to resolve most complaints. However, if a case is fully investigated and results in a finding of noncompliance, DOJ must inform the recipient of the noncompliance through a Letter of Findings that sets out the areas of noncompliance and the steps that must be taken to correct the noncompliance. It must attempt to secure voluntary compliance through informal means. If the matter cannot be resolved informally, DOJ must secure compliance through the termination of Federal assistance after the DOJ recipient has been given an opportunity for an administrative hearing and/or by referring the matter to a DOJ litigation section to seek injunctive relief or pursue other enforcement proceedings. DOJ engages in voluntary compliance efforts and provides technical assistance to recipients at all stages of an investigation. During these efforts, DOJ proposes reasonable timetables for achieving compliance and consults with and assists recipients in exploring cost-effective ways of coming into compliance. In determining a recipient's compliance with the Title VI regulations, DOJ's primary concern is to ensure that the recipient's policies and procedures provide meaningful access for LEP persons to the recipient's programs and activities.

While all recipients must work toward building systems that will ensure access for LEP individuals, DOJ acknowledges that the implementation of a comprehensive system to serve LEP individuals is a process and that a system will evolve over time as it is implemented and periodically reevaluated. As recipients take reasonable steps to provide meaningful access to Federally assisted programs and activities for LEP persons, DOJ will look favorably on intermediate steps recipients take that are consistent with this Guidance, and that, as part of a broader implementation plan or schedule, move their service delivery system toward providing full access to LEP persons. This does not excuse noncompliance but instead recognizes that full compliance in all areas of a recipient's activities and for all potential language minority groups may reasonably require a series of implementing actions over a period of time. However, in developing any phased implementation schedule, DOJ recipients should ensure that the provision of appropriate assistance for significant LEP populations or with respect to activities having a significant impact on the health, safety, legal rights, or livelihood of beneficiaries is addressed first. Recipients are encouraged to document their efforts to provide LEP persons with meaningful access to Federally assisted programs and activities.

IX. Application to Specific Types of Recipients

Appendix A of this Guidance provides examples of how the meaningful access requirement of the Title VI regulations applies to law enforcement, corrections, courts, and other recipients of DOJ assistance.

A. State and Local Law Enforcement

Appendix A further explains how law enforcement recipients can apply the four factors to a range of encounters with the public. The responsibility for providing language services differs with different types of encounters.

Appendix A helps recipients identify the population they should consider when considering the types of services to provide. It then provides guidance and examples of applying the four factors. For instance, it gives examples on how to apply this guidance to:

- Receiving and responding to requests for help
- Enforcement stops short of arrest and field investigations
- Custodial interrogations
- Intake/detention Community outreach

B. Departments of Corrections

Appendix A also helps departments of corrections understand how to apply the four factors. For instance, it gives examples of LEP access in:

- Intake
- Disciplinary action
- Health and safety
- Participation in classes or other programs affecting length of sentence
- English as a Second Language (ESL) Classes
- Community corrections programs

C. Other Types of Recipients

Appendix A also applies the four factors and gives examples for other types of recipients. Those include, for example:

- Courts
- Juvenile Justice Programs
- Domestic Violence Prevention/ Treatment Programs

Appendix A—Application of LEP Guidance for DOJ Recipients to Specific Types of Recipients

While a wide range of entities receive Federal financial assistance through DOJ, most of DOJ's assistance goes to law enforcement agencies, including state and local police and sheriffs' departments, and to state departments of corrections. Sections A and B below provide examples of how these two major types of DOJ recipients might apply the four-factor analysis. Section C provides examples for other types of recipients. The examples in this Appendix are not meant to be exhaustive and may not apply in many situations.

The requirements of the Title VI regulations, as clarified by this Guidance, supplement, but do not supplant, constitutional and other statutory or regulatory provisions that may require LEP services. Thus, a proper application of the four-factor analysis and compliance with the Title VI regulations does not replace constitutional or other statutory protections mandating warnings and notices in languages other than English in the criminal justice context. Rather, this Guidance clarifies the Title VI regulatory obligation to address, in appropriate circumstances and in a reasonable manner, the language assistance needs of LEP individuals beyond those required by the Constitution or statutes and regulations other than the Title VI regulations.

A. State and Local Law Enforcement

For the vast majority of the public, exposure to law enforcement begins and ends with interactions with law enforcement personnel discharging their duties while on patrol, responding to a request for services, talking to witnesses, or conducting community outreach activities. For a much smaller number, that exposure includes a visit to a station house. And for an important but even smaller number, that visit to the station house results in one's exposure to the criminal justice, judicial, or juvenile justice systems.

The common thread running through these and other interactions between the public and law enforcement is the exchange of information. Where police and sheriffs' departments receive Federal financial assistance, these departments have an obligation to provide LEP services to LEP individuals to ensure that they have meaningful access to the system, including, for example, understanding rights and accessing police assistance. Language barriers can, for instance, prevent victims from effectively reporting crimes to the police and hinder police investigations of reported crimes. For example, failure to communicate effectively with a victim of domestic violence can result in reliance on the batterer or a minor child and failure to identify and protect against harm.

Many police and sheriffs' departments already provide language services in a wide variety of circumstances to obtain information effectively, to build trust and

relationships with the community, and to contribute to the safety of law enforcement personnel. For example, many police departments already have available printed Miranda rights in languages other than English as well as interpreters available to inform LEP persons of their rights and to interpret police interviews.[1] In areas where significant LEP populations reside, law enforcement officials already may have forms and notices in languages other than English or they may employ bilingual law enforcement officers, intake personnel, counselors, and support staff. These experiences can form a strong basis for applying the four-factor analysis and complying with the Title VI regulations.

1. General Principles

The touchstone of the four-factor analysis is reasonableness based upon the specific purposes, needs, and capabilities of the law enforcement service under review and an appreciation of the nature and particularized needs of the LEP population served. Accordingly, the analysis cannot provide a single uniform answer on how service to LEP persons must be provided in all programs or activities in all situations or whether such service need be provided at all. Knowledge of local conditions and community needs becomes critical in determining the type and level of language services needed.

Before giving specific examples, several general points should assist law enforcement in correctly applying the analysis to the wide range of services employed in their particular jurisdictions.

a. Permanent Versus Seasonal Populations

In many communities, resident populations change over time or season. For example, in some resort communities, populations swell during peak vacation periods, many times exceeding the number of permanent residents of the jurisdiction. In other communities, primarily agricultural areas, transient populations of workers will require increased law enforcement services during the relevant harvest season. This dynamic demographic ebb and flow can also dramatically change the size and nature of the LEP community likely to come into contact with law enforcement personnel. Thus, law enforcement officials may not want to limit their analysis to numbers and percentages of permanent residents. In assessing factor one—the number or proportion of LEP individuals—police departments should consider any significant but temporary changes in a jurisdiction's demographics.

Example: A rural jurisdiction has a permanent population of 30,000, 7% of which is Hispanic. Based on demographic data and on information from the contiguous school district, of that number, only 15% are estimated to be LEP individuals. Thus, the total estimated permanent LEP population is 315 or approximately 1% of the total permanent population. Under the four-factor analysis, a sheriffs' department could reasonably conclude that the small number of LEP persons makes the affirmative translation of documents and/or employment of bilingual staff unnecessary. However, during the spring and summer planting and harvest seasons, the local population swells to 40,000 due to the influx of seasonal agricultural workers. Of this transitional number, about 75% are Hispanic and about 50% of that number are LEP individuals. This information comes from the schools and a local migrant worker community group. Thus, during the harvest season, the jurisdiction's LEP population increases to over 10% of all residents. In this case, the department may want to consider whether it is required to translate vital written documents into Spanish. In addition, this increase in LEP population during those seasons makes it important for the jurisdiction to review its interpretation services to ensure meaningful access for LEP individuals.

b. Target Audiences

For most law enforcement services, the target audience is defined in geographic rather than programmatic terms. However, some services may be targeted to reach a particular audience (*e.g.*, elementary school children, elderly, residents of high crime areas, minority communities, small business owners/operators). Also, within the larger geographic area covered by a police department, certain precincts or portions of precincts may have concentrations of LEP persons. In these cases, even if the overall number or proportion of LEP individuals in the district is low, the frequency of contact may be foreseeably higher for certain areas or programs. Thus, the second factor—frequency of contact—should be considered in light of the specific program or the geographic area being served.

Example: A police department that receives funds from the DOJ Office of Justice Programs initiates a program to increase awareness and understanding of police services among elementary school age children in high crime areas of the jurisdiction. This program involves "Officer in the Classroom" presentations at elementary schools located in areas of high poverty. The population of the jurisdiction is estimated to include only 3% LEP individuals. However, the LEP population at the target schools is 35%, the vast majority of whom are Vietnamese speakers. In applying the four-factor analysis, the higher LEP language group populations of the target schools and the frequency of contact within the program with LEP students in those schools, not the LEP population generally, should be used in determining the nature of the LEP needs of that particular program. Further, because the Vietnamese LEP population is concentrated in one or two main areas of town, the police department should consider whether to apply the four-factor analysis to other services provided by the police department.

c. Importance of Service/Information

Given the critical role law enforcement plays in maintaining quality of life and property, traditional law enforcement and protective services rank high on the critical/non-critical continuum. However, this does not mean that information about, or provided by, each of the myriad services and activities performed by law enforcement officials must be equally available in languages other than English. While clearly important to the ultimate success of law enforcement, certain community outreach activities do not have the same direct impact on the provision of core law enforcement services as the activities of 911 lines or law enforcement officials' ability to respond to requests for assistance while on patrol, to communicate basic information to suspects, etc. Nevertheless, with the rising importance of community partnerships and community-based programming as a law enforcement technique, the need for language services with respect to these programs should be considered in applying the four-factor analysis.

d. Interpreters

Just as with other recipients, law enforcement recipients have a variety of options for providing language services. Under certain circumstances, when interpreters are required and recipients should provide competent interpreter services free of cost to the LEP person, LEP persons should be advised that they may choose either to secure the assistance of an interpreter of their own choosing, at their own expense, or a competent interpreter provided by the recipient.

If the LEP person decides to provide his or her own interpreter, the provision of this choice to the LEP person and the LEP person's election should be documented in any written record generated with respect to the LEP person. While an LEP person may sometimes look to bilingual family members or friends or other persons with whom they are comfortable for language assistance, there are many situations where an LEP person might want to rely upon recipient-supplied interpretative services. For example, such individuals may not be available when and where they are needed, or may not have the ability to interpret program-specific technical information. Alternatively, an individual may feel uncomfortable revealing or describing sensitive, confidential, or potentially embarrassing medical, law enforcement (e.g., sexual or violent assaults), family, or financial information to a family member, friend, or member of the local community. Similarly, there may be situations where a recipient's own interests justify the provision of an interpreter regardless of whether the LEP individual also provides his or her own interpreter. For example, where precise, complete and accurate translations of information and/or testimony are critical for law enforcement, adjudicatory or legal reasons, a recipient might decide to provide its own, independent interpreter, even if an LEP person wants to use their own interpreter as well.

In emergency situations that are not reasonably foreseeable, the recipient may have to temporarily rely on non-recipient-provided language services. Reliance on children is especially discouraged unless

[1] The Department's Federal Bureau of Investigation makes written versions of those rights available in several different languages. Of course, where literacy is of concern, these are most useful in assisting an interpreter in using consistent terms when providing Miranda warnings orally.

there is an extreme emergency and no preferable interpreters are available.

While all language services need to be competent, the greater the potential consequences, the greater the need to monitor interpretation services for quality. For instance, it is important that interpreters in custodial interrogations be highly competent to translate legal and other law enforcement concepts, as well as be extremely accurate in their interpretation. It may be sufficient, however, for a desk clerk who is bilingual but not skilled at interpreting to help an LEP person figure out to whom he or she needs to talk about setting up a neighborhood watch.

2. Applying the Four-Factor Analysis Along the Law Enforcement Continuum

While all police activities are important, the four-factor analysis requires some prioritizing so that language services are targeted where most needed because of the nature and importance of the particular law enforcement activity involved. In addition, because of the "reasonableness" standard, and frequency of contact and resources/costs factors, the obligation to provide language services increases where the importance of the activity is greater.

Under this framework, then, critical areas for language assistance could include 911 calls, custodial interrogation, and health and safety issues for persons within the control of the police. These activities should be considered the most important under the four-factor analysis. Systems for receiving and investigating complaints from the public are important. Often very important are routine patrol activities, receiving non-emergency information regarding potential crimes, and ticketing. Community outreach activities are hard to categorize, but generally they do not rise to the same level of importance as the other activities listed. However, with the importance of community partnerships and community-based programming as a law enforcement technique, the need for language services with respect to these programs should be considered in applying the four-factor analysis. Police departments have a great deal of flexibility in determining how to best address their outreach to LEP populations.

a. Receiving and Responding to Requests for Assistance

LEP persons must have meaningful access to police services when they are victims of or witnesses to alleged criminal activity. Effective reporting systems transform victims, witnesses, or bystanders into assistants in law enforcement and investigation processes. Given the critical role the public plays in reporting crimes or directing limited law enforcement resources to time-sensitive emergency or public safety situations, efforts to address the language assistance needs of LEP individuals could have a significant impact on improving responsiveness, effectiveness, and safety.

Emergency service lines for the public, or 911 lines, operated by agencies that receive Federal financial assistance must be accessible to persons who are LEP. This will mean different things to different jurisdictions. For instance, in large cities with significant LEP communities, the 911 line may have operators who are bilingual and capable of accurately interpreting in high stress situations. Smaller cities or areas with small LEP populations should still have a plan for serving callers who are LEP, but the LEP plan and implementation may involve a telephonic interpretation service that is fast enough and reliable enough to attend to the emergency situation, or include some other accommodation short of hiring bilingual operators.

Example: A large city provides bilingual operators for the most frequently encountered languages, and uses a commercial telephone interpretation service when it receives calls from LEP persons who speak other languages. Ten percent of the city's population is LEP, and sixty percent of the LEP population speaks Spanish. In addition to 911 service, the city has a 311 line for non-emergency police services. The 311 Center has Spanish speaking operators available, and uses a language bank, staffed by the city's bilingual city employees who are competent translators, for other non-English-speaking callers. The city also has a campaign to educate non-English speakers when to use 311 instead of 911. These actions constitute strong evidence of compliance.

b. Enforcement Stops Short of Arrest and Field Investigations

Field enforcement includes, for example, traffic stops, pedestrian stops, serving warrants and restraining orders, Terry stops, activities in aid of other jurisdictions or Federal agencies (e.g., fugitive arrests or INS detentions), and crowd/traffic control. Because of the diffuse nature of these activities, the reasonableness standard allows for great flexibility in providing meaningful access. Nevertheless, the ability of law enforcement agencies to discharge fully and effectively their enforcement and crime interdiction mission requires the ability to communicate instructions, commands, and notices. For example, a routine traffic stop can become a difficult situation if an officer is unable to communicate effectively the reason for the stop, the need for identification or other information, and the meaning of any written citation. Requests for consent to search are meaningless if the request is not understood. Similarly, crowd control commands will be wholly ineffective where significant numbers of people in a crowd cannot understand the meaning of law enforcement commands.

Given the wide range of possible situations in which law enforcement in the field can take place, it is impossible to equip every officer with the tools necessary to respond to every possible LEP scenario. Rather, in applying the four factors to field enforcement, the goal should be to implement measures addressing the language needs of significant LEP populations in the most likely, common, and important situations, as consistent with the recipients' resources and costs.

Example: A police department serves a jurisdiction with a significant number of LEP individuals residing in one or more precincts, and it is routinely asked to provide crowd control services at community events or demonstrations in those precincts. If it is otherwise consistent with the requirements of the four-factor analysis, the police department should assess how it will discharge its crowd control duties in a language-appropriate manner. Among the possible approaches are plans to assign bilingual officers, basic language training of all officers in common law enforcement commands, the use of devices that provide audio commands in the predictable languages, or the distribution of translated written materials for use by officers.

Field investigations include neighborhood canvassing, witness identification and interviewing, investigative or Terry stops, and similar activities designed to solicit and obtain information from the community or particular persons. Encounters with LEP individuals will often be less predictable in field investigations. However, the jurisdiction should still assess the potential for contact with LEP individuals in the course of field investigations and investigative stops, identify the LEP language group(s) most likely to be encountered, and provide, if it is consistent with the four-factor analysis, its officers with sufficient interpretation and/or translation resources to ensure that lack of English proficiency does not impede otherwise proper investigations or unduly burden LEP individuals.

Example: A police department in a moderately large city includes a precinct that serves an area which includes significant LEP populations whose native languages are Spanish, Korean, and Tagalog. Law enforcement officials could reasonably consider the adoption of a plan assigning bilingual investigative officers to the precinct and/or creating a resource list of department employees competent to interpret and ready to assist officers by phone or radio. This could be combined with developing language-appropriate written materials, such as consents to searches or statements of rights, for use by its officers where LEP individuals are literate in their languages. In certain circumstances, it may also be helpful to have telephonic interpretation service access where other options are not successful and safety and availability of phone access permit.

Example: A police department receives Federal financial assistance and serves a predominantly Hispanic neighborhood. It routinely sends officers on domestic violence calls. The police department is in a state in which English has been declared the official language. The police therefore determine that they cannot provide language services to LEP persons. Thus, when the victim of domestic violence speaks only Spanish and the perpetrator speaks English, the officers have no way to speak with the victim so they only get the perpetrator's side of the story. The failure to communicate effectively with the victim results in further abuse and failure to charge the batterer. The police department should be aware that despite the state's official English law, the Title VI regulations apply to it. Thus, the police department should provide meaningful access for LEP persons.

c. Custodial Interrogations

Custodial interrogations of unrepresented LEP individuals trigger constitutional rights that this Guidance is not designed to address. Given the importance of being able to communicate effectively under such circumstances, law enforcement recipients should ensure competent and free language services for LEP individuals in such situations. Law enforcement agencies are strongly encouraged to create a written plan on language assistance for LEP persons in this area. In addition, in formulating a plan for effectively communicating with LEP individuals, agencies should strongly consider whether qualified independent interpreters would be more appropriate during custodial interrogations than law enforcement personnel themselves.[2]

Example: A large city police department institutes an LEP plan that requires arresting officers to procure a qualified interpreter for any custodial interrogation, notification of rights, or taking of a formal statement where the suspect's legal rights could be adversely impacted. When considering whether an interpreter is qualified, the LEP plan discourages use of police officers as interpreters in interrogations except under circumstances in which the LEP individual is informed of the officer's dual role and the reliability of the interpretation is verified, such as, for example, where the officer has been trained and tested in interpreting and tape recordings are made of the entire interview. In determining whether an interpreter is qualified, the jurisdiction uses the analysis noted above. These actions would constitute strong evidence of compliance.

d. Intake/Detention

State or local law enforcement agencies that arrest LEP persons should consider the inherent communication impediments to gathering information from the LEP arrestee through an intake or booking process. Aside from the basic information, such as the LEP arrestee's name and address, law enforcement agencies should evaluate their ability to communicate with the LEP arrestee about his or her medical condition. Because medical screening questions are commonly used to elicit information on the arrestee's medical needs, suicidal inclinations, presence of contagious diseases, potential illness, resulting symptoms upon withdrawal from certain medications, or the need to segregate the arrestee from other prisoners, it is important for law enforcement agencies to consider how to communicate effectively with an LEP arrestee at this stage. In jurisdictions with few bilingual officers or in situations where the LEP person speaks a language not encountered very frequently, telephonic interpretation services may provide the most cost effective and efficient method of communication.

e. Community Outreach

Community outreach activities increasingly are recognized as important to the ultimate success of more traditional duties. Thus, an application of the four-factor analysis to community outreach activities can play an important role in ensuring that the purpose of these activities (to improve police/community relations and advance law enforcement objectives) is not thwarted due to the failure to address the language needs of LEP persons.

Example: A police department initiates a program of domestic counseling in an effort to reduce the number or intensity of domestic violence interactions. A review of domestic violence records in the city reveals that 25% of all domestic violence responses are to minority areas and 30% of those responses involve interactions with one or more LEP persons, most of whom speak the same language. After completing the four-factor analysis, the department should take reasonable steps to make the counseling accessible to LEP individuals. For instance, the department could seek bilingual counselors (for whom they provided training in translation) for some of the counseling positions. In addition, the department could have an agreement with a local university in which bilingual social work majors who are competent in interpreting, as well as language majors who are trained by the department in basic domestic violence sensitivity and counseling, are used as interpreters when the in-house bilingual staff cannot cover the need. Interpreters under such circumstances should sign a confidentiality agreement with the department. These actions constitute strong evidence of compliance.

Example: A large city has initiated an outreach program designed to address a problem of robberies of Vietnamese homes by Vietnamese gangs. One strategy is to work with community groups and banks and others to help allay traditional fears in the community of putting money and other valuables in banks. Because a large portion of the target audience is Vietnamese speaking and LEP, the department contracts with a bilingual community liaison competent in the skill of translating to help with outreach activities. This action constitutes strong evidence of compliance.

B. Departments of Corrections/Jails/Detention Centers

Departments of corrections that receive Federal financial assistance from DOJ must provide LEP prisoners[3] with meaningful access to benefits and services within the program. In order to do so, corrections departments, like other recipients, must apply the four-factor analysis.

1. General Principles

Departments of corrections also have a wide variety of options in providing translation services appropriate to the particular situation. Bilingual staff competent in interpreting, in person or by phone, pose one option. Additionally, particular prisons may have agreements with local colleges and universities, interpreter services, and/or community organizations to provide paid or volunteer competent translators under agreements of confidentiality and impartiality. Telephonic interpretation services may offer a prudent oral interpreting option for prisons with very few and/or infrequent prisoners in a particular language group. Reliance on fellow prisoners is generally not appropriate. Reliance on fellow prisoners should only be an option in unforeseeable emergency circumstances; when the LEP inmate signs a waiver that is in his/her language and in a form designed for him/her to understand; or where the topic of communication is not sensitive, confidential, important, or technical in nature and the prisoner is competent in the skill of interpreting.

In addition, a department of corrections that receives Federal financial assistance would be ultimately responsible for ensuring that LEP inmates have meaningful access within a prison run by a private or other entity with which the department has entered into a contract. The department may provide the staff and materials necessary to provide required language services, or it may choose to require the entity with which it contracted to provide the services itself.

2. Applying the Four Factors Along the Corrections Continuum

As with law enforcement activities, critical and predictable contact with LEP individuals poses the greatest obligation for language services. Corrections facilities have somewhat greater abilities to assess the language needs of those they encounter, although inmate populations may change rapidly in some areas. Contact affecting health and safety, length of stay, and discipline likely present the most critical situations under the four-factor analysis.

a. Assessment

Each department of corrections that receives Federal financial assistance should assess the number of LEP prisoners who are in the system, in which prisons they are located, and the languages he or she speaks. Each prisoner's LEP status, and the language he or she speaks, should be placed in his or her file. Although this Guidance and Title VI are not meant to address literacy levels, agencies should be aware of literacy problems so that LEP services are provided in a way that is meaningful and useful (*e.g.*, translated written materials are of little use to a nonliterate inmate). After the initial assessment, new LEP prisoners should be identified at intake or orientation, and the data should be updated accordingly.

b. Intake/Orientation

Intake/Orientation plays a critical role not merely in the system's identification of LEP prisoners, but in providing those prisoners with fundamental information about their

[2] Some state laws prohibit police officers from serving as interpreters during custodial interrogation of suspects.

[3] In this Guidance, the terms "prisoners" or "inmates" include all of those individuals, including Immigration and Naturalization Service (INS) detainees and juveniles, who are held in a facility operated by a recipient. Certain statutory, regulatory, or constitutional mandates/rights may apply only to juveniles, such as educational rights, including those for students will disabilities or limited English proficiency. Because a decision by a recipient or a federal, state, or local entity to make an activity compulsory serves as strong evidence of the program's importance, the obligation to provide language services may differ depending upon whether the LEP person is a juvenile or an adult inmate.

obligations to comply with system regulations, participate in education and training, receive appropriate medical treatment, and enjoy recreation. Even if only one prisoner doesn't understand English, that prisoner should likely be given the opportunity to be informed of the rules, obligations, and opportunities in a manner designed effectively to communicate these matters. An appropriate analogy is the obligation to communicate effectively with deaf prisoners, which is most frequently accomplished through sign language interpreters or written materials. Not every prison will use the same method for providing language assistance. Prisons with large numbers of Spanish-speaking LEP prisoners, for example, may choose to translate written rules, notices, and other important orientation material into Spanish with oral instructions, whereas prisons with very few such inmates may choose to rely upon a telephonic interpretation service or qualified community volunteers to assist.

Example: The department of corrections in a state with a 5% Haitian Creole-speaking LEP corrections population and an 8% Spanish-speaking LEP population receives Federal financial assistance to expand one of its prisons. The department of corrections has developed an intake video in Haitian Creole and another in Spanish for all of the prisons within the department to use when orienting new prisoners who are LEP and speak one of those languages. In addition, the department provides inmates with an opportunity to ask questions and discuss intake information through either bilingual staff who are competent in interpreting and who are present at the orientation or who are patched in by phone to act as interpreters. The department also has an agreement whereby some of its prisons house a small number of INS detainees. For those detainees or other inmates who are LEP and do not speak Haitian Creole or Spanish, the department has created a list of sources for interpretation, including department staff, contract interpreters, university resources, and a telephonic interpretation service. Each person receives at least an oral explanation of the rights, rules, and opportunities. These actions constitute strong evidence of compliance. Example:

A department of corrections that receives Federal financial assistance determines that, even though the state in which it resides has a law declaring English the official language, it should still ensure that LEP prisoners understand the rules, rights, and opportunities and have meaningful access to important information and services at the state prisons. Despite the state's official English law, the Title VI regulations apply to the department of corrections.

c. Disciplinary Action

When a prisoner who is LEP is the subject of disciplinary action, the prison, where appropriate, should provide language assistance. That assistance should ensure that the LEP prisoner had adequate notice of the rule in question and is meaningfully able to understand and participate in the process afforded prisoners under those circumstances. As noted previously, fellow inmates should generally not serve as interpreters in disciplinary hearings.

d. Health and Safety

Prisons providing health services should refer to the Department of Health and Human Services' guidance [4] regarding health care providers' Title VI and Title VI regulatory obligations, as well as with this Guidance.

Health care services are obviously extremely important. How access to those services is provided depends upon the four-factor analysis. If, for instance, a prison serves a high proportion of LEP individuals who speak Spanish, then the prison health care provider should likely have available qualified bilingual medical staff or interpreters versed in medical terms. If the population of LEP individuals is low, then the prison may choose instead, for example, to rely on a local community volunteer program that provides qualified interpreters through a university. Due to the private nature of medical situations, only in unpredictable emergency situations or in non-emergency cases where the inmate has waived rights to a non-inmate interpreter would the use of other bilingual inmates be appropriate.

e. Participation Affecting Length of Sentence

If a prisoner's LEP status makes him/her unable to participate in a particular program, such a failure to participate should not be used to adversely impact the length of stay or significantly affect the conditions of imprisonment. Prisons have options in how to apply this standard. For instance, prisons could: (1) Make the program accessible to the LEP inmate; (2) identify or develop substitute or alternative, language-accessible programs, or (3) waive the requirement.

Example: State law provides that otherwise eligible prisoners may receive early release if they take and pass an alcohol counseling program. Given the importance of early release, LEP prisoners should, where appropriate, be provided access to this prerequisite in some fashion. How that access is provided depends on the three factors other than importance. If, for example, there are many LEP prisoners speaking a particular language in the prison system, the class could be provided in that language for those inmates. If there were far fewer LEP prisoners speaking a particular language, the prison might still need to ensure access to this prerequisite because of the importance of early release opportunities. Options include, for example, use of bilingual teachers, contract interpreters, or community volunteers to interpret during the class, reliance on videos or written explanations in a language the inmate understands, and/or modification of the requirements of the class to meet the LEP individual's ability to understand and communicate.

f. ESL Classes

States often mandate English-as-a-Second language (ESL) classes for LEP inmates. Nothing in this Guidance indicates how recipients should address such mandates. But recipients should not overlook the long-term positive impacts of incorporating or offering ESL programs in parallel with language assistance services as one possible strategy for ensuring meaningful access. ESL courses can serve as an important adjunct to a proper LEP plan in prisons because, as prisoners gain proficiency in English, fewer language services are needed. However, the fact that ESL classes are made available does not obviate the need to provide meaningful access for prisoners who are not yet English proficient.

g. Community Corrections

This guidance also applies to community corrections programs that receive, directly or indirectly, Federal financial assistance. For them, the most frequent contact with LEP individuals will be with an offender, a victim, or the family members of either, but may also include witnesses and community members in the area in which a crime was committed.

As with other recipient activities, community corrections programs should apply the four factors and determine areas where language services are most needed and reasonable. Important oral communications include, for example: interviews; explaining conditions of probations/release; developing case plans; setting up referrals for services; regular supervision contacts; outlining violations of probations/parole and recommendations; and making adjustments to the case plan. Competent oral language services for LEP persons are important for each of these types of communication. Recipients have great flexibility in determining how to provide those services.

Just as with all language services, it is important that language services be competent. Some knowledge of the legal system may be necessary in certain circumstances. For example, special attention should be given to the technical interpretation skills of interpreters used when obtaining information from an offender during pre-sentence and violation of probation/parole investigations or in other circumstances in which legal terms and the results of inaccuracies could impose an enormous burden on the LEP person.

In addition, just as with other recipients, corrections programs should identify vital written materials for probation and parole that should be translated when a significant number or proportion of LEP individuals that speak a particular language is encountered. Vital documents in this context could include, for instance: probation/parole department descriptions and grievance procedures, offender rights information, the pre-sentence/release investigation report, notices of alleged violations, sentencing/release orders, including conditions of parole, and victim impact statement questionnaires.

C. Other Types of Recipients

DOJ provides Federal financial assistance to many other types of entities and programs, including, for example, courts, juvenile justice programs, shelters for victims of domestic violence, and domestic violence prevention programs. The Title VI regulations and this Guidance apply to those

[4] A copy of that guidance can be found on the HHS Web site at *http://www.hhs.gov/ocr/lep.* and at *http://www.usdoj.gov/crt/cor.*

entities. Examples involving some of those recipients follow: [5]

1. Courts

Application of the four-factor analysis requires recipient courts to ensure that LEP parties and witnesses receive competent language services, consistent with the four-factor analysis. At a minimum, every effort should be taken to ensure competent interpretation for LEP individuals during all hearings, trials, and motions during which the LEP individual must and/or may be present. When a recipient court appoints an attorney to represent an LEP defendant, the court should ensure that either the attorney is proficient in the LEP person's language or that a competent interpreter is provided during consultations between the attorney and the LEP person.

Many states have created or adopted certification procedures for court interpreters. This is one way for recipients to ensure competency of interpreters. Where certification is available, courts should consider carefully the qualifications of interpreters who are not certified. Courts will not, however, always be able to find a certified interpreter, particularly for less frequently encountered languages. In a courtroom or administrative hearing setting, the use of informal interpreters, such as family members, friends, and caretakers, would not be appropriate.

Example: A state court receiving DOJ Federal financial assistance has frequent contact with LEP individuals as parties and witnesses, but has experienced a shortage in certified interpreters in the range of languages encountered. State court officials work with training and testing consultants to broaden the number of certified interpreters available in the top several languages spoken by LEP individuals in the state. Because resources are scarce and the development of tests expensive, state court officials decide to partner with other states that have already established agreements to share proficiency tests and to develop new ones together. The state court officials also look to other existing state plans for examples of: codes of professional conduct for interpreters; mandatory orientation and basic training for interpreters; interpreter proficiency tests in Spanish and Vietnamese language interpretation; a written test in English for interpreters in all languages covering professional responsibility, basic legal term definitions, court procedures, etc. They are considering working with other states to expand testing certification programs in coming years to include several other most frequently encountered languages. These actions constitute strong evidence of compliance.

Many individuals, while able to communicate in English to some extent, are still LEP insofar as ability to understand the terms and precise language of the courtroom. Courts should consider carefully whether a person will be able to understand and communicate effectively in the stressful role of a witness or party and in situations where knowledge of language subtleties and/or technical terms and concepts are involved or where key determinations are made based on credibility.

Example: Judges in a county court receiving Federal financial assistance have adopted a voir dire for determining a witness' need for an interpreter. The voir dire avoids questions that could be answered with "yes" or "no." It includes questions about comfort level in English, and questions that require active responses, such as: "How did you come to court today?" etc. The judges also ask the witness more complicated conceptual questions to determine the extent of the person's proficiency in English. These actions constitute strong evidence of compliance.

Example: A court encounters a domestic violence victim who is LEP. Even though the court is located in a state where English has been declared the official language, it employs a competent interpreter to ensure meaningful access. Despite the state's official English law, the Title VI regulations apply to the court.

When courts experience low numbers or proportions of LEP individuals from a particular language group and infrequent contact with that language group, creation of a new certification test for interpreters may be overly burdensome. In such cases, other methods should be used to determine the competency of interpreters for the court's purposes.

Example: A witness in a county court in a large city speaks Urdu and not English. The jurisdiction has no court interpreter certification testing for Urdu language interpreters because very few LEP individuals encountered speak Urdu and there is no such test available through other states or organizations. However, a non-certified interpreter is available and has been given the standard English-language test on court processes and interpreter ethics. The judge brings in a second, independent, bilingual Urdu-speaking person from a local university, and asks the prospective interpreter to interpret the judge's conversation with the second individual. The judge then asks the second Urdu speaker a series of questions designed to determine whether the interpreter accurately interpreted their conversation. Given the infrequent contact, the low number and proportion of Urdu LEP individuals in the area, and the high cost of providing certification tests for Urdu interpreters, this "second check" solution may be one appropriate way of ensuring meaningful access to the LEP individual.

Example: In order to minimize the necessity of the type of intense judicial intervention on the issue of quality noted in the previous example, the court administrators in a jurisdiction, working closely with interpreter and translator associations, the bar, judges, and community groups, have developed and disseminated a stringent set of qualifications for court interpreters. The state has adopted a certification test in several languages. A questionnaire and qualifications process helps identify qualified interpreters even when certified interpreters are not available to meet a particular language need. Thus, the court administrators create a pool from which judges and attorneys can choose. A team of court personnel, judges, interpreters, and others have developed a recommended interpreter oath and a set of frequently asked questions and answers regarding court interpreting that have been provided to judges and clerks. The frequently asked questions include information regarding the use of team interpreters, breaks, the types of interpreting (consecutive, simultaneous, summary, and sight translations) and the professional standards for use of each one, and suggested questions for determining whether an LEP witness is effectively able to communicate through the interpreter. Information sessions on the use of interpreters are provided for judges and clerks. These actions constitute strong evidence of compliance.

Another key to successful use of interpreters in the courtroom is to ensure that everyone in the process understands the role of the interpreter.

Example: Judges in a recipient court administer a standard oath to each interpreter and make a statement to the jury that the role of the interpreter is to interpret, verbatim, the questions posed to the witness and the witness' response. The jury should focus on the words, not the non-verbals, of the interpreter. The judges also clarify the role of the interpreter to the witness and the attorneys. These actions constitute strong evidence of compliance.

Just as corrections recipients should take care to ensure that eligible LEP individuals have the opportunity to reduce the term of their sentence to the same extent that non-LEP individuals do, courts should ensure that LEP persons have access to programs that would give them the equal opportunity to avoid serving a sentence at all.

Example: An LEP defendant should be given the same access to alternatives to sentencing, such as anger management, batterers' treatment and intervention, and alcohol abuse counseling, as is given to non-LEP persons in the same circumstances.

Courts have significant contact with the public outside of the courtroom. Providing meaningful access to the legal process for LEP individuals might require more than just providing interpreters in the courtroom. Recipient courts should assess the need for language services all along the process, particularly in areas with high numbers of unrepresented individuals, such as family, landlord-tenant, traffic, and small claims courts.

Example: Only twenty thousand people live in a rural county. The county superior court receives DOJ funds but does not have a budget comparable to that of a more-populous urbanized county in the state. Over 1000 LEP Hispanic immigrants have settled in the rural county. The urbanized county also has more than 1000 LEP Hispanic immigrants. Both counties have "how to" materials in English helping unrepresented individuals negotiate the family court processes and providing information for

[5] As used in this appendix, the word "court" or "courts" includes administrative adjudicatory systems or administrative hearings administered or conducted by a recipient.

victims of domestic violence. The urban county has taken the lead in developing Spanish-language translations of materials that would explain the process. The rural county modifies these slightly with the assistance of family law and domestic violence advocates serving the Hispanic community, and thereby benefits from the work of the urban county. Creative solutions, such as sharing resources across jurisdictions and working with local bar associations and community groups, can help overcome serious financial concerns in areas with few resources.

There may be some instances in which the four-factor analysis of a particular portion of a recipient's program leads to the conclusion that language services are not currently required. For instance, the four-factor analysis may not necessarily require that a purely voluntary tour of a ceremonial courtroom be given in languages other than English by courtroom personnel, because the relative importance may not warrant such services given an application of the other factors. However, a court may decide to provide such tours in languages other than English given the demographics and the interest in the court. Because the analysis is fact-dependent, the same conclusion may not be appropriate with respect to all tours.

Just as with police departments, courts and/or particular divisions within courts may have more contact with LEP individuals than an assessment of the general population would indicate. Recipients should consider that higher contact level when determining the number or proportion of LEP individuals in the contact population and the frequency of such contact.

Example: A county has very few residents who are LEP. However, many Vietnamese-speaking LEP motorists go through a major freeway running through the county that connects two areas with high populations of Vietnamese speaking LEP individuals. As a result, the Traffic Division of the county court processes a large number of LEP persons, but it has taken no steps to train staff or provide forms or other language access in that Division because of the small number of LEP individuals in the county. The Division should assess the number and proportion of LEP individuals processed by the Division and the frequency of such contact. With those numbers high, the Traffic Division may find that it needs to provide key forms or instructions in Vietnamese. It may also find, from talking with community groups, that many older Vietnamese LEP individuals do not read Vietnamese well, and that it should provide oral language services as well. The court may already have Vietnamese-speaking staff competent in interpreting in a different section of the court; it may decide to hire a Vietnamese-speaking employee who is competent in the skill of interpreting; or it may decide that a telephonic interpretation service suffices.

2. Juvenile Justice Programs

DOJ provides funds to many juvenile justice programs to which this Guidance applies. Recipients should consider LEP parents when minor children encounter the legal system. Absent an emergency, recipients are strongly discouraged from using children as interpreters for LEP parents.

Example: A county coordinator for an anti-gang program operated by a DOJ recipient has noticed that increasing numbers of gangs have formed comprised primarily of LEP individuals speaking a particular foreign language. The coordinator may choose to assess the number of LEP youths at risk of involvement in these gangs, so that she can determine whether the program should hire a counselor who is bilingual in the particular language and English, or provide other types of language services to the LEP youths.

When applying the four factors, recipients encountering juveniles should take into account that certain programs or activities may be even more critical and difficult to access for juveniles than they would be for adults. For instance, although an adult detainee may need some language services to access family members, a juvenile being detained on immigration-related charges who is held by a recipient may need more language services in order to have access to his or her parents.

3. Domestic Violence Prevention/Treatment Programs

Several domestic violence prevention and treatment programs receive DOJ financial assistance and thus must apply this Guidance to their programs and activities. As with all other recipients, the mix of services needed should be determined after conducting the four-factor analysis. For instance, a shelter for victims of domestic violence serving a largely Hispanic area in which many people are LEP should strongly consider accessing qualified bilingual counselors, staff, and volunteers, whereas a shelter that has experienced almost no encounters with LEP persons and serves an area with very few LEP persons may only reasonably need access to a telephonic interpretation service. Experience, program modifications, and demographic changes may require modifications to the mix over time.

Example: A shelter for victims of domestic violence is operated by a recipient of DOJ funds and located in an area where 15 percent of the women in the service area speak Spanish and are LEP. Seven percent of the women in the service area speak various Chinese dialects and are LEP. The shelter uses competent community volunteers to help translate vital outreach materials into Chinese (which is one written language despite many dialects) and Spanish. The shelter hotline has a menu providing key information, such as location, in English, Spanish, and two of the most common Chinese dialects. Calls for immediate assistance are handled by the bilingual staff. The shelter has one counselor and several volunteers fluent in Spanish and English. Some volunteers are fluent in different Chinese dialects and in English. The shelter works with community groups to access interpreters in the several Chinese dialects that they encounter. Shelter staff train the community volunteers in the sensitivities of domestic violence intake and counseling. Volunteers sign confidentiality agreements. The shelter is looking for a grant to increase its language capabilities despite its tiny budget. These actions constitute strong evidence of compliance.

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DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Computer Associates International, Inc.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America* v. *Computer Associates International, Inc. and Platinum technology International, inc.*, Civil Action No. 1:01CV02062 (GK). On September 28, 2001, the United States filed a Complaint alleging that the Defendants' conduct surrounding the acquisition of Platinum *technology* International, *inc.* by Computer Associates International, Inc. (CA) violated Section 1 of the Sherman Act (15 U.S.C. 1) and section 7a of the Clayton Act (15 U.S.C. 18(a)), commonly known as the Hart-Scott-Rodino ("HSR") Act. The Complaint alleges that the Defendants violated Section 1 of the Sherman Act by entering into an agreement that restricted Platinum's ability to offer price discounts to customers during the time period before they consummated their merger. The proposed Final Judgment enjoins CA and future merger partners from engaging in similar conduct. The proposed Final Judgment also requires that the Defendants pay a civil penalty to resolve the HSR Act violation. The civil penalty component of the proposed Final Judgment is not open to public comment. Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice in Washington, DC, in Room 200, 325 Seventh Street, NW., on the Department of Justice Web site at *http://www.usdoj.gov/atr*, and at the Office of the Clerk of the United States District Court for the District of Columbia, 333 Constitution Avenue, NW., Washington, DC 20001.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments

Common Language Access Questions, Technical Assistance, and Guidance for Federally Conducted and Federally Assisted Programs

Federal Coordination and Compliance Section
Civil Rights Division
U.S. Department of Justice

August 2011

COMMON LANGUAGE ACCESS QUESTIONS, TECHNICAL ASSISTANCE, AND GUIDANCE FOR FEDERALLY CONDUCTED AND FEDERALLY ASSISTED PROGRAMS

A. Why must my agency designate a primary contact person for services to limited English proficient (LEP) persons in my agency?

- In his Memorandum for Heads of Department Components regarding Language Access Obligations Under Executive Order 13166 and his Memorandum for Heads of Federal Agencies regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166, the Attorney General directed federal agencies to appoint a language access coordinator. This individual is responsible for ensuring that the agency adheres to its language access plan, policy directives, and procedures to provide meaningful access to LEP persons. The language access coordinator should report to a high-ranking official within the agency. The coordinator is responsible for language assistance services and may delegate duties but should retain ultimate responsibility for oversight, performance, and implementation of the language access plan. Federal agencies with multiple offices and divisions may find that each component or field office should designate an individual as a local language access coordinator. The language access plan should set forth the name and contact information of the responsible official(s). The language access coordinator should consider creating a working group of key stakeholders to assist in implementing and creating language access procedures for the agency. *See Language Access Assessment and Planning Tool for Federally Conducted and Federally Assisted Programs*

B. What are my agency's responsibilities with respect to providing Federal Financial Assistance?

- In his Memorandum for Heads of Federal Agencies regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166, the Attorney General directed federal agencies that provide Federal financial assistance to draft recipient guidance.
- Federal financial assistance includes, but is not limited to, grants and loans of federal funds; grants or donations of federal property; training; details of federal personnel; or any agreement, arrangement, or other contract which has as one of its purposes the provision of assistance. For instance, the Department of Justice provides federal financial assistance to several agencies, primarily state and local law enforcement agencies, and departments of corrections.
- Federal agencies providing federal financial assistance should obtain information and maintain records that ensure that they can determine which entities have received such assistance, including a list of subgrantees, and for what purpose the assistance has been provided.
- Federal agencies that provide Federal financial assistance must ensure that recipients of Federal financial assistance acknowledge and agree that they will comply (and require

any subgrantees, contractors, successors, transferees, and assignees to comply) with applicable provisions of Federal laws and policies prohibiting discrimination, including but not limited to Title VI of the Civil Rights Act of 1964, as amended, which prohibits recipients from discriminating on the basis of race, color, or national origin (including language) (42 U.S.C. 2000d et seq.). Model assurance language can be found at http://www.justice.gov/crt/about/cor/draft_assurance_language.pdf.

- Federal agencies that provide Federal financial assistance must require recipients to obtain these assurances from their subrecipients and must maintain systems that can record and track the recipient's agreement with these assurances (28 CFR 42.105 et seq.).
- Federal agencies have a variety of mechanisms for securing recipient compliance with Title VI, including, but not limited to, executing assurances of nondiscrimination, conducting periodic compliance reviews, conducting complaint-based investigations, noncomplaint-based investigations, negotiating settlement agreements, and taking judicial action. These mechanisms are in addition to any programmatic compliance specific to the agency providing Federal financial assistance.
- Agencies must ensure that communications with recipients, including at the conclusion of a term of financial assistance documenting satisfaction with financial assistance deliverables, do not imply that the recipient was or is in compliance with Title VI.

C. Would it be helpful to have agreements with other federal agencies, subcomponents, field or district offices to provide language assistance services?

- Agreements with other subcomponents, field or district offices, or federal agencies can be a cost-effective approach to language assistance services. For example, many intelligence community components have arrangements with the National Virtual Translation Center (NVTC) to provide translations.
    - Is your agreement with the other entity in writing?
    - Is it a reciprocal arrangement?
    - How long is the agreement in place?
    - How do you ensure that both parties to the agreement are satisfied? Is there an opportunity to revisit the agreement?
- Agreements between agencies to provide interpretation or translation must also consider who will serve as interpreters or translators. For example, an agency must still ensure that any interpreter or translator working on behalf of the agency is competent.
- Generally, if your agency continues to seek language assistance services from a specific agency, you may consider drafting a written language assistance services agreement with that agency. A written document can clarify each entity's role and responsibility and can serve to memorialize and document the arrangement. This can be especially useful in the event of changes in staffing.

D. Why is it important to have a Language Access Implementation Plan, Policy Directives, and Procedures in place?

- In his Memorandum for Heads of Federal Agencies regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166,

the Attorney General directed each federal agency to develop and implement a system by which LEP persons can meaningfully access the agency's services.

- A **Language Access Implementation Plan** helps management and staff understand their roles and responsibilities with respect to overcoming language barriers for LEP individuals. The plan is a management document that outlines how the agency has or will define language assistance tasks, set deadlines and priorities, assign responsibility, and allocate the resources necessary to come into or maintain compliance with language access requirements. It describes how the agency will effectuate the service delivery standards delineated in the policy directives, including the manner by which it will address the language service and resource needs identified in a self-assessment.
- **Language Policy Directives** set forth standards, operating principles, and guidelines that govern the delivery of language appropriate services. Policy directives may come in different forms but are designed to require the agency and its staff to ensure meaningful access. Policy directives should be made publicly available.
- **Language Access Procedures** are the "how to" for staff. They specify for staff the steps to follow to provide language services, gather data, and deliver services to LEP individuals. Procedures can be set forth in handbooks, intranet sites, desk references, reminders at counters, notations on telephone references, and the like.

E. Why is it important to modify or update your Language Access Implementation Plan and related Language Access Procedures?

- In his Memorandum for Heads of Federal Agencies regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166, the Attorney General asked each federal agency to evaluate and/or update your current response to LEP needs by, among other things, conducting an inventory of languages most frequently encountered, identifying the primary channels of contact with LEP community members (whether telephonic, in person, correspondence, web-based, etc.), and reviewing agency programs and activities for language accessibility.
- Agencies may need to update program operations, services provided, outreach activities, and other mission-specific activities to reflect current language needs. For example, changes in demographics, types of services provided, or the economy may impact the number and languages spoken by LEP individuals who participate in your agency's program or activities.
- Agencies should, where appropriate, have a process for determining, on an ongoing basis, whether new documents, programs, services, and activities need to be made accessible for LEP individuals, and they may want to provide notice of any changes in services to the LEP public and to employees.
- Each agency should establish a schedule to periodically evaluate and update agency LEP services and LEP policies, plans, and protocols. At a minimum, periodic reviews should occur on a biannual basis.

F. What are resources that might be helpful in creating, modifying, or updating a Federal agency's Language Access Implementation Plan, Policy Directives or Procedures?

- View federal agency plans, DOJ guidance documents, and other resources at www.lep.gov
- Consult with the Civil Rights Division, Federal Coordination and Compliance Section, http://www.justice.gov/crt/about/cor/
- Consult with frontline staff, management, or others in your office to evaluate the language services needed
- Consult with internal divisions or regional offices to assess how they provide language services
- Consult with outside experts to assess how they provide language services
- Consult with the public, non-profit organizations and other community stakeholders
- Obtain help in constructing multilingual websites at http://www.usa.gov/webcontent/multilingual/index.shtml

G. Why is it important to monitor the effectiveness of your Language Access Implementation Plan?

- It is important to monitor the effectiveness of your Language Access Implementation Plan in order to ensure that LEP individuals have meaningful access to agency programs or activities. In his Memorandum for Heads of Federal Agencies regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166, the Attorney General emphasized the need to evaluate your current response to LEP individuals. As some strategies may prove more effective than others, ongoing monitoring can help an agency fine-tune the provision of language assistance services and can potentially realize cost-savings over time.
- Some federal agencies may designate a committee or staff person to be the language access coordinator responsible for monitoring and evaluating your agency's Language Access Implementation Plan. Monitoring the effectiveness of your Plan may include:
    - Analyzing current and historical data on language assistance usage, including languages served;
    - Observing the provision of language assistance services through audits or testing;
    - Surveying staff on how often they use language assistance services, if they believe there should be changes in the way services are provided or the providers that are used, and if they believe that the language assistance services in place are meeting the needs of the LEP communities in your service area;
    - Conducting customer satisfaction surveys of LEP applicants and beneficiaries based on their actual experience of accessing the agency's programs, benefits or services;
    - Soliciting feedback from community-based organizations and other stakeholders about the agency's effectiveness and performance in ensuring meaningful access for LEP individuals;
    - Updating community demographics and needs by engaging school districts, faith communities, refugee resettlement agencies, and other local resources;
    - Considering new resources including funding, collaborations with other agencies, human resources, and other mechanisms for ensuring improved access for LEP individuals; and

- Monitoring your agency's response rate to complaints or suggestions by LEP individuals, community members and employees regarding language assistance services provided.

H. Why is it important to publish your Language Access Policy Directives or inform members of the public about the availability of language assistance services?

- In his Memorandum for Heads of Federal Agencies regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166, the Attorney General asked each federal agency to notify the public, through mechanisms that will reach the LEP communities it serves, of its LEP policies and LEP access-related developments. Examples of methods for publicizing LEP access information include, but are not limited to, posting on agency websites, issuing print and broadcast notifications, providing relevant information at "town hall" style meetings, and issuing press releases. Agencies should consult with their information technology specialists, civil rights personnel, and public affairs personnel to develop a multi-pronged strategy to achieve maximum and effective notification to LEP communities.

- Other methods for publicizing language assistance services include:
  - Posting signs in intake areas and other entry points;
  - Stating in outreach documents that language services are available from the agency;
  - Using a telephone voice mail menu to provide information about available language assistance services and how to get them;
  - Working with community-based organizations and other stakeholders to inform LEP individuals of the agency's services, including the availability of language assistance services; and,
  - Including notices in local and ethnic media.
- Agencies should provide notice about its language assistance services in languages LEP persons will understand.

I. Why is it important for Federal agencies to consult with or seek input from non-governmental organizations such as faith-based groups, civic groups, civil rights organizations, etc.?

- When language services are not readily available at a given agency or an LEP individual does not know about the availability of language assistance services, LEP individuals will be less likely to participate in or benefit from an agency's programs and services. As a result, many LEP persons may not seek out agency benefits, programs, and services; may not offer vital assistance in investigations or information that would help determine entitlement or eligibility for benefits; may not file complaints; and may not have access to critical information provided by the agency because of limited access to language services.
- Organizations that have significant contact with LEP persons, such as schools, religious organizations, community groups, and groups working with new immigrants can be very

helpful in linking LEP persons to an agency's programs and its language assistance services.

- Community-based organizations provide important input into the language access planning process and can often assist in identifying populations for whom outreach is needed and who would benefit from the agency's programs and activities were language services provided.
- Community-based organizations may also be useful in recommending which outreach materials the agency should translate. As documents are translated, community-based organizations may be able to help consider whether the documents are written at an appropriate level for the audience.
- Community-based organizations may also provide valuable feedback to the agency to help the agency determine whether its language assistance services are effective in overcoming language barriers for LEP persons.

J. Why is it necessary to develop standard ways to identify non-English speakers or LEP populations for whom you would provide language assistance?

- In his Memorandum for Heads of Federal Agencies regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166, the Attorney General requested that each federal agency identify LEP contact situations and take the necessary steps to provide meaningful access. Agency staff should be able to, among other tasks, identify LEP contact situations, determine primary language of LEP individuals, and effectively utilize available options to assist in interpersonal, electronic, print, and other methods of communication between the agency and LEP individuals.
- Staff at the point of first contact with an individual must determine whether that person is LEP, must determine his/her primary language, and procure the appropriate language assistance services. Standardizing the method for identifying an LEP person and his/her language helps an agency provide consistent and meaningful access to the program or activity sought. An individual's primary language will be identified and documented utilizing one or more of the following methods:

    1) Use of "I Speak" Language Identification Cards; an example of such a card from the U.S. Census Bureau is available at: http://www.justice.gov/crt/lep/resources/ISpeakCards2004.pdf;
    2) Use of a language identification poster displayed in the reception or intake area;
    3) Verification of foreign language proficiency by qualified bilingual staff (in-person, telephonically, or through video interpretation services);
    4) Verification of foreign language proficiency by a qualified interpreter (in-person, telephonically, or through video interpretation services); or,
    5) Self-identification by the LEP individual or identification by a companion.

K. Why is it important to track the number of LEP individuals that your agency has served or who have participated in your program or activity:

- Creating a record of language assistance services can help inform agencies with respect to whether there should be changes to the quantity or type of language assistance services. For instance, agencies may decide to hire qualified bilingual staff for positions in which there is a high-incidence language need.
- Agencies should keep a record of the number of LEP individuals served, the primary language spoken by each LEP person encountered, and the type of language assistance provided (oral or written) during each encounter, if any.
- Procurement offices should also consider preparing for management an annual estimate of the cost of translation and interpretation services within the agency. This will help management ensure that resources are appropriately allocated to the most critical programs, geographic areas, or languages.

L. What are the types of language assistances services available?

- There are two primary types of language assistance services: oral and written.
    - Oral language assistance service may come in the form of "in-language" communication (a demonstrably qualified bilingual staff member communicating directly in an LEP person's language) or interpreting. Interpretation can take place in-person, through a telephonic interpreter, or via internet or video interpreting. An interpreter is a person who renders a message spoken in one language into one or more languages. An interpreter must be competent and have knowledge in both languages of the relevant terms or concepts particular to the program or activity and the dialect and terminology used by the LEP individual. Depending upon the circumstances, language assistance services may call upon interpreters to provide simultaneous interpretation of proceedings so that an LEP person understands what is happening in that proceeding, or to interpret an interview or conversation with an LEP person in a consecutive fashion. Interpreter competency requires more than self-identification as bilingual. "Some bilingual staff and community volunteers, for instance, may be able to communicate effectively in a different language when communicating information directly in that language, but may not be competent to interpret in and out of English."[1] Agencies should avoid using family members, children, friends, and untrained volunteers as interpreters because it is difficult to ensure that they interpret accurately and lack ethical conflicts.
    - Translation is the replacement of written text from one language into another. A translator also must be qualified and trained. Federal agencies may need to identify and translate vital documents to ensure LEP individuals have meaningful access to important written information. Vital written documents include, but are not limited to, consent and complaint forms; intake and application forms with the potential for important consequences; written notices of rights; notices of denials, losses, or decreases in benefits or services; notice of disciplinary action; signs; and notices advising LEP individuals of free language assistance services. Agencies should proactively translate vital written documents into the frequently encountered languages of LEP groups eligible to be served or likely to be affected

[1] Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg., 41,455, 41,461 (June 18, 2002).

by the benefit program or service. Agencies should also put in place processes for handling written communication with LEP individuals in less frequently encountered languages.

M. Hiring bilingual staff:

- In his Memorandum for Heads of Federal Agencies regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166, the Attorney General asked each federal agency to assess, when considering hiring criteria, the extent to which non-English language proficiency would be necessary for particular positions or to fulfill an agency's mission. For example, an agency should determine whether the agency would benefit from including non-English language skills and competence thresholds in certain job vacancy announcements, retention policies, performance appraisals, promotion plans or criteria, and position descriptions.
- An agency should consider language-sensitive deployment of qualified bilingual staff and interpreters to match skills with language needs. Senior management may also consider establishing appropriate adjustments in assignments and protocols for using bilingual staff who are employed in the agency to ensure that bilingual staff are fully and appropriately utilized.

N. How do you assess your current staff's ability to provide language assistance services?

- Quality and accuracy of the language assistance service provided by the agency is critical in order to avoid serious consequences to the LEP person and to the agency.
- Agencies must ensure that all bilingual or contracted personnel who serve as interpreters:
  - Demonstrate proficiency and ability to communicate information accurately in both English and in the other language and identify and employ the appropriate mode of interpreting (e.g. consecutive, simultaneous, summarization, or sight translation);
  - Have knowledge in both languages of any specialized terms or concepts peculiar to the Agency's program or activity and of any particularized vocabulary and phraseology used by the LEP person;
  - Understand and follow confidentiality, impartiality, and ethical rules to the same extent the Division employee for whom they are interpreting and/or to the extent their position requires;
  - Understand and adhere to their role as interpreters without deviating into a role as counselor, legal advisor, or other roles.
- Bilingual staff who communicate directly in language with LEP persons must also demonstrate proficiency in the target language and have knowledge in both languages of any specialized terms or concepts peculiar to the Agency's program or activity and of any particularized vocabulary and phraseology used by the LEP person.
- An agency should also ensure that all bilingual or contracted personnel who serve as translators understand the expected reading level of the audience and, where appropriate, have fundamental knowledge about the target language group's vocabulary and phraseology.

- An agency should periodically check the quality of translations by having a second, independent translator "check" the work of the primary translator. An agency should also consider community input and the use of audits to maintain and improve its ability to provide timely and accurate language assistance.
- Agencies may consider developing language assessment protocols to ensure that current and prospective bilingual employees who elect to use their language skills as part of their job are appropriately qualified to serve as interpreters or translators.

O. Understanding how to prioritize the languages that you should consistently accommodate using existing internal structures versus languages where you may need to seek external language assistance services to communicate with LEP individuals:

- The languages spoken by the LEP individuals with whom the agency has contact determine the languages accommodated by your agency. A distinction should be made, however, between languages that are frequently encountered by an agency and less commonly-encountered languages. Many agencies serve communities in large cities or across the country. They regularly serve LEP persons who speak dozens and sometimes over 100 different languages. To provide language assistance services, both oral and written, to all of those languages may not be possible using in-house resources. Therefore, it is important to distinguish between establishing a system for communicating with LEP individuals who speak frequently-encountered languages (e.g. hiring bilingual staff members) versus enabling access to a telephonic interpretation service for LEP individuals who speak less commonly-encountered languages.
- The extent of an agency's obligation to provide language assistance services in multiple languages is determined by the agency on a case-by-case basis, looking at the totality of the circumstances in light of four factors:
    - the number or proportion of LEP persons served or encountered in the eligible service population;
    - the frequency with which LEP individuals come in contact with the program;
    - the nature and importance of the program, activity, or service provided by the program; and,
    - the resources available to the agency and costs

P. Using contracted interpreters or translators when your agency cannot meet the demand for language assistance services:

- When an agency cannot meet its language assistance services needs in-house, or when there are case- or management-related reasons to seek non-staff assistance, agencies typically contract with private translation or interpretation firms. An agency must ensure that any contract for language assistance services will specify responsibilities, assign liability, set pay rates, and lay out the ways in which difficulties or disputes are resolved. For example, contracted language assistance service providers must have:
    - qualified and competent translators and interpreters, including mechanisms to ensure confidentiality and avoid conflicts of interest;
    - an ability to meet the agency's demand for interpreters;

- an ability to meet the agency's demand for translation;
- reasonable cancellation fees;
- on-time service delivery;
- an acceptable emergency response time;
- rational scheduling of qualified interpreters;
- rapid rates of connection to interpreters via the telephone, electronically, or by video; and,
- effective complaint resolution when translation or interpretation errors occur.

- Potential bidders for language assistance services contracts should also be required to commit to an adequate quality control process for all deliverables. This can include a process where multiple linguists review all translations before delivery. Contractors should detail their (and their independent contractors') capabilities with translation memory software. Contractors must also include the discounted prices in their final proposal that would result from using the translation memory software.

Q. Critical staff training on language access issues:

- Staff will not be able to provide meaningful access to LEP individuals if they do not receive training on language access policies and procedures, including how to access language assistance services. For policies and procedures to be effective, new and existing staff should periodically receive training on the content of the language access policy, identifying language access needs, and providing language assistance services to LEP individuals. This staff training should be mandatory for staff who have the potential to interact or communicate with LEP individuals, staff whose job it is to arrange for language support services, and managers. Training should include making procedures clear and readily available to ensure seamless provision of language assistance services.
- Bilingual staff members who communicate "in-language" to LEP individuals, or who serve as interpreters or translators should be assessed and receive regular training on proper interpreting and translation techniques, ethics, specialized terminology, and other topics as needed. Without regular assessment and training, bilingual staff may not be able to provide the language access services necessary to ensure LEP individuals have meaningful access to your agency's program.

R. Monitoring language assistance services provided in your agency:

- An agency may also consider evaluating the actual experience of accessing services from the perspective of an LEP individual. This can be accomplished by managers and supervisors through regular observation of interactions between agency staff and LEP individuals. Periodic client satisfaction surveys may also be used to assess whether LEP individuals are satisfied with the level of service provided to them. .
- Agencies may also maintain partnerships with local community-based organizations and rely upon these connections for reports of inadequate language access or other language-related complaints.

S. Establishing a process for LEP individuals to provide feedback if they are denied services because of their lack of English proficiency:

- An agency must also ensure that its process for receiving feedback from LEP individuals is transparent and accessible to LEP persons. Any LEP individual must be able to communicate his or her comments or suggestions regarding the failure to provide language access or any other agency criticism. And, of course, investigations of such complaints must involve appropriate language assistance services for LEP persons or witnesses.
- Agencies should maintain a record of feedback received and any resolution based on LEP individual's comments or suggestions.

T. Resource-sharing when translating documents:

- In his Memorandum for Heads of Federal Agencies regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166, the Attorney General asked each federal agency to collaborate with other agencies to share translation resources, improve efficiency, standardize federal terminology, and streamline processes for obtaining community feedback on the accuracy and quality of professional translations for mass distribution. This affirms the General Accountability Office's (GAO) April 2010 report on Language Access: Selected Agencies Can Improve Services to Limited English Proficient Persons which notes that collaboration among federal agencies to improve LEP access through planning and providing language access could be enhanced. For example, agreements with other subcomponents, components, or federal agencies can be a cost-effective approach to language assistance services. Many intelligence community components have arrangements with the National Virtual Translation Center (NVTC) to provide translations.

U. Identifying and prioritizing documents for translation:

- Agencies should prioritize translating vital documents. A document will be considered vital if it contains information that is critical for accessing the agency's program or activities, or is required by law. Vital documents include, but are not limited to:
    - Documents that must be provided by law;
    - Complaint, consent, release or waiver forms;
    - Claim or application forms;
    - Conditions of settlement or resolution agreements;
    - Letters or notices pertaining to the reduction, denial, or termination of services or programs or that require a response from the LEP person;
    - Time-sensitive notice, including notice of hearing, upcoming grand jury or deposition appearance, or other investigation or litigation-related deadlines;
    - Form or written material related to individual rights;
    - Notice of rights, requirements, or responsibilities; and,
    - Notices regarding the availability of free language assistance services for LEP individuals.

V. Translating disaster-preparedness or emergency information:

- In his Memorandum for Heads of Federal Agencies regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166, the Attorney General stated that, "[w]hen in an emergency or in the course of routine business matters, the success of government efforts to effectively communicate with members of the public depends on the widespread and nondiscriminatory availability of accurate, timely, and vital information." Swift and accurate communication with the general public is critical during major disasters and public-health emergencies. Consequently, an agency should ensure that LEP individuals have meaningful access to disaster-preparedness and emergency information.

W. Understanding when/how to make your website more accessible to LEP persons:

- Providing appropriate access to people with limited English proficiency is one of the requirements for managing your agency's website. An agency may determine how much information it needs to provide in other languages, based on an assessment of its website visitors.
- Public website content and electronic documents that contain vital information about agency programs and services should be translated into frequently-encountered languages to ensure meaningful access by LEP individuals.
- The use of machine or automatic translations is strongly discouraged even if a disclaimer is added. If an agency decides to use software-assisted translation, it is important to have the translation reviewed by a qualified language professional before posting it to the website to ensure that the translation correctly communicates the message.
- In his Memorandum for Heads of Federal Agencies regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166, the Attorney General asked each federal agency to provide a link to materials posted on your website to the Federal Coordination and Compliance Section so that it can be posted on LEP.gov.
- More information on building multilingual websites can be found at: http://www.usa.gov/webcontent/multilingual/index.shtml

X. Cross-agency federal resources regarding language assistance:

- View federal agency plans, DOJ guidance documents, and other resources at www.lep.gov
- Consult with the Civil Rights Division, Federal Coordination and Compliance Section, http://www.justice.gov/crt/about/cor/
- Contact the National Virtual Translation Center for help in obtaining translations, http://www.nvtc.gov/
- Obtain help in constructing multilingual websites at http://www.usa.gov/webcontent/multilingual/index.shtml
- Participate in the Federal Interagency Working Group on Limited English Proficiency by visiting http://www.lep.gov/iwglep.htm and sending an email to DOJLAWG@usdoj.gov
- Participate in the Interagency Language Roundtable, http://www.govtilr.org/

§ 42.104 Discrimination prohibited.

(a) General. No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this subpart applies.

(b) Specific discriminatory actions prohibited. (1) A recipient to which this subpart applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:

(i) Deny an individual any disposition, service, financial aid, or benefit provided under the program;

(ii) Provide any disposition, service, financial aid, or benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any disposition, service, financial aid, or benefit under the program;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any disposition, service, financial aid, or benefit under the program;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which individuals must meet in order to be provided any disposition, service, financial aid, function or benefit provided under the program; or

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section).

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2)A recipient, in determining the type of disposition, services, financial aid, benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such will be provided under any

such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.

(3) In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this subpart applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this subpart.

(4) For the purposes of this section the disposition, services, financial aid, or benefits provided under a program receiving Federal financial assistance shall be deemed to include all portions of the recipient's program or activity, including facilities, equipment, or property provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in this paragraph and in paragraph (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(6)

(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

(c) Employment practices.

(1) Whenever a primary objective of the Federal financial assistance to a program to which this subpart applies, is to provide employment, a recipient of such assistance may not (directly or through contractual or other arrangements) subject any individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff, or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities). That prohibition also applies to programs as to which a primary objective of the Federal financial assistance is (i) to assist individuals, through employment, to meet expenses incident to the commencement or continuation of their education or training, or (ii) to provide work experience which

contributes to the education or training of the individuals involved. The requirements applicable to construction employment under any such program shall be those specified in or pursuant to part III of Executive Order 11246 or any Executive order which supersedes it.

(2) In regard to Federal financial assistance which does not have providing employment as a primary objective, the provisions of paragraph (c)(1) of this section apply to the employment practices of the recipient if discrimination on the ground of race, color, or national origin in such employment practices tends, on the ground of race, color, or national origin, to exclude persons from participation in, to deny them the benefits of or to subject them to discrimination under the program receiving Federal financial assistance. In any such case, the provisions of paragraph (c)(1) of this section shall apply to the extent necessary to assure equality of opportunity to and nondiscriminatory treatment of beneficiaries.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE SUBPART:

42 U.S.C. 2000d-2000d-7; E.O. 12250, *45 FR 72995,* 3 CFR, 1980 Comp., p. 298.

History

[31 FR 10265, July 29, 1966, as amended by *38 FR 17955,* July 5, 1973; *68 FR 51334, 51364,* Aug. 26, 2003]

Annotations

Notes

[EFFECTIVE DATE NOTE:

68 FR 51334, 51364, Aug. 26, 2003, amended paragraph (b)(1), and revised paragraph (b)(4), effective Sept. 25, 2003.]

Case Notes

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --

Alexander v Sandoval (2001, US) 149 L Ed 2d 517, 121 S Ct 1511

LexisNexis® Notes

Civil Rights Law : General Overview

Civil Rights Law : Civil Rights Acts : Civil Rights Act of 1964
Civil Rights Law : Federally Assisted Programs : Discriminatory Intent
Civil Rights Law : Federally Assisted Programs : Enforcement
Civil Rights Law : Federally Assisted Programs : Federal Assistance
Civil Rights Law : Federally Assisted Programs : Scope
Governments : State & Territorial Governments : Claims By & Against
Labor & Employment Law : Discrimination : Disparate Impact : Statutory Application : General Overview
Labor & Employment Law : Discrimination : National Origin Discrimination : Federal & State Interrelationships
Public Health & Welfare Law : Housing & Public Buildings : General Overview
Public Health & Welfare Law : Social Services : General Overview

Civil Rights Law : General Overview

Clyburn v. Shields, 2002 U.S. App. LEXIS 5752 (2d Cir Mar. 29, 2002).
Overview: *Where the law school applicant's complaint that the use of the law school admissions test as a criterion for admission was discriminatory was insufficient to state a claim, the law school's motion to dismiss was granted.*

- The use of criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race is prohibited under *28 C.F.R. § 42.104(b)(2)*. *Go To Headnote*

Maryland State Conf. of NAACP Branches v. Maryland Dep't of State Police, 72 F. Supp. 2d 560, 1999 U.S. Dist. LEXIS 16613 (D Md Sept. 30, 1999).
Overview: *In class action suit against State Police alleging discriminatory stops of minority motorists, defendants' motion for summary junction denied in part. Defendants had standing and alleged a claim for supervisory liability.*

- No program receiving financial assistance through the Department of Justice shall utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin. *28 C.F.R. § 42.104(b)(2)*. *Go To Headnote*

Civil Rights Law : Civil Rights Acts : Civil Rights Act of 1964

S. Camden Citizens In Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 505, 2001 U.S. Dist. LEXIS 5988 (D NJ May 10, 2001).
Overview: *U.S. Supreme Court's decision did not preclude plaintiffs from pursuing their claim for disparate impact discrimination, in violation of the EPA's implementing regulations to Title VI. Thus, the motion to vacate was denied.*

- 28 C.F.R. § 42.104(b)(2) prohibits recipients of federal funds from, inter alia, utilizing criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin. Go To Headnote

Alexander v. Sandoval, 532 U.S. 275, 69 U.S.L.W. 4250, 121 S. Ct. 1511, 149 L. Ed. 2d 517, 2001 U.S. LEXIS 3367 (Apr. 24, 2001).
Overview: *No private right of action existed to enforce regulations which prohibited discriminatory impact of conduct by federal funding recipients, since implementing statute only prohibited intentional discrimination in federal programs.*

- The disparate-impact regulations of the United States Department of Justice, 28 C.F.R. § 42.104(b)(2) (1999), and the United States Department of Transportation, 49 C.F.R. § 21.5(b)(2) (2000), do not simply apply § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d et seq., since they indeed forbid conduct that § 601 of Title VI permits, and therefore the private right of action to enforce § 601 of Title VI does not include a private right to enforce these regulations. A private plaintiff may not bring a suit based on a regulation against a defendant for acts not prohibited by the text of the statute. Go To Headnote

Rodriguez v. California Highway Patrol, 89 F. Supp. 2d 1131, 2000 U.S. Dist. LEXIS 3062 (ND Cal Mar. 13, 2000).
Overview: *In a racial discrimination action, a government defendant could not prove it was entitled to statutory immunity at the demurrer stage. However, state law claims against defendant were dismissed pursuant to its sovereign immunity.*

- The regulations implementing Title VI of the Civil Rights Act of 1964 provide that no program receiving federal assistance through the Department of Justice shall utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin. 28 C.F.R. § 42.104(b)(2). Go To Headnote

Civil Rights Law : Federally Assisted Programs : Discriminatory Intent

Nat'l Multi Hous. Council v. Jackson, 539 F. Supp. 2d 425, 2008 U.S. Dist. LEXIS 24822 (DDC Mar. 28, 2008).
Overview: *HUD's motion for a judgment on the pleadings was granted because two landlord groups lacked standing to challenge a policy guidance since invalidation of the policy guidance would not redress their claimed injury; the guidance took pains to identify its function as fleshing out existing responsibilities, rather than creating new ones.*

- 28 C.F.R. § 42.104(b)(2) states that a federally funded program may not utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of

defeating, or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin. Go To Headnote

- The Department of Housing and Urban Development (HUD) has adopted the same operative language found in 28 C.F.R. § 42.104(b)(2) to govern recipients of funding for housing, accommodations, facilities, services, financial aid, or other benefits which will be provided under any funded program or activity. 24 C.F.R. § 1.4(b)(2)(i). Thus, a ″disparate impact″ theory of discrimination is and has been available under the duly promulgated Title VI of the Civil Rights Act of 1964 regulations of both the Department of Justice and HUD for 35 years. Go To Headnote

Civil Rights Law : Federally Assisted Programs : Enforcement

Alexander v. Sandoval, 532 U.S. 275, 69 U.S.L.W. 4250, 121 S. Ct. 1511, 149 L. Ed. 2d 517, 2001 U.S. LEXIS 3367 (Apr. 24, 2001).
Overview: *No private right of action existed to enforce regulations which prohibited discriminatory impact of conduct by federal funding recipients, since implementing statute only prohibited intentional discrimination in federal programs.*

- The disparate-impact regulations of the United States Department of Justice, 28 C.F.R. § 42.104(b)(2) (1999), and the United States Department of Transportation, 49 C.F.R. § 21.5(b)(2) (2000), do not simply apply § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d et seq., since they indeed forbid conduct that § 601 of Title VI permits, and therefore the private right of action to enforce § 601 of Title VI does not include a private right to enforce these regulations. A private plaintiff may not bring a suit based on a regulation against a defendant for acts not prohibited by the text of the statute. Go To Headnote

Civil Rights Law : Federally Assisted Programs : Federal Assistance

S. Camden Citizens In Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 505, 2001 U.S. Dist. LEXIS 5988 (D NJ May 10, 2001).
Overview: *U.S. Supreme Court's decision did not preclude plaintiffs from pursuing their claim for disparate impact discrimination, in violation of the EPA's implementing regulations to Title VI. Thus, the motion to vacate was denied.*

- 28 C.F.R. § 42.104(b)(2) prohibits recipients of federal funds from, inter alia, utilizing criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin. Go To Headnote

Farm Labor Org. Comm. v. Ohio State Highway Patrol, 95 F. Supp. 2d 723, 2000 U.S. Dist. LEXIS 6068 (ND Ohio Apr. 20, 2000).
Overview: *Motorists stated viable equal protection claim against state highway patrol and individuals based on alleged practice of interrogating motorists concerning their immigration status because of motorists' Hispanic appearance.*

- 28 C.F.R. § 42.104 (b), promulgated under Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d et seq. (Title VI), provides that a federally funded program or activity cannot provide any disposition to an individual which is different, or is provided in a different manner based on that individual's race, color or national original. ″Disposition″ is defined as any treatment, handling, decision, sentencing, confinement, or other prescription of conduct. 28 C.F.R. § 42.102(j). Clearly, the process of questioning motorists about their immigration status constitutes a ″disposition″ within the meaning of Title VI. Go To Headnote

Rodriguez v. California Highway Patrol, 89 F. Supp. 2d 1131, 2000 U.S. Dist. LEXIS 3062 (ND Cal Mar. 13, 2000).
Overview: *In a racial discrimination action, a government defendant could not prove it was entitled to statutory immunity at the demurrer stage. However, state law claims against defendant were dismissed pursuant to its sovereign immunity.*

- The regulations implementing Title VI of the Civil Rights Act of 1964 provide that no program receiving federal assistance through the Department of Justice shall utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin. 28 C.F.R. § 42.104(b)(2). Go To Headnote

Civil Rights Law : Federally Assisted Programs : Scope

Farm Labor Org. Comm. v. Ohio State Highway Patrol, 95 F. Supp. 2d 723, 2000 U.S. Dist. LEXIS 6068 (ND Ohio Apr. 20, 2000).
Overview: *Motorists stated viable equal protection claim against state highway patrol and individuals based on alleged practice of interrogating motorists concerning their immigration status because of motorists' Hispanic appearance.*

- 28 C.F.R. § 42.104 (b), promulgated under Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d et seq. (Title VI), provides that a federally funded program or activity cannot provide any disposition to an individual which is different, or is provided in a different manner based on that individual's race, color or national original. ″Disposition″ is defined as any treatment, handling, decision, sentencing, confinement, or other prescription of conduct. 28 C.F.R. § 42.102(j). Clearly, the process of questioning motorists about their immigration status constitutes a ″disposition″ within the meaning of Title VI. Go To Headnote

Rodriguez v. California Highway Patrol, 89 F. Supp. 2d 1131, 2000 U.S. Dist. LEXIS 3062 (ND Cal Mar. 13, 2000).
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- The regulations implementing Title VI of the Civil Rights Act of 1964 provide that no program receiving federal assistance through the Department of Justice shall utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin. *28 C.F.R. § 42.104(b)(2)*. *Go To Headnote*

Governments : State & Territorial Governments : Claims By & Against

Farm Labor Org. Comm. v. Ohio State Highway Patrol, 95 F. Supp. 2d 723, 2000 U.S. Dist. LEXIS 6068 (ND Ohio Apr. 20, 2000).

Overview: *Motorists stated viable equal protection claim against state highway patrol and individuals based on alleged practice of interrogating motorists concerning their immigration status because of motorists' Hispanic appearance.*

- *28 C.F.R. § 42.104 (b)*, promulgated under Title VI of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000d* et seq. (Title VI), provides that a federally funded program or activity cannot provide any disposition to an individual which is different, or is provided in a different manner based on that individual's race, color or national original. ″Disposition″ is defined as any treatment, handling, decision, sentencing, confinement, or other prescription of conduct. *28 C.F.R. § 42.102(j)*. Clearly, the process of questioning motorists about their immigration status constitutes a ″disposition″ within the meaning of Title VI. *Go To Headnote*

Labor & Employment Law : Discrimination : Disparate Impact : Statutory Application : General Overview

Am. Ass'n of People With Disabilities v. Harris, 605 F.3d 1124, 2010 U.S. App. LEXIS 9615 (11th Cir May 11, 2010), substituted opinion at *647 F.3d 1093, 2011 U.S. App. LEXIS 15455, 23 Fla. L. Weekly Fed. C 159, 25 Am. Disabilities Cas. (BNA) 467 (11th Cir. Fla. 2011).*

Overview: *Where disabled voters asserted claims under 42 U.S.C.S. § 12133* and the Rehabilitation Act, *29 U.S.C.S. § 794,* based on inaccessible voting machines, the court of appeals found that *42 U.S.C.S. § 15481*(a)(3) and *28 C.F.R. § 35.151(b)* did not provide for a private cause of action against state election officials, and their injunction was dissolved.

- Section 601 of Title VI of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000d,* contained a provision prohibiting discrimination in covered programs or activities on the basis of race, color, or national origin. Section 602 of Title VI of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000d-1,* authorized federal agencies to effectuate § 2000d, by promulgating regulations. One regulation promulgated under § 2000d-1 prohibited funding recipients from using criteria or methods of administration that had the effect of discriminating based on race, color, or national origin. *28 C.F.R. § 42.104(b)(2)*. *Go To Headnote*

Labor & Employment Law : Discrimination : National Origin Discrimination : Federal & State Interrelationships

Sandoval v. Hagan, 197 F.3d 484, 1999 U.S. App. LEXIS 30722 (11th Cir Nov. 30, 1999).
Overview: *Official policy of English-only driver's license exams constituted disparate impact on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964, and suit was not barred by U.S. Const. amend. XI.*

- Department of Transportation and Department of Justice regulations prohibit grant recipients from employing criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their national origin. *49 C.F.R. § 21.5(b)(2)*; *28 C.F.R. § 42.104(b)(2)*. *Go To Headnote*

Public Health & Welfare Law : Housing & Public Buildings : General Overview

Nat'l Multi Hous. Council v. Jackson, 539 F. Supp. 2d 425, 2008 U.S. Dist. LEXIS 24822 (DDC Mar. 28, 2008).
Overview: *HUD's motion for a judgment on the pleadings was granted because two landlord groups lacked standing to challenge a policy guidance since invalidation of the policy guidance would not redress their claimed injury; the guidance took pains to identify its function as fleshing out existing responsibilities, rather than creating new ones.*

- The Department of Housing and Urban Development (HUD) has adopted the same operative language found in *28 C.F.R. § 42.104(b)(2)* to govern recipients of funding for housing, accommodations, facilities, services, financial aid, or other benefits which will be provided under any funded program or activity. *24 C.F.R. § 1.4(b)(2)(i)*. Thus, a ″disparate impact″ theory of discrimination is and has been available under the duly promulgated Title VI of the Civil Rights Act of 1964 regulations of both the Department of Justice and HUD for 35 years. *Go To Headnote*

Public Health & Welfare Law : Social Services : General Overview

Nat'l Multi Hous. Council v. Jackson, 539 F. Supp. 2d 425, 2008 U.S. Dist. LEXIS 24822 (DDC Mar. 28, 2008).
Overview: *HUD's motion for a judgment on the pleadings was granted because two landlord groups lacked standing to challenge a policy guidance since invalidation of the policy guidance would not redress their claimed injury; the guidance took pains to identify its function as fleshing out existing responsibilities, rather than creating new ones.*

- The Department of Housing and Urban Development (HUD) has adopted the same operative language found in *28 C.F.R. § 42.104(b)(2)* to govern recipients of funding for housing, accommodations, facilities, services, financial aid, or other benefits which will be provided under any funded program or activity. *24 C.F.R. § 1.4(b)(2)(i)*. Thus, a ″disparate impact″ theory of discrimination is and has been available under the duly promulgated Title VI of the Civil Rights Act of 1964 regulations of both the Department of Justice and HUD for 35 years. *Go To Headnote*

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE CHAPTER:

CROSS REFERENCES: Customs Service, Department of the Treasury: See Customs Duties, 19 CFR chapter I.

Internal Revenue Service, Department of the Treasury: See Internal Revenue Service, 26 CFR chapter I.

Employees' Benefits: See title 20.

Federal Trade Commission: See Commercial Practices, 16 CFR chapter I.

Other regulations issued by the Department of Justice appear in title 4; title 8; title 21; title 45; title 48.

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 42 procedural limitations, see: *61 FR 42556,* Aug. 16, 1996.]

NOTES APPLICABLE TO ENTIRE SUBPART:

h1 See also *28 CFR 50.3*. Guidelines for enforcement of Title VI, Civil Rights Act.

Supreme Court of Texas
Language Access Plan

I. Legal Basis and Purpose

This document serves as the plan for the Supreme Court of Texas ("the Court") to provide to persons with limited English proficiency ("LEP") services that are in compliance with Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*; 45 C.F.R. § 80.1 *et seq.*; and 28 C.F.R. § 42.101–42.112). The purpose of this plan is to provide a framework for the provision of timely and reasonable language assistance to LEP persons who have contact with the Court.

This LEP plan was developed to ensure meaningful access to the Court's services for persons with limited English proficiency. Access services for persons with hearing loss are covered under the Americans with Disabilities Act rather than Title VI of the Civil Rights Act, and therefore will not be addressed in this plan.

II. Needs Assessment

Public hearings before the Court are at the highest appellate level in the State of Texas, and they tend to involve oral arguments among attorneys and judges. To date, the need for LEP services has been quite limited.

Nonetheless, the Court will make every effort to provide services to persons with LEP. The following list shows the top foreign languages that are most frequently used in Texas, from current U.S. Census Bureau statistics.[1]

1. Spanish
2. Vietnamese
3. Chinese
4. Korean

III. Language Assistance Resources

The Court has designated its Clerk as the primary point of contact for all LEP services. All staff will be trained to direct anyone inquiring about LEP services to the Clerk. The Court is taking reasonable steps to ensure that LEP individuals have meaningful access to all services, though the Court has generally received very limited requests for assistance in languages other than English. LEP individuals may contact the Court's personnel via the phone, the Clerk's office reception counter, e-mail, or other means.

1. **Spoken-language services.** The most common point of service is at the Clerk's office's

[1] U.S Census Bureau; American Community Survey, 2008-2012 American Community Survey 5-Year Estimates, Table B16001; generated by Marco Hanson of the Office of Court Administration using American FactFinder; <http://factfinder2.census.gov>; (4 March 2014).

reception counter or telephone calls to the Clerk's office. Bilingual assistance is provided at the reception counter and by phone by the placement of bilingual staff as is practical. The Court can also call on other bilingual staff from elsewhere in the building to assist at the reception counter or by phone. To facilitate communication between LEP individuals and staff, the Court will use the following resources to the extent they are available within the Court's funding restrictions:

- Bilingual employees;
- "I Speak" cards, to identify the individual's primary language;
- When appropriate, Language Line, Lionbridge, and other companies that are available to provide assistance through remote interpretation and translation. These contractors provide interpretation services via the telephone in over 170 languages; and
- Guidance from the Office of Court Administration's Language Access Coordinator.

2. **Written documents.** The Court will utilize its staff and other resources to begin the process of:

- Translating key forms, FAQs, and parts of the Court's homepage, intended for the general public, into Spanish; and
- Provide translations into English of Spanish-language forms and letters received by the Court.

IV. Staff Training

The Court is committed to providing LEP training opportunities for all staff members. Training and learning opportunities currently offered by the Court will be expanded or continued as needed. Those opportunities include:

- Training for current employees to make them aware of the Court's Language Access Plan;
- Diversity training, cultural competency training; and
- New employee orientation training on language access for public-facing employees.

V. Public Notification and Evaluation of Language Access Plan

The Court's Language Access Plan is subject to approval by the Justices of the Court. Any revisions to the plan will be submitted to the full Court for approval. Copies of the plan will be provided to the public on request, and the Court will post this plan on its public website. Periodically, the General Counsel in consultation with the Clerk will assess whether changes to the plan are needed. The plan will remain in effect unless modified or updated. Periodic assessments may include identification of any problem areas and development of corrective action strategies. Elements of the assessment may include:

- Number of LEP persons requesting assistance and cost to the Court of providing this access;
- Assessment of current language needs to determine if additional services or translated

materials should be provided;

- Solicitation and review of feedback from LEP communities and advocacy groups;
- Assessment of whether staff adequately understand LEP policies and procedures and how to carry them out; and
- Review of feedback from staff.

Language Access Plan
April 1, 2014

Office of Court Administration

David Slayton
Administrative Director

Office of Court Administration
State of Texas

Language Access Plan

I. Legal Basis and Purpose

This document serves as the plan for the Office of Court Administration (OCA) to provide to persons with limited English proficiency (LEP) services that are in compliance with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.; 45 C.F.R. §80.1 et seq.; and 28 C.F.R. §42.101–42.112). The purpose of this plan is to provide a framework for the provision of timely and reasonable language assistance to LEP persons who come in contact with OCA. Under Chapter 72 of the Texas Government Code, the mission of the OCA is to provide resources and information for the efficient administration of the judicial branch of Texas, which is not a unified court system.

This LEP plan was developed to ensure meaningful access to OCA services for persons with limited English proficiency. Access services for persons with hearing loss are covered under the Americans with Disabilities Act rather than Title VI of the Civil Rights Act, and therefore will not be addressed in this plan.

II. Needs Assessment

OCA will make every effort to provide services to all LEP persons. The following list shows the top foreign languages that are most frequently used in Texas, from current U.S. Census Bureau statistics.[1]

1. Spanish
2. Vietnamese
3. Chinese
4. Korean

III. Language Assistance Resources

OCA has designated its Language Access Coordinator as the primary point of contact for all LEP services. All staff will be trained to direct anyone inquiring about LEP services to that coordinator. OCA is taking reasonable steps to ensure that LEP individuals have meaningful access to all services, though OCA's mission of providing services to the judiciary rather than the public has generally resulted in very limited requests for assistance in languages other than English. LEP individuals may come in contact with OCA personnel via the phone, the reception counter, e-mail or other means.

[1] U.S Census Bureau; American Community Survey, 2008-2012 American Community Survey 5-Year Estimates, Table B16001; generated by Marco Hanson; using American FactFinder; <http://factfinder2.census.gov>; (4 March 2014).

1. **Spoken-language services.** The most common points of service are at OCA's reception counter and at the administrative boards that regulate court interpreters, court reporters, guardians and process servers. Bilingual assistance is provided at the reception counter by the placement of bilingual staff as is practical. OCA can also call on other bilingual staff from elsewhere in the building to assist at the reception counter. To facilitate communication between LEP individuals and staff, OCA will use the following resources to the degree that resources are available:

    - Bilingual employees;
    - "I Speak" cards, to identify the individual's primary language; and
    - When appropriate, Language Line, Lionbridge and other companies are available to provide assistance through remote interpretation and translation. These contractors provide interpretation services via the telephone in over 170 languages.

2. **Written documents.** OCA's Language Access staff will:

    - Translate key forms and OCA webpages, intended for the general public, into Spanish; and
    - Provide translations into English of Spanish-language forms and letters received by OCA.

IV. Staff Training

OCA is committed to providing LEP training opportunities for all staff members. Training and learning opportunities currently offered by OCA will be expanded or continued as needed. Those opportunities include:

- Training for current employees on OCA's Language Access Plan;
- Designated staff attending statewide and national conferences on language access or conferences that include sessions dedicated to topics on language access; and
- New employee orientation training on language access

V. Public Notification and Evaluation of Language Access Plan

The OCA Language Access Plan is subject to approval by the Administrative Director of OCA. Any revisions to the plan will be submitted to the director for approval. Copies of the plan will be provided to the public on request, and OCA will post this plan on its public website. Once each year, the Language Access Coordinator will assess whether changes to the plan are needed. The plan will remain in effect unless modified or updated. Period assessments may include identification of any problem areas and development of corrective action strategies. Elements of the assessment may include:

- Number of LEP persons requesting assistance and cost to OCA of providing this access;
- Assessment of current language needs to determine if additional services or translated materials should be provided;
- Solicitation and review of feedback from LEP communities and advocacy groups;

- Assessment of whether staff adequately understand LEP policies and procedures and how to carry them out; and
- Review of feedback from staff training sessions.

Language Access Plan effective date: April 1, 2014

Approved by: David Slayton, OCA Administrative Director

Language Access in State Courts

U.S. Department of Justice
Civil Rights Division

Federal Coordination and Compliance Section

September 2016

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, DC 20530*

September 15, 2016

Dear State Court Stakeholders:

As head of the Civil Rights Division, I have the privilege of working alongside a dedicated team of colleagues to enforce the law in pursuit of equal justice and equal opportunity for all. A core component of our work begins with making federally funded services accessible to all people, regardless of the language they speak or their English proficiency.

Through our Federal Coordination and Compliance Section (FCS), the Civil Rights Division has prioritized protecting the rights of all people, whatever level of English proficiency they hold, to participate meaningfully, fully, and fairly in state court proceedings. Providing language services is essential to upholding the integrity of our justice system. Barriers to language access can interfere with the capacity of state courts to accurately evaluate the facts and fairly administer justice. And they can also place unfair and unconstitutional burdens on individuals – from litigants, to criminal defendants, to victims and witnesses – who participate in court proceedings or seek assistance from court programs and services.

This booklet aims to provide a brief overview of the importance of legal requirements for, and accomplishments in, providing language access services in state courts across the country. The Division has committed to a Courts Language Access Initiative to focus on the implementation of language access requirements and best practices in courts. Despite the significant progress that we have achieved, however, the challenge of providing meaningful language access in state courts demands that we continue to modernize, innovate, and keep pace with the evolving demographics of our country.

I hope you find this guide useful as you encounter these challenges in your communities in the months and years ahead. At the Department of Justice, we look forward to advancing the mission of equal access to state courts by forging dynamic partnerships with all stakeholders, by removing language access barriers, and by celebrating the diversity of our people that has always defined the resiliency and strength of our nation.

Sincerely,

Vanita Gupta
Principal Deputy Assistant Attorney General

LANGUAGE ACCESS IN STATE COURTS: A CRITICAL CIVIL RIGHT

Key Areas for Language Access in Courts:

Resources to Help:

Part I

Language Access in State Courts: A Critical Civil Right

The Civil Rights Division (Division) of the U.S. Department of Justice (DOJ) upholds the civil and constitutional rights of all members of our society. It enforces federal laws prohibiting discrimination based on race, color, sex, disability, religion, familial status, and national origin. The Division's Federal Coordination and Compliance Section (FCS), together with the Offices for Civil Rights of the DOJ Office of Justice Programs and other agencies, work to ensure consistent and effective enforcement of Title VI of the Civil Rights Act of 1964[1] (Title VI) and other laws and executive orders that prohibit discrimination in programs and activities that receive federal funding. Through the Courts Language Access Initiative, FCS secures the rights of all people, regardless of their national origin and English language ability, to participate meaningfully in state court proceedings and programs, consistent with the nondiscrimination provisions of Title VI and its regulations.

A. Introduction

Court systems exist to deliver justice. If a state court policy or action unjustly limits or burdens the ability of certain groups to be heard, it can erode the court's legitimacy. Those who work in and through the state court system—including judges, lawyers, clerks, interpreters, and court staff—have a shared mission to maintain and uphold the legitimacy of the judicial system and to prevent miscarriages of justice. This mission includes ensuring the provision of quality language services when necessary to allow people whose English language ability is limited to participate in court proceedings and services.

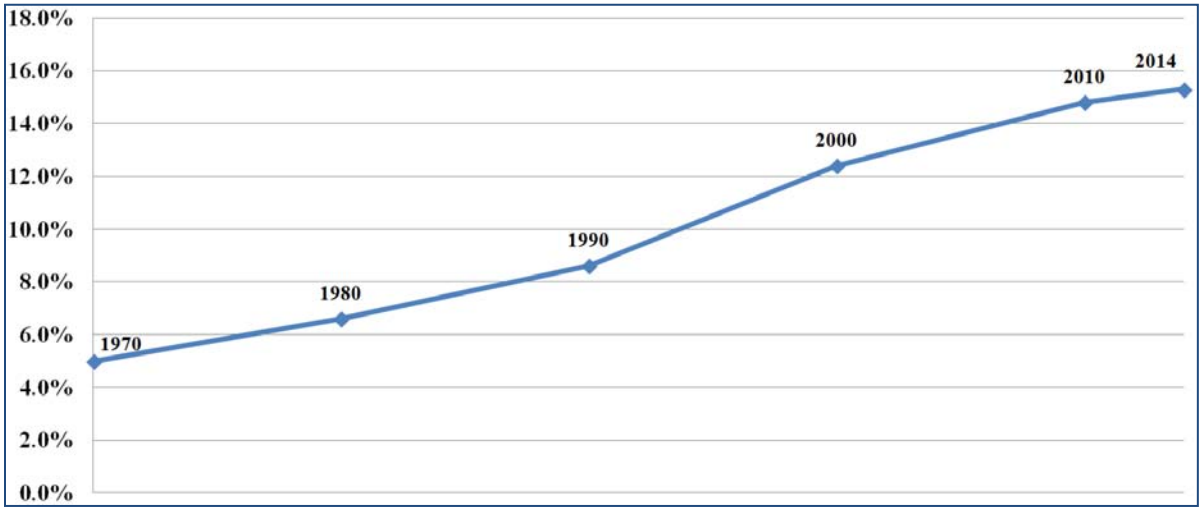
Simply put, interpretation and translation are essential to providing meaningful access to the courts and to maintaining the integrity of our justice system.[2] Court cases are often highly structured, stressful experiences requiring specialized terminology. Without careful attention to providing effective language services, many people will face a judicial process that places unfair and unconstitutional burdens on their ability to fully participate in proceedings. At the same time, relying on un-interpreted or poorly interpreted testimony from witnesses who are not proficient in English, or from improperly translated documents, will hinder the court's ability to determine the facts and dispense justice.

"When state courts fail to provide competent interpreters for people in civil cases who are of limited English proficiency, they can't protect their children, they can't protect their homes, they can't protect their safety. Courts suffer because they lose faith in the justice system. Society suffers because its laws cannot be enforced: laws guaranteeing minimal wages, laws barring domestic violence and illegal evictions can't be enforced."

– Chief Judge Eric T. Washington, District of Columbia Court of Appeals[3]

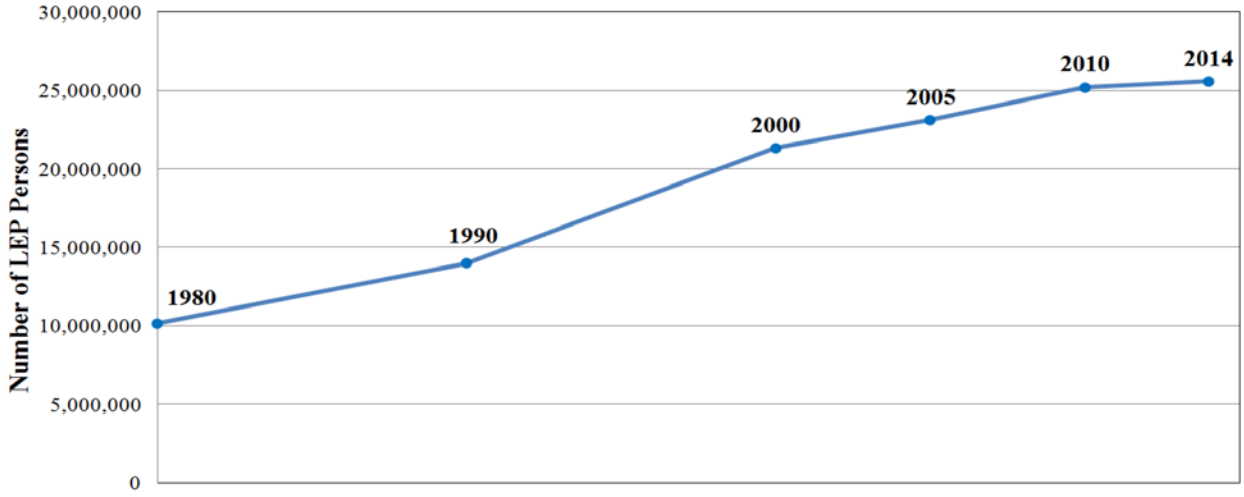
Demographic Trends Highlight the Need for Courts to Provide Language Assistance Services. There is a clear connection between national origin, primary language, and limited ability to read, write, speak, or understand English (known as limited English proficiency).[4] The presence of limited English proficient, or "LEP", parties and witnesses in courthouses is nothing new. Since the first Europeans arrived, immigration has been a part of the American experience. However, as the chart that follows illustrates, the foreign-born immigrant population as a proportion of U.S. residents has increased in the last 40 years from historic lows in the 1970s.[5]

Percent of the Population that is Foreign Born: 1970-2014[6]



In the last twenty-five years, the number of LEP individuals in the United States has nearly doubled to over 25 million.[7] These demographic shifts are happening all across America. Thus, while immigrants and the next generation learn English, data from the U.S. Census Bureau reveals the widespread need for language services. In 2013, one out of every three counties was home to 1,000 or more LEP residents, and in one out of every five counties, at least 5% of residents identified as LEP.[8]

Total LEP Population in U.S. from 1980-2014[9]



For example, from 1990 to 2012, LEP populations in Alabama, Oklahoma, and Nevada more than doubled.[10] Cities like Columbia, South Carolina, and the Dallas/Fort Worth/Arlington, Texas area saw more than 200% growth in their LEP communities.[11] In some areas the LEP population has increased even while the non-LEP population decreased. For example, in the Scranton/Wilkes-Barre/Hazleton, Pennsylvania area, the LEP population grew by 71% while the non-LEP population shrank by 12.5%.[12] These population changes call for state courts across the nation to incorporate interpretation, translation, and other language assistance services to meet the needs of the communities they serve.

In 2013, one out of every three counties was home to 1,000 or more LEP residents, and in one out of every five counties, at least 5% of residents identified as LEP.

The Law Requires Language Assistance Services. Finding ways to effectively bridge language barriers is necessary to preserve the integrity of our legal system. Federal law also requires it. There is widespread agreement among federal and state courts that in criminal proceedings, LEP defendants are entitled to the assistance of an interpreter under the U.S. Constitution.[13] In addition, for state courts that receive federal financial assistance, Title VI and its implementing regulations prohibit discrimination on the basis of race, color, or national origin in all court programs and services, whether criminal, civil, or administrative.[14] The Supreme Court has affirmed that the Title VI prohibition against national origin discrimination includes discrimination against LEP individuals on the basis of language.[15] This means that courts that receive federal assistance must take reasonable steps to ensure that limited English ability does not get in the way of a person's ability to appear and communicate effectively in court.

In August 2000, the President issued Executive Order 13166: Improving Access to Services for Persons with Limited English Proficiency. This Order requires federal agencies to ensure that their

grantees comply with Title VI and provide meaningful access to federally funded programs and services for LEP individuals.[16] In 2002, DOJ issued guidance to recipients of federal funds that offered further detail on what it means to provide meaningful access, including in state courts.[17] Since then, DOJ has provided technical assistance planning tools and additional guidance to courts, and has conducted investigations and worked collaboratively to bring about improved language assistance services for LEP court users.

> *"[W]e hold that one who cannot communicate effectively in English may be effectively incompetent to proceed in a criminal matter and rendered effectively absent at trial if no interpreter is provided.*
>
> ** * **
>
> *We also remind the bench that, as a recipient of federal funding, the court system in this State is obligated to provide persons who are 'limited English proficient' with meaningful access to the courts in order to comply with Title VI of the Civil Rights Act of 1964 . . . . [V]igilance in protecting the rights of non-English speakers is required in all of our courts."*
>
> *– Ling v. State, Georgia Supreme Court, 2010*[18]

In 2010, the Civil Rights Division launched its Courts Language Access Initiative, issuing a letter to state court chief justices and administrators to provide greater clarity about the long-standing requirement to provide meaningful access for LEP individuals in courts receiving federal financial assistance.[19] Since then, the Division and the Office for Civil Rights in the DOJ Office of Justice Programs have worked with state courts in a variety of ways to ensure that LEP individuals can meaningfully participate in court proceedings, maneuver through the court system, and access court services. As a result, state court systems around the country have created policies and plans that have significantly improved the provision of language assistance services in their courts.[20]

Sixteen years after the issuance of Executive Order 13166, DOJ reaffirms its commitment to ensuring that LEP individuals can participate meaningfully in federally funded programs and activities. Comprehensive language assistance services in state courts are critical for LEP court users and a priority for the Civil Rights Division. DOJ has worked with state courts to improve their programs, including through collaborative cooperation, investigations and voluntary compliance and, where negotiations for voluntary compliance are not fruitful, through the issuance of letters of finding and engagement in enforcement efforts. Through this work, and together with state court leaders, the bar, and stakeholders, changes are occurring: a consensus has emerged about the importance of language services, state courts across the country are making commendable progress, and a number of tools and resources have become available to state courts working to strengthen their language access programs.

B. Language Services Make a Difference

State courts can provide language access in many forms, including interpretation, translation, and bilingual services. Interpretation involves hearing information spoken in one language and orally relaying it into another in a manner that preserves its meaning. Depending on the nature of the interaction, interpretation services may be rendered using in-person interpreters, or through video-remote or telephonic interpretation. Additionally, bilingual staff members may provide language services during certain interactions, such as communications at a clerk's desk or with security personnel. In these cases, the bilingual staff member speaks directly with the LEP person in the LEP person's language. Translation consists of taking information which has been written in one language and conveying it in writing into another language while preserving its meaning. Translations are often necessary for signs inside and outside the courtroom, for letters sent by the court to LEP individuals, and for forms and other court documents that an LEP person may need to complete in order to participate in court proceedings. Below, we provide examples illustrating the need for effective language services in state courts and the harm that results when courts fail to provide those services.

1. Court Services and Programs

Providing language services inside the courtroom is essential, but courts do much more than hold hearings and trials. There are clerks' offices, self-help centers, signs, websites, forms, and a variety of other court services. Sometimes, courts appoint counsel, psychologists, mediators, and other professionals who need language services to assist them in their interactions with LEP individuals. Providing language services in these settings is essential.

Without appropriate language assistance services and clear procedures for court staff to follow outside the courtroom, LEP persons may not be able to take the steps necessary to initiate or participate in state court proceedings as parties or witnesses. An LEP person may not be able to read or understand the signs and notices necessary to navigate through the courthouse and appear for a proceeding. An LEP person may not be able to speak with staff in the clerk's office or with court-appointed counsel, obtain and complete necessary paperwork, participate in mediation, or engage in court-mandated treatment, visitation, or evaluation programs.

Situations like these are far from theoretical. In a survey conducted by the National Center for State Courts, two-thirds of community-based service and treatment providers had received LEP individuals who had been ordered by the courts to participate in their programs, but 41% often or sometimes turned them away.[21] In the absence of appropriate language services, courts have reported instructing LEP individuals to wait in the court lobby until another person who speaks their language comes in, or have expected the LEP person to come to the courthouse with an English-speaking friend or family member.[22] One county judge described the results of not providing language services in court operations: "Many people don't even make it through the courtroom door. They don't understand the papers, they don't file an answer and they default."[23]

"The right to an interpreter rests fundamentally, however, on the notion that no defendant should face the Kafkaesque specter of an incomprehensible ritual which may terminate in punishment."

– United States v. Carrion, 1st Circuit Court of Appeals, 1973[24]

2. Criminal Court Proceedings

A court-provided, qualified interpreter is essential for an LEP criminal defendant to effectively appear and participate in proceedings against him.[25] Denying a defendant timely interpretation and translation services could jeopardize that individual's life, liberty, and property. In addition, failure to provide appropriate interpretation and translation services to a defendant both in the courtroom and during related communications may result in overturned convictions or sentences.

For example, an LEP defendant appeared with an interpreter at his arraignment and stated that he could not read or write English. The court knew that he had signed several untranslated waivers of his rights as a defendant, but nevertheless accepted his guilty plea. The defendant later moved to withdraw his plea, arguing in part that he had not knowingly and intelligently entered it. Based in part on the fact that the written waivers were never translated, the court granted his motion.[26]

3. Civil Court Proceedings

Civil proceedings resolve a diverse array of disputes that can affect critical aspects of an individual's life and property. DOJ investigations have uncovered many cases in which the absence of language assistance services in civil proceedings devastated individuals and families. In one instance, an LEP woman attempted to obtain a protective order after her husband allegedly attacked her. During the hearing, the court denied her an interpreter. As a result, the judge did not understand her and ultimately dismissed the case.[27] In another case, an LEP woman appeared in court for an eviction proceeding. Because the court did not provide her with an interpreter, she could not communicate with the court or understand the proceedings. The LEP individual was evicted during the

proceeding without understanding what was taking place.[28] Even in child welfare hearings, interpreters are still not always being provided when needed. In one example, the court did not provide an interpreter for an LEP mother who had difficulty communicating with the court and understanding opposing counsel's argument during child custody proceedings. The mother did not know that she had lost custody of her children until she spoke with a child services employee after the hearing had ended.[29]

4. LEP Witnesses, Victims, and Others

LEP individuals appear in court, not just as litigants or criminal defendants, but also witnesses. Failure to provide appropriate language services to LEP individuals can have serious effects on cases even when an LEP person's interests are not directly at stake. For instance, the testimony of an LEP witness may affect the outcome of litigation between two English-speaking parties. If a court fails to provide effective language access services, that decision may taint evidence and skew results in favor of one party over the other. In criminal proceedings, inadequate interpretation may result in miscarriages of justice and put the community at risk. In a 2013 case, an LEP rape survivor testifying against her alleged attacker informed the court that she did not fully understand English and requested an interpreter. Instead of providing an interpreter, the judge asked counsel to rephrase the question and continued with the proceeding. As a result, the survivor provided insufficient testimony, and the judge dismissed the charge against her alleged attacker. Six months later, the defendant was arrested for the brutal sexual assault of a fifteen-year-old girl.[30] Courts also need to provide interpreters for other LEP persons with a substantial interest in the case, including LEP parents and guardians of minor victims, witnesses, or parties.

> *"We are aware that the loss of resources may impose an additional burden on local court jurisdictions. However, the opportunity for persons to effectively and meaningfully communicate in court proceedings and to participate in court services is a fundamental principle of justice that must be preserved despite the financial challenge it may create for local governments."*
>
> *– Washington Administrative Office of the Courts, 2015*[31]

5. The Importance of No-Cost Language Services

It is important for courts not to burden parties by charging them when court interpreters are needed, an approach that is fraught with problems. Providing qualified interpreter assistance at no cost to the parties serves the interests of all involved. An LEP person who must pay for an interpreter to participate in proceedings bears a greater financial burden to pursue a case than individuals who are not LEP.[32] Charging for language access services may also discourage LEP individuals from using interpreters, and encourage them to try to struggle through their court appearances without understanding or being able to communicate with the court. This, in turn,

inhibits not only the LEP person's ability to participate in the proceedings, but also the ability of the judge, jurors, and other participants to understand and communicate with the LEP person. Thus, imposing interpreter fees is contrary to the court's interest in protecting the integrity and fairness of the proceeding.

Rather than charging for language assistance services, state courts may address interpreter costs through a variety of other means. Courts may raise fees across the board, seek additional external funding, or treat interpreter costs as general operating costs; none of these options require courts to treat people differently based on a protected characteristic – national origin.

An LEP criminal defendant required an interpreter. Although as a defendant he had no choice but to appear in court, and although the criminal charges against him were ultimately dropped, the court charged him nearly $500 for an interpreter. People v. Santillan, 138 Ill.2d 176, 561 N.E.2d 655 (Ill. 1990).

6. Qualification and Training of Court Interpreters

Whether spoken or written, words lost or miscommunicated due to inadequate interpretation or translation may interfere with the court's ability to determine the facts and administer justice. For LEP individuals, accurate interpretation is the only way that they will be able to communicate their side of the story, preserve their evidence for the record, and challenge the testimony of adverse witnesses. Interpretation requires a high level of fluency in two languages, and skill in conveying—sometimes simultaneously—what is being said. Interpreters who have not been properly trained or assessed may have trouble understanding or accurately conveying important information, including difficult legal terminology.

"[S]imply providing 'any' interpreter upon request is insufficient….it is imperative to ensure accurate interpretation throughout the proceedings lest we run the risk of diminishing our system of justice by infringing upon the defendant's rights of due process."

– Ponce v. State, Indiana Supreme Court, 2014[33]

Interpreters must also follow ethical standards to avoid providing advice, expressing bias, or otherwise engaging in inappropriate side conversations with LEP persons. In one case, an LEP defendant accepted a plea agreement during a hearing in which the interpreter inaccurately interpreted his rights. Later, he petitioned for post-conviction relief. The Supreme Court of Indiana reversed and remanded the case, concluding that because the advisement of rights was inaccurately interpreted, the defendant did not knowingly and voluntarily enter his guilty plea.[34]

Part II

Department of Justice Enforcement and Technical Assistance

DOJ often receives complaints that court systems have failed to provide interpreter or other language assistance services in state court operations or proceedings, in possible violation of Title VI. The Division works with courts to investigate, and, if necessary, obtain voluntary compliance. In addition, the Office for Civil Rights in the DOJ Office of Justice Programs investigates and resolves complaints and conducts Title VI compliance reviews of recipients, including court system components.[35] This section highlights a few examples of state courts with which the Division became involved after receiving complaints of discrimination against LEP individuals. Further information about each of these cases can be found at lep.gov. It also highlights some of the Division's technical assistance materials.

A. Focus on Achieving Compliance

When state courts recognize that they need to improve access for LEP individuals to their courts and court systems, DOJ works collaboratively with them to ensure that meaningful access is achieved. For example, the Mohave County, Arizona Superior Court actively worked with the Division to improve the court's language access program in a number of ways, including:

- Clarifying that all LEP parties, witnesses, and anyone with a substantial interest in a matter will be provided interpreter services in all court proceedings free of charge regardless of case type, court user income, or language spoken;
- Enhancing communication with community stakeholders;
- Expanding the availability of telephonic or video interpreter services;
- Training all court staff on the importance of providing language services; and
- Creating and implementing a language services complaint system.[36]

The Division has engaged in similar efforts in response to complaints in places such as Hawai'i, Kentucky,[37] New Jersey,[38] and King County, Washington.[39] In Kentucky, for example, the Division worked with the Kentucky Administrative Office of the Courts to develop and finalize a complaint form and process through which an LEP individual can file a grievance regarding provision or quality of language assistance services in the Kentucky State Court system. This document will be available both in hard copy and online, and will be available in over 10 non-English languages with additional languages available upon request.

"The court is grateful for the leadership, support and guidance from the Department of Justice and will continue to work on providing the best services we can for court users who do not speak English as their first language."

– Mohave County Superior Court[40]

In August 2012, FCS received a complaint from an LEP Spanish-speaking mother who alleged she was not provided an interpreter during a custody hearing in the Lake County, Ohio Juvenile Court where she lost custody of her child. Between 2013 and 2016, pursuant to an agreement with FCS to resolve the issues raised in the complaint, the Supreme Court of Ohio (SCO) worked collaboratively with FCS and took steps to ensure the mother had access to a court-appointed interpreter and to improve its language services program. SCO improved its language services program by establishing a statewide complaint system; conducting outreach to LEP users and their counsel; educating judges, court personnel, and people who access the courts about Title VI; and continuing to translate vital court documents. SCO also changed its Supreme Court rules so that the appointment of a foreign language interpreter applies to court activities outside of a courtroom proceeding. SCO committed to continuing to strive to ensure all people, no matter what language they speak, have equal access to its courts.

Investigations often precede voluntary compliance in Title VI cases. For instance, after receiving a complaint alleging the Los Angeles County Superior Court (LASC) failed to provide LEP litigants with meaningful access to state court civil proceedings and court operations, the Civil Rights Division initiated an investigation. The Division uncovered compliance concerns in LASC and with California Judicial Council policies and practices, including a state statute that was interpreted to require charging litigants for interpreters in civil matters.

In May 2013, the Division—joined by the United States Attorney's Office for the Central District of California—issued a letter to LASC and the state Judicial Council that identified Title VI compliance concerns, made recommendations to improve compliance, and offered to work collaboratively to ensure compliance.[41] Since then, the California Judicial Branch, including LASC, has taken steps on the path toward compliance with Title VI in response to DOJ's concerns and recommendations. More work remains for both entities, and the Division continues to work with them to resolve the complaint and achieve voluntary compliance.

The Division has engaged in a similar manner with other state court systems, such as Colorado and Maine, to ensure compliance with their language access obligations under Title VI.[42] In Rhode Island, the Division negotiated the provisions of an executive order issued by the Rhode Island Chief Justice in 2012, which mandated comprehensive and free language assistance to LEP persons in all court proceedings and operations.[43] The Division approved the Rhode Island Courts' Language Access Plan, which outlines the judiciary's planned efforts to ensure comprehensive

language assistance throughout the court system, and signed a voluntary settlement agreement with the Rhode Island court system in 2014.[44] In 2016, DOJ closed the Rhode Island case following completion of planned improvements and a monitoring period.[45]

"Through extensive work with the Federal Coordination and Compliance Section of the Civil Rights Division of the U.S. Department of Justice, the Colorado Judicial Department has significantly revised Chief Justice Directive 06-03, which now not only provides language interpreters for all case types, but also ensures language access in all court operations."

– Michael L. Bender, Former Chief Justice, Supreme Court of Colorado[46]

In Colorado, the Division investigated a Title VI complaint claiming that Colorado state courts do not provide interpreters for LEP parties in civil cases. The Division negotiated a settlement with the Chief Justice in 2011,[47] who issued a directive mandating that court interpreters and other language assistance be provided at no cost to LEP parties in all cases and in court services and programs. In 2012, the court issued a Division-approved strategic plan that outlined 35 specific improvements in court policies, standards, infrastructure, and training to be undertaken in order to support the court system's ability to deliver timely and appropriate language assistance statewide. Following the successful and collaborative completion of the work and a period of monitoring, DOJ closed the case in 2016.[48]

Case Highlight: Hawai'i:

In 2012, the Division received complaints about problems with the Hawai'i State Judiciary's provision of language access services, including (1) the absence of a clear court policy on the provision of high quality, timely, language assistance services free of charge to LEP individuals in court proceedings and operations; (2) inconsistent procedures for accessing court language services; (3) a complaint system that did not include any notification targeted at LEP populations and those who work with them; (4) a court interpreter assignment system that did not adequately ensure that the most highly qualified interpreters were utilized before lesser qualified interpreters; and (5) a lack of accountability measures to ensure the court interpreter program was implemented in compliance with Title VI.

From the beginning, the Hawai'i Judiciary committed to address these concerns and, over the course of about a year, staff from the Hawai'i State Judiciary Office on Equality and Access to the Courts worked cooperatively with the Division to make a number of improvements to interpreter and translation services provided in the courts. In 2013, the Division issued

recommendations to address remaining barriers, and worked with court representatives to establish appropriate time frames to meet these goals. Among other actions, the Hawai'i State Judiciary has:

- *Issued a clear policy stating that the courts will provide all LEP individuals with free, competent court interpretation in all court proceedings, and that language assistance services will be provided in court operations free of charge;*
- *Revised its court interpreter assignment system and improved training on the interpreter assignment process for interpreters and judges;*
- *Committed to creating a language assistance complaint system; and*
- *Tightened its oversight of language assistance delivery.*[49]

In March 2015, when the Division closed its review of the Hawai'i state courts,[50] *Chief Justice Recktenwald stated: "We are committed to providing the best services we can for court users who do not speak English as their first language. The Hawai`i State Judiciary provides services to persons with limited English proficiency in all case types at no charge. I am proud of the progress we have made." The Court Program Director noted: "We are thankful for the leadership, support and guidance from the Department of Justice. We look forward to continuing to work with the DOJ as we move forward to ensure meaningful access to court operations."*[51]

B. Division Enforcement

When recipients are found in violation of Title VI, DOJ can take a number of steps in order to secure compliance, beginning with issuing a violation finding. For instance, in March 2012, after attempts to achieve voluntary resolution failed, DOJ issued its letter finding that the North Carolina Judicial Department's Administrative Office of the Courts (NCAOC) had engaged in systemic national origin discrimination because of its failure to provide meaningful access to court proceedings and operations for LEP individuals.[52] The letter stated that if NCAOC did not agree to correct the violations, DOJ would take legal action to compel compliance.[53] Since the issuance of the letter, the NCAOC has been working to resolve the complaints and ensure meaningful access to its courts for LEP persons. Federal agencies can seek to terminate federal financial assistance or pursue other means of enforcing the law when efforts to achieve voluntary compliance have failed.[54]

The following links lead to agreements and resolutions the Division has entered into with several state courts in order to resolve complaints about the availability of language access services.

- Colorado Judicial Department, memorandum of agreement (June 28, 2011) - go.usa.gov/cRSRw.

- Hawai'i Judiciary, closure letter and acceptance (March 24, 2015) - go.usa.gov/cRSX4.
- Kentucky Court of Justice, settlement agreement (June 22, 2016) - go.usa.gov/xcyBW.
- King County Superior Court, WA, closure letter and acknowledgement (December 1, 2015) - go.usa.gov/xcyBF.
- Maine Judicial Branch, memorandum of understanding (September 29, 2008) - go.usa.gov/cRSP3.
- Mohave County Superior Court, AZ, closure letter and acknowledgement (May 11, 2015) - go.usa.gov/cn3Uw.
- New Jersey Judiciary, closure letter (April 7, 2014) - go.usa.gov/cRSRB.
- Rhode Island Judiciary, settlement agreement (April 9, 2014) - go.usa.gov/cRSN9.

C. Division Technical Assistance

The links below provide Division tools and guidance documents that clarify recipients' language access obligations under Title VI and assist courts seeking to improve their language services.

- Language Access Planning and Technical Assistance Tool for Courts (February 2014) - go.usa.gov/xDMDR.
- Language Access Guidance Letter to State Courts from Assistant Attorney General for Civil Rights (August 16, 2010) - go.usa.gov/x3tV4.
- DOJ Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455 (June 18, 2002) - go.usa.gov/cRSBG.

For additional language access resources for state courts, visit LEP.gov, a web-based clearinghouse on LEP and language services for federal agencies, recipients of federal funds, users of federal and federally assisted programs, and other stakeholders.

Part III

The New National Consensus

"For individuals to be afforded equal justice, and for courts to achieve their mission of providing equal justice accessible to all, court systems must develop viable systems to provide competent interpretation services to limited and non-English speakers. Our promise of justice for all must be supported by a commitment to provide all individuals accessing our court systems with a means for true communication and understanding, and not through a mere babble of unintelligible voices."

– Conference of State Court Administrators[55]

In the past several years, a national consensus has formed around the vital importance of providing language assistance services in state court proceedings and operations. Consistent with the principles of DOJ's Courts Language Access Initiative, bar and court organizations have agreed on the importance of comprehensive court language access. In 2012, the American Bar Association (ABA) formally recognized that access to justice is impossible for LEP individuals unless courts provide qualified language services to allow them to understand what takes place in courts and to be understood in turn.[56]

To address this issue, the ABA, with the assistance of DOJ and an array of stakeholders, promulgated Standards for Language Access in Courts to help courts design and implement comprehensive language access systems that are responsive to the needs of their communities.[57] The ABA also urged all courts and adjudicatory tribunals to adopt plans to implement the standards.[58] The Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) provided significant input into the standards, and both organizations adopted resolutions supporting them.[59]

In 2012, under the leadership of the National Center for State Courts (NCSC), about three hundred judicial leaders from forty-nine states, the District of Columbia, and three territories gathered for the National Summit on Language Access in the Courts to show their support for implementing language services in their jurisdictions, to identify challenges to providing meaningful access to LEP individuals, and to develop solutions to identified challenges.[60] In 2013, the NCSC issued a National Call to Action, which built upon the work of the Summit by setting forth steps that states may use to guide the implementation and improvement of their language access services.[61]

"Inability to communicate due to language differences also has an impact on the functioning of the courts and the effect of judgments, as proceedings may be delayed, the court record insufficient to meet legal standards, and court orders rendered unenforceable or convictions overturned, if a defendant or other party has not been able to understand or be understood during the proceedings."

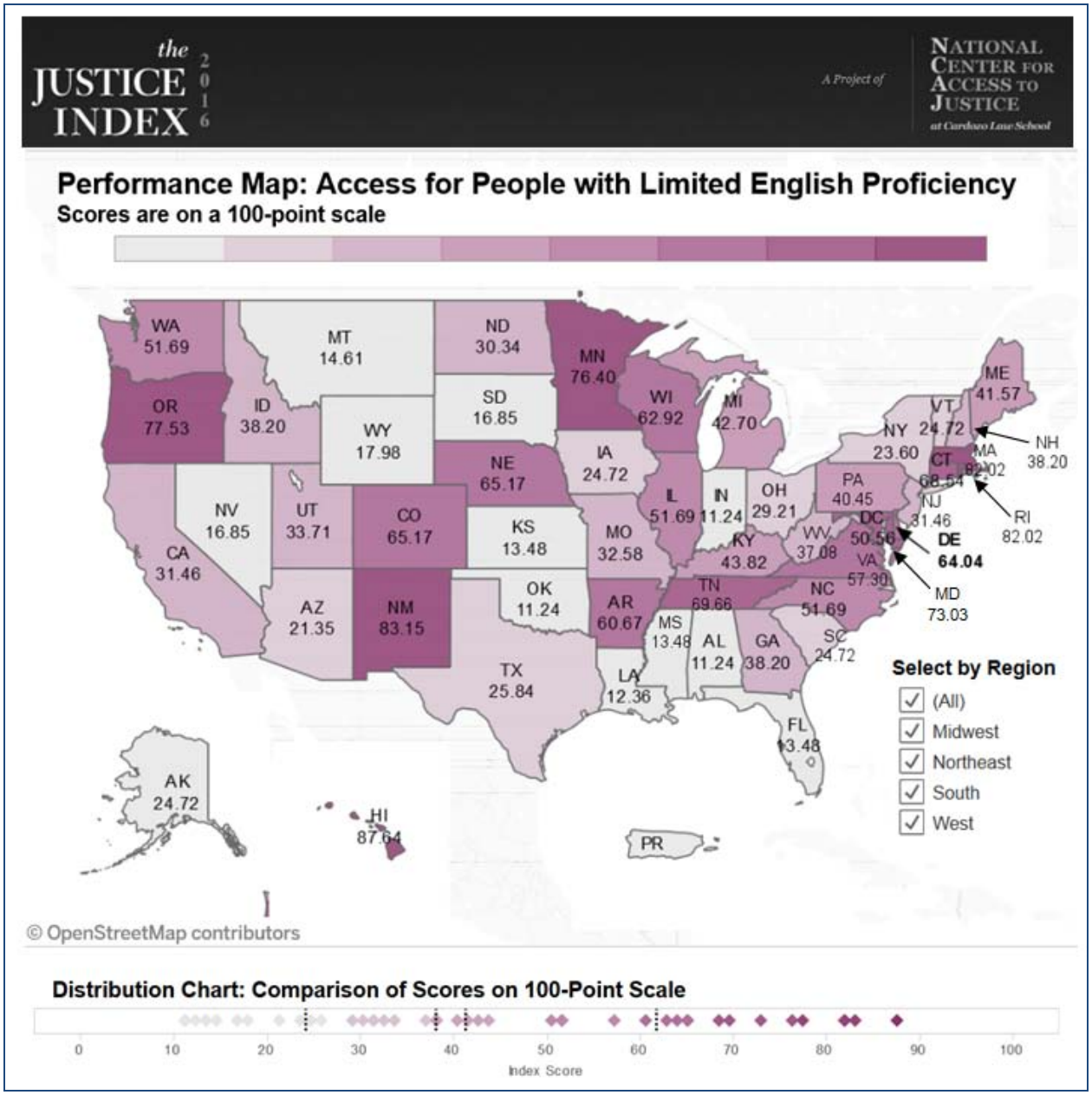
– American Bar Association Standards for Language Access in Courts[62]

Increasingly, state policies and practices reflect this new norm. Since 2010, several states have improved access to justice for LEP individuals. For example, Nebraska passed legislation making clear that LEP individuals would not be charged for court interpretation.[63] New Mexico has asked each of its courts to implement a language access plan, have a bilingual language access specialist who can provide meaningful language assistance outside the courtroom, and develop standards for ensuring that quality language services are provided to court-ordered programs.[64] In 2013, the New Hampshire Supreme Court issued an order adopting the New Hampshire Judicial Branch Language Services Plan.[65] In 2014, the Superior Court of the District of Columbia issued an order articulating its policy that it would "provide interpreting services to all hearing-impaired and non-English and limited English proficient persons participating in court proceedings involving all case types in all divisions of the Superior Court, and to pay the cost for such services, unless such services are waived by the participant."[66]

The National Center for Access to Justice (NCAJ) identified language access as one of four key measures in a survey of access policies and practices in state court systems.[67] The NCAJ created the Justice Index, which ranks state performance with regard to each of these key measures based on the extent to which each state's laws, rules, policies, and practices facilitate access to justice.[68] The data collected was used by NCAJ to give each state a score indicative of its performance on a 100 point scale; higher scores indicate better access to justice. The map below provides a visual representation of each state's performance with regard to language access.

Through data gathered during 2015 as part of this initiative, the NCAJ found that:

- In the past twelve months, more than half of all state courts trained their court staff who interact with the public on how to communicate with LEP individuals;
- 78% of state courts had a statute, rule, or other policy in place that requires courts to provide interpreters for all criminal and civil court proceedings; and
- Over 80% of states had a process in place to certify their court interpreters.[69]



For more information about the National Center for Access to Justice at Cardozo Law School's Justice Index, visit justiceindex.org/2016-findings/language-access/

State courts across the country have made significant progress toward providing LEP individuals meaningful access to their programs and services. Further progress will result from continued efforts from court leaders, legislators, judicial and bar organizations, professional interpreters and translators, advocates, and DOJ. Such efforts are important, for the work is not complete. Some courts have not yet seriously considered how best to ensure that LEP individuals can participate fully in court matters. A shrinking minority of courts remain comfortable with policies imposing special financial burdens on parties because of their limited English proficiency.

Others recognize the need to provide language assistance services but face implementation challenges.

> *"The Department applauds courts that are promoting equal access to the judicial system for limited English proficient individuals through concerted efforts to remove language barriers."*
>
> *– Tony West, Associate Attorney General, February 2014*

As the linguistic diversity of the country grows and more state courts recognize the critical role that language services play in ensuring access to justice for all, we look forward to continued progress and highlighting more resources on LEP.gov. DOJ recognizes the steps taken by state courts toward providing meaningful access for LEP individuals, and welcomes the opportunity to work collaboratively with courts in this area.

The Division remains committed to the Courts Language Access Initiative to promote language access in the state courts through enforcement of Title VI, technical assistance, and collaborative work with others. We offer in the Appendix a variety of tools and resources from non-DOJ sources that can assist courts to comply with the law. In addition, DOJ is available to provide technical assistance to courts interested in improving their language assistance services.

Appendix

Additional Resources

These links to non-DOJ[70] tools, resources, and examples of language access plans and policies, developed by state courts and other organizations, may provide additional assistance in ensuring meaningful access for LEP individuals in courts.

- **American Bar Association Standards for Language Access in Courts (February 2012) -** American Bar Association's comprehensive guide to ensuring language access in state and federal courts and administrative agencies - americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.authcheckdam.pdf.
- **National Center for State Courts Language Access Resource Guide -** National Center for State Courts portal of tools and resources for ensuring language access in state courts - ncsc.org/Topics/Access-and-Fairness/Language-Access/Resource-Guide.aspx.
- **National Center for State Courts, A National Call to Action: Access to Justice for Limited English Proficient Litigants: Creating Solutions to Language Barriers in State Courts (July 2013) -** Suggests steps for states to implement and improve language access services - ncsc.org/services-and-experts/areas-of-expertise/language-access/~/media/files/pdf/services%20and%20experts/areas%20of%20expertise/language%20access/call-to-action.ashx.
- **National Center for State Courts Language Access Services Section -** Offers resources for state courts to assist in overcoming language barriers and ensuring meaningful access to LEP individuals - ncsc.org/languageaccess.
- **Rhode Island Supreme Court Executive Order on Language Services in the Courts: Supreme Court No. 2012-05 (June 13, 2012) -** The Chief Justice of Rhode Island's comprehensive language access policy - go.usa.gov/xDsfH.
- **Strategic Plan for Language Access in the California Courts (January 22, 2015) -** The Judicial Council of California's strategic plan sets goals for ensuring compliance - courts.ca.gov/documents/jc-20150122-itemK.pdf.
- **Strategic Plan for Implementing Enhanced Language Access in the Colorado State Courts (March 15, 2012) -** Colorado Judicial Department's strategic plan assigns responsibility and timelines for completion of specific tasks to implement the language access directive issued by the Chief Justice - go.usa.gov/xDsGz.
- **Standards for Language Services in the North Carolina Court System (April 29, 2015) –** The North Carolina Administrative Office of the Courts court language access policy articulates comprehensive policies and procedures for provision of language

access services in courts and court operations - nccourts.org/LanguageAccess/Documents/NC_Standards_for_Language_Access.pdf.

- **Vagenas, Konstantina et al. Wisconsin Remote Interpreting: Needs Assessment for Developing a Pilot (July 2014) -** The National Center for State Courts action plan for a Wisconsin State Courts' remote interpretation pilot - ncsc.contentdm.oclc.org/cdm/ref/collection/accessfair/id/350.

Endnotes

[1] 42 U.S.C. § 2000d.

[2] *See* Am. Bar Ass'n, Standing Comm. on Legal Aid and Indigent Defendants, *Standards for Language Access in Courts*, 1 (2012), *at* americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.authcheckdam.pdf [hereinafter *ABA Standards*].

[3] State Courts, Experts Speak on Language Access, vimeo.com (2013), *at* vimeo.com/66249113.

[4] Though not all foreign-born individuals are limited English proficient, or "LEP," and not all LEP individuals are foreign-born, census data demonstrates that foreign-born individuals are far more likely to be LEP than those born in the U.S. Using U.S. Census 2009-2013 American Community Survey (ACS) data, we found that foreign-born residents are significantly more likely than native-born residents to be LEP ($p<.001$).

[5] Gibson, C. & Jung, K. (2006), *Historical Census Statistics on the Foreign-Born Population of the United States: 1850 to 2000* (Working Paper 81), Population Division, U.S. Census Bureau: Washington, D.C. (time period in graph shortened from original); U.S. Census Bureau, 2014, *Am. Cmty. Survey 1-Year Estimates,* Table S0501, *at* go.usa.gov/x3zgh (visited July 8, 2016).

[6] *See* Gibson, C. & Jung, K., *supra* note 5; U.S. Census Bureau, 2010, 2014, *Am. Cmty Survey 1-Year Estimates*, Table S0501. Note there has been variation from year to year in the phrasing of census questions concerning country of birth. *Compare* 2000 U.S. Census, Form D-2 *at* go.usa.gov/x3t8m *with* 1980 U.S. Census Long Form, *at* go.usa.gov/x3t5z *and* 1990 U.S. Census, Form D-2, *at* go.usa.gov/x3tNR.

[7] In 1990, there were 13,982,502 LEP individuals and by 2013, this number had climbed to 25,125,132 LEP individuals. *Compare* U.S. Census Bureau, 2014, *Am. Cmty. Survey 1-Year Estimates*, Table B06007, *at* go.usa.gov/cn3bm (visited July 8, 2016) *with* U.S. Census Bureau, *1990 Decennial Census, at* go.usa.gov/x3tR9 (visited July 8, 2016) [hereinafter 1990 Census].

[8] U.S. Census Bureau, *2009-2013 5-Year Am. Cmty. Survey*. Table: B16001 5-Year Estimate Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over, *at* go.usa.gov/cn3jY (visited July 8, 2016).

[9] U.S. Bureau of the Census, *1980 Census of the Population*, vol 1, Characteristics of the Population, Table 99: Nativity and Language; U.S. Bureau of the Census, *1990 Census of Population*, CPHL-96; U.S. Census Bureau 2000 Summary File 3; and U.S. Census Bureau, 2005, 2010, 2014, *Am. Cmty. Survey 1-Year Estimates*, Table B06007. The LEP numbers presented in this graph measure English speaking ability in the population 5 years and older. Note that until the year 2000, the U.S. Census Bureau collected data only in ten-year intervals. Thus, data for 1985 and 1995 is not available. At the time of this writing, data for 2015 had not yet been released.

[10] LEP populations grew substantially from 1990 to 2013 in Alabama (36,018 to 99,606), Oklahoma (51,885 to 142,859), and Nevada (62,168 to 303,815). *Compare* Place of Birth by Language Spoken at Home and Ability to Speak English in the United States, U.S. Census Bureau, 2008-2012 Am. Cmty. Survey 5-Year Estimates, *at* go.usa.gov/cn3jQ (visited July 8, 2016) [hereinafter 2008-2012 ACS Survey], *with* 1990 Census, *supra* note 7.

[11] 2008-2012 ACS Survey, *supra* note 10; 1990 Census, *supra* note 7. Note that the geographic areas discussed in the text refer to Metropolitan Statistical Areas as defined in the 2008-2012 ACS survey and the 1990 Census.

[12] *Compare* 2008-2012 ACS Survey, *supra* note 10, *with* 1990 Census, *supra* note 7, at Table 5.

[13] Federal courts have found the constitutional right to language access services in criminal proceedings under the Fifth, Sixth, and Fourteenth Amendments. *See, e.g.*, *United States v. Cirrincione*, 780 F.2d 620, 634 (7th Cir. 1985) ("We hold that a defendant in a criminal proceeding is denied due process when: (1) what is told him is incomprehensible; (2) the accuracy and scope of a translation at a hearing or trial is subject to grave doubt; (3) the nature of the proceeding is not explained to him in a manner designed to insure his full comprehension; or (4) a credible claim of incapacity to understand due to language difficulty is made and the district court fails to review the evidence and make appropriate findings of fact."); *United States v. Lim*, 794 F.2d 469, 470 (9th Cir. 1986). Several circuits have held that a defendant whose fluency in English is so impaired that it interferes with his right to confrontation or his capacity, as a witness, to understand or respond to questions has a constitutional right to an interpreter. *United States ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970); *see United States v.*

Martinez, 616 F.2d 185, 188 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 994, 101 S.Ct. 1694, 68 L.Ed.2d 193 (1981); *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973) (per curiam), *cert. denied*, 416 U.S. 907, 94 S.Ct. 1613, 40 L.Ed.2d 112 (1974); *United States v. Mayans*, 17 F.3d 1174, 1181 (9th Cir. 1994) ("While these cases have often been concerned with the role of interpreters in helping a defendant to understand those who testify against him, and hence have focused on the Sixth Amendment right to confront witnesses, the withdrawal of an interpreter whose assistance has been enlisted in order that the defendant may deliver his own testimony clearly implicates the defendant's Fifth Amendment right to testify on his own behalf."). *See also*, *Ling v. State*, 702 S.E.2d 881, 884 (Ga. 2010).

[14] 42 U.S.C. § 2000d.

[15] *Lau v. Nichols*, 414 U.S. 563 (1974).

[16] Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50,121 (Aug. 16, 2000), *at* go.usa.gov/x3tUz.

[17] DOJ Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455 (June 18, 2002), *at* go.usa.gov/x3tyh [hereinafter DOJ LEP Guidance].

[18] *Ling v. State*, 702 S.E.2d 881, 884 (Ga. 2010) (citations omitted).

[19] Letter from Thomas E. Perez, Assistant Attorney General, Civil Rights Division, Department of Justice, to Chief Justices and State Court Administrators (Aug. 16, 2010), *at* go.usa.gov/x3tV4 [hereinafter 2010 State Courts Language Access Letter].

[20] *See, e.g.*, Language Access Plan, R.I. Judiciary Admin. Office of State Courts (Apr. 1, 2014) *at* go.usa.gov/x3tpd*; Strategic Plan for Implementing Enhanced Language Access in the Colorado State Courts, Blueprint for Providing Full Access to Justice for Colorado's Limited English Proficient Court Users*, Colorado Judicial Dep't Office for Language Access (Mar. 2012) *at* go.usa.gov/cRSJh.

[21] Nat'l Ctr. for State Courts, Ctr. for Court Innovation, *Effective Court Communication: Assessing the Need for Language Access Services for Limited English Proficient Litigants in Domestic Violence, Sexual Assault, Dating Violence, and Stalking Cases*, 6 (2015) *at* ncsc.contentdm.oclc.org/cdm/ref/collection/accessfair/id/373.

[22] Stephen and Sandra Sheller Ctr. for Social Justice, Temple Univ. Beasley School of Law, *Barriers to Justice, Limited English Proficient Individuals and Pennsylvania's Minor Courts*, 8-9, (Jan. 2015).

[23] *State Courts' Interpreters to Help Poor in Civil Cases*, SFGate, Jan. 24, 2014, *at* sfgate.com/news/article/State-courts-interpreters-to-help-poor-in-civil-5173458.php.

[24] 488 F.2d 12, 14 (1st Cir. 1973) (discussing the trial court's refusal to appoint an interpreter).

[25] *Supra*, note 13.

[26] *People v. Padilla*, 42 Misc. 3d 1221(A), 986 N.Y.S.2d 867, No. 2012-204S (Co. Ct. 2014) (Finding "nowhere in the plea minutes does it indicate that the interpreter translated those English-written documents into Spanish. Nor was any evidence adduced at the hearing to establish that Padilla read these documents…").

[27] DOJ Letter and Report of Findings to the North Carolina Administrative Office of the Courts, Complaint No. 171-54M-8, 12 (Mar. 8, 2012), *at* go.usa.gov/cn3X3 [hereinafter North Carolina Letter].

[28] *Id*.

[29] *Id*. at 11.

[30] *Belmont-Cragin Sex Assault Suspect Faced Similar, Dropped Charges*, ABC7 Eyewitness News, Jan. 7, 2014, *at* abc7chicago.com/archive/9384441/; *Without an Interpreter to Help Rape Victim Testify, Alleged Rapist Walks Free and Finds Another Victim*, Salon, Jan. 7, 2014, *at* salon.com/2014/01/07/without_a_translator_to_help_rape_victim_testify_alleged_rapist_walks_free_and_finds_another_victim/ (cached copy).

[31] Memorandum Regarding Provision of Language Services Under Title VI of the Civil Rights Act (of 1964) and the

Americans with Disabilities Act, Wash. State Admin. Office of the Courts (May 22, 2015) (on file with DOJ).

[32] *E.g.*, 2010 State Courts Language Access Letter, *supra* note 17; Executive Order 13166 Limited English Proficiency Resource Document: Tips and Tools From the Field at 51 (Sept. 21, 2004) *at* go.usa.gov/cmshm; Letter from Coordination and Review Section, Civil Rights Division, U.S. Department of Justice to National Center for State Courts at 4 (February 21, 2008), *at* go.usa.gov/xDHCG.

[33] *Ponce v. State*, 9 N.E.3d 1265, 1269 (Ind. 2014).

[34] *Id.* at 1272-74.

[35] *E.g.*, U.S. Dep't of Justice, Office of Justice Programs, "Title VI Enforcement," *at* go.usa.gov/xDxY3.

[36] Press Release, DOJ, Department of Justice and Mohave County, Arizona, Superior Court Work to Ensure Equal Access for Non-English Speakers (May 14, 2015), *at* go.usa.gov/xDH4V.

[37] Press Release, Justice Department Reaches Agreement with Kentucky Courts to Ensure Equal Access for Non-English Speakers (June 27, 2016), *at* go.usa.gov/x3tAY.

[38] *See* Press Release, DOJ, Department of Justice and New Jersey Judiciary Collaborate to Ensure Provision of Language Assistance Services in Courts (Apr. 9, 2014), *at* go.usa.gov/cncBW.

[39] DOJ Closure Letter, Review of Interpretive Services in King County Superior Court: DOJ No. 171-82-22 (Jan. 9, 2014) (on file with DOJ).

[40] Press Release, Superior Court in Mohave County, Department of Justice Commends Mohave County Courts for Efforts to Ensure Access to Justice for Those with Limited English Proficiency (May 18, 2015), *at* mohavecourts.com/news/Press%20Release%20DOJ%20Language%20Access.pdf.

[41] Letter from Deeana Jang, Chief, Federal Coordination and Compliance Section, Civil Rights Division, Dep't of Justice, to Hon. Tani G. Cantil-Sakauye, Chief Justice, California Supreme Court, et. al. (May 22, 2013), *at* go.usa.gov/x3tsh.

[42] Press Release, DOJ, Department Reaches Agreement with Maine Courts to Reduce Language Barriers (Sept. 30, 2008), *at* go.usa.gov/xDH24 . The Colorado case was closed in June 2016. *See* Press Release, Justice Department Closes Case Following Colorado Judiciary Reforms Removing Language Barriers (June 21, 2016), *at* go.usa.gov/x3t6d.

[43] R.I. Supreme Court, Exec. Order No. 2012-5 (June 13, 2012), *at* go.usa.gov/x3tFm.

[44] R.I. Judiciary Admin. Office of State Courts, Language Access Plan (Apr. 1, 2014), *at* go.usa.gov/x3tMY; Voluntary Resolution Agreement between the United States of America and the Rhode Island Judiciary, DOJ No. 171-66-2, ¶5 (Mar. 28, 2014), *at* go.usa.gov/cRSN9; Press Release, DOJ, Department of Justice and Rhode Island Judiciary Enter into Agreement for Provision of Language Assistance Services in Rhode Island Courts (Apr. 10, 2014), *at* go.usa.gov/x3tej.

[45] *See* Press Release, Justice Department Closes Case after Rhode Island Judiciary Reforms Provide Equal Access for Individuals with Limited English Proficiency (April 21, 2016), *at* go.usa.gov/x3tHG.

[46] Letter from Michael L. Bender, Chief Justice, Colorado Supreme Court, to COSCA and CCJ Members, 3 (June 28, 2011), *at* go.usa.gov/xDH2G.

[47] Press Release, DOJ, Justice Department Reaches Agreement with Colorado State Courts to Remove Language Barriers (June 28, 2011), *at* go.usa.gov/cnx3x.

[48] *See* Press Release, Justice Department Closes Case Following Colorado Judiciary Reforms Removing Language Barriers (June 21, 2016), *at* go.usa.gov/x3t6d.

[49] Press Release, DOJ, Following Justice Department's Review, Hawai'i State Court Commits to Equal Access for Non-English Speakers (Mar. 24, 2015), *at* go.usa.gov/cnctA.

[50] *Id.*

[51] Hawai'i State Judiciary. Press Releases. Department of Justice Applauds Hawaii State Judiciary for Continued

Commitment in Expanding Language Assistance Services (March 24, 2015) *at* go.usa.gov/xDvSh.

[52] North Carolina Letter, *supra* note 27.

[53] *Id*. at 4.

[54] 42 U.S.C. 2000d-1.

[55] Conference of State Court Administrators, *White Paper on Court Interpretation: Fundamental to Access to Justice*, 3-4 (Nov. 2007), *at* cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/CourtInterpretation-FundamentalToAccessToJustice.ashx.

[56] *See ABA Standards*, at *Foreword*, *supra* note 2.

[57] *ABA Standards*, *supra* note 2.

[58] Am. Bar Ass'n House of Delegates, Resolution 12M113 (Feb. 6, 2012) *in ABA Standards*, at *Resolution Adopted by the ABA House of Delegates*, *supra* note 2.

[59] Conference of Chief Justices, Conference of State Court Adm'rs, Resolution in Support of Passage of Standards for Language Access in the Courts per Am. Bar Ass'n Resolution 113 (Dec. 8, 2011), *at* ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/12082011-Access-Justice-Passage-Standards-for-Language-Access.ashx.

[60] Nat'l Ctr. for State Courts, and State Justice Inst., "A National Call to Action: Access to Justice for Limited English Proficient Litigants, Creating Solutions to Language Barriers in State Courts," 12 (July 2013), *at* ncsc.org/services-and-experts/areas-of-expertise/language-access/~/media/files/pdf/services%20and%20experts/areas%20of%20expertise/language%20access/call-to-action.ashx.

[61] *Id*. at 18.

[62] *ABA Standards*, at 2, *supra* note 2.

[63] *See* Neb. Rev. Stat. 25-2406; 2011 NE L.B. 669, 102nd Legis., 1st Sess. LB669 § 18 (Neb. 2011), *at* nebraskalegislature.gov/FloorDocs/102/PDF/Slip/LB669.pdf.

[64] *See*, *e.g.*, N.M, Judiciary, Admin. Office of the Courts, *New Mexico Language Access Report and Plan*, 4, 8-10, 21 (July 1, 2011-June 30, 2013), *at* migrationpolicy.org/sites/default/files/language_portal/NM%20Judiciary%20LAP_0.pdf ("[t]his plan identifies the efforts of the New Mexico Administrative Office of the Courts (AOC), the New Mexico Supreme Court, and the New Mexico Court of Appeals to ensure Title VI compliance across New Mexico State Courts through an ongoing, collaborative planning and assessment process. The majority of New Mexico Magistrate, District, and Metropolitan Courts will have fully developed Language Access Plans in place by December 31, 2012 and all state courts will have Language Access Plans in place by July 1, 2013.").

[65] Order, N.H. Sup. Ct., Dec. 24, 2013, *at* go.usa.gov/xDHTF; New Hampshire Judicial Branch Language Services Plan, Appendix A, Dec. 24, 2013, *at id*.

[66] Admin. Order 14-15, Super. Ct. D.C., Sept. 19, 2014, *at* go.usa.gov/xcVtd.

[67] *Research Methodology*, The Justice Index, Nat'l Ctr. for Access to Justice at Cardozo Law School, *at* justiceindex.org/methodology/ (visited July 8, 2016).

[68] *Id*.

[69] *Performance Map: Access for People with Limited English Proficiency*, The Justice Index, Nat'l Ctr. for Access to Justice at Cardozo Law School, *at* justiceindex.org/2016-findings/language-access/ (visited July 8, 2016).

[70] DOJ does not endorse referenced non-federal resources, linked websites, the views they express, or the products/services they offer.

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Proposed Amendment to Tex. R. App. P. 49 (First Alternative)

Rule 49. Motion for Rehearing and En Banc Reconsideration
[Note: This version fixes the ambiguous "when permitted" language and continues to allow an en banc motion to be filed after a panel motion is denied.]

49.1. Motion for Rehearing

A motion for rehearing may be filed within 15 days after the court of appeals' judgment or order is rendered. The motion must clearly state the points relied on for the rehearing.

49.2. Response

No response to a motion for rehearing need be filed unless the court so requests. A motion will not be granted unless a response has been filed or requested by the court.

49.3. Decision on Motion

A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. Otherwise, it must be denied. If rehearing is granted, the court or panel may dispose of the case with or without rebriefing and oral argument.

49.4. Accelerated Appeals

In an accelerated appeal, the appellate court may deny the right to file a motion for rehearing or shorten the time to file such a motion.

49.5. Further Motion for Rehearing

After a motion for rehearing is decided, a further motion for rehearing may be filed within 15 days of the court's action if the court:

(a) Modifies its judgment;

(b) Vacates its judgment and renders a new judgment; or

(c) Issues a different opinion.

49.6. Amendments

A motion for rehearing or en banc reconsideration may be amended as a matter of right any time before the 15-day period allowed for filing the motion expires, and with leave of the court, any time before the court of appeals decides the motion.

49.7. En Banc Reconsideration

A party may file a motion for en banc reconsideration as a separate motion, with or without filing a motion for rehearing. The motion must be filed within 15 days after the court of appeals' judgment or order is rendered or within 15 days after the court of appeals' denial of the party's last timely filed motion for rehearing. While the court has plenary power, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision. If a majority orders reconsideration, the panel's judgment or order does not become final, and the case will be resubmitted to the court for en banc review and disposition.

Comment [TS1]: Deleted: when permitted

Comment [TS2]: Deleted: or en banc reconsideration

49.8. Further Motion En Banc Reconsideration

After a motion for en banc reconsideration is decided, a further motion for en banc reconsideration may be filed within 15 days if the court:

(a) modifies the judgment

(b) vacates its judgment and renders a new judgment

(c) issues a different opinion.

[renumber remaining subsections accordingly]

Note: Depending on how the rule is revised, the 2008 comments may need to be revised as well. The first sentence of those comments reads: "Rule 49 is revised to treat a motion for en banc reconsideration as a motion for rehearing and to include procedures governing the filing of a motion for en banc reconsideration."

Proposed Amendment to Tex. R. App. P. 49 (Second Alternative)

Rule 49. Motion for Rehearing and En Banc Reconsideration
[Note: This version fixes the ambiguous "when permitted" language and requires simultaneous filing of panel and en banc motions.]

49.1. Motion for Rehearing

A motion for rehearing may be filed within 15 days after the court of appeals' judgment or order is rendered. The motion must clearly state the points relied on for the rehearing.

49.2. Response

No response to a motion for rehearing need be filed unless the court so requests. A motion will not be granted unless a response has been filed or requested by the court.

49.3. Decision on Motion

A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. Otherwise, it must be denied. If rehearing is granted, the court or panel may dispose of the case with or without rebriefing and oral argument.

49.4. Accelerated Appeals

In an accelerated appeal, the appellate court may deny the right to file a motion for rehearing or shorten the time to file such a motion.

49.5. Further Motion for Rehearing

After a motion for rehearing is decided, a further motion for rehearing may be filed within 15 days of the court's action if the court:

(a) modifies its judgment;

(b) vacates its judgment and renders a new judgment; or

(c) issues a different opinion.

49.6. Amendments

A motion for rehearing or en banc reconsideration may be amended as a matter of right any time before the 15-day period allowed for filing the motion expires, and with leave of the court, any time before the court of appeals decides the motion.

49.7. En Banc Reconsideration

A party may file a motion for en banc reconsideration as a separate motion, with or without filing a motion for rehearing. The motion must be filed within 15 days after the court of appeals' judgment or order is rendered. While the court has plenary power, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision. If a majority orders reconsideration, the panel's judgment or order does not become final, and the case will be resubmitted to the court for en banc review and disposition.

Comment [TS1]: Deleted: or whe n permitted within 15 days after the court of appeals' denial of the party's last timely filed motion for rehearing or en banc reconsideration

49.8. Further Motion En Banc Reconsideration

After a motion for en banc reconsideration is decided, a further motion for en banc reconsideration may be filed within 15 days if the court:

(a) modifies the judgment

(b) vacates its judgment and renders a new judgment

(c) issues a different opinion.

[renumber remaining subsections accordingly]

Note: Depending on how the rule is revised, the 2008 comments may need to be revised as well. The first sentence of those comments reads: "Rule 49 is revised to treat a motion for en banc reconsideration as a motion for rehearing and to include procedures governing the filing of a motion for en banc reconsideration."

Walker, Marti

From: Meadows, Robert <RMeadows@KSLAW.com>
Sent: Wednesday, June 08, 2016 3:58 PM
To: Walker, Marti
Cc: aalbright@law.utexas.edu; adawson@beckredden.com; Babcock, Chip; brett.busby@txcourts.gov; cristina.rodriguez@hoganlovells.com; csoltero@mcginnislaw.com; cwatson@lockelord.com; d.b.jackson@att.net; dpeeples@bexar.org; ecarlson@stcl.edu; elsa.alcala@txcourts.gov; errodriguez@atlashall.com; esteveza@pottercscd.org; evan.young@bakerbotts.com; evansdavidl@msn.com; fgilstrap@hillgilstrap.com; fuller@namanhowell.com; harvey.brown@txcourts.gov; Honorable Robert H. Pemberton; jane.bland@txcourts.gov; jperduejr@perdueandkidd.com; Sullivan, Kent; kvoth@obt.com; LJefferson@JeffersonCano.com; lbenton@levibenton.com; lhoffman@central.uh.edu; Linda Riley; lisa@kuhnhobbs.com; mahatchell@lockelord.com; martha.newton@txcourts.gov; mgreer@adjtlaw.com; nathan.hecht@txcourts.gov; nina.cortell@haynesboone.com; och@atlashall.com; pkelly@texasappeals.com; psbaron@baroncounsel.com; pschenkkan@gdhm.com; rhardin@rustyhardin.com; rhughes@adamsgraham.com; rhwallace@tarrantcounty.com; richard@ondafamilylaw.com; rmeadows@kslaw.com; rmun@scotthulse.com; robert.l.levy@exxonmobil.com; Scott Stolley; shanna.dawson@txcourts.gov; stephen.yelenosky@co.travis.tx.us; tom.gray@txcourts.gov; tracy.christopher@txcourts.gov; triney@rineymayfield.com; wdorsane@mail.smu.edu; coliden@lockelord.com; wshelton@shelton-valadez.com; 'Justice Boyd; 'Elaine Carlson; Viator, Mary; bill.boyce@txcourts.gov; Sharon Tabbert (Assistant to B. Dorsaneo; judgebillboyce@gmail.com; Dee Dee Jones (dee2jones@ranchwireless.com) (dee2jones@ranchwireless.com); Lisa Verm
Subject: Re: Discovery Subcommittee Report

Correction:

...it makes sense to consider the proposed spoliation rule and changes to Rule 192.3 as part of the larger review of all our discovery rules, rather than taking up these proposals in isolation in advance. ...

> On Jun 8, 2016, at 9:53 AM, Walker, Marti <mawalker@jw.com> wrote:
>
> SCAC:
> Please see attached documents and the email below for your review and consideration. Thank you.
>
> Marti Walker | Legal Administrative Assistant
> 1401 McKinney Suite 1900 | Houston, TX | 77010
> V: (713) 752-4375 | mawalker@jw.com<mailto:mawalker@jw.com>
> [cid:image001.jpg@01D1C162.BD955010]
>
> From: Meadows, Robert [mailto:RMeadows@KSLAW.com]
> Sent: Wednesday, June 08, 2016 5:31 AM
> To: Walker, Marti
> Subject: Discovery Subcommittee Report
>
> Marti, good morning; here is the report of Discovery Subcommittee for the SCAC meeting on Friday.
>

>
> The Discovery Subcommittee has been tasked with considering (1) two proposed changes to Texas Rule 192.3, (2) a proposed new rule on spoliation and (3) undertaking a wholesale review of the Texas discovery rules. These matters were taken up by the Discovery Subcommittee at a recent meeting, and it was decided that inasmuch as we will be considering all the Texas discovery rules to evaluate their current effectiveness and in light of the 2015 amendments to the Federal Rules of Civil Procedure, it makes sense to consider the proposed spoliation rule changes to Rule 192.3 as part of the larger review of all our discovery rules, rather than taking up these proposals in isolation in advance. For consideration of the Texas discovery rules and procedures front to back, the Discovery Subcommittee believes it would be helpful to have direction from the full SCAC as to what members think is working and what needs attention..
>
> To facilitate the discussion, attached are two charts (each in word and pdf form) comparing the Texas discovery rules to the relevant Federal Rules of Civil Procedure. We have prepared the charts to (1) indicate where the federal rules were amended, effective December 2015, (2) include the proposed Texas spoliation rule opposite the relevant federal rule (marked as PROPOSED), and (3) include the two proposed changes to Texas Rule 192.3 (marked as PROPOSED). Each chart includes an index and key to guide readers.
>
> The difference between the two charts is the "Full-Text Comparison" chart places the full text of the Texas discovery rules opposite the full text of the federal discovery rules, divided by the following topics:
>
> Index
> I. General Rules and Disclosures: Tex. R. Civ. P. 190-194, 205; Fed. R. Civ. P. 26
> II. Experts: Tex. R. Civ. P. 195; Fed. R. Civ. P. 26(a)(2), (b)(4), (e)
> III. Pre-Suit Depositions and Depositions Pending Appeal: Tex. R. Civ. P. 202; Fed. R. Civ. P. 27
> IV. Depositions: Tex. R. Civ. P. 199-201, 203; Fed. R. Civ. P. 28, 30-32
> V. Stipulations about Discovery Procedure: Tex. R. Civ. P. 191.1, 191.2; Fed. R. Civ. P. 29
> VI. Interrogatories: Tex. R. Civ. P. 197; Fed. R. Civ. P. 33
> VII. Production and Inspection: Tex. R. Civ. P. 196; Fed. R. Civ. 34
> VIII. Physical and Mental Examinations: Tex. R. Civ. P. 204; Fed. R. Civ. P. 35
> IX. Admissions: Tex. R. Civ. P. 198; Fed. R. Civ. P. 36
> X. Sanctions: Tex. R. Civ. P. 215; Fed. R. Civ. P. 37
>
> The "Matched Comparison" chart, while also divided by the same index topics, rearranges the relevant federal rules to better match the federal provisions to the Texas provisions. It also notates differences between the rules. It is helpful to have both charts because the Full-Text Comparison chart preserves the structure of the federal rules in a way the matched comparison chart does not.
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> <2016.6.5.Full-Text Comparison-TRCP and FRCP.docx>
> <2016.6.5.Matched Comparison - TRCP and FRCP.docx>
> <2016.6.5.Full-Text Comparison-TRCP and FRCP.pdf>
> <2016.6.5.Matched Comparison-TRCP and FRCP.pdf>

Full-Text Comparison; TRCP and FRCP

Index

*Underlined text indicates amendments to the Federal Rules of Civil Procedure, effective on December 1, 2015

*Proposed amendments to the Texas Rules of Civil Procedure are underlined and marked as follows: [PROPOSED CHANGE: . . .]

*Proposed Texas Rule of Civil Procedure on spoliation is indicated as follows: [PROPOSED RULE: . . .]

I. General Rules And Disclosures

Tex. R. Civ. P. 190-194, 205	Fed. R. Civ. P. 26
RULE 190. DISCOVERY LIMITATIONS **190.1 Discovery Control Plan Required.** Every case must be governed by a discovery control plan as provided in this Rule. A plaintiff must allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under Level 1, 2, or 3 of this Rule. **190.2 Discovery Control Plan - Expedited Actions and Divorces Involving $50,000 or Less (Level 1)** (a) **Application.** This subdivision applies to: (1) any suit that is governed by the expedited actions process in Rule 169; and (2) unless the parties agree that rule 190.3 should apply or the court orders a discovery control plan under Rule 190.4, any suit for divorce not involving children in which a party pleads that the value of the marital estate is more than zero but not more than $ 50,000. (b) **Limitations**. Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations: (1) **Discovery period**. All discovery must be conducted during the discovery period, which begins when the suit is filed and continues until 180 days after the date the first request for discovery of any kind is served on a party. (2) **Total time for oral depositions.** Each party may have no more than six hours in total to examine and cross-	**26: Duty to Disclose; General Provisions Governing Discovery** **(a) Required Disclosures.** **(1)** ***Initial Disclosure.*** **(A)** *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties: **(i)** the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment; **(ii)** a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment; **(iii)** a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34

examine all witnesses in oral depositions. The parties may agree to expand this limit up to ten hours in total, but not more except by court order. The court may modify the deposition hours so that no party is given unfair advantage. (3) **Interrogatories.** Any party may serve on any other party no more than 15 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory. (4) **Requests for Production.** Any party may serve on any other party no more than 15 written requests for production. Each discrete subpart of a request for production is considered a separate request for production. (5) **Requests for Admissions.** Any party may serve on any other party no more than 15 written requests for admissions. Each discrete subpart of a request for admission is considered a separate request for admission. (6) **Requests for Disclosure.** In addition to the content subject to disclosure under Rule 194.2, a party may request disclosure of all documents, electronic information, and tangible items that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses. A request for disclosure made pursuant to this paragraph is not considered a request for production. (c) **Reopening Discovery**. If a suit is removed from the expedited actions process in Rule 169 or, in a divorce, the filing	the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and **(iv)** for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment. **(B)** *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure: **(i)** an action for review on an administrative record; **(ii)** a forfeiture action in rem arising from a federal statute; **(iii)** a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence; **(iv)** an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision; **(v)** an action to enforce or quash an administrative summons or subpoena; **(vi)** an action by the United States to recover benefit payments;

of a pleading renders this subdivision no longer applicable, the discovery period reopens, and discovery must be completed within the limitations provided in Rules 190.3 or 190.4, whichever is applicable. Any person previously deposed may be redeposed. On motion of any party, the court should continue the trial date if necessary to permit completion of discovery.

190.3 Discovery Control Plan - By Rule (Level 2)

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

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

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

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

(B) in other cases, the earlier of

(i) 30 days before the date set for trial, or

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

(2) **Total time for oral depositions.** Each side may have no more than 50 hours in oral depositions to examine and cross-examine parties on the opposing side, experts designated by those parties, and persons who are subject to those parties' control. "Side" refers to all the litigants with generally common interests in the

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures—In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures—For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges

litigation. If one side designates more than two experts, the opposing side may have an additional six hours of total deposition time for each additional expert designated. The court may modify the deposition hours and must do so when a side or party would be given unfair advantage. (3) **Interrogatories.** Any party may serve on any other party no more than 25 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory. **190.4 Discovery Control Plan - By Order (Level 3)** (a) **Application.** The court must, on a party's motion, and may, on its own initiative, order that discovery be conducted in accordance with a discovery control plan tailored to the circumstances of the specific suit. The parties may submit an agreed order to the court for its consideration. The court should act on a party's motion or agreed order under this subdivision as promptly as reasonably possible. (b) **Limitations.** The discovery control plan ordered by the court may address any issue concerning discovery or the matters listed in Rule 166, and may change any limitation on the time for or amount of discovery set forth in these rules. The discovery limitations of Rule 190.2, if applicable, or otherwise of Rule 190.3 apply unless specifically changed in the discovery control plan ordered by the court. The plan must include: (1) a date for trial or for a conference to determine a trial setting; (2) a discovery period during which either all discovery	the sufficiency of another party's disclosures or because another party has not made its disclosures. **(2) *Disclosure of Expert Testimony*.** **(A)** *In General*. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. **(B)** *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain: **(i)** a complete statement of all opinions the witness will express and the basis and reasons for them; **(ii)** the facts or data considered by the witness in forming them; **(iii)** any exhibits that will be used to summarize or support them; **(iv)** the witness's qualifications, including a list of all publications authored in the previous 10 years; **(v)** a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

must be conducted or all discovery requests must be sent, for the entire case or an appropriate phase of it;
(3) appropriate limits on the amount of discovery; and
(4) deadlines for joining additional parties, amending or supplementing pleadings, and designating expert witnesses.

190.5 Modification of Discovery Control Plan

The court may modify a discovery control plan at any time and must do so when the interest of justice requires. Unless a suit is governed by the expedited actions process in Rule 169, the court must allow additional discovery:

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

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

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

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

Comment to 2013 change: Rule 190 is amended to implement section 22.004(h) of the Texas Government Code, which calls for rules to promote the prompt, efficient, and cost-effective resolution of civil actions when the amount in controversy does not exceed $100,000. Rule 190.2 now applies to expedited actions, as defined by Rule 169. Rule 190.2 continues to apply

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report*. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Time to Disclose Expert Testimony*. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure*. The parties must supplement these disclosures when required under Rule 26(e).

to divorces not involving children in which the value of the marital estate is not more than $50,000, which are otherwise exempt from the expedited actions process. Amended Rule 190.2(b) ends the discovery period 180 days after the date the first discovery request is served; imposes a fifteen limit maximum on interrogatories, requests for production, and requests for admission; and allows for additional disclosures. Although expedited actions are not subject to mandatory additional discovery under amended Rule 190.5, the court may still allow additional discovery if the conditions of Rule 190(a) are met. **190.6 Certain Types of Discovery Excepted** This rule's limitations on discovery do not apply to or include discovery conducted under Rule 202 ("Depositions Before Suit or to Investigate Claims"), or Rule 621a ("Discovery and Enforcement of Judgment"). But Rule 202 cannot be used to circumvent the limitations of this rule. **RULE 191. MODIFYING DISCOVERY PROCEDURES AND LIMITATIONS; CONFERENCE REQUIREMENT; SIGNING DISCLOSURES; DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS; FILING REQUIREMENTS** **191.1 Modification of Procedures** Except where specifically prohibited, the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit by the agreement of the parties or by court order for good cause. An agreement of the parties is enforceable if it complies with Rule 11 or, as it affects an oral deposition, if it is made a part of the record of the deposition.	**(3)** ***Pretrial Disclosures.*** **(A)** *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment: **(i)** the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises; **(ii)** the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and **(iii)** an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises. **(B)** *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another

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

191.3 Signing of Disclosures, Discovery Requests, Notices, Responses, and Objections
(a) **Signature required.** Every disclosure, discovery request, notice, response, and objection must be signed:

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

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

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

party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

(4) ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) ***Limitations on Frequency and Extent.***

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of

request, notice, response, or objection: (1) is consistent with the rules of civil procedure and these discovery rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) has a good faith factual basis; (3) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) is not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. (d) **Effect of failure to sign.** If a request, notice, response, or objection is not signed, it must be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, notice, response, or objection. A party is not required to take any action with respect to a request or notice that is not signed. (e) **Sanctions.** If the certification is false without substantial justification, the court may, upon motion or its own initiative, impose on the person who made the certification, or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under Chapter 10 of the Civil Practice and Remedies Code. **191.4 Filing of Discovery Materials.** (a) **Discovery materials not to be filed.** The following discovery materials must not be filed: (1) discovery requests, deposition notices, and	requests under Rule 36. **(B)** *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery. **(C)** *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: **(i)** the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; **(ii)** the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or **(iii)** the proposed discovery <u>is outside the scope permitted by Rule 26(b)(1).</u> **(3)** ***Trial Preparation: Materials*.**

subpoenas required to be served only on parties; (2) responses and objections to discovery requests and deposition notices, regardless on whom the requests or notices were served; (3) documents and tangible things produced in discovery; and (4) statements prepared in compliance with Rule 193.3(b) or (d). (b) **Discovery materials to be filed.** The following discovery materials must be filed: (1) discovery requests, deposition notices, and subpoenas required to be served on nonparties; (2) motions and responses to motions pertaining to discovery matters; and (3) agreements concerning discovery matters, to the extent necessary to comply with Rule 11. (c) **Exceptions.** Notwithstanding paragraph (a): (1) the court may order discovery materials to be filed; (2) a person may file discovery materials in support of or in opposition to a motion or for other use in a court proceeding; and (3) a person may file discovery materials necessary for a proceeding in an appellate court. (d) **Retention requirement for persons.** Any person required to serve discovery materials not required to be filed must retain the original or exact copy of the materials during the pendency of the case and any related appellate proceedings begun within six months after judgment is signed, unless otherwise provided by the trial court. (e) **Retention requirement for courts.** The clerk of the court shall retain and dispose of deposition transcripts and	**(A)** *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if: **(i)** they are otherwise discoverable under Rule 26(b)(1); and **(ii)** the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. **(B)** *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation. **(C)** *Previous Statement*. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either: **(i)** a written statement that the person has signed or otherwise adopted or

depositions upon written questions as directed by the Supreme Court.

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

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

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

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

192.3 Scope of Discovery.
(a) **Generally.** In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the

approved; or
(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts*.
(A) *Deposition of an Expert Who May Testify*. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.
(B) *Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.
(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses*. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:
(i) relate to compensation for the expert's study or testimony;
(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be

claim or defense of the party seeking discovery or the claim or defense of any other party. It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (b) **Documents and tangible things.** A party may obtain discovery of the existence, description, nature, custody, condition, location, and contents of documents and tangible things (including papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, data, and data compilations) that constitute or contain matters relevant to the subject matter of the action. A person is required to produce a document or tangible thing that is within the person's possession, custody, or control. (c) **Persons with knowledge of relevant facts.** A party may obtain discovery of the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case. [PROPOSED CHANGE: <u>A responding party may not satisfy its obligations to provide the addresses and telephone numbers of persons having knowledge of relevant facts by providing the address and telephone number of counsel.</u>] A person has knowledge of relevant facts when that person has or may have knowledge of any discoverable matter. The person need not have admissible information or personal knowledge of the facts. An expert is "a person with knowledge of relevant facts" only if that knowledge was obtained firsthand or if it was not obtained in preparation for trial or in anticipation of litigation. (d) **Trial witnesses.** A party may obtain discovery of the name, address, and telephone number of any person who is expected to be called to testify at trial. This paragraph does not apply to	expressed; or **(iii)** identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. **(D)** *Expert Employed Only for Trial Preparation*. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only: (i) as provided in Rule 35(b); or (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means. **(E)** *Payment*. Unless manifest injustice would result, the court must require that the party seeking discovery: (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and (ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions. **(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*** **(A)** *Information Withheld.* When a party

rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial. [PROPOSED CHANGE: <u>If requested by interrogatory, and unless the court orders otherwise, at least 45 days before trial a party must provide the name and, if not previously provided, the address, and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises.</u>] (e) **Testifying and consulting experts.** The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable. A party may discover the following information regarding a testifying expert or regarding a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert: (1) the expert's name, address, and telephone number; (2) the subject matter on which a testifying expert will testify; (3) the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was acquired; (4) the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them; (5) any bias of the witness; (6) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony; (7) the expert's current resume and bibliography. (f) **Indemnity and insuring agreements.** Except as otherwise	withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim. **(B)** *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved. **(c) Protective Orders.** **(1)** ***In General.*** A party or any person from whom

provided by law, a party may obtain discovery of the existence and contents of any indemnity or insurance agreement under which any person may be liable to satisfy part or all of a judgment rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the indemnity or insurance agreement is not by reason of disclosure admissible in evidence at trial. (g) **Settlement agreements.** A party may obtain discovery of the existence and contents of any relevant portions of a settlement agreement. Information concerning a settlement agreement is not by reason of disclosure admissible in evidence at trial. (h) **Statements of persons with knowledge of relevant facts.** A party may obtain discovery of the statement of any person with knowledge of relevant facts--a "witness statement"-regardless of when the statement was made. A witness statement is (1) a written statement signed or otherwise adopted or approved in writing by the person making it, or (2) a stenographic, mechanical, electrical, or other type of recording of a witness's oral statement, or any substantially verbatim transcription of such a recording. Notes taken during a conversation or interview with a witness are not a witness statement. Any person may obtain, upon written request, his or her own statement concerning the lawsuit, which is in the possession, custody or control of any party. (i) **Potential parties.** A party may obtain discovery of the name, address, and telephone number of any potential party. (j) **Contentions.** A party may obtain discovery of any other party's legal contentions and the factual bases for those contentions.	discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: **(A)** forbidding the disclosure or discovery; **(B)** specifying terms, including time and place <u>or the allocation of expenses</u>, for the disclosure or discovery; **(C)** prescribing a discovery method other than the one selected by the party seeking discovery; **(D)** forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters; **(E)** designating the persons who may be present while the discovery is conducted; **(F)** requiring that a deposition be sealed and opened only on court order; **(G)** requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and **(H)** requiring that the parties simultaneously file specified documents or information in sealed

192.4 Limitations on Scope of Discovery.
The discovery methods permitted by these rules should be limited by the court if it determines, on motion or on its own initiative and on reasonable notice, that:
(a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or
(b) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

192.5 Work Product.
(a) **Work product defined.** Work product comprises:
(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.
(b) **Protection of work product.**
(1) **Protection of core work product--attorney mental processes**. Core work product - the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories - is

envelopes, to be opened as the court directs.
(2) *Ordering Discovery.* If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.
(3) *Awarding Expenses.* Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.
(1) *Timing.* A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.
(2) *Early Rule 34 Requests.*
(A) *Time to Deliver*. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:
(i) to that party by any other party, and
(ii) by that party to any plaintiff or to any other party that has been served.
(B) *When Considered Served.* The request is considered to have been served at the first Rule 26(f) conference.
(3) *Sequence.* Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:
(A) methods of discovery may be used in any sequence; and
(B) discovery by one party does not require any other party to delay its discovery.

not discoverable. (2) **Protection of other work product**. Any other work product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means. (3) **Incidental disclosure of attorney mental processes**. It is not a violation of subparagraph (1) if disclosure ordered pursuant to subparagraph (2) incidentally discloses by inference attorney mental processes otherwise protected under subparagraph (1). (4) **Limiting disclosure of mental processes.** If a court orders discovery of work product pursuant to subparagraph (2), the court must--insofar as possible--protect against disclosure of the mental impressions, opinions, conclusions, or legal theories not otherwise discoverable. (c) **Exceptions.** Even if made or prepared in anticipation of litigation or for trial, the following is not work product protected from discovery: (1) information discoverable under Rule 192.3 concerning experts, trial witnesses, witness statements, and contentions; (2) trial exhibits ordered disclosed under Rule 166 or Rule 190.4; (3) the name, address, and telephone number of any potential party or any person with knowledge of relevant facts; (4) any photograph or electronic image of underlying	**(e) Supplementing Disclosures and Responses.** **(1) *In General.*** A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response: **(A)** in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or **(B)** as ordered by the court. **(2) *Expert Witness.*** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due. **(f) Conference of the Parties; Planning for Discovery.** **(1) *Conference Timing.*** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b). **(2) *Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities

facts (e.g., a photograph of the accident scene) or a photograph or electronic image of any sort that a party intends to offer into evidence; and (5) any work product created under circumstances within an exception to the attorney-client privilege in Rule 503(d) of the Rules of Evidence. (d) **Privilege.** For purposes of these rules, an assertion that material or information is work product is an assertion of privilege. **192.6 Protective Order.** (a) **Motion.** A person from whom discovery is sought, and any other person affected by the discovery request, may move within the time permitted for response to the discovery request for an order protecting that person from the discovery sought. A person should not move for protection when an objection to written discovery or an assertion of privilege is appropriate, but a motion does not waive the objection or assertion of privilege. If a person seeks protection regarding the time or place of discovery, the person must state a reasonable time and place for discovery with which the person will comply. A person must comply with a request to the extent protection is not sought unless it is unreasonable under the circumstances to do so before obtaining a ruling on the motion. (b) **Order.** To protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may - among other things - order that: (1) the requested discovery not be sought in whole or in part;	for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person. **(3)** ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on: **(A)** what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made; **(B)** the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues; **(C)** any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced; **(D)** any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to

(2) the extent or subject matter of discovery be limited; (3) the discovery not be undertaken at the time or place specified; (4) the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court; (5) the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a. **192.7 Definitions.** As used in these rules (a) *Written discovery* means requests for disclosure, requests for production and inspection of documents and tangible things, requests for entry onto property, interrogatories, and requests for admission. (b) *Possession, custody, or control* of an item means that the person either has physical possession of the item or has a right to possession of the item that is equal or superior to the person who has physical possession of the item. (c) A *testifying expert* is an expert who may be called to testify as an expert witness at trial. (d) A *consulting expert* is an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert. **RULE 193. WRITTEN DISCOVERY: RESPONSE; OBJECTION; ASSERTION OF PRIVILEGE; SUPPLEMENTATION AND AMENDMENT; FAILURE TO TIMELY RESPOND; PRESUMPTION OF AUTHENTICITY**	ask the court to include their agreement in an order under Federal Rule of Evidence 502; **(E)** what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and **(F)** any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c). **(4) *Expedited Schedule.*** If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule: **(A)** require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and **(B)** require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference. **(g) Signing Disclosures and Discovery Requests, Responses, and Objections.** **(1) *Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an

193.1 Responding to Written Discovery; Duty to Make Complete Response.

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

193.2 Objecting to Written Discovery

(a) **Form and time for objections.** A party must make any objection to written discovery in writing - either in the response or in a separate document - within the time for response. The party must state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request.

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

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

(d) **Amendment.** An objection or response to written discovery may be amended or supplemented to state an objection or

attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

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

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) ***Failure to Sign.*** Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) ***Sanction for Improper Certification****.* If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose

basis that, at the time the objection or response initially was made, either was inapplicable or was unknown after reasonable inquiry. (e) **Waiver of objection.** An objection that is not made within the time required, or that is obscured by numerous unfounded objections, is waived unless the court excuses the waiver for good cause shown. (f) **No objection to preserve privilege.** A party should not object to a request for written discovery on the grounds that it calls for production of material or information that is privileged but should instead comply with Rule 193.3. A party who objects to production of privileged material or information does not waive the privilege but must comply with Rule 193.3 when the error is pointed out. **193.3 Asserting a Privilege** A party may preserve a privilege from written discovery in accordance with this subdivision. (a) **Withholding privileged material or information.** A party who claims that material or information responsive to written discovery is privileged may withhold the privileged material or information from the response. The party must state--in the response (or an amended or supplemental response) or in a separate document--that: (1) information or material responsive to the request has been withheld, (2) the request to which the information or material relates, and (3) the privilege or privileges asserted. (b) **Description of withheld material or information.** After receiving a response indicating that material or information has	behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

been withheld from production, the party seeking discovery may serve a written request that the withholding party identify the information and material withheld. Within 15 days of service of that request, the withholding party must serve a response that: (1) describes the information or materials withheld that, without revealing the privileged information itself or otherwise waiving the privilege, enables other parties to assess the applicability of the privilege, and (2) asserts a specific privilege for each item or group of items withheld. (c) **Exemption.** Without complying with paragraphs (a) and (b), a party may withhold a privileged communication to or from a lawyer or lawyer's representative or a privileged document of a lawyer or lawyer's representative (1) created or made from the point at which a party consults a lawyer with a view to obtaining professional legal services from the lawyer in the prosecution or defense of a specific claim in the litigation in which discovery is requested, and (2) concerning the litigation in which the discovery is requested. (d) **Privilege not waived by production**. A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if - within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made - the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party	

must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege. **193.4 Hearing and Ruling on Objections and Assertions of Privilege.** (a) **Hearing.** Any party may at any reasonable time request a hearing on an objection or claim of privilege asserted under this rule. The party making the objection or asserting the privilege must present any evidence necessary to support the objection or privilege. The evidence may be testimony presented at the hearing or affidavits served at least seven days before the hearing or at such other reasonable time as the court permits. If the court determines that an *in camera* review of some or all of the requested discovery is necessary, that material or information must be segregated and produced to the court in a sealed wrapper within a reasonable time following the hearing. (b) **Ruling.** To the extent the court sustains the objection or claim of privilege, the responding party has no further duty to respond to that request. To the extent the court overrules the objection or claim of privilege, the responding party must produce the requested material or information within 30 days after the court's ruling or at such time as the court orders. A party need not request a ruling on that party's own objection or assertion of privilege to preserve the objection or privilege. (c) **Use of material or information withheld under claim of privilege.** A party may not use--at any hearing or trial--material or information withheld from discovery under a claim of privilege, including a claim sustained by the court, without timely amending or supplementing the party's response to that discovery.	

193.5 Amending or Supplementing Responses to Written Discovery. (a) **Duty to amend or supplement.** If a party learns that the party's response to written discovery was incomplete or incorrect when made, or, although complete and correct when made, is no longer complete and correct, the party must amend or supplement the response: (1) to the extent that the written discovery sought the identification of persons with knowledge of relevant facts, trial witnesses, or expert witnesses, and (2) to the extent that the written discovery sought other information, unless the additional or corrective information has been made known to the other parties in writing, on the record at a deposition, or through other discovery responses. (b) **Time and form of amended or supplemental response**. An amended or supplemental response must be made reasonably promptly after the party discovers the necessity for such a response. Except as otherwise provided by these rules, it is presumed that an amended or supplemental response made less than 30 days before trial was not made reasonably promptly. An amended or supplemental response must be in the same form as the initial response and must be verified by the party if the original response was required to be verified by the party, but the failure to comply with this requirement does not make the amended or supplemental response untimely unless the party making the response refuses to correct the defect within a reasonable time after it is pointed out. **193.6 Failing to Timely Respond - Effect on Trial**	

(a) **Exclusion of evidence and exceptions.** A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that: (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties. (b) **Burden of establishing exception.** The burden of establishing good cause or the lack of unfair surprise or unfair prejudice is on the party seeking to introduce the evidence or call the witness. A finding of good cause or of the lack of unfair surprise or unfair prejudice must be supported by the record. (c) **Continuance.** Even if the party seeking to introduce the evidence or call the witness fails to carry the burden under paragraph (b), the court may grant a continuance or temporarily postpone the trial to allow a response to be made, amended, or supplemented, and to allow opposing parties to conduct discovery regarding any new information presented by that response. **193.7 Production of Documents Self-Authenticating** A party's production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial unless - within ten days or a longer or shorter time ordered by the court, after the producing party has actual notice that the document will be used - the party objects to the authenticity of the document, or any part	

of it, stating the specific basis for objection. An objection must be either on the record or in writing and must have a good faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity. **RULE 194. REQUESTS FOR DISCLOSURE** **194.1 Request.** A party may obtain disclosure from another party of the information or material listed in Rule 194.2 by serving the other party - no later than 30 days before the end of any applicable discovery period - the following request: "Pursuant to Rule 194, you are requested to disclose, within 30 days of service of this request, the information or material described in Rule [state rule, e.g., 194.2, or 194.2(a), (c), and (f), or 194.2(d)-(g)]." **194.2 Content.** A party may request disclosure of any or all of the following: (a) the correct names of the parties to the lawsuit; (b) the name, address, and telephone number of any potential parties; (c) the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial); (d) the amount and any method of calculating economic damages; (e) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each	

identified person's connection with the case; (f) for any testifying expert: (1) the expert's name, address, and telephone number; (2) the subject matter on which the expert will testify; (3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information; (4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party: (A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and (B) the expert's current resume and bibliography; (g) any indemnity and insuring agreements described in Rule 192.3(f); (h) any settlement agreements described in Rule 192.3(g); (i) any witness statements described in Rule 192.3(h); (j) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills; (k) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of	

an authorization furnished by the requesting party; (l) the name, address, and telephone number of any person who may be designated as a responsible third party. **194.3 Response.** The responding party must serve a written response on the requesting party within 30 days after service of the request, except that: (a) a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request, and (b) a response to a request under Rule 194.2(f) is governed by Rule 195. **194.4 Production.** Copies of documents and other tangible items ordinarily must be served with the response. But if the responsive documents are voluminous, the response must state a reasonable time and place for the production of documents. The responding party must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them. **194.5 No Objection or Assertion of Work Product.** No objection or assertion of work product is permitted to a request under this rule. **194.6 Certain Responses Not Admissible.** A response to requests under Rule 194.2(c) and (d) that has been changed by an amended or supplemental response is not	

admissible and may not be used for impeachment.

RULE 205. DISCOVERY FROM NON-PARTIES

205.1 Forms of Discovery; Subpoena Requirement.
A party may compel discovery from a nonparty--that is, a person who is not a party or subject to a party's control--only by obtaining a court order under Rules 196.7, 202, or 204, or by serving a subpoena compelling:
(a) an oral deposition;
(b) a deposition on written questions;
(c) a request for production of documents or tangible things, pursuant to Rule 199.2(b)(5) or Rule 200.1(b), served with a notice of deposition on oral examination or written questions; and
(d) a request for production of documents and tangible things under this rule.

205.2 Notice.
A party seeking discovery by subpoena from a nonparty must serve, on the nonparty and all parties, a copy of the form of notice required under the rules governing the applicable form of discovery. A notice of oral or written deposition must be served before or at the same time that a subpoena compelling attendance or production under the notice is served. A notice to produce documents or tangible things under Rule 205.3 must be served at least 10 days before the subpoena compelling production is served.

205.3 Production of Documents and Tangible Things Without Deposition.

(a) **Notice; subpoena.** A party may compel production of documents and tangible things from a nonparty by serving - reasonable time before the response is due but no later than 30 days before the end of any applicable discovery period - the notice required in Rule 205.2 and a subpoena compelling production or inspection of documents or tangible things. (b) **Contents of notice.** The notice must state: (1) the name of the person from whom production or inspection is sought to be compelled; (2) a reasonable time and place for the production or inspection; and (3) the items to be produced or inspected, either by individual item or by category, describing each item and category with reasonable particularity, and, if applicable, describing the desired testing and sampling with sufficient specificity to inform the nonparty of the means, manner, and procedure for testing or sampling. (c) **Requests for production of medical or mental health records of other non-parties.** If a party requests a nonparty to produce medical or mental health records of another nonparty, the requesting party must serve the nonparty whose records are sought with the notice required under this rule. This requirement does not apply under the circumstances set forth in Rule 196.1(c)(2). (d) **Response.** The nonparty must respond to the notice and subpoena in accordance with Rule 176.6. (e) **Custody, inspection and copying.** The party obtaining the production must make all materials produced available for inspection by any other party on reasonable notice, and must furnish copies to any party who requests at that party's expense.	

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

II. Experts

Tex. R. Civ. P. 195	Fed. R. Civ. P. 26(a)(2), (b)(4), (e)
RULE 195. DISCOVERY REGARDING TESTIFYING EXPERT WITNESSES **195.1 Permissible Discovery Tools.** A party may request another party to designate and disclose information concerning testifying expert witnesses only through a request for disclosure under Rule 194 and through depositions and reports as permitted by this rule. **195.2 Schedule for Designating Experts.** Unless otherwise ordered by the court, a party must designate experts - that is, furnish information requested under Rule 194.2(f) - by the later of the following two dates: 30 days after the request is served, or (a) with regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery period; (b) with regard to all other experts, 60 days before the end of the discovery period. **195.3 Scheduling Depositions.** (a) **Experts for party seeking affirmative relief.** A party seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition as follows: (1) **If no report furnished.** If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is not produced	**RULE 26. DUTY TO DISCLOSE; GENERAL PROVISIONS GOVERNING DISCOVERY** **(a) Required Disclosures.** **(2) *Disclosure of Expert Testimony*.** **(A)** *In General*. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. **(B)** *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain: **(i)** a complete statement of all opinions the witness will express and the basis and reasons for them; **(ii)** the facts or data considered by the witness in forming them; **(iii)** any exhibits that will be used to summarize or support them; **(iv)** the witness's qualifications, including a list of all publications authored in the previous 10 years;

when the expert is designated, then the party must make the expert available for deposition reasonably promptly after the expert is designated. If the deposition cannot--due to the actions of the tendering party--reasonably be concluded more than 15 days before the deadline for designating other experts, that deadline must be extended for other experts testifying on the same subject. (2) **If report furnished.** If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is produced when the expert is designated, then the party need not make the expert available for deposition until reasonably promptly after all other experts have been designated. (b) **Other experts.** A party not seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition reasonably promptly after the expert is designated and the experts testifying on the same subject for the party seeking affirmative relief have been deposed. **195.4 Oral Deposition.** In addition to disclosure under Rule 194, a party may obtain discovery concerning the subject matter on which the expert is expected to testify, the expert's mental impressions and opinions, the facts known to the expert (regardless of when the factual information was acquired) that relate to or form the basis of the testifying expert's mental impressions and opinions, and other discoverable matters, including documents not produced in disclosure, only by oral deposition of the expert and by a report prepared by the expert under this rule.	**(v)** a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and **(vi)** a statement of the compensation to be paid for the study and testimony in the case. **(C)** *Witnesses Who Do Not Provide a Written Report*. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state: **(i)** the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and **(ii)** a summary of the facts and opinions to which the witness is expected to testify. **(D)** *Time to Disclose Expert Testimony*. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made: **(i)** at least 90 days before the date set for trial or for the case to be ready for trial; or **(ii)** if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

195.5 Court-Ordered Reports. If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert have not been recorded and reduced to tangible form, the court may order these matters reduced to tangible form and produced in addition to the deposition. **195.6 Amendment and Supplementation.** A party's duty to amend and supplement written discovery regarding a testifying expert is governed by Rule 193.5. If an expert witness is retained by, employed by, or otherwise under the control of a party, that party must also amend or supplement any deposition testimony or written report by the expert, but only with regard to the expert's mental impressions or opinions and the basis for them. **195.7 Cost of Expert Witnesses.** When a party takes the oral deposition of an expert witness retained by the opposing party, all reasonable fees charged by the expert for time spent in preparing for, giving, reviewing, and correcting the deposition must be paid by the party that retained the expert.	**(E)** *Supplementing the Disclosure*. The parties must supplement these disclosures when required under Rule 26(e). **. . .** **(b) Discovery Scope and Limits.** **. . .** **(4)** ***Trial Preparation: Experts*****.** **(A)** *Deposition of an Expert Who May Testify*. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided. **(B)** *Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded. **(C)** *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses*. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications: **(i)** relate to compensation for the expert's study or testimony; **(ii)** identify facts or data that the party's attorney provided and that the expert

	considered in forming the opinions to be expressed; or **(iii)** identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. **(D)** *Expert Employed Only for Trial Preparation*. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only: (i) as provided in Rule 35(b); or (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means. **(E)** *Payment*. Unless manifest injustice would result, the court must require that the party seeking discovery: (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and (ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions. . . . **(e) Supplementing Disclosures and Responses.**

	(1) ***In General.*** A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response: **(A)** in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or **(B)** as ordered by the court. **(2)** ***Expert Witness****.* For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

III. Pre-Suit Depositions and Depositions Pending Appeal

Tex. R. Civ. P. 202	Fed. R. Civ. P. 27
RULE 202. DEPOSITIONS BEFORE SUIT OR TO INVESTIGATE CLAIMS **202.1 Generally.** A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either: (a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or (b) to investigate a potential claim or suit. **202.2 Petition** The petition must: (a) be verified; (b) be filed in a proper court of any county: (1) where venue of the anticipated suit may lie, if suit is anticipated; or (2) where the witness resides, if no suit is yet anticipated; (c) be in the name of the petitioner; (d) state either: (1) that the petitioner anticipates the institution of a suit in which the petitioner may be a party; or (2) that the petitioner seeks to investigate a potential claim by or against petitioner; (e) state the subject matter of the anticipated action, if any, and the petitioner's interest therein; (f) if suit is anticipated, either:	**RULE 27. DEPOSITIONS TO PERPETUATE TESTIMONY** **(a) Before an Action Is Filed.** **(1) *Petition.*** A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show: **(A)** that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought; **(B)** the subject matter of the expected action and the petitioner's interest; **(C)** the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it; **(D)** the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and **(E)** the name, address, and expected substance of the testimony of each deponent. **(2) *Notice and Service.*** At least 21 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice

(1) state the names of the persons petitioner expects to have interests adverse to petitioner's in the anticipated suit, and the addresses and telephone numbers for such persons; or (2) state that the names, addresses, and telephone numbers of persons petitioner expects to have interests adverse to petitioner's in the anticipated suit cannot be ascertained through diligent inquiry, and describe those persons; (g) state the names, addresses and telephone numbers of the persons to be deposed, the substance of the testimony that the petitioner expects to elicit from each, and the petitioner's reasons for desiring to obtain the testimony of each; and (h) request an order authorizing the petitioner to take the depositions of the persons named in the petition. **202.3 Notice and Service.** (a) **Personal service on witnesses and persons named.** At least 15 days before the date of the hearing on the petition, the petitioner must serve the petition and a notice of the hearing – in accordance with Rule 21a - on all persons petitioner seeks to depose and, if suit is anticipated, on all persons petitioner expects to have interests adverse to petitioner's in the anticipated suit. (b) **Service by publication on persons not named.** (1) **Manner.** Unnamed persons described in the petition whom the petitioner expects to have interests adverse to petitioner's in the anticipated suit, if any, may be served by publication with the petition and notice of the hearing. The notice must state the place for the hearing and the time it will be held, which must be more than 14	may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies. **(3) *Order and Examination.*** If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken under these rules, and the court may issue orders like those authorized by Rules 34 and 35. A reference in these rules to the court where an action is pending means, for purposes of this rule, the court where the petition for the deposition was filed. **(4) *Using the Deposition.*** A deposition to perpetuate testimony may be used under Rule 32(a) in any later-filed district-court action involving the same subject matter if the deposition either was taken under these rules or, although not so taken, would be admissible in evidence in the courts of the state where it was taken. **(b) Pending Appeal.** **(1) *In General.*** The court where a judgment has been

days after the first publication of the notice. The petition and notice must be published once each week for two consecutive weeks in the newspaper of broadest circulation in the county in which the petition is filed, or if no such newspaper exists, in the newspaper of broadest circulation in the nearest county where a newspaper is published. (2) **Objection to depositions taken on notice by publication.** Any interested party may move, in the proceeding or by bill of review, to suppress any deposition, in whole or in part, taken on notice by publication, and may also attack or oppose the deposition by any other means available. (c) **Service in probate cases.** A petition to take a deposition in anticipation of an application for probate of a will, and notice of the hearing on the petition, may be served by posting as prescribed by Section 33(f)(2) of the Probate Code. The notice and petition must be directed to all parties interested in the testator's estate and must comply with the requirements of Section 33(c) of the Probate Code insofar as they may be applicable. (d) **Modification by order.** As justice or necessity may require, the court may shorten or lengthen the notice periods under this rule and may extend the notice period to permit service on any expected adverse party. **202.4 Order.** (a) **Required findings.** The court must order a deposition to be taken if, but only if, it finds that: (1) allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an	rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court. **(2) *Motion.*** The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court. The motion must show: **(A)** the name, address, and expected substance of the testimony of each deponent; and **(B)** the reasons for perpetuating the testimony. **(3) *Court Order.*** If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in a pending district-court action. **(c) Perpetuation by an Action.** This rule does not limit a court's power to entertain an action to perpetuate testimony.

anticipated suit; or (2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure. (b) **Contents.** The order must state whether a deposition will be taken on oral examination or written questions. The order may also state the time and place at which a deposition will be taken. If the order does not state the time and place at which a deposition will be taken, the petitioner must notice the deposition as required by Rules 199 or 200. The order must contain any protections the court finds necessary or appropriate to protect the witness or any person who may be affected by the procedure. **202.5 Manner of Taking and Use.** Except as otherwise provided in this rule, depositions authorized by this rule are governed by the rules applicable to depositions of non-parties in a pending suit. The scope of discovery in depositions authorized by this rule is the same as if the anticipated suit or potential claim had been filed. A court may restrict or prohibit the use of a deposition taken under this rule in a subsequent suit to protect a person who was not served with notice of the deposition from any unfair prejudice or to prevent abuse of this rule.	

IV. Depositions

Tex. R. Civ. P. 199-201, 203	Fed. R. Civ. P. 28, 30-32
RULE 199. DEPOSITIONS UPON ORAL EXAMINATION **199.1 Oral Examination; Alternative Methods of Conducting or Recording.** (a) **Generally.** A party may take the testimony of any person or entity by deposition on oral examination before any officer authorized by law to take depositions. The testimony, objections, and any other statements during the deposition must be recorded at the time they are given or made. (b) **Depositions by telephone or other remote electronic means.** A party may take an oral deposition by telephone or other remote electronic means if the party gives reasonable prior written notice of intent to do so. For the purposes of these rules, an oral deposition taken by telephone or other remote electronic means is considered as having been taken in the district and at the place where the witness is located when answering the questions. The officer taking the deposition may be located with the party noticing the deposition instead of with the witness if the witness is placed under oath by a person who is present with the witness and authorized to administer oaths in that jurisdiction. (c) **Non-stenographic recording.** Any party may cause a deposition upon oral examination to be recorded by other than stenographic means, including videotape recording. The party requesting the non-stenographic recording will be responsible for obtaining a person authorized by law to administer the oath and for assuring that the recording will be intelligible, accurate,	**RULE 28. PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN** **(a) Within the United States.** **(1)** ***In General.*** Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before: **(A)** an officer authorized to administer oaths either by federal law or by the law in the place of examination; or **(B)** a person appointed by the court where the action is pending to administer oaths and take testimony. **(2)** ***Definition of "Officer".*** The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a). **(b) In a Foreign Country.** **(1)** ***In General.*** A deposition may be taken in a foreign country: **(A)** under an applicable treaty or convention; **(B)** under a letter of request, whether or not captioned a "letter rogatory"; **(C)** on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or **(D)** before a person commissioned by the court to administer any necessary oath and take

and trustworthy. At least five days prior to the deposition, the party must serve on the witness and all parties a notice, either in the notice of deposition or separately, that the deposition will be recorded by other than stenographic means. This notice must state the method of non-stenographic recording to be used and whether the deposition will also be recorded stenographically. Any other party may then serve written notice designating another method of recording in addition to the method specified, at the expense of such other party unless the court orders otherwise.

199.2 Procedure for Noticing Oral Depositions.

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

(b) **Content of notice.**

(1) **Identity of witness; organizations.** The notice must state the name of the witness, which may be either an individual or a public or private corporation, partnership, association, governmental agency, or other organization. If an organization is named as the witness, the notice must describe with reasonable particularity the matters on which examination is requested. In response, the organization named in the notice must - a reasonable time before the deposition - designate one or more individuals to testify on its behalf and set forth, for each individual designated, the matters on which the individual will testify. Each individual designated must testify as to matters that are known or reasonably testimony.

(2) ***Issuing a Letter of Request or a Commission.*** A letter of request, a commission, or both may be issued:

(A) on appropriate terms after an application and notice of it; and

(B) without a showing that taking the deposition in another manner is impracticable or inconvenient.

(3) ***Form of a Request, Notice, or Commission.*** When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken.

(4) ***Letter of Request—Admitting Evidence.*** Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States.

(c) Disqualification. A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action.

RULE 30. DEPOSITIONS BY ORAL EXAMINATION

(a) When a Deposition May Be Taken.

(1) ***Without Leave.*** A party may, by oral questions, depose any person, including a party, without leave of

available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized by these rules. (2) **Time and place.** The notice must state a reasonable time and place for the oral deposition. The place may be in: (A) the county of the witness's residence; (B) the county where the witness is employed or regularly transacts business in person; (C) the county of suit, if the witness is a party or a person designated by a party under Rule 199.2(b)(1); (D) the county where the witness was served with the subpoena, or within 150 miles of the place of service, if the witness is not a resident of Texas or is a transient person; or (E) subject to the foregoing, at any other convenient place directed by the court in which the cause is pending. (3) **Alternative means of conducting and recording.** The notice must state whether the deposition is to be taken by telephone or other remote electronic means and identify the means. If the deposition is to be recorded by nonstenographic means, the notice may include the notice required by Rule 199.1(c). (4) **Additional attendees.** The notice may include the notice concerning additional attendees required by Rule 199.5(a)(3). (5) **Request for production of documents.** A notice may include a request that the witness produce at the deposition documents or tangible things within the	court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45. **(2)** ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2): **(A)** if the parties have not stipulated to the deposition and: **(i)** the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants; **(ii)** the deponent has already been deposed in the case; or **(iii)** the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or **(B)** if the deponent is confined in prison. **(b) Notice of the Deposition; Other Formal Requirements.** **(1)** ***Notice in General.*** A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to

scope of discovery and within the witness's possession, custody, or control. If the witness is a nonparty, the request must comply with Rule 205 and the designation of materials required to be identified in the subpoena must be attached to, or included in, the notice. The nonparty's response to the request is governed by Rules 176 and 205. When the witness is a party or subject to the control of a party, document requests under this subdivision are governed by Rules 193 and 196.

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

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

199.5 Examination, Objection, and Conduct During Oral Depositions.
(a) **Attendance.**
(1) **Witness.** The witness must remain in attendance from day to day until the deposition is begun and which the person belongs.
(2) ***Producing Documents.*** If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.
(3) ***Method of Recording.***
(A) *Method Stated in the Notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.
(B) *Additional Method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.
(4) ***By Remote Means.*** The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.
(5) ***Officer's Duties.***

completed. (2) **Attendance by party.** A party may attend an oral deposition in person, even if the deposition is taken by telephone or other remote electronic means. If a deposition is taken by telephone or other remote electronic means, the party noticing the deposition must make arrangements for all persons to attend by the same means. If the party noticing the deposition appears in person, any other party may appear by telephone or other remote electronic means if that party makes the necessary arrangements with the deposition officer and the party noticing the deposition. (3) **Other attendees.** If any party intends to have in attendance any persons other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the oral deposition, that party must give reasonable notice to all parties, either in the notice of deposition or separately, of the identity of the other persons. (b) **Oath; examination.** Every person whose deposition is taken by oral examination must first be placed under oath. The parties may examine and cross-examine the witness. Any party, in lieu of participating in the examination, may serve written questions in a sealed envelope on the party noticing the oral deposition, who must deliver them to the deposition officer, who must open the envelope and propound them to the witness. (c) **Time limitation.** No side may examine or cross-examine an individual witness for more than six hours. Breaks during depositions do not count against this limitation. (d) **Conduct during the oral deposition; conferences.** The oral	**(A)** *Before the Deposition.* Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes: **(i)** the officer's name and business address; **(ii)** the date, time, and place of the deposition; **(iii)** the deponent's name; **(iv)** the officer's administration of the oath or affirmation to the deponent; and **(v)** the identity of all persons present. **(B)** *Conducting the Deposition; Avoiding Distortion.* If the deposition is recorded non-stenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques. **(C)** *After the Deposition.* At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters. **(6)** ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership,

deposition must be conducted in the same manner as if the testimony were being obtained in court during trial. Counsel should cooperate with and be courteous to each other and to the witness. The witness should not be evasive and should not unduly delay the examination. Private conferences between the witness and the witness's attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during agreed recesses and adjournments. If the lawyers and witnesses do not comply with this rule, the court may allow in evidence at trial statements, objections, discussions, and other occurrences during the oral deposition that reflect upon the credibility of the witness or the testimony. (e) **Objections.** Objections to questions during the oral deposition are limited to "Objection, leading" and "Objection, form." Objections to testimony during the oral deposition are limited to "Objection, non-responsive." These objections are waived if not stated as phrased during the oral deposition. All other objections need not be made or recorded during the oral deposition to be later raised with the court. The objecting party must give a clear and concise explanation of an objection if requested by the party taking the oral deposition, or the objection is waived. Argumentative or suggestive objections or explanations waive objection and may be grounds for terminating the oral deposition or assessing costs or other sanctions. The officer taking the oral deposition will not rule on objections but must record them for ruling by the court. The officer taking the oral deposition must not fail to record testimony because an objection has been made. (f) **Instructions not to answer.** An attorney may instruct a	an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules. **(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.** **(1) *Examination and Cross-Examination.*** The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer. **(2) *Objections.*** An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated

witness not to answer a question during an oral deposition only if necessary to preserve a privilege, comply with a court order or these rules, protect a witness from an abusive question or one for which any answer would be misleading, or secure a ruling pursuant to paragraph (g). The attorney instructing the witness not to answer must give a concise, non-argumentative, non-suggestive explanation of the grounds for the instruction if requested by the party who asked the question. (g) **Suspending the deposition.** If the time limitations for the deposition have expired or the deposition is being conducted or defended in violation of these rules, a party or witness may suspend the oral deposition for the time necessary to obtain a ruling. (h) **Good faith required.** An attorney must not ask a question at an oral deposition solely to harass or mislead the witness, for any other improper purpose, or without a good faith legal basis at the time. An attorney must not object to a question at an oral deposition, instruct the witness not to answer a question, or suspend the deposition unless there is a good faith factual and legal basis for doing so at the time. **199.6 Hearing on Objections.** Any party may, at any reasonable time, request a hearing on an objection or privilege asserted by an instruction not to answer or suspension of the deposition; provided the failure of a party to obtain a ruling prior to trial does not waive any objection or privilege. The party seeking to avoid discovery must present any evidence necessary to support the objection or privilege either by testimony at the hearing or by affidavits served on opposing parties at least seven days before the hearing. If the court determines that an *in camera* review of some or all of the	concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3). **(3) *Participating Through Written Questions.*** Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim. **(d) Duration; Sanction; Motion to Terminate or Limit.** **(1) *Duration.*** Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination. **(2) *Sanction.*** The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent. **(3) *Motion to Terminate or Limit.*** **(A)** *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is

requested discovery is necessary to rule, answers to the deposition questions may be made in camera, to be transcribed and sealed in the event the privilege is sustained, or made in an affidavit produced to the court in a sealed wrapper.

RULE 200. DEPOSITIONS UPON WRITTEN QUESTIONS

200.1 Procedure for Noticing Deposition Upon Written Questions.

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

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

200.2 Compelling Witness to Attend.

A party may compel the witness to attend the deposition on written questions by serving the witness with a subpoena under

being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) *Order.* The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) *Award of Expenses.* Rule 37(a)(5) applies to the award of expenses.

(e) Review by the Witness; Changes.

(1) ***Review; Statement of Changes.*** On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) ***Changes Indicated in the Officer's Certificate.*** The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.

(1) ***Certification and Delivery.*** The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony.

Rule 176. If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the deposition notice upon the party's attorney has the same effect as a subpoena served on the witness. **200.3 Questions and Objections.** (a) **Direct questions.** The direct questions to be propounded to the witness must be attached to the notice. (b) **Objections and additional questions.** Within ten days after the notice and direct questions are served, any party may object to the direct questions and serve cross-questions on all other parties. Within five days after cross-questions are served, any party may object to the cross-questions and serve redirect questions on all other parties. Within three days after redirect questions are served, any party may object to the redirect questions and serve re-cross questions on all other parties. Objections to re-cross questions must be served within five days after the earlier of when re-cross questions are served or the time of the deposition on written questions. (c) **Objections to form of questions.** Objections to the form of a question are waived unless asserted in accordance with this subdivision. **200.4 Conducting the Deposition Upon Written Questions.** The deposition officer must: take the deposition on written questions at the time and place designated; record the testimony of the witness under oath in response to the questions; and prepare, certify, and deliver the deposition transcript in accordance with Rule 203. The deposition officer has authority when necessary to summon and swear an interpreter to facilitate the taking of the deposition.	The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration. **(2) *Documents and Tangible Things.*** **(A)** *Originals and Copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may: **(i)** offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or **(ii)** give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition. **(B)** *Order Regarding the Originals.* Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

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

201.1 Depositions in Foreign Jurisdictions for Use in Texas Proceedings.

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

(1) notice;

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

(3) agreement of the parties; or

(4) court order.

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

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

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

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

(3) *Copies of the Transcript or Recording.* Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) *Notice of Filing.* A party who files the deposition must promptly notify all other parties of the filing.

(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses. A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

RULE 31. DEPOSITIONS BY WRITTEN QUESTIONS

(a) When a Deposition May Be Taken.

(1) *Without Leave.* A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more

questions; and (3) request and authorize that authority to cause the witness's testimony to be reduced to writing and returned, together with any items marked as exhibits, to the party requesting the letter rogatory. (d) **By letter of request or other such device.** On motion by a party, the court in which an action is pending, or the clerk of that court, must issue a letter of request or other such device in accordance with an applicable treaty or international convention on terms that are just and appropriate. The letter or other device must be issued regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter or other device must: (1) be in the form prescribed by the treaty or convention under which it is issued, as presented by the movant to the court or clerk; and (2) must state the time, place, and manner of the examination of the witness. (e) **Objections to form of letter rogatory, letter of request, or other such device.** In issuing a letter rogatory, letter of request, or other such device, the court must set a time for objecting to the form of the device. A party must make any objection to the form of the device in writing and serve it on all other parties by the time set by the court, or the objection is waived. (f) **Admissibility of evidence.** Evidence obtained in response to a letter rogatory, letter of request, or other such device is not inadmissible merely because it is not a verbatim transcript, or the testimony was not taken under oath, or for any similar departure from the requirements for depositions taken within this State under these rules. (g) **Deposition by electronic means.** A deposition in another	than 10 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants; **(ii)** the deponent has already been deposed in the case; or **(iii)** the party seeks to take a deposition before the time specified in Rule 26(d); or **(B)** if the deponent is confined in prison. **(3)** ***Service; Required Notice.*** A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken. **(4)** ***Questions Directed to an Organization.*** A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6). **(5)** ***Questions from Other Parties.*** Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times. **(b) Delivery to the Officer; Officer's Duties.** The party who

jurisdiction may be taken by telephone, video conference, teleconference, or other electronic means under the provisions of Rule 199. **201.2 Depositions in Texas for Use in Proceedings in Foreign Jurisdictions.** If a court of record of any other state or foreign jurisdiction issues a mandate, writ, or commission that requires a witness's oral or written deposition testimony in this State, the witness may be compelled to appear and testify in the same manner and by the same process used for taking testimony in a proceeding pending in this State. **RULE 203. SIGNING, CERTIFICATION AND USE OF ORAL AND WRITTEN DEPOSITIONS** **203.1 Signature and Changes.** (a) **Deposition transcript to be provided to witness.** The deposition officer must provide the original deposition transcript to the witness for examination and signature. If the witness is represented by an attorney at the deposition, the deposition officer must provide the transcript to the attorney instead of the witness. (b) **Changes by witness; signature.** The witness may change responses as reflected in the deposition transcript by indicating the desired changes, in writing, on a separate sheet of paper, together with a statement of the reasons for making the changes. No erasures or obliterations of any kind may be made to the original deposition transcript. The witness must then sign the transcript under oath and return it to the deposition officer. If the witness does not return the transcript to the deposition	noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in Rule 30(c), (e), and (f) to: **(1)** take the deponent's testimony in response to the questions; **(2)** prepare and certify the deposition; and **(3)** send it to the party, attaching a copy of the questions and of the notice. **(c) Notice of Completion or Filing.** **(1)** ***Completion.*** The party who noticed the deposition must notify all other parties when it is completed. **(2)** ***Filing.*** A party who files the deposition must promptly notify all other parties of the filing. **RULE 32. USING DEPOSITIONS IN COURT PROCEEDINGS** **(a) Using Depositions.** **(1)** ***In General.*** At a hearing or trial, all or part of a deposition may be used against a party on these conditions: **(A)** the party was present or represented at the taking of the deposition or had reasonable notice of it; **(B)** it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and **(C)** the use is allowed by Rule 32(a)(2) through (8). **(2)** ***Impeachment and Other Uses.*** Any party may use a deposition to contradict or impeach the testimony given

officer within 20 days of the date the transcript was provided to the witness or the witness's attorney, the witness may be deemed to have waived the right to make the changes.
(c) **Exceptions.** The requirements of presentation and signature under this subdivision do not apply:
(1) if the witness and all parties waive the signature requirement;
(2) to depositions on written questions; or
(3) to non-stenographic recordings of oral depositions.

203.2 Certification.
The deposition officer must file with the court, serve on all parties, and attach as part of the deposition transcript or non-stenographic recording of an oral deposition a certificate duly sworn by the officer stating:
(a) that the witness was duly sworn by the officer and that the transcript or non-stenographic recording of the oral deposition is a true record of the testimony given by the witness;
(b) that the deposition transcript, if any, was submitted to the witness or to the attorney for the witness for examination and signature, the date on which the transcript was submitted, whether the witness returned the transcript, and if so, the date on which it was returned.
(c) that changes, if any, made by the witness are attached to the deposition transcript;
(d) that the deposition officer delivered the deposition transcript or nonstenographic recording of an oral deposition in accordance with Rule 203.3;
(e) the amount of time used by each party at the deposition;
(f) the amount of the deposition officer's charges for preparing

by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.
(3) *Deposition of Party, Agent, or Designee.* An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).
(4) *Unavailable Witness.* A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:
(A) that the witness is dead;
(B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;
(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;
(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or
(E) on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used.
(5) *Limitations on Use.*
(A) *Deposition Taken on Short Notice.* A deposition must not be used against a party who, having received less than 14 days' notice of the

the original deposition transcript, which the clerk of the court must tax as costs; and (g) that a copy of the certificate was served on all parties and the date of service. **203.3 Delivery.** (a) **Endorsement; to whom delivered.** The deposition officer must endorse the title of the action and "Deposition of (name of witness)" on the original deposition transcript (or a copy, if the original was not returned) or the original nonstenographic recording of an oral deposition, and must return: (1) the transcript to the party who asked the first question appearing in the transcript, or (2) the recording to the party who requested it. (b) **Notice.** The deposition officer must serve notice of delivery on all other parties. (c) **Inspection and copying; copies.** The party receiving the original deposition transcript or non-stenographic recording must make it available upon reasonable request for inspection and copying by any other party. Any party or the witness is entitled to obtain a copy of the deposition transcript or non-stenographic recording from the deposition officer upon payment of a reasonable fee. **203.4 Exhibits.** At the request of a party, the original documents and things produced for inspection during the examination of the witness must be marked for identification by the deposition officer and annexed to the deposition transcript or non-stenographic recording. The person producing the materials may produce copies instead of originals if the party gives all other parties fair	deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place—and this motion was still pending when the deposition was taken. **(B)** *Unavailable Deponent; Party Could Not Obtain an Attorney.* A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition. **(6)** ***Using Part of a Deposition.*** If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts. **(7)** ***Substituting a Party.*** Substituting a party under Rule 25 does not affect the right to use a deposition previously taken. **(8)** ***Deposition Taken in an Earlier Action.*** A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence. **(b) Objections to Admissibility.** Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the

opportunity at the deposition to compare the copies with the originals. If the person offers originals rather than copies, the deposition officer must, after the conclusion of the deposition, make copies to be attached to the original deposition transcript or non-stenographic recording, and then return the originals to the person who produced them. The person who produced the originals must preserve them for hearing or trial and make them available for inspection or copying by any other party upon seven days' notice. Copies annexed to the original deposition transcript or non-stenographic recording may be used for all purposes.

203.5 Motion to Suppress.

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

203.6 Use.

(a) **Non-stenographic recording; transcription.** A non-stenographic recording of an oral deposition, or a written transcription of all or part of such a recording, may be used to the same extent as a deposition taken by stenographic means. However, the court, for good cause shown, may require that the party seeking to use a non-stenographic recording or

admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) Form of Presentation. Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

(d) Waiver of Objections.

(1) ***To the Notice.*** An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) ***To the Officer's Qualification.*** An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(A) before the deposition begins; or

(B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) ***To the Taking of the Deposition.***

(A) *Objection to Competence, Relevance, or Materiality.* An objection to a deponent's competence--or to the competence, relevance, or materiality of testimony--is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) *Objection to an Error or Irregularity.* An objection to an error or irregularity at an oral examination is waived if:

written transcription first obtain a complete transcript of the deposition recording from a certified court reporter. The court reporter's transcription must be made from the original or a certified copy of the deposition recording. The court reporter must, to the extent applicable, comply with the provisions of this rule, except that the court reporter must deliver the original transcript to the attorney requesting the transcript, and the court reporter's certificate must include a statement that the transcript is a true record of the non-stenographic recording. The party to whom the court reporter delivers the original transcript must make the transcript available, upon reasonable request, for inspection and copying by the witness or any party. (b) **Same proceeding.** All or part of a deposition may be used for any purpose in the same proceeding in which it was taken. If the original is not filed, a certified copy may be used. "Same proceeding" includes a proceeding in a different court but involving the same subject matter and the same parties or their representatives or successors in interest. A deposition is admissible against a party joined after the deposition was taken if: (1) the deposition is admissible pursuant to Rule 804(b)(1) of the Rules of Evidence, or (2) that party has had a reasonable opportunity to redepose the witness and has failed to do so. (c) **Different proceeding.** Depositions taken in different proceedings may be used as permitted by the Rules of Evidence.	**(i)** it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and **(ii)** it is not timely made during the deposition. **(C)** *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it. **(4)** ***To Completing and Returning the Deposition.*** An objection to how the officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

V. Stipulations about Discovery Procedure

Tex. R. Civ. P. 191.1, 191.2	Fed. R. Civ. P. 29
191.1 Modification of Procedures Except where specifically prohibited, the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit by the agreement of the parties or by court order for good cause. An agreement of the parties is enforceable if it complies with Rule 11 or, as it affects an oral deposition, if it is made a part of the record of the deposition. **191.2 Conference.** Parties and their attorneys are expected to cooperate in discovery and to make any agreements reasonably necessary for the efficient disposition of the case. All discovery motions or requests for hearings relating to discovery must contain a certificate by the party filing the motion or request that a reasonable effort has been made to resolve the dispute without the necessity of court intervention and the effort failed.	**RULE 29. STIPULATIONS ABOUT DISCOVERY PROCEDURE** Unless the court orders otherwise, the parties may stipulate that: **(a)** a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition; and **(b)** other procedures governing or limiting discovery be modified—but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

VI. Interrogatories

Tex. R. Civ. P. 197	Fed. R. Civ. P. 33
RULE 197. INTERROGATORIES TO PARTIES **197.1 Interrogatories.** A party may serve on another party - no later than 30 days before the end of the discovery period - written interrogatories to inquire about any matter within the scope of discovery except matters covered by Rule 195. An interrogatory may inquire whether a party makes a specific legal or factual contention and may ask the responding party to state the legal theories and to describe in general the factual bases for the party's claims or defenses, but interrogatories may not be used to require the responding party to marshal all of its available proof or the proof the party intends to offer at trial. **197.2 Response to Interrogatories.** (a) **Time for response.** The responding party must serve a written response on the requesting party within 30 days after service of the interrogatories, except that a defendant served with interrogatories before the defendant's answer is due need not respond until 50 days after service of the interrogatories. (b) **Content of response.** A response must include the party's answers to the interrogatories and may include objections and assertions of privilege as required under these rules. (c) **Option to produce records.** If the answer to an interrogatory may be derived or ascertained from public records, from the responding party's business records, or from a compilation, abstract or summary of the responding party's business records,	**RULE 33. INTERROGATORIES TO PARTIES** **(a) In General.** **(1)** ***Number.*** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2). **(2)** ***Scope.*** An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time. **(b) Answers and Objections.** **(1)** ***Responding Party.*** The interrogatories must be answered: **(A)** by the party to whom they are directed; or **(B)** if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party. **(2)** ***Time to Respond.*** The responding party must serve its answers and any objections within 30 days after

and the burden of deriving or ascertaining the answer is substantially the same for the requesting party as for the responding party, the responding party may answer the interrogatory by specifying and, if applicable, producing the records or compilation, abstract or summary of the records. The records from which the answer may be derived or ascertained must be specified in sufficient detail to permit the requesting party to locate and identify them as readily as can the responding party. If the responding party has specified business records, the responding party must state a reasonable time and place for examination of the documents. The responding party must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them. (d) **Verification required; exceptions.** A responding party - not an agent or attorney as otherwise permitted by Rule 14 - must sign the answers under oath except that: (1) when answers are based on information obtained from other persons, the party may so state, and (2) a party need not sign answers to interrogatories about persons with knowledge of relevant facts, trial witnesses, and legal contentions. **197.3 Use.** Answers to interrogatories may be used only against the responding party. An answer to an interrogatory inquiring about matters described in Rule 194.2(c) and (d) that has been amended or supplemented is not admissible and may not be used for impeachment.	being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. **(3) *Answering Each Interrogatory.*** Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath. **(4) *Objections.*** The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure. **(5) *Signature.*** The person who makes the answers must sign them, and the attorney who objects must sign any objections. **(c) Use.** An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence. **(d) Option to Produce Business Records.** If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by: **(1)** specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and **(2)** giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

VII. Production and Inspection

Tex. R. Civ. P. 196	Fed. R. Civ. P. 34
RULE 196. REQUESTS FOR PRODUCTION AND INSPECTION TO PARTIES; REQUESTS AND MOTIONS FOR ENTRY UPON PROPERTY **196.1 Request for Production and Inspection to Parties.** (a) **Request.** A party may serve on another party--no later than 30 days before the end of the discovery period--a request for production or for inspection, to inspect, sample, test, photograph and copy documents or tangible things within the scope of discovery. (b) **Contents of request.** The request must specify the items to be produced or inspected, either by individual item or by category, and describe with reasonable particularity each item and category. The request must specify a reasonable time (on or after the date on which the response is due) and place for production. If the requesting party will sample or test the requested items, the means, manner and procedure for testing or sampling must be described with sufficient specificity to inform the producing party of the means, manner, and procedure for testing or sampling. (c) **Requests for production of medical or mental health records regarding nonparties.** (1) **Service of request on nonparty.** If a party requests another party to produce medical or mental health records regarding a nonparty, the requesting party must serve the nonparty with the request for production under Rule 21a. (2) **Exceptions.** A party is not required to serve the	**RULE 34. PRODUCING DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND TANGIBLE THINGS, OR ENTERING ONTO LAND, FOR INSPECTION AND OTHER PURPOSES** **(a) In General.** A party may serve on any other party a request within the scope of Rule 26(b): **(1)** to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control: **(A)** any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or **(B)** any designated tangible things; or **(2)** to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it. **(b) Procedure.** **(1)** ***Contents of the Request*****.** The request: **(A)** must describe with reasonable particularity each item or category of items to be inspected;

request for production on a nonparty whose medical records are sought if: (A) the nonparty signs a release of the records that is effective as to the requesting party; (B) the identity of the nonparty whose records are sought will not directly or indirectly be disclosed by production of the records; or (C) the court, upon a showing of good cause by the party seeking the records, orders that service is not required. (3) **Confidentiality.** Nothing in this rule excuses compliance with laws concerning the confidentiality of medical or mental health records. **196.2 Response to Request for Production and Inspection.** (a) **Time for response.** The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request. (b) **Content of response.** With respect to each item or category of items, the responding party must state objections and assert privileges as required by these rules, and state, as appropriate, that: (1) production, inspection, or other requested action will be permitted as requested; (2) the requested items are being served on the requesting party with the response; (3) production, inspection, or other requested action will take place at a specified time and place, if the responding party is objecting to the time and place of	**(B)** must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and **(C)** may specify the form or forms in which electronically stored information is to be produced. **(2) *Responses and Objections*.** **(A)** *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. **(B)** *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response. **(C)** *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit

production; or (4) no items have been identified - after a diligent search - that are responsive to the request. **196.3 Production.** (a) **Time and place of production.** Subject to any objections stated in the response, the responding party must produce the requested documents or tangible things within the person's possession, custody or control at either the time and place requested or the time and place stated in the response, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them. (b) **Copies.** The responding party may produce copies in lieu of originals unless a question is raised as to the authenticity of the original or in the circumstances it would be unfair to produce copies in lieu of originals. If originals are produced, the responding party is entitled to retain the originals while the requesting party inspects and copies them. (c) **Organization.** The responding party must either produce documents and tangible things as they are kept in the usual course of business or organize and label them to correspond with the categories in the request. **196.4 Electronic or Magnetic Data.** To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is	inspection of the rest. **(D)** *Responding to a Request for Production of Electronically Stored Information.* The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use. **(E)** *Producing the Documents or Electronically Stored Information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information: **(i)** A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request; **(ii)** If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and **(iii)** A party need not produce the same electronically stored information in more than one form. **(c) Nonparties.** As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

reasonably available to the responding party in its ordinary course of business. If the responding party cannot - through reasonable efforts - retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information. **196.5 Destruction or Alteration.** Testing, sampling or examination of an item may not destroy or materially alter an item unless previously authorized by the court. **196.6 Expenses of Production.** Unless otherwise ordered by the court for good cause, the expense of producing items will be borne by the responding party and the expense of inspecting, sampling, testing, photographing, and copying items produced will be borne by the requesting party. **196.7 Request of Motion for Entry Upon Property.** (a) **Request or motion.** A party may gain entry on designated land or other property to inspect, measure, survey, photograph, test, or sample the property or any designated object or operation thereon by serving - no later than 30 days before the end of any applicable discovery period - (1) a request on all parties if the land or property belongs to a party, or (2) a motion and notice of hearing on all parties and the	

nonparty if the land or property belongs to a nonparty. If the identity or address of the nonparty is unknown and cannot be obtained through reasonable diligence, the court must permit service by means other than those specified in Rule 21a that are reasonably calculated to give the nonparty notice of the motion and hearing. (b) **Time, place, and other conditions.** The request for entry upon a party's property, or the order for entry upon a nonparty's property, must state the time, place, manner, conditions, and scope of the inspection, and must specifically describe any desired means, manner, and procedure for testing or sampling, and the person or persons by whom the inspection, testing, or sampling is to be made. (c) **Response to request for entry.** (1) **Time to respond.** The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request. (2) **Content of response.** The responding party must state objections and assert privileges as required by these rules, and state, as appropriate, that: (A) entry or other requested action will be permitted as requested; (B) entry or other requested action will take place at a specified time and place, if the responding party is objecting to the time and place of production; or (C) entry or other requested action cannot be	

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

VIII. Physical and Mental Examinations

Tex. R. Civ. P. 204	Fed. R. Civ. P. 35
RULE 204. PHYSICAL AND MENTAL EXAMINATION **204.1 Motion and Order Required.** (a) **Motion.** A party may - no later than 30 days before the end of any applicable discovery period - move for an order compelling another party to: (1) submit to a physical or mental examination by a qualified physician or a mental examination by a qualified psychologist; or (2) produce for such examination a person in the other party's custody, conservatorship or legal control. (b) **Service.** The motion and notice of hearing must be served on the person to be examined and all parties. (c) **Requirements for obtaining order.** The court may issue an order for examination only for good cause shown and only in the following circumstances: (1) when the mental or physical condition (including the blood group) of a party, or of a person in the custody, conservatorship or under the legal control of a party, is in controversy; or (2) except as provided in Rule 204.4, an examination by a psychologist may be ordered when the party responding to the motion has designated a psychologist as a testifying expert or has disclosed a psychologist's records for possible use at trial. (d) **Requirements of order.** The order must be in writing and must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be	**RULE 35. PHYSICAL AND MENTAL EXAMINATION** **(a) Order for an Examination.** **(1)** ***In General.*** The court where the action is pending may order a party whose mental or physical condition--including blood group--is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control. **(2)** ***Motion and Notice; Contents of the Order.*** The order: **(A)** may be made only on motion for good cause and on notice to all parties and the person to be examined; and **(B)** must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it. **(b) Examiner's Report.** **(1)** ***Request by the Party or Person Examined.*** The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined. **(2)** ***Contents.*** The examiner's report must be in writing and must set out in detail the examiner's findings,

made. **204.2 Report of Examining Physician or Psychologist.** (a) **Right to report.** Upon request of the person ordered to be examined, the party causing the examination to be made must deliver to the person a copy of a detailed written report of the examining physician or psychologist setting out the findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery of the report, upon request of the party causing the examination, the party against whom the order is made must produce a like report of any examination made before or after the ordered examination of the same condition, unless the person examined is not a party and the party shows that the party is unable to obtain it. The court on motion may limit delivery of a report on such terms as are just. If a physician or psychologist fails or refuses to make a report the court may exclude the testimony if offered at the trial. (b) **Agreements; relationship to other rules**. This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance with the provisions of any other rule. **204.3 Effect of No Examination.** If no examination is sought either by agreement or under this subdivision, the party whose physical or mental condition is in controversy must not comment to the court or jury concerning the party's willingness to submit to an examination, or on the	including diagnoses, conclusions, and the results of any tests. **(3) *Request by the Moving Party.*** After delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them. **(4) *Waiver of Privilege.*** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony about all examinations of the same condition. **(5) *Failure to Deliver a Report.*** The court on motion may order—on just terms—that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial. **(6) *Scope.*** This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

right or failure of any other party to seek an examination. **204.4 Cases Arising Under Titles II or V, Family Code.** In cases arising under Family Code Titles II or V, the court may - on its own initiative or on motion of a party - appoint: (a) one or more psychologists or psychiatrists to make any and all appropriate mental examinations of the children who are the subject of the suit or of any other parties, and may make such appointment irrespective of whether a psychologist or psychiatrist has been designated by any party as a testifying expert; (b) one or more experts who are qualified in paternity testing to take blood, body fluid, or tissue samples to conduct paternity tests as ordered by the court. **204.5 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.	

IX. Admissions

Tex. R. Civ. P. 198	Fed. R. Civ. P. 36
RULE 198. REQUESTS FOR ADMISSIONS **198.1 Request for Admissions.** A party may serve on another party - no later than 30 days before the end of the discovery period - written requests that the other party admit the truth of any matter within the scope of discovery, including statements of opinion or of fact or of the application of law to fact, or the genuineness of any documents served with the request or otherwise made available for inspection and copying. Each matter for which an admission is requested must be stated separately. **198.2 Response to Requests for Admissions.** (a) **Time for response.** The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request. (b) **Content of response.** Unless the responding party states an objection or asserts a privilege, the responding party must specifically admit or deny the request or explain in detail the reasons that the responding party cannot admit or deny the request. A response must fairly meet the substance of the request. The responding party may qualify an answer, or deny a request in part, only when good faith requires. Lack of information or knowledge is not a proper response unless the responding party states that a reasonable inquiry was made but that the information known or easily obtainable is insufficient	**RULE 36. REQUESTS FOR ADMISSIONS** **(a) Scope and Procedure.** **(1)** ***Scope.*** A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to: **(A)** facts, the application of law to fact, or opinions about either; and **(B)** the genuineness of any described documents. **(2)** ***Form; Copy of a Document.*** Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying. **(3)** ***Time to Respond; Effect of Not Responding.*** A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court. **(4)** ***Answer.*** If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or

to enable the responding party to admit or deny. An assertion that the request presents an issue for trial is not a proper response. (c) **Effect of failure to respond.** If a response is not timely served, the request is considered admitted without the necessity of a court order. **198.3 Effect of Admissions; Withdrawal or Amendment.** Any admission made by a party under this rule may be used solely in the pending action and not in any other proceeding. A matter admitted under this rule is conclusively established as to the party making the admission unless the court permits the party to withdraw or amend the admission. The court may permit the party to withdraw or amend the admission if: (a) the party shows good cause for the withdrawal or amendment; and (b) the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved by permitting the party to amend or withdraw the admission.	deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny. **(5) *Objections.*** The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for trial. **(6) *Motion Regarding the Sufficiency of an Answer or Objection.*** The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses. **(b) Effect of an Admission; Withdrawing or Amending It.** A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other

	proceeding.

X. Sanctions

Tex. R. Civ. P. 215	Fed. R. Civ. P. 37
RULE 215. ABUSE OF DISCOVERY; SANCTIONS **215.1 Motion for Sanctions or Order Compelling Discovery.** A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows: (a) **Appropriate court.** On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, an application for an order will be made to the court in which the action is pending. (b) **Motion.** (1) If a party or other deponent which is a corporation or other entity fails to make a designation under Rules 199.2(b)(1) or 200.1(b); or (2) if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails: (A) to appear before the officer who is to take his deposition, after being served with a proper notice; or (B) to answer a question propounded or submitted upon oral examination or upon written questions; or (3) if a party fails:	**RULE 37 – FAILURE TO MAKE DISCLOSURES OR TO COOPERATE IN DISCOVERY; SANCTIONS** **(a) Motion for an Order Compelling Disclosure or Discovery.** **(1) *In General*.** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action. **(2) *Appropriate Court*.** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken. **(3) *Specific Motions*.** **(A)** *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. **(B)** *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if: **(i)** a deponent fails to answer a question asked under Rule 30or 31; **(ii)** a corporation or other entity fails to make a designation under Rule

(A) to serve answers or objections to interrogatories submitted under Rule 197, after proper service of the interrogatories; or (B) to answer an interrogatory submitted under Rule 197; or (C) to serve a written response to a request for inspection submitted under Rule 196, after proper service of the request; or (D) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 196; the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by Rule 215.2(b) without the necessity of first having obtained a court order compelling such discovery. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order. If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule 192.6. (c) **Evasive or incomplete answer.** For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer. (d) **Disposition of motion to compel: award of expenses.** If the	30(b)(6) or 31(a)(4); **(iii)** a party fails to answer an interrogatory submitted under Rule 33; or **(iv)** a party <u>fails to produce documents or</u> fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34. **(C)** *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order. **(4)** ***Evasive or Incomplete Disclosure, Answer, or Response*****.** For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond. **(5)** ***Payment of Expenses; Protective Orders*****.** **(A)** *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if: **(i)** the movant filed the motion before

motion is granted, the court shall, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment. If the motion is denied, the court may, after opportunity for hearing, require the moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner. In determining the amount of reasonable expenses, including attorney fees, to be awarded in connection with a motion, the trial court shall award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or in opposing a motion which is denied. (e) **Providing person's own statement.** If a party fails to comply with any person's written request for the person's own statement as provided in Rule 192.3(h), the person who made the request may move for an order compelling compliance. If the motion is granted, the movant may recover the expenses	attempting in good faith to obtain the disclosure or discovery without court action; **(ii)** the opposing party's nondisclosure, response, or objection was substantially justified; or **(iii)** other circumstances make an award of expenses unjust. **(B)** *If the Motion Is Denied*. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust. **(C)** *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion. **(b) Failure to Comply with a Court Order.** **(1)** ***Sanctions Sought in the District Where the Deposition Is Taken*****.** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may

incurred in obtaining the order, including attorney fees, which are reasonable in relation to the amount of work reasonably expended in obtaining the order.

215.2 Failure to Comply with Order or with Discovery Request.
(a) **Sanctions by court in district where deposition is taken.** If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.
(b) **Sanctions by court in which action is pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rules 199.2(b)(1) or 200.1(b) to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under Rules 204 or 215.1, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

(1) an order disallowing any further discovery of any kind or of a particular kind by the disobedient party;
(2) an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;
(3) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
(4) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or

be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) *Sanctions Sought in the District Where the Action Is Pending*.

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
(iii) striking pleadings in whole or in part;
(iv) staying further proceedings until the order is obeyed;
(v) dismissing the action or proceeding in whole or in part;
(vi) rendering a default judgment against

prohibiting him from introducing designated matters in evidence; (5) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party; (6) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination; (7) when a party has failed to comply with an order under Rule 204 requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination. (8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment. (c) **Sanction against nonparty for violation of Rules 196.7 or 205.3.** If a nonparty fails to comply with an order under Rules 196.7 or 205.3, the court which made the order may treat the failure to obey as contempt of court.	the disobedient party; or **(vii)** treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination. **(B)** *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)—(vi), unless the disobedient party shows that it cannot produce the other person. **(C)** *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust. **(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.** **(1)** ***Failure to Disclose or Supplement*****.** If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard: **(A)** may order payment of the reasonable

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

215.4 Failure to Comply with Rule 198
(a) **Motion.** A party who has requested an admission under Rule 198 may move to determine the sufficiency of the answer or objection. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of Rule 198, it may order either that the matter is admitted or that an amended answer be served. The provisions of Rule 215.1(d) apply to the award of expenses incurred in relation to the motion.
(b) **Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 198 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an expenses, including attorney's fees, caused by the failure;
(B) may inform the jury of the party's failure; and
(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi).

(2) *Failure to Admit*. If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:
(A) the request was held objectionable under Rule 36(a);
(B) the admission sought was of no substantial importance;
(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or
(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) *In General*.

(A) *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if:
(i) a party or a party's officer, director, or managing agent—or a person designated

order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 193, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit. **215.5 Failure of Party or Witness to Attend to or Serve Subpoena; Expenses.** (a) **Failure of party giving notice to attend.** If the party giving the notice of the taking of an oral deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees. (b) **Failure of witness to attend.** If a party gives notice of the taking of an oral deposition of a witness and the witness does not attend because of the fault of the party giving the notice, if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees. **215.6 Exhibits to Motions and Responses.** Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.	under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or **(ii)** a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response. **(B)** *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action. **(2)** ***Unacceptable Excuse for Failing to Act*.** A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c). **(3)** ***Types of Sanctions*.** Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)—(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust. **(e) Failure to <u>Preserve</u> Electronically Stored Information.** <u>If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it,</u>

[PROPOSED RULE: **RULE 215.7 Spoliation** (a) *Motion for Order Granting Spoliation Remedies.* A party, upon reasonable notice to other parties, may move for an order seeking spoliation remedies if: (1) another party intentionally or negligently breached a duty to preserve a document or tangible thing—as described by Rule 192.3(b)—that may be material and relevant to a claim or defense; (2) the document or tangible thing cannot be reproduced, restored, or replaced through additional discovery; and (3) the movant is unfairly prejudiced as a result. The motion should be filed reasonably promptly after the discovery of the spoliation. (b) *Standards.* (1) The court must consider the spoliation motion outside the presence of the jury, as provided in Texas Rule of Evidence 104. The court must determine the spoliation motion based on the pleadings, any stipulations of the parties, any affidavits, documents or other testimony filed by a party, discovery materials, and any oral testimony. Unless the court orders otherwise, if the movant will be relying on affidavits, the movant must file any affidavits at least fourteen days before the hearing date and if the non-movant will be relying on affidavits, the non-movant must file any controverting affidavits at least seven days before the hearing date. (2) To find spoliation, the court must find that the allegedly spoliating party had a duty to preserve a	and it cannot be restored or replaced through additional discovery, the court: **(1)** upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or **(2)** only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: **(A)** presume that the lost information was unfavorable to the party; **(B)** instruct the jury that it may or must presume the information was unfavorable to the party; or **(C)** dismiss the action or enter a default judgment. **(f) Failure to Participate in Framing a Discovery Plan.** If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

document or tangible thing that may be material and relevant to a claim or defense and breached that duty by intentionally or negligently destroying the document or tangible thing or by failing to take reasonable steps to preserve the document or tangible thing. (3) If the court finds that spoliation occurred, the remedies ordered by the court must be proportionate to the wrongdoing and not excessive. The court should weigh the spoliating party's culpability and the prejudice to the nonspoliating party based on the relevance of the spoliated evidence to key issues in the case, the harmful effect of the evidence on the spoliating party's case, the degree of helpfulness of the evidence to the nonspoliating party's case, and whether the evidence is cumulative of other available evidence. (4) In the order, the court must specify the conduct that formed the basis or bases for its ruling. (c) *Spoliation Remedies.* If the court finds that spoliation occurred, the court may make such orders in regard to the spoliation as are just, and among others the following[1]: (1) If the court finds that a nonspoliating party is prejudiced because of the loss of the document or tangible thing, then the court may order one or more of the following remedies: (A) awarding the nonspoliating, prejudiced party the reasonable expenses, including attorneys' fees and costs, caused by the spoliation; or (B) excluding evidence. (2) If the court finds that the spoliating party acted intentionally or acted negligently and caused the	

[1] This language is derived from Tex. R. Civ. P. 215.2(b).

nonspoliating party to be irreparably deprived of any meaningful ability to present a claim or defense, then the court may order an instruction to the jury regarding the spoliation in addition to the remedies in (c)(1). If the court submits a spoliation instruction to the jury, then evidence of the circumstances surrounding the spoliation may be admissible at trial. The admissibility at trial of evidence of the circumstances surrounding the spoliation is governed by the Texas Rules of Evidence. (3) If the court finds that a party acted with intent to spoliate, then in addition to the remedies set forth in (c)(1) and (c)(2), the court may order one or more of the following remedies: (A) finding that the lost document or tangible thing was unfavorable to the spoliating party; (B) striking the spoliating party's pleadings; (C) dismissing the spoliating party's claims or defenses; or (D) entering a default judgment in part or in full against the spoliating party. The remedies in this section are in addition to the remedies available under Rules 215.2 and 215.3.]	

Matched Comparison; TRCP and FRCP

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*Underlined text indicates amendments to the Federal Rules of Civil Procedure, effective on December 1, 2015

*Proposed amendments to the Texas Rules of Civil Procedure are underlined and marked as follows: [PROPOSED CHANGE: . . .]

*Proposed Texas Rule of Civil Procedure on spoliation is indicated as follows: [PROPOSED RULE: . . .]

I. General Rules And Disclosures

Tex. R. Civ. P. 190-194, 205	Fed. R. Civ. P. 26
Rule 190. DISCOVERY LIMITATIONS **190.1 Discovery Control Plan Required.** Every case must be governed by a discovery control plan as provided in this Rule. A plaintiff must allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under Level 1, 2, or 3 of this Rule.	**RULE 26. DUTY TO DISCLOSE; GENERAL PROVISIONS GOVERNING DISCOVERY** *(closest provision)* **(f) Conference of the Parties; Planning for Discovery.** **(1)** ***Conference Timing.*** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b). **(2)** ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person. **(3)** ***Discovery Plan.*** A discovery plan must state the

	parties' views and proposals on: **(A)** what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made; **(B)** the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues; **(C)** any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced; **(D)** any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502; **(E)** what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and **(F)** any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c). **(4)** ***Expedited Schedule****.* If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule: **(A)** require the parties' conference to occur less than 21 days before the scheduling conference is

	held or a scheduling order is due under Rule 16(b); and **(B)** require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.
190.2 Discovery Control Plan - Expedited Actions and Divorces Involving $50,000 or Less (Level 1) (a) **Application.** This subdivision applies to: (1) any suit that is governed by the expedited actions process in Rule 169; and (2) unless the parties agree that rule 190.3 should apply or the court orders a discovery control plan under Rule 190.4, any suit for divorce not involving children in which a party pleads that the value of the marital estate is more than zero but not more than $ 50,000.	(*No directly related provision dividing lawsuits by levels)*
(b) **Limitations**. Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations: (1) **Discovery period**. All discovery must be conducted during the discovery period, which begins when the suit is filed and continues until 180 days after the date the first request for discovery of any kind is served on a party.	*(closest provisions)* **(a) Required Disclosures.** **(1)** ***Initial Disclosure.*** **(C)** *Time for Initial Disclosures—In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery

	plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure. **(D)** *Time for Initial Disclosures—For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order. **(d) Timing and Sequence of Discovery.** **(1)** ***Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order. **(2)** ***Early Rule 34 Requests***. **(A)** *Time to Deliver*. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered: **(i)** to that party by any other party, and **(ii)** by that party to any plaintiff or to any other party that has been served. **(B)** *When Considered Served.* The request is considered to have been served at the first Rule 26(f) conference. **(3)** ***Sequence.*** Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice: **(A)** methods of discovery may be used in any

	sequence; and **(B)** discovery by one party does not require any other party to delay its discovery.
(2) **Total time for oral depositions.** Each party may have no more than six hours in total to examine and cross-examine all witnesses in oral depositions. The parties may agree to expand this limit up to ten hours in total, but not more except by court order. The court may modify the deposition hours so that no party is given unfair advantage. (3) **Interrogatories.** Any party may serve on any other party no more than 15 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory. (4) **Requests for Production.** Any party may serve on any other party no more than 15 written requests for production. Each discrete subpart of a request for production is considered a separate request for production. (5) **Requests for Admissions.** Any party may serve on any other party no more than 15 written requests for admissions. Each discrete subpart of a request for admission is considered a separate request for admission. (6) **Requests for Disclosure.** In addition to the content subject to disclosure under Rule 194.2, a party may request disclosure of all documents, electronic information, and tangible items that the disclosing party	*(closest provision)* **(b) Discovery Scope and Limits** **(2) *Limitations on Frequency and Extent.*** **(A)** *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. *(See Fed. R. Civ. P. 30 and 31 below, setting limits on the number of depositions; Fed. R. Civ. P. 33 below, setting limits on the number of interrogatories)*

has in its possession, custody, or control and may use to support its claims or defenses. A request for disclosure made pursuant to this paragraph is not considered a request for production. (c) **Reopening Discovery**. If a suit is removed from the expedited actions process in Rule 169 or, in a divorce, the filing of a pleading renders this subdivision no longer applicable, the discovery period reopens, and discovery must be completed within the limitations provided in Rules 190.3 or 190.4, whichever is applicable. Any person previously deposed may be redeposed. On motion of any party, the court should continue the trial date if necessary to permit completion of discovery.	
190.3 Discovery Control Plan - By Rule (Level 2) (a) **Application**. Unless a suit is governed by a discovery control plan under Rules 190.2 or 190.4, discovery must be conducted in accordance with this subdivision. (b) **Limitations.** Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations: (1) **Discovery period**. All discovery must be conducted during the discovery period, which begins when suit is filed and continues until: (A) 30 days before the date set for trial, in cases under the Family Code; or (B) in other cases, the earlier of (i) 30 days before the date set for trial, or (ii) nine months after the earlier of the date of the first oral deposition or the due date of the first response to written	(*No directly related provision dividing lawsuits by levels)* *(closest provisions)* **(a) Required Disclosures.** **(1)** ***Initial Disclosure.*** **(C)** *Time for Initial Disclosures—In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery

discovery.	plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure. **(D)** *Time for Initial Disclosures—For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order. **(d) Timing and Sequence of Discovery.** **(1)** ***Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order. **(2)** ***Early Rule 34 Requests***. **(A)** *Time to Deliver*. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered: **(i)** to that party by any other party, and **(ii)** by that party to any plaintiff or to any other party that has been served. **(B)** *When Considered Served.* The request is considered to have been served at the first Rule 26(f) conference. **(3)** ***Sequence.*** Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice: **(A)** methods of discovery may be used in any

	sequence; and **(B)** discovery by one party does not require any other party to delay its discovery.
(2) **Total time for oral depositions.** Each side may have no more than 50 hours in oral depositions to examine and cross-examine parties on the opposing side, experts designated by those parties, and persons who are subject to those parties' control. "Side" refers to all the litigants with generally common interests in the litigation. If one side designates more than two experts, the opposing side may have an additional six hours of total deposition time for each additional expert designated. The court may modify the deposition hours and must do so when a side or party would be given unfair advantage. (3) **Interrogatories.** Any party may serve on any other party no more than 25 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory.	*(closest provision)* **(b) Discovery Scope and Limits** **(2)** ***Limitations on Frequency and Extent.*** **(A)** *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. *(See Fed. R. Civ. P. 30 and 31 below, setting limits on the number of depositions; Fed. R. Civ. P. 33 below, setting limits on the number of interrogatories)*
190.4 Discovery Control Plan - By Order (Level 3) (a) **Application.** The court must, on a party's motion, and may, on its own initiative, order that discovery be conducted in accordance with a discovery control plan tailored to the circumstances of the specific suit. The parties may submit an agreed order to the court for its consideration. The court should act on a party's motion or agreed order under this subdivision	(*No directly related provision dividing lawsuits by levels; see provisions above relating to discovery plans and limits)*

as promptly as reasonably possible. (b) **Limitations.** The discovery control plan ordered by the court may address any issue concerning discovery or the matters listed in Rule 166, and may change any limitation on the time for or amount of discovery set forth in these rules. The discovery limitations of Rule 190.2, if applicable, or otherwise of Rule 190.3 apply unless specifically changed in the discovery control plan ordered by the court. The plan must include: (1) a date for trial or for a conference to determine a trial setting; (2) a discovery period during which either all discovery must be conducted or all discovery requests must be sent, for the entire case or an appropriate phase of it; (3) appropriate limits on the amount of discovery; and (4) deadlines for joining additional parties, amending or supplementing pleadings, and designating expert witnesses.	
190.5 Modification of Discovery Control Plan The court may modify a discovery control plan at any time and must do so when the interest of justice requires. Unless a suit is governed by the expedited actions process in Rule 169, the court must allow additional discovery: (a) related to new, amended or supplemental pleadings, or new information disclosed in a discovery response or in an amended or supplemental response, if: (1) the pleadings or responses were made after the deadline for completion of discovery or so nearly before that deadline that an adverse party does not have an adequate opportunity to conduct discovery related to the new matters, and	*(closest provisions)* **(d) Timing and Sequence of Discovery.** **(1)** ***Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order. **(2)** ***Early Rule 34 Requests***. **(A)** *Time to Deliver*. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered: **(i)** to that party by any other party, and **(ii)** by that party to any plaintiff or to any other party that has been served.

(2) the adverse party would be unfairly prejudiced without such additional discovery; (b) regarding matters that have changed materially after the discovery cutoff if trial is set or postponed so that the trial date is more than three months after the discovery period ends.	**(B)** *When Considered Served.* The request is considered to have been served at the first Rule 26(f) conference. **(3)** ***Sequence.*** Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice: **(A)** methods of discovery may be used in any sequence; and **(B)** discovery by one party does not require any other party to delay its discovery. **(e) Supplementing Disclosures and Responses.** **(1)** ***In General.*** A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response: **(A)** in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or **(B)** as ordered by the court. **(2)** ***Expert Witness****.* For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

190.6 Certain Types of Discovery Excepted This rule's limitations on discovery do not apply to or include discovery conducted under Rule 202 ("Depositions Before Suit or to Investigate Claims"), or Rule 621a ("Discovery and Enforcement of Judgment"). But Rule 202 cannot be used to circumvent the limitations of this rule.	*(no directly related provision)*
RULE 191. MODIFYING DISCOVERY PROCEDURES AND LIMITATIONS; CONFERENCE REQUIREMENT; SIGNING DISCLOSURES; DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS; FILING REQUIREMENTS	
191.1 Modification of Procedures Except where specifically prohibited, the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit by the agreement of the parties or by court order for good cause. An agreement of the parties is enforceable if it complies with Rule 11 or, as it affects an oral deposition, if it is made a part of the record of the deposition.	*(no directly related provision)*
191.2 Conference. Parties and their attorneys are expected to cooperate in discovery and to make any agreements reasonably necessary for the efficient disposition of the case. All discovery motions or requests for hearings relating to discovery must contain a certificate by the party filing the motion or request that a reasonable effort has been made to resolve the dispute without the necessity of court intervention and the effort failed.	*(closest provision)* **(f) Conference of the Parties; Planning for Discovery.** **(1) *Conference Timing*.** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

	(2) ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.
191.3 Signing of Disclosures, Discovery Requests, Notices, Responses, and Objections (a) **Signature required.** Every disclosure, discovery request, notice, response, and objection must be signed: (1) by an attorney, if the party is represented by an attorney, and must show the attorney's State Bar of Texas identification number, address, telephone number, and fax number, if any; or (2) by the party, if the party is not represented by an attorney, and must show the party's address, telephone number, and fax number, if any. (b) **Effect of signature on disclosure.** The signature of an attorney or party on a disclosure constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete	*(closest provision)* **(g) Signing Disclosures and Discovery Requests, Responses, and Objections.** **(1)** ***Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry: **(A)** with respect to a disclosure, it is complete and correct as of the time it is made; and **(B)** with respect to a discovery request,

and correct as of the time it is made. (c) **Effect of signature on discovery request, notice, response, or objection.** The signature of an attorney or party on a discovery request, notice, response, or objection constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, notice, response, or objection: (1) is consistent with the rules of civil procedure and these discovery rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) has a good faith factual basis; (3) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) is not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.	response, or objection, it is: **(i)** consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law; **(ii)** not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and **(iii)** neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.
(d) **Effect of failure to sign.** If a request, notice, response, or objection is not signed, it must be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, notice, response, or objection. A party is not required to take any action with respect to a request or notice that is not signed.	**(2)** ***Failure to Sign.*** Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.
(e) **Sanctions.** If the certification is false without substantial justification, the court may, upon motion or its own initiative, impose on the person who made the certification, or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under Chapter 10 of the Civil Practice and	**(3)** ***Sanction for Improper Certification****.* If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses,

Remedies Code.	including attorney's fees, caused by the violation.
191.4 Filing of Discovery Materials. (a) **Discovery materials not to be filed.** The following discovery materials must not be filed: (1) discovery requests, deposition notices, and subpoenas required to be served only on parties; (2) responses and objections to discovery requests and deposition notices, regardless on whom the requests or notices were served; (3) documents and tangible things produced in discovery; and (4) statements prepared in compliance with Rule 193.3(b) or (d). (b) **Discovery materials to be filed.** The following discovery materials must be filed: (1) discovery requests, deposition notices, and subpoenas required to be served on nonparties; (2) motions and responses to motions pertaining to discovery matters; and (3) agreements concerning discovery matters, to the extent necessary to comply with Rule 11. (c) **Exceptions.** Notwithstanding paragraph (a): (1) the court may order discovery materials to be filed; (2) a person may file discovery materials in support of or in opposition to a motion or for other use in a court proceeding; and (3) a person may file discovery materials necessary for a proceeding in an appellate court. (d) **Retention requirement for persons.** Any person required to	*(No directly related provision)*

serve discovery materials not required to be filed must retain the original or exact copy of the materials during the pendency of the case and any related appellate proceedings begun within six months after judgment is signed, unless otherwise provided by the trial court. (e) **Retention requirement for courts.** The clerk of the court shall retain and dispose of deposition transcripts and depositions upon written questions as directed by the Supreme Court. **191.5 Service of Discovery Materials.** Every disclosure, discovery request, notice, response, and objection required to be served on a party or person must be served on all parties of record. **RULE 192. PERMISSIBLE DISCOVERY: FORMS AND SCOPE; WORK PRODUCT; PROTECTIVE ORDERS; DEFINITIONS** **192.1 Forms of Discovery.** Permissible forms of discovery are: (a) requests for disclosure; (b) requests for production and inspection of documents and tangible things; (c) requests and motions for entry upon and examination of real property; (d) interrogatories to a party; (e) requests for admission; (f) oral or written depositions; and (g) motions for mental or physical examinations.	*(No directly related provision)*

192.2 Sequence of Discovery. The permissible forms of discovery may be combined in the same document and may be taken in any order or sequence.	**(d) Timing and Sequence of Discovery.** **(3) *Sequence.*** Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice: **(A)** methods of discovery may be used in any sequence; and **(B)** discovery by one party does not require any other party to delay its discovery.
192.3 Scope of Discovery. (a) **Generally.** In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.	**(b) Discovery Scope and Limits.** **(1) *Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.
(b) **Documents and tangible things.** A party may obtain discovery of the existence, description, nature, custody, condition, location, and contents of documents and tangible things (including papers, books, accounts, drawings, graphs,	*(closest provision)* **(a) Required Disclosures** **(1) *Initial Disclosure.*** **(A)** *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a

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.	party must, without awaiting a discovery request, provide to the other parties: **(ii)** a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
(c) **Persons with knowledge of relevant facts.** A party may obtain discovery of the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case. [PROPOSED CHANGE: <u>A responding party may not satisfy its obligations to provide the addresses and telephone numbers of persons having knowledge of relevant facts by providing the address and telephone number of counsel.</u>] A person has knowledge of relevant facts when that person has or may have knowledge of any discoverable matter. The person need not have admissible information or personal knowledge of the facts. An expert is "a person with knowledge of relevant facts" only if that knowledge was obtained firsthand or if it was not obtained in preparation for trial or in anticipation of litigation.	*(closest provision)* **(a) Required Disclosures.** (**1) Initial Disclosure.** **(A)** *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties: **(i)** the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
(d) **Trial witnesses.** A party may obtain discovery of the name, address, and telephone number of any person who is expected to be called to testify at trial. This paragraph does not apply to rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial.	*(closest provisions)* **(a) Required Disclosures.** **(2) *Disclosure of Expert Testimony*.** **(A)** *In General*. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it

[PROPOSED CHANGE: <u>If requested by interrogatory, and unless the court orders otherwise, at least 45 days before trial a party must provide the name and, if not previously provided, the address, and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises.</u>] (e) **Testifying and consulting experts.** The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable. A party may discover the following information regarding a testifying expert or regarding a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert: (1) the expert's name, address, and telephone number; (2) the subject matter on which a testifying expert will testify; (3) the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was acquired; (4) the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them; (5) any bias of the witness; (6) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony; (7) the expert's current resume and bibliography.	may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. **(B)** *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain: **(i)** a complete statement of all opinions the witness will express and the basis and reasons for them; **(ii)** the facts or data considered by the witness in forming them; **(iii)** any exhibits that will be used to summarize or support them; **(iv)** the witness's qualifications, including a list of all publications authored in the previous 10 years; **(v)** a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and **(vi)** a statement of the compensation to be paid for the study and testimony in the case. **(C)** *Witnesses Who Do Not Provide a Written Report*. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must

	state: **(i)** the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and **(ii)** a summary of the facts and opinions to which the witness is expected to testify. **(D)** *Time to Disclose Expert Testimony*. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made: **(i)** at least 90 days before the date set for trial or for the case to be ready for trial; or **(ii)** if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure. **(E)** *Supplementing the Disclosure*. The parties must supplement these disclosures when required under Rule 26(e). **(3)** ***Pretrial Disclosures.*** **(A)** *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

	(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises; **(ii)** the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and **(iii)** an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises. **(B)** *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

	(4) ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.
(f) **Indemnity and insuring agreements.** Except as otherwise provided by law, a party may obtain discovery of the existence and contents of any indemnity or insurance agreement under which any person may be liable to satisfy part or all of a judgment rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the indemnity or insurance agreement is not by reason of disclosure admissible in evidence at trial.	*(closest provision)* **(a) Required Disclosures.** **(1)** ***Initial Disclosure.*** **(A)** *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties: **(iv)** for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.
(g) **Settlement agreements.** A party may obtain discovery of the existence and contents of any relevant portions of a settlement agreement. Information concerning a settlement agreement is not by reason of disclosure admissible in evidence at trial.	*(no directly related provision)*
(h) **Statements of persons with knowledge of relevant facts.** A party may obtain discovery of the statement of any person with knowledge of relevant facts--a "witness statement"-regardless of when the statement was made. A witness statement is (1) a written statement signed or otherwise adopted or approved in writing by the person making it, or (2) a stenographic,	*(no directly related provision)*

mechanical, electrical, or other type of recording of a witness's oral statement, or any substantially verbatim transcription of such a recording. Notes taken during a conversation or interview with a witness are not a witness statement. Any person may obtain, upon written request, his or her own statement concerning the lawsuit, which is in the possession, custody or control of any party. (i) **Potential parties.** A party may obtain discovery of the name, address, and telephone number of any potential party. (j) **Contentions.** A party may obtain discovery of any other party's legal contentions and the factual bases for those contentions.	*(no directly related provision)* *(no directly related provision)*
192.4 Limitations on Scope of Discovery. The discovery methods permitted by these rules should be limited by the court if it determines, on motion or on its own initiative and on reasonable notice, that: (a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or (b) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.	**(b) Discovery Scope and Limits.** **(2) *Limitations on Frequency and Extent.*** **(A)** *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. **(B)** *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not

	reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery. **(C)** *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: **(i)** the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; **(ii)** the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or **(iii)** the proposed discovery <u>is outside the scope permitted by Rule 26(b)(1).</u>
192.5 Work Product. (a) **Work product defined.** Work product comprises: (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or (2) a communication made in anticipation of litigation or	*(closest provisions)* **(b) Discovery Scope and Limits.** **(3)** ***Trial Preparation: Materials*.** **(A)** *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer,

for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents. (b) **Protection of work product.** (1) **Protection of core work product--attorney mental processes**. Core work product - the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories - is not discoverable. (2) **Protection of other work product**. Any other work product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means. (3) **Incidental disclosure of attorney mental processes**. It is not a violation of subparagraph (1) if disclosure ordered pursuant to subparagraph (2) incidentally discloses by inference attorney mental processes otherwise protected under subparagraph (1). (4) **Limiting disclosure of mental processes.** If a court orders discovery of work product pursuant to subparagraph (2), the court must--insofar as possible--protect against disclosure of the mental impressions, opinions, conclusions, or legal theories not otherwise discoverable. (c) **Exceptions.** Even if made or prepared in anticipation of litigation or for trial, the following is not work product	or agent). But, subject to Rule 26(b)(4), those materials may be discovered if: **(i)** they are otherwise discoverable under Rule 26(b)(1); and **(ii)** the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. **(B)** *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation. **(C)** *Previous Statement*. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either: **(i)** a written statement that the person has signed or otherwise adopted or approved; or **(ii)** a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

protected from discovery: (1) information discoverable under Rule 192.3 concerning experts, trial witnesses, witness statements, and contentions; (2) trial exhibits ordered disclosed under Rule 166 or Rule 190.4; (3) the name, address, and telephone number of any potential party or any person with knowledge of relevant facts; (4) any photograph or electronic image of underlying facts (e.g., a photograph of the accident scene) or a photograph or electronic image of any sort that a party intends to offer into evidence; and (5) any work product created under circumstances within an exception to the attorney-client privilege in Rule 503(d) of the Rules of Evidence. (d) **Privilege.** For purposes of these rules, an assertion that material or information is work product is an assertion of privilege.	**(4) *Trial Preparation: Experts*.** **(A)** *Deposition of an Expert Who May Testify*. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided. **(B)** *Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded. **(C)** *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses*. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications: **(i)** relate to compensation for the expert's study or testimony; **(ii)** identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or **(iii)** identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. **(D)** *Expert Employed Only for Trial Preparation*.

	Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only: (i) as provided in Rule 35(b); or (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means. **(E)** *Payment*. Unless manifest injustice would result, the court must require that the party seeking discovery: (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and (ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions. **(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*** **(A)** *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents,

	communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim. **(B)** *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.
192.6 Protective Order. (a) **Motion.** A person from whom discovery is sought, and any other person affected by the discovery request, may move within the time permitted for response to the discovery request for an order protecting that person from the discovery sought.	**(c) Protective Orders.** **(1)** ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the

A person should not move for protection when an objection to written discovery or an assertion of privilege is appropriate, but a motion does not waive the objection or assertion of privilege. If a person seeks protection regarding the time or place of discovery, the person must state a reasonable time and place for discovery with which the person will comply. A person must comply with a request to the extent protection is not sought unless it is unreasonable under the circumstances to do so before obtaining a ruling on the motion. (b) **Order.** To protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may - among other things - order that: (1) the requested discovery not be sought in whole or in part; (2) the extent or subject matter of discovery be limited; (3) the discovery not be undertaken at the time or place specified; (4) the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court; (5) the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a.	court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: **(A)** forbidding the disclosure or discovery; **(B)** specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; **(C)** prescribing a discovery method other than the one selected by the party seeking discovery; **(D)** forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters; **(E)** designating the persons who may be present while the discovery is conducted; **(F)** requiring that a deposition be sealed and opened only on court order; **(G)** requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and **(H)** requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs. **(2)** ***Ordering Discovery***. If a motion for a protective order is wholly or partly denied, the court may, on just

	terms, order that any party or person provide or permit discovery. **(3) *Awarding Expenses*.** Rule 37(a)(5) applies to the award of expenses.
192.7 Definitions. As used in these rules (a) *Written discovery* means requests for disclosure, requests for production and inspection of documents and tangible things, requests for entry onto property, interrogatories, and requests for admission. (b) *Possession, custody, or control* of an item means that the person either has physical possession of the item or has a right to possession of the item that is equal or superior to the person who has physical possession of the item. (c) A *testifying expert* is an expert who may be called to testify as an expert witness at trial. (d) A *consulting expert* is an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert.	*(no directly related provision)*
RULE 193. WRITTEN DISCOVERY: RESPONSE; OBJECTION; ASSERTION OF PRIVILEGE; SUPPLEMENTATION AND AMENDMENT; FAILURE TO TIMELY RESPOND; PRESUMPTION OF AUTHENTICITY	

193.1 Responding to Written Discovery; Duty to Make Complete Response. A party must respond to written discovery in writing within the time provided by court order or these rules. When responding to written discovery, a party must make a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made. The responding party's answers, objections, and other responses must be preceded by the request to which they apply.	*(no directly related provision)*
193.2 Objecting to Written Discovery (a) **Form and time for objections.** A party must make any objection to written discovery in writing - either in the response or in a separate document - within the time for response. The party must state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request. (b) **Duty to respond when partially objecting; objection to time or place of production.** A party must comply with as much of the request to which the party has made no objection unless it is unreasonable under the circumstances to do so before obtaining a ruling on the objection. If the responding party objects to the requested time or place of production, the responding party must state a reasonable time and place for complying with the request and must comply at that time and place without further request or order. (c) **Good faith basis for objection.** A party may object to written discovery only if a good faith factual and legal basis for the objection exists at the time the objection is made. (d) **Amendment.** An objection or response to written discovery may be amended or supplemented to state an objection or	*(no directly related provisions, however the following provisions concern objecting to initial disclosures or pretrial disclosures)* **(a) Required Disclosures.** **(1)** ***Initial Disclosure.*** **(C)** *Time for Initial Disclosures—In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure. **(D)** *Time for Initial Disclosures—For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or

basis that, at the time the objection or response initially was made, either was inapplicable or was unknown after reasonable inquiry. (e) **Waiver of objection.** An objection that is not made within the time required, or that is obscured by numerous unfounded objections, is waived unless the court excuses the waiver for good cause shown. (f) **No objection to preserve privilege.** A party should not object to a request for written discovery on the grounds that it calls for production of material or information that is privileged but should instead comply with Rule 193.3. A party who objects to production of privileged material or information does not waive the privilege but must comply with Rule 193.3 when the error is pointed out.	court order. **(E)** *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures. **(3) Pretrial Disclosures.** **(B)** *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.
193.3 Asserting a Privilege A party may preserve a privilege from written discovery in accordance with this subdivision.	*(closest provision)* **(b) Discovery Scope and Limits.** **(5) *Claiming Privilege or Protecting Trial-Preparation Materials.***

(a) **Withholding privileged material or information.** A party who claims that material or information responsive to written discovery is privileged may withhold the privileged material or information from the response. The party must state--in the response (or an amended or supplemental response) or in a separate document--that: (1) information or material responsive to the request has been withheld, (2) the request to which the information or material relates, and (3) the privilege or privileges asserted. (b) **Description of withheld material or information.** After receiving a response indicating that material or information has been withheld from production, the party seeking discovery may serve a written request that the withholding party identify the information and material withheld. Within 15 days of service of that request, the withholding party must serve a response that: (1) describes the information or materials withheld that, without revealing the privileged information itself or otherwise waiving the privilege, enables other parties to assess the applicability of the privilege, and (2) asserts a specific privilege for each item or group of items withheld. (c) **Exemption.** Without complying with paragraphs (a) and (b), a party may withhold a privileged communication to or from a lawyer or lawyer's representative or a privileged document of a lawyer or lawyer's representative (1) created or made from the point at which a party consults a lawyer with a view to obtaining professional legal services from the lawyer in the prosecution or	**(A)** *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim. **(B)** *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

defense of a specific claim in the litigation in which discovery is requested, and (2) concerning the litigation in which the discovery is requested. (d) **Privilege not waived by production**. A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if - within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made - the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.	
193.4 Hearing and Ruling on Objections and Assertions of Privilege. (a) **Hearing.** Any party may at any reasonable time request a hearing on an objection or claim of privilege asserted under this rule. The party making the objection or asserting the privilege must present any evidence necessary to support the objection or privilege. The evidence may be testimony presented at the hearing or affidavits served at least seven days before the hearing or at such other reasonable time as the court permits. If the court determines that an *in camera* review of some or all of the requested discovery is necessary, that material or information must be segregated and produced to the court in a sealed wrapper within a reasonable time following the hearing.	*(No directly related provision)*

(b) **Ruling.** To the extent the court sustains the objection or claim of privilege, the responding party has no further duty to respond to that request. To the extent the court overrules the objection or claim of privilege, the responding party must produce the requested material or information within 30 days after the court's ruling or at such time as the court orders. A party need not request a ruling on that party's own objection or assertion of privilege to preserve the objection or privilege. (c) **Use of material or information withheld under claim of privilege.** A party may not use--at any hearing or trial--material or information withheld from discovery under a claim of privilege, including a claim sustained by the court, without timely amending or supplementing the party's response to that discovery.	
193.5 Amending or Supplementing Responses to Written Discovery. (a) **Duty to amend or supplement.** If a party learns that the party's response to written discovery was incomplete or incorrect when made, or, although complete and correct when made, is no longer complete and correct, the party must amend or supplement the response: (1) to the extent that the written discovery sought the identification of persons with knowledge of relevant facts, trial witnesses, or expert witnesses, and (2) to the extent that the written discovery sought other information, unless the additional or corrective information has been made known to the other parties in writing, on the record at a deposition, or through other discovery responses. (b) **Time and form of amended or supplemental response**. An	*(closest provision)* **(e) Supplementing Disclosures and Responses.** **(1)** ***In General.*** A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response: **(A)** in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or **(B)** as ordered by the court. **(2)** ***Expert Witness****.* For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the

amended or supplemental response must be made reasonably promptly after the party discovers the necessity for such a response. Except as otherwise provided by these rules, it is presumed that an amended or supplemental response made less than 30 days before trial was not made reasonably promptly. An amended or supplemental response must be in the same form as the initial response and must be verified by the party if the original response was required to be verified by the party, but the failure to comply with this requirement does not make the amended or supplemental response untimely unless the party making the response refuses to correct the defect within a reasonable time after it is pointed out.	report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.
193.6 Failing to Timely Respond - Effect on Trial (a) **Exclusion of evidence and exceptions.** A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that: (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties. (b) **Burden of establishing exception.** The burden of establishing good cause or the lack of unfair surprise or unfair prejudice is on the party seeking to introduce the evidence or call the witness. A finding of good cause or of the lack of unfair	*(No directly related provision)*

surprise or unfair prejudice must be supported by the record. (c) **Continuance.** Even if the party seeking to introduce the evidence or call the witness fails to carry the burden under paragraph (b), the court may grant a continuance or temporarily postpone the trial to allow a response to be made, amended, or supplemented, and to allow opposing parties to conduct discovery regarding any new information presented by that response.	
193.7 Production of Documents Self-Authenticating A party's production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial unless - within ten days or a longer or shorter time ordered by the court, after the producing party has actual notice that the document will be used - the party objects to the authenticity of the document, or any part of it, stating the specific basis for objection. An objection must be either on the record or in writing and must have a good faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity.	*(No directly related provision)*
RULE 194. REQUESTS FOR DISCLOSURE	*(Full Required Disclosures, partially quoted above, are included here)*
194.1 Request. A party may obtain disclosure from another party of the information or material listed in Rule 194.2 by serving the other party - no later than 30 days before the end of any applicable discovery period - the following request: "Pursuant to Rule 194,	**(a) Required Disclosures.** **(1) *Initial Disclosure.*** **(A)** *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a

you are requested to disclose, within 30 days of service of this request, the information or material described in Rule [state rule, e.g., 194.2, or 194.2(a), (c), and (f), or 194.2(d)-(g)]." **194.2 Content.** A party may request disclosure of any or all of the following: (a) the correct names of the parties to the lawsuit; (b) the name, address, and telephone number of any potential parties; (c) the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial); (d) the amount and any method of calculating economic damages; (e) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case; (f) for any testifying expert: (1) the expert's name, address, and telephone number; (2) the subject matter on which the expert will testify; (3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information; (4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party: (A) all documents, tangible things, reports, models, or data compilations that have been	discovery request, provide to the other parties: **(i)** the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment; **(ii)** a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment; **(iii)** a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and **(iv)** for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible

provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and (B) the expert's current resume and bibliography; (g) any indemnity and insuring agreements described in Rule 192.3(f); (h) any settlement agreements described in Rule 192.3(g); (i) any witness statements described in Rule 192.3(h); (j) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills; (k) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party; (l) the name, address, and telephone number of any person who may be designated as a responsible third party. **194.3 Response.** The responding party must serve a written response on the requesting party within 30 days after service of the request, except that: (a) a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request, and (b) a response to a request under Rule 194.2(f) is governed by Rule 195. **194.4 Production.**	judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment. **(B)** *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure: **(i)** an action for review on an administrative record; **(ii)** a forfeiture action in rem arising from a federal statute; **(iii)** a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence; **(iv)** an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision; **(v)** an action to enforce or quash an administrative summons or subpoena; **(vi)** an action by the United States to recover benefit payments; **(vii)** an action by the United States to collect on a student loan guaranteed by the United States; **(viii)** a proceeding ancillary to a proceeding in another court; and **(ix)** an action to enforce an arbitration award. **(C)** *Time for Initial Disclosures—In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f)

Copies of documents and other tangible items ordinarily must be served with the response. But if the responsive documents are voluminous, the response must state a reasonable time and place for the production of documents. The responding party must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them. **194.5 No Objection or Assertion of Work Product.** No objection or assertion of work product is permitted to a request under this rule. **194.6 Certain Responses Not Admissible.** A response to requests under Rule 194.2(c) and (d) that has been changed by an amended or supplemental response is not admissible and may not be used for impeachment.	conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure. **(D)** *Time for Initial Disclosures—For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order. **(E)** *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures. **(2) *Disclosure of Expert Testimony*.** **(A)** *In General*. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. **(B)** *Witnesses Who Must Provide a Written*

	Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain: **(i)** a complete statement of all opinions the witness will express and the basis and reasons for them; **(ii)** the facts or data considered by the witness in forming them; **(iii)** any exhibits that will be used to summarize or support them; **(iv)** the witness's qualifications, including a list of all publications authored in the previous 10 years; **(v)** a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and **(vi)** a statement of the compensation to be paid for the study and testimony in the case. **(C)** *Witnesses Who Do Not Provide a Written Report*. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state: **(i)** the subject matter on which the witness is expected to present evidence

	under Federal Rule of Evidence 702, 703, or 705; and **(ii)** a summary of the facts and opinions to which the witness is expected to testify. **(D)** *Time to Disclose Expert Testimony*. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made: **(i)** at least 90 days before the date set for trial or for the case to be ready for trial; or **(ii)** if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure. **(E)** *Supplementing the Disclosure*. The parties must supplement these disclosures when required under Rule 26(e). **(3)** ***Pretrial Disclosures.*** **(A)** *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment: **(i)** the name and, if not previously provided, the address and telephone number of each witness—separately

	identifying those the party expects to present and those it may call if the need arises; **(ii)** the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and **(iii)** an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises. **(B)** *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause. **(4)** ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

RULE 205. DISCOVERY FROM NON-PARTIES **205.1 Forms of Discovery; Subpoena Requirement.** A party may compel discovery from a nonparty--that is, a person who is not a party or subject to a party's control--only by obtaining a court order under Rules 196.7, 202, or 204, or by serving a subpoena compelling: (a) an oral deposition; (b) a deposition on written questions; (c) a request for production of documents or tangible things, pursuant to Rule 199.2(b)(5) or Rule 200.1(b), served with a notice of deposition on oral examination or written questions; and (d) a request for production of documents and tangible things under this rule. **205.2 Notice.** A party seeking discovery by subpoena from a nonparty must serve, on the nonparty and all parties, a copy of the form of notice required under the rules governing the applicable form of discovery. A notice of oral or written deposition must be served before or at the same time that a subpoena compelling attendance or production under the notice is served. A notice to produce documents or tangible things under Rule 205.3 must be served at least 10 days before the subpoena compelling production is served. **205.3 Production of Documents and Tangible Things Without Deposition.**	*(See Fed. R. Civ. P. 45, which governs subpoenas)*

(a) **Notice; subpoena.** A party may compel production of documents and tangible things from a nonparty by serving - reasonable time before the response is due but no later than 30 days before the end of any applicable discovery period - the notice required in Rule 205.2 and a subpoena compelling production or inspection of documents or tangible things. (b) **Contents of notice.** The notice must state: (1) the name of the person from whom production or inspection is sought to be compelled; (2) a reasonable time and place for the production or inspection; and (3) the items to be produced or inspected, either by individual item or by category, describing each item and category with reasonable particularity, and, if applicable, describing the desired testing and sampling with sufficient specificity to inform the nonparty of the means, manner, and procedure for testing or sampling. (c) **Requests for production of medical or mental health records of other non-parties.** If a party requests a nonparty to produce medical or mental health records of another nonparty, the requesting party must serve the nonparty whose records are sought with the notice required under this rule. This requirement does not apply under the circumstances set forth in Rule 196.1(c)(2). (d) **Response.** The nonparty must respond to the notice and subpoena in accordance with Rule 176.6. (e) **Custody, inspection and copying.** The party obtaining the production must make all materials produced available for inspection by any other party on reasonable notice, and must furnish copies to any party who requests at that party's expense.	

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

II. Experts

Tex. R. Civ. P. 195	Fed. R. Civ. P. 26(a) (2), (b) (4), (e)
RULE 195. DISCOVERY REGARDING TESTIFYING EXPERT WITNESSES **195.1 Permissible Discovery Tools.** A party may request another party to designate and disclose information concerning testifying expert witnesses only through a request for disclosure under Rule 194 and through depositions and reports as permitted by this rule. **195.2 Schedule for Designating Experts.** Unless otherwise ordered by the court, a party must designate experts - that is, furnish information requested under Rule 194.2(f) - by the later of the following two dates: 30 days after the request is served, or (a) with regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery period; (b) with regard to all other experts, 60 days before the end of the discovery period.	**RULE 26. DUTY TO DISCLOSE; GENERAL PROVISIONS GOVERNING DISCOVERY** **(a) Required Disclosures.** **(2) *Disclosure of Expert Testimony*.** **(A)** *In General*. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. **(B)** *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain: **(i)** a complete statement of all opinions the witness will express and the basis and reasons for them; **(ii)** the facts or data considered by the witness in forming them; **(iii)** any exhibits that will be used to summarize or support them; **(iv)** the witness's qualifications, including a list of all publications authored in the previous 10 years;

	(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and **(vi)** a statement of the compensation to be paid for the study and testimony in the case. **(C)** *Witnesses Who Do Not Provide a Written Report*. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state: **(i)** the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and **(ii)** a summary of the facts and opinions to which the witness is expected to testify. **(D)** *Time to Disclose Expert Testimony*. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made: **(i)** at least 90 days before the date set for trial or for the case to be ready for trial; or **(ii)** if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

	(E) *Supplementing the Disclosure*. The parties must supplement these disclosures when required under Rule 26(e).
195.3 Scheduling Depositions. (a) **Experts for party seeking affirmative relief.** A party seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition as follows: (1) **If no report furnished.** If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is not produced when the expert is designated, then the party must make the expert available for deposition reasonably promptly after the expert is designated. If the deposition cannot--due to the actions of the tendering party--reasonably be concluded more than 15 days before the deadline for designating other experts, that deadline must be extended for other experts testifying on the same subject. (2) **If report furnished.** If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is produced when the expert is designated, then the party need not make the expert available for deposition until reasonably promptly after all other experts have been designated. (b) **Other experts.** A party not seeking affirmative relief must make an expert retained by, employed by, or otherwise in the	**(b) Discovery Scope and Limits.** **(4)** ***Trial Preparation: Experts*****.** **(A)** *Deposition of an Expert Who May Testify*. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided. **(B)** *Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded. **(C)** *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses*. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications: **(i)** relate to compensation for the expert's study or testimony; **(ii)** identify facts or data that the party's attorney provided and that the expert

control of the party available for deposition reasonably promptly after the expert is designated and the experts testifying on the same subject for the party seeking affirmative relief have been deposed. **195.4 Oral Deposition.** In addition to disclosure under Rule 194, a party may obtain discovery concerning the subject matter on which the expert is expected to testify, the expert's mental impressions and opinions, the facts known to the expert (regardless of when the factual information was acquired) that relate to or form the basis of the testifying expert's mental impressions and opinions, and other discoverable matters, including documents not produced in disclosure, only by oral deposition of the expert and by a report prepared by the expert under this rule.	considered in forming the opinions to be expressed; or **(iii)** identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. **(D)** *Expert Employed Only for Trial Preparation*. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only: (i) as provided in Rule 35(b); or (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.
195.5 Court-Ordered Reports. If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert have not been recorded and reduced to tangible form, the court may order these matters reduced to tangible form and produced in addition to the deposition.	*(No directly related provision)*
195.6 Amendment and Supplementation. A party's duty to amend and supplement written discovery regarding a testifying expert is governed by Rule 193.5. If an	**(e) Supplementing Disclosures and Responses.** **(1)** ***In General.*** A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory,

expert witness is retained by, employed by, or otherwise under the control of a party, that party must also amend or supplement any deposition testimony or written report by the expert, but only with regard to the expert's mental impressions or opinions and the basis for them.	request for production, or request for admission—must supplement or correct its disclosure or response: **(A)** in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or **(B)** as ordered by the court. **(2)** ***Expert Witness****.* For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.
195.7 Cost of Expert Witnesses. When a party takes the oral deposition of an expert witness retained by the opposing party, all reasonable fees charged by the expert for time spent in preparing for, giving, reviewing, and correcting the deposition must be paid by the party that retained the expert.	**(b) Discovery Scope and Limits.** **(4)** ***Trial Preparation: Experts*****.** **(E)** *Payment*. Unless manifest injustice would result, the court must require that the party seeking discovery: (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and (ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

III. Pre-Suit Depositions and Depositions Pending Appeal

Tex. R. Civ. P. 202	Fed. R. Civ. P. 27
RULE 202. DEPOSITIONS BEFORE SUIT OR TO INVESTIGATE CLAIMS **202.1 Generally.** A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either: (a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or (b) to investigate a potential claim or suit. **202.2 Petition** The petition must: (a) be verified; (b) be filed in a proper court of any county: (1) where venue of the anticipated suit may lie, if suit is anticipated; or (2) where the witness resides, if no suit is yet anticipated; (c) be in the name of the petitioner; (d) state either: (1) that the petitioner anticipates the institution of a suit in which the petitioner may be a party; or (2) that the petitioner seeks to investigate a potential claim by or against petitioner; (e) state the subject matter of the anticipated action, if any, and the petitioner's interest therein;	**Rule 27. DEPOSITIONS TO PERPETUATE TESTIMONY** **(a) Before an Action Is Filed.** **(1) *Petition.*** A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. **(a) Before an Action Is Filed.** **(1) *Petition.*** A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show: **(A)** that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought; **(B)** the subject matter of the expected action and the petitioner's interest; **(C)** the facts that the petitioner wants to

(f) if suit is anticipated, either: (1) state the names of the persons petitioner expects to have interests adverse to petitioner's in the anticipated suit, and the addresses and telephone numbers for such persons; or (2) state that the names, addresses, and telephone numbers of persons petitioner expects to have interests adverse to petitioner's in the anticipated suit cannot be ascertained through diligent inquiry, and describe those persons; (g) state the names, addresses and telephone numbers of the persons to be deposed, the substance of the testimony that the petitioner expects to elicit from each, and the petitioner's reasons for desiring to obtain the testimony of each; and (h) request an order authorizing the petitioner to take the depositions of the persons named in the petition.	establish by the proposed testimony and the reasons to perpetuate it; **(D)** the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and **(E)** the name, address, and expected substance of the testimony of each deponent.
202.3 Notice and Service. (a) **Personal service on witnesses and persons named.** At least 15 days before the date of the hearing on the petition, the petitioner must serve the petition and a notice of the hearing – in accordance with Rule 21a - on all persons petitioner seeks to depose and, if suit is anticipated, on all persons petitioner expects to have interests adverse to petitioner's in the anticipated suit. (b) **Service by publication on persons not named.** (1) **Manner.** Unnamed persons described in the petition whom the petitioner expects to have interests adverse to petitioner's in the anticipated suit, if any, may be served by publication with the petition and notice of the hearing. The notice must state the place for the hearing	**(2)** ***Notice and Service.*** At least 21 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies.

and the time it will be held, which must be more than 14 days after the first publication of the notice. The petition and notice must be published once each week for two consecutive weeks in the newspaper of broadest circulation in the county in which the petition is filed, or if no such newspaper exists, in the newspaper of broadest circulation in the nearest county where a newspaper is published. (2) **Objection to depositions taken on notice by publication.** Any interested party may move, in the proceeding or by bill of review, to suppress any deposition, in whole or in part, taken on notice by publication, and may also attack or oppose the deposition by any other means available. (c) **Service in probate cases.** A petition to take a deposition in anticipation of an application for probate of a will, and notice of the hearing on the petition, may be served by posting as prescribed by Section 33(f)(2) of the Probate Code. The notice and petition must be directed to all parties interested in the testator's estate and must comply with the requirements of Section 33(c) of the Probate Code insofar as they may be applicable. (d) **Modification by order.** As justice or necessity may require, the court may shorten or lengthen the notice periods under this rule and may extend the notice period to permit service on any expected adverse party.	
202.4 Order. (a) **Required findings.** The court must order a deposition to be taken if, but only if, it finds that: (1) allowing the petitioner to take the requested	**(3) *Order and Examination.*** If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order that designates or describes the persons whose depositions

deposition may prevent a failure or delay of justice in an anticipated suit; or (2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure. (b) **Contents.** The order must state whether a deposition will be taken on oral examination or written questions. The order may also state the time and place at which a deposition will be taken. If the order does not state the time and place at which a deposition will be taken, the petitioner must notice the deposition as required by Rules 199 or 200. The order must contain any protections the court finds necessary or appropriate to protect the witness or any person who may be affected by the procedure.	may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken under these rules, and the court may issue orders like those authorized by Rules 34 and 35. A reference in these rules to the court where an action is pending means, for purposes of this rule, the court where the petition for the deposition was filed.
202.5 Manner of Taking and Use. Except as otherwise provided in this rule, depositions authorized by this rule are governed by the rules applicable to depositions of non-parties in a pending suit. The scope of discovery in depositions authorized by this rule is the same as if the anticipated suit or potential claim had been filed. A court may restrict or prohibit the use of a deposition taken under this rule in a subsequent suit to protect a person who was not served with notice of the deposition from any unfair prejudice or to prevent abuse of this rule.	**(4) *Using the Deposition.*** A deposition to perpetuate testimony may be used under Rule 32(a) in any later-filed district-court action involving the same subject matter if the deposition either was taken under these rules or, although not so taken, would be admissible in evidence in the courts of the state where it was taken.
(No directly related provision)	**(b) Pending Appeal.** **(1) *In General.*** The court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to

	perpetuate their testimony for use in the event of further proceedings in that court. **(2)** ***Motion.*** The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court. The motion must show: **(A)** the name, address, and expected substance of the testimony of each deponent; and **(B)** the reasons for perpetuating the testimony. **(3)** ***Court Order.*** If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in a pending district-court action. **(c) Perpetuation by an Action.** This rule does not limit a court's power to entertain an action to perpetuate testimony.

IV. Depositions

Tex. R. Civ. P. 199-201, 203	Fed. R. Civ. P. 28, 30-32
RULE 199. DEPOSITIONS UPON ORAL EXAMINATION **199.1 Oral Examination; Alternative Methods of Conducting or Recording.** (a) **Generally.** A party may take the testimony of any person or entity by deposition on oral examination before any officer authorized by law to take depositions. The testimony, objections, and any other statements during the deposition must be recorded at the time they are given or made. ***(See Rule 201 below)***	**RULE 28. PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN** **(a) Within the United States.** **(1)** ***In General.*** Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before: **(A)** an officer authorized to administer oaths either by federal law or by the law in the place of examination; or **(B)** a person appointed by the court where the action is pending to administer oaths and take testimony. **(2)** ***Definition of "Officer".*** The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a). **(b) In a Foreign Country.** **(1)** ***In General.*** A deposition may be taken in a foreign country: **(A)** under an applicable treaty or convention; **(B)** under a letter of request, whether or not captioned a "letter rogatory"; **(C)** on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or **(D)** before a person commissioned by the court

	to administer any necessary oath and take testimony. **(2)** ***Issuing a Letter of Request or a Commission.*** A letter of request, a commission, or both may be issued: **(A)** on appropriate terms after an application and notice of it; and **(B)** without a showing that taking the deposition in another manner is impracticable or inconvenient. **(3)** ***Form of a Request, Notice, or Commission.*** When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken. **(4)** ***Letter of Request—Admitting Evidence.*** Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States. **(c) Disqualification.** A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action.

(No directly related provision)	**RULE 30. DEPOSITIONS BY ORAL EXAMINATION** **(a) When a Deposition May Be Taken.** **(1)** ***Without Leave.*** A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45. **(2)** ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2): **(A)** if the parties have not stipulated to the deposition and: **(i)** the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants; **(ii)** the deponent has already been deposed in the case; or **(iii)** the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or **(B)** if the deponent is confined in prison.

(b) **Depositions by telephone or other remote electronic means.** A party may take an oral deposition by telephone or other remote electronic means if the party gives reasonable prior written notice of intent to do so. For the purposes of these rules, an oral deposition taken by telephone or other remote electronic means is considered as having been taken in the district and at the place where the witness is located when answering the questions. The officer taking the deposition may be located with the party noticing the deposition instead of with the witness if the witness is placed under oath by a person who is present with the witness and authorized to administer oaths in that jurisdiction. (c) **Non-stenographic recording.** Any party may cause a deposition upon oral examination to be recorded by other than stenographic means, including videotape recording. The party requesting the non-stenographic recording will be responsible for obtaining a person authorized by law to administer the oath and for assuring that the recording will be intelligible, accurate, and trustworthy. At least five days prior to the deposition, the party must serve on the witness and all parties a notice, either in the notice of deposition or separately, that the deposition will be recorded by other than stenographic means. This notice must state the method of non-stenographic recording to be used and whether the deposition will also be recorded stenographically. Any other party may then serve written notice designating another method of recording in addition to the method specified, at the expense of such other party unless the court orders otherwise.	*(closest provision)* **(b) Notice of the Deposition; Other Formal Requirements.** **(3) *Method of Recording.*** **(A)** *Method Stated in the Notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition. **(B)** *Additional Method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise. **(4) *By Remote Means.*** The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions. **(5) *Officer's Duties.*** **(A)** *Before the Deposition.* Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:

	(i) the officer's name and business address; **(ii)** the date, time, and place of the deposition; **(iii)** the deponent's name; **(iv)** the officer's administration of the oath or affirmation to the deponent; and **(v)** the identity of all persons present. **(B)** *Conducting the Deposition; Avoiding Distortion.* If the deposition is recorded non-stenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques. **(C)** *After the Deposition.* At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.
199.2 Procedure for Noticing Oral Depositions. (a) **Time to notice deposition.** A notice of intent to take an oral deposition must be served on the witness and all parties a reasonable time before the deposition is taken. An oral deposition may be taken outside the discovery period only by agreement of the parties or with leave of court.	**(b) Notice of the Deposition; Other Formal Requirements.** **(1)** ***Notice in General.*** A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown,

(b) **Content of notice.** (1) **Identity of witness; organizations.** The notice must state the name of the witness, which may be either an individual or a public or private corporation, partnership, association, governmental agency, or other organization. If an organization is named as the witness, the notice must describe with reasonable particularity the matters on which examination is requested. In response, the organization named in the notice must - a reasonable time before the deposition - designate one or more individuals to testify on its behalf and set forth, for each individual designated, the matters on which the individual will testify. Each individual designated must testify as to matters that are known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized by these rules. (2) **Time and place.** The notice must state a reasonable time and place for the oral deposition. The place may be in: (A) the county of the witness's residence; (B) the county where the witness is employed or regularly transacts business in person; (C) the county of suit, if the witness is a party or a person designated by a party under Rule 199.2(b)(1); (D) the county where the witness was served with the subpoena, or within 150 miles of the place of service, if the witness is not a resident of Texas or is a transient person; or (E) subject to the foregoing, at any other	the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

convenient place directed by the court in which the cause is pending. (3) **Alternative means of conducting and recording.** The notice must state whether the deposition is to be taken by telephone or other remote electronic means and identify the means. If the deposition is to be recorded by nonstenographic means, the notice may include the notice required by Rule 199.1(c).	**(3)** ***Method of Recording.*** **(A)** *Method Stated in the Notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition. **(B)** *Additional Method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise. **(4)** ***By Remote Means.*** The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.
(4) **Additional attendees.** The notice may include the notice concerning additional attendees required by Rule 199.5(a)(3).	*(No directly related provision)*

(5) **Request for production of documents.** A notice may include a request that the witness produce at the deposition documents or tangible things within the scope of discovery and within the witness's possession, custody, or control. If the witness is a nonparty, the request must comply with Rule 205 and the designation of materials required to be identified in the subpoena must be attached to, or included in, the notice. The nonparty's response to the request is governed by Rules 176 and 205. When the witness is a party or subject to the control of a party, document requests under this subdivision are governed by Rules 193 and 196.	*(closest provision)***(b) Notice of the Deposition; Other Formal Requirements.** **(2)** ***Producing Documents.*** If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition
199.3 Compelling Witness to Attend. A party may compel the witness to attend the oral deposition by serving the witness with a subpoena under Rule 176. If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the notice of oral deposition upon the party's attorney has the same effect as a subpoena served on the witness.	**(6)** ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does

	not preclude a deposition by any other procedure allowed by these rules. **RULE 30(a)(1) *Without Leave.*** . . . The deponent's attendance may be compelled by subpoena under Rule 45.
199.4 Objections to Time and Place of Oral Deposition. A party or witness may object to the time and place designated for an oral deposition by motion for protective order or by motion to quash the notice of deposition. If the motion is filed by the third business day after service of the notice of deposition, an objection to the time and place of a deposition stays the oral deposition until the motion can be determined.	*(No directly related provision)*
199.5 Examination, Objection, and Conduct During Oral Depositions. (a) **Attendance.** (1) **Witness.** The witness must remain in attendance from day to day until the deposition is begun and completed. (2) **Attendance by party.** A party may attend an oral deposition in person, even if the deposition is taken by telephone or other remote electronic means. If a deposition is taken by telephone or other remote electronic means, the party noticing the deposition must make arrangements for all persons to attend by the same means. If the party noticing the deposition appears in person, any other party may appear by	*(Closest provision)* **(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.** **(1) *Examination and Cross-Examination.*** The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

telephone or other remote electronic means if that party makes the necessary arrangements with the deposition officer and the party noticing the deposition. (3) **Other attendees.** If any party intends to have in attendance any persons other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the oral deposition, that party must give reasonable notice to all parties, either in the notice of deposition or separately, of the identity of the other persons. (b) **Oath; examination.** Every person whose deposition is taken by oral examination must first be placed under oath. The parties may examine and cross-examine the witness. Any party, in lieu of participating in the examination, may serve written questions in a sealed envelope on the party noticing the oral deposition, who must deliver them to the deposition officer, who must open the envelope and propound them to the witness.	
(c) **Time limitation.** No side may examine or cross-examine an individual witness for more than six hours. Breaks during depositions do not count against this limitation. (d) **Conduct during the oral deposition; conferences.** The oral deposition must be conducted in the same manner as if the testimony were being obtained in court during trial. Counsel should cooperate with and be courteous to each other and to the witness. The witness should not be evasive and should not unduly delay the examination. Private conferences between the witness and the witness's attorney during the actual taking of	**(d) Duration; Sanction; Motion to Terminate or Limit.** **(1) *Duration.*** Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination. **(2) *Sanction.*** The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who

the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during agreed recesses and adjournments. If the lawyers and witnesses do not comply with this rule, the court may allow in evidence at trial statements, objections, discussions, and other occurrences during the oral deposition that reflect upon the credibility of the witness or the testimony.	impedes, delays, or frustrates the fair examination of the deponent. **(3) *Motion to Terminate or Limit.*** **(A)** *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order. **(B)** *Order.* The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending. **(C)** *Award of Expenses.* Rule 37(a)(5) applies to the award of expenses.
(e) **Objections.** Objections to questions during the oral deposition are limited to "Objection, leading" and "Objection, form." Objections to testimony during the oral deposition are limited to "Objection, non-responsive." These objections are waived if not stated as phrased during the oral deposition. All other objections need not be made or recorded during the oral deposition to be later raised with the court. The objecting party must give a clear and concise explanation of an objection if	**(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.** **(2) *Objections.*** An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken

requested by the party taking the oral deposition, or the objection is waived. Argumentative or suggestive objections or explanations waive objection and may be grounds for terminating the oral deposition or assessing costs or other sanctions. The officer taking the oral deposition will not rule on objections but must record them for ruling by the court. The officer taking the oral deposition must not fail to record testimony because an objection has been made. (f) **Instructions not to answer.** An attorney may instruct a witness not to answer a question during an oral deposition only if necessary to preserve a privilege, comply with a court order or these rules, protect a witness from an abusive question or one for which any answer would be misleading, or secure a ruling pursuant to paragraph (g). The attorney instructing the witness not to answer must give a concise, non-argumentative, non-suggestive explanation of the grounds for the instruction if requested by the party who asked the question.	subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).
(g) **Suspending the deposition.** If the time limitations for the deposition have expired or the deposition is being conducted or defended in violation of these rules, a party or witness may suspend the oral deposition for the time necessary to obtain a ruling. (h) **Good faith required.** An attorney must not ask a question at an oral deposition solely to harass or mislead the witness, for any other improper purpose, or without a good faith legal basis at the time. An attorney must not object to a question at an oral deposition, instruct the witness not to answer a question, or suspend the deposition unless there is a good faith factual and legal basis for doing so at the time.	*(Closest provisions)* **(d)(3) *Motion to Terminate or Limit.*** **(A)** *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order. **(B)** *Order.* The court may order that the

	deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending. **(C)** *Award of Expenses.* Rule 37(a)(5) applies to the award of expenses.
199.6 Hearing on Objections. Any party may, at any reasonable time, request a hearing on an objection or privilege asserted by an instruction not to answer or suspension of the deposition; provided the failure of a party to obtain a ruling prior to trial does not waive any objection or privilege. The party seeking to avoid discovery must present any evidence necessary to support the objection or privilege either by testimony at the hearing or by affidavits served on opposing parties at least seven days before the hearing. If the court determines that an *in camera* review of some or all of the requested discovery is necessary to rule, answers to the deposition questions may be made in camera, to be transcribed and sealed in the event the privilege is sustained, or made in an affidavit produced to the court in a sealed wrapper.	*(No directly related provision)*
(See Tex. R. Civ. P. 203 below)	**(e) Review by the Witness; Changes.** **(1)** ***Review; Statement of Changes.*** On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which: **(A)** to review the transcript or recording; and

(See Tex. R. Civ. P. 203 below)	**(B)** if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them. **(2)** ***Changes Indicated in the Officer's Certificate.*** The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period. **(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.** **(1)** ***Certification and Delivery.*** The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration. **(2)** ***Documents and Tangible Things.*** **(A)** *Originals and Copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may: **(i)** offer copies to be marked, attached to

	the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or **(ii)** give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition. **(B)** *Order Regarding the Originals.* Any party may move for an order that the originals be attached to the deposition pending final disposition of the case. **(3)** ***Copies of the Transcript or Recording.*** Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent. **(4)** ***Notice of Filing.*** A party who files the deposition must promptly notify all other parties of the filing.
(no directly related provision)	**(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses.** A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to: **(1)** attend and proceed with the deposition; or **(2)** serve a subpoena on a nonparty deponent, who consequently did not attend.

RULE 200. DEPOSITIONS UPON WRITTEN QUESTIONS

200.1 Procedure for Noticing Deposition Upon Written Questions.

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

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

(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(3) ***Participating Through Written Questions.*** Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

RULE 31. DEPOSITIONS BY WRITTEN QUESTIONS

(a) When a Deposition May Be Taken.

(1) ***Without Leave.*** A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take a deposition

	before the time specified in Rule 26(d); or **(B)** if the deponent is confined in prison. **(3)** ***Service; Required Notice.*** A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken. **(4)** ***Questions Directed to an Organization.*** A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6). **(5)** ***Questions from Other Parties.*** Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times.
200.2 Compelling Witness to Attend. A party may compel the witness to attend the deposition on written questions by serving the witness with a subpoena under Rule 176. If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the deposition notice upon the party's attorney has	*(See above)* **(a)(1)** ***Without Leave.*** . . . The deponent's attendance may be compelled by subpoena under Rule 45.

the same effect as a subpoena served on the witness.	
200.3 Questions and Objections. (a) **Direct questions.** The direct questions to be propounded to the witness must be attached to the notice. (b) **Objections and additional questions.** Within ten days after the notice and direct questions are served, any party may object to the direct questions and serve cross-questions on all other parties. Within five days after cross-questions are served, any party may object to the cross-questions and serve redirect questions on all other parties. Within three days after redirect questions are served, any party may object to the redirect questions and serve re-cross questions on all other parties. Objections to re-cross questions must be served within five days after the earlier of when re-cross questions are served or the time of the deposition on written questions. (c) **Objections to form of questions.** Objections to the form of a question are waived unless asserted in accordance with this subdivision.	*(closest provision)* **RULE 32.(d)(3)(C)** *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it.
200.4 Conducting the Deposition Upon Written Questions. The deposition officer must: take the deposition on written questions at the time and place designated; record the testimony of the witness under oath in response to the questions; and prepare, certify, and deliver the deposition transcript in accordance with Rule 203. The deposition officer has authority when necessary to summon and swear an interpreter to facilitate the taking of the deposition.	**(b) Delivery to the Officer; Officer's Duties.** The party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in Rule 30(c), (e), and (f) to: **(1)** take the deponent's testimony in response to the questions; **(2)** prepare and certify the deposition; and **(3)** send it to the party, attaching a copy of the questions

	and of the notice. **(c) Notice of Completion or Filing.** **(1)** ***Completion.*** The party who noticed the deposition must notify all other parties when it is completed. **(2)** ***Filing.*** A party who files the deposition must promptly notify all other parties of the filing.
RULE 201. DEPOSITIONS IN FOREIGN JURISDICTIONS FOR USE IN TEXAS PROCEEDINGS; DEPOSITIONS IN TEXAS FOR USE IN FOREIGN PROCEEDINGS **201.1 Depositions in Foreign Jurisdictions for Use in Texas Proceedings.** (a) **Generally.** A party may take a deposition on oral examination or written questions of any person or entity located in another state or a foreign country for use in proceedings in this State. The deposition may be taken by: (1) notice; (2) letter rogatory, letter of request, or other such device; (3) agreement of the parties; or (4) court order. (b) **By notice.** A party may take the deposition by notice in accordance with these rules as if the deposition were taken in this State, except that the deposition officer may be a person authorized to administer oaths in the place where the deposition is taken. (c) **By letter rogatory.** On motion by a party, the court in which an action is pending must issue a letter rogatory on terms that are just and appropriate, regardless of whether any other	**RULE 28(b) In a Foreign Country.** **(1)** ***In General.*** A deposition may be taken in a foreign country: **(A)** under an applicable treaty or convention; **(B)** under a letter of request, whether or not captioned a "letter rogatory"; **(C)** on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or **(D)** before a person commissioned by the court to administer any necessary oath and take testimony. **(2)** ***Issuing a Letter of Request or a Commission.*** A letter of request, a commission, or both may be issued: **(A)** on appropriate terms after an application and notice of it; and **(B)** without a showing that taking the deposition in another manner is impracticable or inconvenient. **(3)** ***Form of a Request, Notice, or Commission.*** When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of

manner of obtaining the deposition is impractical or inconvenient. The letter must: (1) be addressed to the appropriate authority in the jurisdiction in which the deposition is to be taken; (2) request and authorize that authority to summon the witness before the authority at a time and place stated in the letter for examination on oral or written questions; and (3) request and authorize that authority to cause the witness's testimony to be reduced to writing and returned, together with any items marked as exhibits, to the party requesting the letter rogatory. (d) **By letter of request or other such device.** On motion by a party, the court in which an action is pending, or the clerk of that court, must issue a letter of request or other such device in accordance with an applicable treaty or international convention on terms that are just and appropriate. The letter or other device must be issued regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter or other device must: (1) be in the form prescribed by the treaty or convention under which it is issued, as presented by the movant to the court or clerk; and (2) must state the time, place, and manner of the examination of the witness. (e) **Objections to form of letter rogatory, letter of request, or other such device.** In issuing a letter rogatory, letter of request, or other such device, the court must set a time for objecting to the form of the device. A party must make any objection to the form of the device in writing and serve it on all other parties by the time set by the court, or the objection is waived.	request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken.

(f) **Admissibility of evidence.** Evidence obtained in response to a letter rogatory, letter of request, or other such device is not inadmissible merely because it is not a verbatim transcript, or the testimony was not taken under oath, or for any similar departure from the requirements for depositions taken within this State under these rules.	**(4)** ***Letter of Request—Admitting Evidence.*** Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States.
(g) **Deposition by electronic means.** A deposition in another jurisdiction may be taken by telephone, video conference, teleconference, or other electronic means under the provisions of Rule 199.	
201.2 Depositions in Texas for Use in Proceedings in Foreign Jurisdictions. If a court of record of any other state or foreign jurisdiction issues a mandate, writ, or commission that requires a witness's oral or written deposition testimony in this State, the witness may be compelled to appear and testify in the same manner and by the same process used for taking testimony in a proceeding pending in this State.	*(No directly related provision)*
RULE 203. SIGNING, CERTIFICATION AND USE OF ORAL AND WRITTEN DEPOSITIONS **203.1 Signature and Changes.** (a) **Deposition transcript to be provided to witness.** The deposition officer must provide the original deposition transcript to the witness for examination and signature. If the witness is represented by an attorney at the deposition, the deposition officer must provide the transcript to the attorney instead of the witness.	**RULE 30(e) Review by the Witness; Changes.** **(1)** ***Review; Statement of Changes.*** On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which: **(A)** to review the transcript or recording; and **(B)** if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(b) **Changes by witness; signature.** The witness may change responses as reflected in the deposition transcript by indicating the desired changes, in writing, on a separate sheet of paper, together with a statement of the reasons for making the changes. No erasures or obliterations of any kind may be made to the original deposition transcript. The witness must then sign the transcript under oath and return it to the deposition officer. If the witness does not return the transcript to the deposition officer within 20 days of the date the transcript was provided to the witness or the witness's attorney, the witness may be deemed to have waived the right to make the changes. (c) **Exceptions.** The requirements of presentation and signature under this subdivision do not apply: (1) if the witness and all parties waive the signature requirement; (2) to depositions on written questions; or (3) to non-stenographic recordings of oral depositions.	**(2)** ***Changes Indicated in the Officer's Certificate.*** The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.
203.2 Certification. The deposition officer must file with the court, serve on all parties, and attach as part of the deposition transcript or non-stenographic recording of an oral deposition a certificate duly sworn by the officer stating: (a) that the witness was duly sworn by the officer and that the transcript or non-stenographic recording of the oral deposition is a true record of the testimony given by the witness; (b) that the deposition transcript, if any, was submitted to the witness or to the attorney for the witness for examination and signature, the date on which the transcript was submitted, whether the witness returned the transcript, and if so, the date	**RULE 30(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.** **(1)** ***Certification and Delivery.*** The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under

on which it was returned. (c) that changes, if any, made by the witness are attached to the deposition transcript; (d) that the deposition officer delivered the deposition transcript or nonstenographic recording of an oral deposition in accordance with Rule 203.3; (e) the amount of time used by each party at the deposition; (f) the amount of the deposition officer's charges for preparing the original deposition transcript, which the clerk of the court must tax as costs; and (g) that a copy of the certificate was served on all parties and the date of service.	conditions that will protect it against loss, destruction, tampering, or deterioration.
203.3 Delivery. (a) **Endorsement; to whom delivered.** The deposition officer must endorse the title of the action and "Deposition of (name of witness)" on the original deposition transcript (or a copy, if the original was not returned) or the original nonstenographic recording of an oral deposition, and must return: (1) the transcript to the party who asked the first question appearing in the transcript, or (2) the recording to the party who requested it. (b) **Notice.** The deposition officer must serve notice of delivery on all other parties. (c) **Inspection and copying; copies.** The party receiving the original deposition transcript or non-stenographic recording must make it available upon reasonable request for inspection and copying by any other party. Any party or the witness is entitled to obtain a copy of the deposition transcript or non-stenographic recording from the deposition officer upon payment of a reasonable fee.	*(copied from above)* **RULE 30(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.** **(1) *Certification and Delivery.*** The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

203.4 Exhibits. At the request of a party, the original documents and things produced for inspection during the examination of the witness must be marked for identification by the deposition officer and annexed to the deposition transcript or non-stenographic recording. The person producing the materials may produce copies instead of originals if the party gives all other parties fair opportunity at the deposition to compare the copies with the originals. If the person offers originals rather than copies, the deposition officer must, after the conclusion of the deposition, make copies to be attached to the original deposition transcript or non-stenographic recording, and then return the originals to the person who produced them. The person who produced the originals must preserve them for hearing or trial and make them available for inspection or copying by any other party upon seven days' notice. Copies annexed to the original deposition transcript or non-stenographic recording may be used for all purposes.	*(closest provision)* **RULE 30(f)(2)** ***Documents and Tangible Things.*** **(A)** *Originals and Copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may: **(i)** offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or **(ii)** give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition. **(B)** *Order Regarding the Originals.* Any party may move for an order that the originals be attached to the deposition pending final disposition of the case. **(3)** ***Copies of the Transcript or Recording.*** Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

203.5 Motion to Suppress. A party may object to any errors and irregularities in the manner in which the testimony is transcribed, signed, delivered, or otherwise dealt with by the deposition officer by filing a motion to suppress all or part of the deposition. If the deposition officer complies with Rule 203.3 at least one day before the case is called to trial, with regard to a deposition transcript, or 30 days before the case is called to trial, with regard to a non-stenographic recording, the party must file and serve a motion to suppress before trial commences to preserve the objections.	**(4) *Notice of Filing.*** A party who files the deposition must promptly notify all other parties of the filing. *(Closest provisions)* **RULE 32(b) Objections to Admissibility.** Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying. **RULE 32(c) Form of Presentation.** Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise. **RULE 32(d) Waiver of Objections.** **(1) *To the Notice.*** An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice. **(2) *To the Officer's Qualification.*** An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made: **(A)** before the deposition begins; or **(B)** promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known. **(3) *To the Taking of the Deposition.*** **(A)** *Objection to Competence, Relevance, or Materiality.* An objection to a deponent's competence--or to the competence, relevance,

	or materiality of testimony--is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time. **(B)** *Objection to an Error or Irregularity.* An objection to an error or irregularity at an oral examination is waived if: **(i)** it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and **(ii)** it is not timely made during the deposition. **(C)** *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it. **(4)** ***To Completing and Returning the Deposition.*** An objection to how the officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

203.6 Use. (a) **Non-stenographic recording; transcription.** A non-stenographic recording of an oral deposition, or a written transcription of all or part of such a recording, may be used to the same extent as a deposition taken by stenographic means. However, the court, for good cause shown, may require that the party seeking to use a non-stenographic recording or written transcription first obtain a complete transcript of the deposition recording from a certified court reporter. The court reporter's transcription must be made from the original or a certified copy of the deposition recording. The court reporter must, to the extent applicable, comply with the provisions of this rule, except that the court reporter must deliver the original transcript to the attorney requesting the transcript, and the court reporter's certificate must include a statement that the transcript is a true record of the non-stenographic recording. The party to whom the court reporter delivers the original transcript must make the transcript available, upon reasonable request, for inspection and copying by the witness or any party. (b) **Same proceeding.** All or part of a deposition may be used for any purpose in the same proceeding in which it was taken. If the original is not filed, a certified copy may be used. "Same proceeding" includes a proceeding in a different court but involving the same subject matter and the same parties or their representatives or successors in interest. A deposition is admissible against a party joined after the deposition was taken if: (1) the deposition is admissible pursuant to Rule 804(b)(1) of the Rules of Evidence, or (2) that party has had a reasonable opportunity to	**RULE 32. USING DEPOSITIONS IN COURT PROCEEDINGS** *(Closest provisions)* **(a) Using Depositions.** **(1)** ***In General.*** At a hearing or trial, all or part of a deposition may be used against a party on these conditions: **(A)** the party was present or represented at the taking of the deposition or had reasonable notice of it; **(B)** it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and **(C)** the use is allowed by Rule 32(a)(2) through (8). **(2)** ***Impeachment and Other Uses.*** Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence. **(3)** ***Deposition of Party, Agent, or Designee.*** An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4). **(4)** ***Unavailable Witness.*** A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds: **(A)** that the witness is dead; **(B)** that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

redepose the witness and has failed to do so.	**(C)** that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment; **(D)** that the party offering the deposition could not procure the witness's attendance by subpoena; or **(E)** on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used. **(5)** ***Limitations on Use.*** **(A)** *Deposition Taken on Short Notice.* A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place—and this motion was still pending when the deposition was taken. **(B)** *Unavailable Deponent; Party Could Not Obtain an Attorney.* A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition. **(6)** ***Using Part of a Deposition.*** If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in

	fairness should be considered with the part introduced, and any party may itself introduce any other parts. **(7) *Substituting a Party.*** Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.
(c) **Different proceeding**. Depositions taken in different proceedings may be used as permitted by the Rules of Evidence.	*(closest provision)* **(8) *Deposition Taken in an Earlier Action.*** A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.
(See Rule 203.5 above)	**(b) Objections to Admissibility.** Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying. **(c) Form of Presentation.** Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise. **(d) Waiver of Objections.** **(1) *To the Notice.*** An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice. **(2) *To the Officer's Qualification.*** An objection based on

	disqualification of the officer before whom a deposition is to be taken is waived if not made: **(A)** before the deposition begins; or **(B)** promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known. **(3)** ***To the Taking of the Deposition.*** **(A)** *Objection to Competence, Relevance, or Materiality.* An objection to a deponent's competence--or to the competence, relevance, or materiality of testimony--is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time. **(B)** *Objection to an Error or Irregularity.* An objection to an error or irregularity at an oral examination is waived if: **(i)** it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and **(ii)** it is not timely made during the deposition.
(reproduced from above) Rule 200.3(c) **Objections to form of questions.** Objections to the form of a question are waived unless asserted in accordance with this subdivision.	**(C)** *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for

(See Rule 203.5 above)	serving responsive questions or, if the question is a recross-question, within 7 days after being served with it. **(4)** ***To Completing and Returning the Deposition.*** An objection to how the officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

V. Stipulations about Discovery Procedure

Tex. R. Civ. P. 191.1, 191.2	Fed. R. Civ. P. 29
191.1 Modification of Procedures Except where specifically prohibited, the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit by the agreement of the parties or by court order for good cause. An agreement of the parties is enforceable if it complies with Rule 11 or, as it affects an oral deposition, if it is made a part of the record of the deposition. **191.2 Conference.** Parties and their attorneys are expected to cooperate in discovery and to make any agreements reasonably necessary for the efficient disposition of the case. All discovery motions or requests for hearings relating to discovery must contain a certificate by the party filing the motion or request that a reasonable effort has been made to resolve the dispute without the necessity of court intervention and the effort failed.	**RULE 29. STIPULATIONS ABOUT DISCOVERY PROCEDURE** Unless the court orders otherwise, the parties may stipulate that: **(a)** a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition; and **(b)** other procedures governing or limiting discovery be modified—but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

VI. Interrogatories

Tex. R. Civ. P. 197	Fed. R. Civ. P. 33
RULE 197. INTERROGATORIES TO PARTIES **197.1 Interrogatories.** A party may serve on another party - no later than 30 days before the end of the discovery period - written interrogatories to inquire about any matter within the scope of discovery except matters covered by Rule 195. An interrogatory may inquire whether a party makes a specific legal or factual contention and may ask the responding party to state the legal theories and to describe in general the factual bases for the party's claims or defenses, but interrogatories may not be used to require the responding party to marshal all of its available proof or the proof the party intends to offer at trial. **197.2 Response to Interrogatories.** (a) **Time for response.** The responding party must serve a written response on the requesting party within 30 days after service of the interrogatories, except that a defendant served with interrogatories before the defendant's answer is due need not respond until 50 days after service of the interrogatories. (b) **Content of response.** A response must include the party's answers to the interrogatories and may include objections and assertions of privilege as required under these rules.	**RULE 33. INTERROGATORIES TO PARTIES** *(Closest provision)* **(a) In General.** **(1)** ***Number.*** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2). **(2)** ***Scope.*** An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time. **(b) Answers and Objections.** **(1)** ***Responding Party.*** The interrogatories must be answered: **(A)** by the party to whom they are directed; or **(B)** if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party. **(2)** ***Time to Respond.*** The responding party must serve

	its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. **(3)** ***Answering Each Interrogatory.*** Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath. **(4)** ***Objections.*** The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure. **(5)** ***Signature.*** The person who makes the answers must sign them, and the attorney who objects must sign any objections.
(c) **Option to produce records.** If the answer to an interrogatory may be derived or ascertained from public records, from the responding party's business records, or from a compilation, abstract or summary of the responding party's business records, and the burden of deriving or ascertaining the answer is substantially the same for the requesting party as for the responding party, the responding party may answer the interrogatory by specifying and, if applicable, producing the records or compilation, abstract or summary of the records. The records from which the answer may be derived or ascertained must be specified in sufficient detail to permit the requesting party to locate and identify them as readily as can the responding party. If the responding party has specified business records, the responding party must state a reasonable time and place for examination of the documents. The responding party	**(d) Option to Produce Business Records.** If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by: **(1)** specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and **(2)** giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them.	
(d) **Verification required; exceptions.** A responding party - not an agent or attorney as otherwise permitted by Rule 14 - must sign the answers under oath except that: (1) when answers are based on information obtained from other persons, the party may so state, and (2) a party need not sign answers to interrogatories about persons with knowledge of relevant facts, trial witnesses, and legal contentions.	*(copied from above)***(b)(5) *Signature.*** The person who makes the answers must sign them, and the attorney who objects must sign any objections.
197.3 Use. Answers to interrogatories may be used only against the responding party. An answer to an interrogatory inquiring about matters described in Rule 194.2(c) and (d) that has been amended or supplemented is not admissible and may not be used for impeachment.	**(c) Use.** An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence.

VII. Production and Inspection

Tex. R. Civ. P. 196	Fed. R. Civ. P. 34
RULE 196. REQUESTS FOR PRODUCTION AND INSPECTION TO PARTIES; REQUESTS AND MOTIONS FOR ENTRY UPON PROPERTY **196.1 Request for Production and Inspection to Parties.** (a) **Request.** A party may serve on another party--no later than 30 days before the end of the discovery period--a request for production or for inspection, to inspect, sample, test, photograph and copy documents or tangible things within the scope of discovery.	**RULE 34. PRODUCING DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND TANGIBLE THINGS, OR ENTERING ONTO LAND, FOR INSPECTION AND OTHER PURPOSES** **(a) In General.** A party may serve on any other party a request within the scope of Rule 26(b): **(1)** to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control: **(A)** any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or **(B)** any designated tangible things; or **(2)** to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) **Contents of request.** The request must specify the items to be produced or inspected, either by individual item or by category, and describe with reasonable particularity each item and category. The request must specify a reasonable time (on or after the date on which the response is due) and place for production. If the requesting party will sample or test the requested items, the means, manner and procedure for testing or sampling must be described with sufficient specificity to inform the producing party of the means, manner, and procedure for testing or sampling.	**(b) Procedure.** **(1)** ***Contents of the Request*****.** The request: **(A)** must describe with reasonable particularity each item or category of items to be inspected; **(B)** must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and **(C)** may specify the form or forms in which electronically stored information is to be produced.
(c) **Requests for production of medical or mental health records regarding nonparties.** (1) **Service of request on nonparty.** If a party requests another party to produce medical or mental health records regarding a nonparty, the requesting party must serve the nonparty with the request for production under Rule 21a. (2) **Exceptions.** A party is not required to serve the request for production on a nonparty whose medical records are sought if: (A) the nonparty signs a release of the records that is effective as to the requesting party; (B) the identity of the nonparty whose records are sought will not directly or indirectly be disclosed by production of the records; or (C) the court, upon a showing of good cause by the party seeking the records, orders that service is not required. (3) **Confidentiality.** Nothing in this rule excuses compliance with laws concerning the confidentiality of	*(closest provision)* **(c) Nonparties.** As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection. *(Also see Fed. R. Civ. P. 26(b)(1), (5) for discovery scope and limits and Fed. R. Civ. P. 26(c) for protective orders)*

medical or mental health records. **196.2 Response to Request for Production and Inspection.** (a) **Time for response.** The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request. (b) **Content of response.** With respect to each item or category of items, the responding party must state objections and assert privileges as required by these rules, and state, as appropriate, that: (1) production, inspection, or other requested action will be permitted as requested; (2) the requested items are being served on the requesting party with the response; (3) production, inspection, or other requested action will take place at a specified time and place, if the responding party is objecting to the time and place of production; or (4) no items have been identified - after a diligent search - that are responsive to the request. **196.3 Production.** (a) **Time and place of production.** Subject to any objections stated in the response, the responding party must produce the requested documents or tangible things within the person's	**(2) *Responses and Objections*.** **(A)** *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. **(B)** *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response. **(C)** *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest. **(D)** *Responding to a Request for Production of Electronically Stored Information.* The response

possession, custody or control at either the time and place requested or the time and place stated in the response, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them. (b) **Copies.** The responding party may produce copies in lieu of originals unless a question is raised as to the authenticity of the original or in the circumstances it would be unfair to produce copies in lieu of originals. If originals are produced, the responding party is entitled to retain the originals while the requesting party inspects and copies them. (c) **Organization.** The responding party must either produce documents and tangible things as they are kept in the usual course of business or organize and label them to correspond with the categories in the request. **196.4 Electronic or Magnetic Data.** To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot - through reasonable efforts - retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to	may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use. **(E)** *Producing the Documents or Electronically Stored Information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information: **(i)** A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request; **(ii)** If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and **(iii)** A party need not produce the same electronically stored information in more than one form.

retrieve and produce the information. **196.5 Destruction or Alteration.** Testing, sampling or examination of an item may not destroy or materially alter an item unless previously authorized by the court. **196.6 Expenses of Production.** Unless otherwise ordered by the court for good cause, the expense of producing items will be borne by the responding party and the expense of inspecting, sampling, testing, photographing, and copying items produced will be borne by the requesting party. **196.7 Request of Motion for Entry Upon Property.** (a) **Request or motion.** A party may gain entry on designated land or other property to inspect, measure, survey, photograph, test, or sample the property or any designated object or operation thereon by serving - no later than 30 days before the end of any applicable discovery period - (1) a request on all parties if the land or property belongs to a party, or (2) a motion and notice of hearing on all parties and the nonparty if the land or property belongs to a nonparty. If the identity or address of the nonparty is unknown and cannot be obtained through reasonable diligence, the court must permit service by means other than those specified in Rule 21a that are reasonably calculated to give the nonparty notice of the motion and hearing. (b) **Time, place, and other conditions.** The request for entry	*(No directly related provision)* *(No directly related provision)* *(Closest provision, copied from above)* **(a) In General.** A party may serve on any other party a request within the scope of Rule 26(b): **(2)** to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it. *[Federal rules do not have additional separate procedures related to entry on land or property.]*

upon a party's property, or the order for entry upon a nonparty's property, must state the time, place, manner, conditions, and scope of the inspection, and must specifically describe any desired means, manner, and procedure for testing or sampling, and the person or persons by whom the inspection, testing, or sampling is to be made. (c) **Response to request for entry.** (1) **Time to respond.** The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request. (2) **Content of response.** The responding party must state objections and assert privileges as required by these rules, and state, as appropriate, that: (A) entry or other requested action will be permitted as requested; (B) entry or other requested action will take place at a specified time and place, if the responding party is objecting to the time and place of production; or (C) entry or other requested action cannot be permitted for reasons stated in the response. (d) **Requirements for order for entry on nonparty's property.** An order for entry on a nonparty's property may issue only for good cause shown and only if the land, property, or object thereon as to which discovery is sought is relevant to the subject matter of the action.	

VIII. Physical and Mental Examinations

Tex. R. Civ. P. 204.1	Fed. R. Civ. P. 35
RULE 204. PHYSICAL AND MENTAL EXAMINATION **204.1 Motion and Order Required.** (a) **Motion.** A party may - no later than 30 days before the end of any applicable discovery period - move for an order compelling another party to: (1) submit to a physical or mental examination by a qualified physician or a mental examination by a qualified psychologist; or (2) produce for such examination a person in the other party's custody, conservatorship or legal control. (b) **Service.** The motion and notice of hearing must be served on the person to be examined and all parties. (c) **Requirements for obtaining order.** The court may issue an order for examination only for good cause shown and only in the following circumstances: (1) when the mental or physical condition (including the blood group) of a party, or of a person in the custody, conservatorship or under the legal control of a party, is in controversy; or (2) except as provided in Rule 204.4, an examination by a psychologist may be ordered when the party responding to the motion has designated a psychologist as a testifying expert or has disclosed a psychologist's records for possible use at trial. (d) **Requirements of order.** The order must be in writing and	**RULE 35. PHYSICAL AND MENTAL EXAMINATION** **(a) Order for an Examination.** **(2)** ***Motion and Notice; Contents of the Order.*** The order: **(A)** may be made only on motion for good cause and on notice to all parties and the person to be examined; and **(B)** must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it. **(a) (1)** ***In General.*** The court where the action is pending may order a party whose mental or physical condition--including blood group--is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. **204.2 Report of Examining Physician or Psychologist.** (a) **Right to report.** Upon request of the person ordered to be examined, the party causing the examination to be made must deliver to the person a copy of a detailed written report of the examining physician or psychologist setting out the findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery of the report, upon request of the party causing the examination, the party against whom the order is made must produce a like report of any examination made before or after the ordered examination of the same condition, unless the person examined is not a party and the party shows that the party is unable to obtain it. The court on motion may limit delivery of a report on such terms as are just. If a physician or psychologist fails or refuses to make a report the court may exclude the testimony if offered at the trial. (b) **Agreements; relationship to other rules**. This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance with the provisions of any other rule. **204.3 Effect of No Examination.** If no examination is sought either by agreement or under this subdivision, the party whose physical or mental condition is in	**(b) Examiner's Report.** **(1) *Request by the Party or Person Examined.*** The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined. **(2) *Contents.*** The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests. **(3) *Request by the Moving Party.*** After delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them. **(4) *Waiver of Privilege.*** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony about all examinations of the same condition.

controversy must not comment to the court or jury concerning the party's willingness to submit to an examination, or on the right or failure of any other party to seek an examination.	**(5)** ***Failure to Deliver a Report.*** The court on motion may order—on just terms—that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial. **(6)** ***Scope.*** This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.
204.4 Cases Arising Under Titles II or V, Family Code. In cases arising under Family Code Titles II or V, the court may - on its own initiative or on motion of a party - appoint: (a) one or more psychologists or psychiatrists to make any and all appropriate mental examinations of the children who are the subject of the suit or of any other parties, and may make such appointment irrespective of whether a psychologist or psychiatrist has been designated by any party as a testifying expert; (b) one or more experts who are qualified in paternity testing to take blood, body fluid, or tissue samples to conduct paternity tests as ordered by the court.	
204.5 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.	

IX. Admissions

Tex. R. Civ. P. 198	Fed. R. Civ. P. 36
RULE 198. REQUESTS FOR ADMISSIONS	**RULE 36. REQUESTS FOR ADMISSIONS**
198.1 Request for Admissions. A party may serve on another party - no later than 30 days before the end of the discovery period - written requests that the other party admit the truth of any matter within the scope of discovery, including statements of opinion or of fact or of the application of law to fact, or the genuineness of any documents served with the request or otherwise made available for inspection and copying. Each matter for which an admission is requested must be stated separately.	**(a) Scope and Procedure.** **(1)** ***Scope.*** A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to: **(A)** facts, the application of law to fact, or opinions about either; and **(B)** the genuineness of any described documents. **(2)** ***Form; Copy of a Document.*** Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.
198.2 Response to Requests for Admissions. (a) **Time for response.** The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request. ****[198.2(b) moved below]**** (c) **Effect of failure to respond.** If a response is not timely served, the request is considered admitted without the necessity of a court order.	**(3)** ***Time to Respond; Effect of Not Responding.*** A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

(b) **Content of response.** Unless the responding party states an objection or asserts a privilege, the responding party must specifically admit or deny the request or explain in detail the reasons that the responding party cannot admit or deny the request. A response must fairly meet the substance of the request. The responding party may qualify an answer, or deny a request in part, only when good faith requires. Lack of information or knowledge is not a proper response unless the responding party states that a reasonable inquiry was made but that the information known or easily obtainable is insufficient to enable the responding party to admit or deny. An assertion that the request presents an issue for trial is not a proper response.	**(4)** ***Answer.*** If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny. **(5)** ***Objections.*** The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for trial. **(6)** ***Motion Regarding the Sufficiency of an Answer or Objection.*** The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses.

198.3 Effect of Admissions; Withdrawal or Amendment. Any admission made by a party under this rule may be used solely in the pending action and not in any other proceeding. A matter admitted under this rule is conclusively established as to the party making the admission unless the court permits the party to withdraw or amend the admission. The court may permit the party to withdraw or amend the admission if: (a) the party shows good cause for the withdrawal or amendment; and (b) the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved by permitting the party to amend or withdraw the admission.	**(b) Effect of an Admission; Withdrawing or Amending It.** A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

X. Sanctions

Tex. R. Civ. P. 215	Fed. R. Civ. P. 37
RULE 215. ABUSE OF DISCOVERY; SANCTIONS	**RULE 37. FAILURE TO MAKE DISCLOSURES OR TO COOPERATE IN DISCOVERY; SANCTIONS**
215.1 Motion for Sanctions or Order Compelling Discovery. A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows:	**(a) Motion for an Order Compelling Disclosure or Discovery.** **(1) *In General*.** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.
(a) **Appropriate court.** On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, an application for an order will be made to the court in which the action is pending.	**(2) *Appropriate Court*.** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.
(b) **Motion.** (1) If a party or other deponent which is a corporation or other entity fails to make a designation under Rules 199.2(b)(1) or 200.1(b); or (2) if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails: (A) to appear before the officer who is to take his	*(Closest provisions)* **(3) *Specific Motions*.** **(A)** *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. **(B)** *To Compel a Discovery Response.* A party seeking discovery may move for an order

deposition, after being served with a proper notice; or (B) to answer a question propounded or submitted upon oral examination or upon written questions; or (3) if a party fails: (A) to serve answers or objections to interrogatories submitted under Rule 197, after proper service of the interrogatories; or (B) to answer an interrogatory submitted under Rule 197; or (C) to serve a written response to a request for inspection submitted under Rule 196, after proper service of the request; or (D) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 196; the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by Rule 215.2(b) without the necessity of first having obtained a court order compelling such discovery. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order. If the court denies the motion in whole or in part, it may make such protective order as it would have been	compelling an answer, designation, production, or inspection. This motion may be made if: **(i)** a deponent fails to answer a question asked under Rule 30or 31; **(ii)** a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4); **(iii)** a party fails to answer an interrogatory submitted under Rule 33; or **(iv)** a party <u>fails to produce documents or</u> fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34. **(C)** *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

empowered to make on a motion pursuant to Rule 192.6.	
(c) **Evasive or incomplete answer.** For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.	**(4)** ***Evasive or Incomplete Disclosure, Answer, or Response*****.** For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.
(d) **Disposition of motion to compel: award of expenses.** If the motion is granted, the court shall, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment. If the motion is denied, the court may, after opportunity for hearing, require the moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.	**(5)** ***Payment of Expenses; Protective Orders*****.** **(A)** *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if: **(i)** the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; **(ii)** the opposing party's nondisclosure, response, or objection was substantially justified; or **(iii)** other circumstances make an award

In determining the amount of reasonable expenses, including attorney fees, to be awarded in connection with a motion, the trial court shall award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or in opposing a motion which is denied.	of expenses unjust. **(B)** *If the Motion Is Denied*. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust. **(C)** *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.
(e) **Providing person's own statement.** If a party fails to comply with any person's written request for the person's own statement as provided in Rule 192.3(h), the person who made the request may move for an order compelling compliance. If the motion is granted, the movant may recover the expenses incurred in obtaining the order, including attorney fees, which are reasonable in relation to the amount of work reasonably expended in obtaining the order.	*(No directly related provision)*

215.2 Failure to Comply with Order or with Discovery Request. (a) **Sanctions by court in district where deposition is taken.** If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.	**(b) Failure to Comply with a Court Order.** **(1)** ***Sanctions Sought in the District Where the Deposition Is Taken*****.** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.
(b) **Sanctions by court in which action is pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rules 199.2(b)(1) or 200.1(b) to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under Rules 204 or 215.1, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following: (1) an order disallowing any further discovery of any kind or of a particular kind by the disobedient party; (2) an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him; (3) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the	**(2)** ***Sanctions Sought in the District Where the Action Is Pending*****.** **(A)** *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following: **(i)** directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; **(ii)** prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

order; (4) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence; (5) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party; (6) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;	**(iii)** striking pleadings in whole or in part; **(iv)** staying further proceedings until the order is obeyed; **(v)** dismissing the action or proceeding in whole or in part; **(vi)** rendering a default judgment against the disobedient party; or **(vii)** treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.
(7) when a party has failed to comply with an order under Rule 204 requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.	**(B)** *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)—(vi), unless the disobedient party shows that it cannot produce the other person.
(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to	**(C)** *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

review on appeal from the final judgment.	
(No directly related provision)	**(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.** **(1)** ***Failure to Disclose or Supplement*****.** If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard: **(A)** may order payment of the reasonable expenses, including attorney's fees, caused by the failure; **(B)** may inform the jury of the party's failure; and **(C)** may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi).
(c) **Sanction against nonparty for violation of Rules 196.7 or 205.3.** If a nonparty fails to comply with an order under Rules 196.7 or 205.3, the court which made the order may treat the failure to obey as contempt of court.	*(No directly related provision)*
215.3 Abuse of Discovery Process in Seeking, Making, or Resisting Discovery. If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is	*(No directly related provision)*

unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after notice and hearing, impose any appropriate sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of Rule 215.2(b). Such order of sanction shall be subject to review on appeal from the final judgment. **215.4 Failure to Comply with Rule 198** (a) **Motion.** A party who has requested an admission under Rule 198 may move to determine the sufficiency of the answer or objection. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of Rule 198, it may order either that the matter is admitted or that an amended answer be served. The provisions of Rule 215.1(d) apply to the award of expenses incurred in relation to the motion. (b) **Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 198 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 193, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe	**(2) *Failure to Admit*.** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless: **(A)** the request was held objectionable under Rule 36(a); **(B)** the admission sought was of no substantial importance; **(C)** the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or **(D)** there was other good reason for the failure to admit.

that he might prevail on the matter, or (4) there was other good reason for the failure to admit.	
215.5 Failure of Party or Witness to Attend to or Serve Subpoena; Expenses. (a) **Failure of party giving notice to attend.** If the party giving the notice of the taking of an oral deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees. (b) **Failure of witness to attend.** If a party gives notice of the taking of an oral deposition of a witness and the witness does not attend because of the fault of the party giving the notice, if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.	*(Closest provision)***(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.** **(1)** ***In General*****.** **(A)** *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if: **(i)** a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or **(ii)** a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response. **(B)** *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action. **(2)** ***Unacceptable Excuse for Failing to Act*****.** A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable,

	unless the party failing to act has a pending motion for a protective order under Rule 26(c). **(3) *Types of Sanctions*.** Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)—(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.
215.6 Exhibits to Motions and Responses. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.	*(No directly related provision)*
[PROPOSED RULE: **RULE 215.7 Spoliation** (a) *Motion for Order Granting Spoliation Remedies.* A party, upon reasonable notice to other parties, may move for an order seeking spoliation remedies if: (1) another party intentionally or negligently breached a duty to preserve a document or tangible thing—as described by Rule 192.3(b)—that may be material and relevant to a claim or defense; (2) the document or tangible thing cannot be reproduced, restored, or replaced through additional discovery; and (3) the movant is unfairly prejudiced as a result. The motion should be filed reasonably promptly after	**(e) Failure to Preserve Electronically Stored Information.** If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: **(1)** upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or **(2)** only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: **(A)** presume that the lost information was

the discovery of the spoliation. (b) *Standards.* (1) The court must consider the spoliation motion outside the presence of the jury, as provided in Texas Rule of Evidence 104. The court must determine the spoliation motion based on the pleadings, any stipulations of the parties, any affidavits, documents or other testimony filed by a party, discovery materials, and any oral testimony. Unless the court orders otherwise, if the movant will be relying on affidavits, the movant must file any affidavits at least fourteen days before the hearing date and if the non-movant will be relying on affidavits, the non-movant must file any controverting affidavits at least seven days before the hearing date. (2) To find spoliation, the court must find that the allegedly spoliating party had a duty to preserve a document or tangible thing that may be material and relevant to a claim or defense and breached that duty by intentionally or negligently destroying the document or tangible thing or by failing to take reasonable steps to preserve the document or tangible thing. (3) If the court finds that spoliation occurred, the remedies ordered by the court must be proportionate to the wrongdoing and not excessive. The court should weigh the spoliating party's culpability and the prejudice to the nonspoliating party based on the relevance of the spoliated evidence to key issues in the case, the harmful effect of the evidence on the spoliating party's case, the degree of helpfulness of the evidence to the nonspoliating party's case, and whether the evidence is	unfavorable to the party; **(B)** instruct the jury that it may or must presume the information was unfavorable to the party; or **(C)** dismiss the action or enter a default judgment.

cumulative of other available evidence. (4) In the order, the court must specify the conduct that formed the basis or bases for its ruling. (c) *Spoliation Remedies.* If the court finds that spoliation occurred, the court may make such orders in regard to the spoliation as are just, and among others the following[1]: (1) If the court finds that a nonspoliating party is prejudiced because of the loss of the document or tangible thing, then the court may order one or more of the following remedies: (A) awarding the nonspoliating, prejudiced party the reasonable expenses, including attorneys' fees and costs, caused by the spoliation; or (B) excluding evidence. (2) If the court finds that the spoliating party acted intentionally or acted negligently and caused the nonspoliating party to be irreparably deprived of any meaningful ability to present a claim or defense, then the court may order an instruction to the jury regarding the spoliation in addition to the remedies in (c)(1). If the court submits a spoliation instruction to the jury, then evidence of the circumstances surrounding the spoliation may be admissible at trial. The admissibility at trial of evidence of the circumstances surrounding the spoliation is governed by the Texas Rules of Evidence. (3) If the court finds that a party acted with intent to spoliate, then in addition to the remedies set forth in (c)(1) and (c)(2), the court may order one or more of the following remedies: (A) finding that the lost document or tangible	

[1] This language is derived from Tex. R. Civ. P. 215.2(b).

thing was unfavorable to the spoliating party; (B) striking the spoliating party's pleadings; (C) dismissing the spoliating party's claims or defenses; or (D) entering a default judgment in part or in full against the spoliating party. The remedies in this section are in addition to the remedies available under Rules 215.2 and 215.3.]	
(No directly related provision)	**(f) Failure to Participate in Framing a Discovery Plan.** If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

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September 13, 2016

Supreme Court Advisory Committee
c/o Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
cbabcock@jw.com

Re: Discovery Subcommittee Proposed Amendments to Part II, Section 9 of the Rules of Civil Procedure

Dear Advisory Committee Members,

On behalf of the Discovery Subcommittee, I submit the result of our review of Part II, Section 9 of the Rules of Civil Procedure. The Discovery Subcommittee offers the enclosed recommendations for amendments to the discovery rules. The proposed amendments are designed to modernize the rules, increase efficiency, and decrease the cost of litigation. The Discovery Subcommittee specifically considered the December 2015 amendments to the Federal Rules of Civil Procedure and the proposals from the State Bar Court Rules Committee.

In addition to the enclosed proposed amendments, the Discovery Subcommittee highlighted several issues for future attention. A list of those issues is enclosed.

Regards,

Robert E. Meadows /mfr

Robert Meadows

Enclosures

Texas Supreme Court Advisory Committee
Discovery Subcommittee Proposed Amendments

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General Rules and Disclosures, Stipulations about Discovery Procedure: Tex. R. Civ. P. 190-194, 205

RULE 190. DISCOVERY LIMITATIONS **190.1 Discovery Control Plan Required.** Every case must be governed by a discovery control plan as provided in this Rule. A plaintiff must allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under Level 1, 2, or 3 of this Rule.	
190.2 Discovery Control Plan - Expedited Actions and Divorces Involving $~~50,000~~100,000 or Less (Level 1) (a) **Application.** This subdivision applies to: (1) any suit that is governed by the expedited actions process in Rule 169; and (2) unless the parties agree that rule 190.3 should apply or the court orders a discovery control plan under Rule 190.4, any suit for divorce not involving children in which a party pleads that the value of the marital estate is more than zero but not more than $ ~~50,000~~100,000. (b) **Limitations**. Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations: (1) **Discovery period**. All discovery must be conducted during the discovery period, which begins when the suit is filed and continues until 180 days after the date the first request for discovery of any kind is served on a party. (2) **Total time for oral depositions.** Each party may have no more than six hours in total to examine and cross-examine all witnesses in oral depositions. The parties may agree to expand this limit up to ten hours in total, but not more except by court order. If one side designates more than one expert, the opposing side may have an additional two hours of total deposition time for each	Discovery Subcommittee recommends increasing the amount for Level 1 cases in TRCP 190.2, and increasing total time for depositions if more than one expert is designated in TRCP 190.2(b)(2).

additional expert designated. The court may modify the deposition hours so that no party is given unfair advantage. (3) **Interrogatories.** Any party may serve on any other party no more than 15 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory. (4) **Requests for Production.** Any party may serve on any other party no more than 15 written requests for production. Each discrete subpart of a request for production is considered a separate request for production. (5) **Requests for Admissions.** Any party may serve on any other party no more than 15 written requests for admissions. Each discrete subpart of a request for admission is considered a separate request for admission. ~~(6) **Requests for Disclosure.** In addition to the content subject to disclosure under Rule 194.2, a party may request disclosure of all documents, electronic information, and tangible items that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses. A request for disclosure made pursuant to this paragraph is not considered a request for production.~~ (c) **Reopening Discovery**. If a suit is removed from the expedited actions process in Rule 169 or, in a divorce, the filing of a pleading renders this subdivision no longer applicable, the discovery period reopens, and discovery must be completed within the limitations provided in Rules 190.3 or 190.4, whichever is applicable. Any person previously deposed may be redeposed. On motion of any party, the court should continue the trial date if necessary to permit completion of discovery. **190.3 Discovery Control Plan - By Rule (Level 2)** (a) **Application**. Unless a suit is governed by a discovery control	The Discovery Subcommittee recommends mandatory disclosures for all Levels (*infra* Rule 194). Therefore, this provision should be removed.

plan under Rules 190.2 or 190.4, discovery must be conducted in accordance with this subdivision.

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

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

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

(B) in other cases, the earlier of

(i) 30 days before the date set for trial, or

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

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

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

[The Discovery Subcommittee discussed limiting the number of Requests for Production and recommends this topic for future consideration. With mandatory disclosure of production under TRCP 194, there may not be a need for as many Requests for Production. One consideration is whether and how to include 30(b)(6) and depositions with documents in the limit.]

190.4 Discovery Control Plan - By Order (Level 3)

(a) **Application.** The court must, on a party's motion, and may,

[The Discovery Subcommittee discussed requiring Level 3 cases, in

on its own initiative, order that discovery be conducted in accordance with a discovery control plan tailored to the circumstances of the specific suit. After a conference required by this rule, t~~T~~he parties ~~may~~ must submit an agreed discovery control order to the court for its consideration. The court should act on a party's motion or agreed order under this subdivision as promptly as reasonably possible. (b) **Limitations.** The discovery control plan ordered by the court may address any issue concerning discovery or the matters listed in Rule 166, and may change any limitation on the time for or amount of discovery set forth in these rules. The discovery limitations of Rule 190.2, if applicable, or otherwise of Rule 190.3 apply unless specifically changed in the discovery control plan ordered by the court. The plan must include~~:~~ ~~(1) a date for trial or for a conference to determine a trial setting;~~ ~~(2) a discovery period during which either all discovery must be conducted or all discovery requests must be sent, for the entire case or an appropriate phase of it;~~ ~~(3) appropriate limits on the amount of discovery; and~~ ~~(4) deadlines for joining additional parties, amending or supplementing pleadings, and designating expert witnesses.~~ the items listed in 190.4(d). (c) **Conference.** (1) **Conference timing.** For suits governed by a discovery control plan under Rule 190.4 (Level 3) or for any other suit when the court orders, the parties must confer as soon as practicable. (2) **Conference content; Parties' responsibilities.** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 194; discuss any issues about preserving discoverable information; and develop a proposed discovery control plan. The attorneys of record and all unrepresented parties that have	those counties that have a central docket, be assigned to a specific court for management purposes, i.e. in the Rules of Judicial Administration, and recommends this topic for future consideration.] The Discovery Subcommittee recommends mandatory meet and confer requirement for Level 3 cases (or any case by court order), similar to the requirement in FRCP 26(f). The Discovery Subcommittee does not recommend a meet and confer requirement for Level 1 or Level 2 cases (except by court order) because the TRCPs set out specific plans for these cases, and differences in docket size and management practices. [Suggestion: Some Discovery Subcommittee members recommend including additional limits on conference timing in TRCP 190.4(c)(1): "and in any event at least 21 days before a court discovery control plan conference is to be held or the discovery control order is due under Rule 190.4(e)."] Some Discovery Subcommittee members

appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery control plan, and for submitting to the court within 14 days after the conference a written report outlining the proposed discovery control plan. (3) **No discovery before conference.** A party may not seek discovery from any source before the parties have conferred as required by this rule. (d) **Discovery control plan.** The discovery control plan must state the parties' views and proposals on: (1) a date for trial or for a conference to determine a trial setting; (2) a discovery period during which either all discovery must be conducted or all discovery requests must be sent, for the entire case or an appropriate phase of it; ~~(3) appropriate limits on the amount of discovery; and~~ (~~4~~3) deadlines for joining additional parties, amending or supplementing pleadings, and designating expert witnesses~~.~~; (4) what changes should be made in the timing, form, or requirement for disclosures under Rule 194, including a statement of when initial disclosures were made or will be made; (5) the subjects on which discovery may be needed, and whether discovery should be conducted in phases or be limited to or focused on particular issues; (6) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced; (7) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Texas Rule of Evidence 511; (8) what changes should be made in the limitations on	recommend including the following language from FRCP 26(f)(2) in TRCP 190.4(c)(2): "The court may order the parties or attorneys attend the conference in person." The Discovery Subcommittee also recommends limiting discovery requests until after the conference. TRCP 190.4(d)(3) is omitted because it is duplicative of new TRCP 190.4(d)(8) below. The Discovery Subcommittee recommends Level 3 discovery control plans include the items required in FRCP 26(f)(3), in addition to the items already required by the TRCPs.

discovery imposed under these rules or by local rule, and what other limitations should be imposed; and (9) any other orders that the court should issue under Rule 192.6, Rule 190.4, or Rule 166. [(e) **Discovery control order.** (1) **Order.** The court must issue a discovery control order after receiving the parties' report under Rule 190.4(d); or after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means. (2) **Time to issue.** The judge must issue the order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the petition or 90 days after any defendant has appeared. (3) **Contents**. The discovery control order must include the dates set out in Rule 190.4(d)(1)-(3), and may address any issue concerning discovery or the matters listed in Rule 166 or addressed in the proposed discovery control plan, and may change any limitation on the time or amount of discovery set forth in these rules. The discovery limitations of Rule 190.3 (or if applicable of Rule 190.2) apply unless specifically changed in the discovery control order.]	[Suggestion: Some Discovery Subcommittee members recommend including TRCP 190.4(e), or something similar, based on FRCP 16(b) (federal scheduling order rule). If included, TRCP 190.4(b) will need to be omitted or amended.]
[(f) **Failure to participate in framing a discovery control plan.** If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery control plan as required by Rule 190.4, the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.]	[Suggestion: Some Discovery Subcommittee members recommend including TRCP 190.4(f), modeled after FRCP 37(f), in light of revisions to the TRCPs requiring parties to meet and confer.]
190.5 Modification of Discovery Control Plan The court may modify a discovery control plan at any time and must do so when the interest of justice requires. Unless a suit is governed by the expedited actions process in Rule 169, the court must allow additional discovery: (a) related to new, amended or supplemental pleadings, or new	[Suggestion: A Discovery Subcommittee member suggested changing the standard for modifying discovery control orders for Level 3 cases only to follow FRCP 16(b) (scheduling order provision): "(4)

information disclosed in a discovery response or in an amended or supplemental response, if: (1) the pleadings or responses were made after the deadline for completion of discovery or so nearly before that deadline that an adverse party does not have an adequate opportunity to conduct discovery related to the new matters, and (2) the adverse party would be unfairly prejudiced without such additional discovery; (b) regarding matters that have changed materially after the discovery cutoff if trial is set or postponed so that the trial date is more than three months after the discovery period ends. Comment to 2013 change: Rule 190 is amended to implement section 22.004(h) of the Texas Government Code, which calls for rules to promote the prompt, efficient, and cost-effective resolution of civil actions when the amount in controversy does not exceed $100,000. Rule 190.2 now applies to expedited actions, as defined by Rule 169. Rule 190.2 continues to apply to divorces not involving children in which the value of the marital estate is not more than $50,000, which are otherwise exempt from the expedited actions process. Amended Rule 190.2(b) ends the discovery period 180 days after the date the first discovery request is served; imposes a fifteen limit maximum on interrogatories, requests for production, and requests for admission; and allows for additional disclosures. Although expedited actions are not subject to mandatory additional discovery under amended Rule 190.5, the court may still allow additional discovery if the conditions of Rule 190(a) are met. **190.6 Certain Types of Discovery Excepted** This rule's limitations on discovery do not apply to or include discovery conducted under Rule 202 ("Depositions Before Suit or to Investigate Claims"), or Rule 621a ("Discovery and Enforcement of Judgment"). But Rule 202 cannot be used to circumvent the limitations of this rule.	Modifying the discovery control order. The discovery control order may be modified only for good cause and with the judge's consent." If that change is made, the standard in TRCP 190.5 would only apply to Level 1 and Level 2 cases.]

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

[The Discovery Subcommittee discussed whether the standard for modifying discovery procedures and limitations should be "for good cause" as it is now. Note the standard for modifying a control plan in TRCP 190.5 ("may modify a discovery control plan at any time and must do so when the interest of justice requires"). The "good cause" requirement could be removed (FRCP 26(b)(2) permits a court to alter the number of depositions and interrogatories, the length of depositions, and the number of admissions without requiring a showing of "good cause.").]

191.1 Modification of Procedures

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

191.2 Conference

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

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

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

TRCP 191.3(a) is revised to correspond with the Texas pleading requirements in TRCP 57.

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

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

(b) **Effect of signature on disclosure.** The signature of an attorney or party on a disclosure constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made. (c) **Effect of signature on discovery request, notice, response, or objection.** The signature of an attorney or party on a discovery request, notice, response, or objection constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, notice, response, or objection: (1) is consistent with the rules of civil procedure and these discovery rules and warranted by existing law or ~~a good faith argument for the extension, modification, or reversal of existing law~~by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law; (2) has a good faith factual basis; (3) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) is not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.	FRCP 26(g)(1) uses this language, but changing TRCP 191.3(c)(1) will affect other language in other rules, including TRCP 13 and maybe various TRAPs.
(d) **Effect of failure to sign.** Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.~~If a request, notice, response, or objection is not signed, it must be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, notice, response, or objection. A party is not required to take any action with respect to a request or notice that is not signed.~~ (e) **Sanctions.** If the certification is false without substantial justification, the court may, upon motion or its own initiative,	The Discovery Subcommittee recommends revising TRCP 191.3(d) to conform to FRCP 26(g)(2) and improve readability.

impose on the person who made the certification, or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under Chapter 10 of the Civil Practice and Remedies Code.

191.4 Filing of Discovery Materials.

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

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

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

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

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

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

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

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

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

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

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

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

(3) a person may file discovery materials necessary for a

proceeding in an appellate court. (d) **Retention requirement for persons.** Any person required to serve discovery materials not required to be filed must retain the original or exact copy of the materials during the pendency of the case and any related appellate proceedings begun within six months after judgment is signed, unless otherwise provided by the trial court. (e) **Retention requirement for courts.** The clerk of the court shall retain and dispose of deposition transcripts and depositions upon written questions as directed by the Supreme Court. **191.5 Service of Discovery Materials.** Every disclosure, discovery request, notice, response, and objection required to be served on a party or person must be served on all parties of record. **RULE 192. PERMISSIBLE DISCOVERY: FORMS AND SCOPE; WORK PRODUCT; PROTECTIVE ORDERS; DEFINITIONS** **192.1 Forms of Discovery.** Permissible forms of discovery are: (a) ~~requests for~~required disclosures; (b) requests for production and inspection of documents and tangible things; (c) requests and motions for entry upon and examination of real property; (d) interrogatories to a party; (e) requests for admission; (f) oral or written depositions; and (g) motions for mental or physical examinations.	[Suggestion: Is TRCP 192.1 necessary in light of other provisions of the TRCPs detailing the methods of discovery?] TRCP 192.1(a) is revised to correspond with changes to TRCP 194, described below. [The Discovery Subcommittee discussed revising TRCP 192.2(a) to make clear that discovery

192.2 Timing and Sequence of Discovery. (a) **Timing.** A party may not seek discovery from any source before the defendant's answer is due. (b) **Sequence.** The permissible forms of discovery may be combined in the same document and may be taken in any order or sequence. **192.3 Scope of Discovery.** (a) **Generally.** Unless otherwise ordered by the court, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case as set forth in 192.4(b). Information within this scope of discovery need not be admissible in evidence to be discoverable.~~In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.~~ (b) **Documents and tangible things.** A party may obtain discovery of the existence, description, nature, custody, condition, location, and contents of documents and tangible things (including papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, data, and data compilations) that constitute or contain matters relevant to ~~the subject matter of the action~~any party's claim or defense. A person is required to produce a document or tangible thing that is within the person's possession, custody, or control. ~~(c) **Persons with knowledge of relevant facts.** A party may obtain discovery of the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case. A person has knowledge of relevant facts when that person has or may have knowledge of any discoverable matter. The person need not have admissible information or personal knowledge of~~	cannot be served with a petition. One Subcommittee member suggested using a time limit similar to the time limit used in FRCP 16(b)(2): "within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared."]] The Discovery Subcommittee recommends revising 192.3(a) to adopt some of the language in FRCP 26(b)(1) regarding proportionality, and to adopt the relevancy language from the FRCPs. The Discovery Subcommittee recommends deleting language relating to "subject matter of the pending action" and "reasonably calculated" from the existing TRCP. Also see companion revisions to TRCP 192.4(b) (below). The Discovery Subcommittee recommends adopting the relevancy language from the FRCPs (i.e. 26(b)(1)). TRCP 192.3(c)-(i) is incorporated into the new mandatory disclosure requirement of Rule 194 (see below). The Discovery Subcommittee does not recommend including the

~~the facts. An expert is "a person with knowledge of relevant facts" only if that knowledge was obtained firsthand or if it was not obtained in preparation for trial or in anticipation of litigation.~~ ~~(d) **Trial witnesses.** A party may obtain discovery of the name, address, and telephone number of any person who is expected to be called to testify at trial. This paragraph does not apply to rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial.~~ ~~(e) **Testifying and consulting experts.** The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable. A party may discover the following information regarding a testifying expert or regarding a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert:~~ ~~(1) the expert's name, address, and telephone number;~~ ~~(2) the subject matter on which a testifying expert will testify;~~ ~~(3) the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was acquired;~~ ~~(4) the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them;~~ ~~(5) any bias of the witness;~~ ~~(6) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony;~~ ~~(7) the expert's current resume and bibliography.~~ ~~(f) **Indemnity and insuring agreements.** Except as otherwise provided by law, a party may obtain discovery of the existence~~	State Bar of Texas Committee on Court Rules proposed amendment to TRCP 192.3(c). The State Bar of Texas Committee on Court Rules Proposed Amendment to TRCP 192.3(d) is incorporated into the new mandatory disclosure requirement of Rule 194 (see below). [Question: does moving all items from TRCP 192.3 to TRCP 194 preserve the scope of discovery?]

~~and contents of any indemnity or insurance agreement under which any person may be liable to satisfy part or all of a judgment rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the indemnity or insurance agreement is not by reason of disclosure admissible in evidence at trial.~~ ~~(g) **Settlement agreements.** A party may obtain discovery of the existence and contents of any relevant portions of a settlement agreement. Information concerning a settlement agreement is not by reason of disclosure admissible in evidence at trial.~~ ~~(h) **Statements of persons with knowledge of relevant facts.** A party may obtain discovery of the statement of any person with knowledge of relevant facts--a "witness statement" regardless of when the statement was made. A witness statement is (1) a written statement signed or otherwise adopted or approved in writing by the person making it, or (2) a stenographic, mechanical, electrical, or other type of recording of a witness's oral statement, or any substantially verbatim transcription of such a recording. Notes taken during a conversation or interview with a witness are not a witness statement. Any person may obtain, upon written request, his or her own statement concerning the lawsuit, which is in the possession, custody or control of any party.~~ ~~(i) **Potential parties.** A party may obtain discovery of the name, address, and telephone number of any potential party.~~ (j) **Contentions.** A party may obtain discovery of any other party's legal contentions and the factual bases for those contentions. **192.4 Limitations on Scope of Discovery.** The discovery methods permitted by these rules should be limited by the court if it determines, on motion or on its own initiative and on reasonable notice, that: (a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or	The Discovery Subcommittee recommends revising 192.4(b) to adopt some of the language in

(b) the discovery sought is not proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. ~~the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.~~	FRCP 26(b)(1) regarding proportionality. Also see companion revisions to TRCP 192.3(a) (above). The Discovery Subcommittee rejects the following language from FRCP 26(b)(2)(C)(ii)-(iii) because the concepts are already covered by the other limits in this rule: "(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (ii) the proposed discovery is outside the scope permitted by Rule 26(b)(1)."
192.5 Work Product. (a) **Work product defined.** Work product comprises: (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents. (b) **Protection of work product.** (1) **Protection of core work product--attorney mental processes**. Core work product - the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories - is not discoverable. (2) **Protection of other work product**. Any other work	

product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means. (3) **Incidental disclosure of attorney mental processes**. It is not a violation of subparagraph (1) if disclosure ordered pursuant to subparagraph (2) incidentally discloses by inference attorney mental processes otherwise protected under subparagraph (1). (4) **Limiting disclosure of mental processes.** If a court orders discovery of work product pursuant to subparagraph (2), the court must--insofar as possible--protect against disclosure of the mental impressions, opinions, conclusions, or legal theories not otherwise discoverable. (c) **Exceptions.** Even if made or prepared in anticipation of litigation or for trial, the following is not work product protected from discovery: (1) information discoverable under Rule ~~192.3~~ 194 concerning experts, trial witnesses, witness statements, and contentions; (2) trial exhibits ordered disclosed under Rule 166 or Rule ~~190.4~~194; (3) the name, address, and telephone number of any potential party or any person with knowledge of relevant facts; (4) any photograph or electronic image of underlying facts (e.g., a photograph of the accident scene) or a photograph or electronic image of any sort that a party intends to offer into evidence; and (5) any work product created under circumstances within an exception to the attorney-client privilege in Rule 503(d) of the Rules of Evidence.	TRCP 192.5(c) is revised to correspond with changes to TRCP 192, 190, and 194.

(d) **Privilege.** For purposes of these rules, an assertion that material or information is work product is an assertion of privilege. **192.6 Protective Order.** (a) **Motion.** A person from whom discovery is sought, and any other person affected by the discovery request, may move within the time permitted for response to the discovery request for an order protecting that person from the discovery sought. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. A person should not move for protection when an objection to written discovery or an assertion of privilege is appropriate, but a motion does not waive the objection or assertion of privilege. If a person seeks protection regarding the time or place of discovery, the person must state a reasonable time and place for discovery with which the person will comply. A person must comply with a request to the extent protection is not sought unless it is unreasonable under the circumstances to do so before obtaining a ruling on the motion. (b) **Order.** To protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may - among other things - order that: (1) the requested discovery not be sought in whole or in part; (2) the extent or subject matter of discovery be limited; (3) the discovery not be undertaken at the time or place specified; (4) the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court; (5) the results of discovery be sealed or otherwise	The Discovery Subcommittee recommends including this language in TRCP 192.6(a) from FRCP 26(c)(1)(protective order provision).

protected, subject to the provisions of Rule 76a. **192.7 Definitions.** As used in these rules (a) *Written discovery* means requests for disclosure, requests for production and inspection of documents and tangible things, requests for entry onto property, interrogatories, and requests for admission. (b) *Possession, custody, or control* of an item means that the person either has physical possession of the item or has a right to possession of the item that is equal or superior to the person who has physical possession of the item. (c) A *testifying expert* is an expert who may be called to testify as an expert witness at trial. (d) A *consulting expert* is an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert. **RULE 193. WRITTEN DISCOVERY: RESPONSE; OBJECTION; ASSERTION OF PRIVILEGE; SUPPLEMENTATION AND AMENDMENT; FAILURE TO TIMELY RESPOND; PRESUMPTION OF AUTHENTICITY** **193.1 Responding to Written Discovery; Duty to Make Complete Response.** A party must respond to written discovery in writing within the time provided by court order or these rules. When responding to written discovery, a party must make a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made. The responding party's answers, objections, and other responses must be preceded by the request to which they apply.	[Suggestion: Are TRCP 192.7(c) and (d) definitions necessary given amendments to expert disclosure requirements?]

193.2 Objecting to Written Discovery (a) **Form and time for objections.** A party must make any objection to written discovery in writing - either in the response or in a separate document - within the time for response. The party must state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request. An objection must state whether any responsive materials are being withheld on the basis of that objection. (b) **Duty to respond when partially objecting; objection to time or place of production.** A party must comply with as much of the request to which the party has made no objection unless it is unreasonable under the circumstances to do so before obtaining a ruling on the objection. If the responding party objects to the requested time or place of production, the responding party must state a reasonable time and place for complying with the request and must comply at that time and place without further request or order. (c) **Good faith basis for objection.** A party may object to written discovery only if a good faith factual and legal basis for the objection exists at the time the objection is made. (d) **Amendment.** An objection or response to written discovery may be amended or supplemented to state an objection or basis that, at the time the objection or response initially was made, either was inapplicable or was unknown after reasonable inquiry. (e) **Waiver of objection.** An objection that is not made within the time required, or that is obscured by numerous unfounded objections, is waived unless the court excuses the waiver for good cause shown. (f) **No objection to preserve privilege.** A party should not object to a request for written discovery on the grounds that it calls for production of material or information that is privileged but should instead comply with Rule 193.3. A party who objects to production of privileged material or information does not waive the privilege but must comply with Rule 193.3 when the error is	The Discovery Subcommittee recommends adding this sentence to TRCP 193.2(a). The language is from FRCP 34(b)(2)(C).

pointed out.

193.3 Asserting a Privilege

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

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

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

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

(3) the privilege or privileges asserted.

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

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

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

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

(1) created or made from the point at which a party consults a lawyer with a view to obtaining professional

legal services from the lawyer in the prosecution or defense of a specific claim in the litigation in which discovery is requested, and (2) concerning the litigation in which the discovery is requested. (d) **Privilege not waived by production**. A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if - within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made - the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege. **193.4 Hearing and Ruling on Objections and Assertions of Privilege.** (a) **Hearing.** Any party may at any reasonable time request a hearing on an objection or claim of privilege asserted under this rule. The party making the objection or asserting the privilege must present any evidence necessary to support the objection or privilege. The evidence may be testimony presented at the hearing or affidavits served at least seven days before the hearing or at such other reasonable time as the court permits. If the court determines that an *in camera* review of some or all of the requested discovery is necessary, that material or information must be segregated and produced to the court in a sealed wrapper within a reasonable time following the hearing. (b) **Ruling.** To the extent the court sustains the objection or claim of privilege, the responding party has no further duty to respond to that request. To the extent the court overrules the objection or claim of privilege, the responding party must produce the requested material or information within 30 days after the court's ruling or at such time as the court orders. A party need not request a ruling on that party's own objection or	

assertion of privilege to preserve the objection or privilege.

(c) **Use of material or information withheld under claim of privilege.** A party may not use--at any hearing or trial--material or information withheld from discovery under a claim of privilege, including a claim sustained by the court, without timely amending or supplementing the party's response to that discovery.

193.5 Amending or Supplementing Responses to Written Discovery.

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

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

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

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

(c) **Use of Material or Information Withheld under other Objection.** A party may not use—at any hearing or trial—material or information withheld from discovery under any objection, including an objection sustained by the court, without timely amending or supplementing the party's response to include that discovery in accordance with these rules. **193.6 Failing to Timely Respond - Effect on Trial** (a) **Exclusion of evidence and exceptions.** A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that: (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties. (b) **Burden of establishing exception.** The burden of establishing good cause or the lack of unfair surprise or unfair prejudice is on the party seeking to introduce the evidence or call the witness. A finding of good cause or of the lack of unfair surprise or unfair prejudice must be supported by the record. (c) **Continuance.** Even if the party seeking to introduce the evidence or call the witness fails to carry the burden under paragraph (b), the court may grant a continuance or temporarily postpone the trial to allow a response to be made, amended, or supplemented, and to allow opposing parties to conduct discovery regarding any new information presented by that response. **193.7 Production of Documents Self-Authenticating** A party's production of a document in response to written	The Discovery Subcommittee recommends adding TRCP 193.5(c) to require parties to disclose information and documents used at hearing or trial.

discovery authenticates the document for use against that party in any pretrial proceeding or at trial unless - within ten days or a longer or shorter time ordered by the court, after the producing party has actual notice that the document will be used - the party objects to the authenticity of the document, or any part of it, stating the specific basis for objection. An objection must be either on the record or in writing and must have a good faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity.	
RULE 194. ~~REQUESTS FOR DISCLOSURE~~DUTY TO DISCLOSE	The Discovery Subcommittee recommends adopting FRCP 26(a)'s requirement of mandatory disclosures for all cases, including initial disclosures and pretrial disclosures. The specific recommended changes are described below.
194.1 ~~Request~~Required Disclosures. ~~A party may obtain disclosure from another party of the information or material listed in Rule 194.2 by serving the other party - no later than 30 days before the end of any applicable discovery period - the following request: "Pursuant to Rule 194, you are requested to disclose, within 30 days of service of this request, the information or material described in Rule [state rule, e.g., 194.2, or 194.2(a), (c), and (f), or 194.2(d) (g)]."~~ (a) **In general**. Except as exempted by this Rule or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties the information or material described in Rule 194.2, 194.3, and 194.4. Unless the court orders otherwise, all disclosures under Rule 194 must be in writing, signed, and served. In ruling on an objection that initial disclosures are not appropriate in this action, the court must determine what disclosures, if any, are to be made and must set the time for disclosure. (b) **Production.** Copies of documents and other tangible items required to be disclosed under this rule ordinarily must be served with the response. But if the responsive documents are voluminous, the response must state a reasonable time and place for the production of documents. The responding party	TRCP 194.1(a) is from FRCP 26(a)(1)(A)(Initial Disclosure In General), 26(a)(1)(C)(Time for Initial Disclosures), and 26(a)(4) (Form of Disclosures). TRCP 194.1(b) is moved from prior TRCP 194.4 for clarity, and revised to make clear it concerns production of documents as part of this rule. Note, this rule could cross-reference requirements in TRCP 196, to the extent they are

must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them.

194.2 ~~Content~~Initial Disclosures.

(a) **Time for initial disclosures.** A party must make the initial disclosures at or within 30 days after the filing of the answer unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action. A party that is first served or otherwise joined after the filing of the first answer must make the initial disclosures within 30 days after the filing of the party's answer, unless a different time is set by stipulation or court order.

(b) **Content.** Without awaiting a discovery request, ~~A~~ a party ~~may request disclosure of any or all of~~ must provide the following:

(~~a~~1) the correct names of the parties to the lawsuit;

(~~b~~2) the name, address, and telephone number of any potential parties;

(~~c~~3) the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial);

(~~d~~4) the amount and any method of calculating economic damages;

(~~e~~5) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case. A person has knowledge of relevant facts when that person has or may have knowledge of any discoverable matter. The person need not have admissible information or personal knowledge of the facts. An expert is "a person with knowledge of relevant facts" only if that knowledge was obtained firsthand or if it was not obtained in preparation for trial or in anticipation of litigation.;

applicable.

The addition at TRCP 194.2(a) is from FRCP 26(a)(1)(C) and (D), modified to fit state rules. [As for timing for initial disclosures, one suggestion is adopting something similar to FRCP 16(b)(2): "within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared." Another suggestion is pinning each party's due date to the date of the party's own answer, with the exception of the Plaintiff.]

TRCP 194.2(b) maintains the disclosure topics from the current Texas rule, with a few additions.

Note many members of the Discovery Subcommittee recommend including FRCP 26(a)(1)(A)(iii)'s damages disclosure requirement at TRCP 194.2(b)(4): "a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based,

(6) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control, and may use to support its claims or defenses, unless the use would be solely for impeachment; ~~(f) for any testifying expert:~~ ~~(1) the expert's name, address, and telephone number;~~ ~~(2) the subject matter on which the expert will testify;~~ ~~(3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;~~ ~~(4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:~~ ~~(A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and~~ ~~(B) the expert's current resume and bibliography;~~ (~~g~~7) except as otherwise provided by law, the existence and contents of any indemnity or insurance agreement under which any person may be liable to satisfy part or all of a judgment rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the indemnity or insurance agreement is not by reason of disclosure admissible in evidence at trial~~any indemnity and insuring agreements described in Rule 192.3(f);~~	including materials bearing on the nature and extent of injuries suffered." The addition at TRCP 194.2(b)(5) is from TRCP 192.3(c) to remove the unnecessary cross-reference. The addition at TRCP 194.2(b)(6) is from FRCP 26(a)(1)(A)(ii). The TRCPs did not previously include this requirement. Expert disclosures are now addressed in Rule 195 and Rule 194.3. The addition at TRCP 194.2(b)(7) is from TRCP 192.3(f) to remove the unnecessary cross-reference.

(~~h~~8) the existence and contents of any relevant portions of a settlement agreement. Information concerning a settlement agreement is not by reason of disclosure admissible in evidence at trial~~any settlement agreements described in Rule 192.3(g)~~;	The addition at TRCP 194.2(b)(8) is from TRCP 192.3(g) to remove the unnecessary cross-reference.
(~~i~~9) the statement of any person with knowledge of relevant facts--a "witness statement"-regardless of when the statement was made. A witness statement is (1) a written statement signed or otherwise adopted or approved in writing by the person making it, or (2) a stenographic, mechanical, electrical, or other type of recording of a witness's oral statement, or any substantially verbatim transcription of such a recording. Notes taken during a conversation or interview with a witness are not a witness statement. Any person may obtain, upon written request, his or her own statement concerning the lawsuit, which is in the possession, custody or control of any party.~~any witness statements described in Rule 192.3(h)~~;	The addition at TRCP 194.2(b)(9) is from TRCP 192.3(h) to remove the unnecessary cross-reference.
(~~j~~10) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;	
(~~k~~11) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party;	
(~~l~~12) the name, address, and telephone number of any person who may be designated as a responsible third party.	
(c) **Proceedings exempt from initial disclosure**. The following proceedings are exempt from initial disclosure, but a court may order that the parties make particular disclosures as appropriate:	The addition at TRCP 194.2(c) is from FRCP 26(a)(1)(B), modified to fit state rules and to clarify that all the listed initial disclosure topics are within
(1) an action for review on an administrative record;	

(2) a forfeiture action arising from a state statute; (3) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence; (4) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision; (5) an action to enforce or quash an administrative summons or subpoena; (6) an action by the state to recover benefit payments; (7) an action by the state to collect on a student loan guaranteed by the state; (8) a proceeding ancillary to a proceeding in another court; and (9) an action to enforce an arbitration award. **194.2A Initial Disclosures Under Title I and V of the Texas Family Code** [TBD].	the scope of discoverable information in all cases. Because the disclosure rule does not fit family law cases, there should be an additional disclosure rule for family law cases in line with the local orders of major counties as discussed by the SCAC on January 12, 2001, and March 30, 2001.
~~**194.3 Response.**~~ ~~The responding party must serve a written response on the requesting party within 30 days after service of the request, except that:~~ ~~(a) a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request, and~~ ~~(b) a response to a request under Rule 194.2(f) is governed by Rule 195.~~	Prior TRCP 194.3 is no longer necessary.
194.3 Expert Disclosure. In addition to the disclosures required by Rule 194.2, a party must disclose to the other parties expert information as provided by Rule 195.	TRCP 194.3 is to clarify expert disclosure requirements exist, as described in TRCP 195.
~~**194.4 Production.**~~ ~~Copies of documents and other tangible items ordinarily must be~~	Prior TRCP 194.4 is moved

~~served with the response. But if the responsive documents are voluminous, the response must state a reasonable time and place for the production of documents. The responding party must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them.~~ **194.4 Pretrial Disclosures.** (a) **In General**. In addition to the disclosures required by Rules 194.2 and 194.3, a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment: (1) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises; (2) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises. (b) **Time for Pretrial Disclosures; Objections**. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. ~~194.6~~194.5 **No Objection or Assertion of Work Product**. No objection or assertion of work product is permitted to a ~~request~~ disclosure under this rule. **194.~~7~~ 5 Certain Responses Not Admissible.** A ~~response to requests~~ disclosure under Rule 194.2(b)(~~c~~3) and (~~d~~4) that has been changed by an amended or supplemental response is not admissible and may not be used for impeachment.	to TRCP 194.1(b). The addition at TRCP 194.4 is from FRCP 26(a)(3). Note TRCP 166 touches on some of these issues as well and may also need to be amended. TRCP 194.4(a)(1) incorporates the amendment to TRCP 192.3(d) proposed by the State Bar of Texas Committee on Court Rules. Note the following language from FRCP 26(a)(3) is not incorporated into TRCP 194.4(b) at this time: "Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of any objections, together with the grounds for the objections, that may be made to the admissibility of materials identified. An objection not so made—except for one under Texas Rule of Evidence 402 or 403—is waived unless excused by the court for good cause." [Question: Should the limit in TRCP 194.5 only apply to initial disclosures?]

RULE 205. DISCOVERY FROM NON-PARTIES

205.1 Forms of Discovery; Subpoena Requirement.

A party may compel discovery from a nonparty--that is, a person who is not a party or subject to a party's control--only by obtaining a court order under Rules 196.7, 202, or 204, or by serving a subpoena compelling:

(a) an oral deposition;

(b) a deposition on written questions;

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

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

205.2 Notice.

A party seeking discovery by subpoena from a nonparty must serve, on the nonparty and all parties, a copy of the form of notice required under the rules governing the applicable form of discovery. A notice of oral or written deposition must be served before or at the same time that a subpoena compelling attendance or production under the notice is served. A notice to produce documents or tangible things under Rule 205.3 must be served at least 10 days before the subpoena compelling production is served.

205.3 Production of Documents and Tangible Things Without Deposition.

(a) **Notice; subpoena.** A party may compel production of documents and tangible things from a nonparty by serving - reasonable time before the response is due but no later than 30

days before the end of any applicable discovery period - the notice required in Rule 205.2 and a subpoena compelling production or inspection of documents or tangible things. (b) **Contents of notice.** The notice must state: (1) the name of the person from whom production or inspection is sought to be compelled; (2) a reasonable time and place for the production or inspection; and (3) the items to be produced or inspected, either by individual item or by category, describing each item and category with reasonable particularity, and, if applicable, describing the desired testing and sampling with sufficient specificity to inform the nonparty of the means, manner, and procedure for testing or sampling. (c) **Requests for production of medical or mental health records of other non-parties.** If a party requests a nonparty to produce medical or mental health records of another nonparty, the requesting party must serve the nonparty whose records are sought with the notice required under this rule. This requirement does not apply under the circumstances set forth in Rule 196.1(c)(2). (d) **Response.** The nonparty must respond to the notice and subpoena in accordance with Rule 176.6. (e) **Custody, inspection and copying.** The party obtaining the production must make all materials produced available for inspection by any other party on reasonable notice, and must furnish copies to any party who requests at that party's expense. (f) **Cost of production.** A party requiring production of documents by a nonparty must reimburse the nonparty's reasonable costs of production.	

Experts: Tex. R. Civ. P. 195

RULE 195. DISCOVERY REGARDING TESTIFYING EXPERT WITNESSES	
195.1 Permissible Discovery Tools.	
A party may request another party to designate and disclose information concerning testifying expert witnesses only through ~~a request for disclosure~~disclosure under Rule 194 and through ~~depositions and reports as~~other discovery permitted by this rule.	The Discovery Subcommittee recommends revising TRCP 195.1 to correspond with changes to TRCP 194 (above).
195.2 Schedule for Designating Experts.	
Unless otherwise ordered by the court, a party must designate experts - that is, furnish information ~~requested under Rule 194.2(f)~~described in Rule 195.5(b) - by the ~~later of the~~ following ~~two~~ dates: ~~30 days after the request is served, or~~ (a) with regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery period; (b) with regard to all other experts, 60 days before the end of the discovery period.	The Discovery Subcommittee recommends revising TRCP 195.2 to correspond with changes to TRCPs 194 and 195.5.
195.3 Scheduling Depositions.	
(a) **Experts for party seeking affirmative relief.** A party seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition as follows: (1) **If no report furnished.** If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is not produced when the expert is designated, then the party must make the expert available for deposition reasonably promptly after the expert is designated. If the deposition cannot--due to the actions of the tendering party--reasonably be concluded more than 15 days before the deadline for	

designating other experts, that deadline must be extended for other experts testifying on the same subject. (2) **If report furnished.** If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is produced when the expert is designated, then the party need not make the expert available for deposition until reasonably promptly after all other experts have been designated. (b) **Other experts.** A party not seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition reasonably promptly after the expert is designated and the experts testifying on the same subject for the party seeking affirmative relief have been deposed.	
195.4 Oral Deposition. In addition to ~~disclosure under Rule 194~~the information disclosed under Rule 195.5, a party may obtain discovery concerning the subject matter on which the expert is expected to testify, the expert's mental impressions and opinions, the facts known to the expert (regardless of when the factual information was acquired) that relate to or form the basis of the testifying expert's mental impressions and opinions, and other discoverable matters, including documents not produced in disclosure, only by oral deposition of the expert and by a report prepared by the expert under this rule.	The Discovery Subcommittee recommends revising TRCP 195.4 to correspond with changes to TRCPs 194 and 195.5.
195.5 ~~Court-Ordered Reports~~Expert Disclosures and Reports. (a) **Disclosures**. Pursuant to Rule 194.3, and without awaiting a discovery request, a party must provide the following for any testifying expert:	A portion of the Discovery Subcommittee recommends revising TRCP 195.5 to incorporate some elements of FRCP 26, including protecting draft reports, expanding expert disclosure requirements, exempting expert communications from disclosure, and expressly incorporating the consulting expert

(1) the expert's name, address, and telephone number; (2) the subject matter on which the expert will testify; and (3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information; (4) For any expert retained by, employed by, or otherwise subject to the control of the responding party, a party must provide the following: (A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; (B) the expert's current resume and bibliography; (C) the witness's qualifications, including a list of all publications authored in the previous 10 years; (D) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and (E) a statement of the compensation to be paid for the study and testimony in the case. (b) **Expert reports.** If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert have not been recorded and reduced to tangible form, the court may order these matters reduced to tangible form and produced in addition to the deposition. If the trial court orders an expert report for a witness retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony, the report must contain: (1) a complete statement of all opinions the witness will express and the basis and reasons for them; (2) the facts or data considered by the witness in forming them;	exemption. The Discovery Subcommittee does not recommend requiring expert reports. Specific changes are noted below and areas of disagreement among the committee are highlighted. TRCP 195.5(a)(1)-(4) is moved from prior TRCP 194 due to proposed amendments to TRCP 194. The addition of TRCP 195.5(a)(4)(C)-(E) is from FRCP 26(a)(2)(B)'s expert report requirements. The addition to TRCP 195.5(b) is based on FRCP 26(a)(2)(B).

and (3) any exhibits that will be used to summarize or support them.	
(c) **Expert communication exempt from disclosure.** Communications between the party's attorney and any testifying expert witness in the case are exempt from discovery regardless of the form of the communications, except to the extent that the communications: (1) relate to compensation for the expert's study or testimony; (2) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (3) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.	The addition of TRCP 195.5(c) is based on FRCP 26(b)(4)(C). The Discovery Subcommittee is not unanimous on this revision.
(d) **Draft reports or disclosures.** Any draft of a report by an expert or disclosure required under this rule is protected from disclosure regardless of the form in which the draft is recorded.	The addition of TRCP 195.5(d) is based on FRCP 26(b)(4)(B). The Discovery Subcommittee is not unanimous on this revision.
(e) **Expert employed for trial preparation.** A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial and whose mental impressions or opinions have not been reviewed by a testifying expert. But a party may do so as provided in Rule 204.2 (Report of Examining Physician or Psychologist) or on showing exceptional circumstances under which it is impracticable for the party to obtain facts on the same subject by other means.	The addition of TRCP 195.5(e) is based on FRCP 26(b)(4)(D), which expressly incorporates the consulting expert exemption referred to in the comments and TRCP 192.3(e) and provides for an exceptional circumstance exception to the exemption. The Discovery Subcommittee recommends one revision to the "exceptional circumstances" exception to remove the ability to discover the *opinions* of consulting experts on a showing of exceptional circumstances.
195.6 Amendment and Supplementation. A party's duty to amend and supplement written discovery regarding a testifying expert is governed by Rule 193.5. If an expert witness is retained by, employed by, or otherwise under the control of a party, that party must also amend or supplement	

any deposition testimony or written report by the expert, but only with regard to the expert's mental impressions or opinions and the basis for them. **195.7 Cost of Expert Witnesses.** When a party takes the oral deposition of an expert witness retained by the opposing party, all reasonable fees charged by the expert for time spent in preparing for, giving, reviewing, and correcting the deposition must be paid by the party that retained the expert.	The Discovery Subcommittee does not recommend adopting FRCP 26(b)(4)(E), which requires the party deposing a testifying expert pay the expert a reasonable fee for time spent responding to discovery. The Discovery Subcommittee takes the position that this would invite abuse and hearings. Additionally, the TRCPs do not require expert reports like the FRCPs do, and the TRCPs impose limitations on depositions.

Production and Inspection: Tex. R. Civ. P. 196

RULE 196. REQUESTS FOR PRODUCTION AND INSPECTION TO PARTIES; REQUESTS AND MOTIONS FOR ENTRY UPON PROPERTY	The Discovery Subcommittee recommends revising the format of TRCP 196.1 to follow FRCP 34's format for clarity.
196.1 Request for Production and Inspection to Parties.	
(a) **Request.** A party may serve on another party~~ no later than 30 days before the end of the discovery period~~ a request for production or for inspection within the scope of discovery, to inspect, sample, test, photograph and copy ~~documents or tangible things within the scope of discovery.~~the following items in the responding party's possession, custody, or control: (1) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or (2) any designated tangible things.	The Discovery Subcommittee recommends revising TRCP 196.1 based on FRCP 34(a) because the FRCP more specifically covers electronically stored information.
(b) **Timing of request.** The request must be served no later than 30 days before the end of the discovery period.	
(~~b~~c) **Contents of request.** The request (1) must ~~specify the items to be produced or inspected, either by individual item or by category, and~~ describe with reasonable particularity each item ~~and~~ or category of items to be inspected; (2) ~~The request~~ must specify a reasonable time (on or after the date on which the response is due), ~~and~~ place, and manner for the production or inspection and for performing the related acts; and (3) If the requesting party will sample or test the requested items, the means, manner and procedure for testing or sampling must be described with sufficient	The Discovery Subcommittee recommends revising the format of former subsection b (now c) to follow FRCP 34(b)(1) for clarity.

specificity to inform the producing party of the means, manner, and procedure for testing or sampling.

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

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

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

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

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

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

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

196.2 Response to Request for Production and Inspection.

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

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

The Discovery Subcommittee recommends removing this language from TRCP 196.2(a) so that no discovery can be served prior to the answer. The Discovery Subcommittee also rejected the following language from FRCP 34(b)(2)(A) because another TRCP already permits this: "A shorter or longer time may be stipulated to under

(1) must either state that ~~production, inspection, or other requested action~~ inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request or assert privileges as required by these rules, including the reasons; (2) ~~the requested items are being served on the requesting party with the response~~may state that it will produce copies of documents or electronically stored information instead of permitting inspection; (3) state, as appropriate, that production, inspection, or other requested action will take place at a specified time and place, if the responding party is objecting to the time and place of production; or (4) state, as appropriate, that no items have been identified - after a diligent search - that are responsive to the request.	Rule 29 or be ordered by the court." The Discovery Subcommittee recommends revising TRCP 196.2(b) based on FRCP 34(b)(2)(B).
196.3 Production. (a) **Time and place of production.** Subject to any objections stated in the response, the production must be completed no later than the time for the production or inspection specified in the request or another reasonable time specified in the response. Subject to any objections stated in the response, the responding party must produce the requested documents or tangible things within the person's possession, custody or control at ~~either~~ the ~~time and~~ place requested or the ~~time and~~ place stated in the response, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them. (b) **Copies.** The responding party may produce copies in lieu of originals unless a question is raised as to the authenticity of the original or in the circumstances it would be unfair to produce copies in lieu of originals. If originals are produced, the responding party is entitled to retain the originals while the requesting party inspects and copies them.	The Discovery Subcommittee recommends revising TRCP 196.3(a) to include language in the last sentence of FRCP 34(b)(2)(B). The Discovery Subcommittee recommends revising TRCP 196.3(c) to give a party the

(c) **Organization.** The responding party must ~~either~~ produce documents and tangible things as they are kept in the usual course of business or organize and label them to correspond with the categories in the request.	option of asking the court to order production using the other organizational method.
196.4 ~~Electronic or Magnetic Data~~Electronically Stored Information. (a) **Request.** To obtain discovery of data or information that exists in electronic ~~or magnetic~~ form ("electronically stored information"), the requesting party must ~~specifically request production of electronic or magnetic data and~~ specify the form in which the requesting party wants it produced. (b) **Responses and Objections.** ~~The responding party~~The response: (1) must either state that production of the electronically stored information ~~or magnetic data~~ that is responsive to the request and is reasonably available to the responding party in its ordinary course of business will occur or state with specificity the grounds for objecting to the request or assert privileges as required by these rules, including the reasons; (2) may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use; and (3) must object to the production, ~~. I~~if the responding party cannot - through reasonable efforts - retrieve the ~~data or~~electronically stored information requested or produce it in the form requested~~, the responding party must state an objection complying with these rules~~. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.	The Discovery Subcommittee recommends revising TRCP 196.4 based on FRCP 34(b)(2)(D) and (E).

(c) **Producing the Electronically Stored Information**. Unless otherwise stipulated or ordered by the court, if a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and a party need not produce the same electronically stored information in more than one form. **196.5 Destruction or Alteration.** Testing, sampling or examination of an item may not destroy or materially alter an item unless previously authorized by the court. **196.6 Expenses of Production.** Unless otherwise ordered by the court for good cause, the expense of producing items will be borne by the responding party and the expense of inspecting, sampling, testing, photographing, and copying items produced will be borne by the requesting party. **196.7 Request of Motion for Entry Upon Property.** (a) **Request or motion.** ~~A party may gain entry on designated land or other property to inspect, measure, survey, photograph, test, or sample the property or any designated object or operation thereon by serving - no later than 30 days before the end of any applicable discovery period~~A party may serve on any other party a request within the scope of discovery to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it. If ~~–~~ ~~(1) a request on all parties if~~ the land or property belongs to a ~~party~~non-party, ~~or~~ the party seeking entry onto designated land or other property possessed or controlled by the nonparty must file	The Discovery Subcommittee recommends revising TRCP 196.7(a) based on FRCP 34(a)(2).

~~(2)~~ a motion and notice of hearing on all parties and the nonparty ~~if the land or property belongs to a nonparty~~. If the identity or address of the nonparty is unknown and cannot be obtained through reasonable diligence, the court must permit service by means other than those specified in Rule 21a that are reasonably calculated to give the nonparty notice of the motion and hearing.	
(b) **Timing of request.** The request for entry upon a party's property, or the order for entry upon a nonparty's property, must be filed no later than 30 days before the end of any applicable discovery period.	The Discovery Subcommittee recommends setting out TRCP 196.7(b) for clarity.
(~~b~~c) ~~**Time**~~**Requested time, place, and other conditions of inspection.** ~~The request for entry upon a party's property, or the order for entry upon a nonparty's property,~~The request must state the time, place, manner, conditions, and scope of the inspection, and must specifically describe any desired means, manner, and procedure for testing or sampling, and the person or persons by whom the inspection, testing, or sampling is to be made.	The Discovery Subcommittee recommends making these stylistic changes to TRCP 196.7(c) for clarity.
(~~c~~d) **Response to request for entry.**	
(1) **Time to respond.** The responding party must serve a written response on the requesting party within 30 days after service of the request~~, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request~~.	The Discovery Subcommittee recommends removing this language from TRCP 196.7(d) so that no discovery can be served prior to the answer.
(2) **Content of response.** The responding party must state with specificity the grounds for ~~objections~~ objecting and assert privileges as required by these rules, including the reasons, and state, as appropriate, that:	The Discovery Subcommittee recommends revising TRCP 196.7(d)(2) to correspond with other changes in this Rule.
(A) entry or other requested action will be permitted as requested;	
(B) entry or other requested action will take place at a specified time and place, if the responding party is objecting to the time and	

place of production; or (C) entry or other requested action cannot be permitted for reasons stated in the response. (~~d~~e) **Requirements for order for entry on nonparty's property.** An order for entry on a nonparty's property may issue only for good cause shown and only if the land, property, or object thereon as to which discovery is sought is relevant to the ~~subject matter~~claims or defenses of the action.	The Discovery Subcommittee recommends revising TRCP 196.7(e) to parallel the scope of discovery in FRCP 26.

Interrogatories: Tex. R. Civ. P. 197

RULE 197. INTERROGATORIES TO PARTIES	
197.1 Interrogatories – In General.~~.~~	The Discovery Subcommittee recommends revising the format of TRCP 197.1 to follow FRCP 33's format for clarity.
(a) **Number.** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 15 written interrogatories in a Level 1 case or 25 written interrogatories in Level 2 or Level 3 cases, including all discrete subparts, but excluding interrogatories asking a party only to identify or authenticate specific documents.	The Discovery Subcommittee recommends adding 197.1(a), based on FRCP 33(a)(1), for convenience.
(b) **Scope.** A written ~~interrogatories~~ interrogatory ~~to~~ may inquire about any matter within the scope of discovery except matters covered by Rule 195. An interrogatory may inquire whether a party makes a specific legal or factual contention and may ask the responding party to state the legal theories and to describe in general the factual bases for the party's claims or defenses, but interrogatories may not be used to require the responding party to marshal all of its available proof or the proof the party intends to offer at trial.	The Discovery Subcommittee rejected the following language from FRCP 33(a)(2) because parties do not need to be invited to do this: "the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time."
(c) **Timing of request.** A party may serve written interrogatories on another party ~~–~~no later than 30 days before the end of the discovery period.	
197.2 Response to Interrogatories.	The Discovery Subcommittee recommends moving the verification requirement to TRCP 197.2(a) from 197.2(d) to track the format of FRCP 33 and to indicate who must respond earlier in the rule. The Discovery Subcommittee also revised the verification requirement to: (1) remove confusing language indicating an agent could not
(a) **Responding parties; verification.** A responding party - not an attorney of record as otherwise permitted by Rule 14 - must sign the answers under oath or a declaration except that: (1) when answers are based on information obtained from other persons, the party may so state, and (2) a party need not sign answers to interrogatories about persons with knowledge of relevant facts, trial witnesses, and legal contentions.	

(b) **Time for response.** The responding party must serve a written response on the requesting party within 30 days after service of the interrogatories~~, except that a defendant served with interrogatories before the defendant's answer is due need not respond until 50 days after service of the interrogatories.~~. (~~b~~c) **Content of response.** A response must include the party's answers to the interrogatories and may include objections and assertions of privilege as required under these rules. (d) **Objections.** The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure. (~~c~~e) **Option to produce records.** If the answer to an interrogatory may be derived or ascertained from public records, from the responding party's business records, or from an examination, auditing, ~~a~~ compilation, abstract or summary of the responding party's business records (including electronically stored information), and the burden of deriving or ascertaining the answer is substantially the same for the requesting party as for the responding party, the responding party may answer the interrogatory by (1) specifying the records that must be reviewed, in sufficient detail to enable the requesting party to locate and identify them as readily as the responding party could; and, (2) if applicable, producing the records or compilation, abstract or summary of the records; and~~. The records from which the answer may be derived or ascertained must be specified in sufficient detail to permit the requesting party to locate and identify them as readily as can the responding party.~~ (3) ~~If the responding party has specified business records, the responding party must state~~stating a reasonable time and place for examination of the documents. The responding party must produce the documents at the time and place stated, unless	respond, and (2) to add declaration language. The Discovery Subcommittee recommends removing this language from TRCP 197.2(b) so that no discovery can be served prior to the answer. The Discovery Subcommittee also rejected the following language from FRCP 33(b)(2) because another TRCP already permits this: "A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court." The Discovery Subcommittee recommends adding TRCP 197.2(d) from FRCP 33(b)(4). The Discovery Subcommittee recommends revising TRCP 197.2(e) to correspond with language in FRCP 33(d).

otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them. **197.3 Use.** Answers to interrogatories may be used only against the responding party. An answer to an interrogatory inquiring about matters described in Rule 194.2(c) and (d) that has been amended or supplemented is not admissible and may not be used for impeachment.	

Admissions: Tex. R. Civ. P. 198

RULE 198. REQUESTS FOR ADMISSIONS	
198.1 Request for Admissions.	The Discovery Subcommittee recommends breaking down TRCP 198.1 into subsections for clarity.
(a) **Request.** A party may serve on another party ~~no later than 30 days before the end of the discovery period~~ written requests that the other party admit, for purposes of the pending action only, the truth of any matter within the scope of discovery, including:	
(1) ~~statements of opinion or of fact or of the application of law to fact~~facts, the application of law to fact, or opinions about either~~, or~~; and	The revisions to TRCP 198.1(a)(1)-(2) are from FRCP 36(a)(1) and 36(b).
(2) the genuineness of any described documents ~~served with the request or otherwise made available for inspection and copying~~.	
(b) **Number**. Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 15 written requests for admissions in a Level 1 case or 25 written requests for admissions in Level 2 or Level 3 cases, including all discrete subparts, but excluding requests asking a party only to identify or authenticate specific documents.	The Discovery Subcommittee recommends limiting the number of requests for admissions in TRCP 198.1(b) to correspond with the limit on interrogatories.
(c) **Timing of request.** The request must be served no later than 30 days before the end of the discovery period.	
(d) **Form; copy of a document**. Each matter for which an admission is requested must be stated separately. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.	The revisions to TRCP 198.1(d) are from FRCP 36(a)(2).
198.2 Response to Requests for Admissions.	The Discovery Subcommittee recommends removing this language from TRCP 198.2(a) so that no discovery can be served
(a) **Time ~~for response~~to respond; effect of failure to respond.** The responding party must serve a written response on the requesting party within 30 days after service of the request~~,~~	

~~except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request.~~. If a response is not timely served, the request is considered admitted without the necessity of a court order. (b) ~~**Content of response**~~**Answer.** If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny. ~~Unless the responding party states an objection or asserts a privilege, the responding party must specifically admit or deny the request or explain in detail the reasons that the responding party cannot admit or deny the request. A response must fairly meet the substance of the request. The responding party may qualify an answer, or deny a request in part, only when good faith requires. Lack of information or knowledge is not a proper response unless the responding party states that a reasonable inquiry was made but that the information known or easily obtainable is insufficient to enable the responding party to admit or deny. An assertion that the request presents an issue for trial is not a proper response.~~ ~~(c) **Effect of failure to respond.** If a response is not timely served, the request is considered admitted without the necessity of a court order.~~ (c) **Motion regarding the sufficiency of an answer or objection.** The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served.	prior to the answer. The Discovery Subcommittee recommends adding this language to TRCP 198.2(a) from TRCP 198.2(c) for clarity. The revisions to TRCP 198.2(b) are from FRCP 36(a)(4). TRCP 198.2(c) is moved to TRCP 198.2(a). The addition of TRCP 198.2(c) is from FRCP 36(a)(6).

198.3 Effect of an Admission~~s~~; Withdrawal or Amendment. An~~y~~ admission made by a party under this rule ~~may be used solely in the pending action~~is not an admission for any other purpose and cannot be used against the party in any other proceeding. A matter admitted under this rule is conclusively established ~~as to the party making the admission~~ unless the court, on motion, permits the party to withdraw or amend the admission. The court may permit the party to withdraw or amend the admission if: (a) the party shows good cause for the withdrawal or amendment; and (b) the court finds that ~~the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved by permitting the party to amend or withdraw the admission.~~the withdrawal or amendment would promote the presentation of the merits of the action and the court is not persuaded that the withdrawal or amendment would prejudice the requesting party in maintaining or defending the action on the merits.	The revisions to TRCP 198.3 are from FRCP 36(b). It is also stylistically revised for clarity and parallelism.

Depositions, Pre-Suit Depositions, and Depositions Pending Appeal:

Tex. R. Civ. P. 199-203

RULE 199. DEPOSITIONS UPON ORAL EXAMINATION **199.1 Oral Examination; Alternative Methods of Conducting or Recording.** (a) **Generally.** A party may take the testimony of any person or entity by deposition on oral examination before any officer authorized by law to take depositions. The testimony, objections, and any other statements during the deposition must be recorded at the time they are given or made. (b) **Depositions by ~~telephone or other~~ remote ~~electronic~~ means.** ~~A party may take~~The parties may stipulate—or the court may on motion order—an oral deposition by telephone or other remote electronic means ~~if the party gives reasonable prior written notice of intent to do so~~. For the purposes of these rules, an oral deposition taken by telephone or other remote electronic means is considered as having been taken in the district and at the place where the witness is located when answering the questions. The officer taking the deposition may be located with the party noticing the deposition instead of with the witness if the witness is placed under oath by a person who is present with the witness and authorized to administer oaths in that jurisdiction. (c) **Non-stenographic recording.** Any party may cause a deposition upon oral examination to be recorded by other than stenographic means, including videotape recording. The party requesting the non-stenographic recording will be responsible for obtaining a person authorized by law to administer the oath and for assuring that the recording will be intelligible, accurate, and trustworthy. At least five days prior to the deposition, the party must serve on the witness and all parties a notice, either in the notice of deposition or separately, that the deposition will be recorded by other than stenographic means. This notice must state the method of non-stenographic recording to be used and whether the deposition will also be recorded	The Discovery Subcommittee considered revising TRCP 199.1(a) to adopt part of FRCP 30(a)(2) to require a party to obtain leave of court to take more than 10 depositions (change only for oral depositions). However, due to deposition time limits already in the TRCPs, many committee members disagree with this change. The Discovery Subcommittee recommends revising TRCP 199.1(b) to be consistent with FRCP 30(b)(4), which requires agreement or leave of court for remote depositions.

stenographically. Any other party may then serve written notice designating another method of recording in addition to the method specified, at the expense of such other party unless the court orders otherwise. **199.2 Procedure for Noticing Oral Depositions.** (a) **Time to notice deposition.** A notice of intent to take an oral deposition must be served on the witness and all parties a reasonable time before the deposition is taken. An oral deposition may be taken outside the discovery period only by agreement of the parties or with leave of court. (b) **Content of notice.** (1) **Identity of witness; organizations.** The notice must state the name of the witness, which may be either an individual or a public or private corporation, partnership, association, governmental agency, or other organization. If an organization is named as the witness, the notice must describe with reasonable particularity the matters on which examination is requested. In response, the organization named in the notice must - a reasonable time before the deposition - designate one or more individuals to testify on its behalf and set forth, for each individual designated, the matters on which the individual will testify. Each individual designated must testify as to matters that are known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized by these rules. (2) **Time and place.** The notice must state a reasonable time and place for the oral deposition. The place may be in: (A) the county of the witness's residence; (B) the county where the witness is employed or regularly transacts business in person; (C) the county of suit, if the witness is a party or a person designated by a party under Rule	

199.2(b)(1);

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

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

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

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

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

199.3 Compelling Witness to Attend.

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

as a subpoena served on the witness.

199.4 Objections to Time and Place of Oral Deposition.

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

199.5 Examination, Objection, and Conduct During Oral Depositions.

(a) **Attendance.**

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

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

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

(b) **Oath; examination.** Every person whose deposition is taken

by oral examination must first be placed under oath. The parties may examine and cross-examine the witness. Any party, in lieu of participating in the examination, may serve written questions in a sealed envelope on the party noticing the oral deposition, who must deliver them to the deposition officer, who must open the envelope and propound them to the witness. The record must state: (1) the officer's name and business address; (2) the date, time, and place of the deposition; (3) the deponent's name; (4) the administration of the oath or affirmation to the deponent; and (5) the identity of all persons present.	The Discovery Subcommittee recommends revising TRCP 199.5(b) to adopt FRCP 30(b)(5)(A), amended to require only that the record must state these items. The Discovery Subcommittee does not recommend requiring an officer begin the deposition with an on-the-record statement of these items like the FRCPs.
(c) **Time limitation.** No side may examine or cross-examine an individual witness for more than six hours. Breaks during depositions do not count against this limitation. The court must allow additional time consistent with Rule 192.3 and Rule 192.4 if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.	The Discovery Subcommittee recommends revising TRCP 199.5(c) to adopt language from FRCP 30(d); the Discovery Subcommittee does not recommend adopting the FRCP's limit of "one day of 7 hours" for a deposition.
(d) **Conduct during the oral deposition; conferences.** The oral deposition must be conducted in the same manner as if the testimony were being obtained in court during trial. If the deposition is recorded nonstenographically, the deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques. Counsel should cooperate with and be courteous to each other and to the witness. The witness should not be evasive and should not unduly delay the examination. Private conferences between the witness and the witness's attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during agreed recesses and adjournments. If the lawyers and witnesses do not comply with this rule, the court may allow in evidence at trial statements, objections, discussions, and other occurrences during the oral deposition	The Discovery Subcommittee recommends revising TRCP 199.5(d) to adopt language in FRCP 30(b)(5)(B). The Discovery Subcommittee recommends considering adopting the FRCP option for TRCP 199.5(e). FRCP 30(c)(2) provides: "An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's

that reflect upon the credibility of the witness or the testimony. (e) **Objections.** Objections to questions during the oral deposition are limited to "Objection, leading" and "Objection, form." Objections to testimony during the oral deposition are limited to "Objection, non-responsive." These objections are waived if not stated as phrased during the oral deposition. All other objections need not be made or recorded during the oral deposition to be later raised with the court. The objecting party must give a clear and concise explanation of an objection if requested by the party taking the oral deposition, or the objection is waived. Argumentative or suggestive objections or explanations waive objection and may be grounds for terminating the oral deposition or assessing costs or other sanctions. The officer taking the oral deposition will not rule on objections but must record them for ruling by the court. The officer taking the oral deposition must not fail to record testimony because an objection has been made. (f) **Instructions not to answer.** An attorney may instruct a witness not to answer a question during an oral deposition only if necessary to preserve a privilege, comply with a court order or these rules, protect a witness from an abusive question or one for which any answer would be misleading, or secure a ruling pursuant to paragraph (g). The attorney instructing the witness not to answer must give a concise, non-argumentative, non-suggestive explanation of the grounds for the instruction if requested by the party who asked the question. (g) **Suspending the deposition.** If the time limitations for the deposition have expired or the deposition is being conducted or defended in violation of these rules, a party or witness may suspend the oral deposition for the time necessary to obtain a ruling. (h) **Good faith required.** An attorney must not ask a question at an oral deposition solely to harass or mislead the witness, for any other improper purpose, or without a good faith legal basis at the time. An attorney must not object to a question at an oral deposition, instruct the witness not to answer a question, or suspend the deposition unless there is a good faith factual and legal basis for doing so at the time.	qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion [to terminate or limit the deposition.]" If the FRCP option is not adopted, the Discovery Subcommittee recommends adopting a rule requiring objections to a party's conduct or officer's qualifications be noted on the record.

199.6 Hearing on Objections. Any party may, at any reasonable time, request a hearing on an objection or privilege asserted by an instruction not to answer or suspension of the deposition; provided the failure of a party to obtain a ruling prior to trial does not waive any objection or privilege. The party seeking to avoid discovery must present any evidence necessary to support the objection or privilege either by testimony at the hearing or by affidavits served on opposing parties at least seven days before the hearing. If the court determines that an *in camera* review of some or all of the requested discovery is necessary to rule, answers to the deposition questions may be made in camera, to be transcribed and sealed in the event the privilege is sustained, or made in an affidavit produced to the court in a sealed wrapper. **RULE 200. DEPOSITIONS UPON WRITTEN QUESTIONS** **200.1 Procedure for Noticing Deposition Upon Written Questions.** (a) **Who may be noticed; when.** A party may take the testimony of any person or entity by deposition on written questions before any person authorized by law to take depositions on written questions. A notice of intent to take the deposition must be served on the witness and all parties at least 20 days before the deposition is taken. A deposition on written questions may be taken outside the discovery period only by agreement of the parties or with leave of court. The party noticing the deposition must also deliver to the deposition officer a copy of the notice and of all written questions to be asked during the deposition. (b) **Content of notice.** The notice must comply with Rules 199.1(b), 199.2(b), and 199.5(a)(3). If the witness is an organization, the organization must comply with the requirements of that provision. The notice also may include a request for production of documents as permitted by Rule	Note the Discovery Subcommittee does not recommend adopting FRCP 30(a)'s 10-deposition rule for depositions on written questions.

199.2(b)(5), the provisions of which will govern the request, service, and response. **200.2 Compelling Witness to Attend.** A party may compel the witness to attend the deposition on written questions by serving the witness with a subpoena under Rule 176. If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the deposition notice upon the party's attorney has the same effect as a subpoena served on the witness. **200.3 Questions and Objections.** (a) **Direct questions.** The direct questions to be propounded to the witness must be attached to the notice. (b) **Objections and additional questions.** Within ten days after the notice and direct questions are served, any party may object to the direct questions and serve cross-questions on all other parties. Within five days after cross-questions are served, any party may object to the cross-questions and serve redirect questions on all other parties. Within three days after redirect questions are served, any party may object to the redirect questions and serve re-cross questions on all other parties. Objections to re-cross questions must be served within five days after the earlier of when re-cross questions are served or the time of the deposition on written questions. (c) **Objections to form of questions.** Objections to the form of a question are waived unless asserted in accordance with this subdivision. **200.4 Conducting the Deposition Upon Written Questions.** The deposition officer must: take the deposition on written questions at the time and place designated; record the testimony of the witness under oath in response to the questions; and prepare, certify, and deliver the deposition transcript in accordance with Rule 203. The deposition officer	

has authority when necessary to summon and swear an interpreter to facilitate the taking of the deposition. **RULE 201. DEPOSITIONS IN FOREIGN JURISDICTIONS FOR USE IN TEXAS PROCEEDINGS; DEPOSITIONS IN TEXAS FOR USE IN FOREIGN PROCEEDINGS** **201.1 Depositions in Foreign Jurisdictions for Use in Texas Proceedings.** (a) **Generally.** A party may take a deposition on oral examination or written questions of any person or entity located in another state or a foreign country for use in proceedings in this State. The deposition may be taken by: (1) notice; (2) letter rogatory, letter of request, or other such device; (3) agreement of the parties; or (4) court order. (b) **By notice.** A party may take the deposition by notice in accordance with these rules as if the deposition were taken in this State, except that the deposition officer may be a person authorized to administer oaths in the place where the deposition is taken. (c) **By letter rogatory.** On motion by a party, the court in which an action is pending must issue a letter rogatory on terms that are just and appropriate, regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter must: (1) be addressed to the appropriate authority in the jurisdiction in which the deposition is to be taken; (2) request and authorize that authority to summon the witness before the authority at a time and place stated in the letter for examination on oral or written	Note the Discovery Subcommittee does not recommend adopting FRCP 30(a)'s 10-deposition rule in TRCP 201.

questions; and (3) request and authorize that authority to cause the witness's testimony to be reduced to writing and returned, together with any items marked as exhibits, to the party requesting the letter rogatory. (d) **By letter of request or other such device.** On motion by a party, the court in which an action is pending, or the clerk of that court, must issue a letter of request or other such device in accordance with an applicable treaty or international convention on terms that are just and appropriate. The letter or other device must be issued regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter or other device must: (1) be in the form prescribed by the treaty or convention under which it is issued, as presented by the movant to the court or clerk; and (2) must state the time, place, and manner of the examination of the witness. (e) **Objections to form of letter rogatory, letter of request, or other such device.** In issuing a letter rogatory, letter of request, or other such device, the court must set a time for objecting to the form of the device. A party must make any objection to the form of the device in writing and serve it on all other parties by the time set by the court, or the objection is waived. (f) **Admissibility of evidence.** Evidence obtained in response to a letter rogatory, letter of request, or other such device is not inadmissible merely because it is not a verbatim transcript, or the testimony was not taken under oath, or for any similar departure from the requirements for depositions taken within this State under these rules. (g) **Deposition by electronic means.** A deposition in another jurisdiction may be taken by telephone, video conference, teleconference, or other electronic means under the provisions of Rule 199. **201.2 Depositions in Texas for Use in Proceedings in Foreign**	

Jurisdictions.

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

RULE 202. DEPOSITIONS BEFORE SUIT OR TO INVESTIGATE CLAIMS

202.1 Generally.

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

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

(b) to investigate a potential claim or suit.

202.2 Petition

The petition must:

(a) be verified;

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

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

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

(c) be in the name of the petitioner;

(d) state either:

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

(2) that the petitioner seeks to investigate a potential claim by or against petitioner; (e) state the subject matter of the anticipated action, if any, and the petitioner's interest therein; (f) if suit is anticipated, either: (1) state the names of the persons petitioner expects to have interests adverse to petitioner's in the anticipated suit, and the addresses and telephone numbers for such persons; or (2) state that the names, addresses, and telephone numbers of persons petitioner expects to have interests adverse to petitioner's in the anticipated suit cannot be ascertained through diligent inquiry, and describe those persons; (g) state the names, addresses and telephone numbers of the persons to be deposed, the substance of the testimony that the petitioner expects to elicit from each, and the petitioner's reasons for desiring to obtain the testimony of each; and (h) request an order authorizing the petitioner to take the depositions of the persons named in the petition. **202.3 Notice and Service.** (a) **Personal service on witnesses and persons named.** At least 15 days before the date of the hearing on the petition, the petitioner must serve the petition and a notice of the hearing – in accordance with Rule 21a - on all persons petitioner seeks to depose and, if suit is anticipated, on all persons petitioner expects to have interests adverse to petitioner's in the anticipated suit. (b) **Service by publication on persons not named.** (1) **Manner.** Unnamed persons described in the petition whom the petitioner expects to have interests adverse to petitioner's in the anticipated suit, if any, may be served by publication with the petition and notice of the hearing. The notice must state the place for the hearing	

and the time it will be held, which must be more than 14 days after the first publication of the notice. The petition and notice must be published once each week for two consecutive weeks in the newspaper of broadest circulation in the county in which the petition is filed, or if no such newspaper exists, in the newspaper of broadest circulation in the nearest county where a newspaper is published. (2) **Objection to depositions taken on notice by publication.** Any interested party may move, in the proceeding or by bill of review, to suppress any deposition, in whole or in part, taken on notice by publication, and may also attack or oppose the deposition by any other means available. (c) **Service in probate cases.** A petition to take a deposition in anticipation of an application for probate of a will, and notice of the hearing on the petition, may be served by posting as prescribed by Section 33(f)(2) of the Probate Code. The notice and petition must be directed to all parties interested in the testator's estate and must comply with the requirements of Section 33(c) of the Probate Code insofar as they may be applicable. (d) **Modification by order.** As justice or necessity may require, the court may shorten or lengthen the notice periods under this rule and may extend the notice period to permit service on any expected adverse party. **202.4 Order.** (a) **Required findings.** The court must order a deposition to be taken if, but only if, it finds that: (1) allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit; or (2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure.	

(b) **Contents.** The order must state whether a deposition will be taken on oral examination or written questions. The order may also state the time and place at which a deposition will be taken. If the order does not state the time and place at which a deposition will be taken, the petitioner must notice the deposition as required by Rules 199 or 200. The order must contain any protections the court finds necessary or appropriate to protect the witness or any person who may be affected by the procedure. **202.5 Manner of Taking and Use.** Except as otherwise provided in this rule, depositions authorized by this rule are governed by the rules applicable to depositions of non-parties in a pending suit. The scope of discovery in depositions authorized by this rule is the same as if the anticipated suit or potential claim had been filed. A court may restrict or prohibit the use of a deposition taken under this rule in a subsequent suit to protect a person who was not served with notice of the deposition from any unfair prejudice or to prevent abuse of this rule. **RULE 203. SIGNING, CERTIFICATION AND USE OF ORAL** **AND WRITTEN DEPOSITIONS** **203.1 Signature and Changes.** (a) **Deposition transcript to be provided to witness.** The deposition officer must provide the original deposition transcript to the witness for examination and signature. If the witness is represented by an attorney at the deposition, the deposition officer must provide the transcript to the attorney instead of the witness. (b) **Changes by witness; signature.** The witness may change responses as reflected in the deposition transcript by indicating the desired changes, in writing, on a separate sheet of paper, together with a statement of the reasons for making the	

changes. No erasures or obliterations of any kind may be made to the original deposition transcript. The witness must then sign the transcript under oath and return it to the deposition officer. If the witness does not return the transcript to the deposition officer within ~~20~~ 30 days of the date the transcript was provided to the witness or the witness's attorney, the witness may be deemed to have waived the right to make the changes. (c) **Exceptions.** The requirements of presentation and signature under this subdivision do not apply: (1) if the witness and all parties waive the signature requirement; (2) to depositions on written questions; or (3) to non-stenographic recordings of oral depositions. **203.2 Certification.** The deposition officer must file with the court, serve on all parties, and attach as part of the deposition transcript or non-stenographic recording of an oral deposition a certificate duly sworn by the officer stating: (a) that the witness was duly sworn by the officer and that the transcript or non-stenographic recording of the oral deposition is a true record of the testimony given by the witness; (b) that the deposition transcript, if any, was submitted to the witness or to the attorney for the witness for examination and signature, the date on which the transcript was submitted, whether the witness returned the transcript, and if so, the date on which it was returned. (c) that changes, if any, made by the witness are attached to the deposition transcript; (d) that the deposition officer delivered the deposition transcript or nonstenographic recording of an oral deposition in accordance with Rule 203.3;	The Discovery Subcommittee recommends revising TRCP 203.1 to conform with FRCP 30(e).

(e) the amount of time used by each party at the deposition; (f) the amount of the deposition officer's charges for preparing the original deposition transcript, which the clerk of the court must tax as costs; and (g) that a copy of the certificate was served on all parties and the date of service. **203.3 Delivery.** (a) **Endorsement; to whom delivered.** The deposition officer must endorse the title of the action and "Deposition of (name of witness)" on the original deposition transcript (or a copy, if the original was not returned) or the original nonstenographic recording of an oral deposition, and must return: (1) the transcript to the party who asked the first question appearing in the transcript, or (2) the recording to the party who requested it. (b) **Notice.** The deposition officer must serve notice of delivery on all other parties. (c) **Inspection and copying; copies.** The party receiving the original deposition transcript or non-stenographic recording must make it available upon reasonable request for inspection and copying by any other party. Any party or the witness is entitled to obtain a copy of the deposition transcript or non-stenographic recording from the deposition officer upon payment of a reasonable fee. **203.4 Exhibits.** At the request of a party, the original documents and things produced for inspection during the examination of the witness must be marked for identification by the deposition officer and annexed to the deposition transcript or non-stenographic recording. The person producing the materials may produce copies instead of originals if the party gives all other parties fair opportunity at the deposition to compare the copies with the	

originals. If the person offers originals rather than copies, the deposition officer must, after the conclusion of the deposition, make copies to be attached to the original deposition transcript or non-stenographic recording, and then return the originals to the person who produced them. The person who produced the originals must preserve them for hearing or trial and make them available for inspection or copying by any other party upon seven days' notice. Copies annexed to the original deposition transcript or non-stenographic recording may be used for all purposes.

203.5 Motion to Suppress.

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

203.6 Use.

(a) **Non-stenographic recording; transcription.** A non-stenographic recording of an oral deposition, or a written transcription of all or part of such a recording, may be used to the same extent as a deposition taken by stenographic means. However, the court, for good cause shown, may require that the party seeking to use a non-stenographic recording or written transcription first obtain a complete transcript of the deposition recording from a certified court reporter. The court reporter's transcription must be made from the original or a certified copy of the deposition recording. The court reporter must, to the extent applicable, comply with the provisions of this rule, except that the court reporter must deliver the original transcript to the attorney requesting the transcript, and the

court reporter's certificate must include a statement that the transcript is a true record of the non-stenographic recording. The party to whom the court reporter delivers the original transcript must make the transcript available, upon reasonable request, for inspection and copying by the witness or any party. (b) **Same proceeding.** All or part of a deposition may be used for any purpose in the same proceeding in which it was taken. If the original is not filed, a certified copy may be used. "Same proceeding" includes a proceeding in a different court but involving the same subject matter and the same parties or their representatives or successors in interest. A deposition is admissible against a party joined after the deposition was taken if: (1) the deposition is admissible pursuant to Rule 804(b)(1) of the Rules of Evidence, or (2) that party has had a reasonable opportunity to redepose the witness and has failed to do so. (c) **Different proceeding.** Depositions taken in different proceedings may be used as permitted by the Rules of Evidence.	

Physical and Mental Examinations: Tex. R. Civ. P. 204

RULE 204. PHYSICAL AND MENTAL EXAMINATION **204.1 Motion and Order Required.** (a) **Motion.** A party may - no later than 30 days before the end of any applicable discovery period - move for an order compelling another party to: (1) submit to a physical or mental examination ~~by a qualified physician or a mental examination by a qualified psychologist~~by a suitably licensed or certified examiner; or (2) produce for such examination a person in the other party's custody, conservatorship or legal control. (b) **Service.** The motion and notice of hearing must be served on the person to be examined and all parties. (c) **Requirements for obtaining order.** The court may issue an order for examination only for good cause shown and only in the following circumstances: (1) when the mental or physical condition (including the blood group) of a party, or of a person in the custody, conservatorship or under the legal control of a party, is in controversy; or (2) except as provided in Rule 204.4, an examination by a psychologist may be ordered when the party responding to the motion has designated a psychologist as a testifying expert or has disclosed a psychologist's records for possible use at trial. (d) **Requirements of order.** The order must be in writing and must specify the time, place, manner, conditions, and scope of the examination and the person or persons by who~~m it is to be made~~will perform it.	The Discovery Subcommittee recommends revising TRCP 204.1(a) to adopt language in FRCP 35(a). This would permit vocational examinations and other similar examinations upon satisfaction of the other rule requirements. The Discovery Subcommittee recommends revising TRCP 204.1(d) to match FRCP 35(a)(2)(B) for clarity. The Discovery

204.2 Examiner's Report ~~of Examining Physician or Psychologist~~. (a) **Right to report by the party or person examined.** Upon request of the person ordered to be examined, the party causing the examination to be made must deliver to the person a copy of a detailed written report of the examining physician or psychologist. The court on motion may limit delivery of a report on such terms as are just. (b) **Contents of report.** The written report must set out in detail ~~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. (c) **Request by the moving party.** ~~After delivery of the report, upon request of the party causing the examination, the party against whom the order is made must produce a like report of any examination made before or after the ordered examination of the same condition, unless the person examined is not a party and the party shows that the party is unable to obtain it. The court on motion may limit delivery of a report on such terms as are just.~~After delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them. The court on motion may limit delivery of a report on such terms as are just. (d) **Waiver of privilege.** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony about all examinations of the same condition. (e) **Failure to deliver a report.** If a physician or psychologist fails or refuses to make a report the court may exclude the testimony if offered at the trial. (~~b~~f) **Agreements; relationship to other rules**. This subdivision applies to examinations made by agreement of the parties,	Subcommittee recommends breaking up the provisions of TRCP 204.2 into separately numbered paragraphs like FRCP 35(b) for clarity. The Discovery Subcommittee recommends revising TRCP 204.2(b) to add the language "in detail" from FRCP 35(b)(2). The Discovery Subcommittee recommends revising TRCP 204.2(c) to use language from FRCP 35(b)(3) for clarity. The Discovery Subcommittee recommends adding TRCP 204.2(d) based on FRCP 35(b)(4).

unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance with the provisions of any other rule. **204.3 Effect of No Examination.** If no examination is sought either by agreement or under this subdivision, the party whose physical or mental condition is in controversy must not comment to the court or jury concerning the party's willingness to submit to an examination, or on the right or failure of any other party to seek an examination. **204.4 Cases Arising Under Titles II or V, Family Code.** In cases arising under Family Code Titles II or V, the court may - on its own initiative or on motion of a party - appoint: (a) one or more psychologists or psychiatrists to make any and all appropriate mental examinations of the children who are the subject of the suit or of any other parties, and may make such appointment irrespective of whether a psychologist or psychiatrist has been designated by any party as a testifying expert; (b) one or more experts who are qualified in paternity testing to take blood, body fluid, or tissue samples to conduct paternity tests as ordered by the court. **204.5 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.	

SCAC Discovery Subcommittee
Future Issues

- Limiting the number of RFPs: The Discovery Subcommittee discussed whether to limit the number of Requests for Production permitted under Texas Rules of Civil Procedure 190 and 196. The discussion included whether the limit would apply to depositions with document productions.
- Level 3 cases mandatory: The Discovery Subcommittee discussed whether Level 3 (Texas Rule of Civil Procedure 190.4) should be mandatory and automatic at a certain dollar amount in controversy.
- Level 3 cases assigned to a specific court: The Discovery Subcommittee discussed requiring Level 3 cases be assigned to a specific court for management purposes. This change may be made in the Rules of Judicial Administration.
- Modifying discovery procedures for good cause: Currently, Texas Rule of Civil Procedure 191.1 permits discovery procedures and limitations to be modified by agreement of the parties "or by court order for good cause." Tex. R. Civ. P. 191.1 (emphasis added). The Discovery Subcommittee discussed whether the "good cause" standard should be used in Rule 191.1, particularly given that Texas Rule of Civil Procedure 190.5 requires modification of a discovery control plan "when the interest of justice requires." Tex. R. Civ. P. 190.5.
- Pleading amendment deadlines: The Discovery Subcommittee discussed whether the pleading amendment deadlines in Texas Rules of Civil Procedure 66 and 63 should be amended. One modest change discussed was to require leave of court to file amended pleadings, responses, or pleas filed within 30 days of the date of trial. Current Texas Rule of Civil Procedure 63 sets the deadline for amendments without leave of court at seven days of the date of trial. Tex. R. Civ. P. 63. Changing the burden required to obtain leave to file an amendment was also discussed. Tex. R. Civ. P. 63.
- Increasing disclosure requirements: The Discovery Subcommittee discussed a more robust Texas Rule of Civil Procedure 194 that would not allow parties to incorporate their pleadings into the responses.
- Rule 215 and spoliation: The Discovery Subcommittee discussed amendments to Texas Rule of Civil Procedure 215 and a proposed spoliation rule, but more discussion is needed.

[8.31.16 CONFERENCE CALL REDRAFT]

Rule 9. Documents Generally.

(d) Sealing Documents in Appellate Courts.

(1) Definitions. For the purposes of this rule:

(A) "Appellate proceeding" means any proceeding in a Court of Appeals or the Supreme Court, including appeals from trial court orders or judgments and original proceedings.

(B) "Document" means any compilation of information in written electronic, photographic or other form, including the Clerk's Record, the Reporter's Record or filed in the court of appeals in the first instance in an appellate proceeding.

(C) "Document filed under seal" means any document that is filed subject to a motion to seal the document by a court order.

(D) "Sealed document" means any document to which access is prohibited or restricted by court order or by law, including documents sealed under rule 76a, privileged documents, documents to which access is restricted under Rule 192.6(b)(5), or documents submitted for in-camera inspection under Rule 193.

(2) Effect of Trial Court Sealing [or Protective] Orders. Any portion of the appellate record that was sealed [or protected from discovery or public disclosure] in the court below and is transmitted to an appellate court in connection with an appeal or an original proceeding is presumed to be sealed for all appellate proceedings until the trial court's order expires by its own terms, or is vacated or modified by the appellate court.

(3) Completion of Appellate Record. If the appellate record includes a trial court order concerning documents filed or submitted for in camera inspection in the trial court under Rule 193.4, but the clerk of the trial court or the court reporter has custody of the documents, the clerk or the reporter must [promptly] forward the documents to the appellate clerk [under seal] in the form provided in paragraph (d)(6) for inclusion in the appellate record [at the request of the appellant or relator].

(4) Motions to Seal in Appellate Courts

(A) In an appeal or original proceeding, a party who wishes to file any document or portion of a document, including a brief, under seal (that was not filed under seal or not filed at all) in the court below, must file a motion to seal the document simultaneously with the document, as provided in paragraph (d)(6). The motion must be in writing and must contain the following information:

(i) a general description of each document or group of documents without disclosing their contents, sufficient to enable the appellate court [and other parties] to understand the motion;

(ii) whether a motion to seal [or to unseal] any of the documents is pending in the trial court;

(iii) [specific] facts [supported by affidavit or other evidence] showing prima facie why the documents should be sealed or otherwise protected from discovery or disclosure pending the determination of the proceedings in the appellate court under the standards prescribed by Civil Procedure Rule 76a, or under Rule 192.6 (b) (to prevent harm to the movant from undue burden, unnecessary expense, harassment, annoyance or invasion of personal, constitutional or property rights) or because the documents are privileged from discovery or public disclosure under applicable law.

(B) The documents filed under seal will be provisionally sealed pending a ruling on the motion.

(5) Response and Reply. Any party to the proceeding in the appellate Court may file a response to the motion [supported by affidavit or other evidence] within ____ days after the date the motion is filed or on or before the date specified in writing by the appellate court. A reply to a response may be filed within ____ days after the date the response was due or on or before the date specified in writing by the appellate court.

(6) Form of [Sealed] [Restricted-Access] Documents Submitted to Appellate Court.

(A) The documents must be filed [under seal] in the appellate court [by the movant or the trial court clerk or court reporter at the movant's request] in [a manner that preserves confidentiality] [electronic form] [electronic form in a manner that preserves confidentiality]. The documents must be labeled with the style of the case, the case number in the trial court [and in the appellate court,] and a brief description of the contents.

(B) A copy of any [sealing] order [restricting access] signed by the trial court or any motion to [seal] [restrict access to] documents filed in the trial court must be [filed with] [submitted with] the documents.

(C) The documents submitted to the [appellate] court are subject to in camera inspection by the [appellate] court but are not subject to inspection by the other parties or the public [unless the [appellate] court's order makes them available].

(7) Appellate Court Rulings.

(A) Abatement of Appellate Proceedings. The appellate court may abate the appeal or original proceeding for a reasonable time, to

allow the trial court to rule on a pending motion to seal [or unseal] documents filed in the trial court, or to take further action as directed by the appellate court.

(B) Temporary Orders. The appellate court may grant temporary relief with respect to some or all of the documents pending a decision on the merits of the appeal or original proceeding if the appellate court determines:

(i) the documents are court records that should be temporarily sealed under the standards and procedures for sealing records in Texas Rule of Civil Procedure 76a.5; or

(ii) the documents are not court records under Texas Rule of Civil Procedure 76a.2, but the movant needs a sealing order to preserve privileged documents from disclosure or a protective order for relief from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights in the interest of justice, as provided in Texas Rule of Civil Procedure 192.6.

[(C) Motions to Unseal Documents. The appellate court may grant a motion to unseal court records or other documents if the trial court erred or abused its discretion in ordering the court records or other documents to be sealed or protected from discovery or disclosure in the trial court. Relief from the order may be sought by motion filed in the court of appeals during the pendency of the appeal or original proceeding.]

(D) Decision on Motion.

(i) Relief Denied. If the court determines [from the motion and any response or any reply to a response] that the movant or relator is not entitled to the relief sought in the motion, the court must deny the motion;

(ii) Relief Granted. If the court finally determines that the movant or the relator is entitled to relief, the court may make an appropriate order or orders.

(E) Referral to Trial Court. The appellate court may refer a motion to seal filed in the appellate court and direct the trial court to hold further hearings, to make and to transmit findings of fact and conclusions of law to the court of appeals as to whether any documents that were not filed in the trial court or that were not filed under seal in the trial court are:

(i) court records that may be sealed in accordance with Rule 76a;

(ii) granted protection from discovery or public disclosure under Rules 192.6(b); or

(iii) privileged from discovery or public disclosure under applicable law.

(8) Contents of Sealing Order. A sealing order must identify the documents submitted for filing under seal and protected from public disclosure without disclosing their contents, state the time period during which the order will remain in effect, identify the persons, if any, who may be given access to the documents filed under seal in the appellate court, specify the terms and conditions of access to the documents, if any, and decide whether the documents should be temporarily sealed under Rule 76a.5 or state why the documents should be permanently sealed under the standards and procedures for sealing court records contained in Civil Procedure Rule 76a.1 and 2.

Rule 193.4 ***Hearing and Ruling on Objections and Assertions of Privilege.*** (9/7/2016)

(a) Hearing; [*Presentation of Evidence*] Any party may at any reasonable time request a hearing on an objection or claim of privilege asserted under this rule. The party making the objection or asserting the privilege must present any evidence necessary to support the objection or privilege. The evidence may be testimony presented at the hearing or affidavits served at least seven days before the hearing or at such other reasonable time as the court permits.

[(b) In Camera Review.] If the court determines that an in camera review of some or all of the requested discovery is necessary, that material or information must be segregated and produced to the court in a sealed wrapper within a reasonable time following the hearing. [The documents reviewed in camera are [presumed to be] protected [by law] from discovery and public disclosure pending the trial court's determination of the discovery objections or claims of privilege.

[(c) Custody of Documents.] Unless the trial court or an appellate court directs the court clerk or the court reporter to return the in camera documents to the party claiming a privilege or protection from discovery or public disclosure, the court clerk or court reporter must retain custody of the documents or information reviewed *in camera* for a reasonable time period after the signing of the trial court's order granting or denying relief, sufficient for a relator or an appellant to seek appellate review of the trial court's order.]

[(d)] Ruling. To the extent the court sustains the objection or claim of privilege, the responding party has no further duty to respond to that request. To the extent the court overrules the objection or claim of privilege, the responding party must produce the requested material or information to the requesting party within ____ days after the court's ruling or at such times as the court orders. A party need not request a ruling on that party's own objection or assertion of privilege to preserve the objection or privilege.

[(e)] Use of Material or Information . . .

6. *Order on Motion to Seal Court Records*. A motion relating to sealing or unsealing court records shall be decided by written order, open to the public, which shall state: the style and number of the case; the specific reasons for finding and concluding whether the showing required by paragraph 1 has been made; the specific portions of court records which are to be sealed; *specify who can have access to the records*; and the time period for which the sealed portions of the court records are to be sealed. The order shall not be included in any judgment or order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

8. *Appeal* [Procedures]

(a) Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order.

(b) *Documents that have been sealed by an order of the trial court or are subject to a motion to seal filed in the trial court must be filed in the appellate court as part of the appellate record in an appeal or an original proceeding pending in the appellate court. The documents must be filed in [a manner that preserves confidentiality] [electronic form] [electronic form in a manner that preserves confidentiality] and must be labeled with the style of the case, the case number in the trial court [and in the appellate court] and a brief description of their contents.*

(c) The appellate court may [abate an appeal and] order the trial court to *determine whether documents not filed in the trial court or that were not filed under seal in the trial court are court records that may be sealed in the proceeding in accordance with the standard and the procedures for sealing court records contained in this rule.* The appellate court may abate the appeal and order the trial court to direct that further notice be given, or to hold further hearings, or to make additional findings.