SCAC MEETING AGENDA
Friday, February 3, 2017
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 January 13 meeting.

3. **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

(a) February 1, 2017 Discovery Subcommittee Letter of B. Meadows
(b) Discovery Subcommittee Proposed Amendments Jan. 2017
(c) State Bar of Texas Committee on Court Rules Proposed Spoliation Rules

4. **EVIDENCE RULES**

Buddy Low
Professor Goode

(d) 2017 Evidence Rules

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

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

(e) Rule 9 Redraft, December 20, 2016
(f) Rule 193.4(a) and (b) December 19, 2016
(g) Tex. R. Civ. P. 76a December 20, 2016
(h) Hon. Brett Busby email
(i) Filing Documents Under Seal October 24, 2016 B. Dorsaneo Memo

6. TEXAS RULES OF CIVIL PROCEDURE 21a, 21c, 57 and 244

Rules 15-165a Committee Members:

Richard Orsinger – Chair
Frank Gilstrap – Vice
Prof. Alexandra Albright
Prof. Elaine Carlson
Nina Cortell
Prof. Bill Dorsaneo
O. C. Hamilton
Pete Schenkkan
Hon. Anahid Estevez

(j) September 1, 2016 Referral Letter

7. AMENDMENTS TO THE JUSTICE COURT RULES

Rules 523-734 Committee Members:

O. C. Hamilton – Chair
L. Hayes Fuller – Vice Chair
Eduardo Rodriguez

8. AMENDMENTS TO THE CODE OF JUDICIAL CONDUCT

Legislative Mandates Committee Members:

Jim Perdue, Jr. – Chair
Hon. Jane Bland – Vice Chair
Hon. Robert Pemberton
Prof. Elaine Carlson
Pete Schenkkan
Hon. David L. Evans
Robert Levy
Hon . Brett Busby
Wade Shelton
Richard Orsinger

9. AMENDMENTS TO THE STATE BAR RULE

Judicial Administration Committee Members:

Nina Cortell – Chair
Hon. David Peeples – Vice Chair
Prof. Lonny Hoffman
Hon. Tom Gray
Hon. Bill Boyce
Hon. David Newell
Kennon Wooten

(k) Memorandum To Full Committee

10. WHETHER THE DEADLINES PRESCRIBED BY RULE 53.7 OF THE RULES OF APPELLATE PROCEDURE ARE JURISDICTIONAL; PROCEDURE FOR FILING LATE PETITION DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL

Appellate Committee Members:

Prof. Bill Dorseano – Chair
Pamela Baron – Vice Chair
Hon. Bill Boyce
Hon. Brett Busry
Prof. Elaine Carlson
Frank Gilstrap
Charles Watson
Evan Young
Scott Stolley

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February 1, 2017

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, please find an updated version of recommended changes to Part II, Section 9 of the Rules of Civil Procedure, incorporating discussion from September's SCAC meeting. While perhaps not binding, we seemed to have agreement in the SCAC on the changes that now appear in the proposal on the following key matters:

- Increase Level One amount in controversy
- Level Three mandatory conference
- Remove "good cause" requirement for modifying discovery procedures
- Eliminate references to fax, and add e-mail requirements
- Mandatory initial disclosures
- Proportionality and relevancy

The Discovery Subcommittee's recommended changes on the following key topics have not yet been discussed by the SCAC:

- Content of mandatory initial disclosures
- Objecting to written discovery
- Experts
- Requests for production and inspection
- Interrogatories, Admissions, Depositions, and Physical and Mental Examinations

- Sanctions, including spoliation

With regard to Spoliation, the only topic on which we have not concluded our review for possible changes, the Discovery Subcommittee is in agreement that the language of Federal Rule of Civil Procedure 37(e)—modified slightly—should be added to our sanctions rule (Rule 215). Our Subcommittee does not recommend the adoption of the proposed rule by the State Bar of Texas Committee on Court Rules (attached), and other recommendations on a Spoliation rule (that deal with duty, notice, the mechanism for seeking redress from the court and punishment) remain under review.

Regards,

Robert Meadows

Enclosures

Texas Supreme Court Advisory Committee
Discovery Subcommittee Proposed Amendments
January 2017

Key:

Changes approved by SCAC in September 2016 are in yellow highlight in the draft.
Deletions approved by SCAC have been removed from the draft.
Previous suggestions that were rejected by the SCAC have been removed.
Discovery Subcommittee suggested changes are underlined.

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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) Initial Pleading. 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. (b) Change by Court Order. On motion and showing of good cause by a party, the court may change the level designated by the plaintiff.	Amended to clarify the method for changing the discovery level.
190.2 Discovery Control Plan - Expedited Actions and Divorces Involving $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 $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 initial disclosures are due.~~the first request for discovery of any kind is served on a party.~~	Amended due to mandatory initial disclosures.
(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 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.

(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, for a level 2 suit.

(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.~~initital disclosures are due; or (C) a docket control order sets a new date for the end of discovery.	Amended due to discussion about deadlines under Level 2.
(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.	
(4) **Requests for Production.** Any party may serve on any other party no more than 25 written requests for production. Each discrete subpart of a request for production is considered a separate request for	Amended due to discussion about limits on RFPs, particularly due to documents required by mandatory initial disclosures.

production.

190.4 Discovery Control Plan - ~~By Order (~~Level 3~~)~~

(a) **Application.** Discovery under level 3 is governed by this rule. ~~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.~~ After a conference required by this rule, t~~T~~he parties ~~may~~ must submit a~~n agreed~~ discovery control plan and proposed order(s) 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 the items listed in 190.4(c)~~:~~

(b) Conference

(1) **Conference timing.** 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 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.

Amended to clarify the conference process.

(3) **No discovery before conference. Unless otherwise ordered by the court,** a~~A~~ party may not seek discovery from any ~~source before the~~ party~~ies~~ before the parties have conferred as required by this rule. This does not include initial disclosures. (c~~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) deadlines for joining additional parties, amending or supplementing pleadings, and designating expert witnesses~~.~~; (4) what changes should be made in the timing, or form, of~~r~~ the initial ~~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 discovery imposed under these rules or by local rule, and what other limitations should be imposed; (9) Dispositive Motion deadlines;	Amended due to discussion that having initial disclosures prior to conference could aid the process. Amended due to discussion about not wanting mandatory disclosure requirement to be modified (but allowing form and timing of initial disclosures modifications). TRCP 190.4(c)(9)-(11) are added due to the addition at 190.4(d).

(10) Expert challenges deadlines; and (11) proposed docket control order(s) **(d) Docket Control Order.** Upon receipt of the discovery control plan, the trial court must issue a docket control order. **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. **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**	TRCP 190.4(d) is added due to the removal of 190.4(b) and to comport with FRCP 16(b).

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. An agreement of the parties is enforceable if it complies with Rule 11 or, as it affects an oral deposition, if it is made a part of the record of the deposition. **191.2 Conference** Parties and their attorneys are expected to cooperate in discovery and to make any agreements reasonably necessary for the efficient disposition of the case. All discovery motions or requests for hearings relating to discovery must contain a certificate by the party filing the motion or request that a reasonable effort has been made to resolve the dispute without the necessity of court intervention and the effort failed. **191.3 Signing of Disclosures, Discovery Requests, Notices, Responses, and Objections** (a) **Signature required.** Every disclosure, discovery request, notice, response, and objection must be signed: (1) by an attorney, if the party is represented by an attorney, and must show the attorney's State Bar of Texas identification number, address, telephone number, and service e-mail address ~~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 service email address, 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	"Good cause" has been removed. Amended to eliminate fax.

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.	No consensus on proposed change to TRCP 191.3(c)(1) to track FRCP 26(g)(1) (affects TRCP 13 and maybe various TRAPs).
(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	Rejected proposed change to TRCP 191.3(d) to track FRCP 26(g)(2).

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) 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. **192.2 Timing and Sequence of Discovery.** (a) **Timing.** Unless otherwise agreed to by the parties, or ordered by the court a party may not serve discovery until after the initial disclosures. (b) **Sequence.** The permissible forms of discovery may be combined in the same document and may be taken in any order or sequence.	Amended to clarify discovery cannot be served with a petition, revised proposal in light of comments from 9/16-9/17 meeting.

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 the subject matter of the pending action 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. (b) **Documents, information and tangible things.** A party may obtain discovery of the existence, description, nature, custody, condition, location, and contents of documents, information 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) **Contentions.** A party may obtain discovery of any other party's legal contentions and the factual bases for those contentions. **192.4 Limitations on Scope of Discovery.** The discovery methods permitted by these rules should be limited by the court if it determines, on motion or on its own initiative and on reasonable notice, that: (a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or (b) the 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.	Revised in light of discussion about relevancy at 9/16-9/17 meeting (keep "subject matter of the pending action"). Proportionality concept remains a proposed change to 192.3(a) due to mixed discussions at 9/16-9/17 meeting.

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 194 concerning experts, trial witnesses, witness statements, and contentions;

(2) trial exhibits ordered disclosed under Rule 166 or Rule 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.

(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

The Discovery Subcommittee recommends including this language in TRCP 192.6(a) from FRCP 26(c)(1) (protective order provision).

a person seeks protection regarding the time or place of discovery, the person must state a reasonable time and place for discovery with which the person will comply. A person must comply with a request to the extent protection is not sought unless it is unreasonable under the circumstances to do so before obtaining a ruling on the motion. (b) **Order.** To protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may - among other things - order that: (1) the requested discovery not be sought in whole or in part; (2) the extent or subject matter of discovery be limited; (3) the discovery not be undertaken at the time or place specified; (4) the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court; (5) the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a. **192.7 Definitions.** As used in these rules (a) *Written discovery* means requests for disclosure, requests for production and inspection of documents and tangible things, requests for entry onto property, interrogatories, and requests for admission. (b) *Possession, custody, or control* of an item means that the person either has physical possession of the item or has a right to possession of the item that is equal or superior to the person who has physical possession of the item. (c) A *testifying expert* is an expert who may be called to testify as an expert witness at trial.	

(d) A *consulting expert* is an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert. **RULE 193. WRITTEN DISCOVERY: RESPONSE; OBJECTION; ASSERTION OF PRIVILEGE; SUPPLEMENTATION AND AMENDMENT; FAILURE TO TIMELY RESPOND; PRESUMPTION OF AUTHENTICITY** **193.1 Responding to Written Discovery; Duty to Make Complete Response.** A party must respond to written discovery in writing within the time provided by court order or these rules. When responding to written discovery, a party must make a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made. The responding party's answers, objections, and other responses must be preceded by the request to which they apply. **193.2 Objecting to Written Discovery** (a) **Form and time for objections.** A party must make any objection to written discovery in writing - either in the response or in a separate document - within the time for response. The party must state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request. 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	The Discovery Subcommittee recommends adding this sentence to TRCP 193.2(a). The language is from FRCP 34(b)(2)(C).

request and must comply at that time and place without further request or order.

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

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

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

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

193.3 Asserting a Privilege

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

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

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

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

(3) the privilege or privileges asserted.

(b) **Description of withheld material or information.** After receiving a response indicating that material or information has been withheld from production, the party seeking discovery may serve a written request that the withholding party 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	The Discovery Subcommittee recommends adding TRCP 193.5(c) to require parties to disclose information and documents used at hearing or trial.

(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. DUTY TO DISCLOSE

194.1 Required Disclosures.

(a) **In general**. Except as exempted by this Rule or as otherwise

At the 9/16-9/17 meeting, adopting a mandatory disclosure requirement was approved.

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 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 Initial Disclosures.** (a) **Time for initial disclosures.** Both the plaintiff and the defendant~~A party~~ must make the initial disclosures at or within 30 days after the filing of the defendant's answer unless a different time is set by agreement~~stipulation~~ or court order. 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 agreement~~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	Revised to address discussion about timing at 9/16-9/17 meeting. The Discovery Subcommittee recommends the following content for initial disclosures. 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

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.; (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~~	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." 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.

~~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);~~	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: (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]. **194.3 Expert Disclosure.** In addition to the disclosures required by Rule 194.2, a party	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 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. TRCP 194.3 is to clarify expert disclosure requirements exist, as

must disclose to the other parties expert information as provided by Rule 195.	described in TRCP 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.~~	Prior TRCP 194.4 is moved to TRCP 194.1(b).
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.	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
~~**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.	403—is waived unless excused by the court for good cause."
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 Rule 29 or be ordered by the court."

(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.	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).

(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.	The Discovery Subcommittee recommends revising TRCP 196.3(c) to give a party the 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.**	*Note there are two cases pending at the Supreme Court of Texas on this topic, set to be argued on March 9. *See In re State Farm Lloyds*, Case No. 15-0903, and *In re State Farm Lloyds*, Case No. 15-0905.
(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, one or two 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	The Discovery Subcommittee recommends adopting a

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. An objection at the time of the examination 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. 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. (c) **Qualifications and Objections to Translator** [Placeholder]	portion of FRCP 30(c)(2) at TRCP 199.5(b) to require objections to officer's qualifications and the manner of taking the deposition be noted on the record. The Discovery Subcommittee also 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. The Discovery Subcommittee recommends adding a rule on qualifications and objections to a translator at TRCP 199.5(c).
(~~c~~d) **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. (~~d~~e) **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	The Discovery Subcommittee recommends revising TRCP 199.5(d) 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. The Discovery Subcommittee recommends revising TRCP 199.5(e) to adopt language in FRCP 30(b)(5)(B).

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~~f) **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~~g) **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~~h) **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	The Discovery Subcommittee recommends considering adopting a portion of FRCP 30(c)(2) for TRCP 199.5(f). FRCP 30(c)(2) provides: "An objection at the time of the examination—whether to evidence, to a party's conduct, . . . 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.]"

ruling. (~~h~~i) **Good faith required.** An attorney must not ask a question at an oral deposition solely to harass or mislead the witness, for any other improper purpose, or without a good faith legal basis at the time. An attorney must not object to a question at an oral deposition, instruct the witness not to answer a question, or suspend the deposition unless there is a good faith factual and legal basis for doing so at the time. **199.6 Hearing on Objections.** Any party may, at any reasonable time, request a hearing on an objection or privilege asserted by an instruction not to answer or suspension of the deposition; provided the failure of a party to obtain a ruling prior to trial does not waive any objection or privilege. The party seeking to avoid discovery must present any evidence necessary to support the objection or privilege either by testimony at the hearing or by affidavits served on opposing parties at least seven days before the hearing. If the court determines that an *in camera* review of some or all of the requested discovery is necessary to rule, answers to the deposition questions may be made in camera, to be transcribed and sealed in the event the privilege is sustained, or made in an affidavit produced to the court in a sealed wrapper. **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	Note the Discovery Subcommittee does not recommend adopting FRCP 30(a)'s 10-deposition rule for depositions on written questions.

noticing the deposition must also deliver to the deposition officer a copy of the notice and of all written questions to be asked during the deposition. (b) **Content of notice.** The notice must comply with Rules 199.1(b), 199.2(b), and 199.5(a)(3). If the witness is an organization, the organization must comply with the requirements of that provision. The notice also may include a request for production of documents as permitted by Rule 199.2(b)(5), the provisions of which will govern the request, service, and response. **200.2 Compelling Witness to Attend.** A party may compel the witness to attend the deposition on written questions by serving the witness with a subpoena under Rule 176. If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the deposition notice upon the party's attorney has the same effect as a subpoena served on the witness. **200.3 Questions and Objections.** (a) **Direct questions.** The direct questions to be propounded to the witness must be attached to the notice. (b) **Objections and additional questions.** Within ten days after the notice and direct questions are served, any party may object to the direct questions and serve cross-questions on all other parties. Within five days after cross-questions are served, any party may object to the cross-questions and serve redirect questions on all other parties. Within three days after redirect questions are served, any party may object to the redirect questions and serve 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	Note the Discovery Subcommittee does not recommend adopting FRCP 30(a)'s 10-deposition rule in TRCP 201.

are just and appropriate, regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter must: (1) be addressed to the appropriate authority in the jurisdiction in which the deposition is to be taken; (2) request and authorize that authority to summon the witness before the authority at a time and place stated in the letter for examination on oral or written questions; and (3) request and authorize that authority to cause the witness's testimony to be reduced to writing and returned, together with any items marked as exhibits, to the party requesting the letter rogatory. (d) **By letter of request or other such device.** On motion by a party, the court in which an action is pending, or the clerk of that court, must issue a letter of request or other such device in accordance with an applicable treaty or international convention on terms that are just and appropriate. The letter or other device must be issued regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter or other device must: (1) be in the form prescribed by the treaty or convention under which it is issued, as presented by the movant to the court or clerk; and (2) must state the time, place, and manner of the examination of the witness. (e) **Objections to form of letter rogatory, letter of request, or other such device.** In issuing a letter rogatory, letter of request, or other such device, the court must set a time for objecting to the form of the device. A party must make any objection to the form of the device in writing and serve it on all other parties by the time set by the court, or the objection is waived. (f) **Admissibility of evidence.** Evidence obtained in response to a letter rogatory, letter of request, or other such device is not inadmissible merely because it is not a verbatim transcript, or the testimony was not taken under oath, or for any similar	

departure from the requirements for depositions taken within this State under these rules. (g) **Deposition by electronic means.** A deposition in another jurisdiction may be taken by telephone, 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	The Discovery Subcommittee recommends revising TRCP 203.1 to conform with FRCP 30(e).

signature, the date on which the transcript was submitted, whether the witness returned the transcript, and if so, the date on which it was returned. (c) that changes, if any, made by the witness are attached to the deposition transcript; (d) that the deposition officer delivered the deposition transcript or nonstenographic recording of an oral deposition in accordance with Rule 203.3; (e) the amount of time used by each party at the deposition; (f) the amount of the deposition officer's charges for preparing the original deposition transcript, which the clerk of the court must tax as costs; and (g) that a copy of the certificate was served on all parties and the date of service. **203.3 Delivery.** (a) **Endorsement; to whom delivered.** The deposition officer must endorse the title of the action and "Deposition of (name of witness)" on the original deposition transcript (or a copy, if the original was not returned) or the original nonstenographic recording of an oral deposition, and must return: (1) the transcript to the party who asked the first question appearing in the transcript, or (2) the recording to the party who requested it. (b) **Notice.** The deposition officer must serve notice of delivery on all other parties. (c) **Inspection and copying; copies.** The party receiving the original deposition transcript or 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.

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,	The Discovery 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.	

Sanctions, including spoliation: Tex. R. Civ. P. 215

RULE 215. ~~ABUSE OF~~FAILURE TO MAKE DISCLOSURES OR TO COOPERATE IN DISCOVERY; SANCTIONS **215.1 Motion for ~~Sanctions or~~ Order Compelling Disclosure or Discovery.** (a) ***In General***. On notice to other parties and all affected persons, a~~A~~ party~~, upon reasonable notice to other parties and all other persons affected thereby,~~ may ~~apply for sanctions or~~move for an order compelling disclosure or discovery ~~as follows:~~. (~~a~~b) ***Appropriate court***. ~~On matters relating to a deposition, an application~~A motion for an order to a party ~~may~~ must be made ~~to the court in which~~in the court where the action is pending~~, or to any district court in the district where the deposition is being taken. An application~~. A motion for an order to a ~~deponent who is not a party shall~~nonparty must be made to ~~the~~ any district court in the district where the ~~deposition is being~~discovery is or will be 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~~c) ***Specific Motions***. (1) *To compel disclosure*. If a party fails to make a disclosure required by Rule 194, any other party may move to compel disclosure and for appropriate sanctions. (2) *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: (A) a deponent fails to answer a question asked under Rule 199 or 200; (B) ~~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~~	The revisions to TRCP 215.1 are based on FRCP 37(a). The revisions to TRCP 215.1(b) are based on FRCP 37(a)(2). The revisions to TRCP 215.1(c) are based on FRCP 37(a)(3)(A). The language in TRCP 215.1(c)(2) is moved from further below.

(C) a party fails to answer an interrogatory submitted under Rule 197;

(D)a party fails to serve a written response to a request, fails to produce documents, or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 196; or

(E) a party fails to comply with any person's written request for the person's own statement as provided in Rule 192.3(h).

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

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

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

~~(3) if a party fails:~~

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

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

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

~~(D) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 196; the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance with the request, or apply to the court in which the action~~

~~is pending for the imposition of any sanction authorized by Rule 215.2(b) without the necessity of first having obtained a court order compelling such discove~~ (3) *Related to a deposition.* When taking an oral deposition ~~on oral examination~~, ~~the proponent of the~~the party asking a question may complete or adjourn the examination before ~~he applies~~moving 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~~d) ***Evasive or incomplete answer*.** For purposes of this Rule 215.1 ~~subdivision,~~ an evasive or incomplete disclosure, answer, or response must be ~~is to be~~ treated as a failure to disclose, ~~answer~~answer, or respond. (~~d~~e) ~~***Disposition of motion to compel: award of expenses***~~***Payment of expenses; protective orders*.** (1) *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 may~~, the court shall~~, after giving an opportunity ~~for hearing~~to be heard, require ~~a~~ the party or deponent whose conduct necessitated the motion, ~~or~~ the party or attorney advising ~~such~~ that conduct, or both, ~~of them~~ to pay, at such time as ordered by the court, the ~~moving party~~movant's ~~the~~ reasonable expenses incurred in ~~obtaining the order~~making the motion, including attorney fees. But the court must not order this payment if: (A) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (B) ~~, unless the court finds that the opposition to the motion~~the opposing party's nondisclosure, response, or objection was substantially justified;	This language is moved to below.

or (C) ~~or that~~ other circumstances make an award of expenses unjust. ~~Such an order shall be subject to review on appeal from the final judgment.~~ (2) *If the motion is denied.* If the motion is denied, the court may issue any protective order authorized under Rule 192.6 and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both, to pay to the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust. (3) *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 192.6 and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.	
~~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.~~	This language is moved to above.
~~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.~~	This language is moved to above.
(4) *Reasonable expenses.* In determining the amount of reasonable expenses, including attorney fees, to be awarded ~~in connection with a motion~~, the ~~trial~~ court ~~shall~~ must award expenses ~~which~~ that are reasonable in relation to the amount of work reasonably expended in ~~obtaining an order compelling compliance~~ making the	

motion or in opposing ~~a motion which is denied~~the denied 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.~~	This language is moved to above.
215.2 Failure to Comply with ~~Order or with Discovery Request~~a Court Order.	The revisions to TRCP 215.2 are based on FRCP 37(b).
(a) ***Sanctions ~~by court in district where deposition is taken~~sought in the district where the deposition is taken.*** If the court where the discovery is taken orders a deponent ~~fails to appear or~~ to be sworn or to answer a question and the deponent fails to obey, ~~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~~ treated as a contempt of that court.	The revisions to 215.2(a) are based on FRCP 37(b)(1).
(b) ***Sanctions ~~by court in which action is pending~~sought in the court where the action is pending.***	The revisions to TRCP 215.2(b) are based on FRCP 37(b)(2).
(1) *For not obeying a discovery order.* If a party or a party's~~an~~ officer, director, or managing agent—or a witness ~~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~~ fails to obey an order to provide or permit discovery, including an order ~~made~~ under Rules 204 or 215.1, the court ~~in which~~where the action is pending may~~, after notice and hearing, make such orders in regard to the failure as are just, and among others the~~ issue further just orders. They may include the following:	
(~~1~~A) ~~an order~~ disallowing the disobedient party from requesting further discovery~~ 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~~B) ~~an order~~ directing that the matters ~~regarding which~~embraced in the order ~~was made~~ or ~~any~~ other designated facts ~~shall~~ be taken ~~to be~~as established for the purposes of the action ~~in accordance with the claim of the party obtaining the order~~as the prevailing party claims;

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

(~~5~~D) ~~an order striking out pleadings or parts thereof, or~~striking pleadings in whole or in part;

(E) staying further proceedings until the order is obeyed~~,~~;

(F) ~~or~~ dismissing with or without prejudice the action or proceedings ~~or any part thereof~~in whole or in part;

(G)~~, or~~ rendering a default judgment ~~by default~~ against the disobedient party; or

(~~6~~H) ~~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 order~~s~~ except an order to submit to a physical or mental examination~~;~~.

(2) *For not producing a person for examination.* ~~when~~ If a party ~~has failed~~fails to comply with an order under Rule 204 requiring ~~him~~ it to appear or produce another for examination, the court may issue any of the orders listed in Rule 215.2(b)(1)(A)-(H), ~~such orders as are~~

~~listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision,~~ unless the disobedient party ~~person failing to comply~~ shows that ~~he~~ it ~~is unable to appear or to produce such person for examination~~cannot appear or to produce the other person. (3) *Payment of expenses.* Instead of ~~In lieu of any of the foregoing orders~~ or in addition ~~thereto~~to the orders above, the court ~~shall~~ must require ~~the party failing to obey the order or~~the disobedient party, the attorney advising ~~him~~that party, 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~~The order ~~shall be subject to~~must be ~~-~~reviewed 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.~~	This language is moved to above.
215.3 Abuse of Discovery Process in Seeking, Making, or Resisting Discovery. If ~~the court finds~~ a party ~~is abusing~~abuses the discovery process in seeking, making~~,~~ or resisting discovery or if ~~the court finds that any~~the party serves an interrogatory or request for inspection or production that is unreasonably frivolous, oppressive, or harassing, or ~~that~~ serves a response ~~or answer~~that 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)~~issue any of the orders listed in Rule 215.2(b)(1)(A)-(H). ~~Such order of sanction shall be subject to review.~~ The order must be reviewed on appeal from the final judgment.	TRCP 215.3 is revised for clarity. This rule is not in the FRCPs.
215.4 Failure to Comply with Rule 198 (a) ***Motion*.** A party who has requested an admission under Rule	The FRCP 37(c) (federal admission rule) is as follows: **(c) Failure to Disclose, to**

198 may move to determine the sufficiency of the answer or objection. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of Rule 198, it may order either that the matter is admitted or that an amended answer be served. The provisions of Rule 215.1(d) apply to the award of expenses incurred in relation to the motion. (b) ***Expenses on failure to admit*.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 198 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 193, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.	**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). **(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.
215.5 ~~Failure of Party or Witness to Attend to or Serve Subpoena; Expenses~~Party's Failure to Attend its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection. (a) ***Motion; grounds for sanctions.*** The court where the action is pending may, on motion, order sanctions if: (1) a party or a party's officer, director, or managing agent—or a person designated under Rule 199.2(b)(1) or Rule 200.1(b)—fails, after being served with proper notice, to appear for that person's deposition; ~~(~~2) ~~**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.~~a party fails, after serving notice, to attend and proceed with a deposition, or the witness fails to attend and proceed with the deposition through the fault of the party that served notice; or (3) ~~(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~~	TRCP 215.5 is based on FRCP 37(d).

~~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.~~a party, after being properly served with interrogatories under Rule XX, 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.

(c) ***Unacceptable excuse for failing to act.*** A failure described in Rule 215.5(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 192.6.

(d) ***Types of sanctions.*** Sanctions may include any of the orders listed in Rule 215.2(b)(1)(A)-(G). 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 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.

215.7 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, and the trial court finds prejudice to another party from loss of the information:

The Discovery Subcommittee recommends the adoption of FRCP 37(e) as TRCP 215.7. The Subcommittee suggests revising subpart (a) to make it clear that in the case of unintentional spoliation of evidence the trial court may not comment on a party's failure to preserve records

(a) the party may present evidence concerning the loss of the evidence; (b) the court may order measures no greater than necessary to cure the prejudice but must not comment on the failure to preserve the evidence or instruct the jury that a duty to preserve the evidence existed or the consequences of the failure to produce the evidence ; and (c) only upon the trial court finding that the party acted with the intent to deprive another party of the information's use in the litigation, the trial court may: (1) presume that the lost information was unfavorable to the party; (2) instruct the jury that it may or must presume the information was unfavorable to the party; or (3) dismiss the action or enter a default judgment.	either by an oral comment or in the jury instructions. Federal trial courts are permitted to comment on the evidence but Texas trial courts are not.

STATE BAR OF TEXAS COMMITTEE ON COURT RULES

PROPOSED NEW SPOLIATION RULE OF CIVIL PROCEDURE 215.7

I. Exact language of existing Rule: None.

II. Proposed New Spoliation 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 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 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

[1] This language is derived from Tex. R. Civ. P. 215.2(b).

(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.

III. Brief statement of reasons for requested changes and advantages to be served by proposed new rule:

A. General Purpose and Reasons

Considering the recent revisions to Federal Rule of Evidence 37(e) pertaining to spoliation of Electronically Stored Information and existing Texas law regarding spoliation,[2] the State Bar Court Rules Committee believes that a rule providing a procedure for litigants and courts to follow when considering allegations of spoliation would be helpful to the bar.

B. The Proposed Rule's 3-Part Structure

The proposed Rule has three parts:

Part (a) pertains to what the non-spoliating party should do when seeking judicial remedies.

Part (b) pertains to the standards the trial court should consider when faced with a spoliation complaint.

Part (c) pertains to the three broad categories of remedies the trial court may order depending on the particular facts and circumstances. Part (c) sets out the different standards and categories: (1) when remedies such as fees or exclusion of evidence may suffice; (2) when a jury instruction is warranted; and (3) when more severe remedies are needed to address the intentional destruction of evidence.

C. The Court's Standards Guiding the Proposed Rule

To submit a spoliation instruction, the trial court must find that "(1) the spoliating party acted with intent to conceal discoverable evidence, or (2) the spoliating party acted negligently and caused the nonspoliating party to be irreparably deprived of any meaningful ability to present a claim or defense." *Wackenhut v. Gutierrez*, 453 S.W.3d 917, 921 (Tex. 2015). Moreover, the court must find that a less severe remedy would be

[2] This includes the clarifications of the law of spoliation in Texas in 2014 and 2015 by the Court. *See Wackenhut v. Gutierrez*, 453 S.W.3d 917, 921 (Tex. 2015); *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W3d 9, 19-29 (Tex. 2014); *Petro. Solutions, Inc. v. Head*, 454 S.W.3d 482, 488-89 (Tex. 2014).

insufficient to reduce the prejudice caused by the spoliation. *Brookshire Bros.*, 438 S.W.3d at 25.

Trial courts have historically had broad discretion in fashioning remedies in the event of actual spoliation. *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 721 (Tex. 2003); *Trevino v. Ortega*, 969 S.W.2d 950, 953 (Tex. 1998). However, as the Texas Supreme Court has recognized, evidence may be unavailable for a number of reasons: it could be lost, altered, or destroyed in bad faith, or for completely innocent reasons with good explanations. *Johnson*, 106 S.W.3d at 721. Texas law disfavors spoliation instructions when evidence is merely lost or missing as opposed to when there is evidence of intentional destruction.

D. The Proposed Rule Diverges on Admissibility of Evidence Surrounding Spoliation

While acknowledging the proposed rule's divergence from the Court's precedent, the majority of the Committee believes that the rule of spoliation should specifically state that evidence of the circumstances surrounding the spoliation ***may*** be admissible at trial. In *Brookshire Bros.*, the Court wrote that evidence of the circumstances surrounding the spoliation ***is generally not*** admissible at trial. *Brookshire Bros.*, 438 S.W.3d at 14, 26 ("Accordingly, evidence bearing directly upon whether a party has spoliated evidence is not to be presented to the jury except insofar as it relates to the substance of the lawsuit." and "However, there is no basis on which to allow the jury to hear evidence that is unrelated to the merits of the case, but serves only to highlight the spoliating party's breach and culpability.").

E. Reference to PJC Instruction

The Texas Pattern Jury Charge has the following commentary on whether "may" or "must" should be used:

> In *Brookshire Bros.*, the majority does not articulate the specific language that should be included in the instruction, particularly whether the jury "must" or "may" consider that the missing evidence would have been unfavorable to the spoliator. The dissent in *Brookshire Bros.* interpreted the majority as requiring the use of the term *must*. *Brookshire Bros.*, 2014 WL 2994435, at *19. The overarching guideline, as with any sanction, remains proportionality. *Brookshire Bros.*, 2014 WL 2994435, at *1 ("Upon a finding of spoliation, the trial court has broad discretion to impose a remedy that, as with any discovery sanction, must be proportionate; that is, it must relate directly to the conduct giving rise to the sanction and may not be excessive.").

Whether *may* or *must* is used should be based on the facts applied to the standards articulated above.

An erroneous spoliation jury instruction can constitute reversible error. *Johnson*, 106 S.W.3d at 724. Unavailable evidence does not necessarily mandate a spoliation instruction, but rather a fact-specific showing of bad conduct and harm should be presented to the trial court by the party requesting a spoliation instruction to evaluate contentions that missing evidence should allow the party to "tilt" or "nudge" the jury.

Respectfully submitted,

Carlos R. Soltero
Chair, State Bar Court Rules Committee
March 7, 2016

Administration of Rules of Evidence Committee (AREC)

Recommendations with Regard to Potential Amendments to Texas Rules of Evidence on Adopting Certain Federal Rules of Evidence

1. a. Texas Rule 804
   b. Federal Rule 804
   c. Texas Rule 803
   d. Federal Rule 807 (No TRE 807)
   e. AREC Report
2. a. Federal Rule 301
   b. Federal Rule 302
   c. AREC Report
3. a. Texas Rule 403
   b. Federal Rule 403
   c. AREC Report
4. a. Texas Rules 509, 510
   b. AREC Report
   c. Supreme Court has amended these rules as recommended.
5. a. Texas Rule 704
   b. Federal Rule 704
   c. AREC Report
6. a. Texas Rules 701, 702, 703, 705
   b. Federal Rules 701, 702, 703, 705
   c. AREC Report
7. a. Texas Rule 203
   b. Federal Rule of Procedure 44.1
   c. AREC Report
8. a. Texas Rule 408
   b. Federal Rule 408
   c. AREC Report
      1) 408(a)
      2) 408(b)
      3) 408 (a)(2)

TRE 804. EXCEPTIONS TO THE RULE AGAINST HEARSAY—WHEN THE DECLARANT IS UNAVAILABLE AS A WITNESS

(a) **Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the declarant's attendance or testimony.

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) **The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony that:

(A) when offered in a civil case:

(i) was given as a witness at a trial or hearing of the current or a different proceeding or in a deposition in a different proceeding; and

(ii) is now offered against a party and the party—or a person with similar interest—had an opportunity and similar motive to develop the testimony by direct, cross-, or redirect examination.

(B) when offered in a criminal case:

(i) was given as a witness at a trial or hearing of the current or a different proceeding; and

(ii) is now offered against a party who had an opportunity and similar motive to develop it by direct, cross-, or redirect examination; or

(iii) was taken in a deposition under—and is now offered in accordance with—chapter 39 of the Code of Criminal Procedure.

(2) *Statement Under the Belief of Imminent Death.* A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement of Personal or Family History.* A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

History of TRE 804 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lxvi). Amended eff. Jan. 1, 1988, by order of Nov. 10, 1986 (733 34 S.W.2d [Tex.Cases] xc): To TRCE 804(b)(1), deleted "the same or" before "another proceeding"; in some circum

FRE 804. EXCEPTIONS TO THE RULE AGAINST HEARSAY—WHEN THE DECLARANT IS UNAVAILABLE AS A WITNESS

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) *Statement Under the Belief of Imminent Death.* In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) *Statement of Personal or Family History.* A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) [*Other Exceptions.*] [Transferred to Rule 807.]

(6) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.* A statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result.

History of FRE 804: Adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975. Amended Dec. 12, 1975, P.L. 94-149, §1(12), (13), 89 Stat. 806; Mar. 2, 1987, eff. Oct. 1, 1987; Nov. 18, 1988, P.L. 100-690, §7075(b), 102 Stat. 4405; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 28, 2010, eff. Dec. 1, 2010; Apr. 26, 2011, eff. Dec. 1, 2011.

TRE 803. EXCEPTIONS TO THE RULE AGAINST HEARSAY—REGARDLESS OF WHETHER THE DECLARANT IS AVAILABLE AS A WITNESS

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) *Present Sense Impression.* A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) *Excited Utterance.* A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) *Then-Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) *Statement Made for Medical Diagnosis or Treatment.* A statement that:

(A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) *Recorded Recollection.* A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge, unless the circumstances of the record's preparation cast doubt on its trustworthiness.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) *Records of a Regularly Conducted Activity.* A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;

(B) the record was kept in the course of a regularly conducted business activity;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by an affidavit or unsworn declaration that complies with Rule 902(10); and

(E) the opponent fails to demonstrate that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

"Business" as used in this paragraph includes every kind of regular organized activity whether conducted for profit or not.

(7) *Absence of a Record of a Regularly Conducted Activity.* Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent fails to show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) *Public Records.* A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent fails to demonstrate that the source of information or other circumstances indicate a lack of trustworthiness.

(9) *Public Records of Vital Statistics.* A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) *Absence of a Public Record.* Testimony—or a certification under Rule 902—that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(11) *Records of Religious Organizations Concerning Personal or Family History.* A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Certificates of Marriage, Baptism, and Similar Ceremonies.* A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) *Family Records.* A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) *Records of Documents That Affect an Interest in Property.* The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) *Statements in Documents That Affect an Interest in Property.* A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose—unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in Ancient Documents.* A statement in a document that is at least 20 years old and whose authenticity is established.

(17) *Market Reports and Similar Commercial Publications.* Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) *Statements in Learned Treatises, Periodicals, or Pamphlets.* A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) *Reputation Concerning Personal or Family History.* A reputation among a person's family by blood, adoption, or marriage—or among a person's associates or in the community—concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) *Reputation Concerning Boundaries or General History.* A reputation in a community—arising before the controversy—concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) *Reputation Concerning Character.* A reputation among a person's associates or in the community concerning the person's character.

(22) *Judgment of a Previous Conviction.* Evidence of a final judgment of conviction if:

(A) it is offered in a civil case and:

(i) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(ii) the conviction was for a felony;

(iii) the evidence is admitted to prove any fact essential to the judgment; and

(iv) an appeal of the conviction is not pending; or

(B) it is offered in a criminal case and:

(i) the judgment was entered after a trial or a guilty or nolo contendere plea;

(ii) the conviction was for a criminal offense;

(iii) the evidence is admitted to prove any fact essential to the judgment;

(iv) when offered by the prosecutor for a purpose other than impeachment, the judgment was against the defendant; and

(v) an appeal of the conviction is not pending.

(23) *Judgments Involving Personal, Family, or General History or a Boundary.* A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability or to make the declarant an object of hatred, ridicule, or disgrace; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

History of TRE 803 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lxii). Amended eff. Jan. 1, 1988, by order of Nov. 10, 1986 (733-34 S.W.2d [Tex.Cases] xc): To (6), added "or by affidavit that complies with Rule 902(10)." Amended eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxxviii): Added the following comment: The provision in par. (6) rejects the doctrine of *Loper v. Andrews*, 404 S.W.2d 300, 305 (Tex. 1966), which required that an entry of a medical opinion or diagnosis meet a test of "reasonable medical certainty." Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lvii). Source: FRE 803. See TRCS arts. 3718-3737e (repealed).

See Fam. Code §54.031 for statutory exceptions to hearsay rule for testimony of certain abuse victims in criminal proceedings; *O'Connor's Texas Rules * Civil Trials* (2015), "Introducing Evidence," ch. 8-C, p. 747; Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 838.

FRE 807. RESIDUAL EXCEPTION

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

History of FRE 807: Adopted Apr. 11, 1997, eff. Dec. 1, 1997. Amended Apr. 26, 2011, eff. Dec. 1, 2011.

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June 8, 2016

AREC REPORT ON RULES 804 AND 807

CHARGE

This Committee was charged with making a recommendation on whether to modify Texas Rules of Evidence 804 and consider a new rule 807 through adopting the language in Federal Rules of Evidence 804 and 807. While Texas does not currently have a Rule 807 or its equivalent, it has previously considered a similar version, which is set out below.

RULE 804

Texas Rule 804 has several differences which separate it from Federal Rule 804:

- Different definitions of unavailability under Rules 804(a)(5)
- Differences in the criminal and civil former-testimony exception and dying declaration exception
- The Federal Rules put declarations against interest in the unavailability section, 804(b)(3), while the Texas Rule is found in 803(24), which does not require unavailability

Texas Rule 804(b)(5) applies broadly to all of the exceptions listed in the remainder of Rule 804. However, the Federal Rule limits the application of the 'unable to secure' provision only certain subsections under certain circumstances. The Texas Rule is easier to use and apply, as there are fewer pre-requisites to admissibility of the evidence and it broadly applies to all subsections. The Committee is not aware of any concern about the Texas Rule being overbroad in this regard and, therefore, recommends no change.

The differences between Texas Rule 804(b) and Federal Rule 804(b) are relatively minor. The Texas Rule incorporates the requirements of the Confrontation Clause and makes specific reference to the deposition procedure under the Texas Code of Criminal Procedure. In criminal cases, courts are bound by the U.S. Constitution and precedent on the Confrontation Clause to apply the standards set out in the Texas Rule, but there is no apparent disadvantage or danger by incorporating the requirements into the Texas Rule. Therefore, the committee recommends no change.

Federal of Evidence 804(b)(3) is similar to Texas Rule of Evidence 803(24). The largest difference between the two rules is that Texas does not require that the witness be unavailable to offer a statement against interest; it is simply an 803 hearsay exception. The Federal Rule require that the witness be unavailable to offer such a statement. This would be a significant change to Texas practice. The value of moving the rule from a hearsay exception to Rule 804, where witness unavailability is a pre-requisite to admission is questionable at best. It could potentially cause problems with cross-examining a live witness based on previous unsworn statements against interest that are offered for the truth of the matter asserted, rather than just for inconsistency. The purpose of the rule on statements against interest is that they are trustworthy because people normally would not utter statements detrimental to themselves, their position, or

their organization unless they were true (under most circumstances). That motivation is not changed or altered by their availability for a deposition or to appear at trial. Therefore, the committee recommends no change.

PROPOSAL TO ADOPT TEXAS VERSION OF RULE 807

Additionally, the committee was charged with looking at Federal Rule of Evidence 807, which does not have a Texas equivalent. This is not the first time a committee, then the 'Liason Committee' has been asked to look at adding a residual exception to the Texas Rules. The Committee proposed Rule 803(25) for the Civil Rules of Evidence only. The Supreme Court deleted it from the Rules that it approved. The proposal read as follows:

803(25) Other exceptions

a. In civil proceedings. A statement not specifically covered by any of the foregoing exceptions but having substantial guarantees of trustworthiness.

b. In criminal proceedings. A statement not specifically covered by any of then foregoing exceptions b having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Some other states have omitted the residual exception, including Florida and Maine, apparently out of a concern that despite the purported safeguards regarding guarantees of trustworthiness, it still left the door open for trial judges to utilize their discretion in a way that could differ greatly, as it remains unclear exactly what equivalent or substantial guarantees of trustworthiness entail. The phrases also give little guidance to a judge on what factors they can and cannot utilize in reaching such a decision. This creates uncertainty for parties over which particular documents will and will not be admissible at trial.

The definition of Hearsay in Texas was purposefully defined more broadly than the Federal Rule to encompass more than just statements and matters asserted. Verbal expressions and matters implied may seem like a subtle difference, but Texas' broader rule excludes more evidence.

While time has passed and technology has progressed, it does not appear to the committee that there are categories of evidence which are being regularly excluded under the current Rules, but seem as though they should be admissible at trial for the reasons stated in the proposed Rule from 1982. Therefore, the committee recommends no change to the Rule at this time.

RECOMMENDATION: No changes

ARTICLE III. PRESUMPTIONS IN CIVIL CASES

FRE 301. PRESUMPTIONS IN CIVIL CASES GENERALLY

In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

History of FRE 301. Adopted Jan. 2, 1975, PL 93-595, § 1, 88 Stat. 1926, eff July 1, 1975. Amended Apr. 26, 2011, eff. Dec. 1, 2011

FRE 302. APPLYING STATE LAW TO PRESUMPTIONS IN CIVIL CASES

In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.

History of FRE 302: Adopted Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1926, eff. July 1, 1975. Amended Apr. 26, 2011, eff. Dec. 1, 2011

MEMORANDUM

To: Supreme Court Advisory Committee
From: Committee on Administration of Rules of Evidence
Re: Fed. R. Evid. 301 & 302, Tex. R. Evid. 403 & 408 (Fed.R.Evid. 403 & 408)
Date: June 7, 2016

Assignment

We were asked to study and consider:

(1) whether Texas should add rules on "presumptions in civil cases" similar to/or in conformity with Fed.R.Evid. 301 & 302;

(2) whether to bring Tex.R.Evid. 403 in conformity with Fed.R.Evid. 403;

(3) whether to bring Tex.R.Evid. 408 in conformity with Fed.R.Evid. 408.

Analysis and Recommendations

1. FED.R.EVID. 301 and 302:
We recommend that Texas not adopt rules to mirror FED.R.EVID. 301 and 302 regarding presumptions in civil cases. Texas has over 400 presumptions, and different burdens (of proof and shifting of burden and going forward with the evidence) apply uniquely to each presumption. The subcommittee believes that adoption of a rule or rules dealing with presumptions is not necessary and will lead to confusion.

2. FED.R.EVID. 403 and TEX.R.EVID. 403:
We recommend that Texas not adopt the language of FED.R.EVID. 403 that includes "wasting time" as an additional basis for excluding relevant evidence because such addition will create new issues/law and that the "wasting of time" grounds are included/subsumed in the "undue delay, or needlessly presenting cumulative evidence" grounds for exclusion.

3. FED.R.EVID. 408 and TEX.R.EVID. 408:
We recommend that Texas
1. Amend TEX.R.EVID. 408(a) as indicated below.
2. Amend TEX.R.EVID. 408(b) as indicated below.
3. Not amend TEX.R.EVID. 408(a)(2) to conform to the FED.R.EVID. 408(a)(2) [see bracketed language from FED.R.EVID. 408(a)(2) below]. Such amendment would result in a substantive change and no need for a substantive change has been made known to the Committee. AREC is available to solicit further input from the criminal bar upon request from the SCAC.

TRE 403. EXCLUDING RELEVANT EVIDENCE FOR PREJUDICE, CONFUSION, OR OTHER REASONS

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.

History of TRE 403 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxvii). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxix). Source: FRE 403.

See *Commentaries*, "Objecting to Evidence," ch. 8-D, p. 781; Brown & Rondon, *Texas Rules of Evidence Handbook* (2016), p. 208.

FRE 403. EXCLUDING RELEVANT EVIDENCE FOR PREJUDICE, CONFUSION, WASTE OF TIME, OR OTHER REASONS

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

History of FRE 403: Adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975. Amended Apr. 26, 2011, eff. Dec. 1, 2011.

See *Commentaries*, "Introducing Evidence," ch. 8-C, p. 771

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MEMORANDUM

To: Supreme Court Advisory Committee
From: Committee on Administration of Rules of Evidence
Re: Fed. R. Evid. 301 & 302, Tex. R. Evid. 403 & 408 (Fed.R.Evid. 403 & 408)
Date: June 7, 2016

Assignment

We were asked to study and consider:

(1) whether Texas should add rules on "presumptions in civil cases" similar to/or in conformity with Fed.R.Evid. 301 & 302;

(2) whether to bring Tex.R.Evid. 403 in conformity with Fed.R.Evid. 403;

(3) whether to bring Tex.R.Evid. 408 in conformity with Fed.R.Evid. 408.

Analysis and Recommendations

1. FED.R.EVID. 301 and 302:
We recommend that Texas not adopt rules to mirror FED.R.EVID. 301 and 302 regarding presumptions in civil cases. Texas has over 400 presumptions, and different burdens (of proof and shifting of burden and going forward with the evidence) apply uniquely to each presumption. The subcommittee believes that adoption of a rule or rules dealing with presumptions is not necessary and will lead to confusion.

2. FED.R.EVID. 403 and TEX.R.EVID. 403:
We recommend that Texas not adopt the language of FED.R.EVID. 403 that includes "wasting time" as an additional basis for excluding relevant evidence because such addition will create new issues/law and that the "wasting of time" grounds are included/subsumed in the "undue delay, or needlessly presenting cumulative evidence" grounds for exclusion.

3. FED.R.EVID. 408 and TEX.R.EVID. 408:
We recommend that Texas
1. Amend TEX.R.EVID. 408(a) as indicated below.
2. Amend TEX.R.EVID. 408(b) as indicated below.
3. Not amend TEX.R.EVID. 408(a)(2) to conform to the FED.R.EVID. 408(a)(2) [see bracketed language from FED.R.EVID. 408(a)(2) below]. Such amendment would result in a substantive change and no need for a substantive change has been made known to the Committee. AREC is available to solicit further input from the criminal bar upon request from the SCAC.

TRE 509. PHYSICIAN-PATIENT PRIVILEGE

(a) **Definitions.** In this rule:

(1) A "patient" is a person who consults or is seen by a physician for medical care.

(2) A "physician" is a person licensed, or who the patient reasonably believes is licensed, to practice medicine in any state or nation.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those:

(A) present to further the patient's interest in the consultation, examination, or interview;

(B) reasonably necessary to transmit the communication; or

(C) participating in the diagnosis and treatment under the physician's direction, including members of the patient's family.

(b) **Limited Privilege in a Criminal Case.** There is no physician-patient privilege in a criminal case. But a confidential communication is not admissible in a criminal case if made:

(1) to a person involved in the treatment of or examination for alcohol or drug abuse; and

(2) by a person being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse.

(c) **General Rule in a Civil Case.** In a civil case, a patient has a privilege to refuse to disclose and to prevent any other person from disclosing:

(1) a confidential communication between a physician and the patient that relates to or was made in connection with any professional services the physician rendered the patient; and

(2) a record of the patient's identity, diagnosis, evaluation, or treatment created or maintained by a physician.

(d) **Who May Claim in a Civil Case.** The privilege may be claimed by:

(1) the patient; or

(2) the patient's representative on the patient's behalf.

The physician may claim the privilege on the patient's behalf—and is presumed to have authority to do so.

(e) **Exceptions in a Civil Case.** This privilege does not apply:

(1) *Proceeding Against Physician.* If the communication or record is relevant to a physician's claim or defense in:

(A) a proceeding the patient brings against a physician; or

(B) a license revocation proceeding in which the patient is a complaining witness.

(2) *Consent.* If the patient or a person authorized to act on the patient's behalf consents in writing to the release of any privileged information, as provided in subdivision (f).

(3) *Action to Collect.* In an action to collect a claim for medical services rendered to the patient.

(4) *Party Relies on Patient's Condition.* If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.

(5) *Disciplinary Investigation or Proceeding.* In a disciplinary investigation of or proceeding against a physician under the Medical Practice Act, Tex. Occ. Code §164.001 et seq., or a registered nurse under Tex. Occ. Code §301.451 et seq. But the board conducting the investigation or proceeding must protect the identity of any patient whose medical records are examined unless:

(A) the patient's records would be subject to disclosure under paragraph (e)(1); or

(B) the patient has consented in writing to the release of medical records, as provided in subdivision (f).

(6) *Involuntary Civil Commitment or Similar Proceeding.* In a proceeding for involuntary civil commitment or court-ordered treatment, or a probable cause hearing under Tex. Health & Safety Code:

(A) chapter 464 (Facilities Treating Alcoholics and Drug-Dependent Persons);[1]

(B) title 7, subtitle C (Texas Mental Health Code); or

(C) title 7, subtitle D (Persons With Mental Retardation Act).[2]

(7) *Abuse or Neglect of "Institution" Resident.* In a proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of a resident of an "institution" as defined in Tex. Health & Safety Code §242.002.

(f) Consent for Release of Privileged Information.

(1) Consent for the release of privileged information must be in writing and signed by:

(A) the patient;

(B) a parent or legal guardian if the patient is a minor;

(C) a legal guardian if the patient has been adjudicated incompetent to manage personal affairs;

(D) an attorney appointed for the patient under Tex. Health & Safety Code title 7, subtitles C and D;

(E) an attorney ad litem appointed for the patient under Tex. Estates Code title 3, subtitle C;

(F) an attorney ad litem or guardian ad litem appointed for a minor under Tex. Fam. Code chapter 107, subchapter B; or

(G) a personal representative if the patient is deceased.

(2) The consent must specify:

(A) the information or medical records covered by the release;

(B) the reasons or purposes for the release; and

(C) the person to whom the information is to be released.

(3) The patient, or other person authorized to consent, may withdraw consent to the release of any information. But a withdrawal of consent does not affect any information disclosed before the patient or authorized person gave written notice of the withdrawal.

(4) Any person who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes specified in the consent.

Comment to 2015 restyling: The physician-patient privilege in a civil case was first enacted in Texas in 1981 as part of the Medical Practice Act, formerly codified in Tex. Rev. Civ. Stat. art. 4495b. That statute provided that the privilege applied even if a patient had received a physician's services before the statute's enactment. Because more than thirty years have now passed, it is no longer necessary to burden the text of the rule with a statement regarding the privilege's retroactive application. But deleting this statement from the rule's text is not intended as a substantive change in the law.

The former rule's reference to "confidentiality or" and "administrative proceedings" in subdivision (e) [Exceptions in a Civil Case] has been deleted. First, this rule is a privilege rule only. Tex. Occ. Code §159.004 sets forth exceptions to a physician's duty to maintain confidentiality of patient information outside court and administrative proceedings. Second, by their own terms the rules of evidence govern only proceedings in Texas courts. See Rule 101(b). To the extent the rules apply in administrative proceedings, it is because the Administrative Procedure Act mandates their applicability. Tex. Gov't Code §2001.083 provides that "[i]n a contested case, a state agency shall give effect to the rules of privilege recognized by law." Section 2001.091 excludes privileged material from discovery in contested administrative cases.

Statutory references in the former rule that are no longer up-to-date have been revised. Finally, reconciling the provisions of Rule 509 with the parts of Tex. Occ. Code ch. 159 that address a physician-patient privilege applicable to court proceedings is beyond the scope of the restyling project.

Comment to 1998 change: This comment is intended to inform the construction and application of this rule. Prior Criminal Rules of Evidence 509 and 510 are now in subparagraph (b) of this Rule. This rule governs disclosures of patient-physician communications only in judicial or administrative proceedings. Whether a physician may or must disclose such communications in other circumstances is governed by TRCS art. 4495b, §5.08 [now Occ. Code ch. 159]. Former subparagraph (d)(6) of the Civil Evidence Rules, regarding disclosures in a suit affecting the parent-child relationship, is omitted, not because there should be no exception to the privilege in suits affecting the parent-child relationship, but because the exception in such suits is properly considered under subparagraph (e)(4) of the new rule (formerly subparagraph (d)(4)), as construed in *R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994). In determining the proper application of an exception in such suits, the trial court must ensure that the precise need for the information is not outweighed by legitimate privacy interests protected by the privilege. Subparagraph (e) of the new rule does not except from the privilege information relating to a nonparty patient who is or may be a consulting or testifying expert in the suit.

1. Editor's note: Now titled "Facilities Treating Persons with a Chemical Dependency." *See* S.B. 219, §3.1179, 84th Leg., R.S., eff. Apr. 2, 2015.

2. Editor's note: Now titled "Persons with an Intellectual Disability Act." *See* S.B. 219, §3.1400, 84th Leg., R.S., eff. Apr. 2, 2015.

History of TRE 509 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xlvii). Amended eff. Jan. 1, 1988, by order of Nov. 10, 1986 (733-34 S.W.2d [Tex.Cases] lxxxvii): Rewrote (d)(4); added references to statutes relating to registered nurses in (d)(5). Amended eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex. Cases] xxxiii): In (a)(2) added the words "in any state or nation, or reasonably believed by the patient so to be"; in (b)(3) substituted the word "provisions" for "prohibitions"; substituted the word "rule" for "section continue to," deleted the phrase "to confidential communications or records concerning any patient irrespective," substituted "even if" for "of when," added the phrase "prior to the enactment of the Medical Practice Act, TRCS art. 4590i (Vernon Supp 1984)"; in (c)(1) substituted the words "by a representative of the patient" for the word "physician"; and in (d)(7) deleted the words "when the disclosure is relevant to" and substituted the words "proceeding, proceeding for court-or-

TRE 510. MENTAL HEALTH INFORMATION PRIVILEGE IN CIVIL CASES

(a) Definitions. In this rule:

(1) A "professional" is a person:

(A) authorized to practice medicine in any state or nation;

(B) licensed or certified by the State of Texas in the diagnosis, evaluation, or treatment of any mental or emotional disorder;

(C) involved in the treatment or examination of drug abusers; or

(D) who the patient reasonably believes to be a professional under this rule.

(2) A "patient" is a person who:

(A) consults or is interviewed by a professional for diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism and drug addiction; or

(B) is being treated voluntarily or being examined for admission to voluntary treatment for drug abuse.

(3) A "patient's representative" is:

(A) any person who has the patient's written consent;

(B) the parent of a minor patient;

(C) the guardian of a patient who has been adjudicated incompetent to manage personal affairs; or

(D) the personal representative of a deceased patient.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those:

(A) present to further the patient's interest in the diagnosis, examination, evaluation, or treatment;

(B) reasonably necessary to transmit the communication; or

(C) participating in the diagnosis, examination, evaluation, or treatment under the professional's direction, including members of the patient's family.

(b) General Rule; Disclosure.

(1) In a civil case, a patient has a privilege to refuse to disclose and to prevent any other person from disclosing:

(A) a confidential communication between the patient and a professional; and

(B) a record of the patient's identity, diagnosis, evaluation, or treatment that is created or maintained by a professional.

(2) In a civil case, any person—other than a patient's representative acting on the patient's behalf—who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes for which it was obtained.

(c) Who May Claim. The privilege may be claimed by:

(1) the patient; or

(2) the patient's representative on the patient's behalf.

The professional may claim the privilege on the patient's behalf—and is presumed to have authority to do so.

(d) Exceptions. This privilege does not apply:

(1) *Proceeding Against Professional.* If the communication or record is relevant to a professional's claim or defense in:

(A) a proceeding the patient brings against a professional; or

(B) a license revocation proceeding in which the patient is a complaining witness.

(2) *Written Waiver.* If the patient or a person authorized to act on the patient's behalf waives the privilege in writing.

(3) *Action to Collect.* In an action to collect a claim for mental or emotional health services rendered to the patient.

(4) *Communication Made in Court-Ordered Examination.* To a communication the patient made to a professional during a court-ordered examination relating to the patient's mental or emotional condition or disorder if:

(A) the patient made the communication after being informed that it would not be privileged;

(B) the communication is offered to prove an issue involving the patient's mental or emotional health; and

(C) the court imposes appropriate safeguards against unauthorized disclosure.

(5) *Party Relies on Patient's Condition.* If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.

(6) *Abuse or Neglect of "Institution" Resident.* In a proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of a resident of an "institution" as defined in Tex. Health & Safety Code §242.002.

Comment to 2015 restyling: The mental-health-information privilege in civil cases was enacted in Texas in 1979. Tex. Rev. Civ. Stat. art. 5561h (later codified at Tex. Health & Safety Code §611.001 et seq.) provided that the privilege applied even if the patient had received the professional's services before the statute's enactment. Because more than thirty years have now passed, it is no longer necessary to burden the text of the rule with a statement regarding the privilege's retroactive application. But deleting this statement from the rule's text is not intended as a substantive change in the law.

Technical Amendments to Rule 509

1. Amend Rule 509(e)(1) as follows:

(e) Exceptions in a Civil Case. This privilege does not apply:

(1) ***Proceeding Against Physician.*** If the communication or record is relevant to a ~~physician's~~ claim or physician's defense in:

(A) a proceeding the patient brings against a physician; or

(B) a license revocation proceeding in which the patient is a complaining witness.

Explanation: The word "physician's" in the introductory language should be moved so that it immediately precedes "defense." Before restyling, Rule 509(e)(1) referred to "the claims or defense of a physician." Clearly, "of the physician" modified only "defense." The exception referenced the claims of the patient and the defense of the physician. Therefore, the language of the restyled rule -- "physician's claim or defense" – inaccurately and unintentionally changed the substance of the rule, and it should be corrected.

2. Amend Rule 509(e)(6)(A) and (C) as follows:

(e) Exceptions in a Civil Case. This privilege does not apply:

* * *

(6) ***Involuntary Civil Commitment or Similar Proceeding.*** In a proceeding for involuntary civil commitment or court-ordered treatment, or a probable cause hearing under Tex. Health & Safety Code:

(A) chapter ~~464~~ 462 (Treatment of Persons With Chemical Dependencies~~Facilities Treating Alcoholics and Drug-Dependent Persons~~);

(B) title 7, subtitle C (Texas Mental Health Code); or

(C) title 7, subtitle D (Persons With an Intellectual Disability ~~Mental Retardation~~ Act).

Explanation: Rule 509(e)(6)(A) mistakenly refers to chapter 464 (Facilities Treating Alcoholics and Drug-Dependent Persons). The reference should be to chapter 462 (Treatment of Persons With Chemical Dependencies). The citation in the corresponding statutory version of the privilege in the Health and Safety Code is chapter 462. Chapter 462, which governs hearings for court-ordered treatment, is clearly the correct reference. The title of this chapter was changed last legislative session from "Treatment of Chemically Dependent Persons" to "Treatment of Persons With Chemical Dependencies." Acts 2015, 84th Leg., ch. 1 (S.B. 219), § 3.1160, eff. April 2, 2015.

Rule 509(E)(6)(C) refers to title 7, subtitle D (Persons With Mental Retardation Act). The title of the act was changed last legislative session to Persons With an Intellectual Disability Act, and so the reference in (e)(6)(C) should correspondingly be changed. Acts 2015, 84th Leg., ch. 1 (S.B. 219), § 3.1401, eff. April 2, 2015.

These are totally nonsubstantive, housekeeping changes.

Technical Amendment to Rule 510

Amend Rule 510(d)(1) as follows:

(d) **Exceptions.** This privilege does not apply:

(1) ***Proceeding Against Professional.*** If the communication or record is relevant to a ~~professional's~~ claim or professional's defense in:

(A) a proceeding the patient brings against a professional; or

(B) a license revocation proceeding in which the patient is a complaining witness.

Explanation: The word "professional's" in the introductory language should be moved so that it immediately precedes "defense." Before restyling, Rule 510(d)(1) referred to "the claims or defense of a professional." Clearly, "of the professional" modified only "defense." The exception referenced the claims of the patient and the defense of the professional. Therefore, the language of the restyled rule -- "professional's claim or defense" –inaccurately and unintentionally changed the substance of the rule, and it should be corrected.

TRE 704. OPINION ON AN ULTIMATE ISSUE

An opinion is not objectionable just because it embraces an ultimate issue.

History of TRE 704 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lx). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lv). Source: FRE 704.

See Brown & Rondon, *Texas Rules of Evidence Handbook* (2016), p. 747.

FRE 704. OPINION ON AN ULTIMATE ISSUE

(a) **In General—Not Automatically Objectionable.** An opinion is not objectionable just because it embraces an ultimate issue.

(b) **Exception.** In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

History of FRE 704. Adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975. Amended Oct. 12, 1984, P.L. 98-473, §406, 98 Stat. 2067; Apr. 26, 2011, eff. Dec. 1, 2011.

on facts or data he has "reviewed." It is debatable whether the term "reviewed" is necessary, as it would seem that any data the expert has "reviewed" would be encompassed by facts or data the expert "has been made aware of." It is possible that the term "reviewed" is included in the Texas rule because of the language of Tex. R. Civ. P. 192.3(e)(6), which defines the material that is discoverable from an expert witness, and includes:

> (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;

(emphasis added). Notably, TRE 703 makes no mention of facts or data "provided to" or "prepared by" an expert, and both of those phrases are also contained in TRCP 192.3(e)(6).

The Committee unanimously recommends that the word "reviewed" be deleted from the first sentence of TRE 703. The Committee believes that the concept of data an expert has "reviewed" is captured by the existing phrase referring to data the expert "has been made aware of." The change has the added benefit of bringing this portion of TRE 703 into complete alignment with the federal rule. The Committee further recommends the inclusion of a comment stating that no substantive change is intended by this amendment.

The other difference between the rules relates to the second sentence of FRE 703, which addresses when the proponent of an expert may disclose to the jury material relied on by the expert that is otherwise inadmissible, and the balancing test the trial court is to use to make that decision. The TRE contains a similar provision, contained in Rule 705(d). The balancing test in the Texas rule is slightly different, as it calls for the court to simply balance the probative value of the facts or data against their prejudicial effect, while the federal rule allows the facts or data to be disclosed only when their probative value ***substantially*** outweighs the prejudicial effect. Further, the Texas rule contains a provision requiring the trial judge, upon proper request, to give a limiting instruction if it allows the disclosure of the otherwise inadmissible material.

The Committee does not recommend any change to this portion of TRE 705(d), as changing either the balancing test, or the requirement of a limiting instruction, would be a substantive change to Texas law, and no party has suggested such a change is warranted, nor do any Committee members see a reason to make such a change.

Rule 704

TEX. R. EVID. 704. Opinion on an Ultimate Issue	FED. R. EVID. 704. Opinion on an Ultimate Issue
An opinion is not objectionable just because it embraces an ultimate issue.	**(a) In General—Not Automatically Objectionable.** An opinion is not objectionable just because it embraces an ultimate issue.
	(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

TRE and FRE 704 both state—in identical language—that the fact that a witness's opinion embraces an "ultimate issue" does not make the opinion objectionable. The difference between the two rules is FRE 704's inclusion of subpart (b). The language of FRE 704(b) was adopted in response to the prosecution of John Hinckley for attempting to assassinate Ronald Reagan.

The Committee considered, but does not recommend, adopting the language of FRE 704(b). It is unclear that there is any need for a similar subpart in Texas. The addition of subsection (b) to the federal rules has not been terribly helpful, and this issue has not created a problem for Texas courts, so the subcommittee does not believe there is a need to adopt the federal approach contained in FRE 704(b).

Rule 705

TEX. R. EVID. 705. Disclosing the Underlying Facts or Data and Examining an Expert About Them

(a) Stating an Opinion Without Disclosing the Underlying Facts or Data. Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

(b) Voir Dire Examination of an Expert About the Underlying Facts or Data. Before an expert states an opinion or discloses the underlying facts or data, an adverse party in a civil case may—or in a criminal case must—be permitted to examine the expert about the underlying facts or data. This examination must take place outside the jury's hearing.

(c) Admissibility of Opinion. An expert's opinion is inadmissible if the underlying facts or data do not provide a sufficient basis for the opinion.

(d) TEX. R. EVID. 705(d) When Otherwise Inadmissible Underlying Facts or Data May Be Disclosed;Instructing the Jury. If the underlying facts or data would otherwise be inadmissible, the proponent of the opinion may not disclose them to the jury if their probative value in helping the jury evaluate the opinion is outweighed by their prejudicial effect. If the court allows the proponent to disclose those facts or data the court must, upon timely request, restrict the evidence to its proper scope and instruct the jury accordingly. **[discussed above with TRE 703]**

FED. R. EVID. 705. Disclosing the Facts or Data Underlying an Expert

Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

TEX. CODE CRIM. P. art. 39.14(b)

(b) On a party's request made not later than the 30th day before the date that jury selection in the trial is scheduled to begin or, in a trial without a jury, the presentation of evidence is scheduled to begin, the party receiving the request shall disclose to the requesting party the name and address of each person the disclosing party may use at trial to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence. Except as otherwise provided by this subsection, the disclosure must be made in writing in hard copy form or by electronic means not later than the 20th day before the date that jury selection in the trial is scheduled to begin or, in a trial without a jury, the presentation of evidence is scheduled to begin. On motion of a party and on notice to the other parties, the court may order an earlier time at which one or more of the other parties must make the disclosure to the requesting party.

TRE 705(a) is identical to the entirety of what is FRE 705. TRE 705 goes on to include three more subdivisions, one of which—Rule 705(d)—was discussed above in connection with FRE 703. The

substantive change in Texas law, and should not change the way courts rule on the admissibility of expert opinion testimony.

TEX. R. EVID. 703. Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

Comment to 2016 Amendment: The reference to "reviewed" has been deleted to bring the rule into alignment with Fed. R. Evid. 703, and because "reviewed" is covered by the broader phrase "made aware of." Courts have not made substantive decisions on the basis of the term "reviewed" in the rule. This is not intended as a substantive change in the law.

TEX. R. EVID. 704. Opinion on an Ultimate Issue

An opinion is not objectionable just because it embraces an ultimate issue.

TEX. R. EVID. 705. Disclosing the Underlying Facts or Data and Examining an Expert About Them

(a) Stating an Opinion Without Disclosing the Underlying Facts or Data. Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

(b) Voir Dire Examination of an Expert About the Underlying Facts or Data. Before an expert states an opinion or discloses the underlying facts or data, an adverse party in a civil case may—or in a criminal case must—be permitted to examine the expert about the underlying facts or data. This examination must take place outside the jury's hearing.

(c) [Admissibility of Opinion.] [Transferred to Rule 702(b).]

(d) When Otherwise Inadmissible Underlying Facts or Data May Be Disclosed;Instructing the Jury. If the underlying facts or data would otherwise be inadmissible, the proponent of the opinion may not disclose them to the jury if their probative value in helping the jury evaluate the opinion is outweighed by their prejudicial effect. If the court allows the proponent to disclose those facts or data the court must, upon timely request, restrict the evidence to its proper scope and instruct the jury accordingly.

Comment to 2016 Amendment: Subdivision (c) was made superfluous by the addition of Tex. R. Evid. 702(b), and it has therefore been deleted from the rule. This is not intended as a substantive change in the law.

ARTICLE VII. OPINIONS & EXPERT TESTIMONY

TRE 701. OPINION TESTIMONY BY LAY WITNESSES

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception; and

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue.

Comment to 2015 restyling: All references to an "inference" have been deleted because this makes the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

History of TRE 701 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lix). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lv). Source: FRE 701.

See Brown & Rondon, *Texas Rules of Evidence Handbook* (2016), p. 678.

TRE 702. TESTIMONY BY EXPERT WITNESSES

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

History of TRE 702 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lix). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lv). Source: FRE 702.

See *Commentaries*, "Motion to Exclude Expert," ch. 5-N, p. 461; "Testimony from expert," ch. 8-C, §5.5, p. 772; "Objection to opinion of expert," ch. 8-D, §4.2, p. 783; Brown & Rondon, *Texas Rules of Evidence Handbook* (2016), p. 693.

TRE 703. BASES OF AN EXPERT'S OPINION TESTIMONY

An expert may base an opinion on facts or data in the case that the expert has been made aware of, reviewed, or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

Comment to 2015 restyling: All references to an "inference" have been deleted because this makes the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Comment to 1998 change: The former Civil Rule referred to facts or data "perceived by or reviewed by" the expert. The former Criminal Rule referred to facts or data "perceived by or made known to" the expert. The terminology is now conformed, but no change in meaning is intended.

History of TRE 703 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d {Tex.Cases} lx). Amended eff. Sept. 1, 1990, by order of Apr. 24, 1990 (785-86 S.W.2d {Tex.Cases} cvii): Changed the words "made known to him" to "reviewed by the expert"; this amendment conforms TRE 703 to the rules of discovery by using the term "reviewed by the expert." See former TRCP 166b. Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d {Tex.Cases} lv). Source: FRE 703.

See *Commentaries*, "Foundation test," ch. 5-N, §2.4, p. 465; Brown & Rondon, *Texas Rules of Evidence Handbook* (2016), p. 734.

TRE 705. DISCLOSING THE UNDERLYING FACTS OR DATA & EXAMINING AN EXPERT ABOUT THEM

(a) Stating an Opinion Without Disclosing the Underlying Facts or Data. Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

(b) Voir Dire Examination of an Expert About the Underlying Facts or Data. Before an expert states an opinion or discloses the underlying facts or data, an adverse party in a civil case may—or in a criminal case must—be permitted to examine the expert about the underlying facts or data. This examination must take place outside the jury's hearing.

(c) Admissibility of Opinion. An expert's opinion is inadmissible if the underlying facts or data do not provide a sufficient basis for the opinion.

(d) When Otherwise Inadmissible Underlying Facts or Data May Be Disclosed; Instructing the Jury. If the underlying facts or data would otherwise be inadmissible, the proponent of the opinion may not disclose them to the jury if their probative value in helping the jury evaluate the opinion is outweighed by their prejudicial effect. If the court allows the proponent to disclose those facts or data the court must, upon timely request, restrict the evidence to its proper scope and instruct the jury accordingly.

Comment to 2015 restyling: All references to an "inference" have been deleted because this makes the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Comment to 1998 change: Paragraphs (b), (c), and (d) are based on the former Criminal Rule and are made applicable to civil cases. This rule does not preclude a party in any case from conducting a *voir dire* examination into the qualifications of an expert.

History of TRE 705 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lx). Amended eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxxviii). Added "disclose on direct examination, or" and "on cross-examination" to last sentence. Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] iv) Source: FRE 705.

See *Commentaries*, "Motion to Exclude Expert," ch. 5-N, p. 461; Brown & Rondon, *Texas Rules of Evidence Handbook* (2016), p. 752.

ARTICLE VII. OPINIONS & EXPERT TESTIMONY

FRE 701. OPINION TESTIMONY BY LAY WITNESSES

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

See selected Notes of Advisory Committee to FRE 701, p. 1346.

FRE 702. TESTIMONY BY EXPERT WITNESSES

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

See selected Notes of Advisory Committee to FRE 702, p. 1347.

History of FRE 702: Adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975. Amended Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011.

See *Commentaries*, "Motion to Exclude Expert Witness," ch. 5-O, p. 420; "Lay & expert testimony," ch. 8-C, §4.2.2, p. 773.

FRE 703. BASES OF AN EXPERT'S OPINION TESTIMONY

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

History of FRE 703: Adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975. Amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011.

See *Commentaries*, "Introducing Evidence," ch. 8-C, §4, p. 772.

FRE 705. DISCLOSING THE FACTS OR DATA UNDERLYING AN EXPERT'S OPINION

Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

History of FRE 705: Adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975. Amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 26, 2011, eff. Dec. 1, 2011.

ANNOTATIONS

B.F. Goodrich v. Betkoski, 99 F.3d 505, 525 (2d Cir. 1996). "An expert's testimony, in order to be admissible under Rule 705, need not detail all the facts and data underlying his opinion in order to present that opinion."

University of R.I. v. A.W. Chesterton Co., 2 F.3d 1200, 1218 (1st Cir.1993). FRE 703 and 705 "normally relieve the proponent of expert testimony from engaging in the awkward art of hypothetical questioning, which involves the ... process of laying a full factual foundation *prior* to asking the expert to state an opinion. In the interests of efficiency, the [FREs] deliberately shift the burden to the cross-examiner to ferret out whatever empirical deficiencies may lurk in the expert opinion. Nevertheless, Rules 703 and 705 do not afford automatic entitlements to proponents of expert testimony. [U]nder the broad exception to Rule 705 ..., the trial court is given considerable latitude over the order in which evidence will be presented to the jury."

FRE 706. COURT-APPOINTED EXPERT WITNESSES

(a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

4

MEMORANDUM

To: Supreme Court Advisory Committee
From: Committee on Administration of Rules of Evidence
Re: Tex. R. Evid. 701-705
Date: June 8, 2016

Assignment:

We were asked to study Tex. R. Evid. 701 - 705, and consider:

(1) whether to bring the Texas rules into conformity with the Federal rules;

(2) whether to revise the rules (primarily Tex. R. Evid. 702) as discussed in the correspondence between Buddy Low (on behalf of the SCAC) and Justice Hecht in 2005;

(3) whether to amend either Tex. R. Evid. 615 or 705(b) in light of the provisions of the Michael Morton Act.

Analysis & Recommendations

Rules 701 & 702

Because similar considerations apply to both Rules 701 and 702, the recommended amendments to these rules are discussed together. The current texts of the Texas and federal rules, respectively, state:

TEX. R. EVID. 701 Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception; and

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue.

FED. R. EVID. 701 Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

TEX. R. EVID. 702 Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

FED. R. EVID. 702 Testimony by an Expert

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

The current content of Texas Rules 701 and 702 predate *Daubert* and its progeny (which we refer to by the shorthand "*Daubert*"). The federal rules, and particularly FRE 702, were amended after *Daubert* to codify the rule set out in those cases, and that is the primary reason for the differences in the rules.

TRE 701 addresses when a witness is permitted to offer lay opinion testimony. The only difference between TRE and FRE 701 is the federal rule's inclusion of subdivision (c). The federal rule comments indicate subsection (c) was included to "eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." The question we considered is whether this concern is worthy of a specific subdivision in the Texas rules. One could argue that subsection (c) is unnecessary, as the very existence of Rules 701 and 702 make the same distinction. On the other hand, adopting the language of the federal rule would not be a substantive change to Texas law, given that FRE 701(c) is consistent with Texas case law, and furthers the policy that a party may not avoid the disclosure requirements for experts by presenting an expert as a "lay opinion witness." *See, e.g.*, *Reid Road Mun. Util Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 851 (Tex. 2011).

The difference between TRE and FRE 702 is that FRE 702 codifies the basic rule of *Daubert* in subdivisions (b) - (d), while the Texas rule does not do so, leaving it to case law to set out those rules. The lack of these subdivisions is irrelevant in practice, as Texas case law requires the very same factors be established for a witness to be permitted to testify as an expert. Thus, the addition of subparts (b) - (d) would not change Texas practice.

The primary issue presented to the Committee on both rules, therefore, was whether there is sufficient benefit from bringing the Texas rules into complete alignment with the federal rules to justify the change. In general, it has been our policy to seek such alignment when doing so does not change, or is not inconsistent with, Texas law. Several committee members expressed concern that—even with a comment that the change is not substantive and does not change current practice—parties might argue, and courts might rule, that certain types of witnesses who have always been permitted to testify as experts and render opinions might no longer be permitted to do so. For example, a witness testifying as an expert based only on his long experience (an oil rig hand

testifying about some aspect of the drilling rig, for example), might be excluded from testifying because of an argument based on subdivisions (b) - (d) (such as, the rig hand's testimony is not the product of "reliable principles or methods"). These Committee members argued that the adoption of subdivisions (b) - (d) would unduly emphasize the scientific or technical requirement of testimony being "the product of reliable principles and methods" at the expense of testimony by a witness with specialized knowledge based on training, skill or experience. They argue this added emphasis in the rule could change the outcome for such witnesses' ability to offer expert opinions.

At the end of the day, a majority of the full Committee felt that subdivisions (b) - (d) simply state what is already Texas law, and, whether set out in Rule 702 or not, the *Daubert* standard applies to all experts, including those whose expertise is based solely on work experience. The Committee felt that the concerns raised could be dealt with by a comment, and the outcomes with or without the subdivisions should be the same under existing law. This has certainly been the experience in federal courts. The addition of subdivisions (b) - (d) to Federal Rule 702 has not prevented witnesses with expertise rooted in experience from being allowed to offer expert opinion testimony. In recognition of the concern raised by the dissenting members, however, the Committee agreed to expand the comment to both rules to make it explicit that no change in practice is intended.

Rule 703

TEX. R. EVID. 703 Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of, reviewed, or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

TEX. R. EVID. 705(d) When Otherwise Inadmissible Underlying Facts or Data May Be Disclosed;Instructing the Jury. If the underlying facts or data would otherwise be inadmissible, the proponent of the opinion may not disclose them to the jury if their probative value in helping the jury evaluate the opinion is outweighed by their prejudicial effect. If the court allows the proponent to disclose those facts or data the court must, upon timely request, restrict the evidence to its proper scope and instruct the jury accordingly.

FED. R. EVID. 703 Bases of an Expert

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

TRE and FRE 703 address the types of facts or data on which an expert may base an opinion. The two rules are similar, though a portion of what is addressed in FRE 703 is instead contained in TRE 705, and the Texas rule contains a reference to data "reviewed" by an expert, which is absent from the federal rule.

On the latter point, in addition to allowing an expert to base his opinion on facts that the expert "has been made aware of" or "personally observed," TRE 703 also permits the expert to base his opinions

on facts or data he has "reviewed." It is debatable whether the term "reviewed" is necessary, as it would seem that any data the expert has "reviewed" would be encompassed by facts or data the expert "has been made aware of." It is possible that the term "reviewed" is included in the Texas rule because of the language of Tex. R. Civ. P. 192.3(e)(6), which defines the material that is discoverable from an expert witness, and includes:

> (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;

(emphasis added). Notably, TRE 703 makes no mention of facts or data "provided to" or "prepared by" an expert, and both of those phrases are also contained in TRCP 192.3(e)(6).

The Committee unanimously recommends that the word "reviewed" be deleted from the first sentence of TRE 703. The Committee believes that the concept of data an expert has "reviewed" is captured by the existing phrase referring to data the expert "has been made aware of." The change has the added benefit of bringing this portion of TRE 703 into complete alignment with the federal rule. The Committee further recommends the inclusion of a comment stating that no substantive change is intended by this amendment.

The other difference between the rules relates to the second sentence of FRE 703, which addresses when the proponent of an expert may disclose to the jury material relied on by the expert that is otherwise inadmissible, and the balancing test the trial court is to use to make that decision. The TRE contains a similar provision, contained in Rule 705(d). The balancing test in the Texas rule is slightly different, as it calls for the court to simply balance the probative value of the facts or data against their prejudicial effect, while the federal rule allows the facts or data to be disclosed only when their probative value ***substantially*** outweighs the prejudicial effect. Further, the Texas rule contains a provision requiring the trial judge, upon proper request, to give a limiting instruction if it allows the disclosure of the otherwise inadmissible material.

The Committee does not recommend any change to this portion of TRE 705(d), as changing either the balancing test, or the requirement of a limiting instruction, would be a substantive change to Texas law, and no party has suggested such a change is warranted, nor do any Committee members see a reason to make such a change.

Rule 704

TEX. R. EVID. 704. Opinion on an Ultimate Issue	FED. R. EVID. 704. Opinion on an Ultimate Issue
An opinion is not objectionable just because it embraces an ultimate issue.	(a) **In General — Not Automatically Objectionable.** An opinion is not objectionable just because it embraces an ultimate issue.
	(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

TRE and FRE 704 both state—in identical language—that the fact that a witness's opinion embraces an "ultimate issue" does not make the opinion objectionable. The difference between the two rules is FRE 704's inclusion of subpart (b). The language of FRE 704(b) was adopted in response to the prosecution of John Hinckley for attempting to assassinate Ronald Reagan.

The Committee considered, but does not recommend, adopting the language of FRE 704(b). It is unclear that there is any need for a similar subpart in Texas. The addition of subsection (b) to the federal rules has not been terribly helpful, and this issue has not created a problem for Texas courts, so the subcommittee does not believe there is a need to adopt the federal approach contained in FRE 704(b).

Rule 705

TEX. R. EVID. 705. Disclosing the Underlying Facts or Data and Examining an Expert About Them

(a) Stating an Opinion Without Disclosing the Underlying Facts or Data. Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

(b) Voir Dire Examination of an Expert About the Underlying Facts or Data. Before an expert states an opinion or discloses the underlying facts or data, an adverse party in a civil case may—or in a criminal case must—be permitted to examine the expert about the underlying facts or data. This examination must take place outside the jury's hearing.

(c) Admissibility of Opinion. An expert's opinion is inadmissible if the underlying facts or data do not provide a sufficient basis for the opinion.

(d) TEX. R. EVID. 705(d) When Otherwise Inadmissible Underlying Facts or Data May Be Disclosed;Instructing the Jury. If the underlying facts or data would otherwise be inadmissible, the proponent of the opinion may not disclose them to the jury if their probative value in helping the jury evaluate the opinion is outweighed by their prejudicial effect. If the court allows the proponent to disclose those facts or data the court must, upon timely request, restrict the evidence to its proper scope and instruct the jury accordingly. **[discussed above with TRE 703]**

FED. R. EVID. 705. Disclosing the Facts or Data Underlying an Expert

Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

TEX. CODE CRIM. P. art. 39.14(b)

(b) On a party's request made not later than the 30th day before the date that jury selection in the trial is scheduled to begin or, in a trial without a jury, the presentation of evidence is scheduled to begin, the party receiving the request shall disclose to the requesting party the name and address of each person the disclosing party may use at trial to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence. Except as otherwise provided by this subsection, the disclosure must be made in writing in hard copy form or by electronic means not later than the 20th day before the date that jury selection in the trial is scheduled to begin or, in a trial without a jury, the presentation of evidence is scheduled to begin. On motion of a party and on notice to the other parties, the court may order an earlier time at which one or more of the other parties must make the disclosure to the requesting party.

TRE 705(a) is identical to the entirety of what is FRE 705. TRE 705 goes on to include three more subdivisions, one of which—Rule 705(d)—was discussed above in connection with FRE 703. The

other two subdivisions address a party's right to take an expert on voir dire, and state that an expert opinion is inadmissible if it is not supported by sufficient facts or data.

The questions related to TRE 705 that the Committee considered are: (1) should a change to TRE 705(b) be made in light of the provisions of the Michael Morton Act, contained in TEX. CODE CRIM. P. 39.14;[1] and (2) is there a continued need for TRE 705(c)?

On the first point, while an argument can be made that a trial court being required to permit voir dire of an expert in a criminal case is not entirely consistent with the Michael Morton Act, any revision to the rule would be complicated, as there are still circumstances in which no expert discovery will have taken place prior to trial in many criminal cases, and TRE 705(b) will have application there. Trying to describe the circumstances when it would not apply could be difficult. More importantly, the Court of Criminal Appeals Rules Advisory Committee has already looked at this very issue, and it decided that no change to TRE 705(b) should be made.

On the second point, things are a little more clear. TRE 705(c) dates back to the pre-*Daubert* time, and thus is somewhat of a relic. Further, and more to the point, the Committee has recommended that TRE 702 be amended to add subparts (b) - (d), and TRE 705(c) duplicates the rule contained in recommended TRE 702(b). The Committee therefore unanimously recommends the elimination of subdivision 705(c).

A red-lined and clean version of the proposed revisions are attached.

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[1]The subcommittee was also charged with considering a similar issue surrounding TRE 615, but any need for an amendment to Rule 615 was rendered moot by the Texas Court of Criminal Appeals and Supreme Court taking action on this issue. *See* Court of Criminal Appeals Order, December 7, 2015, Misc. Docket No. 15-006; and Final Order, February 29, 2016, Misc. Docket No. 16-001; and Supreme Court Order, February 16, 2016, Misc. Docket No. 16-9012.

Proposed Amendments - Redline Version

TEX. R. EVID. 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception; ~~and~~

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Comment to 2016 Amendment: Rule 701 has been amended to add subdivision (c). Since 2000, the Federal Rules of Evidence have included this language, which is intended "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." Fed. R. Evid. 701, Advisory Committee Note to 2000 Amendment. This same principle has been expressed by the Texas Supreme Court on numerous occasions. See, e.g., Reid Road Mun. Util Dist. No. 2 v. Speedy Stop Food Stores, Ltd., 337 S.W.3d 846, 851 (Tex. 2011). The purpose of this amendment is simply to align Rule 701 with its federal counterpart, and to codify what is already Texas law. The addition of subdivision (c) is not intended as a substantive change in Texas law, and should not change the way courts rule on the admissibility of lay and expert opinion testimony.

TEX. R. EVID. 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Comment to 2016 Amendment: Rule 702 has been amended to add subdivisions (b) - (d), to align it with Fed. R. Evid. 702. Those subdivisions were added to the federal rule in 2000, in response to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and the many cases that applied it, including Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). Texas adopted the same "gate keeper" principles in E.I. du Pont De Nemours and Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995) and Kelly v. State, 824 S.W.2d 568 (Tex. Crim. App. 1992). The principles embodied in subdivisions (b) - (d) are now well established in Texas case law, and as with the amendments to Rule 701, the purpose of the amendment to Rule 702 is simply to align it with its federal counterpart, and to codify what is already Texas law. The addition of subdivisions (b) - (d) is not intended as a

substantive change in Texas law, and should not change the way courts rule on the admissibility of expert opinion testimony.

TEX. R. EVID. 703. Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of~~, reviewed,~~ or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

Comment to 2016 Amendment: The reference to "reviewed" has been deleted to bring the rule into alignment with FED. R. EVID. 703, and because "reviewed" is covered by the broader phrase "made aware of." Courts have not made substantive decisions on the basis of the term "reviewed" in the rule. This is not intended as a substantive change in the law.

TEX. R. EVID. 704. Opinion on an Ultimate Issue

An opinion is not objectionable just because it embraces an ultimate issue.

TEX. R. EVID. 705. Disclosing the Underlying Facts or Data and Examining an Expert About Them

(a) Stating an Opinion Without Disclosing the Underlying Facts or Data. Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

(b) Voir Dire Examination of an Expert About the Underlying Facts or Data. Before an expert states an opinion or discloses the underlying facts or data, an adverse party in a civil case may—or in a criminal case must—be permitted to examine the expert about the underlying facts or data. This examination must take place outside the jury's hearing.

[(c) Admissibility of Opinion.] ~~An expert's opinion is inadmissible if the underlying facts or data do not provide a sufficient basis for the opinion.~~ [Transferred to Rule 702(b).]

(d) When Otherwise Inadmissible Underlying Facts or Data May Be Disclosed; Instructing the Jury. If the underlying facts or data would otherwise be inadmissible, the proponent of the opinion may not disclose them to the jury if their probative value in helping the jury evaluate the opinion is outweighed by their prejudicial effect. If the court allows the proponent to disclose those facts or data the court must, upon timely request, restrict the evidence to its proper scope and instruct the jury accordingly.

Comment to 2016 Amendment: Subdivision (c) was made superfluous by the addition of TEX. R. EVID. 702(b), and it has therefore been deleted from the rule. This is not intended as a substantive change in the law.

Proposed Amendments

TEX. R. EVID. 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Comment to 2016 Amendment: Rule 701 has been amended to add subdivision (c). Since 2000, the Federal Rules of Evidence have included this language, which is intended "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." Fed. R. Evid. 701, Advisory Committee Note to 2000 Amendment. This same principle has been expressed by the Texas Supreme Court on numerous occasions. *See, e.g., Reid Road Mun. Util Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 851 (Tex. 2011). The purpose of this amendment is simply to align Rule 701 with its federal counterpart, and to codify what is already Texas law. The addition of subdivision (c) is not intended as a substantive change in Texas law, and should not change the way courts rule on the admissibility of lay and expert opinion testimony.

TEX. R. EVID. 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Comment to 2016 Amendment: Rule 702 has been amended to add subdivisions (b) - (d), to align it with Fed. R. Evid. 702. Those subdivisions were added to the federal rule in 2000, in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and the many cases that applied it, including *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Texas adopted the same "gate keeper" principles in *E.I. du Pont De Nemours and Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) and *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992). The principles embodied in subdivisions (b) - (d) are now well established in Texas case law, and as with the amendments to Rule 701, the purpose of the amendment to Rule 702 is simply to align it with its federal counterpart, and to codify what is already Texas law. The addition of subdivisions (b) - (d) is not intended as a

substantive change in Texas law, and should not change the way courts rule on the admissibility of expert opinion testimony.

TEX. R. EVID. 703. Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

Comment to 2016 Amendment: The reference to "reviewed" has been deleted to bring the rule into alignment with Fed. R. Evid. 703, and because "reviewed" is covered by the broader phrase "made aware of." Courts have not made substantive decisions on the basis of the term "reviewed" in the rule. This is not intended as a substantive change in the law.

TEX. R. EVID. 704. Opinion on an Ultimate Issue

An opinion is not objectionable just because it embraces an ultimate issue.

TEX. R. EVID. 705. Disclosing the Underlying Facts or Data and Examining an Expert About Them

(a) Stating an Opinion Without Disclosing the Underlying Facts or Data. Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

(b) Voir Dire Examination of an Expert About the Underlying Facts or Data. Before an expert states an opinion or discloses the underlying facts or data, an adverse party in a civil case may—or in a criminal case must—be permitted to examine the expert about the underlying facts or data. This examination must take place outside the jury's hearing.

(c) [Admissibility of Opinion.] [Transferred to Rule 702(b).]

(d) When Otherwise Inadmissible Underlying Facts or Data May Be Disclosed;Instructing the Jury. If the underlying facts or data would otherwise be inadmissible, the proponent of the opinion may not disclose them to the jury if their probative value in helping the jury evaluate the opinion is outweighed by their prejudicial effect. If the court allows the proponent to disclose those facts or data the court must, upon timely request, restrict the evidence to its proper scope and instruct the jury accordingly.

Comment to 2016 Amendment: Subdivision (c) was made superfluous by the addition of Tex. R. Evid. 702(b), and it has therefore been deleted from the rule. This is not intended as a substantive change in the law.

TRE 203. DETERMINING FOREIGN LAW

(a) **Raising a Foreign Law Issue.** A party who intends to raise an issue about a foreign country's law must:

(1) give reasonable notice by a pleading or other writing; and

(2) at least 30 days before trial, supply all parties a copy of any written materials or sources the party intends to use to prove the foreign law.

(b) **Translations.** If the materials or sources were originally written in a language other than English, the party intending to rely on them must, at least 30 days before trial, supply all parties both a copy of the foreign language text and an English translation.

(c) **Materials the Court May Consider; Notice.** In determining foreign law, the court may consider any material or source, whether or not admissible. If the court considers any material or source not submitted by a party, it must give all parties notice and a reasonable opportunity to comment and submit additional materials.

(d) **Determination and Review.** The court—not the jury—must determine foreign law. The court's determination must be treated as a ruling on a question of law.

History of TRE 203 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxvi). Amended eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxxii): The words "all parties" were substituted for "to the opposing party or counsel" in the first and second sentences; in the fourth sentence, "all" was substituted for "the"; in the last sentence, "The court's" was substituted for "Its"; and the words "on appeal" were deleted. Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxviii). Source: TRCS art. 3718; FRCrP 26.1; FRCP 44.1.

See *Commentaries*, "Motion for Judicial Notice," ch. 5-M, p. 451; Brown & Rondon, *Texas Rules of Evidence Handbook* (2016), p. 145.

FRCP 44.1. DETERMINING FOREIGN LAW

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

See selected Notes of Advisory Committee to FRCP 44.1, p. 1395.

History of FRCP 44.1. Adopted Feb. 28, 1966, eff. July 1, 1966. Amended Nov. 20, 1972, eff. July 1, 1975; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007.

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TO: Supreme Court Advisory Committee
FROM: Committee on Administration of Rules of Evidence
RE: Texas Rule of Evidence 203
DATE: June 8, 2016

Background

The Rule 203 subcommittee was established to discuss possible issues with the Committee's proposal regarding Rule 203 brought to the Committee's attention by the Supreme Court Advisory Committee. Specifically, the Committee had previously proposed changing the time period in Rule 203 from 30 days to 45 days. The Committee was asked by the SCAC to consider the following questions:

1. Should we make the time requirement longer than 45 days before trial?
2. Should we make the time requirement more in line with (a)(1) and Federal Rule of Civil Procedure 44.1 and require the materials or sources be supplied a reasonable time before trial?
3. Should we also amend TRE 203(b) to have the time frame for providing translations the same as the time frame for supplying materials or sources in TRE 203(a)?
4. Should the rule include language allowing a modification of the time frame for good cause?

Current Version of the Rule

Rule 203. Determining Foreign Law

(a) **Raising a Foreign Law Issue.** A party who intends to raise an issue about a foreign country's law must:

(1) give reasonable notice by a pleading or other writing; and

(2) at least 30 days before trial, supply all parties a copy of any written materials or sources the party intends to use to prove the foreign law.

(b) **Translations.** If the materials or sources were originally written in a language other than English, the party intending to rely on them must, at least 30 days before trial, supply all parties both a copy of the foreign language text and an English translation.

(c) **Materials the Court May Consider; Notice.** In determining foreign law, the court may consider any material or source, whether or not admissible. If the court

considers any material or source not submitted by a party, it must give all parties notice and a reasonable opportunity to comment and submit additional materials.

(d) **Determination and Review.** The court—not the jury—must determine foreign law. The court's determination must be treated as a ruling on a question of law.

Subcommittee's Analysis and Recommendations

The subcommittee's analysis included consideration of their personal experiences with the Rule. In the subcommittee members' experience, proof of foreign law generally involves the use of experts. Texas Rule of Civil Procedure 195.2 provides that "[u]nless otherwise ordered by the court," expert designations are to be made by the later of 30 days after a request for disclosure 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.

It was the experience of the subcommittee that designation of experts on foreign law (and therefore notification of the intent to raise an issue concerning foreign law) thus takes place well before trial and that it is the results of the expert discovery process (which generally involves some changes to the experts' reports/designations) that will be exchanged pursuant to Rule 203. The subcommittee therefore discussed whether the materials exchanged pursuant to Rule 203 should be both exchanged and filed with the court to facilitate obtaining the court's determination of foreign law before trial begins. It was the subcommittee's recommendation that the rule be so amended.

The subcommittee offers the following analysis and recommendations regarding the SCAC's questions.

1. **Should we make the time requirement longer than 45 days before trial?**

Particularly given the analysis above, and the subcommittee's understanding of the practical effect of the two-step process, the subcommittee recommended not lengthening the 45-day deadline because prior notice will generally come through the expert designation process.

2. **Should we make the time requirement more in line with (a)(1) and Federal Rule of Civil Procedure 44.1 and require the materials or sources be supplied a reasonable time before trial?**

Federal Rule of Procedure 44.1 states, in its entirety:

> A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

Regarding the issue of the time for such notice, the advisory committee notes state:

> The new rule does not attempt to set any definite limit on the party's time for giving the notice of an issue of foreign law; in some cases the issue may not become apparent until the trial and notice then given may still be reasonable. The stage which the case has reached at the time of the notice, the reason proffered by the party for his failure to give earlier notice, and the importance to the case as a whole of the issue of foreign law sought to be raised, are among the factors which the court should consider in deciding a question of the reasonableness of a notice. If notice is given by one party it need not be repeated by any other and serves as a basis for presentation of material on the foreign law by all parties.

TRE 203 already includes a requirement of reasonable notice. The subcommittee did not believe that making the rule less specific is advisable. It was therefore the subcommittee's recommendation that the rule not be amended to be more in line with Federal Rule of Civil Procedure 44.1. The subcommittee addressed the Rule 44.1 advisory committee note in response to question 4 below.

3. **Should we also amend TRE 203(b) to have the time frame for providing translations the same as the time frame for supplying materials or sources in TRE 203(a)?**

The March 2015 Article 2 subcommittee recommendation to change the time period in Rule 203 from 30 days to 45 days, which was approved by the full Committee, proposed its change to the pre-restyling version of Rule 203. It was the assumption of the subcommittee that overlapping substantive review of Rule 203 and the restyling process simply resulted in an oversight. It was the subcommittee's recommendation that Rules 203(a)(2) and 203(b) both be amended to change the 30-day period to a 45-day period.

4. **Should the rule include language allowing a modification of the time frame for good cause?**

For the reasons expressed by the federal rules advisory committee in creating Federal Rule of Procedure 44.1, and the fact that cases involving foreign law may be complex cases warranting a Level 3 Discovery Control Plan pursuant to Texas Rule of Civil Procedure 190.4, the subcommittee recommended amending Rule 203 to allow for court modification without reference to the standard to be applied.

Proposed Rule

For the above reasons, the subcommittee proposed that Rule 203 be amended to read as follows:

Rule 203. Determining Foreign Law

(a) **Raising a Foreign Law Issue.** Unless the court orders otherwise, a ~~A~~ party who intends to raise an issue about a foreign country's law must:

(1) give reasonable notice by a pleading or other writing; and

(2) at least ~~30~~ 45 days before trial, supply all parties and the court a copy of any written materials or sources the party intends to use to prove the foreign law.

(b) **Translations.** Unless the court orders otherwise, if ~~If~~ the materials or sources were originally written in a language other than English, the party intending to rely on them must, at least ~~30~~ 45 days before trial, supply all parties and the court both a copy of the foreign language text and an English translation.

(c) **Materials the Court May Consider; Notice.** In determining foreign law, the court may consider any material or source, whether or not admissible. If the court considers any material or source not submitted by a party, it must give all parties notice and a reasonable opportunity to comment and submit additional materials.

(d) **Determination and Review.** The court—not the jury—must determine foreign law. The court's determination must be treated as a ruling on a question of law.

Full Committee Vote

The Committee discussed whether the portion of the proposed rule requiring submission to the court should use "supply" or "file." The Committee agreed to leave the proposal as "supply" because that term is used throughout the rules. The edits proposed by the subcommittee passed.

The Committee wishes to bring to the attention of the Supreme Court Advisory Committee that perhaps "supply" should be "file" in the e-file era because the word supply is ambiguous as to whether the materials end up as part of the court's records and, particularly with the case of judges who ride circuit, and the court could end up without a copy of the materials on hand when needed to make rulings.

Final Proposed Rule

Rule 203. Determining Foreign Law

(e) **Raising a Foreign Law Issue.** Unless the court orders otherwise, a party who intends to raise an issue about a foreign country's law must:

(2) give reasonable notice by a pleading or other writing; and

(3) at least 45 days before trial, supply all parties and the court a copy of any written materials or sources the party intends to use to prove the foreign law.

(f) **Translations.** Unless the court orders otherwise, if the materials or sources were originally written in a language other than English, the party intending to rely on them must, at least 45 days before trial, supply all parties and the court both a copy of the foreign language text and an English translation.

(g) **Materials the Court May Consider; Notice.** In determining foreign law, the court may consider any material or source, whether or not admissible. If the court considers any material or source not submitted by a party, it must give all parties notice and a reasonable opportunity to comment and submit additional materials.

(h) **Determination and Review.** The court—not the jury—must determine foreign law. The court's determination must be treated as a ruling on a question of law.

TRE 408. COMPROMISE OFFERS & NEGOTIATIONS

(a) **Prohibited Uses.** Evidence of the following is not admissible either to prove or disprove the validity or amount of a disputed claim:

(1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made during compromise negotiations about the claim.

(b) **Permissible Uses.** The court may admit this evidence for another purpose, such as proving a party's or witness's bias, prejudice, or interest, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Comment to 2015 restyling: Rule 408 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

The reference to "liability" has been deleted on the ground that the deletion makes the Rule flow better and easier to read, and because "liability" is covered by the broader term "validity." Courts have not made substantive decisions on the basis of any distinction between validity and liability. No change in current practice or in the coverage of the Rule is intended.

Finally, the sentence of the Rule referring to evidence "otherwise discoverable" has been deleted as superfluous. The intent of the sentence was to prevent a party from trying to immunize admissible information, such as a pre-existing document, through the pretense of disclosing it during compromise negotiations. But even without the sentence, the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations.

History of TRE 408 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxix). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xl). Source: FRE 408.

See Brown & Rondon, *Texas Rules of Evidence Handbook* (2016), p. 311.

FRE 408. COMPROMISE OFFERS & NEGOTIATIONS

(a) **Prohibited Uses.** Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim—except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) **Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

History of FRE 408: Adopted Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1926, eff July 1, 1975. Amended Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 26, 2011, eff. Dec. 1, 2011.

See *Commentaries*, "Motion in Limine," ch. 5-H, p. 377; *O'Connor's Federal Civil Forms* (2015), FORMS 5H.

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MEMORANDUM

To: Supreme Court Advisory Committee
From: Committee on Administration of Rules of Evidence
Re: Fed. R. Evid. 301 & 302, Tex. R. Evid. 403 & 408 (Fed.R.Evid. 403 & 408)
Date: June 7, 2016

Assignment

We were asked to study and consider:

(1) whether Texas should add rules on "presumptions in civil cases" similar to/or in conformity with Fed.R.Evid. 301 & 302;

(2) whether to bring Tex.R.Evid. 403 in conformity with Fed.R.Evid. 403;

(3) whether to bring Tex.R.Evid. 408 in conformity with Fed.R.Evid. 408.

Analysis and Recommendations

1. FED.R.EVID. 301 and 302:
We recommend that Texas not adopt rules to mirror FED.R.EVID. 301 and 302 regarding presumptions in civil cases. Texas has over 400 presumptions, and different burdens (of proof and shifting of burden and going forward with the evidence) apply uniquely to each presumption. The subcommittee believes that adoption of a rule or rules dealing with presumptions is not necessary and will lead to confusion.

2. FED.R.EVID. 403 and TEX.R.EVID. 403:
We recommend that Texas not adopt the language of FED.R.EVID. 403 that includes "wasting time" as an additional basis for excluding relevant evidence because such addition will create new issues/law and that the "wasting of time" grounds are included/subsumed in the "undue delay, or needlessly presenting cumulative evidence" grounds for exclusion.

3. FED.R.EVID. 408 and TEX.R.EVID. 408:
We recommend that Texas
1. Amend TEX.R.EVID. 408(a) as indicated below.
2. Amend TEX.R.EVID. 408(b) as indicated below.
3. Not amend TEX.R.EVID. 408(a)(2) to conform to the FED.R.EVID. 408(a)(2) [see bracketed language from FED.R.EVID. 408(a)(2) below]. Such amendment would result in a substantive change and no need for a substantive change has been made known to the Committee. AREC is available to solicit further input from the criminal bar upon request from the SCAC.

Rule 408. Compromise Offers and Negotiations

(a) **Prohibited Uses.** Evidence of the following is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
   (1) furnishing, promising, or offering--or accepting, promising to accept, or offering to accept--a valuable consideration in compromising or attempting to compromise the claim; and
   (2) conduct or a statement made during compromise negotiations about the claim [--except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority].

(b) **Exceptions.** The court may admit this evidence for another purpose, such as proving a ~~party's or~~ witness's bias~~,~~ or prejudice, ~~or interest,~~ negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

[Bracketed language in Rule 408(a)(2) appears in the Federal Rule. We do not recommend adding it.]

Explanation:

1. Amend Rule 408(a) to make clear that compromise evidence is not admissible even when not offered against the offering or settling party.

The exclusionary reach of Rule 408 extends to offers of compromise that are accepted. A defendant may settle with one of a number of persons injured in the same accident or by the same product; a plaintiff may settle with one of several defendants. Allowing a current opponent to introduce against the settling party evidence of the compromise agreement would contravene the policy of encouraging settlements. A defendant, for example, would undoubtedly hesitate to settle with one plaintiff if it feared the settlement might subsequently be used by other plaintiffs to prove defendant's liability.

In one instance, however, the evidence can be admitted without substantial fear that parties will be dissuaded from settling cases. A party will be deterred from making or accepting an offer only if it fears that this might later be used against it. The possibility that the offer or settlement might be introduced against someone else in subsequent litigation is unlikely to dampen the party's interest in compromise. Therefore, parties have sometimes argued that Rule 408 should be interpreted to allow compromise evidence as long as it is not offered against the party who offered to settle or settled.

A similar argument has been made with respect to subsequent remedial measure evidence under Rule 407. Like Rule 408, Rule 407 is written in the passive voice; neither rule specifies whose offer to settle or settlement is inadmissible. Both rules are justified on public policy grounds and relevancy grounds, with the policy grounds predominating. Many courts have agreed that allowing evidence of a third-party's subsequent remedial measure does not contravene the public policy rationale and have admitted the evidence even though the text of Rule 407 seems to bar it. E.g., Beavers on Behalf of Beavers v. Northrop Worldwide Aircraft Services, Inc., 821 S.W.2d 669, 677 (Tex. App.—Amarillo 1991, writ denied) (suit by survivors of Army captain killed in helicopter crash, claiming that defendant negligently maintained helicopter; defendant permitted to offer evidence of post-crash remedial measures taken by Army, a non-party, as proof of Army's negligence); Diehl v. Blaw–Knox, 360 F.3d 426, 429-30 (3d Cir. 2004) (plaintiff offers evidence that owner of machine, a non-party, made post-accident modifications to prove manufacturer's liability).

Courts have proved less receptive to claims that Rule 408 should be similarly interpreted. The caselaw is sparse, but tends toward a literal interpretation of the rule, excluding the compromise evidence even when

it is not being used to the detriment of the settling or offering party. See Stam v. Mack, 984 S.W.2d 747, 752 (Tex. App.—Texarkana 1999, no pet.) (trial court properly excluded evidence that former defendants to malpractice action had settled with plaintiff); Wilson v. John Frantz Co., 723 S.W.2d 189, 194 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) (in suit by mortgage loan broker against developer to recover commission allegedly due, developer offered to show that non-party lender had settled suit brought against it by developer as proof that conditions set forth in the commission agreement had not been met; court, in dictum, held evidence was properly excluded under Rule 408)

In 2006, Federal Rule 408 was amended to resolve this issue. Federal Rule 408(a) now reads, "Evidence of the following is not admissible – on behalf of any party – to prove or disprove the validity or amount of a disputed claim . . ." The addition of "on behalf of any party" makes clear that the federal rule categorically bars the admission of compromise evidence even when it is not being offered against the offeror or settling party.

The subcommittee recommends that Texas Rule 408(a) be amended to conform to this part of the federal rule.

2. Amend Rule 408(a) to make clear that compromise evidence is not admissible to impeach a witness by a prior inconsistent statement or a contradiction.

Rule 408(b) provides that compromise evidence may be admissible if offered for a purpose other than proving or disproving the validity of the disputed claim or the amount of damages. It enumerates some of these other purposes: to prove the bias, prejudice, or interest of a party or witness; to negate a contention of undue delay; or to prove an effort to obstruct a criminal investigation or prosecution. But this is a nonexclusive list.

One area of uncertainty was whether Rule 408(b) authorizes the use of conduct or statements made during compromise negotiations to impeach a witness, either because it constituted a prior inconsistent statement of the witness or contradicted the substance of the witness's testimony. Caselaw addressing this issue under Federal Rule 408 was sparse, and Texas courts have not addressed this issue. The 2006 amendment to Federal Rule 408 resolved this question for federal courts. Federal Rule 408(a) now provides that compromise evidence is inadmissible "either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." The Advisory Committee Note explains:

> The amendment prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent statement or through contradiction. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements.

The subcommittee recommends that Texas Rule 408(a) be amended to conform to this part of the federal rule.

3. Amend Rule 408(b) by deleting references to "party" and "interest"

Federal Rule 408(b) authorizes the use of compromise evidence to prove "a witness's bias or prejudice." In contrast Texas Rule 408(b) authorizes the use of compromise evidence to prove the "a *party's or* witness's bias, prejudice, *or interest*." Texas Rule 408(b) initially added "party" and "interest" to combat Mary Carter agreements, which were still commonly used when the Supreme Court originally promulgated Texas Rule 408. Now that Mary Carter agreements are no longer allowed, see Elbaor v. Smith, 845 S.W.2d 240, 247 (Tex. 1992), the references to "party" and "interest" in Rule 408(b) should be deleted. A witness (whether a party or nonparty) who is biased or prejudiced because he or she entered into a settlement agreement will still be able to be impeached.

The subcommittee recommends that Texas Rule 408(b) be amended to conform to this part of the federal rule.

4. Do not amend Rule 408(a)(2) to allow in criminal cases the use of some conduct or statements made during compromise negotiations as allowed in FED.R.EVID. 408 (a)(2).

Although Rule 408 typically is invoked in civil cases, proffers of settlement evidence are occasionally made in criminal cases. For example, a defendant who settled a civil fraud claim might later face a criminal prosecution arising out of the same conduct, and the state might seek to prove that the defendant settled the civil case. The text of Rule 408 – which bans compromise evidence when it is offered to "prove . . . the validity . . . of a disputed claim" – does not seem to contemplate this possibility.

In Texas, however, the rule's history provides a clear answer. Before the Texas civil and criminal rules were consolidated in 1998, the Texas Rules of Criminal Evidence included its own Rule 408, and the Court of Criminal Appeals held that evidence of offers to settle or actual settlements of civil disputes are inadmissible in criminal cases. Smith v. State, 898 S.W.2d 838, 843 (Tex. Crim. App. 1995) ("We agree that Rule 408 is applicable in criminal cases because of its presence in the Criminal Rules of Evidence * * * ").When the rules of evidence were consolidated, the Court of Criminal Appeals gave no indication that it intended the consolidation to effect a substantive change in Rule 408. Therefore, Rule 408 continues to bar the prosecution from using an accused's settlement of a parallel civil action as proof of his liability for the civil claim and thus his guilt on the criminal charge. Rule 408 may not, however, be used to block evidence of plea negotiations and plea bargains. Smith v. State, 898 S.W.2d 838, 843 (Tex. Crim. App. 1995) ("While Rule 408 is applicable in criminal proceedings, it does not apply to a State's plea offer."). These are governed by Rule 410.

The issue is more complicated under the federal rules. Before 2006, federal courts disagreed about whether Federal Rule 408 applied in criminal cases. A 2006 amendment to Federal Rule 408 resolved this question. The amended rule expressly excludes compromise evidence in criminal cases, but creates one significant exception. The amended federal rule does not protect conduct or statements made in compromise negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement activity. Offers to settle and settlements remain protected; the new exception covers only conduct or statements, such as direct admissions of fault, made in such compromise negotiations. The Advisory Committee Note to the 2006 amendment explains:

> Where an individual makes a statement in the presence of government agents, its subsequent admission in a criminal case should not be unexpected. The individual can seek to protect against subsequent disclosure through negotiation and agreement with the civil regulator or an attorney for the government.
>
> Statements made in compromise negotiations of a claim by a government agency may be excluded in criminal cases where the circumstances so warrant under Rule 403. For example, if an individual was unrepresented at the time the statement was made in a civil enforcement proceeding, its probative value in a subsequent criminal case may be minimal. But there is no absolute exclusion imposed by Rule 408.
>
> In contrast, statements made during compromise negotiations of other disputed claims are not admissible in subsequent criminal litigation, when offered to prove liability for, invalidity of, or amount of those claims. When private parties enter into compromise negotiations they cannot protect against the subsequent use of statements in criminal cases by way of private ordering. The inability to guarantee protection against subsequent use could lead to parties refusing to admit fault,

even if by doing so they could favorably settle the private matter. Such a chill on settlement negotiations would be contrary to the policy of Rule 408.

The amendment distinguishes statements and conduct (such as a direct admission of fault) made in compromise negotiations of a civil claim by a government agency from an offer or acceptance of a compromise of such a claim. An offer or acceptance of a compromise of any civil claim is excluded under the Rule if offered against the defendant as an admission of fault. In that case, the predicate for the evidence would be that the defendant, by compromising with the government agency, has admitted the validity and amount of the civil claim, and that this admission has sufficient probative value to be considered as evidence of guilt. But unlike a direct statement of fault, an offer or acceptance of a compromise is not very probative of the defendant's guilt. Moreover, admitting such an offer or acceptance could deter a defendant from settling a civil regulatory action, for fear of evidentiary use in a subsequent criminal action.

The Committee believes the case for making this substantive change has not been made. The Committee, however, is available to solicit further input from the criminal bar upon request from the SCAC.

[CONFERENCE CALL REDRAFT (Revised)]

Rule 9.2 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 [materials] filed [~~in the court of appeals~~] [an appellate court] in the first instance in an appellate proceeding.

(C) "Document filed under seal" means any document that is filed [in court by a party] subject to a [pending or anticipated] motion to seal the document by a court order [or submitted to a trial court for an in camera inspection under Civil Procedure Rules 76a(4) or 193.4(b)].

(D) "Sealed document" means any document to which access is [already] prohibited or restricted [by law or] by court order, including documents:

(i) sealed under Civil Procedure Rule 76a;

(ii) privileged from disclosure or discovery by court order;

(iii) made subject to a protective order under Civil Procedure Rule 192.6;

[or

(iv) submitted for an *in camera* inspection under Civil Procedure Rule 193.4(b).]

(2) Completion of Appellate Record. If the official court reporter or the trial court clerk have retained custody of a document or documents filed under seal or a sealed document under Civil Procedure Rules 76a(4) or 193.4 (c) and the clerk [and] *OR* [or] the reporter are ordered to file the documents by the trial court or by the appellate court having jurisdiction of an appeal or original proceeding, the clerk [and] *OR* [or] the reporter are responsible for promptly filing the document or documents in the appellate court.

(3) Effect of Trial Court Orders. Any document or portion of a document that was sealed [~~or protected from disclosure or discovery~~] 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.

.

(4) Motions to Seal Documents in Appellate Courts

(A) A party may file a motion to seal a document or portion of a document [that has not already been sealed by a court order,] under seal in an appeal or original proceeding [. A motion to seal a document in an appellate court may be filed whether or not the document was filed under seal or filed at all in the court below. 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 Civil Procedure 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 [in the appellate court] 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 Documents Submitted to Appellate Court.

[(A) Any sealed document or document filed under seal in an appellate court by [a party,] the official court reporter or the trial court clerk under paragraph (d)(2) *is* filed with the clerk of the appellate court in the following forms:

(i) [unless the reporter or the clerk receives permission from the appellate court to file the record in paper form,] the record must be filed in electronic form in a manner that preserves confidentiality.

[(ii) if the clerk's record is filed in paper form, the trial court clerk must place each sealed document in a securely sealed envelope that is labeled SEALED and that is not bound with other documents in the clerk's record.]

(iii) [if the clerk's record is filed in electronic form,] each sealed document must be filed separately from the remainder of the clerk's record and include the word SEALED in the computer file name.]

(iv) [If the reporter's record is filed in paper form it must be contained in a sealed envelope labeled SEALED with the style of the case, the case numbers in the trial court and the appellate court, and a brief description of the contents of the envelope.]

(v) [if the reporter's record is filed electronically,] any sealed documents in the reporter's record must be in a separate computer file. If the sealed part of the transcription is part of a larger volume, an indicator page must be placed where the file logically belongs. The computer file name for the sealed document must contain the elements listed in Section 8.4 of the Uniform Format Record for Texas Reporters' Record, a hyphen, the number of the sealed document, and the term "Sealed" after the phrase "RR" (e.g. Jim Hogg-DC-09-29-RR) (Sealed.pdf, Jim Hogg-DC-090290RR02Sealed.pdf).

(vi) If a document or portion of a document that has not already been sealed by a court order is filed in an appellate court by a party [as provided in paragraph 9.2(d)(1)(C) and paragraph 9.2(d)(4)(A)], the document may be filed under seal in paper form in the appellate court whether or not the

document was filed under seal or filed at all in the court below.

(B) A copy of any sealing order signed by the trial court or any motion to [seal] 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 Rule 76a.5; or

(ii) the documents are not court records under Texas Rule of Civil Procedure Rule 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 Rule 192.6.

[(C) An appellate court may grant a motion to unseal a sealed document if the court below erred in ordering the document to be sealed. [Relief from the order may be sought by motion filed in the appellate court 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 [to the trial court] and direct the trial court to hold further hearings, to make and transmit findings of fact and conclusions of law to the [appellate court] as to whether any documents that were not filed under seal in the trial court are:

(i) [~~court records~~] [documents] that may be sealed in accordance with [Civil Procedure] Rule 76a;

(ii) protected from disclosure or discovery under Civil Procedure Rule 192.6;

(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 Civil Procedure 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.***

(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~~] [envelope] [at least seven days before] *OR* [within a reasonable time following] the hearing. [The material or information reviewed in camera is [~~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 Material or Information. The material or information [submitted to the trial court for in camera review] *OR* [reviewed by the court in camera] must be placed in the custody of the official court reporter or filed with the clerk of the trial court [before] *OR* [following] the hearing. The reporter or clerk must retain custody of the material or information reviewed in camera until the trial court or an appellate court having jurisdiction of the appeal or original proceeding orders the reporter or court clerk to transmit the material or information under seal to the appellate court, and the material or information is filed under seal in the appellate court.]

[(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 trial court must order the responding party to produce the requested material or information [to the requesting party] within 30 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 . . .

4. *Hearing; In Camera Review*. A hearing open to the public on a hearing to seal court records shall be held in open court as soon as practicable, but not less than fourteen days after the motion is filed and notice is posted. . . The court may inspect records in camera when necessary. [If the court determines that an in camera review is necessary, that material or information must be segregated and produced to the court in a sealed envelope [at least seven days before the hearing,] [within a reasonable time before the hearing]. The material or information produced to the trial court for in camera review must be placed in the custody of the official court reporter or filed with the clerk of the trial court before the hearing. The reporter or clerk must retain custody of the material or information reviewed in camera until the trial court or an appellate court having jurisdiction of the appeal [or original proceeding] orders the reporter or court clerk to transmit the material or information under seal to the appellate court, and the material or information is filed under seal in the appellate court.]

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 may be given access to the records; the terms and conditions of 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 have been filed under seal by a party subject to a pending or anticipated 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 the 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 standards and the procedures for sealing court records contained in this rule.] The appellate court may [~~abate the appeal and~~] [also] order the trial court to direct that further public notice be given, or hold further hearings, or to make additional findings.

Subject: RE: DECEMBER 20 - Revised documents: Rule 9.2(d), Rule 193.4 and Rule 76a attached
Date: Monday, January 16, 2017 at 5:27:43 PM Central Standard Time
From: Brett Busby
To: Dorsaneo, William

Bill, thanks for all of your work on this topic. I think these rules generally work well. I find the terminology "document filed under seal" slightly confusing because it has a different meaning than "sealed document." I think a reader who didn't pay careful attention to the definitions would assume that those two things were the same, so we could consider adopting a different term for "document filed under seal," such as "restricted-access document." I don't feel strongly about this, though, because the definitions make the distinction clear (except that documents submitted for in camera inspection appear to fall under both definitions and probably should just be defined as sealed documents so a motion to seal them doesn't have to be filed in the appellate court).

Under 9.2(d)(4)(A), I think we should remove the brackets around the phrase "that has not already been sealed by a court order" and definitely include that language, which helps make the distinction I mentioned above more clear. Also, I think the words "under seal" after the bracketed phrase should be deleted and the word order changed slightly for clarity so that it says: "In an appeal or original proceeding, a party may file a motion to seal a document or portion of a document that has not already been sealed by a court order. . . ."

Hope this helps.

Thanks,
Brett

From: Tabbert, Sharon [mailto:smagill@mail.smu.edu]
Sent: Tuesday, December 20, 2016 1:52 PM
To: psbaron@baroncounsel.com; Brett Busby; Bill Boyce; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Watson, Charles "Skip" <cwatson@lockelord.com> (cwatson@lockelord.com); sstolley@cplalaw.com; evan.young@bakerbotts.com; richard@ondafamilylaw.com
Cc: Nathan Hecht; cbabcock@jw.com; Martha Newton; Blake Hawthorne; Stephen.yelenosky@co.travis.tx.us; Dorsaneo, William; evansdavidl@msn.com; rhwallace@tarrantcounty.com; esteveza@pottercscd.org; rhughes@adamsgraham.com
Subject: DECEMBER 20 - Revised documents: Rule 9.2(d), Rule 193.4 and Rule 76a attached

To: SCAC Subcommittee
From: Bill Dorsaneo
Subject: Revised Rule 9.2(d), Rule 193.4 and Rule 76a
Date: December 20, 2016

For your consideration, attached to this email are the most recently revised versions of the proposed rules concerning sealing of court documents, which include

coverage of the matters discussed in our last telephone conference call

I plan to present each of the proposed rule amendments to the Advisory Committee in January 2017, if possible. The main objectives that have been dealt with in the proposed amendments are:

1. Sequencing and coordination of procedures for handling documents by Civil Procedure Rule 193.4 (b)-(d) and proposed Appellate Rule 9.2(d)(1)(c), (2), (6) to facilitate confidentiality and avoid inadvertent disclosure.
2. Specification of the form of documents filed under seal in appellate courts in both paper and electronic form in Proposed Appellate rule 9.2(d)(6) based on definitions contained in other current rules; and
3. Miscellaneous proposed amendments to Civil Procedure Rule 76a and proposed Appellate Rule 9.2(d) designed to coordinate the procedures for handling documents produced for in camera review under Rule 76a.

   I would appreciate any specific comments you can provide about these proposed amendments. Please pay particular attention to item 3.

Happy Holidays,
Bill

Memorandum

To: Appellate Rules Subcommittee
From: Bill Dorsaneo
Date: October 24, 2016
Re: Filing Documents Under Seal

While reviewing the draft of proposed Rule 9.2(d), it has become increasingly clear to me that the procedures followed in the trial courts probably should be sequenced and coordinated with the procedures following in the appellate courts. As a result, I have revised the draft of proposed Civil Procedure Rule 193.4. Subdivisions (b) and (c) of the draft are designed to provide more detailed guidance to counsel and to trial judges about how documents filed "under seal" or "presented to the court in camera" are presented or produced to the court and how the court should handle them thereafter in anticipation of an appeal or mandamus review of the trial court's order concerning disclosure of the documents.

The revised draft of proposed Rule 9.2(d) also contains paragraphs concerning the procedures for transmission of documents that were filed under seal or presented for in-camera inspection in the trial court under Rule 193.4 (*see* proposed Appellate Rule 9.2(d)(3) and 9.2(d)(6). I have also prepared a draft revision of those portions of Civil Procedure Rule 76a to match the current draft of proposed Appellate Rule 9.2(d).

I am also sending the following documents to the members of the Appellate Rules Subcommittee, the trial judges who are members of the Advisory Committee and some other members of the Advisory Committee who have been providing guidance and assistance to us.

1. The draft of Proposed Appellate Rule 9.2(d) dated 10/21/2016.

2. The draft of Proposed Civil Procedure Rule 193.4 dated 10/21/2016.

3. Draft of proposed revisions to Civil Procedure Rule 76a dated 10/24/2016.

4. A memorandum entitled Filing “Documents Under Seal in Trial and Appellate Courts” dated 10/21/2016.

5. A memorandum entitled “Addressing Bill Dorsaneo’s Questions Regarding Rule 9.2 as Redrafted as of September 21, 2016.” From Judge Stephen Yelenosky to the Appellate Rules Subcommittee and Trial Judges dated October 4, 2016.

I plan to schedule a conference call before our first meeting in 2017 to discuss Proposed Civil Procedure Rule 9.2(d) dated 10/26/2016 and Proposed Civil Procedure Rule 193.4 sometime before the first meeting.

Happy Holidays!!

The Supreme Court of Texas

201 West 14th Street Post Office Box 12248 Austin TX 78711
Telephone: 512/463-1312 Facsimile: 512/463-1365

September 1, 2016

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
cbabcock@jw.com

Re: Referral of Rules Issues

Dear Chip:

The Supreme Court requests the Advisory Committee to study and make recommendations on the following matters.

Texas Rules of Civil Procedure 21a, 21c, 57, and 244. In the attached memoranda, the State Bar Court Rules Committee proposes amendments to Rules of Civil Procedure 21a, 21c, 57, and 244.

Amendments to the Justice Court Rules. In the attached emails, attorney Michael Scott proposes amendments to Part V of the Rules of Civil Procedure relating to discovery, obtaining a default judgment in a debt case, and sensitive data. The Court also asks the Committee to consider whether other changes to Part V are needed to improve practice in the justice courts.

Amendments to the Code of Judicial Conduct. Although the Committee has recommended that the Code of Judicial Conduct not be amended to permit a constitutional county court judge to serve as an arbitrator or mediator for compensation, the Court asks the Committee to draft such amendments, should the Court choose to adopt them. See the attached letter of Hon. Tom Pollard, Constitutional County Court Judge of Kerr County.

Amendments to the State Bar Rules. Article IV, § 5(A)(3) of the State Bar Rules prohibits a person who has ever been suspended or disbarred from the practice of law from serving as a State Bar director or officer. Effective June 14, 2016, Article III, § 9 of the Rules authorizes the Supreme Court Clerk to expunge an administrative suspension for nonpayment of membership fees from a member's record, but by its express terms, the rule does not authorize the expunction of a

disciplinary suspension. The Court asks the Committee to consider under what circumstances a member who has previously been suspended from the practice of law should be eligible to serve as a director or officer of the State Bar and to draft appropriate amendments to the Rules. See the attached letter from Thomas Keyser.

Whether the Deadlines Prescribed by Rule 53.7 of the Rules of Appellate Procedure Are Jurisdictional; Procedure for Filing Late Petition Due to Ineffective Assistance of Counsel. The Court has held that an indigent parent's right to appointed counsel under Section 107.013(a) of the Family Code extends to proceedings in the Court, including the filing of a petition for review. *In the Interest of P.M.*, No. 15-0171, 2016 WL 1274748, at *1 (Tex. Apr. 1, 2016). The Court occasionally receives a late petition for review or motion for extension of time to file a petition for review from a parent, filing pro se, who claims that the ineffective assistance of appointed counsel caused the parent to miss the deadline. The Court asks the Committee (1) to consider whether the deadline for filing a petition for review in Rule of Appellate Procedure 53.7 is jurisdictional; and (2) assuming that the deadline is not jurisdictional, to recommend a procedure for adjudicating a parent's claim that the ineffective assistance of counsel resulted in the parent's missing the deadline to file a petition for review. The Committee should draft any rule amendments that it deems necessary. Judicial decisions that may inform the Committee's work include *Bowles v. Russell*, 551 U.S. 205 (2007); *Glidden Co. v. Aetna Cas. & Sur. Co.*, 291 S.W.2d 315 (Tex. 1956); *Ex parte Wilson*, 956 S.W.2d 25 (Tex. Crim. App. 1997); and *Olivo v. State*, 918 S.W.2d 519 (Tex. Crim. App. 1996).

As always, the Court is grateful for the Committee's counsel and your leadership.

Sincerely,

Nathan L. Hecht
Chief Justice

Attachments

STATE BAR OF TEXAS COMMITTEE ON COURT RULES

PROPOSED AMENDMENT TO RULE OF CIVIL PROCEDURE 21a

I. Exact language of existing Rule: TRCP 21a (Methods of Service)

(a) Methods of Service. Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record in the manner specified below:

> (1) Documents Filed Electronically. A document filed electronically under Rule 21 must be served electronically through the electronic filing manager if the email address of the party or attorney to be served is on file with the electronic filing manager. If the email address of the party or attorney to be served is not on file with the electronic filing manager, the document may be served on that party or attorney under subparagraph (2).
>
> (2) Documents Not Filed Electronically. A document not filed electronically may be served in person, by mail, by commercial delivery service, by fax, by email, or by such other manner as the court in its discretion may direct.

(b) When Complete.

> (1) Service by mail or commercial delivery service shall be complete upon deposit of the document, postpaid and properly addressed, in the mail or with a commercial delivery service.
>
> (2) Service by fax is complete on receipt. Service completed after 5:00 p.m. local time of the recipient shall be deemed served on the following day.
>
> (3) Electronic service is complete on transmission of the document to the serving party's electronic filing service provider. The electronic filing manager will send confirmation of service to the serving party.

(c) Time for Action After Service. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

(d) Who May Serve. Notice may be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify.

(e) Proof of Service. The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument. A certificate by a party or an attorney of record, or the return of the officer, or the affidavit of any other person showing

service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the document was not received, or, if service was by mail, that the document was not received within three days from the date that it was deposited in the mail, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just.

(f) Procedures Cumulative. These provisions are cumulative of all other methods of service prescribed by these rules.

Amended by order of Dec. 13, 2013, eff. Jan. 1, 2014.

Comment to 2013 Change: Rule 21a is revised to incorporate rules for electronic service in accordance with the Supreme Court's order - Misc. Docket No. 12-9206, amended by Misc. Docket Nos. 13-9092 and 13-9164 - mandating electronic filing in civil cases beginning on January 1, 2014.

II. Proposed changes to existing rule:

(a) Methods of Service. Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record in the manner specified below:

(1) Documents Filed Electronically. A document filed electronically under Rule 21 must be served electronically through the electronic filing manager if the email address of the party or attorney to be served is on file with the electronic filing manager. If the email address of the party or attorney to be served is not on file with the electronic filing manager, the document may be served on that party or attorney under subparagraph (2).

(2) Documents Not Filed Electronically. A**ny** document not filed electronically**, including discovery materials not to be filed,** may be served:

A) in person**;**

B) to an attorney by mail, **by** commercial delivery service, **by** fax, or by email **using the attorney's email address provided [*pursuant to Section 2A of Article III of the State Bar Rules*][1];**

C) to a party not represented by an attorney by mail, by commercial delivery service, by fax, or by email if the party has consented to email service under Rule 21;

---

[1] The Court Rules Committee understands that the State Bar of Texas and the Judicial Committee on Information Technology ("JCIT") are considering revisions to the State Bar Rules which may require an attorney to designate an official email address for service in the near future. The Court Rules Committee intends for this rule proposal to be considered in conjunction with, and harmonized with, any proposed changes to the State Bar Rules. Thus, this bracketed language is a placeholder that should be revised as appropriate, to be consistent with the amended State Bar Rules.

D) by any other method to which the parties agree in writing; or
E) by such other manner as the court in its discretion may direct.

(b) When Complete.

(1) Service by mail or commercial delivery service shall be complete upon deposit of the document, postpaid and properly addressed, in the mail or with a commercial delivery service.

(2) Service by fax is complete on receipt. Service completed after 5:00 p.m. local time of the recipient shall be deemed served on the following day.[2]

(3) Electronic service is complete on transmission of the document to the serving party's electronic filing service provider. The electronic filing manager will send confirmation of service to the serving party.

(4) Service by email is complete upon transmission.

(c) Time for Action After Service. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail **or commercial delivery service**, three days ~~shall~~ **must** be added to the prescribed period.

(d) Who May Serve. Notice may be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify.

(e) Proof of Service.

(1) Certificate of Service. The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument. A certificate of service must be signed by the person who made the service and must state:

(A) the date and manner of service;

(B) the name and address of each person served; and

(C) if the person served is a party's attorney, the name of the party represented by that attorney.

(2) Evidence of Service. ~~The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument.~~ A

[2] The subcommittee considered removing this sentence requiring service by 5 pm if by fax as antiquated or unnecessary in light of the seldom use of fax service and the fact that many attorneys now receive fax as an email. Ultimately, because of considerations unique to fax (e.g., that it is a paper which may sit on a fax machine, received but not actually seen over a weekend as an email would be), to leave this special provision for fax service in the rule.

certificate by a party or an attorney of record, or the return of the officer, or the affidavit of any other person showing service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the document was not received~~,~~ or **receipt was delayed,** ~~, if service was by mail, that the document was not received within three days from the date that it was deposited in the mail,~~ and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just.

(f) Procedures Cumulative. These provisions are cumulative of all other methods of service prescribed by these rules.

Proposed Comment: Rule 21a provides that certain service is complete upon "transmission." Transmission is effected when the sender does the last act that must be performed by the sender. Service by other agencies is complete on delivery to the designated agency.

III. Brief statement of reasons for requested changes and advantages to be served by the proposed new rule:

There has been a great deal of comment from the Bar regarding confusion and loopholes in the new electronic service rules, and in particular the appropriate e-mail address for service. These revisions are meant to close some gaps and clarify expectations for attorneys.

For revision to 21a(a)(2), the term "Discovery Materials Not to Be Filed," is used and is a reference to TRCP 191.4.

The change to 21a(b)(4) "upon transmission" is taken from Fed. R. Civ. P. 5(b)(2)(E). The proposed comment is also borrowed from the Fed. R. Civ. P. 5.

The change to 21a(a)(2) is to accommodate users (pro se users) without email addresses. The proposed change would only permit a party to serve a pro se party over email only after the pro se party has consented in writing to electronic service (evidencing the ability to correspond electronically).

Respectfully submitted,

Carlos R. Soltero
Chair, State Bar Court Rules Committee
March 7, 2016

STATE BAR OF TEXAS COMMITTEE ON COURT RULES

PROPOSED AMENDMENT TO RULE OF CIVIL PROCEDURE 21c

I. **Exact language of existing Rule:**

Rule 21c. Privacy Protection for Filed Documents

(a) Sensitive Data Defined. Sensitive data consists of:

(1) a driver's license number, passport number, social security number, tax identification number, or similar government-issued personal identification number;
(2) a bank account number, credit card number, or other financial account number; and
(3) a birth date, home address, and the name of any person who was a minor when the underlying suit was filed.

(b) Filing of Documents Containing Sensitive Data Prohibited. Unless the inclusion of sensitive data is specifically required by a statute, court rule, or administrative regulation, an electronic or paper document, except for wills and documents filed under seal, containing sensitive data may not be filed with a court unless the sensitive data is redacted.

(c) Redaction of Sensitive Data; Retention Requirement. Sensitive data must be redacted by using the letter "X" in place of each omitted digit or character or by removing the sensitive data in a manner indicating that the data has been redacted. The filing party must retain an unredacted version of the filed document during the pendency of the case and any related appellate proceedings filed within six months of the date the judgment is signed.

(d) Notice to Clerk. If a document must contain sensitive data, the filing party must notify the clerk by:

(1) designating the document as containing sensitive data when the document is electronically filed; or
(2) if the document is not electronically filed, by including, on the upper left-hand side of the first page, the phrase: "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA."

(e) Non-Conforming Documents. The clerk may not refuse to file a document that contains sensitive data in violation of this rule. But the clerk may identify the error to be corrected and state a deadline for the party to resubmit a redacted, substitute document.

(f) Restriction on Remote Access. Documents that contain sensitive data in violation of this rule must not be posted on the Internet.

Added by order of Dec. 13, 2013, eff. Jan. 1, 2014.

Comment to 2013 Change: Rule 21c is added to provide privacy protection for documents filed in civil cases.

II. Proposed changes to existing rule:

Rule 21c. Privacy Protection for Filed Documents

(a) Sensitive Data Defined. Sensitive data consists of:

(1) **all but the last three digits of a government-issued personal identification number, such as** a driver's license number, passport number, social security number, **personal** tax identification number, or similar government-issued personal identification number;

(2) **for an open bank account, an open credit card account, or any other open financial account, all but the last four digits of the** ~~a bank account number, credit card number, or other financial~~ account number; ~~and~~

(3) ~~a birth date,~~ **a person's month and day of birth; and**

(4) the **name and** home address~~, and the name~~ of any person who was a minor when the ~~underlying~~ suit was filed.

(b) Filing of Documents Containing Sensitive Data Prohibited. Sensitive data must be included in filed documents if the inclusion of sensitive data is specifically required by a statute, court rule, or administrative regulation. For other documents, sensitive data must be redacted.

(c) Redaction of Sensitive Data; Retention Requirement-**Option for Filing a Reference List.**

(1) Sensitive data must be redacted by using the letter "X" in place of each omitted digit or character or by removing the sensitive data in a manner indicating that the data has been redacted. The filing party must retain any unredacted version of the filed document during the pendency of the case and any related appellate proceedings filed within six months of the date the judgment is signed.

(2) A document that contains redacted sensitive data may be filed with a reference list, accompanied by the notice required under (d), that lists each item of redacted sensitive data and specifies an appropriate identifier that uniquely corresponds to each item listed. Any reference in the case to a specified identifier will be construed to refer to the corresponding item of sensitive data.

(d) Notice to Clerk. If a **filed** document must contain sensitive data **under (b) or is a reference list permitted under (c)**, the filing party must notify the clerk by:

(1) designating the document as containing sensitive data when the document is electronically filed; or

(2) if the document is not electronically filed, by including, on the upper left-hand side of the first page, the phrase: "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA."

(e) Non-Conforming Documents. The clerk may not refuse to file a document that contains sensitive data in violation of this Rule. But the clerk may identify the error to be corrected and state a deadline for the party to resubmit a redacted, substitute document.

(f) Restriction on Remote Access. Documents that contain sensitive data ~~in violation of this rule~~ must not be **made available remotely to any person other than the court, the parties, or the parties' counsel** ~~posted on the Internet~~.

Added by order of Dec. 13, 2013, eff. Jan. 1, 2014.

Comment to 2013 Change: Rule 21c is added to provide privacy protection for documents filed in civil cases.

Proposed additional comment: Rule 21c is amended to modify the definition of "sensitive data," incorporate a procedure for filing a reference list that identifies sensitive data that has been redacted from filed documents that can be accessed remotely, and clarify the scope of permissible remote access to documents that contain sensitive data and have been filed in compliance with Rule 21c. Documents that contain sensitive data in violation of Rule 21c should not be made available remotely to any person other than the court. Remote access means any access other than in-person, physical access at a courthouse.

III. **Brief statement of reasons for requested changes and advantages to be served by the proposed revisions:**

The Texas Supreme Court and the Court Rules Committee have received feedback regarding the effects of existing Rule 21c. Based on that feedback, it appears there are perceived inconsistencies between existing Rule 21c and other laws (e.g., Section 30.014 of the Texas Civil Practice and Remedies Code), difficulties in implementing aspects of existing Rule 21c, and unintentional consequences of the extent of redaction required under existing Rule 21c. These proposed revisions are intended to address those inconsistencies, facilitate compliance with sensitive-data requirements, and strike the appropriate balance between protecting sensitive data and generating a court record that is sufficiently detailed to facilitate the proper processing and disposition of cases.

The provision for a "reference list" in part (c) is borrowed from the Federal Rule of Civil Procedure 5.2(g). This option is an attempt to facilitate disposition in matters where redaction is necessary but where an exact identity of the person/account number/etc. is required for disposition. The Committee is concerned, however, that even though these reference lists are marked as containing sensitive data, the public can still access them at the courthouse. The Committee thus asks the Court to consider an automatic sealing of reference lists, which would require an accompanying amendment to Texas Rule of Civil Procedure 76a. The right to file reference lists under seal, without going through the typical Rule 76a sealing procedures, would be consistent with Federal Rule of Civil Procedure 5.2(g). In case the Court does not want to allow the automatic sealing of reference lists,

STATE BAR OF TEXAS COMMITTEE ON COURT RULES

PROPOSED AMENDMENT TO RULE OF CIVIL PROCEDURE 57

I. Exact language of existing Rule: TRCP 57

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, with his State Bar of Texas identification number, address, telephone number, email address, and if available, fax number. A party not represented by an attorney shall sign his pleadings, state his address, telephone number, email address, and, if available, fax number.

II. Proposed changes to existing rule:

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, with his State Bar of Texas identification number, address, telephone number, email address , and if available, fax number. A party not represented by an attorney shall sign his pleadings, state his address, telephone number, **and, if available,** email address **and** fax number. **Information provided under this Rule may be used for service under Rules 21 and 21a.**

III. Brief statement of reasons for requested changes and advantages to be served by proposed new rule:

Elsewhere in the Rules, e-filing is permissive for parties not represented by an attorney. *E.g.*, Tex. R. Civ. P. 21(f)(1). The email address of a party not represented by an attorney who does not file electronically is not required to be included on a document. Tex. R. Civ. P. 21(f)(2). This proposed change makes Rule 57 consistent with other Rules.

Respectfully submitted,

Carlos R. Soltero
Chair, State Bar Court Rules Committee
March 7, 2016

STATE BAR OF TEXAS COMMITTEE ON COURT RULES

PROPOSED AMENDMENT TO RULE OF CIVIL PROCEDURE 244

I. Exact language of existing Rule:

TRCP 244. ON SERVICE BY PUBLICATION

Where service has been made by publication, and no answer has been filed nor appearance entered within the prescribed time, the court shall appoint an attorney to defend the suit in behalf of the defendant, and judgment shall be rendered as in other cases; but, in every such case a statement of the evidence, approved and signed by the judge, shall be filed with the papers of the cause as a part of the record thereof. The court shall allow such attorney a reasonable fee for his services, to be taxed as part of the costs.

II. Proposed changes to existing rule:

TRCP 244. ON SERVICE BY PUBLICATION

244.1 APPOINTMENT OF ATTORNEY. If service has been made by publication and no answer has been filed nor appearance entered within the prescribed time, the court must appoint an attorney who, without acting as an attorney for any party, must use due diligence to try to locate the defendant.

244.2 REPORT OF ATTORNEY. The appointed attorney must make a report in open court or file a report with the court not later than the thirtieth day after being appointed, or within such other reasonable time period as the court may allow. The report must describe the parties' attempts to locate the defendant or obtain service of nonresident notice, describe the appointed attorney's attempts to locate the defendant, and provide the defendant's location, if discovered. No judgment on service by publication may be granted before the report is made and the court finds that the defendant cannot be located or personal service cannot be obtained.

244.3 DISCHARGE OF ATTORNEY. The court must discharge the appointed attorney from any further duties upon receiving a report from the attorney that complies with this Rule. The appointed attorney will have no duty or authority to represent the defendant on the merits of the case or to appeal any judgment in the case.

244.4 FEES AND EXPENSES. The court must award the attorney a reasonable fee for services provided and all reasonable expenses incurred during the appointment, to be taxed as part of the costs in the judgment rendered by the court.

III. Brief statement of reasons for requested changes and advantages to be served by the proposed revisions:

Under the current Rule 244, which provides for the appointment of an attorney to defend a suit in which service is made by publication, appointed attorneys have often perceived a duty to exhaust all remedies available to the non-appearing defendant and, in many cases, to represent the defendant's interests on appeal. The fees for these services are taxed as costs, ultimately borne by the plaintiff. *See Cahill v. Lyda*, 826 S.W.2d 932 (Tex. 1992).

The practice of appointing an attorney for an absent defendant has its roots in Mexican and Spanish law and was adopted in Texas after Texas attained statehood. *See* Millar, Jurisdiction Over Absent Defendants: Two Chapters in American Civil Procedure, 14 La. L. Rev. 321, 335-335 (1954). This practice reflects a minority view in American jurisprudence, having been adopted by only four states. *Id.* At 335-38 (adopting Spanish law were Texas, Louisiana, Kentucky and Arkansas). One of those states, Louisiana, has abandoned the Spanish rule in favor of a rule similar to the rule proposed here. *See* La. Code Civ. Proc. Ann. art. 5094 (West 2003).

The proposed Rule 244 limits and clarifies the role of the appointed attorney, whose duties would end after the attorney submits a report documenting the efforts made to locate the defendant and provide notice of the proceedings. The Committee believes that the proposed rule, by preventing automatic entry of default judgments against defendants who can be located, accomplishes the primary aim of the current rule. The Committee also notes that when a default judgment is entered following service by publication, Rule 329 allows the defendant two years in which to file a motion for new trial seeking to set aside the judgment.

The principal advantage of the proposed rule is that it reduces the cost of the litigation. The proposed rule, by providing that the appointed attorney is not responsible for defending the suit or pursing an appeal, and by requiring fees and expenses awarded to be reasonable, eliminates the often substantial fees and expenses associated with those responsibilities. Moreover, by clarifying that the appointed attorney does not represent the defendant, the proposed rule addresses the concern that under the current rule, the appointed attorney might owe a duty to a non-appearing defendant who later comes forward and alleges the representation was inadequate. By eliminating the specter of liability to the absent defendant, the proposed rule eliminates the current incentive for attorneys to render services and incur expenses whose benefit to the absent defendant cannot be justified in light of their cost to the plaintiff.

Respectfully submitted,

Carlos R. Soltero
Chair, State Bar Court Rules Committee
June 7, 2016

however, the Committee has proposed that the filing of reference lists be optional, rather than mandatory, which should mitigate filing parties' privacy concerns.

Section 102.008 of the Texas Family Code requires that the name and date of birth of a child be set forth in a petition. The Committee is aware of the confusion created by the apparent conflict between this widely used statute and the requirements of existing Rule 21c. Further, the Committee has received information suggesting that, in many cases, the Office of the Attorney General ignores existing Rule 21c altogether in suits involving minors, including suits other than those arising under Section 102.008 of the Texas Family Code. But the Committee has not proposed amendments to address this issue because the Committee concluded that existing Rule 21c adequately describes the proper procedure for filing documents that must contain sensitive data—e.g., because the inclusion of such data is statutorily required.

The Committee asks the Court to consider whether any of the sensitive data should be subject to sealing by another rule change including a sensitive data repository or potential modifications to Rule 76a. The Committee also had concerns about the retention requirements, if any, beyond the pendency of the case. In particular, the Committee believes the current redaction requirements may prevent parties from properly providing a complete record on appeal unless a 76a sealing order is in place.

In addition, the Committee considered that the retention requirement (as limited to pendency of the case and any related appellate proceedings filed within six months of the date the judgment is signed) may create issues for persons who were minors at the time of suit, but are trying to find/access records of that suit after reaching majority if that occurs after the retention period has expired.

Respectfully submitted,

Carlos R. Soltero
Chair, State Bar Court Rules Committee
June 7, 2016

Martha Newton

From: Martha Newton
Sent: Friday, June 24, 2016 2:07 PM
To: Martha Newton
Subject: Justice Court Issues / Suggested Rule Changes

From: Michael Scott [mailto:mscott@scott-pc.com]
Sent: Thursday, May 05, 2016 10:56 AM
To: Martha Newton <Martha.Newton@txcourts.gov>
Subject: RE: Justice Court Issues / Suggested Rule Changes

Martha,

First, thank you for keeping me in the loop.

Second, if the court is considering Justice Court issues more broadly ….

Appearance Requirement to Obtain Default

Rule 508.3(c) provides that ---

"The judge **may** enter a default judgment without a hearing if the plaintiff submits sufficient written evidence of its damages **and should do so to avoid undue expense and delay**. Otherwise, the plaintiff may request a default judgment hearing at which the plaintiff must appear, in person **or by telephonic or electronic means**, and prove its damages."

The judges of the justice court routinely require our attorneys to attend a prove-up hearing, even when the judge is willing to grant default judgment on the submitted evidence. In speaking with my docketing clerks, **less than 10% of the justices will grant a default on submission**. Further, essentially none of justice courts are allowing for telephonic or electronic hearings. As a result, my travel and appearance counsel budget for Texas is regularly more than $40,000 per month; the vast majority of which is avoidable. It would be one thing if we were rolling in the dough, but …. Let's just say this is becoming a make-or-break issue for us.

The expressed intent of the Court in enacting Rule 508.3(c) was to "avoid undue expense and delay." Unfortunately, iIn this regard, the rule has utterly failed. It is my opinion that the justice court judges view the imposition of the cost and inconvenience of our appearances as a moderating factor which regulates the filing of collection cases in Texas.

Recommendation: Make the granting of default mandatory upon the submission of an established set of written evidence.

Redaction of Sensitive Data

First, the relevant rules –

RULE 21c. PRIVACY PROTECTION FOR FILED DOCUMENTS, provides as follows:

(a) Sensitive Data Defined. Sensitive data consists of:

…

(2) a bank account number, **credit card number**, or other financial account number;

(3) birth date, **a home address**, and the name of any person who was a minor when the underlying suit was filed.

(b) Filing of Documents Containing Sensitive Data Prohibited. Unless the inclusion of sensitive data is specifically required … an electronic or paper document … may not be filed with a court **unless the sensitive data is redacted**.

The Debt Collection Rules for Justice Court provide as follows –

RULE 502.2. PETITION

(a) Contents. To initiate a lawsuit, a petition must be filed with the court. A petition **must contain**:

(1) the name of the plaintiff;

(2) …

(3) the name, **address**, and telephone number, if known, of the defendant;

RULE 508.2. PETITION

(a) Contents. In addition to the information required by Rule 502.2, a petition filed in a lawsuit governed by this rule must contain the following information:

(1) Credit Accounts. In a claim based upon a credit card, revolving credit, or open account, the petition **must state**:

…

(B) **the account number** (which may be masked)

Issue 1: What constitutes redaction under Rule 21c is not defined. The majority of attorneys in my practice area have construed the redaction requirement to mean every aspect of the data. As such, an account number is not redacted to "XXXXXXXXXX1234;" instead it is redacted to "XXXXXXXXXXXXXX."

Issue 2: The two sets of rules seemingly contradict each other. Under Rule 21c, I would need to file a credit card collection case against Joe Smith, living at XXXXXXXXXXXXXXX, XXXXXXXX XX XXXXX (full redaction of the home/service address) for account number XXXXXXXXXXXXXXXXXX; however, under Rules 502.2 and 508.2, I am required to state the home address and account number. In the real world, these issues are resolved by reasonable people trying to meet the intent of the rules; even if the language of the rules do not entirely mesh together. After all, the "credit card" number is for a closed account and cannot be utilized by anyone for any purpose. Unfortunately, my clients are national banks with internal regulatory and legal compliance sections. As such, they get slightly crazy when trying to resolve these discrepancies.

Recommendation: Rule 21c be revised to (a) be more specific as to what is to be redacted and under what circumstances, and (2) the define the extent to which the information needs to be redacted.

Well, that's it for now. I hope I haven't overstayed my welcome.

Sincerely,
Michael Scott

From: Michael Scott [mailto:mscott@scott-pc.com]
Sent: Wednesday, April 13, 2016 11:50 AM
To: Martha Newton <Martha.Newton@txcourts.gov>
Cc: Teri Mace <TeriM@scott-pc.com>
Subject: Justice Court Issues / Suggested Rule Changes

Ms. Newton,

My name is Michael Scott. I am an attorney in the Dallas area and I am the president of the Texas Creditors' Bar Association "TXCBA").

The TXCBA's membership is largely comprised of law firm which serve the legal recoveries space for national clients such as Bank of America, Capital One Bank and Discover Bank, as well as a variety of national debt buyers. I would estimate that TXCBA law firms file approximately 4,000+ cases per month in Texas, the vast majority of which are filed in Texas Justice Courts.

As you are aware, the Supreme Court made substantial changes to the Justice Court rules of civil procedure in 2013. I was actively involved in that process, attending and speaking at two separate Supreme Court Advisory Committee meetings, and I worked with your predecessor, Marisa Secco, in helping shape the final form of the Justice Court rules. During one of those meetings, I had an unanticipated and, I gather, somewhat uncharacteristic five minute exchange with Chief Justice Hecht during my public comment.

Due to the case volume handled by TXCBA member firms, we have significant insight into the behavior of the Texas Justices Courts. Members of our association are noticing a slow progression of these courts away from what I understood to be the intent of the 2013 rule changes. This is occurring in two primary areas:

Discovery
Proof of damages

DISCOVERY

Rule 500.9(a), Pretrial Discovery, provides –

> **Pretrial discovery is limited to that which the judge considers reasonable and necessary.** Any requests for pretrial discovery must be presented to the court for approval by written motion. The motion must be served on the responding party. **Unless a hearing is requested, the judge may rule on the motion without a hearing.**

Discovery Issue 1 - There is little or no effort by many Justice Courts to address the requirement that discovery must be "reasonable and necessary." Instead. discovery is often propounded solely for the purpose of harassment. For example, proponents seek policies and procedures of national banks, employee rosters, all recorded telephone conversations, etc. Though properly objected to and rarely enforced, this discovery serves as a macabre dance between the attorney actors; with the primary/only intent being to harass the responding party. Further, it is not uncommon for the permitted discovery to go far beyond the limits of a

Level 1 Discovery Control Plan; allowing for 30+ interrogatories and/or requests for production. Apparently, if you have a $100,000 claim you only get 15 interrogatories, but if you have a $1,500 claim, you get 30. …. I apologize. Now, I am just ranting.

There is also the periodic attempt to compel a bank officer to appear for deposition. Debt collection cases are built on business records. These records are maintained by entities with multiple layers of federal regulatory oversight, including the Office of Comptroller of Currency, the Federal Trade Commission, and the Consumer Financial Protection Bureau. There are no witnesses with personal knowledge of credit card purchases ... these are proven-up by business records. As such, a deposition is never warranted and is always sought as a means of harassment. If the consumer attorney wants to delve into the inner workings of the US credit industry, they should move to a higher forum than a Texas Justice Court.

Discovery Issue 2 - Motions for discovery are filed by consumer attorneys as a matter of course and make no effort to justify the request; yet these motions are generally granted by the courts within days of their filing. This practice defeats the purpose of Rule 500.9(a). To grant a motion which is made without any grounds being offered, belies a prejudice by justices which is inconsistent with their obligation to the court and to the law. Further, to do so without allowing a reasonable opportunity to be heard subverts the expressed requirement of the rule.

Proposed Solution

In 2013, the TXCBA advocated a basic disclosure rule; requiring that all documents the creditor was going to rely upon at trial be provided to the defendant within an established time-frame. A simple disclosure rule, similar to Rule 194, removes all of the gamesmanship which currently pervades these cases, while allowing for adequate notice and case development by all parties.

PROOF OF DAMAGES

In 2013, the Justice Court Rules Task Force advocated to the Supreme Court Advisory Committee and to the Court that debt collection cases **must** be proven up by a Business Records Affidavit. In response, the TXCBA and others urged that the damage affidavit, proving-up the unliquidated damage amount, should follow established Texas case law; specifically, *Texas Commerce Bank v. New*, 3 S.W.3d 515 (Tex. 1999). It was, in fact, this issue – the availability and sufficiency of a prove-up affidavit – which Justice Hecht and I discussed during the Advisory Committee meeting. Having been presented with two opposing requests regarding the nature of the proof of damages, the Supreme Court ultimately sided with the position which the TXCBA advanced; that position being that there is no rationale to require any more proof in a debt collection case than would be required in other cases in Texas.

Rule 508.3(b)(2), Form of Evidence, states –

> **Evidence of plaintiff's damages may be offered in a sworn statement** or in live testimony. The evidence offered **may** include documentary evidence.

In *Texas Commerce Bank*, the affiant swore that they had reviewed the account records and, based upon that review, the defendant owed $729,510.96. It was a short, one-and-a-half page affidavit which accomplished its singular purpose; to establish the amount of damages.

Issue - A growing number of Justice Courts are requiring the submission of a Business Records Affidavit in order for the plaintiff to prove-up its default. This trend is in contravention with the Supreme Court's prior consideration and decision regarding what level of proof required in a debt collection case.

The existing rule allows for a certain level of confusion. While not technically requiring account level documentation – "evidence of damages may be offered by a sworn statement" [Rule 508.3(b)(2) – it attempts to limit any consideration of documentation to only that is offered by way of a business records affidavit – "documentary evidence may be considered if it is attached to a sworn statement" [Rule 508.3(b)(4)]. As such, though I may be able to present to a court two years worth of account statements, addressed to the defendant and sent to the address at which service of process was perfected, the court cannot actually consider these records absent a business records affidavit from the bank. When dealing with legal recoveries on a national level, the burden imposed by a requirement to obtain a business records affidavit on every account is substantial. Under current operational policies, the affiant must compare every page of the printed document against the business's system of record, before they can sign the affidavit.

My understanding is that part of the purpose of the 2013 rule change was to simplify the proof of claims in the Justice Courts and to remove the technical strictures imposed by the Rules of evidence. Yet, I cannot offer what is manifestly obvious evidence of damages without meeting what was simply a restatement of the rules which the legislature had instructed to the Supreme Court to avoid.

Solution - Revise and simplify Rule 508.3(b) regarding proof of damages.

CONCLUSION

First, if you have made it this far, I thank you for you diligence. As previously mentioned, our association attorneys file 4,000+ lawsuits per month. As such, the issues presented here having significant impact on the way collection litigation is practiced in Texas. I have brought to you a couple of the primary areas in which we have concerns. After two-plus years of working with the new rules, there are a number of other topics which could be revisited. I would appreciate the opportunity to discuss these further.

Thank you for your time and consideration.

Sincerely,
Michael Scott
(972) – 428-3599

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THE COUNTY COURT
OF
KERR COUNTY, TEXAS

700 Main Street, Ste. 101, Kerrville, Texas 78028
Tel: (830) 792-2211
Fax: (830) 792-2218
Email: commissioners@co.kerr.tx.us

COUNTY JUDGE
TOM POLLARD

COURT COORDINATOR
JODY GRINSTEAD

COMMISSIONERS COURT
H. A. "BUSTER" BALDWIN, PCT. 1
TOM MOSER, PCT. 2
JONATHAN LETZ, PCT. 3
BRUCE OEHLER, PCT. 4

May 12, 2015

Clerk of the Court
Supreme Court of the State of Texas
P. O. Box 12248
Austin, Texas 78711

Attn: Ms. Martha Newton

Re: Request for Revision/update of Cannon 4 F. of the Texas Code of Judicial Conduct

Dear Ms. Newton:

Background:

I am, and have been for 48 years, a licensed Texas Attorney as well as the duly elected constitutional County Judge of Kerr County, Texas. I estimate that 65% of my time involves handling judicial matters such as guardianships, probates, mental health commitments and I am the judge of the juvenile court. The balance of my time, 35% or so, is spent on administrative/non-judicial matters for Kerr County, Texas*.

The Texas Code of Judicial Conduct, Canon 4 F provides that "An active ***full-time*** (emphasis added) judge shall not act as an arbitrator or mediator for compensation outside the judicial system, but a judge may encourage settlement in the performance of official duties."

I note that I am permitted to have a private law practice for compensation so long as it does not relate to a matter pending in my Court, per Canon 4G and Canon 6 B(3).

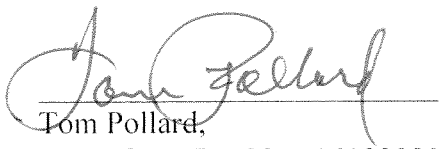
REQUEST:

I respectfully request that the Texas Supreme Court review and update the Texas Code of Judicial Conduct, specifically Canon 4F. by adding the following sentence (or similar language to the same effect), to-wit:

> "Constitutional County Judges may be mediators and/or arbitrators for compensation so long as the matters being mediated and/or arbitrated are not, and never have been, pending in said Judge's Court.

Thank you very much!.

Sincerely,



Tom Pollard,
Texas State Bar No.: 16100000
Kerr County Judge

Encl: (as stated)

* See attached general description of the Kerr County Judge judicial and administrative duties.

County Judge

The Texas Constitution vests broad judicial and administrative powers in the position of County Judge, who presides over a five-member commissioner's court, which has budgetary and administrative authority over county government operations.

The County Judge handles such widely varying matters as hearings for beer and wine license applications, hearing on admittance to state hospitals for the mentally ill and mentally handicapped, juvenile work permits and temporary guardianships for special purposes. The judge is also responsible for calling elections, posting election notices and for receiving and canvassing the election returns. The county judge may also perform marriages.

A County Judge in Texas may have judicial responsibility for certain criminal, civil and probate matters - responsibility for these functions vary from county to county. In those counties in which the judge has judicial responsibilities, the judge has appellate jurisdiction over matters arising from the justice courts. In Kerr County, when the office of County Judge is held by a licensed attorney, the County Judge has traditionally been the Presiding Judge of the Probate, Mental Health and Juvenile dockets. The County Judge is also head of civil defense and disaster relief, county welfare and in counties with a population of under 225,000 the judge prepares the county budget along with the County Auditor's Office.

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February 2, 2016

Chief Justice Nathan L. Hecht
Texas Supreme Court
P. O. Box 12248
Austin, Texas 78711

RE: State Bar of Texas-Board of Directors
Candidate Certification Form

Dear Chief Justice Hecht,

We have met a couple of times in passing at the local (San Antonio Bar) and State Bar Conventions over the last few years. More importantly, you eloquently provided the introduction of the recent TLAP Video (2015) where I and a couple of other attorneys tell their stories and share their experience, strength and hope regarding the subjects of Alcoholism, Chemical Dependency and Mental Illness.

In December, I was asked and nominated by several past SBOT Board members to run for Andy Kerr's seat which will expire by operation of law this June. Former Justice Rebecca Simmons (4th Court of Appeals) holds the other position from the 10th Bar District (San Antonio). All three (3) of us are former Presidents of the San Antonio Bar Association. In fact, I am the immediate Past President and I still occupy a seat on the local Board of Directors.

Last week after procuring more than the one hundred (100) signatures from the local Bar which is a requirement to have your name placed on the ballot, I discovered that paragraph 3 in the Candidate Certification Form which is referenced as an Excerpt under State Bar Rules, Article IV, Section 5 (Qualifications of Officers & Directors) (A) NO PERSON MAY SERVE AS AN OFFICER OR BOARD MEMBER who has ever been suspended from the practice of law precludes me from serving in this position.

As you may recall, I got sober in 1990 (11-11-1990). I surrendered my law license on March 15, 1991 to the clerk of the Texas Supreme Court. I received a one (1) year suspension with eight (8) months probated. That was almost 25 years ago. If this Rule cannot be amended with some sort of Plenary Powers of the Court or Waived in my case, perhaps the Texas Supreme Court could take up the matter in the near future to allow the next person with extenuating circumstances to hold such an esteemed position and continue being of service to his or her chosen profession (The State Bar of Texas).

The deadline to make the ballot for this year's election is March 1, 2016. I'll be 70 on my next birthday and to quote Peyton Manning – "This could be my last rodeo."

Kindest regards,

Thomas g. Keyser

MEMORANDUM TO FULL COMMITTEE

TO: TEXAS SUPREME COURT ADVISORY COMMITTEE

FROM: JUDICIAL ADMINISTRATION SUB-COMMITTEE

RE: ARTICLE IV, SECTION 5.A.3 OF THE STATE BAR RULES

A. Background.

1. Charge from Chief Justice Hecht.

Amendments to the State Bar Rules. Article IV, § 5(A)(3) of the State Bar Rules prohibits a person who has ever been suspended or disbarred from the practice of law from serving as a State Bar director or officer. Effective June 14, 2016, Article III, § 9 of the Rules authorizes the Supreme Court Clerk to expunge an administrative suspension for nonpayment of membership fees from a member's record, but by its express terms, the rule does not authorize the expunction of a disciplinary suspension. The Court asks the Committee to consider under what circumstances a member who has previously been suspended from the practice of law should be eligible to serve as a director of officer of the State Bar and to draft appropriate amendments to the Rules. See the attached letter from Thomas Keyser.

2. Attachments: (1) Article IV, Section 5 of the State Bar Rules, (2) Article III, Section 9 of the State Bar Rules, and (3) Thomas Keyser letter.

B. Subcommittee proposal for February 3, 2017, meeting: The Subcommittee believes it is premature to provide a rule proposal at this time because the input of the State Bar (including the Nominations and Elections Subcommittee) should first be sought and considered. Subject to that caveat, the full Committee might consider the issues set out below.

C. Potential discussion issues.

1. Threshold issue. Should there be *any* change to the State Bar Rule that "[n]o person may serve as an officer or director who . . . as to an elected or ex officio director or an officer, has ever been suspended or disbarred from the practice of law"?

2. Secondary issues. *If* there is a change to the rule, what should the revised rule look like?

a. Bright line options:

i. Substitute "is" for "has ever been." (So, the amended rule would read: "No person may serve as an officer or director who . . . as to an elected or ex officio director or an officer, is suspended or disbarred from the practice of law.")

ii. At end of sentence, add: "within the prior [#] years." (So, the amended rule would read: "No person may serve as an officer or director who . . . as to an elected or ex officio director or an officer, has been suspended or disbarred from the practice of law within the prior [#] years.")

b. Discretionary option: add, at end of the sentence: "unless determined otherwise by [*e.g.*, "the State Bar Board of Law Examiners" or "the State Bar Board of Directors"]. (So, the amended rule would read: "No person may serve as an officer or director who . . . as to an elected or ex officio director or an officer, has ever been suspended or disbarred from the practice of law, unless determined otherwise by [*e.g.*, the State Bar Board of Law Examiners or the State Bar Board of Directors]."

c. Use a modified expunction rule, or something similar: Do not modify Article IV, Section 5. Instead, either modify the expunction rule in Article III, Section 9 to allow the expunction of additional types of suspensions or provide a new rule, modeled after the expunction rule, to apply here.

D. Potential considerations:

1. Pros and cons of a bright line standard.
2. If discretion is left to a board or individual, what board or individual should be specified?
3. Should discretion be allowed, and, if so, should criteria be specified?
4. Is a modified expunction rule the proper vehicle for any revision?

ARTICLE IV
ADMINISTRATION

Section 1. Board of Directors; Duties

A. The State Bar shall be governed by a board with shall enforce the Act and these Rules.

B. The term of office for each elected, public, and minority director shall be three (3) years. The terms of elected and public directors shall be staggered with one-third (1/3) of such directors elected or appointed each year. The terms of minority directors shall be staggered with as near to one-third (1/3) as possible appointed each year.

C. The regular term of office of an elected, public, or minority director shall commence on adjournment of the annual meeting of the State Bar next following election or appointment and continue until the adjournment of the third annual meeting next following election or appointment.

D. The board shall take such action and adopt such regulations and policies, consistent with the Act or these Rules, as shall be necessary and proper for the administration and management of the affairs of the State Bar, for the protection of the property of the State Bar and for the preservation of good order.

Section 2. Meetings of the Board

The board shall meet regularly at least four (4) times annually, and may meet specially, at such times and places as the board shall determine. All meetings, however, shall be held within the State of Texas.

Section 3. Composition of the Board

The board shall be composed of the officers of the State Bar, the president, president-elect, and immediate past president of the Texas Young Lawyers Association, not more than thirty (30) members of the State Bar elected by the membership from their district as may be determined by the board, six (6) persons who are not licensed attorneys, known as public directors, who do not have, other than as consumers, a financial interest in the practice of law, and four (4) minority directors appointed by the president and confirmed by the Board The Board may, in its discretion, also include other members who shall be non-voting board members.

Section 4. Chairperson of the Board

The board shall elect annually from its membership, under such procedures as it shall prescribe, a chairperson to serve for the next succeeding organizational year. Such person shall be elected from the class of directors then serving the second year of their terms.

Section 5. Qualifications of Officers and Directors

A. No person may serve as an officer or director who,

1. has not taken the official oath by the second regular board meeting of the term for which the person was elected or appointed,

2. as to an elected or ex officio director or an officer, is not an active member in good standing,

3. as to an elected or ex officio director or an officer, as ever been suspended or disbarred from the practice of law,

4. as to an elected director, does not maintain in the district from which elected, his principal place of practice,

5. as to an elected director, has his principal place of practice in the same county as the last preceding director from that district, except for an elected director in a Metropolitan County or in El Paso County, and except as necessary to achieve a rebalancing of the sizes of the Board classes in accordance with the provisions of Art. IV, § 8(C),

6. as to an elected director, has previously served at least one and a half (1 ½) years of the immediately preceding director term,

7. is, or becomes, incapacitated from performing the duties of such office for all or a substantial portion of such term,

8. as to a director, is absent from more than half of the regularly scheduled board meetings that the director is eligible to attend during a calendar year without an excuse approved by a majority vote of the board,

9. as to a public director, has failed confirmation by the senate of the State of Texas,

10. is an elected official paid by the State of Texas, except that such prohibition shall not apply to public directors,

11. as to a director or a director's spouse, is an officer, employee, or paid consultant of a Texas trade association in the field of board interest as defined in State Bar Act §81.028.

B. The board shall be the judge of the qualifications of officers and directors.

C. The board shall provide a training program for board members that meets the requirements of § 81.0201 of the State Bar Act. No person who is elected or appointed to and qualifies for office as a member of the board of directors may vote, deliberate, or be counted as a member in attendance at a meeting of the board until the person completes a training program that complies with the requirements of § 81.0201 of the State Bar Act.

Section 6. How Directors Shall Be Elected

Elected directors shall be elected by a majority of the active and emeritus members of the State Bar voting who have their principal place of practice in the same Bar district as that of the candidate. If no candidate receives a majority, a run off shall be held at such time as the board shall prescribe between the two candidates receiving the greatest number of votes.

Section 9. One-Time Expunction of an Administrative Suspension for Nonpayment of Membership Fees

A. This section does not apply to a disciplinary suspension for professional misconduct.

B. A member who meets the following criteria may request a one-time expunction of an administrative suspension for nonpayment of membership fees:

1. the member has not previously obtained an expunction under this rule;

2. the suspension was for 90 days or less;

3. except for the suspension that is the subject of the expunction request, the member has not previously been suspended for nonpayment of membership fees;

4. the member is not currently the subject of a disciplinary proceeding or investigation; and

5. the member has no record of disciplinary suspension – whether active or probated – or of prior disbarment or resignation in lieu of discipline.

C. The member seeking the expunction must make a written request to the State Bar. After verifying that the member meets the criteria in (B), the State Bar will forward to the clerk the member's request and a recommendation that the member's record of suspension be expunged. The clerk will expunge the suspension from the member's record.

D. A suspension expunged under this rule is deemed never to have occurred. The record of an expunction is confidential and may not be disclosed by the clerk or the State Bar.

Section 10. Return to Former Status

A. When a member who has been suspended for nonpayment of fees or assessments removes the default by payment of fees or assessments then owing plus an additional amount equivalent to one-half the delinquency, the suspension will automatically be lifted and the member restored to former status. Return to former status is retroactive to inception of suspension, but does not affect any proceeding for discipline of the member for professional misconduct.

B. A person who has voluntarily resigned from membership must apply to the Board of Law Examiners and comply with the rules of the Court pertaining to admission to the practice of law before resuming the practice of law.

C. An inactive member may return to active status upon written application to the clerk and payment of fees for the current year.

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February 2, 2016

Chief Justice Nathan L. Hecht
Texas Supreme Court
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Austin, Texas 78711

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