DISCOVERY TRAPS…
& HOW TO GET OUT OF THEM

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I. INTRODUCTION

There are few lawyers, especially family lawyers, who will rank discovery at the top of their list of favorite things about practicing law. Those who began their practice prior to the promulgation of the discovery rules will reflect fondly on the good 'ole days of "trial by ambush." Many rule 11 agreements are exchanged each day in an attempt to avoid and modify discovery rules. Regardless of the fervent hopes of many long-practicing litigators, the discovery rules are not going anywhere.

This article is not intended to extol the virtues of the *Texas Rules of Civil Procedure*, Section 9B, but it **is** intended to highlight the importance and usefulness of the rules. The article has three parts.

The first part is the main article which addresses some problems or "traps" that you will encounter in the discovery practice and how to get out of them.

The second part of the article is a summary of the discovery cases cited in the paper. Many of these cases are commonly cited in discovery objections – which means they are commonly misused. Each case, including the facts, should be reviewed often to ensure that the objections you make or your arguments in court are truly based on good faith.

For example, *Loftin v. Martin* does not stand for the proposition that the use of the term "all documents" in a request is always objectionable.[1] Believe it or not, neither does *K-Mart v. Sanderson*.[2]

The second appendix is a copy of the discovery rules. The appendix is not included to artificially increase the size of the article.[3] Since the article contains footnotes to case law and general referral to the rules rather than full recitation of the cases and rules, they are included at the end so they may be used as reference while reviewing the article and cases.

II. TRAP: FORMBOOK DISCOVERY REQUESTS & FORMBOOK OBJECTIONS

Many attorneys suffer from "form-itis." "Form-itis" is a syndrome wherein an attorney will do nothing more than fill in the party names in ProDoc and generate the entire formbook of discovery questions to send to the opposing party. This inevitably results in the 30 page, single-spaced request for production in the divorce with no children and a community estate valued under $100,000.

A. Formbook Requests

Nothing in the rules prohibits the use of formbook discovery requests. However, generic forms are just that – generic. These comments should not be construed so as to disparage formbooks; the *Texas Family Law Practice Manual* is written by exceptional attorneys. However, forms are not written with your case in mind. Forms are not required to be written based in good faith and with regards to the facts of a particular case. Additionally, the *TFLPM* appropriately warns that: "neither the State Bar of Texas, the editors, nor the authors make either express or implied warranties in regard to the use of freedom from error of this publication." The *TFLPM* is meant to be used as a guide and amended as appropriate for your case.

Formbook requests are susceptible to valid objections. Case law is clear that you should do some preliminary background research prior to drafting your requests.[4] A trial court can go so far as to strike your requests if it determines that the requests are not likely to lead to relevant evidence.[5] Also, you must request information with enough specificity so that the responding party knows how to comply.[6]

Regardless of the request, the producing party is under a duty to answer all written discovery which is not objectionable – in other words, partially produce.[7] So even if the request calls for a relevancy objection, you must still produce any documents that are relevant to the lawsuit.

B. Objections

Formbook objections are just as inappropriate as formbook requests. However, if you ask a generic question, be prepared for a generic answer. Objections, like requests, must be based on good faith.[8] Just because a request would elicit some evidence with doubtful relevance does not necessarily make the request overbroad.[9]

It might be tempting to answer formbook requests with formbook objections, but both practices

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[1] *Loftin v. Martin*, 776 S.W.2d 145 (Tex. 1989).

[2] *K-Mart v. Sanderson*, 937 S.W.2d 429 (Tex. 1996) (per curiam).

[3] Author's Note: I have reviewed many CLE articles and have learned the hard way that the quality of the article is not directly proportional to the length.

[4] *In re American Optical Corp*., 988 S.W.2d 711, 713 (Tex. 1998) (per curiam).

[5] *Id.*

[6] *Loftin v. Martin*, 776 S.W.2d 145, 148 (Tex. 1989).

[7] TEX. R. CIV. P. 193.2 (b)

[8] TEX. R. CIV. P. 193.2 (c)

[9] *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813,815 (Tex. 1995) (per curiam)

are highly discouraged by trial and appellate courts.[10] Many of the cases summarized in this article are excellent examples of what can go wrong when you ask a formbook question, or alternatively, if you answer a legitimate question with a formbook objection.

A common objection to discovery requests when a date is not specifically mentioned is that the request is "not limited in scope." However, if the request is specific enough, that objection might not carry water. If the discovery specifically refers to a claim of the lawsuit, then the request is limited in scope and the time period is limited by the lawsuit.[11] For example, if an interrogatory ask the party to "list each community bank account in the parties' names," that is limited in scope because "community" specifically relates to the time period of the marriage.

Another common objection is that the request requires the party to "marshal all of their evidence." This objection should be used sparingly as almost all facts of a case are discoverable. The answering party cannot assume that the request is seeking more information than what is pertinent to the lawsuit as a means of avoiding the question.[12]

III. HOW TO GET OUT OF THE "FORM-ITIS" TRAP

A. Objections

If you receive responses to your discovery that contain nothing but objections, first check to make sure your discovery is not objectionable. Although this suggestion sounds pedestrian, it is an important part of professionalism that you double-check your own work. By analyzing your work, you can anticipate opposing counsel's arguments. If your opposing counsel has a valid argument, you need to recognize it and study it if you want to defeat it at a hearing.

Next, draft a motion to compel. Whether or not you ever file the motion, at the very least, the process of drafting and formulating your arguments will aid you in conference with opposing counsel. Some courts have local rules that permit a judge to rule on discovery matters without hearing. Either way, the motion must be specific. It is not enough to simply request that the court overrule the objections; you must support your position with facts and authority. This is the best way of getting your motion granted and getting attorney's fees awarded.

After you have drafted your motion, call opposing counsel. Conferencing with counsel is professional, it is promoted by the *Lawyer's Creed*, but more importantly it is **required** by the rules.[13] During this conference, you should determine what objections opposing counsel will withdraw. It is not enough for counsel to agree that documents will be produced. As long as objections remain, any evidence produced is subject to those objections. You must demand that opposing counsel amend his discovery responses, or at the very least sign a rule 11 agreement regarding the removal of his objections.

Next, if no agreement can be made, memorialize your conference in writing to opposing counsel. In many jurisdictions, courts are more likely to award attorney's fees to the attorneys who have made multiple attempts at settling the issue prior to having a hearing. Therefore, you should make at least two attempts at conferring with opposing counsel.

If all conferences and negotiations have failed, you need to file your motion and set it for hearing. Once the motion is filed, the burden of proof is on the objecting party who may present evidence to support their objections.[14] The evidence may be presented in affidavit form so long as they served at least 7 days prior to the hearing.[15] Objections that are obscured by numerous unfounded objections may be waived;[16] so have the court rule on that issue. Make sure there is a record of the hearing. If there is an abuse of discretion, a discovery order is subject to mandamus.[17]

Last, follow through with your hearing. Immediately draft an order memorializing the court's ruling. Bear in mind that if the court did not specify a date on which the discovery should be produces, then counsel has 30 days after the court's **ruling.**[18]

B. Handling Formbook Requests

The most important thing to remember when responding to discovery requests is that although discovery may not be used for a "fishing" expedition,[19] courts err on the side of more production, not less.[20] Therefore, when in doubt, answer the discovery with

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[10] *In re SWEPI L.P.*, 103 S.W.3d 578, 589 (Tex. App. - San Antonio 2003, orig. proceeding).

[11] *Id.* at 591.

[12] *Id.*

[13] TEX. R. CIV. P. 191.2

[14] TEX. R. CIV. P. 193.4 (a)

[15] *Id.*

[16] TEX. R. CIV. P. 193.2 (e)

[17] *See generally*, *In re Kuntz*, 124 S.W.3d 179, 184 (Tex. 2003); *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 314 (Tex. 2009).

[18] TEX. R. CIV. P. 193.4 (b)

[19] *K-Mart v. Sanderson*, 937 S.W.2d 429, 431 (Tex. 1996) (per curiam).

[20] *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 664 (Tex. 2009); *Ford v. Ross*, 888 S.W.2d 879, 891 (Tex. App. – Tyler 1994, no pet.)

any relevant, non-privileged information that is responsive.

First, even though the request is voluminous, not every question is objectionable. Segregate out the questions you believe are relevant. Make sure you communicate with your client and let him know which questions he needs to answer and which questions you will object to. Determine an estimate of documents you will produce in response to the request.

Next, call opposing counsel. It is tempting to get angry when you receive the 30 page, single-spaced request for production and just copy it and send it back to opposing counsel. This rarely solves the problem and ensures that neither side will prevail on attorney's fees at a hearing. A conference regarding disagreements is required by the rules anyway, so you should start there if the discovery you received is not relevant or likely to lead to relevant information. Let opposing counsel know how many documents you are prepared to produce in response to the requests which are not objectionable. Memorialize any agreement between counsel in a signed rule 11 agreement.

Last, do not forget that you are entitled to a hearing on your own objections. If the discovery you received is truly objectionable in its entirety, object and set it for hearing. You should have at least two attempts, one in writing, at conferring with opposing counsel prior to setting a hearing.

C. The Only True Formbook Discovery – Rule 194 Request for Disclosure

A 194 request for disclosure is the most common form of discovery. No matter how small the estate or how contested the custody, you should exchange disclosures. A better practice is to include the 194 in your original petition or answer/counterpetition. However, do not forget that if you serve a request on a party before their answer is due, the party has 50 days to respond to the request.[21]

Perhaps the most important section of 194 is section (b) which requires a party to state 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.[22] There is some question as to what the term "brief statement" requires. In family law cases, at least two courts have held that a statement can be very brief indeed – as in "Petitioner's Father" or "social worker."[23]

Do not forget that you cannot object to any part of the 194 request.[24] Also, if you do not list a witness, that witness may be excluded from trial.[25]

IV. TRAP: DETERMINING WHERE AND WHAT TO PRODUCE

Many attorneys answer requests for production by simply stating that production will be permitted and the documents can be inspected at counsel's office. The rules allow the producing party to produce the documents to the place in the request or the place in the response.[26] The rules are unclear which party's request for time and place will trump. It seems logical that if the request would generate thousands of documents, the responding party should be able to determine the time and place for production.

However, if the response will generate a manageable amount of documents, they should be delivered to the requesting party and the time and place requested.[27] The failure to deliver the documents to opposing counsel as requested could result in the exclusion of your evidence.[28]

The requesting party will designate a time and place for the production of documents.[29] If the responding party cannot comply with that request, then they must object **and** state a specified time where production and inspection can take place.[30]

A party is only required to produce documents that are within their possession, custody or control.[31] It is difficult to explain to clients what constitutes "possession" of a document. It is even harder to explain custody and control. Family lawyers do not deal with custody and control definitions as much as other civil litigators. Typically, family finances are the main priority, and those documents are almost always in the possession of one of the parties. However, some divorce cases include complex issues such as

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[21] TEX. R. CIV. P. 194.3

[22] TEX. R. CIV. P. 194.2 (b)

[23] *Van Heerden v. Van Heerden*, 321 S.W.3d 869, 878 (Tex. App. - Houston [14th Dist.] 2004, no pet.); *L.B. v. Tex. Dep't of Family & Protective Servs.*, 2010 Tex. App. LEXIS 2518 (Tex. App. – Austin 2010, no pet.).

[24] TEX. R. CIV. P. 194.5

[25] *Alvarado v. Farah Mfg.*, 830 S.W.2d 911, 914 (Tex. 1992). Author's Note: The court in this case struck witnesses that were not identified in interrogatory responses, however, I think the ruling applies to all discovery formats.

[26] TEX. R. CIV. P. 196.3 (a)

[27] *Overall v. Southwestern Bell Yellow Pages, Inc.*, 869 S.W.2d 629, 631 (Tex. App. – Houston [14th Dist.] 1994, no writ).

[28] *Id.*

[29] TEX. R. CIV. P. 196.1 (b)

[30] TEX. R. CIV. P. 196.2 (b)

[31] TEX. R. CIV. P. 196.3 (a)

ownership of business entities, complex estate planning and privately held stock. In the case of a business owner, for example, does a party have possession of corporate documents simply because they reside in his office?

Not all documents in your client's possession are actually possessed by him. If some other person, say a business associate, owns the documents and refused permission to release those documents, then that is akin to a bank teller having access to the cash in a vault.[32] This may be especially true if the documents contain trade secrets or other privileged data.[33] The right to possession of a document is based on a **legal** relationship between the party and the person in possession of the document.[34]

Documents that do not exist do not have to be produced as a document that does not exist is not within a person's possession custody or control.[35]

Also, keep in mind that certain documents in your own legal file may be discoverable.[36] A party may not request an attorney's file as that is protected by the work product privilege.[37] Although the selection and ordering of some documents is privileged "thought process,"[38] a client cannot protect an otherwise discoverable document by sending it to their attorney.[39]

When possession of a document is a contested issue, the burden of proof is on the party requesting the document.[40]

V. DETERMINING WHERE AND WHAT TO PRODUCE

A. What to Produce

The first step in determining what to produce is to determine what documents are in your client's possession. You must produce all relevant documents that are in your client's possession. If your client has 100% control of a document to the exclusion of all other people then it is clearly in his possession.

The analysis does not stop with those documents in your client's possession. You also have to determine whether or not your client has control of relevant documents. If so, you must produce those documents as well. If the documents requested contain personal information about a non-party, you should contact that non-party and request permission to release the documents. You should only release the documents under a confidentiality order. If you produce the documents, you should still object if any of the information contained in the documents is not relevant to the lawsuit. Also, do not forget that "relevant" should be liberally construed.[41]

If you are requesting documents you know are under a party's control, you might want to determine whether it would be easier to force a party to seek documents "which are in their control" or to just serve discovery on the non-party. Neither choice is easy or cheap, so you should spend some time evaluating your evidence and all likely sources of that evidence.

Truly, the easiest test of determining whether or not you should produce a document is that if you plan on using the document at trial, it is relevant. You must produce it if you want to use it.[42] Conversely, if you know opposing counsel would use the document as an exhibit, it is also relevant, and despite the possible negative effects to your client, you must produce it.

B. Where to Produce

If you are the producing party, make sure you have all of your documents in one place. It is impractical for you and the opposing party to keep documents in your office, your client's office, and your expert's office.

Next, determine how many documents you have to produce. A good rule of thumb is that if the documents would fit in two banker's boxes or less, deliver it to opposing counsel. Do not risk having your documents excluded by requesting that counsel come to your office to inspect 50 documents.

Also, whether you are sending them to counsel or keeping them at your office for inspection, bate stamp and index all documents. If you do not organize and bate stamp your documents, it will be harder to prove to the court that the documents were formally produced.

Last, if you are not going to serve the documents with your responses, you must object to the time and

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[32] *In re Kuntz*, 124 S.W.3d 179, 184 (Tex. 2003).

[33] *Id*.

[34] *GTE Comms. Sys. v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993).

[35] *In re Colonial Pipeline Co.*, 968 S.W.2d 938 (Tex. 1998).

[36] *Occidental Chem. Corp. v. Banales*, 907 S.W.2d 488, 490 (Tex. 1995).

[37] Tex. R. Civ. P. 192.5; *See generally Overall v. Southwestern Bell Yellow Pages, Inc.*, 869 S.W.2d 629, 631 (Tex. App. – Houston [14th Dist.] 1994, no writ); *National Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993).

[38] *National Union Fire Ins. Co. v. Valdez*, 863 S.W.2d at 461.

[39] *National Union Fire Ins. Co. v. Valdez*, 863 S.W.2d at 460.

[40] *GTE Comms. Sys. v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993).

[41] *Ford Motor Co. v. Castillo*, 279 S.W.3d 656 (Tex. 2009).

[42] *In the Interest of L.R.S.*, 2011 Tex. App. LEXIS 1589 (Tex. App. – Ft. Worth 2011, no pet.)

place for production and state a reasonable time and place for the documents to be inspected. If opposing counsel sets this objection for hearing, the burden is on you to prove that the request as stated is burdensome.[43]

VI. TRAP: INTERROGATORRIES – SUBJECT MATTER AND SUBPARTS

Texas rules allow each party to serve 25 interrogatories on the opposing parties in both Level I and Level II cases.[44] Level III cases are limited to 25 interrogatories as well unless altered by agreement or court order.[45]

An interrogatory question may inquire about any matter of the lawsuit except matters related to testifying expert witnesses.[46] This includes a party's legal or factual contentions.[47] Therefore, you should not object to a question such as "all factual contentions that support your claim that the court should award you a disproportionate share of the community estate." However, the request "all factual contentions that support your lawsuit," should draw a valid overbroad objection.[48]

Included in the 25 interrogatory limitation is each discrete subpart.[49] Counting to 25 is easy. Detemining a discreet subpart for each interrogatory is not quite as easy. A discrete subpart is a question that calls for information that is not logically or factually related to the primary interrogatory.[50] Thus, a discrete subpart should be counted as its own interrogatory. If the subpart is reasonably related to the claim, then it is likely to lead to admissible evidence and thus not objectionable.[51]

VII. ASKING AND ANSWERING INTERROGATORIES INCLUDING "SUBPARTS"

Before objecting to the number of interrogatories, you must determine if any of the subparts are discreet subparts. Unfortunately, "discrete subpart" does not have a precise definition.[52] For help determining whether or not an interrogatory sub-question is a discrete subpart, you only need to answer two questions:

1. Does the main interrogatory (not a sub-question) reasonably relate to the subject of the lawsuit or is it likely to lead to relevant information? (For example, in a child support case an interrogatory requesting a list of places of employment would be proper.)
2. Does the sub-question reasonably relate to the main interrogatory or does it ask about details regarding facts underlying the claims of the lawsuit? (For example, the interrogatory above could have the following sub-parts: location of each place of employment, length of each employment, and gross yearly income at each place of employment.)

If the answer to both questions is "yes," then the question is not a discrete subpart, and you must count it as part of the main interrogatory. Obviously this is a subjective test and you will have to use your best judgment. When in doubt, err on the side of answering the question.

VIII. TRAP: AUTHENTICATION OF DISCOVERY DOCUMENTS

Another trap many attorneys fall into is not determining if their evidence is authentic prior to a hearing or trial. Authentication is the first step in the admissibility of trial evidence.[53] Therefore, it is important that you determine if the document you intend to use is authentic.

Some evidence is self-authenticating and no further predicate is necessary for admissibility.[54] (This is not to say the evidence would survive a hearsay or relevancy objection, only that it passes the first hurdle of admissibility – authentication.) However, much of the evidence used in family law cases does not fall under the purview of the *Texas Rules of Evidence*.

The *Texas Rules of Procedure* also have a self-authentication rule within the discovery section. Basically, this rule states that documents produced by a party in response to a request for production authenticate those documents for use against the producing party.[55] The purpose of this rule is to alleviate the burden on the receiving party from

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[43] *Ford v. Ross*, 888 S.W.2d 879, 891 (Tex. App. – Tyler 1994, no pet.)

[44] TEX. R. CIV. P. 190.2 (c) & 190.3 (b)

[45] TEX. R. CIV. P. 190.4 (b)

[46] TEX. R. CIV. P. 197.1

[47] *Id*.

[48] TEX. R. CIV. P. 197.1 cmt. 1

[49] TEX. R. CIV. P. 190 cmt. 3

[50] *Id*.

[51] *In re SWEPI L.P.*, 103 S.W.3d 578, 589 (Tex. App. - San Antonio 2003, orig. proceeding).

[52] *Braden v. Downey*, 811 S.W.2d 922, 928 (Tex. 1991).

[53] TEX. R. EVID. 901

[54] TEX. R. EVID. 902

[55] TEX. R. CIV. P. 193.7

authenticating a document to use against the party who served it.[56]

IX. IS THE DOCUMENT AUTHENTIC?

First and foremost, if you receive the document in response to discovery, then the document is self-authenticating pursuant to the discovery rules.[57]

If you are the producing party, it is helpful to go through your production prior to sending it, and determine whether or not the documents you are producing are authentic. Bank statements are obviously authentic if your client knows they were received from the bank. A hand-written letter to your client may not be authentic. If you cannot determine that a document is what your client claims it is, you cannot authenticate that document. You should object to the authenticity of the document or documents in your response to opposing counsel.

Next, determine whether or not the document is self-authenticating pursuant to the *Texas Rules of Evidence*. If the document is self-authenticating, such as a certified copy of a deed, then no further action is necessary and the document is authenticated for trial.

If you are the party offering the document at trial, you must first notify opposing counsel of your intent to use the document.[58] The party contesting the authenticity of the document has 10 days to object.[59] The objections must be in writing and must be made in good faith. To avoid this problem at trial, the better practice is for both parties to identify the exhibits they intend to use so that the 10 day time period is triggered for each side.[60]

X. TRAP: REQUESTING THE COMPUTER

Requests for production of documents are almost obsolete in this digital age. Many businesses and now even households are going "paperless." For example, if you request bank statement, you are likely to receive an online printout of a party's recent banking activity. Many people do not even receive bank statements in the mail.

Computers are the new file cabinets. Therefore, a simple request for a party's computer will not suffice. Your request must specifically state what you are looking for on the computer.[61] If you are requesting information from a computer, you are requesting electronic information and therefore you are required to specifically request the electronic information as well as the form in which you want it produced.[62]

Because computers contain sensitive information, the Supreme Court has warned that "direct access to another party's electronic storage devices is discouraged, and courts should be extremely cautious to guard against undue intrusion."[63]

XI. HOW TO REQUEST INFORMATION FROM A PARTY'S COMPUTER

First and foremost, you cannot simply request a party to produce their computer. As stated, a computer is nothing more than a filing cabinet, and filing cabinets cannot be requested. Furthermore, a request for the entire computer is nothing more than a fishing expedition because it in no way details your request with any certainty.

The first step to keep in mind when requesting information from a computer is to ensure that the request is specific. You cannot just ask for emails; you must ask for deleted emails and current emails, from specific time period, regarding a specific subject matter.

The best course of action is to first take the party's deposition. At the deposition ask very specific questions about the party's computer including all information contained on that computer. You should also get the party to agree on the record that they will not delete any information contained on that computer. This deposition will you allow you to ask for specific computer documents in your request for production.

Next, you should serve your request for production of information from the computer. The responding party is then allowed to produce all of the information they believe is responsive to your request; just like every other discovery procedure. However, if for some reason the responding party cannot retrieve the information as you have requested, they must object to the request.

If, after conferring with counsel, you are unable to solve any disputes you have over the request for information, either party may request a hearing. At the hearing, the producing party bears the burden of proving why the information is not retrievable without undue burden or cost.

The court may then decide to order production upon a showing by the requesting party that the benefits of production outweigh the burdens imposed. If the benefits are shown to outweigh the burdens of

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[56] *Blanche v. First Nationwide Mortg. Corp.*, 74 S.W.3d 444, 452 (Tex. App. – Dallas 2002, no pet.).

[57] *Id*.

[58] TEX. R. CIV. P. 193.7

[59] *Id*.

[60] TEX. R. CIV. P. 193.7 cmt.7

[61] *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 314 (Tex. 2009).

[62] TEX. R. CIV. P. 196.4; *See generally, In re Weekley Homes, L.P.*, 295 S.W.3d 309 (Tex. 2009).

[63] *In re Weekley Homes, L.P.*, 295 S.W.3d at 314.

production, the trial court may order production of the information using the least intrusive means possible.

Be careful what you wish for – the requesting party must also pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information. Once access to a computer is granted, the court is required to also order certain procedures to ensure the access is minimally invasive.[64] This process will require an expert computer forensic who will also be subject to the court order including any confidentiality orders.[65]

XII. BRIEF ETHICS LECTURE

All of the suggestions in this article are within the bounds of the rules and more importantly, comply with *The Lawyer's Creed*. Although the *Creed* may not be used to "incite ancillary litigation or arguments over whether or not [it] has been observed, you should keep it in mind when drafting and answering discovery.

A *Creed* lawyer will draft discovery that only concerns the merit of their own case as it is, and not draft documents that serve as a fishing expedition into possibilities of additional causes of action.[66] A *Creed* lawyer will answer discovery to "reveal rather than conceal" the facts of the lawsuit.[67] As stated in the introduction, the discovery rules were made to avoid trial by ambush, and discovery cannot and should not be used as a weapon to trick your opponent.[68]

XIII. CONCLUSION

As part of tailoring your discovery, you must read the case law. Many discovery cases turn on one fact of a case. Therefore, the holding in a case may not apply to every case if the facts are distinguishable. You do not have to cite *Loftin* and *K-Mart* in every objection. There are many other cases that might be better, and often the rule standing by itself it the only necessary objection.

Last, if you take any lesson away from this article, it should be this: discovery is not a one-size fits all procedure. Each divorce is unique with unique facts, and thus the discovery drafted for each case should be unique. That is not to say that formbooks should be nixed or that you should not have a stable of questions ready to go. You should, however, take the time to review each question and tailor it to the needs of your case. Not only is this practice required by the rules, but it is an important step towards winning your case.

Justice Green, while sitting on the Fourth Court of Appeal in San Antonio, wrote the opinion in *In re SWEPI* that really sums up the current status of discovery:

"Discovery is thus the linchpin of the search for truth, as it makes 'a trial less of a game of blind man's bluff and more a fair contest with the issues and facts disclosed to the fullest practicable extent.'… Only in certain narrow circumstances is it appropriate to obstruct the search for the truth by denying discovery."[69]

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[64] *In re Honza*, 242 S.W.3d 578, 583 (Tex. App. - Waco 2008, orig. proceeding).

[65] *Id.*

[66] *Dillard Dept. Stores v. Hall*, 909 S.W.2d 491 (Tex. 1995) (per curiam); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813 (Tex. 1995) (per curiam).

[67] *In re SWEPI L.P.*, 103 S.W.3d 578, 587 (Tex. App. - San Antonio 2003, orig. proceeding).

[68] *Van Heerden v. Van Heerden*, 321 S.W.3d 869, 876 (Tex. App. - Houston [14th Dist.] 2004, no pet.).

[69] *In re SWEPI L.P.*, 103 S.W.3d at 585.

APPENDIX A

Summary of Cases

***Alvarado v. Farah Mfg.*, 830 S.W.2d 911 (Tex. 1992)**
Background: Plaintiff sued employer. Both parties served each other with interrogatories asking the basic question regarding the identification of witnesses to be called at trial. Plaintiff issued subpoenas for witnesses to appear at trial that were not listed in his interrogatory response. Trial court allowed a non-disclosed witness to testify as a rebuttal witness.

The Supreme Court turned on the issue that a party may be excused from compliance with the rules **only** on a showing of good cause. If a party cannot show good cause, the testimony must be excluded. The Court opined: [i]t is both reasonable and just that a party expect that the rules he has attempted to comply with will be enforced equally against his adversary. To excuse noncompliance without a showing of good cause frustrates that expectation." *Alvarado* at 914.

The Court goes on to analyze good cause and holds that even if a witness has been deposed, the party sponsoring the witness still needs to identify that witness in discovery. "A party is entitled to prepare for trial assured that a witness will not be called because opposing counsel has not identified him or her in response to a proper interrogatory... Finally, if good cause could be shown simply by establishing the unique importance of the evidence to the presentation of the case, only unimportant evidence would ever be excluded, and the rule would be pointless." *Alvarado* at 915.

The Court concluded that the Plaintiff's **pre-trial** decision to subpoena the witness for rebuttal was not good cause, and "[t]o hold otherwise would be to encourage the very kind of gamesmanship that" the rules were intended to prevent. *Alvarado* at 917.

Blanche v. First Nationwide Mortg. Corp., 74 S.W.3d 444 (Tex. App. - Dallas 2002, no pet.)
Background: Plaintiffs sued First Nationwide regarding a bank loan. First Nationwide filed a summary judgment which was granted. On appeal First Nationwide complains that most of Blanche's evidence was inadmissible because it was not authenticated.

Citing Tex. R. Civ. P. 193.7 the court states: "[t]he clear purpose of this rule is to alleviate the burden on a party receiving documents through discovery from proving the authenticity of those documents when they are used against the party who produced them." *Blanche* at 451. However, the documents relied on in this case were attached to a summary judgment and were not produced by the Defendants, therefore the Plaintiffs were required to authenticate their summary judgment evidence. "A party cannot authenticate a document for use in its own favor by merely producing it in response to a discovery request." *Blanche* at 452.

Braden v. Downey, 811 S.W.2d 922 (Tex. 1991)
Background: Plaintiff, Bank, sued Defendant for breach of contract. Defendant lodged numerous objections to most of the interrogatory questions. He also objected that the number of interrogatories was more than the limit because of the subparts of each interrogatory. The trial court found that Defendant had failed to answer discovery. He was compelled to answer and ordered to pay $10,000 in attorney's fees to Plaintiff. Additionally, Defendant's attorney was ordered to do community service. The Supreme Court affirmed the trial court.

Addressing the interrogatory questions which the Defendant objected to, the court held:

"We acknowledge that interrogatories like the Bank's, sometimes called "contention interrogatories", may be too general, may be constructed to evade the thirty-answer limit of Rule 168, and may require an effort to respond that greatly exceeds the benefit of the information thereby disclosed. At the same time, however, we cannot say that every inquiry into the particulars underlying notice pleadings is too vague or burdensome to answer, or that every response which calls for more than one fact counts as more than one answer toward the maximum of thirty allowed by Rule 168. The thirty-answer limit in Rule 168, like vagueness, burdensomeness and many other standards, while not susceptible of precise definition, establishes some boundary to [**13] the range of discovery. The Bank's interrogatories in this case do not so trespass upon this boundary that it was an abuse of discretion to order that they be answered." *Braden* at 927-928.

***Dillard Dept. Stores v. Hall*, 909 S.W.2d 491 (Tex. 1995) (per curiam)**
Background: Plaintiff sued Dillard Department Store for false arrest. Plaintiff requested: "[c]opies of all complaints, including lawsuits filed against Defendant, which involve an alleged wrongful detention, arrest, civil rights violation, or any other complaint similar to the complaint of Plaintiff. If there are numerous lawsuits, you may produce the names of the court, case numbers and plaintiffs' names, and attorneys' names and addresses." *Dillard* at 491. The trial court ordered Dillard to produce "every claims file and incident report prepared from 1985 through 1990 in every lawsuit or claim that involved allegations of false arrest, civil rights violations, and excessive use of force. It also ordered production of a computer-generated listing of these claims." Plaintiff argued that he needed the discovery to show a policy of racial discrimination. Dillard complained that the request was overbroad. *Dillard* at 492.

The Supreme Court held that the request was overbroad. The Court opined that this was a impermissible fishing expedition because it was not related to the "simple false arrest case" and Plaintiff admitted that he only wanted these documents to see if he could prove racial discrimination. The Court states: "[w]e hold that a twenty-state search for documents over a five-year period is overly broad as a matter of law." *Dillard* at 492.

***Ford Motor Co. v. Castillo*, 279 S.W.3d 656 (Tex. 2009)**
Background: Products liability case – Ford Motor Company and Plaintiff settled while the jury was deliberating and after a note was presented to the judge by the foreperson asking how much money they could award the Plaintiff. At some point after the settlement, Ford suspected that outside influence may have been brought to bear on the presiding juror. Ford requested, but was refused, permission to obtain discovery on the outside influence question. Ford withdrew its consent to the settlement. Castillo sued Ford for breach of the settlement agreement and filed summary judgment. Ford renewed its request for discovery, but the trial court rendered summary judgment for Castillo on the breach claim.

The Supreme Court reversed the trial court and held:

> "… a party may obtain discovery "regarding any matter that is not privileged and is relevant to the subject matter of the pending action." *TEX. R. CIV. P. 192.3*. The phrase 'relevant to the subject matter' is to be 'liberally construed to allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial.' *Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 553 (Tex. 1990)*. The trial court's preemptive denial of discovery could have been proper only if there existed no possible relevant, discoverable testimony, facts, or material to support or lead to evidence that would support a defense to Castillo's claim for breach of contract." *Castillo* at 664.

***Ford v. Ross*, 888 S.W.2d 879 (Tex. App. – Tyler 1994 (no pet.)**
Background: This was a products liability case. Plaintiffs sued Ford and served them with interrogatories to which Ford provided limited answers and objections. The trial court granted Plaintiff's motion to compel, compelled Ford to answer certain discovery requests and excluded certain evidence.

Ford complains that they released over 700,000 pages of documents. According to Ford, the documents were responsive to Plaintiffs' requests based on its representations to Ford during attorney meetings. Ford represented that it took 149 people working over 6,400 hours to produce the documents at a cost to Ford of $355,000. In addition to producing these documents, Ford also supplemented its responses to Plaintiffs interrogatories and production requests with additional objections, *many of which asserted the attorney-client and work-product privileges for the first time*.

The Tyler Court of Appeals supported the trial court arguing that Ford did not meet their burden to provide evidence supporting their objections. The Court distinguished this case from *Loftin*, stating that the requests in this case were not as broad as those in *Loftin*. *Id*. The court adopts the Ft. Worth Court of Appeals opinion stating that "any party who seeks to exclude matters from discovery on grounds that the requested information is unduly burdensome, costly or harassing to produce, has the affirmative duty to plead and prove the work necessary to comply with discovery." *Ford* at 891.
The Court does state that relevance objections need not necessarily be supported by evidence but "in the instant case, Ford, at the very least, should have directed the court's attention to such objections and advocated their validity." *Ford* at 892.

The Court disagreed with the trial court regarding the timeliness of the assertion of privilege. The Court adopted the *Loftin* argument that when a party objects to overbreadth and privilege, the objecting party is relieved of the duty to "*unconditionally plead and prove the existence of specific privileges for documents which may be located or generated in the future.*" *Ford* at 894. Further the court held:

> "[W]e agree with the dissent in *Hyundai* and *Loftin* that in cases where an overbreadth objection has been timely lodged, *Rule 166b(4)* does not require that claimed privileges be elaborated upon or that the responding party be prepared to prove these privileges at an initial hearing on a motion to compel. However, we do hold that a responding party is required to timely assert privilege as one of its initial battery of objections… To hold that there is no duty to even assert a privilege objection until the responding party deems the scope of the request "appropriate" would likely foster prolonged discovery delays and trial by ambush, practices the Supreme Court has censured." *Id*.

***GTE Comms. Sys. v. Tanner*, 856 S.W.2d 725 (Tex. 1993)**
Background: This lawsuit stemmed from an incident in which one child was killed and one hurt by a telephone cord from a payphone that had been altered and stretched across a sidewalk as a prank. Plaintiffs sued the phone manufacturers. In a hearing regarding discovery sanctions, Plaintiffs claimed that GCSC had a document which revealed that the company knew the inherent dangers of this cord. GCSC claimed the document was never in their possession custody or control. The trial court granted the sanctions requested.

The Supreme Court held that GCSC did not have possession of the document. "The right to obtain possession is a legal right based upon the relationship between the party from whom a document is sought and the person who has actual possession of it." *GTE* at 729.

The burden to prove a party has custody of a document is on the party requesting. In this case, the Plaintiffs only put on one witness who surmised that the GCSC should have had the document. He did not have personal knowledge of his assumption. *GTE* at 729.

Further, the sanctions order and the record did not contain any evidence that the judge considered lesser sanctions; therefore striking defendant's pleadings was an abuse of discretion. *GTE* at 729.

In re American Optical Corp., 988 S.W.2d 711 (Tex. 1998) (per curiam)
Background: Plaintiffs sued alleging American Optical manufactured and distributed defective respiratory products which resulted in asbestos related injuries. Plaintiffs served on American Optical a 76-page document request, containing 221 separately numbered requests. The requests asked for virtually every document which American Optical ever generated regarding its equipment.

Court ruled that the Plaintiff's could have done some preliminary background research into their own claims in order to prevent the overly broad discovery requests. Type of discovery requested is the exact fishing expedition prohibited as stated in numerous Supreme Court opinions. *In re American Optical Corp.* at 713.

***In re Colonial Pipeline Co.*, 968 S.W.2d 938 (Tex. 1998)**
Background: Trial court ordered Defendants to produce an inventory of evidence and produce a witness with the greatest knowledge of that inventory to appear for a deposition.

The rules regarding production of documents cannot be used to force a party to make lists or reduce information to tangible form. "A document that does not exist is not within a party's 'possession, custody or control.'" *In re Colonial* at 942.

In re Honza, 242 S.W.3d 578 (Tex. App. - Waco 2008, orig. proceeding)
Background: This was a civil lawsuit dealing with a partial assignment of a real estate contract. A&W contended that a contract was amended by the Honzas without certain agreed terms. A&W sued for declaratory relief claiming, among other things, fraudulent inducement and negligent misrepresentation. The case was tried and a mistrial was granted. In the trial, evidence of Honza's diary was admitted wherein he had an entry that stated "worked on assignment contract and cost calculations." In the second trial, A&W requested "Metadata" and "time stamps" on relevant documents related to the contract at issues in this case. Thirty days before the second trial, A&W filed a motion to gain access to Honza's computers. The trial court granted the access.

The Waco Court of Appeals announced a five-step protocol in their analysis of the right to access a person's computer. First, the party seeking discovery selects a forensic expert to make a mirror image of the computer hard drive at issue. Second, the expert is required to perform an analysis subject to the terms of a protective order, generally prohibiting the expert from disclosing confidential or otherwise privileged information other than under the terms of the discovery order. Third, the expert is required to compile the documents analyzed and provide copies to the party opposing the discovery. Fourth, the opposing party then reviews the documents and produces those that are responsive to the discovery request and creates a privilege log for the documents which are withheld. Fifth, the trial court then conducts an in-camera review should any disputes arise regarding entries in the privilege log. *Honza* at 582.

The Waco Court applied this five-step process to the case and found that A&W had followed correct procedure. In approving the trial court's decision to grant access, the Court found the following facts as relevant: (1) the discovery order provided that the expert was required to index all forensic images acquired form the imaging process for the limited purpose of searching for two documents; (2) although not challenged by Honza, the Court found that the expert witness had qualifications of "critical importance when access to another party's computer hard drives or similar data is sought; (3) the order provided that no waiver of privilege or confidential information would occur if A&W's expert or counsel were to come across any such information during the process; and (4) the order required that the expert, parties and counsel sign an acknowledgment agreeing that they are subject to contempt of court for any violation of the order. *Honza* at 583.

In re Kuntz, 124 S.W.3d 179 (Tex. 2003)
Background: Lawsuit to enforce agreement incident to divorce. AID provided that wife was entitled to 25% of income related to contracts which were initiated during marriage which would be represented by "positive" letter of recommendation written by husband's company to their only client. Company requested permission from client to release the LORs. Client denied permission citing their confidentiality agreement. Trial court ordered company to produce the letters.

Supreme Court agreed with the company (acting as amicus) who compared access to confidential documents to a bank teller having access to cash in a vault. The documents requested did not belong to the company and therefore could not be released by the party without facing a damages suit from the client. *Kuntz* at 184.

Concurring opinion holds that the documents also are not discoverable because they are protected by trade secret. The concurring opinion refers to previous Supreme Court rulings stating:

> "[a]ccordingly, to obtain discovery of the [documents requested], [wife] must establish that they are "necessary or essential to the fair adjudication of the case," weighing her need for the information against the harm that may result from disclosure. [Wife] must "demonstrate with specificity exactly how the lack of the information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat." *Kuntz* at 185-6.

The second concurring opinion supports the majority's dicta stating that wife would have a better claim had she requested the documents from the company rather than her husband. The opinion states:

"[w]hile it is unclear why [wife] sought the documents from [husband] rather than [company], and notwithstanding our regard for the diligent inquiry and complex decisions made by the trial court, I agree with the Court's opinion. I do not disagree with the implication in the opinion of the Court that the documents should be obtained, if at all, from [company]. *Kuntz* at 187.

In re SWEPI L.P., 103 S.W.3d 578 (Tex. App. - San Antonio 2003, orig. proceeding)
Background Regarding Entry on Land: Plaintiff's sued Shell for failing to drill a well on their property which Shell had leased. Shell filed a motion to compel answers to interrogatories and for entry on land to perform tests on the plaintiff's property and operating well. The trial court denied both motions. Shell sent nineteen interrogatories to Plaintiff. Plaintiff responded with multiple broad objections and very little substantive information. Plaintiff also objected that counting subparts, there were ninety-eight questions; therefore, he was not required to respond beyond interrogatory number 5.

The Supreme Court ruled that Shell proved there was good cause to test the well:

"Generally, 'good cause' for a discovery order is shown where the movant establishes: (1) the discovery sought is relevant and material, that is, the information will in some way aid the movant in the preparation or defense of the case; and (2) the substantial equivalent of the material cannot be obtained through other means." *SWEPI* at 584.

The Supreme Court also dismissed the idea that the tests were burdensome and harassing based on the fact that Shell had agreed to pay for the testing and post a bond to cover any potential damages. Because Shell had assumed all of the financial risk, the testing was not burdensome. *SWEPI* at 586.

Additionally, the Supreme Court held that each interrogatory question did relate to a particular claim and that each subpart requested facts related to that claim. *SWEPI* at 589.

Great Dicta: "If the trial court can deny ***discovery*** on the basis that the parties disagree about what the evidence shows, we will have trial by discovery denial." *SWEPI* at 585.

More Great Dicta: "Affording parties full discovery promotes the fair resolution of disputes by the judiciary. This court has vigorously sought to ensure that lawsuits are 'decided by what the facts reveal, not by what facts are concealed.' Discovery is thus the linchpin of the search for truth, as it makes 'a trial less of a game of blind man's bluff and more a fair contest with the issues and facts disclosed to the fullest practicable extent.'… Only in certain narrow circumstances is it appropriate to obstruct the search for the truth by denying discovery." *SWEPI* at 587.

In re Weekley Homes, L.P., 295 S.W.3d 309 (Tex. 2009)
Background: This case involved real estate contracts. The plaintiff was HFG and two of the defendants were Enclave and Weekly Homes. HFG's claims against Weekley Homes included fraud and negligent misrepresentation. HFG requested documents from Weekley Homes to include certain electronic or email messages. *Weekley* at 312. When HFG only received 31 emails, they filed a motion to compel.

HFG received 31 emails pursuant to this request and "was unconvinced" that all emails related to this request were produced by Weekley. HFG moved to compel Weekly to "search for any emails stored on servers or back up tapes or other media, [and] any email folders in the email accounts of [the Employees]." At the hearing, Weekley's General Counsel testified that: (1) each employee has an email box with a size limit; (2) Weekley employees were forced to clear out their mailboxes to comply with this size limit; and (3) deleted emails are saved on backup tapes for 30 days. The trial court granted HFG's request for an expert to retrieve certain deleted emails. *Weekley* at 312.

The Supreme Court first held that "[e]mails and deleted emails stored in electronic or magnetic form (as opposed to being printed out) are clearly "electronic information." *Weekley* at 314.

Texas Rule of Civil Procedure 196.4 requires specificity. HFG did not specifically requested "deleted emails" just emails. However, the Supreme Court theorized that HFG made it clear they were requesting deleted emails in the various motions and hearing regarding discovery requests and Weekley Homes knew that deleted emails were requested. Therefore, "[t]o ensure compliance with the rules and avoid confusion… parties seeking production of deleted emails should expressly request them." *Weekley* at 314.

Even though the Supreme Court held that the trial court abused its discretion in ordering a discovery motion of this nature, they did acknowledge that requests of this type will be more frequent, and that a procedure should be adopted. Therefore, the Supreme Court announced the following protocol for access to computer hard drives:
"(1) the party seeking to discover electronic information must make a specific request for that information and specify the form of production. Tex. R. Civ. P. 196.4.
(2) The responding party must then produce any electronic information that is 'responsive to the request and… reasonably available to the responding party in its ordinary course of business.' *Id.*
(3) If the 'responding party cannot – through reasonable efforts – retrieve the data or information requested or produce in the form requested,' the responding party must object on those grounds. *Id*.
(4) The parties should make reasonable efforts to resolve the dispute without court intervention. Tex. R. Civ. P. 191.2.

(5) If the parties are unable to resolve the dispute, either party may request a hearing on the objection, Tex. R. Civ. P. 193.4(a), at which the responding party must demonstrate that the requested information is not reasonably available because of undue burden or cost. Tex. R. Civ. P. 192.4(b).
(6) If the trial court determines the requested information is not reasonably available, the court may nevertheless order production upon a showing by the requesting party that the benefits of production outweigh the burdens imposed, again subject to Rule 192.4's discovery limitations.
(7) If the benefits are shown to outweigh the burdens of production and the trial court orders production of information that is not reasonably available, sensitive information should be protected and the least intrusive means should be employed. Tex. R. Civ. P. 192.6(b). The requesting party must also pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information. Tex. R. Civ. P.196.4.
(8) Finally, when determining the means by which the sources should be searched and information produced, direct access to another party's electronic storage devices is discouraged, and courts should be extremely cautious to guard against undue intrusion."

***In the Interest of L.R.S.*, 2011 Tex. App. LEXIS 1589 (Tex. App. – Ft. Worth 2011, no pet.)**
Background: This case is about a post divorce modification and enforcement. Father sent interrogatories to Mother regarding the cost of health insurance. Mother did not answer completely. Father complained about the incomplete discovery at trial. Mother argued that husband waived his objections to her interrogatory responses by failing to request a hearing on his motion to compel.

The Ft. Worth Court rejected Mother's claim stating that the issue was not whether or not the proper objections were made, but that Mother failed to provide information in her original response or in a supplement. Based on this failure, Mother's evidence should be automatically excluded for use at trial. Mother had the burden to established good cause or the lack of surprise or prejudice as a result of her failure to supplement her interrogatory answer.

***K-Mart v. Sanderson*, 937 S.W.2d 429 (Tex. 1996) (per curiam)**
Background: Plaintiff sued K-Mart and the management company of the shopping center for negligence after she was abducted from the parking lot of the store. Plaintiff requested all documents "which relate to, touch or concern the allegations of this lawsuit," all documents "reflecting the incident made the basis of this lawsuit," and any document "which is not work product which relates in any way to this incident." K-Mart objected that the requests would include work product and were overly broad. The trial court overruled the objections and ordered production. Plaintiff also served request for admissions basically requesting all criminal activity at any K-Marts. *K-Mart at 430*.

The Supreme Court affirms the trial court and distinguished this case from Loftin stating:

> "[Plaintiff] requested all documents relating to the incident in which she was injured, not all documents which support K-Mart's position or which relate to the claims and defenses in the cause of action. Because the incident was an isolated occurrence, we think a reasonable person would understand from the request what documents fit the description. It would be better, of course, to be more specific. We do not hold that a request as broad as [Plaintiff's] is proper in every circumstance. Here, however, the district court did not abuse its discretion in enforcing [Plaintiff's] requests, except for requiring production of work product." *K-Mart* at 430-31.

With respect to the interrogatories, the Supreme Court cleared up any confusion regarding whether interrogatories could be used for "fishing." The Court states:

> "[a] reference in *Loftin* suggests that interrogatories and depositions may properly be used for a fishing expedition when a request for production of documents cannot. *Loftin, 776 S.W.2d at 148* ("Unlike interrogatories and depositions, Rule 167 is not a fishing rule."). We reject the notion that any discovery device can be used to "fish". The burden of answering interrogatories like those in this case is hardly less to K-Mart than producing documents containing the same information." *K-Mart* at 431.

L.B. v. Tex. Dep't of Family & Protective Servs., 2010 Tex. App. LEXIS 2518 (Tex. App. – Austin 2010, no pet.)
Background: This was a termination case. In response to L.B.'s discovery requests, TDFPS provided witness Cunningham's name, address, telephone number, and a description of her as a "social worker."

In a footnote, the Austin Court of Appeals stated the following regarding disclosure responses:

"While Texas law is unclear regarding precisely what information is required in a "brief statement of each identified person's connection with the case," we note that the description of Cunningham as a "social worker" represents at least an attempt to comply with the rule. *See id*. *R. 194.2(e)*; *Beam v. A.H. Chaney, Inc., 56 S.W.3d 920, 923 (Tex. App.--Fort Worth 2001, pet. denied)* (holding that trial court erred in admitting witness testimony when no statement of connection of any kind was provided). We further note that the description provided, including Cunningham's name, address, telephone number, and title, provided L.B. with reasonable information with which to identify the witness, thus mitigating any potential surprise or prejudice. *Cf. Tex. R. Civ. P. 1* (instructing that rules of civil procedure are to be construed liberally in order "to obtain a just, fair, equitable and impartial adjudication of the rights of litigants"), *193.6(a)(2)* (instructing that trial courts may admit testimony of improperly identified witness if "the failure to make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties")."

***Loftin v. Martin*, 776 S.W.2d 145 (Tex. 1989)**

Background: Lumbermens Mutual Casualty Company filed suit to set aside an award of the Texas Industrial Accident Board granted to relator, Jessie Loftin. Loftin then brought a counterclaim for an affirmative award of total and permanent incapacity and requested Lumbermens to produce certain documents.

Loftin requested that all of Lumbermens' experts produce a report. Lumbermens objected that the rules of discovery do not mandate the production of documents, only the discovery of documents already in existence. Lumbermens further objected that the request was premature because they had not designated their experts yet. The trial court and the Supreme Court sustained these objections. *Loftin at 147*.

Loftin requested "all documents, statements, and communications made during the normal scope of investigating the claimant-employee from July 20, 1986 [date of accident] through the date of the filing of this suit." Lumbermens claimed the "investigative privilege." (Formerly written as TRCP 166b and now encapsulated in TRCP 192.5.) The Supreme Court overruled Lumbermens objection stating:

> "Lumbermens produced no evidence to show that the documents requested were prepared in anticipation of litigation. Although Loftin's request asked for 'documents made during the normal scope of investigating the claimant-employee,' we are unable to conclude as a matter of law that such request would involve producing only documents prepared in anticipation of litigation. We recognize the possibility that certain reports or documents could have been formulated after Loftin's injury which would not be made in anticipation of litigation. The words used in request for production #3 are not sufficient to support the alleged investigative privilege." *Loftin at 148*.

Loftin also requested "all notes, records, memoranda, documents and communications made that the carrier contends support its allegations [that the award of the Industrial Accident Board was contrary to the undisputed evidence]." Lumbermens objected that the request was vague. The Supreme Court sustained this objection stating that:

> "Loftin has requested all evidence that supports Lumbermens' allegations. The request does not identify any particular class or type of documents but it is merely a request that Loftin be allowed to generally peruse all evidence Lumbermens might have. We hold that such request was vague, ambiguous, and overbroad and that the trial court was within its sound discretion in sustaining Lumbermens' objection. No one seeks to deny Loftin's right to see evidence against him, but he must formulate his request for production with a certain degree of specificity to allow Lumbermens to comply." *Loftin at 148*.

As an interesting side note, the dissenting opinion revolves around the fact that Loftin failed to show up at their own hearing to fight the objections. The opinion states:

"[i]t is a very odd rule, in my view, to require a trial court to rule on discovery objections when the party seeking discovery does not insist upon a ruling or offer any explanation why it should go in his favor. By the Court's holding today, a party by merely requesting a hearing on a discovery request may require the trial court and the opposing party to proceed to a thorough consideration of the issue, even without participating himself. In effect, once a party makes a discovery request, that request perseveres even if the party does not. Either the opposing party must present his adversary's arguments, or the trial court must imagine what they might be. If the requesting party is dissatisfied

with the result reached in his absence, he need not move for reconsideration or attempt in any way to acquaint the trial court with his position. He is entitled to go straight to the court of appeals and this Court and complain that the trial court abused its discretion, and to obtain the extraordinary writ of mandamus. That, in sum, is what the Court holds. The Court's rule appears to be limited to discovery issues. Why discovery motions should be treated differently from other motions is not apparent to me." *Loftin* at 151.

***National Union Fire Ins. Co. v. Valdez,* 863 S.W.2d 458 (Tex. 1993)**
Background: Bad faith insurance case. Defendant is the insurance carrier for Wal-Mart stores where Plaintiff was injured during the scope of his employment. Defendant paid Plaintiff as part of his compensation lawsuit. Plaintiff then filed a bad faith claim against Defendant and requested all files related to the compensation case, "including but not limited to the investigation file, the correspondence file and the pleadings file."

The Court reiterated the Supreme Court position that that just because a document is in an attorney's file does not mean the document is privileged. Therefore "a party may not cloak a document with the attorney-client privilege simply by forwarding it to his or her attorney." *National Union* at 460.

The Supreme Court also cited federal court opinions to support the supposition that "an attorney's selection and ordering of documents in anticipation of litigation is protected work product, even where the individual documents are not privileged… This reasoning applies with even greater force where a party seeks to discover an attorney's entire litigation file." *National Union* at 461.

"We hold that a request for an 'attorney's files,' as opposed to a request for specific documents relevant to the pending lawsuit, is objectionable under the attorney work-product exemption from discovery." *National Union* at 458.

***Occidental Chem. Corp. v. Banales,* 907 S.W.2d 488, 490 (Tex. 1995)**
Background: Occidental omitted several names of witnesses they had interviewed while investigating the case from their discovery responses. Occidental lawyers claimed it was a mistake. Trial court awarded Plaintiffs $860,000 in sanctions and ordered that Occidental turn over attorney notes regarding their investigation. Occidental argued this order would violate the attorney work product privilege.

The Supreme Court reversed the trial court. They held that the attorney work product privilege protects to things: (1) the attorney's thought process, "which includes strategy decisions and issue formulation, and notes or writings evincing those mental processes" and (2) the "mechanical compilation of information to the extent such compilation reveals the attorney's thought processes." The Court further warned that "[w]e should not be understood as holding that production of attorney work product notes concerning witness interviews can never be appropriate; rather, we conclude that it is not appropriate in this case." *Occidental* at 490.

***Overall v. Southwestern Bell Yellow Pages, Inc.*, 869 S.W.2d 629 (Tex. App. – Houston [14th Dist.] 1994, no writ)**
Background: Southwestern Bell sued Overall for breach of contract. Southwestern Bell sent discovery including a request for the production of the contract. Overall responded by stating that the documents were available for review in his attorney's office. Trial court excluded the evidence at trial based on Overall's failure to produce the documents.

The court distinguishes this case from those where thousands of documents are relevant:

> "This Court is aware of cases where a responding party has been permitted to make documents available at a specified location, instead of sending them directly to the requesting party. *E.g., Steenbergen v. Ford Motor Co., 814 S.W.2d 755* (Tex. App.-- Dallas 1991, writ denied), *reh'g overruled, cert. denied, U.S. , 113 S. Ct. 97, 121 L. Ed. 2d 58 (1991)*. Such cases involve the production of many, usually thousands, of documents. In *Steerbergen*, for example, the defendant, Ford Motor Company, had gathered over 100,000 documents related to the litigation, and other, similar suits, in a "reading room" at its corporate headquarters, where opposing counsel could inspect and photocopy the documents… In the case before us today, however, appellant has no such justification for producing the documents at his attorney's office. The documents involved number exactly three. Appellant did not seek a protective order. Nor did he object to the form of appellee's questions. In short, appellant simply did not respond to the request for production." *Overall* at 631.

Texaco, Inc. v. Sanderson, 898 S.W.2d 813 (Tex. 1995) (per curiam)
Background: Plaintiffs sued Texaco claiming the death of their husband/father resulted from exposure to toxic materials present in their Port Arthur refinery. Plaintiffs requested production of all documents written by John Sexton, who was corporate safety director, that concern safety, toxicology, and industrial hygiene, epidemiology, fire protection and training. *Texaco* at 814.

Defendants argued this request would require them to hand over innocuous documents, such as those related to safety goggles (as one example). Plaintiffs argued they were entitled to all documents that showed Texaco's "state of mind" regarding employee safety. *Texaco* at 814.

The Court held that although the Plaintiff were entitled to discovery regarding safety evidence, "a request for all documents authored by Sexton on the subject of safety, without limitation as to time, place or subject matter, is overbroad." *Texaco* at 815.

However, they stated that the requests were not overbroad "merely because the request may call for some information of doubtful relevance. Parties must have some latitude in fashioning proper discovery requests. The request in this case, however, is not close; it is well outside the bounds of proper discovery. It is not merely an impermissible fishing expedition; it is an effort to dredge the lake in hopes of finding a fish." *Texaco* at 815.

With regards to the privileged information contained in the documents, the Court held:

> "Because plaintiffs' request was not an appropriate request due to its overbreadth, defendants were not obliged to assert their claims of privilege when they lodged their initial objection to the request, and any deficiency in defendants' response cannot constitute waiver. Defendants must have an opportunity to assert any claims of privilege when a proper discovery request is made. The trial court's denial of defendants' privilege claims was also a clear abuse of discretion for which defendants have no adequate remedy by appeal." *Texaco at 815*.

***TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991)**
Background: Complex breach of contract litigation between TransAmerican and Toma. The district court issued a docket control order which set a discovery cutoff date of April 3, and further ordered that discovery could only be conducted after that date by agreement. Toma subpoenaed TransAmerican's President for deposition after the April 3 date; he did not appear. On May 12, the district court signed an order granting Toma's motion for sanctions and striking TransAmerican's pleadings in their entirety and granting judgment in favor of Toma.

The Supreme Court enunciated a two prong analysis a court must make before death penalty sanctioned are ordered:

> "First, a direct relationship must exist between the offensive conduct and the sanction imposed. This means that a just sanction must be directed against the abuse and toward remedying the prejudice caused the innocent party. It also means that the sanction should be visited upon the offender. The trial court must at least attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both… The point is, the sanctions the trial court imposes must relate directly to the abuse found." *TransAmerican* at 917. Second, just sanctions must not be excessive…It follows that courts must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance." *Id*.

The Court cited federal authority and warned against extraneous sanctions:

> "There are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause… Although punishment and deterrence are legitimate purposes for sanctions, they do not justify trial by sanctions." *Id*.

Van Heerden v. Van Heerden, 321 S.W.3d 869 (Tex. App. - Houston [14th Dist.] 2004, no pet.)
Background: Divorce and custody case. Wife listed father and two sisters as witnesses on her 194 disclosure. She did not make a statement regarding their connection to the case, only that they were "Petitioner's father" and

"Petitioner's sister." At trial the Husband complained that the disclosure did not provide enough information. The trial court excluded the witnesses.

The Appellate Court took issue with the fact that the Husband did not complain about the lack of disclosure until trial. The court admonished Husband stating: "[if he believed he needed more information to adequately prepare for trial, he should have moved to compel more extensive responses. The discovery rules are not meant to be used as weapons in an ambush. *Van Heerden* at 876.

Additionally the court held that just because the witnesses were related to the wife, does not mean their testimony was inappropriately cumulative. The court determined that the witnesses were appropriate because "[r]are indeed is the family courtroom in which multiple interested witnesses do not testify as to the best interests of the children . . . ." *Id*.

The court also determined that the exclusion of witnesses in this case is properly characterized as a death-penalty sanction when it means that a parent has no testimony, other than her own, to defend her parental rights. *Van Heerden* at 878.

Last, the court held that the best interest of a child is an overriding issue that may be a factor influencing a trial court's decision on procedural issues, and that "it is a disservice to children to silence potential fact witnesses who may have probative evidence concerning their best interest." *Van Heerden* at 879.

APPEDIX B

RELEVANT STATUTES

TEXAS RULES OF CIVIL PROCEDURE 190

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

190.2. *Discovery Control Plan—Suits Involving $50,000 or Less (Level 1).*
(a) *Application.*—This subdivision applies to:
(1) any suit in which all plaintiffs affirmatively plead that they seek only monetary relief aggregating $ 50,000 or less, excluding costs, pre-judgment interest and attorneys' fees, and
(2) any suit for divorce not involving children in which a party pleads that the value of the marital estate is more than zero but not more than $ 50,000.

(b) *Exceptions.*—This subdivision does not apply if:
(1) the parties agree that Rule 190.3 should apply;
(2) the court orders a discovery control plan under Rule 190.4; or
(3) any party files a pleading or an amended or supplemental pleading that seeks relief other than that to which this subdivision applies.

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

(c) *Limitations.*—Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations:
(1) *Discovery Period.*—All discovery must be conducted during the discovery period, which begins when the suit is filed and continues until 30 days before the date set for trial.

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

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

(d) *Reopening Discovery.*—When the filing of a pleading or an amended or supplemental pleading renders this subdivision no longer applicable, the discovery period reopens, and discovery must be completed within the limitations provided in Rules 190.3 or 190.4, whichever is applicable. Any person previously deposed may be redeposed. On motion of any party, the court should continue the trial date if necessary to permit completion of discovery.

190.3. *Discovery Control Plan—By Rule (Level 2).*
(a) *Application.*—Unless a suit is governed by a discovery control plan under Rules 190.2 or 190.4, discovery must be conducted in accordance with this subdivision.

(b) *Limitations.*—Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations:
(1) *Discovery Period.*—All discovery must be conducted during the discovery period, which begins when suit is filed and continues until:
(A) 30 days before the date set for trial, in cases under the Family Code; or
(B) in other cases, the earlier of

(i) 30 days before the date set for trial, or
(ii) nine months after the earlier of the date of the first oral deposition or the due date of the first response to written discovery.

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

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

190.4. *Discovery Control Plan—By Order (Level 3).*
(a) *Application.*—The court must, on a party's motion, and may, on its own initiative, order that discovery be conducted in accordance with a discovery control plan tailored to the circumstances of the specific suit. The parties may submit an agreed order to the court for its consideration. The court should act on a party's motion or agreed order under this subdivision as promptly as reasonably possible.

(b) *Limitations.*—The discovery control plan ordered by the court may address any issue concerning discovery or the matters listed in Rule 166, and may change any limitation on the time for or amount of discovery set forth in these rules. The discovery limitations of Rule 190.2, if applicable, or otherwise of Rule 190.3 apply unless specifically changed in the discovery control plan ordered by the court. The plan must include:
(1) a date for trial or for a conference to determine a trial setting;
(2) a discovery period during which either all discovery must be conducted or all discovery requests must be sent, for the entire case or an appropriate phase of it;
(3) appropriate limits on the amount of discovery; and
(4) deadlines for joining additional parties, amending or supplementing pleadings, and designating expert witnesses.

190.5. *Modification of Discovery Control Plan.*—The court may modify a discovery control plan at any time and must do so when the interest of justice requires. The court must allow additional discovery:
(a) related to new, amended or supplemental pleadings, or new information disclosed in a discovery response or in an amended or supplemental response, if:
(1) the pleadings or responses were made after the deadline for completion of discovery or so nearly before that deadline that an adverse party does not have an adequate opportunity to conduct discovery related to the new matters, and
(2) the adverse party would be unfairly prejudiced without such additional discovery;
(b) regarding matters that have changed materially after the discovery cutoff if trial is set or postponed so that the trial date is more than three months after the discovery period ends.

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

Comments
Exceptions & Applicability:
Rule 190 applies to all cases filed on or after January 1, 1999, but a court may adopt an appropriate discovery control plan in previously filed cases. Misc. Docket No. 98-9196 Para. 4b.

Comment to 1999 change:
1. This rule establishes three tiers of discovery plans and requires that every case be in one at all times. A case is in Level 1 if it is pleaded by the plaintiff so as to invoke application of Level 1, as provided by Rule 190.2(a). If a plaintiff does not or cannot plead the case in compliance with Rule 190.2(a) so as to invoke the application of Level 1, the case is automatically in Level 2. A case remains in Level 1 or Level 2, as determined by the pleadings, unless and until it is moved to Level 3. To be in Level 3, the court must order a specific plan for the case, either on a party's

motion or on the court's own initiative. The plan may be one agreed to by the parties and submitted as an agreed order. A Level 3 plan may simply adopt Level 1 or Level 2 restrictions. Separate Level 3 plans for phases of the case may be appropriate. The initial pleading required by Rule 190.1 is merely to notify the court and other parties of the plaintiff's intention; it does not determine the applicable discovery level or bind the court or other parties. Thus, a plaintiff's failure to state in the initial pleading that the case should be in Level 1, as provided in Rule 190.1, does not alone make the case subject to Level 2 because the discovery level is determined by Rule 190.2. Likewise, a plaintiff's statement in the initial paragraph of the petition that the case is to be governed by Level 3 does not make Level 3 applicable, as a case can be in Level 3 only by court order. A plaintiff's failure to plead as required by Rule 190.1 is subject to special exception.

2. Rule 190.2 does not apply to suits for injunctive relief or divorces involving children. The requirement of an affirmative pleading of limited relief (e.g.: "Plaintiff affirmatively pleads that he seeks only monetary relief aggregating $50,000 or less, excluding costs, pre-judgment interest and attorneys' fees") does not conflict with other pleading requirements, such as Rule 47 and Tex. Rev. Civ. Stat. Ann. art. 4590i, § 5.01. In a suit to which Rule 190.2 applies, the relief awarded cannot exceed the limitations of Level 1 because the purpose of the rule, unlike Rule 47, is to bind the pleader to a maximum claim. To this extent, the rule in *Greenhalgh v. Service Lloyds Ins. Co.*, 787 S.W.2d 938 (Tex. 1990), does not apply.

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

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

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

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

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

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

TEXAS RULES OF CIVIL PROCEDURE 191

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

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

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

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

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

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

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

(c) *Effect of Signature on Discovery Request, Notice, Response, or Objection.*—The signature of an attorney or party on a discovery request, notice, response, or objection constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, notice, response, or objection:
(1) is consistent with the rules of civil procedure and these discovery rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
(2) has a good faith factual basis;
(3) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
(4) is not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

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

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

191.4. *Filing of Discovery Materials.*
(a) *Discovery Materials Not to Be Filed.*—The following discovery materials must not be filed:
(1) discovery requests, deposition notices, and subpoenas required to be served only on parties;
(2) responses and objections to discovery requests and deposition notices, regardless on whom the requests or notices were served;
(3) documents and tangible things produced in discovery; and
(4) statements prepared in compliance with Rule 193.3(b) or (d).

(b) *Discovery Materials to Be Filed.*—The following discovery materials must be filed:
(1) discovery requests, deposition notices, and subpoenas required to be served on nonparties;
(2) motions and responses to motions pertaining to discovery matters; and
(3) agreements concerning discovery matters, to the extent necessary to comply with Rule 11.

(c) *Exceptions.*—Notwithstanding paragraph (a)
(1) the court may order discovery materials to be filed;
(2) a person may file discovery materials in support of or in opposition to a motion or for other use in a court proceeding; and
(3) a person may file discovery materials necessary for a proceeding in an appellate court.

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

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

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

Comments
Exceptions & Applicability:
Rule 191 is effective January 1, 1999, except that Rules 191.3 and 191.4 apply only to discovery conducted on or after that date. Misc. Docket No. 98-9196 Para. 4c.

Comment to 1999 change:
1. Rule 191.1 preserves the ability of parties by agreement and trial courts by order to adapt discovery to different circumstances. That ability is broad but not unbounded. Parties cannot merely by agreement modify a court order without the court's concurrence. Trial courts cannot simply "opt out" of these rules by form orders or approve or order a discovery control plan that does not contain the matters specified in Rule 190.4, but trial courts may use standard or form orders for providing discovery plans, scheduling, and other pretrial matters. In individual instances, courts may order, or parties may agree, to use discovery methods other than those prescribed in these rules if appropriate. Because the general rule is stated here, it is not repeated in each context in which it applies. Thus, for example, parties can agree to enlarge or shorten the time permitted for a deposition and to change the manner in which a deposition is conducted, notwithstanding Rule 199.5, although parties could not agree to be abusive toward a witness.
2. Rule 191.2 expressly states the obligation of parties and their attorneys to cooperate in conducting discovery.
3. The requirement that discovery requests, notices, responses, and objections be signed also applies to documents used to satisfy the purposes of such instruments. An example is a statement that privileged material or information has been withheld, which may be separate from a response to the discovery request but is nevertheless part of the response.

TEXAS RULES OF CIVIL PROCEDURE 192

192.1. *Forms of Discovery.*—Permissible forms of discovery are:
(a) requests for disclosure;
(b) requests for production and inspection of documents and tangible things;
(c) requests and motions for entry upon and examination of real property;
(d) interrogatories to a party;
(e) requests for admission;
(f) oral or written depositions; and
(g) motions for mental or physical examinations.

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

192.3. *Scope of Discovery.*
(a) *Generally.*—In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

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

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

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

(e) *Testifying and Consulting Experts.*—The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable. A party may discover the following information regarding a testifying expert or regarding a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert:
(1) the expert's name, address, and telephone number;
(2) the subject matter on which a testifying expert will testify;
(3) the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was acquired;
(4) the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them;
(5) any bias of the witness;
(6) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony;
(7) the expert's current resume and bibliography.

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

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

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

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

192.4. *Limitations on Scope of Discovery.*—The discovery methods permitted by these rules should be limited by the court if it determines, on motion or on its own initiative and on reasonable notice, that:
(a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or
(b) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

192.5. *Work Product.*
(a) *Work Product Defined.*—Work product comprises:
(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

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

(b) *Protection of Work Product.*
(1) *Protection of Core Work Product—Attorney Mental Processes.*—Core work product—the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories—is not discoverable.

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

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

(4) *Limiting Disclosure of Mental Processes.*—If a court orders discovery of work product pursuant to subparagraph (2), the court must—insofar as possible—protect against disclosure of the mental impressions, opinions, conclusions, or legal theories not otherwise discoverable.

(c) *Exceptions.*—Even if made or prepared in anticipation of litigation or for trial, the following is not work product protected from discovery:
(1) information discoverable under Rule 192.3 concerning experts, trial witnesses, witness statements, and contentions;
(2) trial exhibits ordered disclosed under Rule 166 or Rule 190.4;
(3) the name, address, and telephone number of any potential party or any person with knowledge of relevant facts;
(4) any photograph or electronic image of underlying facts (e.g., a photograph of the accident scene) or a photograph or electronic image of any sort that a party intends to offer into evidence; and
(5) any work product created under circumstances within an exception to the attorney-client privilege in Rule 503(d) of the Rules of Evidence.

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

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

(b) *Order*.—To protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may—among other things—order that:
(1) the requested discovery not be sought in whole or in part;
(2) the extent or subject matter of discovery be limited;
(3) the discovery not be undertaken at the time or place specified;
(4) the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court;
(5) the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a.

192.7. *Definitions.*—As used in these rules
(a) *Written discovery* means requests for disclosure, requests for production and inspection of documents and tangible things, requests for entry onto property, interrogatories, and requests for admission.

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

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

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

Comments
Comment to 1999 change:
1. While the scope of discovery is quite broad, it is nevertheless confined by the subject matter of the case and reasonable expectations of obtaining information that will aid resolution of the dispute. The rule must be read and applied in that context. *See In re American Optical Corp.*, -- S.W.2d -- (Tex. 1998) (per curiam); *K-Mart v. Sanderson*, 937 S.W.2d 429 (Tex. 1996) (per curiam); *Dillard Dept. Stores v. Hall*, 909 S.W.2d 491 (Tex. 1995) (per curiam); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813 (Tex. 1995) (per curiam); *Loftin v. Martin*, 776 S.W.2d 145, 148 (Tex. 1989).
2. The definition of documents and tangible things has been revised to clarify that things relevant to the subject matter of the action are within the scope of discovery regardless of their form.
3. Rule 192.3© makes discoverable a "brief statement of each identified person's connection with the case." This provision does not contemplate a narrative statement of the facts the person knows, but at most a few words describing the person's identity as relevant to the lawsuit. For instance: "treating physician," "eyewitness," "chief financial officer," "director," "plaintiff's mother and eyewitness to accident." The rule is intended to be consistent with *Axelson v. McIlhany*, 798 S.W.2d 550 (Tex. 1990).
4. Rule 192.3(g) does not suggest that settlement agreements in other cases are relevant or irrelevant.
5. Rule 192.3(j) makes a party's legal and factual contentions discoverable but does not require more than a basic statement of those contentions and does not require a marshaling of evidence.
6. The sections in former Rule 166b concerning land and medical records are not included in this rule. They remain within the scope of discovery and are discussed in other rules.
7. The court's power to limit discovery based on the needs and circumstances of the case is expressly stated in Rule 192.4. The provision is taken from Rule 26(b)(2) of the Federal Rules of Civil Procedure. Courts should limit discovery under this rule only to prevent unwarranted delay and expense as stated more fully in the rule. A court abuses its discretion in unreasonably restricting a party's access to information through discovery.
8. Work product is defined for the first time, and its exceptions stated. Work product replaces the "attorney work product" and "party communication" discovery exemptions from former Rule 166b.
9. Elimination of the "witness statement" exemption does not render all witness statements automatically discoverable but subjects them to the same rules concerning the scope of discovery and privileges applicable to other documents or tangible things.

TEXAS RULES OF CIVIL PROCEDURE 193

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

193.2. *Objecting to Written Discovery.*
(a) *Form and Time for Objections.*—A party must make any objection to written discovery in writing—either in the response or in a separate document—within the time for response. The party must state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request.

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

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

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

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

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

193.3. *Asserting a Privilege.*—A party may preserve a privilege from written discovery in accordance with this subdivision.
(a) *Withholding Privileged Material or Information.*—A party who claims that material or information responsive to written discovery is privileged may withhold the privileged material or information from the response. The party must state—in the response (or an amended or supplemental response) or in a separate document—that:
(1) information or material responsive to the request has been withheld,
(2) the request to which the information or material relates, and
(3) the privilege or privileges asserted.

(b) *Description of Withheld Material or Information.*—After receiving a response indicating that material or information has been withheld from production, the party seeking discovery may serve a written request that the withholding party identify the information and material withheld. Within 15 days of service of that request, the withholding party must serve a response that:
(1) describes the information or materials withheld that, without revealing the privileged information itself or otherwise waiving the privilege, enables other parties to assess the applicability of the privilege, and
(2) asserts a specific privilege for each item or group of items withheld.

(c) *Exemption.*—Without complying with paragraphs (a) and (b), a party may withhold a privileged communication to or from a lawyer or lawyer's representative or a privileged document of a lawyer or lawyer's representative
(1) created or made from the point at which a party consults a lawyer with a view to obtaining professional legal services from the lawyer in the prosecution or defense of a specific claim in the litigation in which discovery is requested, and
(2) concerning the litigation in which the discovery is requested.

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

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

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

court orders. A party need not request a ruling on that party's own objection or assertion of privilege to preserve the objection or privilege.

(c) *Use of Material or Information Withheld Under Claim of Privilege.*—A party may not use—at any hearing or trial—material or information withheld from discovery under a claim of privilege, including a claim sustained by the court, without timely amending or supplementing the party's response to that discovery.

193.5. *Amending or Supplementing Responses to Written Discovery.*
(a) *Duty to Amend or Supplement.*—If a party learns that the party's response to written discovery was incomplete or incorrect when made, or, although complete and correct when made, is no longer complete and correct, the party must amend or supplement the response:
(1) to the extent that the written discovery sought the identification of persons with knowledge of relevant facts, trial witnesses, or expert witnesses, and
(2) to the extent that the written discovery sought other information, unless the additional or corrective information has been made known to the other parties in writing, on the record at a deposition, or through other discovery responses.

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

193.6. *Failing to Timely Respond—Effect on Trial.*
(a) *Exclusion of Evidence and Exceptions.*—A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that:
(1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or
(2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.

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

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

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

Comments
Exceptions & Applicability:
Rule 193 is effective January 1, 1999, except that a response to a discovery request, an objection to a discovery request, an assertion of privilege, or an amendment or supplementation to a discovery response made before that date need not comply with the new rule. Misc. Docket No. 98-9196 Para. 4d.

Comment to 1999 change:
1. This rule imposes a duty upon parties to make a complete response to written discovery based upon all information reasonably available, subject to objections and privileges.
2. An objection to written discovery does not excuse the responding party from complying with the request to the extent no objection is made. But a party may object to a request for "all documents relevant to the lawsuit" as overly broad and not in compliance with the rule requiring specific requests for documents and refuse to comply with it entirely. *See Loftin v. Martin*, 776 S.W.2d 145 (Tex. 1989). A party may also object to a request for a litigation file on the ground that it is overly broad and may assert that on its face the request seeks only materials protected by privilege. *See National Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993). A party who objects to production of documents from a remote time period should produce documents from a more recent period unless that production would be burdensome and duplicative should the objection be overruled.
3. This rule governs the presentation of all privileges including work product. It dispenses with objections to written discovery requests on the basis that responsive information or materials are protected by a specific privilege from discovery. Instead, the rule requires parties to state that information or materials have been withheld and to identify the privilege upon which the party relies. The statement should not be made prophylactically, but only when specific information and materials have been withheld. The party must amend or supplement the statement if additional privileged information or material is found subsequent to the initial response. Thus, when large numbers of documents are being produced, a party may amend the initial response when documents are found as to which the party claims privilege. A party need not state that material created by or for lawyers for the litigation has been withheld as it can be assumed that such material will be withheld from virtually any request on the grounds of attorney-client privilege or work product. However, the rule does not prohibit a party from specifically requesting the material or information if the party has a good faith basis for asserting that it is discoverable. An example would be material or information described by Rule 503(d)(1) of the Rules of Evidence.
4. Rule 193.3(d) is a new provision that allows a party to assert a claim of privilege to material or information produced inadvertently without intending to waive the privilege. The provision is commonly used in complex cases to reduce costs and risks in large document productions. The focus is on the intent to waive the privilege, not the intent to produce the material or information. A party who fails to diligently screen documents before producing them does not waive a claim of privilege. This rule is thus broader than Tex. R. Evid. 511 and overturns *Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223 (Tex. 1992), to the extent the two conflict. The ten-day period (which may be shortened by the court) allowed for an amended response does not run from the production of the material or information but from the party's first awareness of the mistake. To avoid complications at trial, a party may identify prior to trial the documents intended to be offered, thereby triggering the obligation to assert any overlooked privilege under this rule. A trial court may also order this procedure.
5. This rule imposes no duty to supplement or amend deposition testimony. The only duty to supplement deposition testimony is provided in Rule 195.6.
6. Any party can request a hearing in which the court will resolve issues brought up in objections or withholding statements. The party seeking to avoid discovery has the burden of proving the objection or privilege.
7. The self-authenticating provision is new. Authentication is, of course, but a condition precedent to admissibility and does not establish admissibility. *See* Tex. R. Evid. 901(a). The ten-day period allowed for objection to authenticity (which period may be altered by the court in appropriate circumstances) does not run from the production of the material or information but from the party's actual awareness that the document will be used. To avoid complications at trial, a party may identify prior to trial the documents intended to be offered, thereby triggering the obligation to object to authenticity. A trial court may also order this procedure. An objection to authenticity must be made in good faith.

TEXAS RULES OF CIVIL PROCEDURE 194

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

194.2. *Content.*—A party may request disclosure of any or all of the following:
(a) the correct names of the parties to the lawsuit;
(b) the name, address, and telephone number of any potential parties;
(c) the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial);
(d) the amount and any method of calculating economic damages;

(e) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case;
(f) for any testifying expert:
(1) the expert's name, address, and telephone number;
(2) the subject matter on which the expert will testify;
(3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;
(4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:
(A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and
(B) the expert's current resume and bibliography;
(g) any indemnity and insuring agreements described in Rule 192.3(f);
(h) any settlement agreements described in Rule 192.3(g);
(i) any witness statements described in Rule 192.3(h);
(j) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;
(k) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party;
(*l*) the name, address, and telephone number of any person who may be designated as a responsible third party.

194.3. *Response.*—The responding party must serve a written response on the requesting party within 30 days after service of the request, except that:
(a) a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request, and
(b) a response to a request under Rule 194.2(f) is governed by Rule 195.

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

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

194.6. *Certain Responses Not Admissible.*—A response to requests under Rule 194.2(c) and (d) that has been changed by an amended or supplemental response is not admissible and may not be used for impeachment.

Comments
Comment to 1999 change:
1. Disclosure is designed to afford parties basic discovery of specific categories of information, not automatically in every case, but upon request, without preparation of a lengthy inquiry, and without objection or assertion of work product. In those extremely rare cases when information ordinarily discoverable should be protected, such as when revealing a person's residence might result in harm to the person, a party may move for protection. A party may assert any applicable privileges other than work product using the procedures of Rule 193.3 applicable to other written discovery. Otherwise, to fail to respond fully to a request for disclosure would be an abuse of the discovery process.
2. Rule 194.2© and (d) permit a party further inquiry into another's legal theories and factual claims than is often provided in notice pleadings. So-called "contention interrogatories" are used for the same purpose. Such interrogatories are not properly used to require a party to marshal evidence or brief legal issues. Paragraphs © and (d) are intended to require disclosure of a party's basic assertions, whether in prosecution of claims or in defense. Thus, for example, a plaintiff would be required to disclose that he or she claimed damages suffered in a car wreck caused by defendant's negligence in speeding, and would be required to state how loss of past earnings and future earning capacity was calculated, but would not be required to state the speed at which defendant was allegedly driving.

Paragraph (d) does not require a party, either a plaintiff or a defendant, to state a method of calculating non-economic damages, such as for mental anguish. In the same example, defendant would be required to disclose his or her denial of the speeding allegation and any basis for contesting the damage calculations.
3. Responses under Rule 194.2© and (d) that have been amended or supplemented are inadmissible and cannot be used for impeachment, but other evidence of changes in position is not likewise barred.

2003 Note: The supreme court shall amend Rule 194.2, Texas Rules of Civil Procedure, as soon as practical following September 1, 2003, to include disclosures of the name, address, and telephone number of any person who may be designated as a responsible third party. Stats. 2003 78th Leg. Sess. Ch. 204, § 4.12.

2004 Amendment. Rule 194.2(*l*) is added as required by changes in chapter 33 of the Texas Civil Practice and Remedies Code. The amendment applies in all cases filed on or after July 1, 2003, in which a request under Rule 194.1 is made after May 1, 2004.

TEXAS RULES OF CIVIL PROCEDURE 195

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

195.2. *Schedule for Designating Experts.*—Unless otherwise ordered by the court, a party must designate experts—that is, furnish information requested under Rule 194.2(f)--by the later of the following two dates: 30 days after the request is served, or--
(a) with regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery period;

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

195.3. *Scheduling Depositions.*
(a) *Experts for Party Seeking Affirmative Relief.*—A party seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition as follows:
(1) *If No Report Furnished.*—If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is not produced when the expert is designated, then the party must make the expert available for deposition reasonably promptly after the expert is designated. If the deposition cannot—due to the actions of the tendering party—reasonably be concluded more than 15 days before the deadline for designating other experts, that deadline must be extended for other experts testifying on the same subject.

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

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

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

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

195.6. *Amendment and Supplementation.*—A party's duty to amend and supplement written discovery regarding a testifying expert is governed by Rule 193.5. If an expert witness is retained by, employed by, or otherwise under the control of a party, that party must also 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.

Comments
Exceptions & Applicability:
Rule 195 is effective January 1, 1999, except that: interrogatories that have been served but not answered as of that date and request information pertaining to experts should be answered; and the rule should not be applied to disrupt expert discovery that is in progress or impending, or that has been scheduled by order or by agreement of the parties. Misc. Docket No. 98-9196 Para. 4e.

Comment to 1999 change:
1. This rule does not limit the permissible methods of discovery concerning consulting experts whose mental impressions or opinions have been reviewed by a testifying expert. *See* Rule 192.3(e). Information concerning purely consulting experts, of course, is not discoverable.
2. This rule and Rule 194 do not address depositions of testifying experts who are not retained by, employed by, or otherwise subject to the control of the responding party, nor the production of the materials identified in Rule 192.3(e)(5) and (6) relating to such experts. Parties may obtain this discovery, however, through Rules 176 and 205.
3. In scheduling the designations and depositions of expert witnesses, the rule attempts to minimize unfair surprise and undue expense. A party seeking affirmative relief must either produce an expert's report or tender the expert for deposition before an opposing party is required to designate experts. A party who does not wish to incur the expense of a report may simply tender the expert for deposition, but a party who wishes an expert to have the benefit of an opposing party's expert's opinions before being deposed may trigger designation by providing a report. Rule 191.1 permits a trial court, for good cause, to modify the order or deadlines for designating and deposing experts and the allocation of fees and expenses.

TEXAS RULES OF CIVIL PROCEDURE 196

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

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

(c) *Requests for Production of Medical or Mental Health Records Regarding Nonparties.*
(1) *Service of Request on Nonparty.* If a party requests another party to
produce medical or mental health records regarding a nonparty, the requesting party must serve the nonparty with the request for production under Rule 21a.

(2) *Exceptions.* A party is not required to serve the request for production on a nonparty whose medical records are sought if:
(A) the nonparty signs a release of the records that is effective as to the requesting party;
(B) the identity of the nonparty whose records are sought will not directly or indirectly be disclosed by production of the records; or
(C) the court, upon a showing of good cause by the party seeking the records, orders that service is not required.

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

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

(b) *Content of Response.*—With respect to each item or category of items, the responding party must state objections and assert privileges as required by these rules, and state, as appropriate, that:
(1) production, inspection, or other requested action will be permitted as requested;
(2) the requested items are being served on the requesting party with the response;
(3) production, inspection, or other requested action will take place at a specified time and place, if the responding party is objecting to the time and place of production; or
(4) no items have been identified—after a diligent search—that are responsive to the request.

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

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

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

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

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

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

196.7. *Request or Motion for Entry upon Property.*
(a) *Request or Motion.*—A party may gain entry on designated land or other property to inspect, measure, survey, photograph, test, or sample the property or any designated object or operation thereon by serving—no later than 30 days before the end of any applicable discovery period--
(1) a request on all parties if the land or property belongs to a party, or
(2) a motion and notice of hearing on all parties and the nonparty if the land or property belongs to a nonparty. If the identity or address of the nonparty is unknown and cannot be obtained through reasonable diligence, the court must permit service by means other than those specified in Rule 21a that are reasonably calculated to give the nonparty notice of the motion and hearing.

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

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

(2) *Content of Response.*—The responding party must state objections and assert privileges as required by these rules, and state, as appropriate, that:
(A) entry or other requested action will be permitted as requested;
(B) entry or other requested action will take place at a specified time and place, if the responding party is objecting to the time and place of production; or
(C) entry or other requested action cannot be permitted for reasons stated in the response.

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

Comments
Comment to 1999 change:
1. "Document and tangible things" are defined in Rule 192.3(b).
2. A party requesting sampling or testing must describe the procedure with sufficient specificity to enable the responding party to make any appropriate objections.
3. A party requesting production of magnetic or electronic data must specifically request the data, specify the form in which it wants the data produced, and specify any extraordinary steps for retrieval and translation. Unless ordered otherwise, the responding party need only produce the data reasonably available in the ordinary course of business in reasonably usable form.
4. The rule clarifies how the expenses of production are to be allocated absent a court order to the contrary.
5. The obligation of parties to produce documents within their possession, custody or control is explained in Rule 192.3(b).
6. Parties may request production and inspection of documents and tangible things from nonparties under Rule 205.3.
7. Rule 196.3(b) is based on Tex. R. Evid. 1003.
8. Rule 196.1(c) is merely a notice requirement and does not expand the scope of discovery of a nonparty's medical records.

TEXAS RULES OF CIVIL PROCEDURE 197

197.1. *Interrogatories.*—A party may serve on another party—no later than 30 days before the end of the discovery period—written interrogatories to inquire about any matter within the scope of discovery except matters covered by Rule 195. An interrogatory may inquire whether a party makes a specific legal or factual contention and may ask the responding party to state the legal theories and to describe in general the factual bases for the party's claims or defenses, but interrogatories may not be used to require the responding party to marshal all of its available proof or the proof the party intends to offer at trial.

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

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

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

must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them.

(d) *Verification Required; Exceptions.*—A responding party—not an agent or attorney as otherwise permitted by Rule 14--must sign the answers under oath except that:
(1) when answers are based on information obtained from other persons, the party may so state, and
(2) a party need not sign answers to interrogatories about persons with knowledge of relevant facts, trial witnesses, and legal contentions.

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

Comment to 1999 change:
1. Interrogatories about specific legal or factual assertions—such as, whether a party claims a breach of implied warranty, or when a party contends that limitations began to run—are proper, but interrogatories that ask a party to state all legal and factual assertions are improper. As with requests for disclosure, interrogatories may be used to ascertain basic legal and factual claims and defenses but may not be used to force a party to marshal evidence. Use of the answers to such interrogatories is limited, just as the use of similar disclosures under Rule 194.6 is.
2. Rule 191's requirement that a party's attorney sign all discovery responses and objections applies to interrogatory responses and objections. In addition, the responding party must sign some interrogatory answers under oath, as specified by the rule. Answers in amended and supplemental responses must be signed by the party under oath only if the original answers were required to be signed under oath. The failure to sign or verify answers is only a formal defect that does not otherwise impair the answers unless the party refuses to sign or verify the answers after the defect is pointed out.

TEXAS RULES OF CIVIL PROCEDURE 198

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

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

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

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

198.3. *Effect of Admissions; Withdrawal or Amendment.*—Any admission made by a party under this rule may be used solely in the pending action and not in any other proceeding. A matter admitted under this rule is conclusively established as to the party making the admission unless the court permits the party to withdraw or amend the admission. The court may permit the party to withdraw or amend the admission if:
(a) the party shows good cause for the withdrawal or amendment; and
(b) the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved by permitting the party to amend or withdraw the admission.

TEXAS RULES OF CIVIL PROCEDURE 199

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

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

(c) *Nonstenographic Recording.*—Any party may cause a deposition upon oral examination to be recorded by other than stenographic means, including videotape recording. The party requesting the nonstenographic recording will be responsible for obtaining a person authorized by law to administer the oath and for assuring that the recording will be intelligible, accurate, and trustworthy. At least five days prior to the deposition, the party must serve on the witness and all parties a notice, either in the notice of deposition or separately, that the deposition will be recorded by other than stenographic means. This notice must state the method of nonstenographic recording to be used and whether the deposition will also be recorded stenographically. Any other party may then serve written notice designating another method of recording in addition to the method specified, at the expense of such other party unless the court orders otherwise.

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

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

(2) *Time and Place.*—The notice must state a reasonable time and place for the oral deposition. The place may be in:
(A) the county of the witness's residence;
(B) the county where the witness is employed or regularly transacts business in person;
(C) the county of suit, if the witness is a party or a person designated by a party under Rule 199.2(b)(1);
(D) the county where the witness was served with the subpoena, or within 150 miles of the place of service, if the witness is not a resident of Texas or is a transient person; or
(E) subject to the foregoing, at any other convenient place directed by the court in which the cause is pending.

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

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

(5) *Request for Production of Documents.*—A notice may include a request that the witness produce at the deposition documents or tangible things within the scope of discovery and within the witness's possession, custody, or control. If the witness is a nonparty, the request must comply with Rule 205 and the designation of materials

required to be identified in the subpoena must be attached to, or included in, the notice. The nonparty's response to the request is governed by Rules 176 and 205. When the witness is a party or subject to the control of a party, document requests under this subdivision are governed by Rules 193 and 196.

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

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

199.5. *Examination, Objection, and Conduct During Oral Depositions.*
(a) *Attendance.*
(1) Witness. The witness must remain in attendance from day to day until the deposition is begun and completed.

(2) *Attendance by Party.*—A party may attend an oral deposition in person, even if the deposition is taken by telephone or other remote electronic means. If a deposition is taken by telephone or other remote electronic means, the party noticing the deposition must make arrangements for all persons to attend by the same means. If the party noticing the deposition appears in person, any other party may appear by telephone or other remote electronic means if that party makes the necessary arrangements with the deposition officer and the party noticing the deposition.

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

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

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

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

(e) *Objections.*—Objections to questions during the oral deposition are limited to "Objection, leading" and "Objection, form." Objections to testimony during the oral deposition are limited to "Objection, nonresponsive." These objections are waived if not stated as phrased during the oral deposition. All other objections need not be made or recorded during the oral deposition to be later raised with the court. The objecting party must give a clear and concise explanation of an objection if requested by the party taking the oral deposition, or the objection is waived. Argumentative or suggestive objections or explanations waive objection and may be grounds for terminating the oral deposition or assessing costs or other sanctions. The officer taking the oral deposition will not rule on objections but must record them for ruling by the court. The officer taking the oral deposition must not fail to record testimony because an objection has been made.

(f) *Instructions Not to Answer*.—An attorney may instruct a witness not to answer a question during an oral deposition only if necessary to preserve a privilege, comply with a court order or these rules, protect a witness from

an abusive question or one for which any answer would be misleading, or secure a ruling pursuant to paragraph (g). The attorney instructing the witness not to answer must give a concise, nonargumentative, nonsuggestive explanation of the grounds for the instruction if requested by the party who asked the question.

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

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

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

Comment to 1999 change:
1. Rule 199.2(b)(5) incorporates the procedures and limitations applicable to requests for production or inspection under Rule 196, including the 30-day deadline for responses, as well as the procedures and duties imposed by Rule 193.
2. For purposes of Rule 199.5(c), each person designated by an organization under Rule 199.2(b)(1) is a separate witness.
3. The requirement of Rule 199.5(d) that depositions be conducted in the same manner as if the testimony were being obtained in court is a limit on the conduct of the lawyers and witnesses in the deposition, not on the scope of the interrogation permitted by Rule 192.
4. An objection to the form of a question includes objections that the question calls for speculation, calls for a narrative answer, is vague, is confusing, or is ambiguous. Ordinarily, a witness must answer a question at a deposition subject to the objection. An objection may therefore be inadequate if a question incorporates such unfair assumptions or is worded so that any answer would necessarily be misleading. A witness should not be required to answer whether he has yet ceased conduct he denies ever doing, subject to an objection to form (i.e., that the question is confusing or assumes facts not in evidence) because any answer would necessarily be misleading on account of the way in which the question is put. The witness may be instructed not to answer. Abusive questions include questions that inquire into matters clearly beyond the scope of discovery or that are argumentative, repetitious, or harassing.

TEXAS RULES OF CIVIL PROCEDURE 200

200.1. *Procedure for Noticing Deposition upon Written Questions.*
(a) *Who May Be Noticed; When.*—A party may take the testimony of any person or entity by deposition on written questions before any person authorized by law to take depositions on written questions. A notice of intent to take the deposition must be served on the witness and all parties at least 20 days before the deposition is taken. A deposition on written questions may be taken outside the discovery period only by agreement of the parties or with leave of court. The party noticing the deposition must also deliver to the deposition officer a copy of the notice and of all written questions to be asked during the deposition.

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

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

200.3. *Questions and Objections.*
(a) *Direct Questions.*—The direct questions to be propounded to the witness must be attached to the notice.

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

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

200.4. *Conducting the Deposition upon Written Questions.*—The deposition officer must: take the deposition on written questions at the time and place designated; record the testimony of the witness 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.

Comment to 1999 change:
1. The procedures for asserting objections during oral depositions under Rule 199.5(e) do not apply to depositions on written questions.
2. Section 20.001 of the Civil Practice and Remedies Code provides that a deposition on written questions of a witness who is alleged to reside or to be in this state may be taken by a clerk of a district court, a judge or clerk of a county court, or a notary public of this state.

TEXAS RULES OF CIVIL PROCEDURE 201
201.1. *Depositions in Foreign Jurisdictions for Use in Texas Proceedings.*
(a) *Generally.*—A party may take a deposition on oral examination or written questions of any person or entity located in another state or a foreign country for use in proceedings in this State. The deposition may be taken by:
(1) notice;
(2) letter rogatory, letter of request, or other such device;
(3) agreement of the parties; or
(4) court order.

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

(c) *By Letter Rogatory.*—On motion by a party, the court in which an action is pending must issue a letter rogatory on terms that are just and appropriate, regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter must:
(1) be addressed to the appropriate authority in the jurisdiction in which the deposition is to be taken;
(2) request and authorize that authority to summon the witness before the authority at a time and place stated in the letter for examination on oral or written questions; and
(3) request and authorize that authority to cause the witness's testimony to be reduced to writing and returned, together with any items marked as exhibits, to the party requesting the letter rogatory.

(d) *By Letter of Request or Other Such Device.*—On motion by a party, the court in which an action is pending, or the clerk of that court, must issue a letter of request or other such device in accordance with an applicable treaty or international convention on terms that are just and appropriate. The letter or other device must be issued regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter or other device must:
(1) be in the form prescribed by the treaty or convention under which it is issued, as presented by the movant to the

court or clerk; and
(2) must state the time, place, and manner of the examination of the witness.

(e) *Objections to Form of Letter Rogatory, Letter of Request, or Other Such Device.*—In issuing a letter rogatory, letter of request, or other such device, the court must set a time for objecting to the form of the device. A party must make any objection to the form of the device in writing and serve it on all other parties by the time set by the court, or the objection is waived.

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

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

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

Comment to 1999 change:
1. Rule 201.1 sets forth procedures for obtaining deposition testimony of a witness in another state or foreign jurisdiction for use in Texas court proceedings. It does not, however, address whether any of the procedures listed are, in fact, permitted or recognized by the law of the state or foreign jurisdiction where the witness is located. A party must first determine what procedures are permitted by the jurisdiction where the witness is located before using this rule.
2. Section 20.001 of the Civil Practice and Remedies Code provides a nonexclusive list of persons who are qualified to take a written deposition in Texas and who may take depositions (oral or written) in another state or outside the United States.
3. Rule 201.2 is based on Section 20.002 of the Civil Practice and Remedies Code.

TEXAS RULES OF CIVIL PROCEDURE 204

204.1. *Motion and Order Required.*
(a) *Motion.*—A party may—no later than 30 days before the end of any applicable discovery period—move for an order compelling another party to:
(1) submit to a physical or mental examination by a qualified physician or a mental examination by a qualified psychologist; or
(2) produce for such examination a person in the other party's custody, conservatorship or legal control.

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

(c) *Requirements for Obtaining Order.*—The court may issue an order for examination only for good cause shown and only in the following circumstances:
(1) when the mental or physical condition (including the blood group) of a party, or of a person in the custody, conservatorship or under the legal control of a party, is in controversy; or
(2) except as provided in Rule 204.4, an examination by a psychologist may be ordered when the party responding to the motion has designated a psychologist as a testifying expert or has disclosed a psychologist's records for possible use at trial.

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

204.2. *Report of Examining Physician or Psychologist.*
(a) *Right to Report.*—Upon request of the person ordered to be examined, the party causing the examination to be made must deliver to the person a copy of a detailed written report of the examining physician or psychologist setting out the findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery of the report, upon request of the party causing the examination,

the party against whom the order is made must produce a like report of any examination made before or after the ordered examination of the same condition, unless the person examined is not a party and the party shows that the party is unable to obtain it. The court on motion may limit delivery of a report on such terms as are just. If a physician or psychologist fails or refuses to make a report the court may exclude the testimony if offered at the trial.

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

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

204.4. *Cases Arising Under Titles II or V, Family Code.*—In cases arising under Family Code Titles II or V, the court may—on its own initiative or on motion of a party—appoint:
(a) one or more psychologists or psychiatrists to make any and all appropriate mental examinations of the children who are the subject of the suit or of any other parties, and may make such appointment irrespective of whether a psychologist or psychiatrist has been designated by any party as a testifying expert;
(b) one or more experts who are qualified in paternity testing to take blood, body fluid, or tissue samples to conduct paternity tests as ordered by the court.

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

EDITOR'S NOTES. Former Rule 204 was repealed effective January 1, 1999. See Rule 199.

TEXAS RULES OF CIVIL PROCEDURE 205

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—a reasonable time before the response is due but no later than 30 days before the end of any applicable discovery period—the notice required in Rule 205.2 and a subpoena compelling production or inspection of documents or tangible things.

(b) *Contents of Notice.*—The notice must state:
(1) the name of the person from whom production or inspection is sought to be compelled;
(2) a reasonable time and place for the production or inspection; and
(3) the items to be produced or inspected, either by individual item or by category, describing each item and category with reasonable particularity, and, if applicable, describing the desired testing and sampling with sufficient specificity to inform the nonparty of the means, manner, and procedure for testing or sampling.

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

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

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

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

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

TEXAS RULES OF CIVIL PROCEDURE 215

215.1. *Motion for Sanctions or Order Compelling Discovery.*—A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows:
(a) *Appropriate Court.*—On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, an application for an order will be made to the court in which the action is pending.

(b) *Motion.*
(1) If a party or other deponent which is a corporation or other entity fails to make a designation under Rules 199.2(b)(1) or 200.1(b); or
(2) if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails:
(A) to appear before the officer who is to take his deposition, after being served with a proper notice; or
(B) to answer a question propounded or submitted upon oral examination or upon written questions; or
(3) if a party fails:
(A) to serve answers or objections to interrogatories submitted under Rule 197, after proper service of the interrogatories; or
(B) to answer an interrogatory submitted under Rule 197; or
(C) to serve a written response to a request for inspection submitted under Rule 196, after proper service of the request; or
(D) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 196; the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by Rule 215.2(b) without the necessity of first having obtained a court order compelling such discovery.

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

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule 192.6.

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

(d) *Disposition of Motion to Compel: Award of Expenses.*—If the motion is granted, the court shall, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the

motion was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

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

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

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

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

215.2. *Failure to Comply with Order or with Discovery Request.*
(a) *Sanctions by Court in District Where Deposition is Taken.*—If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.
(b) *Sanctions by Court in Which Action is Pending.*—If a party or an officer, director, or managing agent of a party or a person designated under Rules 199.2(b)(1) or 200.1(b) to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under Rules 204 or 215.1, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:
(1) an order disallowing any further discovery of any kind or of a particular kind by the disobedient party;
(2) an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;
(3) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
(4) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
(5) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;
(6) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
(7) when a party has failed to comply with an order under Rule 204 requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.
(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

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

215.3. *Abuse of Discovery Process in Seeking, Making, or Resisting Discovery.*—If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after notice

and hearing, impose any appropriate sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of Rule 215.2(b). Such order of sanction shall be subject to review on appeal from the final judgment.

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

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

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

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

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

New rule effective April 1, 1984: Rule 170 is deleted because this rule covers conduct in violation of Rule 167. The revisions to Rule 168, the deletion of Rule 170, and the provisions of new Rule 215 are intended to clarify under what circumstances the most severe sanctions authorized under the rules are imposable. New Rule 215 retains the conclusion reached in *Lewis v. Illinois Employers Ins. Co. of Wausau*, 590 S.W.2d 119 (Tex. 1979), and extends such rule to cover all discovery requests, except requests for admissions. New Rule 215 leaves to the discretion of the court whether to impose sanctions with or without an order compelling discovery, so that the court will be free to apply the proper sanction or order based upon the degree of the discovery abuse involved.
This rule is rewritten to gather all discovery sanctions into a single rule. It includes specific provisions concerning the consequences of failing to comply with Rule 169, and spells out penalties imposable upon a party who fails to supplement discovery responses. It provides for sanctions for those who seek to make discovery in an abusive manner.

Change by amendment effective January 1, 1988: This amendment states that the party offering the evidence has the burden of establishing good cause for any failure to supplement discovery before trial and provides a manner for making a record for discovery hearings.

Change by amendment effective September 1, 1990: To require notice and hearing before an imposition of sanctions under subdivision 3, and to specify that such sanctions be appropriate.

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