AGENDA
MAY 19-20, 1995
SCAC MEETING

INDEX

May 19-20, 1995

REPORT OF THE SUPREME COURT ADVISORY COMMITTEE ON PROPOSED CHANGES TO THE JURY CHARGE RULES

Rule 226. Oath to Jury Panel

Before the parties or their attorneys begin the examination of the ~~jurors whose names have thus been listed~~ jury panel, the jurors shall be sworn by the court or under its direction as follows: "~~You, and each of you, d~~ Do you solemnly swear or affirm that you will give true answers ~~give~~ to all questions ~~propounded to you~~ concerning your qualifications as a juror~~, so help you God.~~?"

Notes and Comments

Comment to 1995 change:

Rule 226a. ~~Admonitory~~ Instructions to Jury Panel and Jury

The ~~court~~ judge shall give ~~such admonitory~~ the following instructions to the jury panel and to the jury ~~as may be prescribed by the Supreme Court in an order or orders entered for that purpose~~. If the case is tried to a six-person jury, the references to ten or eleven jurors in these instructions should be changed to read "five."

~~APPROVED INSTRUCTIONS~~

~~Pursuant to the provisions of Rule 226a, Texas Rules of Civil Procedure, it is ordered [July 20, 1966] by the Supreme Court of Texas, effective January 1, 1967; January 1, 1971; February 1, 1973; December 5, 1983, effective April 1, 1984:~~

~~I.~~

~~That the following oral instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jurors after they have been sworn as provided in Rule 226 and before the voir dire examination:~~

PART 1 - JURY PANEL

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

~~Ladies and Gentlemen~~ Members of the Jury Panel: The case that is now on trial is _____ vs. _____. This is a civil ~~action~~ lawsuit ~~which~~ that will be tried before a

jury. Your duty as jurors will be to decide the disputed facts. It is ~~the~~ my duty ~~of the~~ as judge to see that the case is tried in accordance with the rules of law. ~~In this case, as in all cases, the actions of the judge, parties, witnesses, attorneys and jurors must be according to law. The Texas law permits proof of any violation of the rules of proper jury conduct. By this I mean that jurors and others may be called upon to testify in open court about acts of jury misconduct. I instruct you, therefore, to~~ It is very important that you follow carefully all instructions that I give you now and later during the trial. If you do not obey these instructions ~~I am about to give you~~, it may become necessary for another jury to re-try this case with all of the ~~attendant~~ resulting waste of your time here and the expense to the litigants and the taxpayers of this county for another trial. ~~These~~ Your initial instructions are as follows:

1. Do not mingle ~~with~~ nor talk with the parties, the lawyers, the witnesses, ~~the parties,~~ or any other person who might be connected with or interested in this case, except for casual greetings. ~~They have to follow these same instructions and you will understand it when they do.~~ You may not even have casual conversation about things completely unrelated to this lawsuit with any of these people.

2. Do not accept ~~from, nor give to, any of those persons~~ any favors from these people, and do not give them any favors. You must avoid even ~~however~~ slight favors, such as rides, food or refreshments.

3. Do not discuss ~~anything about~~ this case with anyone~~, or even mention it to anyone whomsoever,~~ including your ~~wife or husband, nor permit anyone to mention it~~ spouse. Do not let anyone discuss the case in your hearing ~~until you are discharged as jurors or excused from this case~~. If anyone ~~attempts to discuss~~ tries to talk about the case with you or in your hearing, ~~report it to me at once~~ tell me or the baliff immediately.

4. The ~~parties through their~~ attorneys will now have an opportunity to talk with you about the case and the parties involved, and to ask you some ~~have the right to direct~~ questions ~~to each of you concerning~~ about your ~~qualifications,~~ background~~s~~, experiences~~,~~ ~~and~~ attitudes~~, and opinions~~. In questioning you, they are not meddling in your personal affairs, but are trying to select a fair and impartial jury~~ors~~ ~~who are~~ free from any bias or prejudice in this particular case.

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

~~b~~5. If ~~the attorneys ask some~~ a question~~s~~ ~~directed to you as a group which~~ is asked of the whole panel or part of the panel that require~~s~~ an answer ~~on your part individually~~ from you, ~~hold up~~ please raise your hand and keep it raised long enough for everyone to make a note of those who responded ~~until you have answered the questions~~.

~~Do you understand these instructions? If not, please let me know now.~~

~~Whether you are selected as a juror for this case or not, you are performing a significant service which only free people can perform. We shall try the case as fast as possible consistent with justice, which requires a careful and correct trial. If selected on the jury, unless I instruct you differently, you will be permitted to separate at recesses and for meals, and at night.~~

~~The attorneys will now proceed with their examination.~~ Counsel you may proceed.

~~II.~~

~~That the following oral and written instructions, with such modifications as the circumstances of the particular case may require shall be given by the court to the jury immediately after the jurors are selected for the case:~~

~~ORAL INSTRUCTIONS~~

PART 2 - JURY

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

By ~~the~~ your oath ~~which you take as jurors~~, you ~~become~~ are now officials of this court, and active participants in the ~~public~~ administration of justice. ~~I now give you further instructions which you must obey throughout this trial.~~ It is essential to the

administration of fair and impartial justice that you follow these instructions:

~~It is your duty to listen to and consider the evidence and to determine fact issues later submitted to you, but I, as judge, will decide matters of the law. You will now receive written instructions which you will observe during this trial, together with such other instructions as I may hereafter give, or as heretofore I have given to you.~~

~~(A copy of the written instructions set out below in this Section II shall thereupon be handed to each juror.)~~

~~As you examine the instructions which have just been handed to you, we will go over them briefly together. The first three instructions have previously been stated, and you will continue to observe them throughout the trial. These and the other instructions just handed to you are as follows:~~

~~(The written instructions set out below in this Section II shall thereupon be read by the court to the jury.)~~

~~Counsel, you may proceed.~~

~~WRITTEN INSTRUCTIONS~~

1. ~~Do not mingle with nor talk to the lawyers, the witnesses, the parties, or any other person who might be connected with or interested in this case, except for casual greetings. They have to follow these same instructions and you will understand it when they do.~~ You must continue to obey the instructions I gave you earlier. Do not talk about the case with anyone, and do not

have any contact with the parties, attorneys, witnesses, or other interested persons outside the courtroom.

~~2. Do not accept from, nor give to, any of those persons any favors however slight, such as rides, food or refreshments.~~

~~3. Do not discuss anything about this case, or even mention it to anyone whomsoever, including your wife or husband nor permit anyone to mention it in your hearing until you are discharged as jurors or excused from this case. If anyone attempts to discuss the case, report it to me at once.~~

~~4~~2. Do not even discuss ~~this~~ the case among yourselves until ~~after~~ you have heard all of the evidence, the court's charge, the attorneys' arguments, and ~~until~~ I have sent you to the jury room to ~~consider your verdict~~ begin your deliberations.

~~5~~3. ~~Do not make any investigation about the facts of this case. Occasionally we have a juror who privately seeks out information about a case on trial. This is improper. All evidence must be presented in open court so that each side may question the witnesses and make proper objection. This avoids a trial based upon secret evidence. These rules apply to jurors the same as they apply to the parties and to me. If you know of, or learn anything about, this case except from the evidence admitted during the course of this trial, you should tell me about it at once. You have just taken an oath that you will render a verdict on the evidence submitted to you under my rulings.~~ You are the judges of the facts of this case. It is your duty to listen to and consider carefully the evidence admitted under my rulings, and to answer the

specific questions about the facts that I will submit to you in writing.

~~6~~4. In answering these questions, you can consider only the evidence admitted during the trial. Do not make ~~personal inspections, observations,~~ any investigations~~, or experiments nor personally view premises, things or articles not produced in court~~ about the facts of this case. Do not seek out any information contained in documents, books, or records that are not in evidence. Do not make personal inspections or observations outside the courtroom. Do not let anyone else do any of these things for you. This avoids a trial based upon secret evidence.

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

6. During the presentation of evidence, the attorneys may make legal objections. If an objection to a question is sustained, disregard the question, and do not speculate about why it was asked or what the answer might have been. If an objection to a witness's answer is sustained, disregard that answer. It is not in evidence, and should not be considered. Do not speculate about or consider for any reason the objections or my rulings on them.

I stress again that it is imperative that you follow these instructions, as well as any others that I may give you later. If you do not obey these instructions, then it may become necessary for another jury to retry this case with all of the resulting waste of your time here and the expense to the litigants and the

taxpayers of this county for another trial. Keep your copy of these instructions, and refer to them should any question arise about the rules that govern your conduct during the trial. A violation of any instruction must be reported to me or the baliff as soon as possible.

~~7. Do not tell other jurors your own personal experiences nor those of other persons, nor relate any special information. A juror may have special knowledge of matters such as business, technical or professional matters or he may have expert knowledge or opinions, or he may know what happened in this or some other lawsuit. To tell the other jurors any of this information is a violation of these instructions.~~

~~8. Do not discuss or consider attorney's fees unless evidence about attorney's fees is admitted.~~

~~9. Do not consider, discuss, nor speculate whether or not any party is or is not protected in whole or in part by insurance of any kind.~~

~~10. Do not seek information contained in law books, dictionaries, public or private records or elsewhere, which is not admitted in evidence.~~

~~At the conclusion of all the evidence, I may submit to you a written charge asking you some specific questions. You will not be asked, and you should not consider, whether one party or the other should win. Since you will need to consider all of the evidence admitted by me, it is important that you pay close attention to the evidence as it is presented.~~

~~The Texas law permits proof of any violation of the rules of proper jury conduct. By this I mean that jurors and others may be called upon to testify in open court about acts or jury misconduct. I instruct you, therefore, to follow carefully all instructions which I have given you, as well as others which you later receive while this case is on trial.~~

~~You may keep these instructions and review them as the case proceeds. A violation of these instructions should be reported to me.~~

~~III.~~ PART 3 - COURT'S CHARGE

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

~~Ladies and Gentlemen of the Jury:~~

1. This case is submitted to you by asking questions about the facts.~~,~~ ~~which you must decide from~~ Your answers must be based only upon the evidence, including exhibits, admitted during the ~~you have heard in this~~ trial.

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

3. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony~~, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will~~

~~observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.~~

~~1~~4. Do not let bias, prejudice or sympathy play any part in your deliberations.

~~2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.~~

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

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

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

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

~~3~~9. ~~Since e~~Every answer ~~that is~~ required by the charge is important~~, no juror should state or consider that any required answer is not important~~.

~~4~~10. ~~You must~~ Do not decide who you think should win~~,~~ and then try to answer the questions accordingly. Simply answer the questions~~,~~; and do not ~~discuss nor~~ concern yourselves with the effect of your answers.

~~5~~11. ~~You will~~ Do not decide ~~the answer to~~ a question by ~~lot or by drawing straws, or by~~ any ~~other~~ method of chance.

12. ~~Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by~~ If a question calls for a numerical answer, the figure should be one agreed to by the jurors, not one reached by adding together each juror's figure~~s~~ and then dividing by the number of jurors to get an average.

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

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

15. It is the duty of that presiding juror:

a. to preside during the deliberations to maintain order and compliance with all instructions given you;

b. to write, sign, and deliver to the bailiff any communication to me;

c. to conduct the vote; and

d. to write your answers in the spaces provided.

16. You may render your verdict ~~upon~~ the vote of ten or more members of the jury~~. The~~, but the same ten or more ~~of you~~ must agree upon ~~all of the~~ each and every answers ~~made and to the entire verdict~~. ~~You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten* jurors.~~

17. If the verdict ~~and all of the answers therein are~~ is reached by unanimous agreement, the presiding juror ~~shall~~ will sign the verdict on the certificate page for the entire jury.

18. ~~If any juror disagrees as to any answer made by the verdict, those jurors~~ If the verdict is less than unanimous, the ten or eleven jurors who agree to ~~all findings shall~~ each and every answer will sign the verdict individually on the certificate page.

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

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

21. You must not discuss the case with anyone, not even with other members of the jury, unless all of the jurors are in the jury room. If anyone other than a juror tries to talk to you about the

case before you reach a verdict, tell me or the bailiff immediately.

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

~~These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys, and the judges. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.~~

~~The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.~~

[Instructions, ~~D~~definitions, and questions ~~and special instructions given to the jury will be transcribed~~ to be placed here.]

CERTIFICATE

We, the jury~~,~~ have answered the ~~above and foregoing~~ questions as shown and ~~as herein indicated, and herewith~~ return these answers to the ~~same into~~ court as our verdict.

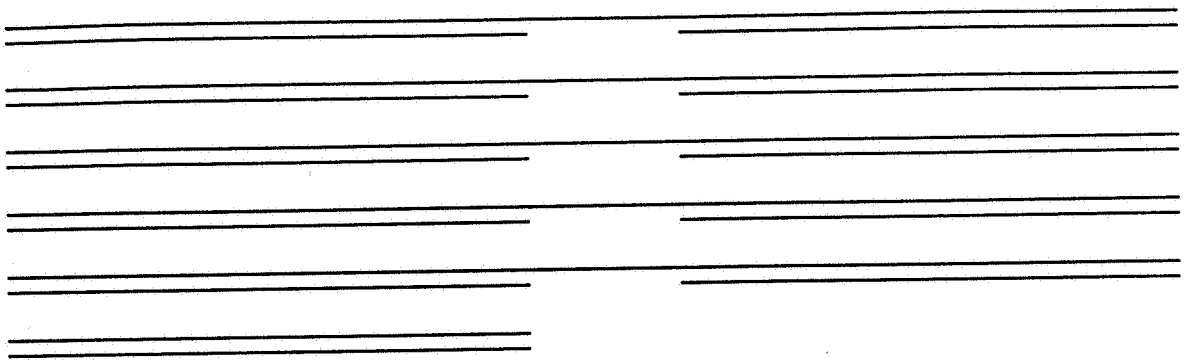
~~(To be signed by the presiding juror if unanimous.)~~

_____

~~Presiding Juror~~

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

~~(To be signed by those rendering the verdict if not unanimous.)~~



Signatures of juror voting for the verdict, if not unanimous

[Eleven signature lines here.]

PART 4 - JURY RELEASE

~~IV.~~

~~That~~ The judge shall give the jury the following oral instructions ~~shall be given by the court to the jury~~ after accepting the verdict ~~has been accepted by the court and before the jurors are discharged~~ and then release them:

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

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

~~After you are discharged, it is lawful for the attorneys or other persons to question you to determine whether any of the standards for jury conduct which I have given you in the course of this trial were violated and to ask you to give an affidavit to that effect. You are free to discuss or not to discuss these matters and to give or not to give an affidavit.~~

Notes and Comments

Comment to 1995 change:

Rule 236. ~~Oath to~~ Jury~~or~~'s Oath

The jury shall be sworn by the court or under its direction~~,~~ ~~in substance~~ as follows: "~~You, and each of you, d~~Do you solemnly swear or affirm that ~~in all cases between parties which shall be to you submitted,~~ you will return a true verdict ~~render~~, according to the law~~, as it may be given you~~ stated in the court's charge ~~by the court,~~ and ~~to~~ the evidence submitted to you under the rulings of ~~the~~ this court~~.~~? ~~So help you God.~~"

Notes and Comments

Comment to 1995 change:

Rule 271. Charge to the Jury

~~Unless expressly waived by the parties, t~~The trial court shall prepare ~~and in open court deliver~~ a written charge to the jury. ~~(FROM A PORTION OF FORMER RULE 272)~~. ~~It shall be submitted to the respective parties or their attorneys for inspection, and a~~ The court shall provide counsel with written copies of the proposed charge, and shall provide a reasonable ~~time given them in which to examine and present~~ opportunity for the parties to prepare their requests and objections ~~thereto~~ and to present them on the record outside the presence of the jury~~, which objections shall in every instance be presented to the court in writing, or be dictated to the court reporter in the presence of the court and opposing counsel,~~ after the conclusion of the evidence and before the charge is read to the jury. ~~(FROM A PORTION OF FORMER RULE 275)~~. ~~Before the argument is begun,~~ After the requests and objections are made and ruled upon and any modifications to the charge are made, ~~T~~the ~~trial~~ court shall read the charge to the jury in open court in the precise words in which it is written~~, including all questions, definitions, and instructions which the court may give~~. The court shall deliver one or more copies of the written charge to the jury. ~~(FROM A PORTION OF FORMER RULE 272).~~ The charge shall be ~~in writing,~~ signed by the court~~,~~ and filed with the clerk~~, and shall be a part of the record of the cause~~.

Notes and Comments

Comment to 1995 change:

Rule 272. ~~Requisites~~ Standards for the Jury Charge

~~The charge shall be in writing, signed by the court, and filed with the clerk, and shall be a part of the record of the cause. It shall be submitted to the respective parties or their attorneys for their inspection, and a reasonable time given them in which to examine and present objections thereto outside the presence of the jury, which objections shall in every instance be presented to the court in writing, or be dictated to the court reporter in the presence of the court and opposing counsel, before the charge is read to the jury. All objections not so presented shall be considered as waived. The court shall announce its rulings thereon before reading the charge to the jury and shall endorse the rulings on the objections if written or dictate same to the court reporter in the presence of counsel. Objections to the charge and the court's rulings thereon may be included as a part of any transcript or statement of facts on appeal and, when so included in either, shall constitute a sufficient bill of exception to the rulings of the court thereon. It shall be presumed, unless otherwise noted in the record, that the party making such objections presented the same at the proper time and excepted to the ruling thereon.~~

1. General Standards

(FROM A PORTION OF FORMER RULE 278)

a. Pleading Required. ~~Except in trespass to try title, statutory partition proceedingss, and other special proceedings in which pleadings are specially defined by statutes or procedural rules, a~~A party who has the burden of pleading a matter shall not

be entitled to ~~any~~ the submission of a~~ny~~ question, instruction, or definition regarding that matter unless the matter is affirmatively ~~raised only by a general denial and not~~ raised by ~~affirmative written pleading by that~~ by the party's pleading.

(FROM A PORTION OF FORMER RULE 277.)

b. Comment on the Evidence. The ~~court shall not in its~~ charge ~~comment~~ shall not directly comment on the weight of the evidence or advise the jury of the effect of ~~their~~ any answers, but ~~the court's charge~~ an otherwise proper question, instruction, or definition shall not be objectionable on the ground that it incidentally comments on the weight of the evidence or advises the jury of the effect of ~~their~~ any answers ~~when it is properly a part of an instruction or definition~~. The charge shall not submit different shades of the same question, definition, or instruction.

(FROM A PORTION OF FORMER RULE 278.)

2. Questions

a. In General. The court shall submit ~~the~~ questions~~,~~ ~~instructions and definitions in the form provided by Rule 277, which are~~ about the disputed material issues of fact raised by the ~~written~~ pleadings and the evidence.

(FROM A PORTION OF FORMER RULE 277.)

b. Broad Form Submission. ~~In all jury cases t~~The court shall, whenever feasible, submit the ~~cause~~ case ~~by~~ upon broad-form questions.

c. Conditional Submission. The court may predicate the ~~damage question or questions upon affirmative findings of liablity~~

jury's consideration of one or more questions upon specified answers to another question or questions on which the materiality of the predicated question or questions depends.

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

e. Inferential Rebuttal. Inferential rebuttal questions shall not be submitted ~~in the charge~~.

3. Instructions and Definitions

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

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

Notes and Comments

Comment to 1995 change:

~~Rule 273. Jury Submissions~~ [Repealed.]

~~Each party may present to the court and request written questions, definitions, and instructions to be given to the jury; and the court may give them or a part thereof, or may refuse to give them, as may be proper. Such requests shall be prepared and presented to the court and submitted to opposing counsel for examination and objection within a reasonable time after the charge is given to the parties or their attorneys for examination. A request by either party for any questions, definitions, or instructions shall be made separate and apart from such party's objections to the court's charge.~~

Notes and Comments

Comment to 1995 Change:

Rule 274. ~~Objections and Requests~~ Preservation of Appellate Complaints

~~A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections. When the complaining party's objection, or requested question, definition, or instruction is, in the opinion of the appellate court, obscured or concealed by voluminous unfounded objections, minute differentiations or numerous unnecessary requests, such objection or request shall be untenable. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only.~~

(DERIVED FROM RULES 272, 273 AND 274)

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

signature, it shall be presumed, unless otherwise noted in the record, that the request was tendered at the proper time.

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

3. Obscured or Concealed Objections or Requests. When an objection or request is obscured or concealed by voluminous unfounded objections or requests, minute differentiations or numerous unnecessary objections or requests, such objection or request shall not preserve appellate complaint. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only.

4. Rulings. The court shall make its rulings on objections in writing or orally on the record before reading the charge to the jury. It shall be presumed, unless otherwise noted in the record, that any rulings were made at the proper time. In the absence of an express ruling, any objection not cured by the charge is deemed overruled at the proper time.

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

Notes and Comments

Comment to 1995 change:

~~Rule 275. Charge Read Before Argument~~ [Repealed.]

~~Before the argument is begun, the trial court shall read the charge to the jury in the precise words in which it was written, including all questions, definitions, and instructions which the court may give.~~

Notes and Comments

Comment to 1995 change: The provisions of Rule 275 have been relocated to Rule 271.

~~Rule 276. Refusal or Modification~~ [Repealed.]

~~When an instruction, question, or definition is requested and the provisions of the law have been complied with and the trial judge refuses the same, the judge shall endorse thereon "Refused," and sign the same officially. If the trial judge modifies the same the judge shall endorse thereon "Modified as follows: (stating in what particular the judge has modified the same) and given, and exception allowed" and sign the same officially. Such refused or modified instruction, question, or definition, when so endorsed shall constitute a bill of exceptions, and it shall be conclusively presumed that the party asking the same presented it at the proper time, excepted to its refusal or modification, and that all the requirements of law have been observed, and such procedure shall entitle the party requesting the same to have the action of the trial judge thereon reviewed without preparing a formal bill of exceptions.~~

Notes and Comments

Comment to 1995 change:

~~Rule 277. Submission to the Jury~~ [Repealed.]

~~In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict.~~

~~Inferential rebuttal questions shall not be submitted in the charge. The placing of the burden of proof may be accomplished by instructions rather than by inclusion in the question.~~

~~In any cause in which the jury is required to apportion the loss among the parties the court shall submit a question or questions inquiring what percentage, if any, of the negligence or causation, as the case may be, that caused the occurrence or injury in question is attributable to each of the persons found to have been culpable. The court shall also instruct the jury to answer the damage question or questions without any reduction because of the percentage of negligence or causation, if any, of the person injured. The court may predicate the damage question or questions upon affirmative findings of liability.~~

~~The court may submit a question disjunctively when it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists.~~

~~The court shall not in its charge comment directly on the weight of the evidence or advise the jury of the effect of their answers, but the court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of~~

~~the evidence or advises the jury of the effect of their answers when it is properly a part of an instruction or definition.~~

Notes and Comments

Comment to 1995 change: The provisions of Rule 275 have been relocated to Rule 272.

~~Rule 278. Submission of Questions, Definitions, and Instructions~~

[Repealed.]

~~The court shall submit the questions, instructions and definitions in the form provided by Rule 277, which are raised by the written pleadings and the evidence. Except in trespass to try title, statutory partition proceedings, and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to any submission of any question raised only by a general denial and not raised by affirmative written pleading by that party. Nothing herein shall change the burden of proof from what it would have been under a general denial. A judgment shall not be reversed because of the failure to submit other and various phases or different shades of the same question. Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the question is one relied upon by the opposing party. Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment.~~

Notes and Comments

Comment to 1995 change: The provisions of Rule 275 have been relocated to Rule 272.

Rule 279. Omissions From the Charge

1. Omission of Entire Ground. ~~Upon appeal all~~ Any independent ground~~s~~ of recovery or ~~of~~ defense which is not conclusively established under the evidence, and ~~no~~ all element~~s~~ of which ~~is submitted or requested are~~ that are not referable to any other ground are omitted from the charge without preservation of appellate complaint by the party relying thereon, is waived.

2. Omission of One or More Elements. When an independent ground of recovery or defense consists of more than one element, ~~if~~ and one or more of ~~such~~ the elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, ~~are~~ is submitted to and found by the jury, and one or more of such elements ~~are~~ is omitted from the charge, ~~without request or objection, and there is factually sufficient evidence to support a finding thereon,~~ the ~~trial~~ court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted element or elements, if the party aggrieved by the findings has failed to preserve appellate complaint with respect to the omitted elements. ~~in support of the judgment~~. If no such written findings are made, and if the party aggrieved by the findings has failed to preserve appellate complaint to the omitted elements, ~~such~~ the omitted ~~element or~~ elements shall be deemed found by the court in such manner as to support the judgment if such deemed findings are supported by legally and factually sufficient evidence. ~~A claim that the evidence was legally or factually insufficient to warrant~~

~~the submission of any question may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant.~~ The legal and factual sufficiency of the evidence to support express findings made under this rule may be challenged in the same manner as challenges to express findings in nonjury cases.

Notes and Comments

Comment to 1995 change:

Approved May 18, 1995.
Effective September 1, 1995, except as provided in § 4.

CHAPTER 137

S.B. No. 31

AN ACT

relating to the assessment of attorney's fees, costs, and damages for certain frivolous lawsuits and defenses.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Subtitle A, Title 2, Civil Practice and Remedies Code, is amended by adding Chapter 10 to read as follows:

CHAPTER 10. SANCTIONS FOR FRIVOLOUS PLEADINGS AND MOTIONS

Sec. 10.001. SIGNING OF PLEADINGS AND MOTIONS. The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry:

(1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) each denial in the pleading or motion of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

Sec. 10.002. MOTION FOR SANCTIONS. (a) A party may make a motion for sanctions, describing the specific conduct violating Section 10.001.

(b) The court on its own initiative may enter an order describing the specific conduct that appears to violate Section 10.001 and direct the alleged violator to show cause why the conduct has not violated that section.

(c) The court may award to a party prevailing on a motion under this section the reasonable expenses and attorney's fees incurred in presenting or opposing the motion, and if no due diligence is shown the court may award to the prevailing party all costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation.

Sec. 10.003. NOTICE AND OPPORTUNITY TO RESPOND. The court shall provide a party who is the subject of a motion for sanctions under Section 10.002 notice of the allegations and a reasonable opportunity to respond to the allegations.

Sec. 10.004. VIOLATION; SANCTION. (a) A court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both.

(b) The sanction must be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated.

(c) A sanction may include any of the following:

(1) a directive to the violator to perform, or refrain from performing, an act;

(2) an order to pay a penalty into court; and

(3) an order to pay to the other party the amount of the reasonable expenses incurred by the other party because of the filing of the pleading or motion, including reasonable attorney's fees.

(d) The court may not award monetary sanctions against a represented party for a violation of Section 10.001(2).

(e) The court may not award monetary sanctions on its own initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party or the party's attorney who is to be sanctioned.

(f) The filing of a general denial under Rule 92, Texas Rules of Civil Procedure, shall not be deemed a violation of this chapter.

Sec. 10.005. ORDER. A court shall describe in an order imposing a sanction under this chapter the conduct the court has determined violated Section 10.001 and explain the basis for the sanction imposed.

Sec. 10.006. CONFLICT. Notwithstanding Section 22.004, Government Code, the supreme court may not amend or adopt rules in conflict with this chapter.

SECTION 2. This Act takes effect September 1, 1995, and applies only to a pleading or motion in a suit commenced on or after that date. A pleading or motion in a suit commenced before the effective date of this Act is governed by the law applicable to the pleading or motion immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

Passed the Senate on February 1, 1995, by a viva-voce vote; the Senate concurred in House amendments on May 8, 1995, by a viva-voce vote; passed the House, with amendments, on May 4, 1995, by a non-record vote.

Approved May 18, 1995.

Effective September 1, 1995.

CHAPTER 138

S.B. No. 32

AN ACT

relating to venue for civil actions.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Subchapter A, Chapter 15, Civil Practice and Remedies Code, is amended to read as follows:

SUBCHAPTER A. *DEFINITIONS;* GENERAL *RULES* [~~RULE~~]

Sec. 15.001. *DEFINITIONS. In this chapter:*

(a) "Principal office" means a principal office of the corporation, unincorporated association, or partnership in this state in which the decision makers for the organization within this state conduct the daily affairs of the organization. The mere presence of an agency or representative does not establish a principal office.

(b) "Proper venue" means:

(1) the venue required by the mandatory provisions of Subchapter B or another statute prescribing mandatory venue; or

DELGADO & ACOSTA, L.L.P.

Attorneys at Law

521 TEXAS AVENUE · EL PASO, TEXAS 79901-1447 · TELEPHONE (915) 544-9997 · FACSIMILE (915) 544-8544

HECTOR DELGADO, P.C.*
ALEJANDRO ACOSTA, JR., P.C.*
PAUL A. BRADEN, P.C.*
J. EDUARDO CADENA
*Professional Corporations Practicing in Partnership

CORRESPONDENT OFFICE, CIUDAD JUAREZ:
ENRIQUEZ, GONZALEZ, AGUIRRE Y OCHOA, S.C.
BOULEVARD MANUEL GOMEZ MORIN 7045
32509 CD. JUAREZ, CHIH., MEXICO
TEL. (16) 18-23-91
FAX (16) 18-23-91

CORRESPONDENT OFFICE MEXICO CITY:
PEREZ CHOW Y ASOCIADOS, S.C.
BOSQUE DE DURAZNOS NO. 75-303
BOSQUES DE LAS LOMAS
11700 MEXICO, D.F.
TEL (5) 251-00-03
FAX (5) 596-51-06

March 15, 1995

Court Rules Committee Members
Supreme Court Advisory Subcommittee
Task Force Rules 1-14

Dear Members:

Enclosed please find our Subcommittee's Task Force Report. I hope you will find it informative. Thank you for your cooperation and consideration.

Sincerely yours,

DELGADO & ACOSTA, L.L.P.

Alejandro Acosta, Jr.

AA/gih

Enclosure

SUBCOMMITTEE REPORT
TRCP 1 - 14

Current Rules

Rule 1	No change.
Rule 2	No change.
Rule 3	No change.
Rule 3a	No change.
Rule 4	Changes suggested.
Rule 5	Changes to make consistent with appellate rules.
Rule 6	Delete
Rule 7, 8, 10 and 12	Recommend consolidation with some minor changes.
Rule 9	Delete
Rule 11	Changes suggested.
Rule 14	Delete.
Rule 14b	No change.
Rule 14c	No change.

Letters from SCAC Agenda

Pg. 000004: No smoking rule	Recommend adoption with some changes. See new Rule 6.
Pgs. 000021-23, 27: Concern over meaning of "legal holiday" in Rule 4	See changes made to Rule 4, consistent with TRAP changes.
Pgs. 000024-25: Certificate of mailing as proof of mailing, Rule 5	Adopt same rule as appellate rules discussed earlier in SCAC.
Pg 000030: Concern over "good cause" standard in TRCP 5(b) for enlarging time when TRAP rules allow upon "reasonable explanation."	No change recommended at this time. The "good cause" standard of TRCP 5(b) applies only when the motion to extend time is filed after the time to act has expired. If made within the time to act, the standard is "for cause." The TRAP standard of "reasonable explanation" applies so long as the request is made within 15 days of the expiration of time. The Committee may want to consider changing the TRCP mechanism for motions to extend time to the TRAP method, but the Subcommittee does not recommend doing so at this time.
Pg 33-37: Allow service on Sundays, contrary to Rule 6	Subcommittee recommends deletion of Rule 6.
Suppl. p. 21-23: Rule 2 should be amended so TRCP applies to small claims court	Recommendation: No change. TRCP should not apply to small claims court.
Suppl. p. 24: Mailbox rule as applied to Fed Express.	Recommendation: No change as per lengthy discussion in SCAC concerning TRAP.
Feb. 1995 letter from Terry Jacobson regarding changing Rule 6 to allow service of process on Sundays, at least in family law matters	Recommendation: Solved by recommended deletion of Rule 6.

Rule 1. Objective of Rules.

The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.

Subcommittee Recommendation: *No change*

Rule 2. Scope of Rules.

These rules shall govern the procedure in the justice, county, and district courts of the State of Texas in all actions of a civil nature, with such exceptions as may be hereinafter stated. Where any statute in effect immediately prior to September 1, 1941, prescribed a rule of procedure in lunacy, guardianship, or estates of decedents, or any other probate proceedings in the county court differing from these Rules, and not included in the ``List of Repealed Statutes," such statute shall apply; and where any statute in effect immediately prior to September 1, 1941, and not included in the ``List of Repealed Statutes," prescribed a rule of procedure in any special statutory proceeding differing from these rules, such statute shall apply. All statutes in effect immediately prior to September 1, 1941, prescribing rules of procedure in bond or recognizance forfeitures in criminal cases are hereby continued in effect as rules of procedure governing such cases, but where such statutes prescribed no rules of procedure in such cases, these rules shall apply. All statutes in effect immediately prior to September 1, 1941, prescribing rules of procedure in tax suits are hereby continued in effect as rules of procedure governing such cases, but where such statutes prescribed no rules of procedure in such cases, these rules shall apply; provided, however, that Rule 117a shall control with respect to citation in tax suits.

Subcommittee Recommendation: *No change.*

Rule 3. Construction of Rules.

Unless otherwise expressly provided, the past, present or future tense shall each include the other; the masculine, feminine, or neuter gender shall each include the other; and the singular and plural number shall each include the other.

Subcommittee Recommendation: *No change.*

Rule 3a. Local Rules.

Each administrative judicial region, district court, county court, county court at law, and probate court, may make and amend local rules governing practice before such courts, provided:

(1) that any proposed rule or amendment shall not be inconsistent with these rules or with any rule of the administrative judicial region in which the court is located;

(2) no time period provided by these rules may be altered by local rules;

(3) any proposed local rule or amendment shall not become effective until it is submitted and approved by the Supreme Court of Texas;

(4) any proposed local rule or amendment shall not become effective until at least thirty days after its publication in a manner reasonably calculated to bring it to the attention of attorneys practicing before the court or courts for which it is made;

(5) all local rules or amendments adopted and approved in accordance herewith are made available upon request to members of the bar;

(6) no local rule, order, or practice of any court, other than local rules and amendments which fully comply with all requirements of this Rule 3a, shall ever be applied to determine the merits of any matter.

Subcommittee Recommendation: *No change.*

Rule 4. Computation of Time.

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day that~~which~~ is not a Saturday, Sunday or legal holiday. Saturdays, Sundays and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays and legal holidays shall be counted for purpose of the three-day periods in Rules ~~21 and~~ 21a, extending other periods by three days when service is made by registered or certified mail or by telephonic document transfer, and for purposes of the five-day periods provided for under Rules 748, 749, 749a, 749b, and 749c. When the act to be done is the filing of a paper in court, and the clerk's office is closed or inaccessible on the last day of the period so computed, the period extends to the end of the next day on which the clerk's office is open and accessible. Proof of closing or inaccessibility of the clerk's office may be made by a certificate of the clerk, or counsel or by affidavit of the party.

Subcommittee Recommendation: *The subcommittee recommends that the reference to "Rule 21" be deleted so that Saturdays, Sundays and holidays are not counted for the three-day notice period required for notice of hearings. The change prevents giving notice on Friday of a Monday hearing. Notice of a Monday hearing must be given on Wednesday unless a court orders otherwise. The subcommittee has also added the language from TRAP proposed Rule 5(a) regarding a closed or inaccessible clerk's office. The other change, "which" to "that," is merely grammatical.*

The Subcommittee also recommends that the TRCP contain a general rule for filed papers similar to TRAP 4 as reported out of the Appellate Rules Subcommittee that would contain the provisions of at least TRCP 4, 5, 21, 57, 74, 75, and 57.

Rule 5. Enlargement of Time.

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (a) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or (b) upon motion permit the act to be done after the expiration of the specified period where good cause is shown for the failure to act. The court may not enlarge the period for taking any action under the rules relating to new trials except as stated in these rules.

If any document is sent to the proper clerk by first-class United States mail or by registered or certified mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail on or before the last day for filing same, the same, if received by the clerk not more than ten days ~~tardily~~after the last day for filing, shall be filed by the clerk and be deemed filed in time. A legible postmark affixed by the United States Postal Service, a receipt for registered or certified mail, or a certificate of mailing by the United States Postal Service shall be ~~prima facie evidence of the date~~accepted as conclusive proof of mailing, but *in the absence of such proof,* other proof may be considered.

Subcommittee Recommendation: *Changes are to make TRCP consistent with TRAP 4(b). The subcommittee has added the italicized language "in the absence of such proof" in the last line for clarity, and suggests that the change be made to TRAP 4(b) as well.*

~~**Rule 6. Suits Commenced on Sunday.**~~

~~No civil suit shall be commenced nor process issued or served on Sunday, except in cases of injunction, attachment, garnishment, sequestration, or distress proceedings; provided that citation by publication published on Sunday shall be valid.~~

Subcommittee Recommendation: *Delete this rule. There is no reason to preclude commencement of a suit or service of process on Sunday so long as clerks, judges or process servers are willing to do what is necessary. This rule is probably a vestige of the old "blue laws."*

Rule 6. No Smoking.

No person (including judges, attorneys, witnesses, jurors, and court reporters shall be permitted to smoke during any civil judicial proceeding, including trials, hearings, and depositions, provided that each judge may adopt rules regarding smoking in his or her own private chambers.

Subcommittee Recommendation: *This is a new rule, suggested by Gregory B. Enos, p. 000004 of Volume 1 of the agenda. The subcommittee made minor changes to the suggested rule. The rule as suggested is as follows:*

No person (including judges, attorneys, witnesses, jurors, and court reporters) shall be permitted to smoke during any civil judicial proceeding, including trials, hearings, and depositions, provided that each court may adopt its own rules regarding smoking in a judge's private chambers and in rooms used for jury deliberations.

Rule 7. Representation by an Attorney.
[Current Rules 7, 8, 10 and 12]

a. Representation by an Attorney. [current Rule 7] Any party to a suit may appear ~~and prosecute or defend his rights therein,~~ either ~~in person~~ on his own behalf or throughby an attorney ~~of the court~~. [current Rule 8] ~~On the occasion of a party's first appearance through counsel, the attorney whose signature first appears on the initial pleadings for any party shall be the attorney in charge, unless another attorney is specifically designated therein. Thereafter, until such designation is changed by written notice to the court and all other parties in accordance with Rule 21a, said attorney in charge shall be responsible for the suit as to such party.~~

~~All communications from the court or other counsel with respect to a suit shall be sent to the attorney in charge.~~

When a party is represented by an attorney, any reference in these rules to notice to a "party" shall be read to require, instead, notice to that party's attorney. If a party is represented by more than one attorney, notice shall be made to the attorney in charge. The attorney in charge shall be the attorney whose signature first appears on the initial pleading of the represented party, unless another attorney is specifically designated in that pleading or by notice.

b. Motion to Show Authority. [current Rule 12] ~~A party in a suit or proceeding pending in a court of this state may, by sworn written motion stating that he believes the suit or proceeding is being prosecuted or defended without authority, cause the attorney to be cited to appear before the court and show his authority to act. The notice of the motion shall be served upon the challenged attorney at least ten days before the hearing on the motion. At the hearing on the motion, the burden of proof shall be upon the challenged attorney to show sufficient authority to prosecute or defend the suit on behalf of the other party. Upon his failure to show such authority, the court shall refuse to permit the attorney to appear in the cause, and shall strike the pleadings if no person who is authorized to prosecute or defend appears. The motion may be heard and determined at any time before the parties have announced ready for trial, but the trial shall not be unnecessarily continued or delayed for the hearing.~~

The authority of an attorney to represent a party may be challenged by a sworn motion stating the basis of the belief that the attorney lacks authority, and causing the attorney to be cited to appear before the court and show his authority to act. Notice of the motion and hearing shall be served at least ten days before the hearing. The burden of proof shall be upon the challenged attorney to show sufficient authority. Upon the attorney's failure to show authority, the court shall refuse to permit the attorney to appear in the cause. If the party or no person who is authorized to represent the party appears, the court may strike the pleadings.

c. **Withdrawal of Attorney.** [current Rule 10] An attorney may withdraw from representing a party only upon written motion for good cause shown. If another attorney is to be substituted as attorney for the party, the motion shall state: the name, address, telephone number, telecopier number, if any, and State Bar of Texas identification number of the substitute attorney; that the party approves the substitution; and that the withdrawal is not sought for delay only. If another attorney is not to be substituted as attorney for the party, the motion shall state: that a copy of the motion has been delivered to the party; that the party has been notified in writing of his right to object to the motion; whether the party consents to the motion; the party's last known address and all pending settings and deadlines. If the motion is granted, the withdrawing attorney shall immediately notify the party in writing of any additional settings or deadlines of which the attorney has knowledge at the time of the withdrawal and has not already notified the party. The Court may impose further conditions upon granting leave to withdraw. Notice or delivery to a party shall be either made to the party in person or mailed to the party's last known address by both certified and regular first class mail. If the attorney in charge withdraws and another attorney remains or becomes substituted, another attorney in charge must be designated of record with notice to all other parties ~~in accordance with Rule 21a~~.

Subcommittee Recommendation: *The subcommittee has consolidated all of the rules relating to a party's representation by counsel. Substantive changes are few: (1) The subcommittee added a provision requiring notice upon the attorney when the party is represented by counsel. (2) Upon the failure to show authority to represent a party when challenged, the rule now provides that the court "shall" strike the party's pleadings. The subcommittee recommends that the rule provide that the court "may" strike pleadings to give the court discretion in situations where it would not be appropriate to strike the pleadings. Other changes are intended merely to make the rule more concise and clear.*

~~**Rule 7. May Appear by Attorney.**~~

~~Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court.~~

~~**Rule 8. Attorney in Charge.**~~

~~On the occasion of a party's first appearance through counsel, the attorney whose signature first appears on the initial pleadings for any party shall be the attorney in charge, unless another attorney is specifically designated therein. Thereafter, until such designation is changed by written notice to the court and all other parties in accordance with Rule 21a, said attorney in charge shall be responsible for the suit up to such party.~~

~~All communications from the court or other counsel with respect to a suit shall be sent to the attorney in charge.~~

Subcommittee Recommendation: These rules have been consolidated into Rule 7. See

~~**Rule 9. Number of Counsel Heard.**~~

~~Not more than two counsel on each side shall be heard on any question or on the trial, except in important cases, and upon special leave of the court.~~

Subcommittee Recommendation: *Delete this rule. This rule is superfluous. The trial judge has discretion in how to conduct the trial, including how many attorneys may be heard on each side. The qualification for "important cases" adds nothing.*

~~**Rule 10. Withdrawal of Attorney.**~~

~~An attorney may withdraw from representing a party only upon written motion for good cause shown. If another attorney is to be substituted as attorney for the party, the motion shall state: the name, address, telephone number, telecopier number, if any, and State Bar of Texas identification number of the substitute attorney; that the party approves the substitution; and that the withdrawal is not sought for delay only. If another attorney is not to be substituted as attorney for the party, the motion shall state: that a copy of the motion has been delivered to the party; that the party has been notified in writing of his right to object to the motion; whether the party consents to the motion; the party's last known address and all pending settings and deadlines. If the motion is granted, the withdrawing attorney shall immediately notify the party in writing of any additional settings or deadlines of which the attorney has knowledge at the time of the withdrawal and has not already notified the party. The Court may impose further conditions upon granting leave to withdraw. Notice or delivery to a party shall be either made to the party in person or mailed to the party's last known address by both certified and regular first class mail. If the attorney in charge withdraws and another attorney remains or becomes substituted, another attorney in charge must be designated of record with notice to all other parties in accordance with Rule 21a.~~

Subcommittee Recommendation: *This rule has been consolidated into Rule 7. See above.*

Rule 11. Agreements to Be in Writing.

~~Unless otherwise provided in these rules, n~~No agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the clerk at the time the party seeks enforcement~~papers as part of the record~~, or unless it be made in open court or in a deposition upon oral examination and recorded by the court reporter~~entered of record~~.

Subcommittee Recommendation: *The Subcommittee is aware of two problems with the current rule: (1) Can a court enforce a written agreement that is filed after the dispute arises? (2) What does "entered of record" mean? Is it sufficient that an oral agreement be recorded by the court reporter, or does it have to be transcribed or incorporated into a court order or "approved" by the court before it is enforceable? The appellate opinions are somewhat inconsistent on both issues. The recommended rule makes clear that written agreements should be enforceable if the writing is filed when enforcement is sought, after the dispute arises. If this is not the rule, the court's file may be filled with incidental agreements between counsel that are never in dispute. The recommended rule further states that oral agreements should be enforced if recorded by a court reporter in open court or in a deposition. This recommendation reflects the Subcommittee's belief that the purpose of this rule is largly evidentiary. Thus, if the agreeement is recorded by a court reporter, that purpose is satisfied regardless of where the recording is made. Note that this rule only concerns the initial requirement of a record of the agreement for enforcement. An alleged agreement may satisfy this rule, but not be enforceable for some other reason that is a matter of contract law.*

The agreements covered by this rule will include settlement agreements and agreements between counsel modifying procedures set out in the rules. Because this rule allows enforceable agreements to be made in depositions, current Rule 166c is no longer necessary.

~~Rule 12. Attorney to Show Authority.~~

~~A party in a suit or proceeding pending in a court of this state may, by sworn written motion stating that he believes the suit or proceeding is being prosecuted or defended without authority, cause the attorney to be cited to appear before the court and show his authority to act. The notice of the motion shall be served upon the challenged attorney at least ten days before the hearing on the motion. At the hearing on the motion, the burden of proof shall be upon the challenged attorney to show sufficient authority to prosecute or defend the suit on behalf of the other party. Upon his failure to show such authority, the court shall refuse to permit the attorney to appear in the cause, and shall strike the pleadings if no person who is authorized to prosecute or defend appears. The motion may be heard and determined at any time before the parties have announced ready for trial, but the trial shall not be unnecessarily continued or delayed for the hearing.~~

Subcommittee Recommendation: *This rule has been consolidated into Rule 7. See above.*

~~**Rule 14. Affidavit by Agent.**~~

~~Whenever it may be necessary or proper for any party to a civil suit or proceeding to make an affidavit, it may be made by either the party or his agent or his attorney.~~

Subcommittee Recommendation: *Delete this rule. Signature by an agent is covered by agency law. This seems to suggest that attorneys ordinarily can sign a client's affidavits when the attorney has no knowledge of the matters stated therein. Caselaw holds that an attorney cannot sign an affidavit in support of a motion for summary judgment unless the affidavit shows personal knowledge on the part of the lawyer signing the affidavit.* Landscape Design and Construction, Inc. v. Warren, *566 S.W.2d 66 (Tex. Civ. App. -- Dallas 1978, no writ). The rule is specifically not applicable to interrogatory answers. TRCP 168(5). With fax machines and overnight delivery, there is no reason today to have lawyers signing affidavits for their clients in other instances where the lawyer has no personal knowledge.*

Rule 14b. Return or Other Disposition of Exhibits.

The clerk of the court in which the exhibits are filed shall retain and dispose of the same as directed by the Supreme Court.

Subcommittee Recommendation: *No change.*

Supreme Court Order Relating to Retention and Disposition of Exhibits

In compliance with the provisions of Rule 14b, the Supreme Court hereby directs that exhibits offered or admitted into evidence shall be retained and disposed of by the clerk of the court in which the exhibits are filed upon the following basis.

This order shall apply only to: (1) those cases in which judgment has been rendered on service of process by publication and in which no motion for new trial was filed within two years after judgment was signed; and, (2) all other cases in which judgment has been signed for one year and in which no appeal was perfected or in which a perfected appeal was dismissed or concluded by a final judgment as to all parties and the issuance of the appellate court's mandate such that the case is no longer pending on appeal or in the trial court.

After first giving all attorneys of record thirty days written notice that they have an opportunity to claim and withdraw the trial exhibits, the clerk, unless otherwise directed by the court, may dispose of the exhibits. If any such exhibit is desired by more than one attorney, the clerk shall make the necessary copies and prorate the cost among all the attorneys desiring the exhibit.

If the exhibit is not a document or otherwise capable of reproduction, the party who offered the exhibit shall be entitled to claim same, provided, however, that the party claiming the exhibit shall provide a photograph of said exhibit to any other party upon request and payment of the reasonable cost thereof by the other party.

Subcommittee Recommendation: *No change.*

Rule 14c. Deposit in Lieu of Surety Bond.

Wherever these rules provide for the filing of a surety bond, the party may in lieu of filing the bond deposit cash or other negotiable obligation of the government of the United States of America or any agency thereof, or with leave of court, deposit a negotiable obligation of any bank or savings and loan association chartered by the government of the United States of America or any state thereof that is insured by the government of the United States of America or any agency thereof, in the amount fixed for the surety bond, conditioned in the same manner as would be a surety bond for the protection of other parties. Any interest thereon shall constitute a part of the deposit.

Subcommittee Recommendation: *No change.*

Memo

To: Supreme Court Advisory Committee

From: Alex Wilson Albright

Date: May 15, 1995

Subject: Discovery Subcommittee Report

Enclosed please find the report of the Discovery Subcommittee.

BRING IT WITH YOU TO THE SCAC MEETING, MAY 19-20.

I understand that this report will be on the agenda for Friday afternoon, May 19, and Saturday, May 20.

I look forward to seeing all of you Friday.

Supreme Court Advisory Committee

Discovery Subcommittee

Proposed Rules of Discovery

DRAFT FOR MAY 19, 1995 MEETING

(Red-lined from draft presented at January and March meetings)

TABLE OF CONTENTS

Preface: Comments to the Proposed Rules

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

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

RULE 1. Discovery Limitations

1. ~~Tier 1 — Additional Discovery Limitations for Amount in Controversy~~Claims seeking $50,000 or less.

a. Applicability. ~~If a suit for damages in which~~ in any suit the plaintiff's pleadings affirmatively ~~seeks~~ only monetary recovery of $50,000 or less, excluding costs, prejudgment interest and attorneys' fees, discovery shall be limited as provided in this section. If by a claim, amendment, or supplement filed more than 30 days before trial, any party seeks relief other than monetary recovery or ~~unless a defendant, by a timely filed claim, seeks an amount~~ in excess of $50,000, excluding costs, prejudgment interest and attorneys' fees, this section shall no longer apply to the suit. When a timely filed pleading renders this section no longer applicable, discovery shall be reopened and completed within the limitations provided in section 2 or 3 of this rule and any person previously deposed may be redeposed.~~.~~

b. Limitations. In addition to ~~other~~ the ~~discovery~~ limitations provided elsewhere in these r~~R~~ules:

(1) Total time for oral depositions. Each party may have ~~Oral depositions shall be limited to~~ no more than 6 hours ~~per party~~ to examine and cross-examine witnesses in oral depositions. The court may modify the deposition hours so that no side or party is given unfair advantage.~~;~~

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

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

~~*c. Amendments.* If an amendment of a claim or counterclaim brings the amount above $50,000, discovery shall be reopened under Tier 2, and a person previously deposed may be redeposed. No amendment bringing the amount above $50,000 shall be allowed at such a time as to unduly prejudice the opposing party.~~

2. Discovery Control Plan. In any suit, the parties may agree or the court may order that discovery be conducted in accordance with a~~A~~ Discovery Control Plan tailored to the circumstances of the specific suit ~~may be entered by agreement of the parties, or imposed by court order~~. A Discovery Control Plan may address any issue concerning discovery or the matters listed in Rule 166, and may change any discovery limitation set forth in these rules. The discovery limitations applicable to section 3 of this Rule, however, shall apply unless specifically changed in the Discovery Control Plan. The following provisions must be included in a Discovery Control Plan, ~~shall include~~, may not be excluded from a Discovery Control Plan by agreement of the parties, and once set forth in the Discovery Control Plan, may not be modified except by court order~~the following provisions~~:

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

b. A discovery period during which all discovery shall be conducted, ~~cutoff date~~ ending ~~which shall~~ not later than 30 days prior to the trial date ~~(~~or requested trial date~~)~~ ~~specified above; failure to try the case as specified shall not reopen discovery in the absence of further agreement or order which shall specify the nature and extent to which further discovery is permitted and a new discovery cutoff date;~~

~~*c.* Date(s) for the disclosure of expert witnesses pursuant to Rule 10;~~

~~*d.* Identifying witnesses to be deposed by name or category, and fixing the maximum deposition time by name, category or total for the case, as needed. Witnesses previously deposed in other cases, whose depositions may be used without being retaken, shall also be listed.~~

~~e. Stating agreements for authentication of documents, or specifying the discovery required to complete or stipulate to document authentication;~~

~~f. Fixing deadlines for joinder of parties and amendment of pleadings;~~

~~g. Specifying any discovery disputes which require resolution by the court.~~

c. Deadlines for :

1. Joinder of additional parties;

2. Amending or supplementing pleadings;

3. Disclosing expert witnesses pursuant to Rule 10;

~~32.~~ **~~Tier 2 — Discovery Period.~~All other suits.**

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

b. Limitations. In addition to the other discovery limitations set forth~~provided~~ in these r~~R~~ules:

(1) Discovery Period. All discovery shall be conducted during the discovery period. The discovery period shall begin on the earliest of (a) the date of the first oral deposition, or (b) the date the first response to written discovery other than a Request for Standard Disclosure is due, and shall continue for no more than 9 months or until 30 days before trial, whichever is earlier. ~~All discovery shall be conducted during a Discovery Period which shall open upon the date the first response to written discovery other than a Request for Standard Disclosure is due or the first oral deposition is taken (whichever is earlier) and shall continue for 9 months or until 30 days before trial, whichever is earlier.~~

(2) Total time for oral depositions. During the discovery period, ~~Oral depositions shall be limited so that~~ each side, the plaintiffs and the defendants, shall have no more than 50 hours to examine and cross-examine in oral depositions

opposing parties and experts designated by opposing parties and persons who are ~~persons~~ subject to the opposing party's~~their~~ control. Third party defendants shall share the defendants' 50 hours with regard to issues common to the defendants;~~,~~ however, third party defendants have an additional 10 hours for examination regarding issues upon which they oppose the defendants. The oral deposition testimony of only two experts designated by any side shall count against any limitation of that side's total deposition testimony applicable under Rule 1. If any side designates more than two experts pursuant to Rule 10, the opposing side shall be allowed an additional six hours to depose each additional expert designated. The court may modify the deposition hours so that no side or party is given unfair advantage.

(3) Interrogatories. During the discovery period, any party may serve on any other party ~~Interrogatories under Rule 12 shall be limited to~~ no more than 30 written interrogatories~~in number~~, including discrete subparts. ~~, except for~~ iInterrogatories ~~that~~ asking a~~any~~ party only to identify or authenticate specific documents as contemplated by Article IX of the ~~Texas~~ Rules of Civil Evidence~~Procedure~~, however, are unlimited in number.

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

~~*c. Inapplicability.* The provisions of this Section shall not apply if the provisions of paragraph 1 apply, or the parties by agreement enter, or the court orders, a Discovery Control Plan pursuant to paragraph 3 of this Rule.~~

RULE 2. Modification of Discovery Procedures and Limitations

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

~~**2. Modification by Court Order.**~~ Except where specifically prohibited, ~~T~~the procedures and limitations set forth in these rules may be modified (1) by the agreement of the parties, or (2) by the court for good reason.[1]

[1] The parties' agreement must satisfy Rule 13.

RULE 3. Permissible Discovery: Forms and Scope (revised 5/3/95)

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

2. Scope of Discovery.

a. In General. Parties may obtain discovery regarding any matter that is relevant to the subject matter in the pending action whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

b. Documents and Tangible Things. A party may obtain discovery of the existence, description, nature, custody, condition, location and contents of any and all documents and tangible things (including but not limited to papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, data, and data compilations) that constitute or contain matters relevant to the subject matter of the action. A person is required to produce a document or tangible thing that is within the person's possession, custody, or control. If a person does not have actual physical possession, but has a superior right to compel the production from a third party, the person has possession, custody or control.

c. Persons With Knowledge of Relevant Facts. A party may obtain discovery of the identity and location (name, address and telephone number) of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case. A person has knowledge of relevant facts when that personhe or she has or may have knowledge of any discoverable matter. The information need not be admissible to satisfy the requirements of this subsection and personal knowledge is not required.

d. Trial Witnesses. A party may obtain discovery of the identity and location (name, address, telephone number) of persons who are expected to be called to testify at trial, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before the time of trial.[2]

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

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

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

(2) The existence and contents of any settlement agreement. Information concerning the settlement agreement is not by reason of disclosure admissible in evidence at trial.

g. Witness statements. A witness statement, regardless of when made, is discoverable, unless privilegedexcept as provided by Rule 4. A "wWitness statement" ismeans (1) a written statement signed or otherwise adopted or approved in writing by the person making it, or (2) a

[2] Language from current Rule 166.

stenographic, mechanical, electrical or other type of recording of a witness' oral statement, or any substantially verbatim transcription ~~thereof~~ such a recording. A lawyer's notes taken during a conversation or interview with a witness is not a "witness statement." ~~which is a substantially verbatim recital of a statement made by the person and contemporaneously adopted.~~ Any person may obtain, upon written request, his or her own witness statement concerning the lawsuit, that is in the possession, custody or control of any party.

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

Comments:

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

2. Subdivision c. requires parties to make a "brief statement of each identified person's connection with the case." This provision does not require a narrative statement of the facts the person knows, but at most a few words describing the person's identity as relevant to the lawsuit. For instance, "treating physician", "eyewitness", "chief financial officer", "director", "plaintiff's mother and eyewitness to accident".

3. The sections in current 166b concerning land, experts, and medical records are deleted from this rule, but it is not intended that these areas are now exempt from discovery. They are clearly within the scope of discovery, and are discussed in the specific discovery vehicles intended for their disclosure.

RULE 4. Privileges and Exemptions from Discovery.

The Subcommittee believes that we need a new rule to clarify the current confusion created by the current Rule 166b(3). The Subcommittee is not prepared to report on this rule, however. The Subcommittee has decided to complete its report on all other discovery rules, then begin the substantial task of considering this rule. Approval of the rest of the discovery rules is not contingent on completion of this rule.

RULE 5. Response to Discovery Requests; Supplementation and Amendment

1. Duty to Respond. When responding to requests for written discovery, a party shall make a complete response, based upon all information reasonably available to the responding party or its attorney at the time the response is made. If the requesting party has served on the responding party a readable computer disk setting out the discovery requests, the responding party's answers, objections and other responses shall be preceded by the request to which they respond; otherwise, the responding party is under no obligation to restate the request when responding.

2. Duty to Amend or Supplement Discovery Responses. A party is under a duty reasonably promptly to amend or supplement its prior responses or document productions responsive to written discovery requests if the party learns that a prior response or production was incomplete or incorrect when made, or, although complete and correct when made, is no longer complete and correct, ~~and if the additional or corrective information has not otherwise been made known to the other parties in discovery or in writing.~~ [3]An amendment or supplement filed or documents produced less than thirty days before trial is presumptively made without reasonable promptness. The amendment or supplement shall be in writing, filed with the clerk, and need not be verified.

3. Additional Discovery After Amendment or Supplementation. If the amendment, ~~or~~ supplement or document production occurs during any applicable Discovery Period, the opposing party may seek from the court departures from the discovery limitations imposed under Rule 1 upon a showing that the opposing party is unable to complete discovery relating to any new

[3] At the January 1995 meeting, the SCAC instructed the Subcommittee to require that certain discovery be formally supplemented. The Subcommittee drafted the following language: "Formal supplementation is required for the identification of persons with knowledge of relevant facts, trial witnesses or expert witnesses, the production of documents, or if other additional or corrective information has not otherwise been made known to the other parties in discovery or in writing." Upon further reflection, however, the Subcommittee believes that the rule should require formal supplementation for all written discovery and submits the proposed draft this way. With the proposed exclusionary rule, if the supplementing information has been provided "otherwise in discovery or in writing," it would be unlikely that the opposing party would be surprised, and thus, ordinarily would not be excluded.

information disclosed in the amendment or supplement within the Discovery Period. If the amendment, supplement, or document production occurs after any applicable Discovery Period, ~~after the discovery period is completed~~, the opposing party~~ies~~ may reopen discovery. A party must respond to reopened written discovery served under this Rule the day before trial or within 20 days after the date of service, whichever is earlier. The reopening side is allowed five (5) hours of deposition time in addition to that provided in Rule 14. Such discovery shall be limited to matters related to any new information disclosed in the amendment or supplement. The court may allow additional discovery as needed.

Comment:

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

RULE 6. Failure to Provide Discovery

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

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

RULE 7. Presentation of Privileges and Objections to Written Discovery

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

21. Withholding Privileged Information and Materials.

(a) Asserting a Privilege. A party may preserve a privilege from discovery only in accordance with this section. If materials or information responsive to a request are privileged, the party shall withhold the privileged materials or information from the response. If a request is both objectionable and calls for privileged materials or information in response, the responding party shall first object pursuant to section 1 of this rule, and only upon compliance with the request or any part thereof, withhold responsive privileged materials or information pursuant to this section. When~~A~~ a party actually withholds specific information and materials responsive to a request on grounds of privilege, either when making the original response or thereafter when making an amended or supplemental response, that party shall file ~~preserves a privilege only by (1) withholding the privileged material or information and (2) filing~~ a withholding statement, as part of the response to the discovery request or separately, stating that information or materials

responsive to the request have been withheld and the privilege(s) relied upon. ~~A party shall make a withholding statement whenever the party is actually withholding specific information and materials responsive to a request.~~

(b) Description of Withheld Materials or Information. After receiving a withholding statement ~~Thereafter~~, the party seeking discovery may file and serve upon the withholding party a request that the withholding party identify the information and materials ~~withheld~~. Within 15 days of service of thate request, the withholding party shall file and serve a description of~~privilege log identifying~~ the information and materials withheld in such a manner that, without revealing the privileged information itself, will enable other parties to assess the applicability of the privilege.[4] ~~with sufficient particularity to allow the requesting party to test the basis of the asserted privilege.~~

(c) Trial Preparation Materials. Withheld information or materials created by trial counsel in preparation for the litigation in which the discovery is requested need not be included in a withholding statement or description~~or identified in the privilege log and need be identified~~ except~~only~~ upon court order in appropriate circumstances.

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

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

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

Comments:

1. This rule provides for objections to the form of a written discovery request. The responding party specifically objects to the request, and states whether the party intends to comply with the request as specifically modified or not comply at all for specified reasons. If a party receives a request for "all documents relevant to the lawsuit," the requesting party can object to the request as an overly broad request that does not comply with the rule requiring specific requests for documents, and refuse to comply with its entirely. See Loftin v. Martin, 776 S.W.2d 145 (Tex. 1989). A party may also object to a request for a litigation file on the ground that it is overly borad and on its face it seeks only materials protected by privilege. See National Union Fire Ins. Co. v. Valdez, 863 S.W.2d 458 (Tex. 1993). If a request seeks specific documents from 1980 to the present, the party may object that the documents from 1980 to 1990 are irrelevant, and that it is overly burdensome to produce them. In such case, the party may produce the documents from 1990 to the present, or refuse to produce any until the court resolves the objection if producing according to a modified request will require a burdensome and duplicative search if the court should overrule the objection.

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

4. Any party can request a hearing in which the court will resolve issues brought up in objections or withholding statements. The party seeking to avoid discovery has the burden of proving the objection or privilege, as under the current rules.

RULE 8. Protective Orders

~~1. Motion.~~ Any person against or from whom discovery is sought may move within the time required to respond to the discovery request for an order protecting that person from the discovery sought. Any party may move for such an order when an objection pursuant to Rule 7 is not appropriate. ~~The movant shall specifically state the objection to the requested discovery and shall respond to so much of the request as to which the party has no objection.~~

~~2. Depositions. A party or deponent may include in a motion for protective order an objection to the time and place designated for a deposition. If the movant had less than ten (10) days notice of the deposition, the filing of the motion excuses compliance with the notice or subpoena until the motion is overruled. If the movant had at least 10 days notice of the deposition, the movant must comply with the notice or subpoena unless the motion is granted, or the movant demonstrates that it was unable to obtain a ruling on the motion despite its good faith efforts to do so pursuant to any applicable local rules.~~

~~3. Order.~~ The court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights, including but to limited to the following:

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

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

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

RULE 9. Requests For Standard Disclosure

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

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

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

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

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

3. Responsive Documents. Copies of the documents responsive to requests under section~~,~~ 3 of this Rule ordinarily shall be served with the response; however, i~~I~~f the responsive documents are voluminous ~~request is for the production of documents~~, the response shall specify a reasonable time and place for the production of documents, not more than 7 days from the date of the response. ~~- If the request is for information, the response shall be verified in the manner required by Rule 12. A standard request for disclosure made pursuant to these rules is presumptively not objectionable under Rule 7(1).~~

43. Standard Requests for Disclosure. A party may make any or all of the following standard requests for disclosure:

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

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

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

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

e. In a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, produce all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;

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

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

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

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

ji. State the general substance of the mental impressions and opinions held by each~~an~~ expert identified in response to section h above ~~discoverable under Rule 10(1)~~ and a brief summary of the basis thereof;~~.~~

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

l. ~~,~~ The~~and the expert's~~ current resume and bibliography of each expert identified in response to section h above ;

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

~~**4. Use at Trial. Information disclosed in response to Requests for Standard Disclosure may be used only against the party responding, subject to any objections to admissibility. Documents produced in response to Requests for Standard Disclosure, however, may be used against any party, subject to any objections to admissibility**~~ [5]

[5] This section 4 was added upon the recommendation of the full SCAC. Upon reflection, the Discovery Subcommittee thinks this section is unnecessary and possible confusing.

RULE 10. Expert Witnesses

1. Request. A party may request another party to designate, and disclose information concerning, expert witnesses only through the standard requests for disclosure set forth in Rule 9.4.h -m, oral deposition, and court ordered reports as set forth in this Rule. An "expert witness" subject to discovery under this rule is an expert who may be called as an expert witness at trial, and an expert used for consultation and who is not expected to be called as an expert witness at trial, but whose opinions and impressions have been reviewed by a testifying expert.

2. Designation of Expert Witnesses. A party may discover the identity (name, address and telephone number) of another party's expert witness and the subject upon which the expert is expected to testify through a standard request for disclosure under Rule 9.4.h and i. The responding party shall comply with Rule 5 in responding to the request. For experts testifying about issues upon which the responding party seeks affirmative relief, supplementation or amendment of the response is presumptively made without reasonable promptness if made less than 75 days before the end of any applicable Discovery Period or 75 days before trial, whichever occurs first. For opposing experts, supplementation or amendment of the response is presumptively made without reasonable promptness if made less than 45 days before the end of any applicable Discovery Period or 45 days before trial, whichever occurs first. ~~The plaintiff shall designate any witness who is expected to offer expert testimony at trial no later than sixty (60) days before the end of the discovery period or five (5) days after the receipt of notice of the first trial setting, whichever is later. The defendant shall designate any witness who is expected to offer expert testimony at trial no later than fifteen (15) days after the plaintiff is required to designate experts. Failure to timely designate an expert shall be grounds for exclusion of that expert's testimony.~~

3. Disclosure of General Information For each expert designated, a party may obtain additional information through the standard requests set forth in Rule 9.4.j through m. A party seeking affirmative relief must respond to the requests upon the later of (1) 75 days before the end

of any applicable Discovery Period or 75 days before trial, whichever occurs first, or (2) 30 days after service of the request. A party who has designated opposing experts must respond to the requests upon the later of (1) 45 days before the end of any applicable Discovery Period or 45 days before trial; whichever occurs first, or (2) 30 days after service of the request. For experts not retained or employed or otherwise in control of the designating party, however, the designating party need not respond to the standard requests set forth in Rule 9.4.l or m, and need only respond to the standard request set forth in Rule 9.4.k. with documents within the possession, custody or control of the designating party. Nothing in this rule shall prevent the requesting party from obtaining this discovery directly from such an expert by subpoena commanding production under Rule 24.

~~. At the time a party designates testifying expert witnesses, the party shall disclose the following with respect to each expert designated:~~

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

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

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

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

~~e. *Documents and Tangible Things.* Any document, tangible thing, reports, models, or data compilations that have been prepared by, provided to, or reviewed by the expert in anticipation of the expert's testimony.~~

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

~~g. *Reviewed consulting experts.* The identity, background, and the general substance of the mental impressions and opinions of a consulting expert who is not expected to testify at trial, but whose opinions or impressions have been reviewed by a testifying expert.~~

~~However, if the expert has first-hand knowledge of relevant facts and is not an employee of or otherwise within the control of the party, the party need not provide the information required in subsection b. or c. above except that information within the party's possession, custody or control.responding~~

4. Additional d~~D~~iscovery through oral deposition. A party may obtain other~~further~~ discovery of the subject matter on which the ~~testifying~~ expert is expected to testify, the ~~testifying~~ expert's mental impressions and opinions, the facts known to the ~~testifying~~ 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 the same information concerning reviewed consulting experts~~ only by oral deposition of the expert, unless the court orders the expert to prepare a report pursuant to this Rule.

5. Reports. If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert have not been recorded and reduced to tangible form, the court may order these matters reduced to tangible form and produced in addition to or in lieu of the deposition as is appropriate. A court may not compel production of such a report before the date upon which the designating party must disclose general information concerning its designated experts under part 3 of this Rule.

~~**6. Expert Depositions.** Each party will make its experts reasonably available in the county of suit during the forty-five (45) day period immediately following the designation of the experts. The deposition testimony of only two experts designated by any side shall count against the deposition testimony limitation set forth in Rule 14. If any side designates more than two experts, the opposing side shall be allowed an additional six (6) hours to depose each additional expert designated.~~

6~~7~~. Supplementation after disclosure of general information. A party that has disclosed general information concerning its designated experts under part 3 of this rule shall supplement and amend such discovery with reasonable promptness if the discovery was incomplete or

incorrect when made, or, although complete and correct when made, is no longer complete and correct. A party's duty to supplement and amend extends to the oral deposition testimony of an expert that is retained or employed by or otherwise within the control of that party concerning the expert's mental impressions or opinions or the basis thereof.

~~Any document or tangible thing subsequently prepared by, provided to, or reviewed by the expert must be provided to the other side as available unless the expert designation is or has been withdrawn. A party is under a duty otherwise to amend or supplement its expert designation, disclosure of general information, and any other discovery provided by its experts (including deposition testimony) reasonably promptly after it learns that a prior response was incorrect or incomplete when made or, although correct and complete when made, is no longer correct and complete and if the corrective or additional information has not otherwise been made known to the other parties in discovery or in writing. Within 10 days of receiving amending or supplementing information, a party may initiate additional discovery limited to matters related to any new information disclosed in the amendment or supplement as provided by Rule 5.~~

8. Discovery of Expert Witnesses. Discovery of the identity of and information concerning witnesses who are expected to offer expert testimony at trial may be obtained only as provided in this rule unless the witness has personal knowledge of relevant facts, in which case a party may obtain discovery as provided elsewhere in these rules.

RULE 11. Requests For Production and Inspection

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

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

3. Response.

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

b. Objections to the time, place, or manner of production. In the response, the responding party may make objections to the time, place, or manner of production, testing, inspection, or sampling ~~(including the manner of producing data or data compilations)~~, stating

specific reasons why such discovery should not be allowed and the circumstances under which the party will comply with the request. If the responding party objects to the time and place of production, the objection shall state when and where the party will comply with the request.

4. Production. Subject to any objections stated in the response, the respondingproducing party shall produce the requested documents or tangible things at either the time and place requested or the time and place set forth in the response, as follows:

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

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

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

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

~~responding party to take the extraordinary steps. The responding party shall respond and may make objections to a request for electronic or magnetic data pursuant to section 3 of this rule.~~

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

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

Comments:

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

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

RULE 12. Interrogatories to Parties (Last revised 2/8/95)

1. Availability. ~~During the discovery period provided for in Rule 1~~At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first, any party may file ~~with the court~~ and serve upon any other party written interrogatories to be answered by the party served. ~~Interrogatories that ask another party only to identify or authenticate specific documents as contemplated by Article IX of the Texas Rules of Civil Evidence shall be unlimited in number. Other interrogatories shall not exceed 30 in number, including discrete subparts.~~

2. Response.

a. The party upon whom the interrogatories have been served shall file and serve ~~with the court and serve~~ answers and objections, if any, to the interrogatories within 30 days after the service of the interrogatories, except that, if the interrogatories accompany citation, a defendant may fileserve answers and objections within 50 days after service of citation and petition upon that defendant.

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

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

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

3. Scope of Interrogatories. A party may use interrogatories to inquire about any discoverable matter within the scope of discovery under Rule 3(2) and the contentions and defenses of another party, provided that contention interrogatories may only request another party to state the legal theories and to describe in general the factual bases for the claims or defenses of

the other party. Contention interrogatories may not be used to require another party to marshall all of its available proof or proof it intends to offer at trial to answer the interrogatory.

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

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

Comment:

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

RULE 13. Requests for Admissions [redlined from TRCP 169]

~~1. Request for Admission.~~ At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first~~At any time after commencement of the action~~, a party may file and serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of rule 166b set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Each matter of which an admission is requested shall be separately set forth. ~~Copies~~ of the documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. ~~Whenever~~ a party is represented by an attorney of record, service of a request for admissions shall be made on his attorney unless service on the party himself is ordered by the court. ~~A true copy of a request for admission or of a written answer or objection, together with proof of the service thereof as provided in Rule 21a, shall be filed promptly in the clerk's office by the party making it.~~

2. Response. ~~Each matter of which an admission is requested shall be separately set forth.~~ The matter is admitted without necessity of a court order unless, within thirty days after service of the request~~, or within such time as the court may allow, or as otherwise agreed by the parties~~, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of fifty days after service of the citation and petition upon that defendant. ~~If objection is made, the reason therefor shall be stated. T~~Unless objection is made, the response~~answer~~ shall specifically deny the matter or set forth in detail the reasons that the answering party cannot truthfully admit or deny the matter. ~~A~~ denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, the party~~he~~ shall specify so

much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party~~he~~ states that ~~a~~he has made reasonable inquiry has been made and that the information known or easily obtainable ~~by him~~ is insufficient to enable the party~~him~~ to admit or deny. A party who considers that a matter of which an admission is requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party~~he~~ may, subject to the provisions of paragraph 3 of Rule 215, deny the matter or set forth reasons why the party~~he~~ cannot admit or deny it.

2. ~~Effect of Admission.~~ Any matter admitted under this rule is conclusively established as to the party making the admission unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 166 governing amendment of a pre-trial order, and ~~rule 166b-6~~Rule 5 governing the duty to supplement discovery responses, the court may permit withdrawal or amendment of responses and deemed admissions upon a showing of good cause for such withdrawal or amendment if the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved thereby. Any admission made by a party under this rule is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

RULE 14. Depositions Upon Oral Examination

1. When Depositions May Be Taken. At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first~~During the discovery period provided for in Rule 1(2)~~, any party may take the testimony of any person, including a party, by deposition upon oral examination, which, unless taken pursuant to Rule 16, will be recorded stenographically by any officer authorized to take depositions as provided by law. A party may take a deposition prior to the appearance date of any defendant only upon leave of court, granted with or without notice.

2. Notice; Subpoena.

a. A party proposing to take a deposition upon oral examination must give reasonable notice ~~in writing~~ to every other party. The notice shall state the name of the deponent~~,~~ ~~and~~ the time and the place of the taking of the deposition, and shall be filed and served. The notice shall also state the identity of persons who will attend the deposition other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the deposition. If any party intends to have any other persons attend, that party must give reasonable notice to all parties of the identity of such other persons. If a subpoena commanding production~~duces tecum~~ under Rule 24 is to be served on the person to be examined, the designation of materials to be produced as set forth in the subpoena shall be attached to or included in, the notice.

b. A party may in the ~~notice~~ name as the deponent a public or private corporation, partnership, association, governmental agency, or other organization and describe with reasonable particularity the matters on which examination is requested. ~~In that event, the organization so named shall designate one or more officers, directors, agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify.~~ In response, the organization so named shall designate one or more persons to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The person so designated shall testify as to matters known or reasonably

available to the organization. ~~A subpoena shall advise a non-party organization of its duty to make such a designation.~~ This subdivision does not preclude taking a deposition by any other procedure authorized by these rules.

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

3. Production. A witness also may be compelled by subpoena commanding production~~duces tecum~~ under Rule 24 to produce at the deposition documents or tangible things within the scope of Rule 3 and within the witness' care, custody or control.

4. Party. When the deponent is a party, or a person subject to the control of a party,[6] service of the notice upon the party's attorney shall have the same effect as a subpoena served on the deponent. The notice to such a deponent may be accompanied by a request made in compliance with Rule 11 for the production of documents and tangible things at the deposition. The procedure of Rule 11, including the 30 days notice requirement, shall apply to the request and the response, and it shall be considered a written request for discovery subject to the provisions of Rule 5.

5. Time and Place. The time and place designated for the deposition shall be reasonable. The place shall be in the county of the witness' residence or, where the witness is employed or regularly transacts business in person or at such other convenient place as may be directed by the court in which the cause is pending; provided, however, the deposition of a party or the person or persons designated by a party under paragraph 2.b. above may be taken in the county of suit. A nonresident or transient person may be required to attend in the county where a witness is served with a subpoena, or within one hundred fifty miles from the place of service, or at such other

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

convenient place as the court may direct. The witness shall remain in attendance from day to day until such deposition is begun and completed.

6. Deposition by Telephone. Any party may give reasonable prior written notice that a deposition will be taken by telephone or other remote electronic means. For the purposes of this rule and Rules 14, 215-1a and 215-2a, a deposition taken by telephone is taken in the district and at the place where the deponent is to answer the questions asked. The officer taking the deposition may be located with the deposing parties instead of with the witness if the witness is placed under oath by a person present with the witness who is authorized, in that jurisdiction, to administer oaths.

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

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

1. Oath; Examination. Every person whose deposition is taken upon oral examination shall first be placed under oath. The parties may orally examine and cross-examine the deponent. Any party, in lieu of participating in the oral examination, may serve written questions in a sealed envelope on the party proposing to take the deposition who shall transmit them to the deposition officer who shall open the envelope and propound them to the witness.

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

~~*a. Total deposition time.* During the discovery period, each side, the plaintiffs and the defendants, shall have 50 hours to examine and cross-examine opposing parties and persons subject to their control. Third-party defendants share the defendants' 50 hours with regard to issues common to the defendants, however, third-party defendants have an additional 10 hours for examination regarding issues upon which they oppose the defendants.~~

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

be. Record of deposition time. Breaks during depositions do not count against any party's deposition time limitation. The officer taking the deposition shall state as part of the certificate required by Rule 206 the amount time each examiner used to examine the deponent.

3. Conduct during the deposition. The oral deposition shall be conducted in the same manner as if the testimony were being obtained in court during trial. Counsel are expected to cooperate with and be courteous to each other and the deponents. Private conferences between

deponents and their attorneys during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during agreed~~normal~~ recesses and adjournments. If the lawyers and witnesses do not comply with this rule, ~~T~~the court may allow statements, objections and discussions conducted during the oral deposition that reflect upon the veracity of the testimony to be introduced in evidence at ~~presented to the jury during~~ trial.

4. Instructions not to answer. Instructions to the deponent not to answer a question are improper except *(a)* to preserve a privilege against disclosure, *(b)* to enforce a limitation on evidence directed by the court, *(c)* to protect a witness from an abusive question, or *(d)* to make a motion under paragraph 5. Should a court later order the deponent to answer a question to which the deponent was instructed not to answer, the court may impose an appropriate sanction for discovery abuse pursuant to Rule 215.

5. Terminating the deposition. A party or the deponent may move to terminate or limit the deposition ~~pursuant to Rule 8~~ when the time limitations for the deposition have expired or when the deposition ~~it~~ is being conducted or defended not in accordance with these rules~~in bad faith or in such a manner as to unreasonably annoy, embarrass, or oppress the party or the deponent~~. Upon demand of the moving party or deponent, the deposition shall be suspended for the time necessary to file a motion for protective order and secure a ruling thereon. Should a court rule that the deposition should not have been terminated, the court may impose an appropriate sanction for discovery abuse pursuant to Rule 215.

6. Objections to testimony. Objections during the oral deposition are improper except the following objections to the form of the question or the responsiveness of the answer: "Objection, leading;" "Objection, form;" and "Objection, nonresponsive." These objections shall be stated as phrased and will be waived if not made at the taking of the deposition. A narrative objection will not preserve the objection for the court's later determination. Upon request, the objecting party shall explain the grounds of the objection clearly and concisely, in a non-argumentative and non-

suggestive manner. Objections or explanations that are argumentative or suggest answers to or otherwise coach the deponent are not permitted and can be grounds for termination of the deposition pursuant to this Rule.

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

RULE 16. Non-Stenographic Recording

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

a. Any party intending to make a non-stenographic recording shall ~~-~~give reasonable prior notice in writing to the deponent and other parties, either in the deposition notice or ~~in writing~~otherwise, of the non-stenographic method by which the testimony will be recorded and whether or not a certified court reporter will be present to record and transcribe the testimony. If a certified court reporter will not be present, the person recording the testimony (the "recorder") must arrange for the presence of a notary public who can administer the oath to the deponent. The party requesting the non-stenographic recording will be responsible for taking, preserving, and maintaining~~filing~~ the original non-stenographic recording and assuring that the recorded testimony will be intelligible, accurate and trustworthy. ~~Any transcription of the non-stenographic recording may be used as evidence only if it complies with the provisions of Rules 205 and 206.~~

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

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

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

2. Certificate. The recorder shall make a duly sworn certificate that accompanies the original recording that shall state the following:

a. that the witness was duly sworn;

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

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

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

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

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

4. Exhibits. If a certified court reporter is not present, the recorder shall, upon the request of a party, mark and annex to the original deposition recording original documents and things produced for inspection during the examination of the witness. The person producing the materials may (a) offer copies to be marked for identification and annexed to the deposition recording and to serve thereafter as originals if the party affords to all other parties fair opportunity at the deposition to verify the copies by comparison with the originals, or (b) offer the originals to be marked for identification, in which event the materials may then be used in the same manner as if annexed to the deposition recording. In the event that original exhibits rather than copies are marked for identification, the recorder shall make copies of all original exhibits to

be annexed to the original deposition recording for delivery, and shall thereafter return the originals of the exhibits to the witness or party producing them, or if the witness or party is represented by an attorney at the deposition, to the attorney, who shall thereafter maintain and preserve the original exhibits and shall produce any such original exhibits for hearing or trial upon seven (7) days notice from any party. Copies annexed to the original deposition recording may be used for all purposes.

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

a. At trial or summary judgment. Any part or all of a non-stenographic recording or transcript of a non-stenographic recording of a deposition that was recorded only by nonstenographic means can be used at the trial or supporting or opposing a motion for summary judgment under the circumstances set forth in Rule 20(1) only if the party intending to use the deposition has obtained a complete transcript of the deposition recording from a certified court reporter. The certified court reporter shall obtain the original or a certified copy of the deposition recording, shall transcribe it, and the provisions of Rule 18 shall apply and the provisions of Rule 19 shall apply to the extent applicable.[7] The certified court reporter shall include in the certificate a statement that the transcript was made from the original or certified copy of the deposition recording and that the transcript is a true record of the recording. If the deposition is to be used as evidence at the trial, the complete transcript must be served on all parties at least 30 days before the trial. If the deposition is to be used as evidence supporting or opposing a motion for summary judgment, the complete transcript must be served on all parties at the time the deposition is presented to the court as summary judgment evidence.

b. At any other hearing. Any part or all of a deposition recorded only by non-stenographic means can be used at any hearing of a motion or an interlocutory proceeding (other than a summary judgment motion) under the circumstances set forth in Rule 20(1) only if the party intending to use the deposition has obtained a transcript of that portion of the deposition

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

recording in accordance with this rule. At least 20 days before the date set for the hearing in which the deposition is to be used, the party seeking to use the deposition must file and serve a written designation specifying (1) the name of the deponent whose deposition the party intends to use; (2) the name and address of the certified court reporter that the party has asked to transcribe all or part of the deposition recording; and (3) the portions of the deposition recording that the party has requested to be included in a transcript. If the party has designated only a part of the deposition testimony, any other party may request the named court reporter to transcribe additional parts of the deposition recording at that party's own expense within 10 days of service of the designation. The deposition can be used only if the transcript is completed at least 3 days before the date of the hearing. The provisions of Rule 18 shall not apply and the provisions of Rule 19 shall apply only to the extent appropriate. The certified court reporter shall include in the certificate a statement that the transcript was made from the original or certified copy of the deposition recording and that the transcript is a true record of the recording.

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

~~**2. Deposition by Telephone.** Any party may give reasonable prior notice that a deposition will be taken by telephone or other remote electronic means, subject to subsection 1(b) of this rule. For the purposes of this rule and Rules 14, 215-1a and 215-2a, a deposition taken by telephone is taken in the district and at the place where the deponent is to answer the questions asked. The officer taking the deposition may be located with the deposing parties instead of with the witness if the identification of the witness is substantiated and the witness does not waive examination and signature of the transcribed deposition.~~

RULE 17. Deposition Upon Written Questions

~~–~~1. Serving Questions; Notice. ~~After commencement of the action,~~ At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first, any party may take the testimony of any person, including a party, by deposition upon written questions. A party may take a deposition prior to the appearance date of any defendant only upon ~~L~~leave of court, granted with or without notice~~, must be obtained only if a party seeks to take a deposition prior to the appearance day of any defendant~~. The attendance of witnesses and the production of designated items may be compelled as provided in Rule 20~~201~~.

2. Notice; written questions.

a. A party proposing to take a deposition upon written questions must give notice to every other party~~shall serve them upon every other party or his attorney with a written notice~~ 20~~ten~~ days before the deposition is to be taken. The notice shall state the name and if known, the address of the deponent, and the time and place of the taking of the deposition, and shall be filed and served. ~~the suit in which the deposition is to be used, the name or descriptive title and address of the officer before whom the deposition is to be taken, and if the production of documents or tangible things in accordance with Rule 201 is desired, a designation of the items to be produced by the deponent either by individual item or by category and which describes each item and category with reasonable particularity.~~ The notice shall also state the identity of persons who will attend other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the deposition. If any party intends to have any other persons attend, that party must give reasonable notice to all parties of the identity of such other persons. If a subpoena commanding production under Rule 24 is to be served on the person being examined, the designation of materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

b. ~~A~~ ~~A~~ party may in his notice name as the witness a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity

the matters on which examination is requested. ~~In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify.~~ In response,, the organization so named shall designate one or more persons to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The person so designated shall testify as to matters known or reasonably available to the organization. ~~A subpoena shall advise a non-party organization of its duty to make such a designation. The person so designated shall testify as to matters known or reasonably available to the organization.~~ This paragraph does not preclude taking a deposition by any other procedure authorized in these rules.

~~2. Notice by Publication. In all civil suits where it shall be shown to the court, by affidavit, that a party is beyond the jurisdiction of the court, or that he cannot be found, or has died since the commencement of the suit, and such death has been suggested at prior term of court, so that the notice and copy of written questions cannot be served upon him for the purpose of taking depositions, and such party has no attorney of record upon whom they can be served, or if he be deceased and all the persons entitled to claim by or through such deceased defendant have not made themselves parties to the suit, and are unknown, the party wishing to take depositions may file his notice in the court where the suit is pending, and the clerk of such court or justice of the peace shall thereupon cause a notice to be published in some newspaper in the county where the suit is pending, if there be a newspaper published in said county, but if not, then in the nearest county where a newspaper is published, once each week for two (2) consecutive weeks, stating the number of the suit, the names of the original parties, in what court the suit is pending, name and residence of the witness to whom the written questions are propounded, and that a deposition will be taken on or after the fourteenth day after the first publication of such notice.~~

~~In suits where service of citation has been made by publication, and the defendant has not answered within the time prescribed by law, service of notice of depositions upon written~~

~~questions may be made at any time after the day when the defendant is required to answer, by filing the notice among the papers of the suit at least twenty days before such depositions are to be taken.~~

~~2~~3. **Cross-Questions, Redirect Questions, Recross Questions and Formal Objections.** Any party may serve cross-questions upon all other parties within ten days after the notice and direct questions are served. Within five days after being served with cross-questions a party may serve redirect questions upon all other parties. Within three days after being served with redirect questions a party may serve recross questions upon all other parties. Objections to the form of written questions are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within five days after service of the last questions authorized. The court may for cause shown enlarge or shorten the time.

~~3~~4. **Deposition Officer; Interpreter.** Any person authorized to administer oaths including notaries public (whether or not the person is a certified shorthand reporter), is an officer who is authorized to issue a subpoena or subpoena commanding production~~duces tecum~~ under Rule 24 for a written deposition~~, as provided in Rule 201~~ and is an officer before whom a written deposition may be taken. An officer who is authorized to take a written deposition shall have authority, when the officer~~he~~ deems it expedient, to summon and swear an interpreter to facilitate the taking of the deposition.

~~4~~5. **Officer to Take Responses and Prepare Record.** A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly to administer an oath to the witness in the manner provided in paragraph ~~1~~2 of Rule 15~~2~~04, to record ~~take~~ the testimony of the witness in response to the questions ~~in the manner provided in paragraph 3 of Rule 204~~ at the time the testimony is given, and thereafter to transcribe the testimony, or personally to supervise another who transcribes the testimony, and to prepare, certify and deliver the deposition transcript, in the

manner provided by Rules 18 and 23~~205 and 206~~, attaching thereto the copy of the notice and questions ~~received by him~~.

~~The officer delivering the deposition transcript shall give prompt notice of its delivery to all parties. It shall be sufficient notice of delivery for the officer to forward to each party a copy of the officer's certification described in paragraph 1 of Rule 206.~~

Rule 18. Submission to Witness; Changes; Signing. [redline from current rule 205]

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

Rule 19. Certification by Officer; Exhibits; Copies; Notice of Delivery. [redlined from current Rule 206]

_____**–1. Certification.** The officer shall attach as part of the deposition transcript a certificate duly sworn by such officer which shall state the following;

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

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

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

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

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

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

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

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

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

_____**–2. Delivery.** Unless otherwise requested or agreed to by the parties on the record in the deposition transcript, the officer, after certification, shall securely seal the original deposition

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

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

~~4. Nothing in this Rule shall preclude the parties from agreeing to any procedure at variance with the provisions of this Rule or Rule 205; provided, however, that any such agreement between the parties shall be set forth on the record in the text of the deposition transcript, set forth in a~~

~~separate exhibit to the transcript and signed by all parties, or approved by prior written order of the court.~~

~~5. Copies. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition transcript to any party or to the deponent.~~

~~6. Notice of Delivery. The deposition officer shall give notice to all parties of delivery of the deposition transcript and copies of exhibits. It shall be sufficient notice of delivery for the officer to serve on each party a copy of the officer's certification described in paragraph 1 herein pursuant to Tex.R.Civ.P. 21a.~~

Rule 20. Use of Deposition Transcripts in Court Proceedings. [redlined from current Rule 207]

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

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

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

~~*c. PARTIES JOINED AFTER DEPOSITION TAKEN*~~*Parties joined after deposition taken.* If one becomes a party after the deposition is taken and has an interest similar to that of any party described in *a.* or *b.* above, the deposition is admissible against that party~~him~~

only if that partyhe has had a reasonable opportunity, after becoming a party, to redepose the deponent, and has failed to exercise that opportunity.

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

3. Motion to Suppress.

a. Depositions recorded stenographically. When a ~~deposition~~ transcript of a deposition that has been recorded stenographically has been delivered by the deposition officer pursuant to Rule 206 and notice of delivery given at least one entire day before the day on which the case is called for trial, errors and irregularities in the notice of delivery, and errors in the manner in which the testimony is transcribed or the deposition transcript is prepared, signed, certified, sealed, endorsed, delivered, or otherwise dealt with by the deposition officer under Rules 18~~205~~ and 19~~206~~ are waived, unless a motion to suppress the deposition transcript or some part thereof is made and notice of the written objections made in the motion is given to every other party before the trial commences.

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

Rule 21: Compelling Production from Nonparty.

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

2. Notice, subpoena. A party proposing to compel production from a nonparty must give reasonable notice to every other party. The notice shall state the name of the nonparty from whom production is sought to be compelled, the time and place for the production, and shall be filed and served. The notice shall set forth the items to be produced or inspected, either by individual item or by category, and describe each item and category with reasonable particularity. If the requesting party intends to sample or test the requested items, the desired testing and sampling shall be described with sufficient specificity to inform the nonparty of the means, manner, and procedure for testing or sampling.

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

RULE 22. Physical and Mental Examinations

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

2. ~~(b)~~ **Report of Examining Physician or Psychologist.**

a. ~~(1)~~ If requested by the party against whom an order is made under this rule or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician or psychologist setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party~~he~~ is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician or psychologist fails or refuses to make a report the court may exclude his testimony if offered at the trial.

b. ~~(2)~~ This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery

of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance with the provisions of any other rule.

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

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

a. ~~(1)~~ one or more psychologists to make any and all appropriate mental examinations of the children who are the subject of the suit or any other parties irrespective of whether a psychologist has been listed by any party as an expert who will testify.

b. ~~(2)~~ non-physician experts who are qualified in paternity testing to take blood, body fluid or tissue samples and to conduct such tests as ordered by the court.

5. ~~(e)~~ **Definitions.** For the purpose of this rule, a psychologist is a person licensed or certified by a State or the District of Columbia as a psychologist.

RULE 23. Motion for Entry Upon Property [8]

1. Motion. At any time no later than 30 days before the end of any applicable Discovery Period or 30 days before trial, whichever occurs first, ~~During the discovery period provided for in Rule 1(2),~~ the court in which the action is pending may order any person, including a person not a party to the pending suit, to allow ~~any party may file a motion seeking permission for~~ entry upon designated land or other property for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon when the land or property is relevant to the subject matter of the action. The order may be made only on motion for good cause shown and shall specify the time, place, manner, conditions, scope of the inspection, and a description of any desired testing or sampling, sufficient to inform the person of the means, manner and procedure for testing or sampling, and the persons or persons by whom the inspection, testing or sampling is to be made. ~~The motion shall state with specific particularity the reasons therefor.~~

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

~~**3. Hearing and Order.** All parties and the person in possession or control of the property shall have the opportunity to assert objections at the hearing. After proper notice and hearing, the court may enter an order permitting the movant to enter upon the property for the purposes of inspection and measuring, surveying, photographing, testing or sampling the property or any designated object or operation thereon.~~

[8] Changes to make this new rule similar to Motion for Physical/Mental exam.

RULE 24: Subpoena[9] **[new rule]**

1. Form; Issuance.

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

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

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

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

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

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

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

2. Service.

---

[9] This new rule is largely based upon FRCP 45, but contains many of the provisions in current TRCP 177-178.

a. Any sheriff or constable of the State of Texas or any person who is not a party and is not less than 18 years of age may serve a subpoena by delivering a copy to the witness and tendering to that person any fees required by law.[10]

b. Subject to the provisions of applicable law, a subpoena may be served at any place within the State of Texas.

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

3. Protection of Nonparties Subject to Subpoenas

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

b. Subject to paragraph (d)(2) of this rule, a nonparty commanded to produce and permit inspection and copying of designated documents and things, within 10 days after service of the subpoena or before the time specified for compliance if such time is less than 10 days after service, may serve upon the party at whose instance the witness is summoned written objection to inspection or copying of any or all of the designated materials. If objection is made, the party at whose instance the witness is summoned shall not be entitled to inspect and copy the materials except pursuant to court order. At any time after an objection is made, the party serving the subpoena may, upon notice to the person commanded to produce, move for an order to compel the production.

c. Within 10 days after service of the subpoena or before the time specified for compliance if such time is less than 10 days after service, the person served with the subpoena may, upon notice to the party at whose instance the witness is summoned, move for a protective order in the court in which the action is pending or a district court in the county in which the subpoena was served. The court shall make such orders in the interests of justice necessary to

---

[10] Fees provided for in CPRC chapter 22.

protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights.

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

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

4. Duties of Nonparties in Responding to Subpoenas

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

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

c. If a subpoena commanding testimony is directed to a public or private corporation, partnership, association, governmental agency, or other organization, and the matters on which examination is requested are described with reasonable particularity, the organization so named

shall designate one or more persons to testify on its behalf as to matters known or reasonably available to the organization.

5. Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued or a district court in the county in which the subpoena is served.

Part Two. Pretrial Conference

RULE 166. Pretrial Conference

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

a. The settlement of the case;

b. Referral of the case to alternate dispute resolution;

c. Development of a scheduling order, including a Discovery Control Plan;

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

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

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

Part Three. Other Rules Affected By Subcommittee Proposals

RULE 63. Amendments and Responsive Pleadings

Parties may amend and supplement their pleadings and respond to other parties' pleadings without leave of court no later than sixty (60) days before the end of the discovery period or five (5) days after receipt of notice of the first trial setting, whichever is later. Thereafter, parties may file pleadings that amend, supplement, or respond only with leave of court or upon the agreement of the parties. Leave shall be granted unless there is insufficient time to complete discovery that would be made necessary by the amendment, supplement, or response, in which case leave shall be denied or the discovery period extended. Leave shall not be granted if it would unreasonably delay the trial.