Questions Relating to Discovery
(With Proposed Answers)

by

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Question 1

If the plaintiff pleads that discovery is intended to be conducted under Level 1, and the defendant thinks it should be a Level 2 or Level 3 case, what can the defendant do?

Proposed Answer 1

If the defendant files a pleading that seeks relief that puts the case outside of Level 1, that automatically makes it a Level 2 case. Rule 190.2(b)(3). The case can be made into a Level 3 case by obtaining a court-ordered discovery control plan.

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Question 2

What kinds of family law cases can and cannot be Level 1 cases?

Proposed Answer 2

Only suits for divorce that do not involve children and have estates between zero and $50,000 can be Level 1 cases. Rule 190.2(a)(2). If the marital estate is over $50,000, or if it is zero or less, it cannot be a Level 1 case. No suit involving children (including a no asset divorce involving agreed terms for the children) can be a Level 1 case.

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Question 3

In cases under the Family Code, how does the discovery period differ from Level 1 to Level 2?

Proposed Answer 3

It doesn't. In both instances the discovery period begins when the suit is filed and ends 30 days before the date set for trial. Compare Rule 190.2(c)(1) to Rule 190.3(b)(1)(A).

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Question 4

How do the limitations on deposition time differ from Level 1 to Level 2?

Proposed Answer 4

Under Level 1, total examination and cross-examination time on all witnesses (including direct examination of your own client) for each party cannot exceed 6 hours, expandible to 10 hours by agreement. Rule 190.2(c)(2). Under Level 2, the 50-hour time limitation on deposition direct and cross-examination only applies to parties on the opposing side, experts designated by those parties, and persons subject to those parties' control. Under Level 2, there is no limit on depositions of third-party witnesses such as neighbors, parents, church members, treating doctors, eyewitnesses, court-appointed psychologists or social workers, etc. Also, under Level 2 there is no limit on questioning your own client in a deposition. Rule 190.3(b)(2).

Note that Level 1 limitations are per *party*, while Level 2 limitations are per *side*.

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Question 5

How do the limitations on interrogatories differ from Level 1 to Level 2?

Proposed Answer 5

They don't. In both instances interrogatories are limited to 25 in number (excluding interrogatories identifying or au-thenticating documents). Compare Rule 190.2(c)(3) to Rule 190.3(b)(3).

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Question 6

Is there a time limit for filing an amended pleading, moving the case from Level 1 to Level 2?

Proposed Answer 6

Yes, 45 days before trial. Rule 190.2(b). After that date, amendment of pleading is only by court order when good cause outweighs prejudice to the opposing party.

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Question 7

What does it mean when Rule 190, Comment 4, says "But depositions on written questions cannot be used to circumvent the limits on interrogatories"?

Proposed Answer 7

This probably means that you can't issue a deposition on written questions of a party if the questions are interrogatory-type questions.

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Question 8

Plaintiff sues three corporate defendants. All three defendants deny liability and damages, and assert no cross-claims against each other. How many hours of deposition time does each defendant have to examine and cross-examine plaintiff corporation, and its designated experts, and persons subject to Plaintiff corporation's control?

Proposed Answer 8

Bad question. Rule 190.3(b)(2) (Level 2) sets a maximum of 50 hours *per side* to depose parties on the *opposing side*, experts designated by the *opposing side*, and persons subject to the control of the *opposing side*. Since all three defendants are on the same side, all three defendants must share the same 50 hours of questioning plaintiff and the witnesses under plaintiff's control.

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Question 9

Same situation, where Plaintiff sues three corporate defendants. All three defendants deny liability and damages, and assert no cross-claims against each other. How many hours of deposition time does each defendant have to examine and cross-examine co-defendant corporations, and their designated experts, and persons subject to their control?

Proposed Answer 9

There is no time limitation on defendants examining co-defendants' witnesses in such depositions. Rule 190.3(b)(2) (Level 2) sets a maximum of 50 hours *per side* to depose parties on the *opposing side*, and their experts, etc. Since the co-defendants are not on opposing sides, the 50-hour limitation does not apply as between them. However, no matter how many depositions the defendants may take between each other, plaintiff is limited to a total of 50-hours of direct and cross-examination on all defendants' experts and controlled witnesses.

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Question 10

Same scenario as before, only this time all three co-defendant corporations assert cross-claims against each other. What are the time limitations on depositions of the plaintiff's experts and witnesses under its control? What are the time limitations on depositions a defendant takes of the witnesses under the control of other defendants?

Proposed Answer 10

"Side" is defined in Rule 190.3(2) a "all litigants with generally common interests in the litigation." All defendants are on the same "side" as to the plaintiff, so they all share the 50-hour limitation as to plaintiff's experts and witnesses under plaintiff's control. The plaintiff is limited to 50 hours of deposition questioning on all of the defendants' experts and witnesses under the defendants' control. However, D1 and D2 share 50 hours for deposing D3's experts and controlled witnesses, and D2 and D3 share 50 hours for deposing D1's experts and controlled witnesses,

and D1 and D3 share 50 hours for deposing D2's experts and controlled witnesses. See Rule 190, *Notes and Comments*, paragraph 6, where examples are given of deposition limitations in multi-party, multi-claim lawsuits.

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Question 11

The rules relating to experts are generally written for experts hired by a party for the litigation. However, many times there will be preexisting relationships with doctors, psychotherapists, CPA's etc. Those witnesses may have personal knowledge of relevant evidence, as well as being qualified to give expert opinions. How does such a mixed fact-expert witness fit into the discovery rules?

Proposed Answer 11

The discovery rules permit discovery as to "testifying experts" and consulting experts whose work has been reviewed by testifying experts. A testifying expert is defined in Rule 192.7 as "an expert who may be called to testify as an expert witness at trial." This term may include both expert witnesses hired to testify in the lawsuit and professionals who had a pre-existing relationship with the parties (such as family doctors, therapists, CPA's, etc.) This term may also apply to one or both of the parties to the lawsuit. The term "testifying expert" also may apply to a court-appointed expert. And it may apply to attorneys who are going to testify to attorney's fees.

Under Rule 192.2(e), a party is entitled to discover the identity, mental impressions, and opinions of, and other information relating to, a testifying expert, or a consulting expert whose work has been reviewed by a testifying expert. Other rules indicate who must provide this information regarding testifying experts.

Under Rule 194, one party can request that the other party disclose standard information relating to "any testifying expert." Rule 194.2(f). Rule 194 distinguishes between testifying experts, who are and who are not retained by, employed by, or otherwise subject to the control of the responding party. Rule 194.2(f)(3) & (4). If the expert is retained by, employed by, or subject to the control of a party, that party must upon request produce all documents, tangible things, reports, data compilations, etc. that were provided to, reviewed by, or prepared by or for the expert in anticipation of his/her testimony, as well as the expert's current resumé and bibliography. Rule 190.2(f)(4). If the expert is under the responding party's control, the standard request for disclosure requires disclosure of the general substance of the expert's mental impressions and opinions, and a brief summary of the basis for them. If the expert is not under the responding party's control, the responding party can substitute documents reflecting the foregoing information. Rule 194.2(f)(3).

Rule 195 sets out timetables for the disclosure of experts and making them available for deposition. Comment 2 to the rule makes it clear that Rule 195 does not address depositions of experts who are not retained by, employed by, or otherwise subject to the control of the responding party.

Comment 2 to Rule 195 also makes it clear that the responding party has no duty to provide the information made discoverable under Rule 192.2(e) (e.g., mental impressions, opinions, etc.) as regards testifying experts not under the responding party's control. Comment 2 indicates that discovery from such an expert can be made using the subpoena power of Rules 176 and 205.

However, even as to noncontrolled testifying experts, a party planning to call them as a witness at trial must designate them as testifying experts by the deadline set in Rule 195. Rule 195 requires disclosure 90 days before the end of the discovery period (i.e., 120 before trial) for parties seeking affirmative relief, and 60 days before the end of the discovery period (i.e., 90 days before trial) for parties no seeking affirmative relief. Rule 195.2.

The provisions in Rule 195.3, about making experts available for deposition, apply only to a controlled expert.

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Question 12

In Level 2, you can add 6 hours to your total deposition time for each expert "designated" by the opposing side in excess of two. Rule 190.3(b)(2). Designation apparently is required if the expert will be testifying for you. *See* Rule 195.2. However, Comment 2 to Rule 195 says that Rule 195 does not address depositions of testifying experts who are not retained by, employed by, or otherwise subject to the control of the responding party. However, depositions are covered by Rule 195.3 (scheduling depositions) and not Rule 195.2 (schedule for designating experts).

If in my case I may call as witnesses the (1) social worker who did marriage counseling, (2) the PhD who did psychological counseling for the kids, (3) the CPA who did the parties' tax returns, (4) a real estate appraiser I hired to value the house, (5) a personal property appraiser I hired to value the furniture and furnishings, (6) my client's business partner to testify on the value of the business, and (7) myself to testify on reasonable attorney's fees, which one of these experts do I have to "designate," and how many extra hours of deposition time have I added to the opponent's deposition time?

Proposed Answer 12

[Panel will discuss]

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Question 13

Who has what rights and duties regarding a court-appointed expert?

Proposed Answer 13

The court-appointed expert is not retained by, employed by, or otherwise subject to the control of any party. Discovery from that expert will be pursuant to court order, or by way of subpoena to produce documents and deposition, or by conversations if the expert is willing. However, any party planning to call the expert to testify must disclose the expert as provided in Rules 194 and 195.

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Question 14

Can a court, as part of a Level 3 discovery control plan, order the parties to produce copies of their trial exhibits in advance of trial?

Proposed Answer 14

Yes. Under Rule 192.5(c)(2), work product protection is not afforded to "trial exhibits ordered disclosed under Rule 166 or Rule 190.4."

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Question 15

If a written discovery request or response does not contain the required signature or certificate of conference, what should the opposing party do?

Proposed Answer 15

If your opponent has sent you an unsigned request or notice, you are not required to take any action, since you need not respond to an unsigned request or notice. Rule 191(d). If your opponent has failed to sign a response to discovery you have sent, call your opponent's attention to the omission, and if it is not signed promptly then "it must be stricken." Rule 191(d).

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Question 16

Rule 191.4(a)(3) says that I cannot file "documents and tangible things produced in discovery." If I need to use that production in responding to a motion for summary judgment, how do I get it into the summary judgment record?

Proposed Answer 16

File it anyway. Rule 191.4(c)(2) provides an exception permitting you to file discovery matter in support of or in opposition to a motion.

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Question 17

If I request business records from my opponent, and receive boxes and boxes of them, am I required to retain those records for some period of time after the case is concluded?

Proposed Answer 17

No. Rule 191.4(d) requires that records be retained after the case is concluded only by the person required to serve discovery materials. So, it is the party who produces and serves records that must preserve them, not the party requesting the records.

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Question 18

Is there a time limit on when I can file a motion for protective order to assert a privilege from written discovery?

Proposed Answer 18

Bad question. Rule 192.6(a) indicates that you can't file a motion for protective order to assert a privilege. The proper way to assert a privilege is by saying in your discovery response that you are withholding information pursuant to a privilege. *See* Rule 193.3(a).

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Question 19

Is there a time limit on when I can file a motion for protective order to complain about the time or place of discovery?

Proposed Answer 19

Yes. You must move for a protective order "within the time permitted for response . . . ." *See* Rule 192.6(a).

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Question 20

Rule 190.3(b)(3) says that "interrogatories asking a party only to identify or authenticate specific documents" do not count against the 25 interrogatory limit under Level 2. What is an example of an interrogatory that asks a party to "identify or authenticate specific documents"?

Proposed Answer 20

"Please identify the so-and-so, attached hereto as Exhibit 11."

"Is the so-and-so, attached hereto as Exhibit 12, a true copy of the original?"

"Is the so-and-so, attached hereto as Exhibit 13, a true copy of a letter signed by you?"

Not "Please identify all documents you say support your claim for money damages." This interrogatory counts as one of your 25 interrogatories because the Rule 190.3(3) exception to the limit of 25 interrogatories applies only when you are asking a party to identify *specific* documents. The interrogatory also may be overbroad.

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Question 21

How do the doctor-patient and mental health privileges apply in discovery?

Proposed Answer 21

Rule 196.1© provides that, if one party requests another party to produce the medical or mental health records of a nonparty, the requesting party must inform the nonparty of the request. Notice to the nonparty is not required if the nonparty signs a release, the identity of the nonparty will not be revealed through the records, or the court rules upon a showing for good cause that notice need not be given to the nonparty. Rule 196.1(c).

If a responding party wishes to assert the privileges as to a request for the production of documents, this is done by withholding the documents and revealing in the reply that certain records were withheld due to these privileges. Rule 193.3. The requesting party can reply with a request that the withheld information be identified. Within 15 days of service of that request, the withholding party must respond with a description of the materials withheld sufficient to permit the requesting party to assess the applicability of the privilege, and an assertion of a specific privilege for each item or groups of items withheld. Rule 193.3(b). It is not proper to assert a privilege through an objection (Rule 193.2(f)) or by motion for protective order (Rule 192.6(a)).

Upon the assertion of privilege, the requesting party can seek a ruling. If the privilege is overruled, the responding party has 30 days to produce the records, or at such time as the court may prescribe. Rule 193.4(b).

A party who asserts a privilege during discovery to keep the opposing party from seeing documents cannot use those documents at a hearing or the trial, except by timely amendment of the discovery response. Rule 1-93.4(c).

If a party is alleging physical or mental injury and damages, all related medical records and bills are discoverable and under Rule 194 Requests for Disclosure, the requesting party is entitled to have either the records and

bills or an authorization from the complaining party to acquire those records. Rule 194.2(k).

The court can order a physical or mental examination of a party, or of a person in their custody, conservatorship or legal control, when the mental or physical condition is in controversy. The examination can be performed by a physician (physical or mental examination) or by a "qualified psychologist" (mental examination only). Rule 204. In a proceeding under Title II (Child in Relation to the Family) or Title V (Suit Affecting the Parent-Child Relationship) of the Family Code, the court can appoint psychologists or psychiatrists to make mental examinations of the children or the parties.

Tex. R. Evid. 509 (physician-patient privilege) and 510 (mental health privilege) were amended in 1998 to eliminate the exception to the rule for suits affecting the parent-child relationship. In a Comment to each rule, the Supreme Court indicated that the elimination of the exception did not mean that discovery of medical and mental health records could not occur in a SAPCR. It meant that discovery in a SAPCR would be available under the "relevancy" exception, as expounded in *R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994). The Comment says that "[i]n determining the proper application of an exception to such suits, the trial court must ensure that the precise need for the information is not outweighed by legitimate privacy interests protected by the privilege." However, the Comment indicates that in no event are the records of an expert witness subject to discovery under the relevancy exception.

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Question 22

How is "core work product" distinguished from "other work product"?

Proposed Answer 22

"Work product" is material prepared, or mental impressions developed, by a party or his/her representative (including attorneys, consultants, etc.) in anticipation of litigation or for trial, as well as what used to be "party communications." Rule 192.5(a). "Core work product" is the work product of an attorney or his/her representative that contains their "mental impressions, opinions, conclusions, or legal theories." Rule 192.5(b)(1).

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Question 23

How do the protections of core work product vary from the protections of other work product?

Proposed Answer 23

Core work product is not discoverable. Rule 192.5(b)(1). Other work product is discoverable upon a showing that the party seeking discovery has a substantial need and is unable without undue hardship to obtain the substantial equivalent of the material by other means. Rule 192.5(b)(2).

There is also a difference in the way you assert the work product privilege for core and other work product. You don't have to disclose that you are withholding what is loosely described as the trial attorney's "litigation files." Rule 193.3(c). Although the definition of core work product under Rule 192.5(b)(1) is not identical to the description in Rule 193.3(c), most of what constitutes core work product fits the exemption in Rule 193.3(c). Thus, you don't need to disclose that you're withholding most types of core work product. You must disclose that you are withholding other work product.

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Question 24

Do you or do you not have to disclose that you are withholding the following items from discovery, based on privilege?

1. The defendant corporation's investigative reports relating to the incident giving rise to the litigation, prepared by an employee who is an engineer, made before any claim was asserted from the incident.

2. Same as 1, only the investigation and report were done after a claim was asserted from the incident.

3. The defendant's corporation's investigative reports relating to the incident giving rise to the litigation, prepared by in house counsel, made before any claim was asserted from the incident.

4. Same as 3, only the investigation and report were done by in house counsel after a claim was asserted from the incident.

5. Trial counsel's memorandum of a telephone conversation with a company employee, relating to the lawsuit.

6. The report of an investigator hired by trial counsel, regarding the incident giving rise to the lawsuit.

7. Legal memoranda and briefs prepared by trial counsel for use at trial. If they are withheld from discovery, can they be used at trial?

8. Demonstrative aids to be used during trial, prepared by (i) the client, (ii) trial counsel, (iii) a testifying expert?. If they are withheld from discovery, can they be used at trial?

Proposed Answer 24

[Panel to discuss]

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Question 25

Is there a difference between Rule 192.5(b)(1)'s description of something prepared by an attorney "in anticipation of litigation"and Rule 193.3(c)(1)'s description of something prepared by an attorney "from the point at which a party consults a lawyer with a view to obtaining professional legal services from the lawyer in the prosecution or defense of a specific claim in the litigation in which discovery is requested"?

Proposed Answer 25

[Panel to discuss]

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Question 26

Can Rule 193.4(a) be interpreted as saying that it is not necessary to tender privileged documents for *in camera* inspection unless the court determines that *in camera* review is necessary, or should the party asserting the privilege submit the documents before the court requests, in support of the claim of privilege?

Proposed Answer 26

[Panel to discuss]

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Question 27

Under the new rules, what types of information can be supplemented in writing or at a deposition, and what must be supplemented in the original form?

Proposed Answer 27

Rule 193.5(a)(1) requires that new information regarding the identification of persons with knowledge of relevant facts, trial witnesses, and expert witnesses, be disclosed by amended or supplemental response. Under Rule 193.5(a)(2), all other written discovery can be supplemented in writing (i.e., a letter), on the record at a deposition, or through a supplemental response.

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Question 28

What should I do if the opposing party files supplemental answers to interrogatories that are not signed and sworn by the client?

Proposed Answer 28

Under Rule 193.5(b), if the answers to interrogatories were required to be sworn, supplemental answers are also required to be sworn. However, you must complain about the lack of swearing, and only if the supplementing party refuses to verify within a reasonable time will the answers be deemed "untimely." Note that under Rule 197.2(d), interrogatory answers relating information obtained from other persons can be identified as such, and a party need not *sign* interrogatory answers about persons with knowledge of relevant facts, trial witnesses, and legal contentions.

Note that inquiries regarding persons with knowledge of relevant facts, trial witnesses, and legal contentions, can also be made under Rule 194 Requests for Disclosure, in lieu of interrogatories. Note also that usually there is just one client signature for a set of answers to interrogatories, so that if some interrogatories inquire into persons with knowledge of relevant facts, trial witnesses, and legal contentions, and the remaining interrogatories do not, it is hard to envision how those few answers could be "not signed" if the entire set is signed.

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Question 29

How can you obtain documents from third parties?

Proposed Answer 29

By asking for voluntary production, by subpoena duces tecum to produce records (Rule 176.6(c)), or by subpoena duces tecum to bring records to an oral or written deposition (Rule 176.6(c)). See Rule 205 (Discovery From Non-parties).

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Question 30

What does it mean in Rule 176.6(c) when it says "A non-party's production of a document authenticates the document for use against the non-party to the same extent as a party's production of a document is authenticated for use against the party under Rule 193.7?

Proposed Answer 30

This statement doesn't make much sense.

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Question 31

What is the procedure for taking a deposition without a court reporter?

Proposed Answer 31

A deposition can only be taken before an officer authorized by law to take depositions. Rule 199.1(a). Tex. Civ. Prac. & Rem. Code § 20.001 lists persons who may take a deposition. Section 20.001(a) provides that depositions on written questions may be taken before a district clerk, a county judge or county clerk, or a notary public. The Section also discusses depositions in other states, and outside of the United States. The Section does not talk about depositions on oral questions. Texas Gov't Code §§ 52.021(b) & (f) provide that all depositions conducted in Texas must be recorded by a certified court reporter.

Rule 199.1© permits parties to cause a deposition upon oral examination to be recorded by other than stenographic means. Videotape recording is mentioned as an example. The party requesting the nonstenographic recording must obtain a person authorized by law to administer the oath and for assuring that the recording will be intelligible, accurate, and trustworth. Notice of the intent to record the deposition by nonstenographic means must be given to other parties at least 5 days before the deposition. The notice must reveal the form of non-stenographic recording, and whether a stenographic recording will also be made. Other parties can serve written notice of another form of recording, to be made at that party's expense.

Rule 199 seems to conflict with the Government Code, in that the Rule implies that an oral deposition can be accomplished by having a notary public administer the oath and having a videographer record the questions and answers. The Government Code suggests that all oral depositions must be recorded by a certified shorthand reporter.

Can the parties have a Rule 11 agreement to follow the rule and not the statute? Can they tacitly agree to follow the Rule and not the statute?

Rule 203.6(a) provides that a non-stenographic recording of an oral deposition can be used just like a stenographic recording would be. However, for good cause the court can require the deposition proponent to obtain a complete transcript from a certified court reporter, which must be prepared from the original or a certified copy of the nonstenographic recording.

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Question 32

When deposing a witness regarding a document written in a foreign language, is it necessary to object to the accuracy of the translation at the time of the deposition, or prior to trial, or can that objection be made for the first time during trial?

Proposed Answer 32

Tex. R. Evid. 1009 governs translation of foreign language documents. Rule 1009(b) requires that objections to the accuracy of a translation be served on all parties at least 15 days prior to trial. However, reading Rule 1009 in its entirety suggests that this 15-deadline applies only to objecting to translations that are offered upon the affidavit of a qualified translator. TRE 1009(e) says that nothing about having to object at least 15 days before trial to deposition testimony about translations. New Discovery Rule 199.5(e) requires that you make objections to the form

of questions at the time of deposition. An objection to a question based upon the inaccuracy of a translation is not a question of form, and can therefore be made at the time of trial.