NEW DEVELOPMENTS IN CIVIL PROCEDURE AND EVIDENCE

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New Developments in Civil Procedure and Evidence©

by

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I. INTRODUCTION This article discusses recent developments in Texas civil procedure and evidence.

II. SCOPE OF ARTICLE The area of coverage for this paper is very broad. It will only be possible to hit the high points. The article discusses important changes in the new Texas Rules of Evidence, the new summary judgment rule, the recently-proposed new discovery rules, and the new Texas Rules of Appellate Procedure. One case of extraordinary importance is also discussed.

III. NEW RULES OF EVIDENCE On February 25, 1998, the Supreme Court and Court of Criminal Appeals adopted unified civil and criminal rules of evidence for Texas courts. The new Texas Rules of Evidence [TRE] became effective on March 1, 1998.

The new Texas Rules of Evidence are mostly the same as the prior Texas Rules of Civil Evidence [TRCE]. However, they are different in important particulars.

A. Offer of Proof Old TRCE 103(a)(2) said that when evidence is excluded, you must make an offer of proof of the excluded testimony in order to complain on appeal. New TRE 103(a)(2) says that the offer of proof is necessary *unless the substance of the included evidence "was apparent from the context within which questions were asked."*

B. Optional Completeness Old TRCE 106 applied the rule of optional completeness to writings and recorded statements. New TRE 107 applies the rule of optional completeness to an act, declaration, conversation, writing or recorded statement. Instead of making the remainder admissible when "in fairness" it ought to be considered, the new rule says that the remainder is admissible when it "is necessary to make it fully understood or to explain the same." New TRE 107 explains that when a letter is read, all letters on the same subject between the same parties may be read. TRE 107 applies to depositions, as well.

C. Attorney-Client Privilege New TRE 503(a)(2)(b) alters the scope of the attorney-client privilege. Former TRCE 503(a)(2) included as a "representative of a client" only a person having the authority to obtain legal services, or to act on legal advice, on behalf of the client. Under new TRE 503(a)(2), "representative of a client" includes that category of persons, plus any person who makes or receives a confidential attorney communication within the scope of employment for the client.

D. Husband-Wife Privilege New TRE 504(a)(4)(C) adds an exception to the husband-wife privilege, where the party is accused of conduct which is a crime against his/her spouse, minor child, or member of the household.

E. Physician-Patient & Mental Health Privileges New TRE 509 (physician-patient privilege) and 510 (mental health privilege) have been altered to eliminate the unqualified exception for suits affecting the parent-child relationship. Instead, SAPCR litigants will have to rely on other exceptions, chiefly the "relevancy exception," which suspends the privilege "as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense." TRE 509(d)(4); TRE 510(d)(5). The Supreme Court and Court of Criminal Appeals make the following significant comment:

> Former subparagraph (d)(6) of the Civil Evidence Rules, regarding disclosures in a suit affecting the parent-child relationship, is omitted, not because there should be no exception to the privilege in suits affecting the parent-child relationship, but because the exception in such suits is properly considered under subparagraph (d)(4), as construed in *R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994). In determining the proper application of an exception in such suits, the trial court must ensure that the precise need for the information is not outweighed by legitimate privacy interests protected by the privilege. Subparagraph (d) does not except from the privilege information relating to a nonparty patient who is or may be a consulting or testifying expert in the suit.

Notes and Comments to TRE 509. An equivalent comment is appended to TRE 510, relating to the mental health privilege.

These new Rules of Evidence thus introduce into SAPCRs a balancing test in judging the admissibility of confidential medical and mental health evidence: the court must weigh legitimate privacy interests against the precise need for information.

F. Instruction Re: Inference From Privilege Under TRE 513, the court is to conduct proceedings so as to avoid the jury becoming aware that a privilege has been invoked. Any party who might be injured by an adverse inference from a claim of privilege is entitled to an instruction to the jury prohibiting such inference. This right to an instruction does not apply to a party invoking the privilege against self-incrimination.

G. Expert Examination New TRE 705 changes the procedure for testifying experts in civil cases. Under the new rule, as under the old, an expert may disclose on direct examination, and must disclose on cross-examination, the facts or data underlying the opinion. Under new TRE 705(b), prior to the expert giving an opinion or testifying to underlying facts and data, the adverse party can conduct a voir dire examination of the expert outside the hearing of the jury. Under new TRE 705(c), if the court finds that the underlying facts or data do not provide a sufficient basis for opinion, the opinion is inadmissible. When the underlying facts or data are otherwise inadmissible, the court must exclude the underlying facts or data "if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial." When the court is going to permit the expert to testify to otherwise inadmissible underlying facts or data, the court must upon request give the jury a limiting instruction.

H. Translations New TRE 1009 sets up a procedure for translation of documents not in English. Translations can be self-authenticated by affidavit of an expert, subject to objections filed 15 days before trial. Failure to file objections precludes challenging the accuracy of the translation. Translations can be proved through live testimony or deposition, except to challenge an affidavit when objections were not timely filed.

IV. RECENT CASE LAW ON EVIDENCE The big news in evidence case law is the Supreme Court's decision on July 3, 1998, in *Gammill v. Jack Williams Chevrolet, Inc.*, 1998 WL 352951 (Tex. July 3, 1998). In *Gammill*, the Texas Supreme Court announced that the reliability and relevance standard of *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995). applies to all types of expert testimony. In *Gammill* a unanimous Supreme Court said:

> We conclude that whether an expert's testimony is based on "scientific, technical or other specialized knowledge," *Daubert* and Rule 702 demand that the district court evaluate the methods, analysis, and principles relied upon in reaching the opinion. The court should ensure that the opinion comports with applicable professional standards outside the courtroom and that it "will have a reliable basis in the knowledge and experience of [the] discipline." [FN47]

The odyssey begins . . . .

V. NEW SUMMARY JUDGMENT RULE On August 15, 1997, the Texas Supreme Court amended the TRCP 166a, the summary judgment rule. The amendments are as follows:

> RULE 166a. SUMMARY JUDGMENT
>
> (a) For Claimant. [No change.]
>
> (b) For Defending Party. [No change.]
>
> (c) Motion and Proceedings Thereon. [No change.]
>
> (d) Appendices, References and Other Use of Discovery Not Otherwise on File. [No change.]
>
> (e) Case Not Fully Adjudicated on Motion. If summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the judge may at the hearing examine the pleadings and the evidence on file, interrogate counsel, ascertain what material fact issues exist and make an order specifying the facts that are established as a matter of law, and directing such further proceedings in the action as are just.
>
> (f) Form of Affidavits; Further Testimony. [No change.]
>
> (g) When Affidavits Are Unavailable. [No change.]

(h) Affidavits Made in Bad Faith. [No change.]

i) No-Evidence Motion. After *adequate time for discovery*, a party *without presenting summary judgment evidence* may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the *respondent produces summary judgment evidence* raising a genuine issue of material fact. [Emphasis added]

The Supreme Court issued the following comments on these amendments:

Notes and Comments

Comment to 1997 change: This comment is intended to inform the construction and application of the rule. Paragraph (i) authorizes a motion for summary judgment based on the assertion that, after adequate opportunity for discovery, there is no evidence to support one or more specified elements of an adverse party's claim or defense. A discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the contrary, and ordinarily a motion under paragraph (i) would be permitted after the period but not before. The motion must be specific in challenging the evidentiary support for an element of a claim or defense; paragraph (i) does not authorize conclusory motions or general no-evidence challenges to an opponent's case. Paragraph (i) does not apply to ordinary motions for summary judgment under paragraphs (a) or (b), in which the movant must prove it is entitled to judgment by establishing each element of its own claim or defense as a matter of law or by negating an element of the respondent's claim or defense as a matter of law. To defeat a motion made under paragraph (i), the respondent is not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements. The existing rules continue to govern the general requirements of summary judgment practice. A motion under paragraph (i) is subject to sanctions provided by existing law (Tex. Civ. Prac. & Rem. Code §§ 9.001-10.006) and rules (Tex. R. Civ. P. 13). The denial of a motion under paragraph (i) is no more reviewable by appeal or mandamus than the denial of a motion under paragraph (c).

The big difference between the new and the old summary judgment rule is the shifting of the burden of proof. Under prior procedure, in Texas "we never shift[ed] the burden to the non-movant unless and until the movant ha[d] "establish[ed] his entitlement to a summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of his cause of action or defense as a matter of law." *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989). Under new paragraph (i), in a "no evidence" motion the party with the burden of proof *at trial* has the burden of proof on summary judgment.

The question of "adequate time for discovery" will no doubt be greatly impacted by the new rules of discovery promulgated by the Texas Supreme Court, where all cases have a "discovery period." This topic is discussed further below.

VI. NEW DISCOVERY RULES On June 9, 1998, the Supreme Court promulgated the latest in its series of new discovery rules. The product, labeled "Tentative Draft No. 2," will go through a period of editing, and will be finalized and submitted to the Texas Bar Journal by September 15, to become effective on January 1, 1999. A copy of this current draft is appended to this article. A digital version can be downloaded from the Texas Judicial Web site: <http://www.supreme.courts.
state.tx.us/rules/index.htm>

The new discovery rules consist of 16 rules:

Rule 1	Discovery Limitations
Rule 2	Modifying Discovery Procedures and Limitations; Conference Required; Signing Disclosures, Discovery Requests, Responses, and Objections

Rule 3	Permissible Discovery: Forms and Scope; Definitions; Work Product; Protective Orders
Rule 4	Response to Written Discovery; Objection; Assertion of Privilege; Supplementation and Amendment; Failure to Timely Respond; Presumption of Authenticity
Rule 5	Requests for Disclosure
Rule 6	Discovery Regarding Expert Witnesses
Rule 7	Requests for Production and Inspection to Parties; Requests and Motions for Entry upon Property
Rule 8	Interrogatories to Parties
Rule 9	Requests for Admissions
Rule 10	Depositions Upon Oral Examination
Rule 11	Depositions Upon Written Questions
Rule 12	Depositions in Foreign Jurisdictions
Rule 13	Depositions to Perpetuate Testimony
Rule 14	Signing, Certification and Use of Oral and Written Depositions
Rule 15	Subpoena; Compelling Discovery from Nonparties
Rule 16	Motions for Physical and Mental Examinations

Each of the new rules is examined below.

A. Rule 1 Rule 1 deals with discovery limitations. Rule 1 does not apply to depositions to perpetuate testimony (Rule 13), discovery in aid of judgment (TRCP 621a), or bills of discovery (TRCP 737).

Under Rule 1, cases fit into one of three levels. Level 1 is for suits with claims for $50,000 or less, excluding costs, pre-judgment interest and attorney's fees. Level 1 also includes divorces not involving children when the marital estate is $ 50,000 or less. Level 2 is the default category which applies when the case is neither in Level 1 ($50,000 or less) nor Level 3 (having a discovery control plan). Level 3 cases involve a discovery control plan "tailored to the circumstances of the specific suit." The plan must be imposed upon request of any party, and may be imposed on the court's own initiative.

Even for cases involving $50,000 or less, Level 1 will not apply if the parties agree that Level 2 should apply, or if a discovery control plan is imposed (making it a Level 3 case), or if the plaintiff amends the pleadings to seek more than $50,000, or any party files a pleading seeking relief other than money recovery, or recovery in excess of $50,000.

If Level 1 applies, the "discovery period" runs from the commencement of the suit until 30 days before trial. Rule 1.2(c)(1). In Level 1 cases, depositions cannot total more than 6 hours per party, for all direct and cross-examination of all witnesses. However, the parties can by agreement expand that to 10 hours total, but cannot exceed that limit without the court's permission. Rule 1.2(c)(2). Under Level 1, interrogatories are limited to 25 in number, including discrete subparts. But interrogatories asking a party to identify or authenticate specific documents can be unlimited in number. Rule 1.2(c). If a timely pleading removes the case from Level 1, discovery must be reopened and a continuance granted to the opponent, if desired. No such pleading can be filed within 30 days of trial. Rule 1.2(d).

If Level 2 applies, the discovery period begins on the earlier of the date of the first oral deposition or the due date of the first response to written discovery. The discovery period continues for 9 months, or until 30 days prior to trial, whichever is earlier. The parties can vary the discovery period, but cannot extend it to more than 12 months or less than 30 days before trial. Rule 1.3(b).

Under Level 2, each side is limited to 50 hours of oral deposition time with parties, experts designated by opposing parties, and persons subject to a party's control. Third party defendants share the defendant's time as to common issues, but have 10 more hours on issues where they are adverse to the defendant. If one side designates more than two experts, the opposing side get an additional 6 hours of deposition time for each expert (beyond two) designated. The court is empowered to modify deposition time and must do so as necessary to avoid one side or party having an unfair advantage. Interrogatories are limited to 25 in number, including discrete subparts, but not considering interrogatories seeking to identify or authenticate documents. Rule 1.3.

Under Level 3, the court will put a discovery control plan into effect. Standing orders applying to all cases are not allowed. The discovery control plan can contain any terms described in TRCP 166 (pre-trial conference), and can change any discovery limitation imposed by the rules. The

plan must include a trial date, a discovery period in which all discovery must transpire, appropriate limits on the amount of discovery, and deadlines for joinder of parties, amending or supplementing pleadings, and designating experts. Rule 1.4(b). The court can modify the plan at any time, and must do so "in the interest of justice." If new, amended or supplemental pleadings are filed, or new information is disclosed in discovery, the court must allow additional discovery related thereto, if the development occurs after the discovery period closes, or so close to the deadline that the adverse party doesn't have an adequate opportunity to conduct discovery on the new matters, and the adverse party would be unfairly prejudiced. If trial is set or postponed more than three months after the end of the discovery period, the court should allow additional discovery regarding changes after the discovery cutoff.

B. Rule 2 Rule 2 deals with modifying discovery procedures and limitations on discovery. Rule 2.1 permits all discovery rules to be modified by agreement of the parties or by order of the court upon good cause, except where specifically prohibited. Rule 2.2 requires all discovery motions or requests for hearing to contain a certificate of conference.

Rule 2.3 requires that each discovery disclosure, request, response and objection be signed by counsel or by a pro se party. The signature verifies that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

> "(1) consistent with the rules of civil procedure and these discovery rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
>
> (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
>
> (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation."

Rule 2.3. If the certification is false without substantial justification, the court can upon motion or upon its own initiative impose sanctions per Tex. Civ. Prac. & Rem. Code Sec. 10. Rule 2.3(e). A request, response or objection not signed must be stricken unless it is signed promptly after the lack of signing is pointed out. Rule 2.3(d). A party need not reply to a discovery request that is not signed. Rule 2.3(d).

C. Rule 3 Rule 3 deals with permissible discovery: forms and scope of discovery; definitions; work product; and protective orders. The forms of permissible discovery are already familiar to us, except the "requests for disclosure." Rule 3.1. Rule 3 omits subpoenas, but probably shouldn't. These forms of discovery can be pursued in any sequence. Rule 3.2. The general outline of the "scope of discovery" is familiar to us. Rule 3.3(a).

Discovery is permitted as to the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case. An expert who has acquired knowledge of relevant facts not in preparation for trial or in anticipation of litigation is "a person with knowledge of relevant facts," but an expert who acquired knowledge of relevant facts for trial or in anticipation of litigation is not "a person with knowledge of relevant facts" as to those facts. Rule 3.3(c).

Comment 3 to Rule 3 indicates that a "brief statement of each identified person's connection with the case" does not mean 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, such as: "treating physician," "eyewitness," "chief financial officer," "director," "plaintiff's mother and eyewitness to accident."

In a significant departure from prior practice, a party may obtain discovery of the name, address, and telephone number of any person who is expected to be called to testify at trial, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial. Rule 3.3(d).

Rule 3.3(e) carries forward the discovery exemption for consulting experts. However, witness statements are now discoverable. Rule 3.3(h). "Witness statements" do not include notes taken during a conversation or interview with a witness. Rule 3.3(j) permits discovery requests on a party's "legal contentions or the factual b discovery sought is unreasonably cumulative or duplicative, obtainable from a more convenient or less burdensome or less expensive source, or the party seeking discovery has had ample opportunity to obtain the information, of the burden or expense of the discovery outweighs its likely benefit, considering the "needs of the case," the amount in controversy, the parties' resources, the importance of the issues in the case, and the importance of the proposed discovery in resolving the issues. Rule 3.4.

Rule 3.5 divides work product into "core work product" and "other work product." Core work product, which consists of the attorney's (or his/her representative's) mental impressions, opinions, conclusions, or legal theories, made

in anticipation of litigation or for trial, is not discoverable. "Other work product" is discoverable upon a showing that the party seeking discovery has substantial need of the materials in preparation of the case, and is unable without undue hardship to obtain the substantial equivalent of the material by other means. Rule 3.5. Disclosure of "other work product" is not prohibited just because it incidentally discloses by inference the attorney mental processes which are core work product. Rule 3.5(b)(3). Disclosure of "other work product" must be structured insofar as possible to protect against disclosure of "core work product." The work product exemption does not apply to information discoverable under Rule 3.3 about experts, trial witnesses, witness statements, and contentions. Rule 3.5(c)(1). The exemption also does not apply to trial exhibits ordered disclosed under TRCP 166 or Rule 1.4. The exemption does not protect the name, address or telephone number of persons with knowledge of relevant facts, any photograph or electronic image of underlying facts or which any party intends to offer into evidence, or work product created in a manner that would bring it within an exception to the attorney-client privilege. Rule 3.5(c).

A party can move for a protective order prior to the time for response. A motion should not be used when an objection suffices. A motion regarding the time and place of discovery must state an alternative acceptable time and place. The responder must comply to the extent not covered by the motion. Rule 3.6(a). The court has the familiar powers to order protection. Rule 3.6(b).

Rule 3.7 defines "written discovery;" "possession, custody or control;" "testifying expert;" and "consulting expert." A testifying expert is "an expert who may be called to testify as an expert witness at trial." The significance of the "testifying expert" designation is that testifying experts can be reached by a "request for disclosure" under Rule 5.2(f).

Rule 3.8 prohibits parties from filing various discovery materials, but requires the filing of the following:
discovery requests, deposition notices and subpoenas required to be served on nonparties; motions pertaining to discovery matters; and agreements concerning discovery matters, to the extent necessary to comply with TRCP 11. However, the court can vary this rule, discovery materials can be filed in support of or opposition to a motion, or for other use in the trial court or in an appellate court. Any party holding discovery materials not required to be filed must retain the original or copies for two years after the case is concluded. Rule 3.8(d).

D. Rule 4 Rule 4 deals with the response to written discovery; making objections to discovery; asserting privileges during discovery; supplementation and amendment of discovery; effect of the failure to timely respond; and presumption of authenticity. A party must make a complete response to written discovery, based on "all information reasonably available to the responding party *or his attorney* at the time of the response. Rule 4.1. If (and only if) the requester provides the discovery requests in digital form readable by the responder, all answers, objections or other responses must be preceded by the request. Rule 4.1.

All objections must be made in writing within the time for a response. They can be made in the response or separately. The responder must specifically state the basis for the objection and the extent to which the responder is refusing to comply. Rule 4.2(a). If a partial objection is made, the responder must comply with the remainder of the request. Rule 4.2(b). If an objection is made to the time or place of production, a reasonable time and place must be stated, and those terms must be met without further request or order. Rule 4.2(b).

All objections must be made upon a good faith factual or legal basis. Rule 4. 2(c). Objections can be made or amended to state a basis that did not exist at the time of initial reply. Rule 4.2(d). An objection is waived if not made by the deadline, or if it is obscured by numerous unfounded objections. Rule 4.2(e). Waiver can be excused by the court for good cause. Rule 4.2(e). *Privilege is not a valid basis for objection.* Instead, privileges are handled by a different procedure. Rule 4.2(f).

A party who claims privilege can withhold material or information from the response, but in doing so must state that pertinent information has been withheld, and must specify which request applies, and the privilege asserted. Rule 4.3(a). The requester can request the responder to identify the information and material withheld, in which event the responder must, within 15 days of service of that request, serve a response describing the nature of the information withheld, and asserting a privilege for each item or group withheld. Rule 4.3(b). However, a statement of privilege is not required as to attorney-client privileged information created "with a view to obtaining professional legal services from the lawyer in the prosecution or defense of the specific claim in the litigation in which discovery is requested" and where the information concerns the present lawsuit. Rule 4.3(c).

Inadvertent or unintentional production of privileged information is "deemed involuntary" and does not waive a claim of privilege if, within 10 days of learning of the production the producing party amends the response and asserts the privilege. If that is done, the requester must return the information to the producer. Rule 4.3(d).

Any party can request a hearing on an objection or claim of privilege. The burden is on the responder to present evidence at the hearing, by testimony or affidavits served 7 days in advance. If the court requests in camera inspection, the material must be submitted to the court within a reasonable time after the hearing. Rule 4.4(a). The failure to obtain a ruling pre-trial does not waive the objection or privilege. If the objection or privilege is sustained by the court, no further action is necessary. If the objection or privilege is overruled by the court, then a response is due within 30 days or such other time as the court may prescribe. Rule 4.4(b).

There is a duty to amend or supplement the requested identification of persons with knowledge of relevant facts, trial witnesses, and experts. Rule 4.5(a). Other information also must be amended or supplemented *unless the additional or corrective information has been made known to the other parties in writing, on the record at a deposition, or through other discovery responses.* Rule 4.5(b).

Amendment or supplementation is due "reasonably promptly after the necessity for such response is discovered." Rule 4.5(c). An amendment or supplementation within 30 days of trial is presumed not reasonably prompt. Rule 4.5(c). However, as to experts, the deadlines in Rule 6 apply. An amended or supplemental response must be in the same form as the initial response. Rule 4.5(c).

Failure to disclose in a timely manner precludes the use at trial of the evidence not disclosed, or the testimony of the undisclosed witness. However, this preclusion does not apply to a party who fails to list himself or herself. Rule 4.6(a). The court can make an exception upon a showing of good cause for the failure, *and that the failure will not unfairly surprise or unfairly prejudice other parties.* Rule 4.6(a). The burden of showing good cause and no unfair surprise or unfair prejudice is on the party seeking to introduce the evidence. A finding of good cause must be supported by the record. Rule 4.6(b). Even is the errant party fails to carry the burden of excuse, the court can grant a continuance or temporarily postpone the case to permit a response and the other party to conduct discovery. Rule 4.6(c).

The production by a party of a document in response to written discovery "authenticates the document for use against that party in any pretrial motion or response," unless within 10 days of knowing the document will be used the producing party serves written objection to authenticity. Rule 4.7. This should ease the burden, in summary judgment proceedings, of authenticating information obtained from your adversary.

The Comment to Rule 4 gives examples of overbroad requests, or possible objections.

E. Rule 5 Rule 5 deals with requests for standardized disclosure. Standard disclosure is triggered by serving the following written request:

> "Pursuant to Rule 5, you are requested to disclose, within 30 days of service of this request, the information or material described in Rule [state rule, e.g., 5.2, or 5.2(a), (c), and (f), or 5.2(d)-(g)].

Rule 5.1. A request for standard disclosure can relate to any or all of the following:

(a) the correct names of the parties to the lawsuit;

(b) the name, address, and telephone number of any potential parties;

(c) the claims or defenses of the responding party and, in general, the essential facts which, if proven at trial, would establish such claims or defenses (without marshaling all evidence that may be offered at trial);

(d) the amount and any method of calculation of each element of damages claimed, and any supporting documents or other materials;

(e) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case;

(f) for any testifying expert:

  (1) the expert's name, address, and telephone number;

  (2) the subject matter on which the expert will testify;

  (3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or documents reflecting such information if the expert is not retained by, employed by, or otherwise in the control of the responding party;

(4) if the expert is retained by, employed by, or otherwise in the control of the responding party:

(A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and

(B) the expert's current resume and bibliography;

(g) any discoverable indemnity and insuring agreements;

(h) any discoverable settlement agreements;

(i) any discoverable witness statements;

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

(k) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by virtue of an authorization furnished by the requesting party.

Rule 5.2. A request relating to experts under Rule 5.2(f) is governed by the terms of Rule 6. Rule 5.3(b).

The response is due 30 days after the request is served, unless the request is served with the citation, in which event the response is due 50 days after service. Rule 5.3. Copies of documents "ordinarily must be served with the response." However, if voluminous, the response can specify a time not more than 7 days from the date of the response, and a place for production of the documents.

NO OBJECTIONS ARE PERMITTED TO A REQUEST UNDER RULE 5. Rule 5.5.

Prior versions of replies to 5.2(c) & (d) (regarding facts underlying claims or defenses and damages) which are later supplemented or amended are not admissible at trial. Rule 5.6. However, this preclusion does not apply to information otherwise made known in writing, on the record at a deposition, or through other discovery responses. Rule 5.6.

F. Rule 6 Rule 6 deals with expert witnesses. A party can request other parties to "designate and disclose information concerning testifying expert witnesses" *only through a request for disclosure under Rule 5, through depositions, or through reports.* Rule 6.1. The requested information must be furnished by the later of the following two dates:

30 days after the request is served, or —

- the earlier of 75 days before the end of any applicable discovery period or 75 days before trial for an expert testifying for a party seeking affirmative relief;

- the earlier of 45 days before the end of any applicable discovery period or 45 days before trial for an opposing expert.

Rule 6.2.

A party must make an expert retained by, employed by, or otherwise in the control of the party, available for deposition reasonably promptly after the expert is designated. If the deposition cannot reasonably be concluded more than 15 days before the deadline for designating opposing experts, that deadline must be extended. Rule 6.3.

Apart from standard disclosures under Rule 5, a party can find out an expert's mental impressions and opinions, etc., only through oral deposition or report. Rule 6.4.

The court can order preparation of a report, in addition to a deposition. Rule 6.5.

The general duty of supplementation regarding experts is set out in Rule 6.6. Where the expert is retained by, employed by, or otherwise under the control of a party, that party must additionally supplement the expert's deposition testimony or written report, as to the expert's mental impressions or opinions, and the basis for them. Rule 6.6.

G. Rule 7 Rule 7 deals with requests for production and inspection to parties; and requests and motions for entry upon property. Such requests can be served only on other parties. Rule 7.1(a). [Note that records can be subpoenaed from non-parties, even without a deposition, under Rule 15] The request must specify the items to be produced or inspected by item or by category, and must describe with reasonable particularity each item and category. Rule 7.1(b). The request must specify a reasonable time or place for production or inspection. Rule 7.1(b). If medical or mental health records of a non-party are requested, notice of the request must be given to the non-party, unless the requester has a signed release, or the identity of the non-party will not be disclosed by production, or the court

orders that notice is not necessary, for good cause. Rule 7.1(2).

The response is due 30 days after service, unless service is effected with the citation, in which event the deadline is 50 days after service. Rule 7.2(a). The prescribed content of the response is:

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

Rule 7.2(b).

A special provision relates to the production of electronic or magnetic data. The requester must specifically request electronic or magnetic data and the form in which it is to be produced. The responder must produce data that is reasonably available in the responder's ordinary course of business. The court can order the requester to pay reasonable expenses of extraordinary steps needed to get the data. Rule 7.4.

Unless the court orders otherwise, costs of production are to be paid by the producing party, and costs of inspection, copying, etc. paid by the requester. Rule 7.6.

The rule provides for request or motion to permit entry upon land. Rule 7.7.

H. Rule 8 Rule 8 deals with interrogatories. Interrogatories can be served on another party no later than the earlier of 30 days before the end of the discovery period or 30 days before trial. Rule 8.1. The interrogatories can relate only to matters within the scope of discovery that are not discoverable through standard disclosures under Rule 5. Rule 8.1. Answers are due 30 days after service, unless served with the citation, in which event the deadline is 50 days after service. Rule 8.2(a). A response should include an answer, objections and assertions of privilege. Rule 8.2(b). The answers must be signed under oath. Rule 8.2(d), and can be used only against the answering party. Rule 8.3.

I. Rule 9 Rule 9 deals with requests for admissions. Requests for admissions can be served on another party no later than the earlier of 30 days before the end of the discovery period or 30 days before trial. Rule 9.1. They may relate to any matter within the scope of discovery. That includes statements or opinions of fact or the application of law to fact. That also includes genuineness of documents served with the request or otherwise made available for copying. Each matter must be stated separately. Rule 9.1 Responses are due in 30 days, except if the requests are served with citation, the responses are due 50 days after service. Rule 9.2(a).

Unless the responding party objects or asserts a privilege, each request must be admitted or denied, or the party must explain in detail the reasons why a request cannot be admitted or denied. Lack of information is not a valid basis to refuse to admit or deny, unless the responding party states that reasonable inquiry was made. Rule 9.2(b).

An unanswered request is deemed admitted without intervention of the court. Rule 9.2(c).

J. Rule 10 Rule 10 deals with oral depositions.

Under new Rule 10, a party can take an oral deposition by telephone or other remote electronic means, merely upon reasonable written notice. A telephone deposition no longer requires the agreement of opposing parties or court order. The reporter or recorder can be situated with the deposing parties instead of with the witness, as long as the witness is put under oath by an authorized person in the witness's presence. Rule 10.1(b).

A party can take a non-stenographically recorded deposition upon 5 days' notice, stating the means of the recording and whether or not a stenographic record will be made. Rule 10.1(c).

A deposition notice must be served on the witness and parties "a reasonable time before the deposition is taken." Rule 10.2(a). Oral depositions must be taken by the earlier of the end of the discovery period or 30 days prior to trial. Rule 10(2)(a). A non-party witness can be subpoenaed to travel up to 150 miles from the place the subpoena is served. Rule 10.2(b)(2)(D). The court has the power to

designate another place for the deposition to be taken. Rule 10(2)b)(2)(E).

The deposition notice can contain a duces tecum request. When the witness is a non-party, the production of records is governed by Rule 15. When the witness is party, the production of records is governed by Rule 7. Rule 10.2(b)(5).

The witness can move for a protective order or move to quash the deposition notice. If the issue is the time or place of the deposition, a motion to quash or motion for protective order stays the oral deposition if the motion is filed no later than the 3rd business day after service of the deposition notice. Rule 10.4.

A party can attend an oral deposition by telephone. Rule 10.5(a)(2). If non-parties are to attend, other than the witness, spouses of parties, counsel and their employees, and the reporter or recorder, reasonable notice of this fact must be given. Rule 10.5(a)(3). Parties can submit questions in a sealed envelope in lieu of attending the oral deposition. Rule 10.5(b). Each "side" in the case is limited to 6 hours of direct or cross-examination per deposition. Rule 10.5(c).

Conduct during the deposition is as if at trial. Conferences between the witness and counsel are limited to issues involving privilege. Private conferences between counsel and the witness can be held during agreed recesses and adjournments. For non-compliance, the court can admit into evidence statements, objections and discussions that occur during the oral deposition. Rule 10.5(d).

Objections during oral depositions are limited to "Objection, form," and "Objection, nonresponsive." Those two objections are waived if not stated in this exact manner during the deposition. Upon request, the objecting party must give a clear and concise explanation of an objection. Argumentative or suggestive objections are grounds for terminating the deposition. Rule 10.5(e). An objection as to "form" includes leading, lack of foundation (including misstating prior testimony, assuming facts not in evidence or not within the witness's knowledge), calling for speculation, calling for narrative answer, compound or vague. Rule 10, Comment 3.

Instructions for a witness not to answer are limited to protection of privileged information, complying with a court order or the discovery rules, protecting from abusive questions, or in connection with suspending the deposition to secure a ruling from the court. Rule 10.5(f).

A party can suspend the deposition to secure a court ruling as to expanding time limitations or if the deposition is being conducted in violation of the discovery rules. Rule 10.5(g).

An objection or instruction not to answer can be brought before the court at any reasonable time. The failure to obtain a pre-trial ruling does not waive the objection or privilege. The party avoiding discovery must present evidence to support his position, either by sworn testimony or affidavits filed 7 days before the hearing. The court can require in camera answers to questions, to be sealed for appeal. Rule 10.6.

When a party takes the deposition of an expert retained by the opposing party, the party who retained the expert must pay all reasonable fees for the expert's time in preparing for, giving, reviewing and correcting the deposition. Rule 10.7.

K. Rule 11 Rule 11 deals with depositions on written questions. Old TRCP 208(1) permitted a deposition on written question upon 10 days' notice. New Rule 11.1(a) requires *20 days notice*. The deposition must be taken no later than the earlier of the end of the discovery period or 30 days before trial. Rule 11.1(a). The deposition on written questions can be taken by anyone authorized to administer oaths (e.g., any notary public). The deposition officer need not be a certified court reporter. Rule 11, Comment 2. Questions on direct must be attached to the deposition notice. Objections and cross-questions are due within 10 days after notice is served. Within 5 days of service of cross-questions, redirect questions can be served, and objections can be made. Recross questions can be issued within 3 days of redirect questions. Rule 11.3. Objections to the form of the question are waived if not asserted in objections. Rule 11.3(c).

L. Rule 12 Rule 12 deals with depositions in foreign jurisdictions. Depositions in a sister state or foreign country can be taken upon notice, pursuant to a letter rogatory, by agreement of the parties, or by court order. Rule 12.1. Texas rules limiting time for depositions, etc. apply. Rule 12.2. Rule 12 provides for letters rogatory and letters of request. Rule 12.3 & 12.4. Videoconference or teleconference depositions may be taken. Rule 12.6.

M. Rule 13 Rule 13 deals with depositions to perpetuate testimony.

N. Rule 14 Rule 14 deals with the mechanics of validating depositions. These details are identical or analogous to existing procedures. The witness must sign the deposition except where signature is waived by agreement, or for depositions on written questions, or for non-stenographic recordings of oral depositions. A witness producing records

at the deposition may produce original records, or may bring the originals and copies, and attach copies to the deposition. Rule 14.4. If originals are produced, the court reporter must copy them and return the originals to the witness. Rule 14.4. As to non-stenographic depositions, the court can require the party wishing to use the deposition at trial to obtain a complete transcript from a certified court reporter.

O. Rule 15 Rule 15 deals with subpoenas and compelling discovery from non-parties, and permits this to be done without a court order. Subpoenas can require a non-party to attend a deposition, hearing or trial. Rule 15.1(3)(A). However, it can also require a person to produce designated documents for inspection and copying at a time and place specified. Where the subpoena is only to produce records and not to appear to testify, the person producing documents need not appear at the time and place of production. Rule 15.1(a)(3)(B). Subpoenas can issue from the court where the suit is pending, except that the officer taking a deposition or certified court reporter can issue a subpoena for a deposition or to produce records. Rule 15.1(b). Subpoena range for a trial or hearing is 150 miles from the courthouse. Rule 15.1(c)(3).

A subpoena to a non-party to produce records without a deposition must be served a reasonable time before the request is due, but no later than the earlier of 30 days before the end of the discovery period or 30 days before trial. Rule 15.2(d)(1).

If medical or mental health records are sought from non-parties, the requesting party must give notice to the nonparty whose records are sought that production of those records has been requested. Rule 15.2(d)(3).

The party receiving records pursuant to a subpoena without deposition must retain copies of the documents produced, and produce those copies for inspection by other parties upon 7 days' notice from another party. Copies must be provided, at the cost of the party asking for copies, within 20 days of request. Rule 15.2(d)(5).

A non-party receiving a subpoena for records can, before the time for compliance, serve written objections to the discovery. If such an objection is made, no production occurs except upon court order. Rule 15.3(a). The non-party can also move for a protective order. Rule 15.3(b). As to trial subpoenas, objections and motions for protection can be presented to the judge at the time specified for production.

A non-party can withhold privileged information. The requesting party can require a description of the withheld materials. Rule 15.3(d)(2).

P. Rule 16 Rule 16 deals with motions for physical and mental examination. The court can order a physical or mental examination by a physician, or a mental examination by a psychologist. Rule 16.1(a). Such an order can be issued only for good cause, when the mental or physical condition of a party, or person in the custody of a party, is in controversy. Rule 16.1(a). The motion must be filed and served prior to the earlier of 30 days before the end of the discovery period, or 30 days before trial. Rule 16.1(b). An examination by a psychologist can be ordered when the responding party has disclosed a psychologist as a testifying expert or has disclosed a psychologist's records for possible use at trial. Rule 16.1(b).

Rule 16 contains a special proviso for SAPCRs. Rule 16.2 provides that:

> **16.2 Cases Arising Under Titles II or V, Family Code.** In cases arising under Titles II or V, Family Code, the court may — on its own initiative or on motion of a party — appoint:
>
> **(a)** one or more psychologists or psychiatrists to make any and all appropriate mental examinations of the children who are the subject of the suit or any other parties, irrespective of whether a psychologist or psychiatrist has been disclosed by any party as a testifying expert;
>
> **(b)** experts, other than physicians, who are qualified in paternity testing to take blood, body fluid, or tissue samples to conduct such tests as ordered by the court.

VII. NEW RULES OF APPELLATE PROCEDURE

Effective September 1, 1997, new Texas Rules of Appellate Procedure went into effect. The entire range of these new rules is beyond the scope of this paper. Be forewarned that the new TRAPs radically depart from prior practice in many respects. The following is a list of key changes in the appellate rules.

Key Changes

- To perfect an appeal, a party now files a notice of appeal rather than a cost bond.

- Each party who wishes to improve its position under the trial court's judgment must now perfect an appeal; appellees can no longer rely on appellant's perfection of an appeal.

- Post-default judgment writ of error appeals have been replaced by "restricted appeals." Parties who timely filed a post-judgment motion can no longer pursue this type of appeal.

- The trial court clerk and the court reporter, not the appellant, are now responsible for filing the record and requesting extensions. Deadlines are monitored by the appellate court clerk.

- In briefs, the parties can use "issues presented" instead of or in addition to points of error.

- All pleadings in original proceedings (mandamus, habeas corpus) can be combined into one document, the petition. There is no longer any motion for leave to file nor a requirement of separate briefs. The style of a mandamus proceeding is "*In re Petitioner" rather than "Petitioner v. Trial Judge*."

- A motion for rehearing in the court of appeals is no longer a prerequisite to an appeal to the Supreme Court. A motion for rehearing is now optional and Supreme Court review is not limited to the matters raised in any motion for rehearing.

- Instead of 50-page briefs, parties in the Supreme Court will file a 15-page petition for review or response. Petitions must concentrate on the reasons the court should hear the case. The traditional 50-page brief cannot be filed, unless requested by the Court.

- Unless the Supreme Court requests it, the record will not be forwarded by the court of appeals. Instead, the petitioner will file an appendix containing certain required materials plus additional optional materials.

There are a host of other changes to the appellate rules.

VIII. APPENDIX The June 9, 1998 version of the new discovery rules are attached.