SCAC MEETING AGENDA (AMENDED)
Friday, June 10, 2016
9:00 a.m.

Location: **Texas Associations of Broadcasters**
502 E. 11th Street, #200
Austin, Texas 78701
(512) 322-9944

1. **WELCOME (Babcock)**

2. **STATUS REPORT FROM CHIEF JUSTICE HECHT**

Chief Justice Hecht will report on Supreme Court actions and those of other courts related to the Supreme Court Advisory Committee since the April 2016 meeting.

3. **EX PARTE COMMUNICATIONS**

Judicial Administration Sub-Committee Members:
Ms. Nina Cortell - Chair
Hon. David Peeples
Hon. Tom Gray
Prof. Lonny Hoffman
Hon. Bill Boyce
Mr. Michael A. Hatchell

(a) June 6, 2016 Memorandum on Ex Parte and Non-Litigant Communications w/attachments

4. **TIME STANDARDS FOR THE DISPOSITION OF CRIMINAL CASES IN DISTRICT AND STATUTORY COUNTY COURTS**

166-166a Sub-Committee Members:
Hon. David Peeples - Chair
Richard Munzinger – Vice
Hon. Jeff Boyd
Prof. Elaine Carlson
Ms. Nina Cortell
Mr. Rusty Hardin
Ms. Cristina Rodriguez
Mr. Carlos Soltero
Hon. Elsa Alcala

(b) 12/10/2015 Email from Judge Peeples re: Time Standards for Criminal Cases
June 9, 2016 Memo from Judge Peeples
2016-5-26 Judge Alcala Trial Letter

5. **DISCOVERY RULES**

171-205 Sub-Committee Members:

Mr. Robert Meadows - Chair
Hon. Tracy Christopher – Vice
Prof. Alexandra Albright
Hon. Jane Bland
Hon. Harvey Brown
Mr. David Jackson
Ms. Cristina Rodriguez
Hon. Ana Estevez
Mr. Kent Sullivan

(c) 2016-6-8 Email from R. Meadows to the SCAC
(d) 2016-6-5 Full Text Comparison; TRCP and FRCP
(e) 2016-6-5 Matched Comparison; TRCP and FRCP

6. **CANON 4F OF THE CODE OF JUDICIAL CONDUCT**

Legislative Mandates Sub-Committee Members:

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

(f) October 8, 2015 J. Perdue Memo re Decision on Judge Pollard's Request
(g) Judge Tom Pollard's May 12, 2015 letter

7. **TEXAS RULE OF APPELLATE PROCEDURE 49**

Appellate Sub-Committee Members:

Prof. Bill Dorsaneo – Chair
Ms. Pamela Baron – Vice
Hon. Bill Boyce
Hon. Brett Busby
Prof. Elaine Carlson
Mr. Frank Gilstrap
Mr. Charles Watson
Mr. Evan Young
Mr. Scott Stolley

(h) May 25, 2016 Memo from Prof. Bill Dorsaneo
(i) Misc. Doc. No. 89-9017
(j) Misc. Doc. No. 08-9115
(k) Misc. Doc. No. 08-9115a

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

Appellate Sub-Committee Members:

Prof. Bill Dorsaneo – Chair
Ms. Pamela Baron – Vice
Hon. Bill Boyce
Hon. Brett Busby
Prof. Elaine Carlson
Mr. Frank Gilstrap
Mr. Charles Watson
Mr. Evan Young
Mr. Scott Stolley

(l) Proposed Rule on Sealing Documents and Appellate Proposed Revs. To Rule 76a-June 8, 2016 w/76a documents
Rule 9 (Alternative Draft) (6/9/2016)
Rule 76a (2)

9. **TEXAS RULE OF CIVIL PROCEDURE 183**

523-734 Sub-Committee Members:

Mr. Carl Hamilton – Chair
Mr. L. Hayes Fuller – Vice
Mr. Eduardo Rodriguez
Mr. Roger Hughes

(m) Draft Amended TRCP 183
(n) Revised Interpreter Memo – June 1, 2016
(o) ABA Standard 2.3
(p) Executive Order 13166
(q) DOJ 2002 Guidelines
(r) DOJ's Fact on Language Access Plans
(s) 28 CFR 42.104
(t) Tex. S. Ct. and OCA's Language Access Plans

10. **TIME FOR JURY DEMAND IN A DE NOVO APPEAL IN COUNTY COURT**

Hon. Tracy Christopher
Prof. Elaine Carlson
Ms. Cristina Rodriguez

11. **GARNISHMENT RULE**

523-734 Sub-Committee Members:

Mr. Carl Hamilton – Chair
Mr. L. Hayes Fuller – Vice
Mr. Eduardo Rodriguez

(u) Garnishment Rule Memo – June 8, 2016
Garnishment Rule Memo Attachment
Garnishment Rule Version #1
Garnishment Rule Version #2

MEMORANDUM

TO: Texas Supreme Court Advisory Committee

FROM: Subcommittee on Ex Parte and Non-Litigant Communications[1]

DATE: June 6, 2016

Attached is a revised proposed rule for consideration at the June 10 meeting. It is the product of extensive discussion by the subcommittee, including consideration of input from the full committee at two prior meetings. The footnotes to the rule reflect the subcommittee's consideration of specific points made at prior TSCAC meetings, but are by no means exhaustive of the points considered by the subcommittee.

Also attached for background are:

1) Chief Justice Hecht's initial referral letter, dated August 4, 2015;
2) Canon 3 of the Texas Code of Judicial Conduct;[2]
3) Opinion No. 154 from the State Bar Committee on Judicial Ethics;
4) ABA Model Code of Judicial Conduct – 2.9; and
5) Code of Conduct for United States Judges – Canon 3(A)(4).

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[1] The proposed rule addresses non-litigant communications, which are distinct from ex parte communications (i.e., communications between parties or party-representatives and the court).

[2] The initial proposal by the subcommittee was in the form of a revised Canon 3.B (8), but, in response to early feedback from the full committee, the current proposal is in the form of a proposed rule of administration.

PROPOSED RULE OF JUDICIAL ADMINISTRATION 17

If a judge receives[1] a written communication[2] from a non-party[3] regarding the merits of a pending case, the clerk of the court or the judge:

(a) must retain a copy of the communication and send a copy to all parties;[4] and

(b) may take other action the court deems appropriate.

Proposed Official Comment[5]

This rule encompasses all forms of written communications, including electronic communications. This rule applies only to communications directed to a judge and does not apply to (1) communications directed to a broad audience such as newspaper editorials, billboards, and non-specific posts on social media, or (2) properly served amicus curiae filings. In subsection (b), for example, the court could notify the sender that the court has received the communication and has provided it to the parties in the case.

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[1] The subcommittee considered whether more than receipt should be required to trigger application of the rule, and concluded that receipt should be the trigger in order to satisfy transparency considerations.

[2] The subcommittee considered the question whether the rule should extend to oral communications, and concluded that the narrower focus addresses the question posed by the Court and is most workable.

[3] The subcommittee considered the question whether the rule should extend to party communications, and concluded that party communications are best addressed by the judicial conduct code and differing factors require different rules.

[4] The subcommittee considered the issues of cost and burdensomeness as to subsection (a), and concluded that the requirements stated in the proposed rule should be manageable.

[5] The comment has been streamlined to reflect comments made at the last full committee meeting. In addition, proposed text for a response to the sender has been provided, and the comment clarifies that it does not apply to amicus curiae filings.

Note to the Committee:

The Subcommittee decided not to include a reference in the rule to Section 36.04 of the Texas Penal Code, but thought that the full Committee should be aware of the code provision:

(a) A person commits an offense if he privately addresses a representation, entreaty, argument, or other communication to any public servant who exercises or will exercise official discretion in an adjudicatory proceeding with an intent to influence the outcome of the proceeding on the basis of considerations other than those authorized by law.

(b) For purposes of this section, "adjudicatory proceeding" means any proceeding before a court or any other agency of government in which the legal rights, powers, duties, or privileges of specified parties are determined.

(c) An offense under this section is a Class A misdemeanor.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994.

15408239_9

The Supreme Court of Texas

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

August 4, 2015

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
1401 McKinney, Suite 1900
Houston, TX 77010

Re: Referral of Rules Issues

Dear Chip:

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

Parental Notification Rules and Forms. HB 3994, passed by the 84th Legislature, makes substantive amendments to Chapter 33 of the Family Code, which governs parental notice of an abortion for an unemancipated minor. In 1999, with the help of the Advisory Committee, the Court promulgated rules to govern proceedings to obtain a court order and forms for use in these proceedings. The rules and forms must be updated to reflect the recent statutory amendments. The Committee should also consider whether parental-notification proceedings should be subject to or exempt from the electronic-filing mandate for civil cases. Because HB 3994 takes effect on January 1, 2016, the Court must have the Committee's recommendations by October 16, 2015.

Three-Judge District Court. SB 455, passed by the 84th Legislature, adds to the Government Code Chapter 22A, which authorizes the Attorney General to request the convention of a special three-judge district court in school-finance and redistricting cases. Section 22A.004(b) authorizes the Court to adopt rules for the operation of a three-judge district court convened under Chapter 22A and for proceedings of the court.

Ex Parte Communications. The Internet and social media have made it easy for any person to direct a communication, or instigate mass communications, to a judge about a pending case. Canon 3(B)(8) of the Code of Judicial Conduct prohibits a judge from "initiat[ing], permit[ting], or consider[ing] *ex parte* communications," but it does not give specific guidance on the ethical duty of a judge who receives an improper communication or a mass of improper communications about a case. The Court

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requests the Advisory Committee's recommendations on whether and how the Code should be amended to specifically address the duty of a judge who receives improper communications about a case, including communications sent by e-mail or through social media.

ADR and Constitutional County Court Judges. The Court has received the attached letter from the Hon. Tom Pollard, county judge of Kerr County. Judge Pollard points out that under Canons 4(F)-(G) and 6(B)(3) of the Code of Judicial Conduct, a constitutional county court judge is permitted to maintain a private law practice but is prohibited from acting as an arbitrator or mediator for compensation. Judge Pollard asks the Court to revise the Code to permit a constitutional county court judge to serve as an arbitrator or mediator for compensation in a case that is not pending before the judge. The Court requests the Advisory Committee's recommendations on whether and how the Code should be amended to permit a constitutional county court judge to serve as a private arbitrator or mediator.

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

Sincerely,

Nathan L. Hecht
Chief Justice

Attachment

Canon 3: Performing the Duties of Judicial Office Impartially and Diligently

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. Judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply:

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.

(2) A judge should be faithful to the law and shall maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice.

(6) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.

(7) A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel or others. This requirement does not preclude legitimate advocacy when any of these factors is an issue in the proceeding.

(8) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:

(a) communications concerning uncontested administrative or uncontested procedural matters;

(b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;

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(c) obtaining the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond;

(d) consulting with other judges or with court personnel;

(e) considering an *ex parte* communication expressly authorized by law.

(9) A judge should dispose of all judicial matters promptly, efficiently and fairly.

(10) A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. This prohibition applies to any candidate for judicial office, with respect to judicial proceedings pending or impending in the court on which the candidate would serve if elected. A judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge or judicial candidate is a litigant in a personal capacity.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity. The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines for a court approved history project.

C. Administrative Responsibilities.

(1) A judge should diligently and promptly discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge should require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

(5) A judge shall not fail to comply with Rule 12 of the Rules of Judicial Administration, knowing that the failure to comply is in violation of the rule.

D. Disciplinary Responsibilities.

(1) A judge who receives information clearly establishing that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the State Commission on Judicial Conduct or take other appropriate action.

(2) A judge who receives information clearly establishing that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Office of the General Counsel of the State Bar of Texas or take other appropriate action.

Canon 4: Conducting the Judge's Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Obligations

A. Extra-Judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or

(2) interfere with the proper performance of judicial duties.

B. Activities to Improve the Law. A judge may:

(1) speak, write, lecture, teach and participate in extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code; and,

(2) serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He or she may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system and the administration of justice.

C. Civic or Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the profit of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly or frequently engaged in adversary proceedings in any court.

(2) A judge shall not solicit funds for any educational, religious, charitable, fraternal or civic organization, but may be listed as an officer, director, delegate, or trustee of such an organization, and may be a speaker or a guest of honor at an organization's fund raising events.

EX PARTE COMMUNICATIONS FROM LITIGANTS
Opinion No. 154 (1993)
State Bar of Texas, Judicial Section, Committee on Judicial Ethics

QUESTION: What is a judge's ethical obligation upon receiving from a litigant a letter which attempts to communicate privately to the judge information concerning a case that is or has been pending?

ANSWER: Canon 3A(5)* provides that a judge shall not permit or consider improper ex parte or other private communication concerning the merits of a pending or impending judicial proceeding. (Canon 10** provides that the word "shall" when used in the Code means compulsion.) Judges may comply with Canon 3A(5)* by doing the following: 1) Preserve the original letter by delivering it to the court clerk to be file marked and kept in the clerk's file. 2) Send a copy of the letter to all opposing counsel and pro se litigants. 3) Read the letter to determine if it is proper or improper; if improper, the judge should send a letter to the communicant, with a copy of the judge's letter to all opposing counsel and pro se litigants, stating that the letter was an improper ex parte communication, that such communication should cease, that the judge will take no action whatsoever in response to the letter, and that a copy of the letter has been sent to all opposing counsel and pro se litigants.

Canon 3A(4)* provides that a judge shall accord to every person who is legally interested in a proceeding the right to be heard according to law. Consideration of an ex parte communication would be inconsistent with Canon 3A(4),* because it would not accord to other parties fair notice of the content of the communication, and it would not accord to other parties an opportunity to respond. Canon 3*** provides that the judicial duties of a judge take precedence over all the judge's other activities. A judge's consideration of a controversy that is not brought before the court in the manner provided by law would be inconsistent with the judicial duty to determine "cases" and "controversies" (Art. 3, Constitution of the United States). A judge has no authority or jurisdiction to consider, or to take any action concerning, out-of-court controversies. A judge's consideration of a controversy that is not properly before the court could give the appearance of inappropriate action under color of judicial authority, which would tend to diminish public confidence in the independence and impartiality of the judiciary, rather than promote it as Canon 1 and Canon 2 require a judge to do.

Finally, a judge should try to minimize the number of cases in which the judge is disqualified. If a judge permits a communication to the judge concerning any matter that may be the subject of a judicial proceeding, that could necessitate disqualification or recusal.

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* Now see Canon 3B(8). ** Now see Canon 8B(1). *** Now see Canon 3A.

ABA Model Code of Judicial Conduct- 2.9

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or impending matter,* except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law* to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

Code of Conduct for United States Judges- Canon 3(A)(4)

(4) A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:

(a) initiate, permit, or consider ex parte communications as authorized by law;

(b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;

(c) obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or

(d) with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

Walker, Marti

From: Walker, Marti
Sent: Thursday, December 10, 2015 2:44 PM
To: 'aalbright@law.utexas.edu'; 'adawson@beckredden.com'; Babcock, Chip; 'brett.busby@txcourts.gov'; 'cristina.rodriguez@hoganlovells.com'; 'csoltero@mcginnislaw.com'; 'cwatson@lockelord.com'; 'd.b.jackson@att.net'; 'dpeeples@bexar.org'; 'ecarlson@stcl.edu'; 'elsa.alcala@txcourts.gov'; 'errodriguez@atlashall.com'; 'esteveza@pottercscd.org'; 'evan.young@bakerbotts.com'; 'evansdavidl@msn.com'; 'fgilstrap@hillgilstrap.com'; 'fuller@namanhowell.com'; 'harvey.brown@txcourts.gov'; 'Honorable Robert H. Pemberton'; 'jane.bland@txcourts.gov'; 'jperduejr@perdueandkidd.com'; Sullivan, Kent; 'kvoth@obt.com'; 'LJefferson@JeffersonCano.com'; 'lbenton@levibenton.com'; 'lhoffman@central.uh.edu'; 'Linda Riley'; 'lisa@kuhnhobbs.com'; 'mahatchell@lockelord.com'; 'martha.newton@txcourts.gov'; 'mgreer@adjtlaw.com'; 'nathan.hecht@txcourts.gov'; 'nina.cortell@haynesboone.com'; 'och@atlashall.com'; 'pkelly@texasappeals.com'; 'psbaron@baroncounsel.com'; 'pschenkkan@gdhm.com'; 'rhardin@rustyhardin.com'; 'rhughes@adamsgraham.com'; 'rhwallace@tarrantcounty.com'; 'richard@ondafamilylaw.com'; 'rmeadows@kslaw.com'; 'rmun@scotthulse.com'; 'robert.l.levy@exxonmobil.com'; 'Scott Stolley'; 'shanna.dawson@txcourts.gov'; 'stephen.yelenosky@co.travis.tx.us'; 'tom.gray@txcourts.gov'; 'tracy.christopher@txcourts.gov'; 'triney@rineymayfield.com'; 'wdorsane@mail.smu.edu'; 'coliden@lockelord.com'; 'wshelton@shelton-valadez.com'; 'Justice Boyd (jeff.boyd@txcourts.gov)'; 'Elaine Carlson (elainecarlson@comcast.net)'; 'Viator, Mary (MViator@kslaw.com)'; 'bill.boyce@txcourts.gov'
Subject: FW: Subcommittee on Time Standards for Criminal Cases
Attachments: Hecht letter and speedy trial statutes.pdf

Committee Members:
On behalf of the 166-166a Sub-Committee, please see the attachment and below email (which will serve as item "N") on the Agenda. Thank you for your attention to this matter.

From: Peeples, David [mailto:dpeeples@bexar.org]
Sent: Thursday, December 10, 2015 2:37 PM
To: Walker, Marti
Subject: Subcommittee on Time Standards for Criminal Cases

To the SCAC:

The Subcommittee on Time Standards for Criminal Cases recommends that a task force be created to draft a set of time standards. Then, at a later meeting, the SCAC could consider the three options stated below. The task force would consist of a few members of the SCAC and other members chosen by the Court of Criminal Appeals. Here is some background and further information.

Chief Justice Hecht's October 9 letter to the SCAC asked our subcommittee to recommend language for Administrative Rule 6.1(a). That rule reads as follows:

Rule 6.1 District and Statutory County Courts.

District and statutory county court judges of the county in which cases are filed should, so far as reasonably possible, ensure that all cases are brought to trial or final disposition in conformity with the following time standards:

(a) Criminal Cases. As provided by Article 32A.02, Code of Criminal Procedure.

As the Chief's letter says, in 1987 the Court of Criminal Appeals held that article 32A.02 violates the separation of powers and is unconstitutional. In 2005 the Legislature repealed article 32A.02. Yet Administrative Rule 6.1 still refers to it. What should the Supreme Court do?

I have attached copies of three parts of the Code of Criminal Procedure that deal with speedy trial principles. They are: (1) article 17.151 (delay when accused has been indicted and is in custody or out on bail), (2) article 32.01 (delay when person is in custody but not yet officially charged), and (3) article 32A.01 (trial priorities).

The Sixth Amendment to the U.S. Constitution says in part, "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial . . . ." This command has been incorporated and it applies to the states.

The subcommittee has identified the following three options:

(1) Simply delete the section on time standards for criminal cases.

(2) Delete the reference to art. 32A.02 and replace it with the three CCP articles mentioned above.

(3) Delete the reference to art. 32A.02, draft time standards, and perhaps refer to the three CCP articles mentioned above.

We have not yet drafted time standards for option three because we feel that this group of primarily civil lawyers and judges should seek input from the Court of Criminal Appeals. After the meeting on December 11, we should be in communication with the CCA through Judge Alcala.

For the December 11 meeting we recommend that a joint subcommittee (or task force) be created to draft time standards for the full SCAC's consideration. The full committee would then have a tangible option three to evaluate when it decides, at a later meeting, which of the three options to recommend to the court.

I add that there is no real support for option one. The real decision seems to be whether the committee should recommend option two or three.

Thanks,
David Peeples

October 9, 2015

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
1401 McKinney, Suite 1900
Houston, TX 77010

Re: Referral of Rules Issues

Dear Chip:

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

Texas Rule of Evidence 203. The State Bar Administration of Rules of Evidence Committee (AREC) has submitted the attached proposal to amend Texas Rule of Evidence 203. AREC recommends changing the deadline in Rule 203(a)(2) for a party to produce any written material that the party intends to use to prove foreign law from 30 days before trial to 45 days before trial. The change would align the requirements of Rule 203 with the requirement in Rule 1009 that a party produce a translation of any foreign language document that the party intends to introduce into evidence at least 45 days before trial.

Texas Rule of Evidence 503. AREC has also submitted the attached proposal to amend Texas Rule of Evidence 503, which governs application of the attorney-client privilege. Rule 503(b)(1)(C) codifies the "allied litigant" doctrine. *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 52 (Tex. 2012). As set forth in the rule, the doctrine protects communications (1) between a client or the client's lawyer (or the representative of either); (2) to a lawyer for another party (or the lawyer's representative); (3) *in a pending action*; and (4) concerning a matter of common interest in the pending action. *See* TEX. R. EVID. 503(b)(1)(C); *In re XL Specialty Ins. Co.*, 373 S.W.3d at 52-53. AREC recommends that the privilege be expanded to include communications made in anticipation of future litigation.

New TRAP Rule on Filing Documents Under Seal. Except for Rule 9.2(c)(3), which states that documents filed under seal or subject to a pending motion to seal must not be filed electronically, the Texas Rules of Appellate Procedure do not address under what circumstances a document may be filed under seal in an appellate court, nor do they set forth any procedure for filing a document under seal. The

Court requests that the Advisory Committee draft a new rule addressing how and under what circumstances a document may be filed under seal in an appellate court. The rule should address both documents that were filed under seal in the trial court and documents that were not filed under seal or were not filed at all in the trial court.

Rules for Juvenile Certification Appeals. SB 888, passed by the 84th Legislature, amends Family Code section 56.01 to permit an immediate appeal from the decision of a juvenile court under section 54.02 waiving its exclusive jurisdiction and certifying the juvenile to stand trial as an adult. Section 56.01(h-1) requires the Court to adopt rules to accelerate these appeals. Concerned that the statutory change might catch some practitioners unaware, the Court in August issued an administrative order (Misc. Docket No. 15-9156), which imposes temporary procedures for accelerated juvenile certification appeals pending the adoption of permanent rules. The Court requests the Advisory Committee to draft an appropriate rule.

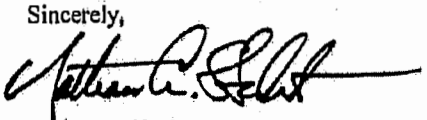
Time Standards for the Disposition of Criminal Cases in District and Statutory County Courts. Rule of Judicial Administration 6.1 sets forth aspirational time standards for the disposition of cases in the district and statutory county courts. Since its adoption in 1987, subsection (a) has provided that, so far as reasonably possible, criminal cases should be brought to trial or final disposition "[a]s provided by Article 32A.02, Code of Criminal Procedure." Former article 32A.02, known as the Speedy Trial Act, required the trial court to grant a motion to set aside an indictment, information, or complaint if the state was not ready for trial within a specified time period. Shortly after Rule 6.1(a) became effective, the Court of Criminal Appeals ruled article 32A.02 unconstitutional as a violation of separation of powers. *See Meshell v. State*, 739 S.W.2d 246, 257-58 (Tex. Crim. App. 1987). Article 32A.02 was formally repealed in 2005, but Rule 6.1(a) has not been amended. The Court requests the Advisory Committee's recommendations on how Rule 6.1(a) should be amended to reflect the repeal of Article 32A.02.

Rules for the Administration of a Deceased Lawyer's Trust Account. SB 995, passed by the 84th Legislature, adds to the Estates Code Chapter 456, which governs the disbursement and closing of a deceased lawyer's trust or escrow account for client funds. Section 465.005 authorizes the Court to adopt rules for the administration of funds in a trust or escrow account that is subject to Chapter 456.

Constitutional Adequacy of Texas Garnishment Procedure. A federal district court has ruled that Georgia's post-judgment garnishment statute violates due process because it (1) does not require that the debtor be notified that seized property may be exempt under state or federal law; (2) does not require that the debtor be notified of the procedure for claiming an exemption; and (3) does not provide a prompt and expeditious procedure for a debtor to reclaim exempt property. *Strickland v. Alexander*, No. 1:12-CV-02735-MHS, 2015 WL 5256836, at *9, 12, 16 (N.D. Ga. Sept. 8, 2015). In light of this decision, the Court requests the Advisory Committee's recommendations on whether further revisions should be made to the garnishment rules proposed in the final report of the Ancillary Proceedings Task Force.

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

Sincerely,



Nathan L. Hecht
Chief Justice

Attachments

ANNOTATIONS

Ludwig v. State, 812 S.W.2d 323, 325 (Tex.Crim. App.1991). "We are not inclined to read 'victim' in [art. 17.15(5)] to cover anyone not actually a complainant in the charged offense."

Ex parte Brooks, 376 S.W.3d 222, 223 (Tex.App.—Fort Worth 2012, pet. ref'd). "In addition to [the rules listed in art. 17.15,] the Texas Court of Criminal Appeals [in *Ex parte Rubac*, 611 S.W.2d 848 (Tex.Crim. App.1981),] stated that the court should also weigh the following factors: (1) the accused's work record; (2) the accused's family ties; (3) the accused's length of residence; (4) the accused's prior criminal record, if any; (5) the accused's conformity with the conditions of any previous bond; (6) the existence of outstanding bonds, if any; and (7) aggravating circumstances alleged to have been involved in the charged offense."

Montalvo v. State, 315 S.W.3d 588, 592-93 (Tex. App.—Houston [1st Dist.] 2010, no pet.). "A defendant carries the burden of proof to establish that bail is excessive. In reviewing a trial court's ruling for an abuse of discretion, an appellate court will not intercede as long as the trial court's ruling is at least within the zone of reasonable disagreement. We acknowledge, however, that an abuse-of-discretion review requires more of the appellate court than simply deciding that the trial court did not rule arbitrarily or capriciously. The appellate court must instead measure the trial court's ruling against the relevant criteria by which the ruling was made."

Perez v. State, 897 S.W.2d 893, 898 (Tex.App.—San Antonio 1995, no pet.). "[T]he court of criminal appeals has considered the nonviolent aspect of an offense as a factor favorable to a bond reduction."

ART. 17.151 RELEASE BECAUSE OF DELAY

Sec. 1. A defendant who is detained in jail pending trial of an accusation against him must be released either on personal bond or by reducing the amount of bail required, if the state is not ready for trial of the criminal action for which he is being detained within:

(1) 90 days from the commencement of his detention if he is accused of a felony;

(2) 30 days from the commencement of his detention if he is accused of a misdemeanor punishable by a sentence of imprisonment in jail for more than 180 days;

(3) 15 days from the commencement of his detention if he is accused of a misdemeanor punishable by a sentence of imprisonment for 180 days or less; or

(4) five days from the commencement of his detention if he is accused of a misdemeanor punishable by a fine only.

Sec. 2. The provisions of this article do not apply to a defendant who is:

(1) serving a sentence of imprisonment for another offense while the defendant is serving that sentence;

(2) being detained pending trial of another accusation against the defendant as to which the applicable period has not yet elapsed;

(3) incompetent to stand trial, during the period of the defendant's incompetence; or

(4) being detained for a violation of the conditions of a previous release related to the safety of a victim of the alleged offense or to the safety of the community under this article.

Sec. 3. Repealed by Acts 2005, 79th Leg., ch. 110, §2, eff. Sept. 1, 2005.

History of CCP art. 17.151; Acts 1977, 65th Leg., ch. 787, §2, eff. July 1, 1978. Amended by Acts 2005, 79th Leg., ch. 110, §§1, 2, eff. Sept. 1, 2005.

See also CCP art. 29.12.

NOTES OF DECISIONS

Rowe v. State, 853 S.W.2d 581, 582 (Tex.Crim.App. 1993). "Article 17.151 provides that if the State is not ready for trial within 90 days after commencement of detention for a felony, the accused 'must be released either on personal bond or by reducing the amount of bail required[.]' Thus the trial court has two options: release upon personal bond or reduce the bail amount. However, there is nothing in the statute indicating that the provisions do not apply if the delay was based upon the accused's request to testify before the grand jury. Article 17.151 contains no provisions excluding certain periods from the statutory time limit to accommodate exceptional circumstances." *But see Ex Parte Matthews*, 327 S.W.3d 884, 888 (Tex.App.—Beaumont 2010, no pet.) (because CCP art. 17.15 applies to CCP art. 17.151, trial court may consider victim and community safety concerns in determining amount of bail under art. 17.151).

Ex parte Shaw, ___ S.W.3d ___ (Tex.App.—Fort Worth 2012, pet. ref'd) (No. 02-12-00116-CR; 12-21-12). Held: D was charged with three offenses. Although one offense had an indictment returned within 90 days, the

other two offenses had no indictments returned, and D continued to be jailed longer than 90 days. Appellate court held D must either be released on personal bond or have bail reduced on the unindicted charges.

Ex parte Okun, 342 S.W.3d 184, 185-86 (Tex. App.—Beaumont 2011, no pet.), "A habeas applicant has the burden of proving bail is excessive. [D] did not present any evidence about any discussions with bail bondsmen or any evidence regarding the maximum amount of bail that [D] believed he could satisfy. [¶] [D] sought a reduction in the bail amount. The trial court granted a substantial reduction in the bail amount. Under the circumstances, given the trial court's grant of [D's] motion, it was incumbent upon [D] to inform the trial court before filing this appeal that the reduced bail was not affordable, or that his request was not for a reduction in bail but for a release on personal bond."

Ex parte Castellano, 321 S.W.3d 760, 764 (Tex. App.—Fort Worth 2010, no pet.). "The stipulated evidence demonstrates that the trial court released [D] on personal bond pursuant to art. 17.151 after he had remained continuously incarcerated on the possession charge for more than 90 days without being indicted. The State thereafter rearrested [D] after he was indicted for the same possession offense. [T]he return of the indictment is the only evidence in the record that supports the trial court's decisions to revoke [D's] personal bond, to set the bond at $100,000, and to deny his requested relief to reinstate the personal bond. Article 17.151, however, 'does not permit the State to obtain an indictment, rearrest [D,] and begin the 90 day period anew from the date of the indictment or rearrest.'"

Vargas v. State, 109 S.W.3d 26, 29 (Tex.App.—Amarillo 2003, no pet.). "The courts of appeals have split over whether appellate jurisdiction exists in regard to direct appeals from pretrial bail rulings such as the one before us. [¶] We lack a statutory grant of jurisdiction over this appeal. And, although TRAP 31 addresses, in part, appeals from bail proceedings, we note that the [TRAPs] do not establish jurisdiction of courts of appeals, and cannot create jurisdiction where none exists. [¶] We lack jurisdiction over this direct appeal from interlocutory pretrial orders refusing to lower bail pursuant to CCP [art.] 17.151." *See also Sanchez v. State*, 340 S.W.3d 848, 850-52 (Tex.App.—San Antonio 2011, no pet.) (no appellate jurisdiction); *Keaton v. State*, 294 S.W.3d 870, 872-73 (Tex.App.—Beaumont 2009, no pet.) (same); *Benford v. State*, 994 S.W.2d 404, 409 (Tex.App.—Waco 1999, no pet.) (same); *Ex parte Shumake*, 953 S.W.2d 842, 846-47 (Tex.App.—Austin 1997, no pet.) (same). *But see Ramos v. State*, 89 S.W.3d 122, 124-26 (Tex.App.—Corpus Christi 2002, no pet.) (TRAP 31.1 contemplates appeals of orders in bail proceedings); *Saliba v. State*, 45 S.W.3d 329, 329 (Tex.App.—Dallas 2001, no pet.) (same); *McKown v. State*, 915 S.W.2d 160, 161 (Tex.App.—Fort Worth 1996, no pet.) (same); *Clark v. Barr*, 827 S.W.2d 556, 556-57 (Tex.App.—Houston [1st Dist.] 1992, no pet.) (same).

Ramos v. State, 89 S.W.3d 122, 128 (Tex.App.—Corpus Christi 2002, no pet.). "Article 17.151 does not require the State to 'announce ready.' The question of the State's 'readiness' within the statutory limits refers to the preparedness of the prosecution for trial. We hold that the State made a *prima facie* showing that it was ready for trial within the statutory period. Accordingly, it became [D's] burden to rebut the State's showing of readiness."

Ex parte McNeil, 772 S.W.2d 488, 489 (Tex.App.—Houston [1st Dist.] 1989, orig. proceeding). "Readiness for trial should be determined [by] the existence of a charging instrument [as] an element of preparedness. Where there is no indictment, the State cannot announce ready for trial." *See also Ex parte Craft*, 301 S.W.3d 447, 449 (Tex.App.—Fort Worth 2009, no pet.); *Ex parte Avila*, 201 S.W.3d 824, 826-27 (Tex.App.—Waco 2006, no pet.).

ART. 17.152. DENIAL OF BAIL FOR VIOLATION OF CERTAIN COURT ORDERS OR CONDITIONS OF BOND IN A FAMILY VIOLENCE CASE

(a) In this article, "family violence" has the meaning assigned by Section 71.004, Family Code.

(b) Except as otherwise provided by Subsection (d), a person who commits an offense under Section 25.07, Penal Code, related to a violation of a condition of bond set in a family violence case and whose bail in the case under Section 25.07, Penal Code, or in the family violence case is revoked or forfeited for a violation of a condition of bond may be taken into custody and, pending trial or other court proceedings, denied release on bail if following a hearing a judge or magistrate determines by a preponderance of the evidence that the person violated a condition of bond related to:

ART. 31.08. RETURN TO COUNTY OF ORIGINAL VENUE

Sec. 1. (a) On the completion of a trial in which a change of venue has been ordered and after the jury has been discharged, the court, with the consent of counsel for the state and the defendant, may return the cause to the original county in which the indictment or information was filed. Except as provided by Subsection (b) of this section, all subsequent and ancillary proceedings, including the pronouncement of sentence after appeals have been exhausted, must be heard in the county in which the indictment or information was filed.

(b) A motion for new trial alleging jury misconduct must be heard in the county in which the cause was tried. The county in which the indictment or information was filed must pay the costs of the prosecution of the motion for new trial.

Sec. 2. (a) Except as provided by Subsection (b), on an order returning venue to the original county in which the indictment or information was filed, the clerk of the county in which the cause was tried shall:

(1) make a certified copy of the court's order directing the return to the original county;

(2) make a certified copy of the defendant's bail bond, personal bond, or appeal bond;

(3) gather all the original papers in the cause and certify under official seal that the papers are all the original papers on file in the court; and

(4) transmit the items listed in this section to the clerk of the court of original venue.

(b) This article does not apply to a proceeding in which the clerk of the court of original venue was present and performed the duties as clerk for the court under Article 31.09.

Sec. 3. Except for the review of a death sentence under Section 2(h), Article 37.071, or under Section 2(h), Article 37.072, an appeal taken in a cause returned to the original county under this article must be docketed in the appellate district in which the county of original venue is located.

History of CCP art. 31.08: Acts 1989, 71st Leg., ch. 824, §1, eff. Sept. 1, 1989. Amended by Acts 1995, 74th Leg., ch. 651, §1, eff. Sept. 1, 1995; Acts 2007, 80th Leg., ch. 593, §3.17, eff. Sept. 1, 2007.

ART. 31.09. CHANGE OF VENUE; USE OF EXISTING SERVICES

(a) If a change of venue in a criminal case is ordered under this chapter, the judge ordering the change of venue may, with the written consent of the prosecuting attorney, the defense attorney, and the defendant, maintain the original case number on its own docket, preside over the case, and use the services of the court reporter, the court coordinator, and the clerk of the court of original venue. The court shall use the courtroom facilities and any other services or facilities of the district or county to which venue is changed. A jury, if required, must consist of residents of the district or county to which venue is changed.

(b) Notwithstanding Article 31.05, the clerk of the court of original venue shall:

(1) maintain the original papers of the case, including the defendant's bail bond or personal bond;

(2) make the papers available for trial; and

(3) act as the clerk in the case.

History of CCP art. 31.09: Acts 1995, 74th Leg., ch. 651, §2, eff. Sept. 1, 1995.

CHAPTER 32. DISMISSING PROSECUTIONS

ART. 32.01. DEFENDANT IN CUSTODY & NO INDICTMENT PRESENTED

When a defendant has been detained in custody or held to bail for his appearance to answer any criminal accusation, the prosecution, unless otherwise ordered by the court, for good cause shown, supported by affidavit, shall be dismissed and the bail discharged, if indictment or information be not presented against such defendant on or before the last day of the next term of the court which is held after his commitment or admission to bail or on or before the 180th day after the date of commitment or admission to bail, whichever date is later.

History of CCP art. 32.01: Acts 1965, 59th Leg., ch. 722, §1, eff. Jan. 1, 1966. Amended by Acts 1997, 75th Leg., ch. 289, §2, eff. May 26, 1997; Acts 2005, 79th Leg., ch. 743, §5, eff. Sept. 1, 2005.

See also CCP art. 15.14.

ANNOTATIONS

Ex parte Countryman, 226 S.W.3d 435, 436 (Tex. Crim.App.2007). "Because the State had not obtained an indictment by the next term of court, [D] filed an application for writ of habeas corpus to have the case dismissed. After [D] filed the application, but before the trial court held a hearing, the grand jury returned an indictment. The trial court denied the application and [D]

appealed. The court of appeals reversed the trial court's order denying habeas relief and ordered that the indictment be dismissed. We granted the State's petition for discretionary review to determine whether a speedy-indictment claim is moot when it is filed before the indictment, but not heard until after the indictment is returned." Held: The court of appeals erred. The claim was moot because even a determination that the State did not show good cause would not provide a remedy to D.

Ex parte Seidel, 39 S.W.3d 221, 223-24 (Tex.Crim. App.2001). "[A] district court lacks jurisdiction over a case when an information or indictment has not yet been filed in that court. In this case, an information or indictment had not yet been filed when the trial judge dismissed the bail and prosecution against [D]. The district court, however, had proper jurisdiction to act under the Speedy Trial Act because [D] was 'held to bail for his appearance to answer any criminal accusation before the district court.' [¶] Generally, a trial court does not have the power to dismiss a case unless the prosecutor so requests. A trial court does, however, have the power to dismiss a case without the State's consent under [CCP] art. 32.01. [CCP] art. 28.061, which bars further prosecution for a discharged offense ... no longer applies to a discharge under Art. 32.01. Therefore, even if a defendant is entitled to discharge from custody under Art. 32.01, that defendant is not free from subsequent prosecution."

Author's comment: The dismissal cannot be with prejudice.

Ex parte Martin, 6 S.W.3d 524, 528 (Tex.Crim.App. 1999). "In *Barker v. Wingo*, the [U.S.] Supreme Court set out a balancing test with four factors to determine when pretrial delay denies an accused of his right to a speedy trial.... Today we adopt a *Barker*-like, totality-of-circumstances test for the determination of good cause under art. 32.01. The habeas court should consider, among other things, the length of the delay, the State's reason for delay, whether the delay was due to lack of diligence on the part of the State, and whether the delay caused harm to the accused. [¶] Another relevant inquiry is whether the grand jury has voted not to present an indictment. *At 529:* By adopting this test, we are not adding constitutional, speedy-trial rights to art. 32.01. We are adopting a test for a fact-based situation."

Cameron v. State, 988 S.W.2d 835, 843 (Tex. App.—San Antonio 1999, pet. ref'd). "[A] defendant cannot complain of the timeliness of a second or other indictment under art. 32.01 once a valid and timely indictment is secured by the State. For timeliness purposes, we hold that art. 32.01 is satisfied once the State secures a timely indictment arising out of the same criminal transaction or occurrence. The defendant suffers no due process violation if he continues under a valid indictment, although it is not the indictment he is ultimately prosecuted and convicted for, so long as the indictment arises out of the same criminal transaction or occurrence. ... Article 32.01 should not be read to preclude the State from advancing alternative theories or charges arising out of the same criminal transaction once the State has acted within the timetable prescribed by art. 32.01 for initially securing a timely indictment. If the State is dilatory in prosecuting the case, the defendant may invoke his speedy trial right."

Soderman v. State, 915 S.W.2d 605, 608 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). "[T]his provision applies only to district courts. Absent any language in the statute or case law to support applying this provision to county courts, we are without authority to do so."

Uptergrove v. State, 881 S.W.2d 529, 531 (Tex. App.—Texarkana 1994, pet. ref'd). Article 32.01 "does not apply to a juvenile proceeding to determine whether a juvenile is to be transferred to district court to be tried as an adult."

ART. 32.02. DISMISSAL BY STATE'S ATTORNEY

The attorney representing the State may, by permission of the court, dismiss a criminal action at any time upon filing a written statement with the papers in the case setting out his reasons for such dismissal, which shall be incorporated in the judgment of dismissal. No case shall be dismissed without the consent of the presiding judge.

History of CCP art. 32.02: Acts 1965, 59th Leg., ch. 722, §1, eff. Jan. 1, 1966.

ANNOTATIONS

Smith v. State, 70 S.W.3d 848, 850-51 (Tex.Crim. App.2002). "The authority to grant immunity derives from the authority of a prosecutor to dismiss prosecutions. The authority to dismiss a case is governed by [art.] 32.02. A grant of immunity from prosecution is, conceptually, a prosecutorial promise to dismiss a case. Article 32.02 directs that a dismissal made by the prosecutor must be approved by the trial court. Therefore, a District Attorney has no authority to grant immunity

without court approval, for the approval of the court is 'essential' to establish immunity. *At 855.* Provided the judge approves the dismissal that results from an immunity agreement, and is aware that the dismissal is pursuant to an immunity agreement, the judge does not have to be aware of the specific terms of that immunity agreement for it to be enforceable."

CHAPTER 32A. SPEEDY TRIAL

ART. 32A.01 TRIAL PRIORITIES

Insofar as is practicable, the trial of a criminal action shall be given preference over trials of civil cases, and the trial of a criminal action against a defendant who is detained in jail pending trial of the action shall be given preference over trials of other criminal actions.

History of CCP art. 32A.01: Acts 1977, 65th Leg., ch. 787, §1, eff. July 1, 1978.

ART. 32A.02. REPEALED

Repealed by Acts 2005, 79th Leg., ch. 1019, §2, eff. June 18, 2005.

CHAPTER 33. THE MODE OF TRIAL

ART. 33.01. JURY SIZE

(a) Except as provided by Subsection (b), in the district court, the jury shall consist of twelve qualified jurors. In the county court and inferior courts, the jury shall consist of six qualified jurors.

(b) In a trial involving a misdemeanor offense, a district court jury shall consist of six qualified jurors.

History of CCP art. 33.01: Acts 1965, 59th Leg., ch. 722, §1, eff. Jan. 1, 1966. Amended by Acts 2003, 78th Leg., ch. 406, §1, eff. Jan. 1, 2004.

See also Tex. Const. art. 5, §13; Gov't Code §62.201.

[redacted] INTERPRETATIONS

Roberts v. State, 957 S.W.2d 80, 81 (Tex.Crim.App. 1997). "[A] defendant may waive his statutory right to a jury of 12 members."

ART. 33.011. ALTERNATE JURORS

(a) In district courts, the judge may direct that not more than four jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. In county courts, the judge may direct that not more than two jurors in addition to the regular jury be called and impaneled to sit as alternate jurors.

(b) Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury renders a verdict on the guilt or innocence of the defendant and, if applicable, the amount of punishment, become or are found to be unable or disqualified to perform their duties or are found by the court on agreement of the parties to have good cause for not performing their duties. Alternate jurors shall be drawn and selected in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, security, and privileges as regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury has rendered a verdict on the guilt or innocence of the defendant and, if applicable, the amount of punishment.

History of CCP art. 33.011: Acts 1983, 68th Leg., ch. 775, §2, eff. Aug. 29, 1983. Amended by Acts 2007, 80th Leg., ch. 848, §1, eff. Sept. 1, 2007.

[redacted] INTERPRETATIONS

Trinidad v. State, 312 S.W.3d 23, 24 (Tex.Crim.App. 2010). "In 2007, the Texas Legislature amended art. 33.011(b).... According to the amendment, an alternate juror in a criminal case tried in the district court, if not called upon to replace a regular juror, shall no longer be discharged at the time that the jury retires to deliberate, but shall now be discharged after the jury has rendered a verdict. Unfortunately, the amended statute does not indicate whether the alternate juror should be allowed to be present for, and to participate in, the jury's deliberations or, instead, whether he should be sequestered from the regular jury during its deliberations until such time as the alternate's services might be required by the disability of a regular juror. In the instant cases, the trial court opted for the former contingency. The court of appeals held in each case that, in doing so, the trial court violated the constitutional requirement of a jury composed of 12 persons, or, alternatively, that the trial court violated the statutory prohibition against permitting any person not a juror into the jury deliberation room. We granted the State's

M E M O R A N D U M

FROM: **David Peeples, for the Subcommittee on Time Standards for Criminal Cases**

TO: **SCAC**

RE: **Time Standards for Criminal Cases**

DATE: **June 9, 2016**

The Subcommittee on Time Standards for Criminal Cases makes the following report and recommendation to the full committee.

I. Some brief history.

We received our assignment in October 2015. After discussion, we concluded that the Court of Criminal Appeals should be consulted for two reasons. First, the SCAC has very little hands-on expertise in the work of the criminal trial courts. Second, the CCA sits at the top of the Texas criminal justice system and should have at least some input on this criminal matter.

After conferring with Chief Justice Hecht, the subcommittee sought the views of the Court of Criminal Appeals. I met in person with four members of the CCA (Hervey, Alcala, Newell, and Yeary) and its general counsel. We did some drafting and discussed things by email.

The CCA then discussed and studied the matter and consulted its own rules committee. Eventually it stated its views in the attached letter dated May 26, 2016 from Judge Elsa Alcala. The CCA opposes time standards for criminal cases and thinks they would be detrimental to the criminal trial courts. It suggested general language to replace the outdated language currently in Administrative Rule 6.1. Our recommendation below corresponds to and implements the CCA's suggestion.

II. Some basic legal principles. There is a considerable body of statutory and case law already occupying this field.

The **Sixth Amendment** to the U.S. Constitution says in part, "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial . . . ." This command has been incorporated and applied to the states. Basic speedy trial jurisprudence is summarized in footnote one of Judge Alcala's letter.

The Texas Constitution says: "Article I, § 10. RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS. In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. . . ."

Three articles in the Texas Code of Criminal Procedure deal with speedy trial principles. They are: (1) article 17.151 (delay when accused has been charged and is in custody or out on bail), (2) article 32.01 (delay when person is in custody but not yet officially charged), and (3) article 32A.01 (trial priorities). The pertinent portions of these three statutes are reproduced here:

Art. 17.151. RELEASE BECAUSE OF DELAY.

§ 1. A defendant who is detained in jail pending trial of an accusation against him must be released either on personal bond or by reducing the amount of bail required, if the state is not ready for trial of the criminal action for which he is being detained within:

(1) 90 days from the commencement of his detention if he is accused of a felony;

(2) 30 days from the commencement of his detention if he is accused of a misdemeanor punishable by a sentence of imprisonment in jail for more than 180 days;

(3) 15 days from the commencement of his detention if he is accused of a misdemeanor punishable by a sentence of imprisonment for 180 days or less; or

(4) five days from the commencement of his detention if he is accused of a misdemeanor punishable by a fine only.

§ 2. The provisions of this article do not apply to a defendant who is:

(1) serving a sentence of imprisonment for another offense while the defendant is serving that sentence;

(2) being detained pending trial of another accusation against the defendant as to which the applicable period has not yet elapsed;

(3) incompetent to stand trial, during the period of the defendant's incompetence; or

(4) being detained for a violation of the conditions of a previous release related to the safety of a victim of the alleged offense or to the safety of the community under this article.

Art. 32.01. DEFENDANT IN CUSTODY AND NO INDICTMENT PRESENTED.

(a) When a defendant has been detained in custody or held to bail for the defendant's appearance

to answer any criminal accusation, the prosecution, unless otherwise ordered by the court, for good cause shown, supported by affidavit, shall be dismissed and the bail discharged, if indictment or information be not presented against the defendant on or before the last day of the next term of the court which is held after the defendant's commitment or admission to bail or on or before the 180th day after the date of commitment or admission to bail, whichever date is later.

(b) A surety may file a motion under Subsection (a) for the purpose of discharging the defendant's bail only.

Art. 32A.01. TRIAL PRIORITIES.

(a) Insofar as is practicable, the trial of a criminal action shall be given preference over trials of civil cases, and the trial of a criminal action against a defendant who is detained in jail pending trial of the action shall be given preference over trials of other criminal actions not described by Subsection (b).

(b) Unless extraordinary circumstances require otherwise, the trial of a criminal action in which the alleged victim is younger than 14 years of age shall be given preference over other matters before the court, whether civil or criminal.

III. Recommendation.

The Subcommittee on Time Standards for Criminal Cases recommends that Administrative Rule 6.1 be amended as follows:

Rule 6.1. District and Statutory County Courts.

District and statutory county court judges of the county in which cases are filed should, so far as reasonably possible, ensure that all cases are brought to trial or final disposition in conformity with the following time standards:

(a) Criminal Cases. ~~As provided by Article 32A.02, Code of Criminal Procedure.~~ In timely compliance with state and federal constitutions and statutes.

May 26, 2016

Dear Judge Peeples,

Thank you for the extensive amount of time that you have personally spent consulting with members of the Court of Criminal Appeals to ascertain whether the court would recommend a guideline for disposition of criminal cases in the trial courts. As I will explain further below, this Court believes that a guideline setting forth a specific period of time would be detrimental to criminal trial courts.

By way of background, I note that this Court spent a considerable amount of time on this inquiry. As you know, on multiple occasions over the past few months, members of the Court have communicated by email, by telephone, and in person engaging in a spirited debate about the pros and cons of a guideline. At two meetings, this Court's criminal rules advisory committee requested input from its members. Furthermore, some research has been conducted with respect to existing law that applies to the timely disposition of criminal cases.

Like most things in life, there are pros and cons to a guideline for the disposition of criminal trial cases. On the one hand, a guideline of a specific period of time would most conform to the format of rules that set forth guidelines that apply to other types of cases in Texas. Furthermore, a guideline would be a rule of thumb that judges could easily remember and aim to comply with. On the other hand, criminal cases, unlike other types of cases, are subject to the federal Constitution's and state Constitution's requirement of a speedy trial. *See* U.S. Const. amend. VI; Tex. Const. art. I, § 10. This type of constitutional violation is determined based on a case-by-case assessment of factors, and there is no definite time at which a violation occurs. A federal constitutional violation may occur in as little as one year or less or in as long as several years.[1] Thus, if trial judges were given a guideline of a year or a year-and-

[1] To trigger an analysis of whether a defendant's Sixth Amendment right to a speedy trial was violated, the defendant must "allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay[.]" *Doggett v. United States*, 505 U.S. 647, 651-52 (1992). The Supreme Court in *Doggett* noted that "lower

a-half for the disposition of criminal trial cases, for example, that guideline could mislead a judge into error by giving him false assurance that he had that amount of time to dispose of a case, when instead compliance with the federal Constitution might require a shorter amount of time. Furthermore, criminal cases, unlike other types of cases, already have a number of statutes, some of which I discuss in the next paragraph, that require compliance within definitive periods of time.

Weighing the benefits of a definitive guideline against the possible harm from it, the Court collectively agreed that a guideline with a specified period of time would be more likely to cause harm than good. We recommend against it. The Court does suggest possible general language to replace the incorrect reference in the current guidelines, such as, "Criminal cases should be resolved in timely compliance with state and federal constitutions and statutes." Furthermore, the Court did discuss the possibility that a comment to the guidelines might be of benefit. The comment could cite to the federal Constitution, the state Constitution, and Code of Criminal Procedure Articles 17.151 (providing for release on bail or bond if the state is not ready for trial within certain length of time); 32.01 (requiring for information or indictment within certain length of time); 32A.01(a) (mandating criminal trials precede civil trials and trials for defendants in jail to precede those for defendants who are on bond); 32A.01(b) (requiring trial involving child-victims to precede those involving adult-victims).

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courts have generally found post-accusation delay 'presumptively prejudicial' at least as it approaches one year." *Id*. at 671, n. 1. When the accused has made the threshold showing that the delay has crossed the threshold and become presumptively prejudicial, the court will engage in a balancing test to determine whether the defendant's rights were violated. There are four factors to be weighed against each other in determining whether the defendant's speedy-trial rights have been violated: the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *See Barker v. Wingo*, 407 U.S. 514 (1972). If the delay is unreasonable, even a relatively short delay may be found to be a violation of a defendant's Sixth Amendment right. *See, e.g., United States v. Seltzer*, 595 F.3d 1170 (10th Cir. 2010) (one-year delay found to be a violation); *United States v. Ingram*, 446 F.3d 1332 (11th Cir. 2006) (two-year delay found to be a violation). A defendant's right to a speedy trial is also protected by the Texas Constitution. Texas follows the Supreme Court's four-factor balancing test from *Barker* to determine whether a defendant's constitutional speedy-trial right was violated. *Zamorano v. State*, 84 S.W.3d 643, 647-48 (Tex. Crim. App. 2002). Texas case law reveals no fixed period of time at which a violation of a defendant's speedy-trial right has occurred. *See, e.g., State v. Rangel*, 980 S.W.2d 840 (Tex. App.—San Antonio 1998, no pet.) (twenty-month delay in DWI case); *State v. Burckhardt*, 952 S.W.2d 100, 102 (Tex. App.—San Antonio 1997, no pet.) (defendant's speedy-trial right was violated by a fourteen-month delay in DWI case); *State v. Empak, Inc*., 889 S.W.2d 618 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd) (defendant's speedy-trial right was violated by a twenty-eight-month delay in corporate criminal case about water pollution); *Phillips v. State*, 650 S.W.2d 396 (Tex. Crim. App. 1983) (defendant's speedy-trial right was violated by a seventeen-month delay in rape case).

Again, the Court expresses its gratitude to Chief Justice Hecht, the Supreme Court of Texas, the Supreme Court Advisory Committee, and to you personally for consulting with us in this important project. We stand willing to participate in any future joint efforts.

Sincerely,

Elsa Alcala

Judge, Court of Criminal Appeals

Cc Court of Criminal Appeals

Supreme Court of Texas

CCA Rules Advisory Committee

Shanna Dawson

From: Meadows, Robert <RMeadows@KSLAW.com>
Sent: Wednesday, June 08, 2016 3:58 PM
To: Walker, Marti
Cc: aalbright@law.utexas.edu; adawson@beckredden.com; Babcock, Chip; brett.busby@txcourts.gov; cristina.rodriguez@hoganlovells.com; csoltero@mcginnislaw.com; cwatson@lockelord.com; d.b.jackson@att.net; dpeeples@bexar.org; ecarlson@stcl.edu; elsa.alcala@txcourts.gov; errodriguez@atlashall.com; esteveza@pottercscd.org; evan.young@bakerbotts.com; evansdavidl@msn.com; fgilstrap@hillgilstrap.com; fuller@namanhowell.com; harvey.brown@txcourts.gov; Bob Pemberton; jane.bland@txcourts.gov; jperduejr@perdueandkidd.com; Sullivan, Kent; kvoth@obt.com; LJefferson@JeffersonCano.com; lbenton@levibenton.com; lhoffman@central.uh.edu; Linda Riley; lisa@kuhnhobbs.com; mahatchell@lockelord.com; martha.newton@txcourts.gov; mgreer@adjtlaw.com; nathan.hecht@txcourts.gov; nina.cortell@haynesboone.com; och@atlashall.com; pkelly@texasappeals.com; psbaron@baroncounsel.com; pschenkkan@gdhm.com; rhardin@rustyhardin.com; rhughes@adamsgraham.com; rhwallace@tarrantcounty.com; richard@ondafamilylaw.com; rmeadows@kslaw.com; rmun@scotthulse.com; robert.l.levy@exxonmobil.com; Scott Stolley; shanna.dawson@txcourts.gov; stephen.yelenosky@co.travis.tx.us; tom.gray@txcourts.gov; tracy.christopher@txcourts.gov; triney@rineymayfield.com; wdorsane@mail.smu.edu; coliden@lockelord.com; wshelton@shelton-valadez.com; Jeffrey S. Boyd; 'Elaine Carlson; Viator, Mary; bill.boyce@txcourts.gov; Sharon Tabbert (Assistant to B. Dorsaneo; judgebillboyce@gmail.com; Dee Dee Jones (dee2jones@ranchwireless.com) (dee2jones@ranchwireless.com); Lisa Verm
Subject: Re: Discovery Subcommittee Report

Correction:

...it makes sense to consider the proposed spoliation rule and changes to Rule 192.3 as part of the larger review of all our discovery rules, rather than taking up these proposals in isolation in advance. ...

> On Jun 8, 2016, at 9:53 AM, Walker, Marti <mawalker@jw.com> wrote:
>
> SCAC:
> Please see attached documents and the email below for your review and consideration. Thank you.
>
> Marti Walker | Legal Administrative Assistant
> 1401 McKinney Suite 1900 | Houston, TX | 77010
> V: (713) 752-4375 | mawalker@jw.com<mailto:mawalker@jw.com>
> [cid:image001.jpg@01D1C162.BD955010]
>
> From: Meadows, Robert [mailto:RMeadows@KSLAW.com]
> Sent: Wednesday, June 08, 2016 5:31 AM
> To: Walker, Marti
> Subject: Discovery Subcommittee Report
>
> Marti, good morning; here is the report of Discovery Subcommittee for the SCAC meeting on Friday.
>

>
> The Discovery Subcommittee has been tasked with considering (1) two proposed changes to Texas Rule 192.3, (2) a proposed new rule on spoliation and (3) undertaking a wholesale review of the Texas discovery rules. These matters were taken up by the Discovery Subcommittee at a recent meeting, and it was decided that inasmuch as we will be considering all the Texas discovery rules to evaluate their current effectiveness and in light of the 2015 amendments to the Federal Rules of Civil Procedure, it makes sense to consider the proposed spoliation rule changes to Rule 192.3 as part of the larger review of all our discovery rules, rather than taking up these proposals in isolation in advance. For consideration of the Texas discovery rules and procedures front to back, the Discovery Subcommittee believes it would be helpful to have direction from the full SCAC as to what members think is working and what needs attention..
>
> To facilitate the discussion, attached are two charts (each in word and pdf form) comparing the Texas discovery rules to the relevant Federal Rules of Civil Procedure. We have prepared the charts to (1) indicate where the federal rules were amended, effective December 2015, (2) include the proposed Texas spoliation rule opposite the relevant federal rule (marked as PROPOSED), and (3) include the two proposed changes to Texas Rule 192.3 (marked as PROPOSED). Each chart includes an index and key to guide readers.
>
> The difference between the two charts is the "Full-Text Comparison" chart places the full text of the Texas discovery rules opposite the full text of the federal discovery rules, divided by the following topics:
>
> Index
> I. General Rules and Disclosures: Tex. R. Civ. P. 190-194, 205; Fed. R. Civ. P. 26
> II. Experts: Tex. R. Civ. P. 195; Fed. R. Civ. P. 26(a)(2), (b)(4), (e)
> III. Pre-Suit Depositions and Depositions Pending Appeal: Tex. R. Civ. P. 202; Fed. R. Civ. P. 27
> IV. Depositions: Tex. R. Civ. P. 199-201, 203; Fed. R. Civ. P. 28, 30-32
> V. Stipulations about Discovery Procedure: Tex. R. Civ. P. 191.1, 191.2; Fed. R. Civ. P. 29
> VI. Interrogatories: Tex. R. Civ. P. 197; Fed. R. Civ. P. 33
> VII. Production and Inspection: Tex. R. Civ. P. 196; Fed. R. Civ. 34
> VIII. Physical and Mental Examinations: Tex. R. Civ. P. 204; Fed. R. Civ. P. 35
> IX. Admissions: Tex. R. Civ. P. 198; Fed. R. Civ. P. 36
> X. Sanctions: Tex. R. Civ. P. 215; Fed. R. Civ. P. 37
>
> The "Matched Comparison" chart, while also divided by the same index topics, rearranges the relevant federal rules to better match the federal provisions to the Texas provisions. It also notates differences between the rules. It is helpful to have both charts because the Full-Text Comparison chart preserves the structure of the federal rules in a way the matched comparison chart does not.
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> <image001.jpg>
> <2016.6.5.Full-Text Comparison-TRCP and FRCP.docx> <2016.6.5.Matched
> Comparison - TRCP and FRCP.docx> <2016.6.5.Full-Text Comparison-TRCP
> and FRCP.pdf> <2016.6.5.Matched Comparison-TRCP and FRCP.pdf>

Full-Text Comparison; TRCP and FRCP

Index

*Underlined text indicates amendments to the Federal Rules of Civil Procedure, effective on December 1, 2015

*Proposed amendments to the Texas Rules of Civil Procedure are underlined and marked as follows: [PROPOSED CHANGE: . . .]

*Proposed Texas Rule of Civil Procedure on spoliation is indicated as follows: [PROPOSED RULE: . . .]

I. General Rules And Disclosures

Tex. R. Civ. P. 190-194, 205	Fed. R. Civ. P. 26
RULE 190. DISCOVERY LIMITATIONS **190.1 Discovery Control Plan Required.** Every case must be governed by a discovery control plan as provided in this Rule. A plaintiff must allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under Level 1, 2, or 3 of this Rule. **190.2 Discovery Control Plan - Expedited Actions and Divorces Involving $50,000 or Less (Level 1)** (a) **Application.** This subdivision applies to: (1) any suit that is governed by the expedited actions process in Rule 169; and (2) unless the parties agree that rule 190.3 should apply or the court orders a discovery control plan under Rule 190.4, any suit for divorce not involving children in which a party pleads that the value of the marital estate is more than zero but not more than $ 50,000. (b) **Limitations**. Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations: (1) **Discovery period**. All discovery must be conducted during the discovery period, which begins when the suit is filed and continues until 180 days after the date the first request for discovery of any kind is served on a party. (2) **Total time for oral depositions.** Each party may have no more than six hours in total to examine and cross-	**26: Duty to Disclose; General Provisions Governing Discovery** **(a) Required Disclosures.** **(1)** ***Initial Disclosure.*** **(A)** *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties: **(i)** the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment; **(ii)** a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment; **(iii)** a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34

examine all witnesses in oral depositions. The parties may agree to expand this limit up to ten hours in total, but not more except by court order. The court may modify the deposition hours so that no party is given unfair advantage. (3) **Interrogatories.** Any party may serve on any other party no more than 15 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory. (4) **Requests for Production.** Any party may serve on any other party no more than 15 written requests for production. Each discrete subpart of a request for production is considered a separate request for production. (5) **Requests for Admissions.** Any party may serve on any other party no more than 15 written requests for admissions. Each discrete subpart of a request for admission is considered a separate request for admission. (6) **Requests for Disclosure.** In addition to the content subject to disclosure under Rule 194.2, a party may request disclosure of all documents, electronic information, and tangible items that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses. A request for disclosure made pursuant to this paragraph is not considered a request for production. (c) **Reopening Discovery**. If a suit is removed from the expedited actions process in Rule 169 or, in a divorce, the filing	the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and **(iv)** for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment. **(B)** *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure: **(i)** an action for review on an administrative record; **(ii)** a forfeiture action in rem arising from a federal statute; **(iii)** a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence; **(iv)** an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision; **(v)** an action to enforce or quash an administrative summons or subpoena; **(vi)** an action by the United States to recover benefit payments;

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

190.3 Discovery Control Plan - By Rule (Level 2)

(a) **Application**. Unless a suit is governed by a discovery control plan under Rules 190.2 or 190.4, discovery must be conducted in accordance with this subdivision.

(b) **Limitations.** Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations:

(1) **Discovery period**. All discovery must be conducted during the discovery period, which begins when suit is filed and continues until:

(A) 30 days before the date set for trial, in cases under the Family Code; or

(B) in other cases, the earlier of

(i) 30 days before the date set for trial, or

(ii) nine months after the earlier of the date of the first oral deposition or the due date of the first response to written discovery.

(2) **Total time for oral depositions.** Each side may have no more than 50 hours in oral depositions to examine and cross-examine parties on the opposing side, experts designated by those parties, and persons who are subject to those parties' control. "Side" refers to all the litigants with generally common interests in the

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures—In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures—For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges

litigation. If one side designates more than two experts, the opposing side may have an additional six hours of total deposition time for each additional expert designated. The court may modify the deposition hours and must do so when a side or party would be given unfair advantage. (3) **Interrogatories.** Any party may serve on any other party no more than 25 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory. **190.4 Discovery Control Plan - By Order (Level 3)** (a) **Application.** The court must, on a party's motion, and may, on its own initiative, order that discovery be conducted in accordance with a discovery control plan tailored to the circumstances of the specific suit. The parties may submit an agreed order to the court for its consideration. The court should act on a party's motion or agreed order under this subdivision as promptly as reasonably possible. (b) **Limitations.** The discovery control plan ordered by the court may address any issue concerning discovery or the matters listed in Rule 166, and may change any limitation on the time for or amount of discovery set forth in these rules. The discovery limitations of Rule 190.2, if applicable, or otherwise of Rule 190.3 apply unless specifically changed in the discovery control plan ordered by the court. The plan must include: (1) a date for trial or for a conference to determine a trial setting; (2) a discovery period during which either all discovery	the sufficiency of another party's disclosures or because another party has not made its disclosures. **(2) *Disclosure of Expert Testimony*.** **(A)** *In General*. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. **(B)** *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain: **(i)** a complete statement of all opinions the witness will express and the basis and reasons for them; **(ii)** the facts or data considered by the witness in forming them; **(iii)** any exhibits that will be used to summarize or support them; **(iv)** the witness's qualifications, including a list of all publications authored in the previous 10 years; **(v)** a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

must be conducted or all discovery requests must be sent, for the entire case or an appropriate phase of it;
(3) appropriate limits on the amount of discovery; and
(4) deadlines for joining additional parties, amending or supplementing pleadings, and designating expert witnesses.

190.5 Modification of Discovery Control Plan

The court may modify a discovery control plan at any time and must do so when the interest of justice requires. Unless a suit is governed by the expedited actions process in Rule 169, the court must allow additional discovery:

(a) related to new, amended or supplemental pleadings, or new information disclosed in a discovery response or in an amended or supplemental response, if:

(1) the pleadings or responses were made after the deadline for completion of discovery or so nearly before that deadline that an adverse party does not have an adequate opportunity to conduct discovery related to the new matters, and

(2) the adverse party would be unfairly prejudiced without such additional discovery;

(b) regarding matters that have changed materially after the discovery cutoff if trial is set or postponed so that the trial date is more than three months after the discovery period ends.

Comment to 2013 change: Rule 190 is amended to implement section 22.004(h) of the Texas Government Code, which calls for rules to promote the prompt, efficient, and cost-effective resolution of civil actions when the amount in controversy does not exceed $100,000. Rule 190.2 now applies to expedited actions, as defined by Rule 169. Rule 190.2 continues to apply

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report*. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Time to Disclose Expert Testimony*. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure*. The parties must supplement these disclosures when required under Rule 26(e).

to divorces not involving children in which the value of the marital estate is not more than $50,000, which are otherwise exempt from the expedited actions process. Amended Rule 190.2(b) ends the discovery period 180 days after the date the first discovery request is served; imposes a fifteen limit maximum on interrogatories, requests for production, and requests for admission; and allows for additional disclosures. Although expedited actions are not subject to mandatory additional discovery under amended Rule 190.5, the court may still allow additional discovery if the conditions of Rule 190(a) are met. **190.6 Certain Types of Discovery Excepted** This rule's limitations on discovery do not apply to or include discovery conducted under Rule 202 ("Depositions Before Suit or to Investigate Claims"), or Rule 621a ("Discovery and Enforcement of Judgment"). But Rule 202 cannot be used to circumvent the limitations of this rule. **RULE 191. MODIFYING DISCOVERY PROCEDURES AND LIMITATIONS; CONFERENCE REQUIREMENT; SIGNING DISCLOSURES; DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS; FILING REQUIREMENTS** **191.1 Modification of Procedures** Except where specifically prohibited, the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit by the agreement of the parties or by court order for good cause. An agreement of the parties is enforceable if it complies with Rule 11 or, as it affects an oral deposition, if it is made a part of the record of the deposition.	**(3)** ***Pretrial Disclosures.*** **(A)** *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment: **(i)** the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises; **(ii)** the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and **(iii)** an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises. **(B)** *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another

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

191.3 Signing of Disclosures, Discovery Requests, Notices, Responses, and Objections
(a) **Signature required.** Every disclosure, discovery request, notice, response, and objection must be signed:

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

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

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

party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

(4) ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) ***Limitations on Frequency and Extent.***

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of

request, notice, response, or objection: (1) is consistent with the rules of civil procedure and these discovery rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) has a good faith factual basis; (3) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) is not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. (d) **Effect of failure to sign.** If a request, notice, response, or objection is not signed, it must be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, notice, response, or objection. A party is not required to take any action with respect to a request or notice that is not signed. (e) **Sanctions.** If the certification is false without substantial justification, the court may, upon motion or its own initiative, impose on the person who made the certification, or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under Chapter 10 of the Civil Practice and Remedies Code. **191.4 Filing of Discovery Materials.** (a) **Discovery materials not to be filed.** The following discovery materials must not be filed: (1) discovery requests, deposition notices, and	requests under Rule 36. **(B)** *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery. **(C)** *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: **(i)** the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; **(ii)** the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or **(iii)** the proposed discovery <u>is outside the scope permitted by Rule 26(b)(1).</u> **(3)** ***Trial Preparation: Materials*.**

subpoenas required to be served only on parties; (2) responses and objections to discovery requests and deposition notices, regardless on whom the requests or notices were served; (3) documents and tangible things produced in discovery; and (4) statements prepared in compliance with Rule 193.3(b) or (d). (b) **Discovery materials to be filed.** The following discovery materials must be filed: (1) discovery requests, deposition notices, and subpoenas required to be served on nonparties; (2) motions and responses to motions pertaining to discovery matters; and (3) agreements concerning discovery matters, to the extent necessary to comply with Rule 11. (c) **Exceptions.** Notwithstanding paragraph (a): (1) the court may order discovery materials to be filed; (2) a person may file discovery materials in support of or in opposition to a motion or for other use in a court proceeding; and (3) a person may file discovery materials necessary for a proceeding in an appellate court. (d) **Retention requirement for persons.** Any person required to serve discovery materials not required to be filed must retain the original or exact copy of the materials during the pendency of the case and any related appellate proceedings begun within six months after judgment is signed, unless otherwise provided by the trial court. (e) **Retention requirement for courts.** The clerk of the court shall retain and dispose of deposition transcripts and	**(A)** *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if: **(i)** they are otherwise discoverable under Rule 26(b)(1); and **(ii)** the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. **(B)** *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation. **(C)** *Previous Statement*. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either: **(i)** a written statement that the person has signed or otherwise adopted or

depositions upon written questions as directed by the Supreme Court.

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

RULE 192. PERMISSIBLE DISCOVERY: FORMS AND SCOPE; WORK PRODUCT; PROTECTIVE ORDERS; DEFINITIONS

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

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

192.3 Scope of Discovery.
(a) **Generally.** In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the

approved; or
(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(4) ***Trial Preparation: Experts*****.**
(A) *Deposition of an Expert Who May Testify*. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.
(B) *Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.
(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses*. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:
(i) relate to compensation for the expert's study or testimony;
(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be

claim or defense of the party seeking discovery or the claim or defense of any other party. It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (b) **Documents and tangible things.** A party may obtain discovery of the existence, description, nature, custody, condition, location, and contents of documents and tangible things (including papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, data, and data compilations) that constitute or contain matters relevant to the subject matter of the action. A person is required to produce a document or tangible thing that is within the person's possession, custody, or control. (c) **Persons with knowledge of relevant facts.** A party may obtain discovery of the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case. [PROPOSED CHANGE: <u>A responding party may not satisfy its obligations to provide the addresses and telephone numbers of persons having knowledge of relevant facts by providing the address and telephone number of counsel.</u>] A person has knowledge of relevant facts when that person has or may have knowledge of any discoverable matter. The person need not have admissible information or personal knowledge of the facts. An expert is "a person with knowledge of relevant facts" only if that knowledge was obtained firsthand or if it was not obtained in preparation for trial or in anticipation of litigation. (d) **Trial witnesses.** A party may obtain discovery of the name, address, and telephone number of any person who is expected to be called to testify at trial. This paragraph does not apply to	expressed; or **(iii)** identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. **(D)** *Expert Employed Only for Trial Preparation*. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only: (i) as provided in Rule 35(b); or (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means. **(E)** *Payment*. Unless manifest injustice would result, the court must require that the party seeking discovery: (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and (ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions. **(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*** **(A)** *Information Withheld.* When a party

rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial. [PROPOSED CHANGE: If requested by interrogatory, and unless the court orders otherwise, at least 45 days before trial a party must provide the name and, if not previously provided, the address, and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises.]

(e) **Testifying and consulting experts.** The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable. A party may discover the following information regarding a testifying expert or regarding a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert:

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

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

(3) the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was acquired;

(4) the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them;

(5) any bias of the witness;

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

(7) the expert's current resume and bibliography.

(f) **Indemnity and insuring agreements.** Except as otherwise

withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) ***In General.*** A party or any person from whom

provided by law, a party may obtain discovery of the existence and contents of any indemnity or insurance agreement under which any person may be liable to satisfy part or all of a judgment rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the indemnity or insurance agreement is not by reason of disclosure admissible in evidence at trial. (g) **Settlement agreements.** A party may obtain discovery of the existence and contents of any relevant portions of a settlement agreement. Information concerning a settlement agreement is not by reason of disclosure admissible in evidence at trial. (h) **Statements of persons with knowledge of relevant facts.** A party may obtain discovery of the statement of any person with knowledge of relevant facts--a "witness statement"-regardless of when the statement was made. A witness statement is (1) a written statement signed or otherwise adopted or approved in writing by the person making it, or (2) a stenographic, mechanical, electrical, or other type of recording of a witness's oral statement, or any substantially verbatim transcription of such a recording. Notes taken during a conversation or interview with a witness are not a witness statement. Any person may obtain, upon written request, his or her own statement concerning the lawsuit, which is in the possession, custody or control of any party. (i) **Potential parties.** A party may obtain discovery of the name, address, and telephone number of any potential party. (j) **Contentions.** A party may obtain discovery of any other party's legal contentions and the factual bases for those contentions.	discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: **(A)** forbidding the disclosure or discovery; **(B)** specifying terms, including time and place <u>or the allocation of expenses</u>, for the disclosure or discovery; **(C)** prescribing a discovery method other than the one selected by the party seeking discovery; **(D)** forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters; **(E)** designating the persons who may be present while the discovery is conducted; **(F)** requiring that a deposition be sealed and opened only on court order; **(G)** requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and **(H)** requiring that the parties simultaneously file specified documents or information in sealed

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

192.5 Work Product.
(a) **Work product defined.** Work product comprises:
(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.
(b) **Protection of work product.**
(1) **Protection of core work product--attorney mental processes**. Core work product - the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories - is

envelopes, to be opened as the court directs.
(2) *Ordering Discovery.* If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.
(3) *Awarding Expenses.* Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.
(1) *Timing.* A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.
(2) *Early Rule 34 Requests.*
(A) *Time to Deliver*. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:
(i) to that party by any other party, and
(ii) by that party to any plaintiff or to any other party that has been served.
(B) *When Considered Served.* The request is considered to have been served at the first Rule 26(f) conference.
(3) *Sequence.* Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:
(A) methods of discovery may be used in any sequence; and
(B) discovery by one party does not require any other party to delay its discovery.

not discoverable. (2) **Protection of other work product**. Any other work product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means. (3) **Incidental disclosure of attorney mental processes**. It is not a violation of subparagraph (1) if disclosure ordered pursuant to subparagraph (2) incidentally discloses by inference attorney mental processes otherwise protected under subparagraph (1). (4) **Limiting disclosure of mental processes.** If a court orders discovery of work product pursuant to subparagraph (2), the court must--insofar as possible--protect against disclosure of the mental impressions, opinions, conclusions, or legal theories not otherwise discoverable. (c) **Exceptions.** Even if made or prepared in anticipation of litigation or for trial, the following is not work product protected from discovery: (1) information discoverable under Rule 192.3 concerning experts, trial witnesses, witness statements, and contentions; (2) trial exhibits ordered disclosed under Rule 166 or Rule 190.4; (3) the name, address, and telephone number of any potential party or any person with knowledge of relevant facts; (4) any photograph or electronic image of underlying	**(e) Supplementing Disclosures and Responses.** **(1) *In General.*** A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response: **(A)** in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or **(B)** as ordered by the court. **(2) *Expert Witness.*** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due. **(f) Conference of the Parties; Planning for Discovery.** **(1) *Conference Timing.*** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b). **(2) *Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities

facts (e.g., a photograph of the accident scene) or a photograph or electronic image of any sort that a party intends to offer into evidence; and (5) any work product created under circumstances within an exception to the attorney-client privilege in Rule 503(d) of the Rules of Evidence. (d) **Privilege.** For purposes of these rules, an assertion that material or information is work product is an assertion of privilege. **192.6 Protective Order.** (a) **Motion.** A person from whom discovery is sought, and any other person affected by the discovery request, may move within the time permitted for response to the discovery request for an order protecting that person from the discovery sought. A person should not move for protection when an objection to written discovery or an assertion of privilege is appropriate, but a motion does not waive the objection or assertion of privilege. If a person seeks protection regarding the time or place of discovery, the person must state a reasonable time and place for discovery with which the person will comply. A person must comply with a request to the extent protection is not sought unless it is unreasonable under the circumstances to do so before obtaining a ruling on the motion. (b) **Order.** To protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may - among other things - order that: (1) the requested discovery not be sought in whole or in part;	for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person. **(3)** ***Discovery Plan****.* A discovery plan must state the parties' views and proposals on: **(A)** what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made; **(B)** the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues; **(C)** any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced; **(D)** any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to

(2) the extent or subject matter of discovery be limited; (3) the discovery not be undertaken at the time or place specified; (4) the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court; (5) the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a. **192.7 Definitions.** As used in these rules (a) *Written discovery* means requests for disclosure, requests for production and inspection of documents and tangible things, requests for entry onto property, interrogatories, and requests for admission. (b) *Possession, custody, or control* of an item means that the person either has physical possession of the item or has a right to possession of the item that is equal or superior to the person who has physical possession of the item. (c) A *testifying expert* is an expert who may be called to testify as an expert witness at trial. (d) A *consulting expert* is an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert. **RULE 193. WRITTEN DISCOVERY: RESPONSE; OBJECTION; ASSERTION OF PRIVILEGE; SUPPLEMENTATION AND AMENDMENT; FAILURE TO TIMELY RESPOND; PRESUMPTION OF AUTHENTICITY**	ask the court to include their agreement in an order under Federal Rule of Evidence 502; **(E)** what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and **(F)** any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c). **(4) *Expedited Schedule.*** If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule: **(A)** require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and **(B)** require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference. **(g) Signing Disclosures and Discovery Requests, Responses, and Objections.** **(1) *Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an

193.1 Responding to Written Discovery; Duty to Make Complete Response.

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

193.2 Objecting to Written Discovery

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

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

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

(d) **Amendment.** An objection or response to written discovery may be amended or supplemented to state an objection or

attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) ***Failure to Sign.*** Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) ***Sanction for Improper Certification****.* If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose

basis that, at the time the objection or response initially was made, either was inapplicable or was unknown after reasonable inquiry. (e) **Waiver of objection.** An objection that is not made within the time required, or that is obscured by numerous unfounded objections, is waived unless the court excuses the waiver for good cause shown. (f) **No objection to preserve privilege.** A party should not object to a request for written discovery on the grounds that it calls for production of material or information that is privileged but should instead comply with Rule 193.3. A party who objects to production of privileged material or information does not waive the privilege but must comply with Rule 193.3 when the error is pointed out. **193.3 Asserting a Privilege** A party may preserve a privilege from written discovery in accordance with this subdivision. (a) **Withholding privileged material or information.** A party who claims that material or information responsive to written discovery is privileged may withhold the privileged material or information from the response. The party must state--in the response (or an amended or supplemental response) or in a separate document--that: (1) information or material responsive to the request has been withheld, (2) the request to which the information or material relates, and (3) the privilege or privileges asserted. (b) **Description of withheld material or information.** After receiving a response indicating that material or information has	behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

been withheld from production, the party seeking discovery may serve a written request that the withholding party identify the information and material withheld. Within 15 days of service of that request, the withholding party must serve a response that: (1) describes the information or materials withheld that, without revealing the privileged information itself or otherwise waiving the privilege, enables other parties to assess the applicability of the privilege, and (2) asserts a specific privilege for each item or group of items withheld. (c) **Exemption.** Without complying with paragraphs (a) and (b), a party may withhold a privileged communication to or from a lawyer or lawyer's representative or a privileged document of a lawyer or lawyer's representative (1) created or made from the point at which a party consults a lawyer with a view to obtaining professional legal services from the lawyer in the prosecution or defense of a specific claim in the litigation in which discovery is requested, and (2) concerning the litigation in which the discovery is requested. (d) **Privilege not waived by production**. A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if - within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made - the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party	

must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege. **193.4 Hearing and Ruling on Objections and Assertions of Privilege.** (a) **Hearing.** Any party may at any reasonable time request a hearing on an objection or claim of privilege asserted under this rule. The party making the objection or asserting the privilege must present any evidence necessary to support the objection or privilege. The evidence may be testimony presented at the hearing or affidavits served at least seven days before the hearing or at such other reasonable time as the court permits. If the court determines that an *in camera* review of some or all of the requested discovery is necessary, that material or information must be segregated and produced to the court in a sealed wrapper within a reasonable time following the hearing. (b) **Ruling.** To the extent the court sustains the objection or claim of privilege, the responding party has no further duty to respond to that request. To the extent the court overrules the objection or claim of privilege, the responding party must produce the requested material or information within 30 days after the court's ruling or at such time as the court orders. A party need not request a ruling on that party's own objection or assertion of privilege to preserve the objection or privilege. (c) **Use of material or information withheld under claim of privilege.** A party may not use--at any hearing or trial--material or information withheld from discovery under a claim of privilege, including a claim sustained by the court, without timely amending or supplementing the party's response to that discovery.	

193.5 Amending or Supplementing Responses to Written Discovery. (a) **Duty to amend or supplement.** If a party learns that the party's response to written discovery was incomplete or incorrect when made, or, although complete and correct when made, is no longer complete and correct, the party must amend or supplement the response: (1) to the extent that the written discovery sought the identification of persons with knowledge of relevant facts, trial witnesses, or expert witnesses, and (2) to the extent that the written discovery sought other information, unless the additional or corrective information has been made known to the other parties in writing, on the record at a deposition, or through other discovery responses. (b) **Time and form of amended or supplemental response**. An amended or supplemental response must be made reasonably promptly after the party discovers the necessity for such a response. Except as otherwise provided by these rules, it is presumed that an amended or supplemental response made less than 30 days before trial was not made reasonably promptly. An amended or supplemental response must be in the same form as the initial response and must be verified by the party if the original response was required to be verified by the party, but the failure to comply with this requirement does not make the amended or supplemental response untimely unless the party making the response refuses to correct the defect within a reasonable time after it is pointed out. **193.6 Failing to Timely Respond - Effect on Trial**	

(a) **Exclusion of evidence and exceptions.** A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that: (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties. (b) **Burden of establishing exception.** The burden of establishing good cause or the lack of unfair surprise or unfair prejudice is on the party seeking to introduce the evidence or call the witness. A finding of good cause or of the lack of unfair surprise or unfair prejudice must be supported by the record. (c) **Continuance.** Even if the party seeking to introduce the evidence or call the witness fails to carry the burden under paragraph (b), the court may grant a continuance or temporarily postpone the trial to allow a response to be made, amended, or supplemented, and to allow opposing parties to conduct discovery regarding any new information presented by that response. **193.7 Production of Documents Self-Authenticating** A party's production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial unless - within ten days or a longer or shorter time ordered by the court, after the producing party has actual notice that the document will be used - the party objects to the authenticity of the document, or any part	

of it, stating the specific basis for objection. An objection must be either on the record or in writing and must have a good faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity. **RULE 194. REQUESTS FOR DISCLOSURE** **194.1 Request.** A party may obtain disclosure from another party of the information or material listed in Rule 194.2 by serving the other party - no later than 30 days before the end of any applicable discovery period - the following request: "Pursuant to Rule 194, you are requested to disclose, within 30 days of service of this request, the information or material described in Rule [state rule, e.g., 194.2, or 194.2(a), (c), and (f), or 194.2(d)-(g)]." **194.2 Content.** A party may request disclosure of any or all of the following: (a) the correct names of the parties to the lawsuit; (b) the name, address, and telephone number of any potential parties; (c) the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial); (d) the amount and any method of calculating economic damages; (e) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each	

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

an authorization furnished by the requesting party; (l) the name, address, and telephone number of any person who may be designated as a responsible third party. **194.3 Response.** The responding party must serve a written response on the requesting party within 30 days after service of the request, except that: (a) a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request, and (b) a response to a request under Rule 194.2(f) is governed by Rule 195. **194.4 Production.** Copies of documents and other tangible items ordinarily must be served with the response. But if the responsive documents are voluminous, the response must state a reasonable time and place for the production of documents. The responding party must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them. **194.5 No Objection or Assertion of Work Product.** No objection or assertion of work product is permitted to a request under this rule. **194.6 Certain Responses Not Admissible.** A response to requests under Rule 194.2(c) and (d) that has been changed by an amended or supplemental response is not	

admissible and may not be used for impeachment.

RULE 205. DISCOVERY FROM NON-PARTIES

205.1 Forms of Discovery; Subpoena Requirement.
A party may compel discovery from a nonparty--that is, a person who is not a party or subject to a party's control--only by obtaining a court order under Rules 196.7, 202, or 204, or by serving a subpoena compelling:
(a) an oral deposition;
(b) a deposition on written questions;
(c) a request for production of documents or tangible things, pursuant to Rule 199.2(b)(5) or Rule 200.1(b), served with a notice of deposition on oral examination or written questions; and
(d) a request for production of documents and tangible things under this rule.

205.2 Notice.
A party seeking discovery by subpoena from a nonparty must serve, on the nonparty and all parties, a copy of the form of notice required under the rules governing the applicable form of discovery. A notice of oral or written deposition must be served before or at the same time that a subpoena compelling attendance or production under the notice is served. A notice to produce documents or tangible things under Rule 205.3 must be served at least 10 days before the subpoena compelling production is served.

205.3 Production of Documents and Tangible Things Without Deposition.

(a) **Notice; subpoena.** A party may compel production of documents and tangible things from a nonparty by serving - reasonable time before the response is due but no later than 30 days before the end of any applicable discovery period - the notice required in Rule 205.2 and a subpoena compelling production or inspection of documents or tangible things. (b) **Contents of notice.** The notice must state: (1) the name of the person from whom production or inspection is sought to be compelled; (2) a reasonable time and place for the production or inspection; and (3) the items to be produced or inspected, either by individual item or by category, describing each item and category with reasonable particularity, and, if applicable, describing the desired testing and sampling with sufficient specificity to inform the nonparty of the means, manner, and procedure for testing or sampling. (c) **Requests for production of medical or mental health records of other non-parties.** If a party requests a nonparty to produce medical or mental health records of another nonparty, the requesting party must serve the nonparty whose records are sought with the notice required under this rule. This requirement does not apply under the circumstances set forth in Rule 196.1(c)(2). (d) **Response.** The nonparty must respond to the notice and subpoena in accordance with Rule 176.6. (e) **Custody, inspection and copying.** The party obtaining the production must make all materials produced available for inspection by any other party on reasonable notice, and must furnish copies to any party who requests at that party's expense.	

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

II. Experts

Tex. R. Civ. P. 195	Fed. R. Civ. P. 26(a)(2), (b)(4), (e)
RULE 195. DISCOVERY REGARDING TESTIFYING EXPERT WITNESSES **195.1 Permissible Discovery Tools.** A party may request another party to designate and disclose information concerning testifying expert witnesses only through a request for disclosure under Rule 194 and through depositions and reports as permitted by this rule. **195.2 Schedule for Designating Experts.** Unless otherwise ordered by the court, a party must designate experts - that is, furnish information requested under Rule 194.2(f) - by the later of the following two dates: 30 days after the request is served, or (a) with regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery period; (b) with regard to all other experts, 60 days before the end of the discovery period. **195.3 Scheduling Depositions.** (a) **Experts for party seeking affirmative relief.** A party seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition as follows: (1) **If no report furnished.** If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is not produced	**RULE 26. DUTY TO DISCLOSE; GENERAL PROVISIONS GOVERNING DISCOVERY** **(a) Required Disclosures.** **(2) *Disclosure of Expert Testimony*.** **(A)** *In General*. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. **(B)** *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain: **(i)** a complete statement of all opinions the witness will express and the basis and reasons for them; **(ii)** the facts or data considered by the witness in forming them; **(iii)** any exhibits that will be used to summarize or support them; **(iv)** the witness's qualifications, including a list of all publications authored in the previous 10 years;

when the expert is designated, then the party must make the expert available for deposition reasonably promptly after the expert is designated. If the deposition cannot--due to the actions of the tendering party--reasonably be concluded more than 15 days before the deadline for designating other experts, that deadline must be extended for other experts testifying on the same subject.

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

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

195.4 Oral Deposition.

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

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report*. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Time to Disclose Expert Testimony*. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

195.5 Court-Ordered Reports. If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert have not been recorded and reduced to tangible form, the court may order these matters reduced to tangible form and produced in addition to the deposition. **195.6 Amendment and Supplementation.** A party's duty to amend and supplement written discovery regarding a testifying expert is governed by Rule 193.5. If an expert witness is retained by, employed by, or otherwise under the control of a party, that party must also amend or supplement any deposition testimony or written report by the expert, but only with regard to the expert's mental impressions or opinions and the basis for them. **195.7 Cost of Expert Witnesses.** When a party takes the oral deposition of an expert witness retained by the opposing party, all reasonable fees charged by the expert for time spent in preparing for, giving, reviewing, and correcting the deposition must be paid by the party that retained the expert.	**(E)** *Supplementing the Disclosure*. The parties must supplement these disclosures when required under Rule 26(e). **. . .** **(b) Discovery Scope and Limits.** **. . .** **(4)** ***Trial Preparation: Experts*****.** **(A)** *Deposition of an Expert Who May Testify*. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided. **(B)** *Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded. **(C)** *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses*. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications: **(i)** relate to compensation for the expert's study or testimony; **(ii)** identify facts or data that the party's attorney provided and that the expert

	considered in forming the opinions to be expressed; or **(iii)** identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. **(D)** *Expert Employed Only for Trial Preparation*. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only: (i) as provided in Rule 35(b); or (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means. **(E)** *Payment*. Unless manifest injustice would result, the court must require that the party seeking discovery: (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and (ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions. . . . **(e) Supplementing Disclosures and Responses.**

	(1) ***In General.*** A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response: **(A)** in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or **(B)** as ordered by the court. **(2)** ***Expert Witness****.* For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

III. Pre-Suit Depositions and Depositions Pending Appeal

Tex. R. Civ. P. 202	Fed. R. Civ. P. 27
RULE 202. DEPOSITIONS BEFORE SUIT OR TO INVESTIGATE CLAIMS **202.1 Generally.** A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either: (a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or (b) to investigate a potential claim or suit. **202.2 Petition** The petition must: (a) be verified; (b) be filed in a proper court of any county: (1) where venue of the anticipated suit may lie, if suit is anticipated; or (2) where the witness resides, if no suit is yet anticipated; (c) be in the name of the petitioner; (d) state either: (1) that the petitioner anticipates the institution of a suit in which the petitioner may be a party; or (2) that the petitioner seeks to investigate a potential claim by or against petitioner; (e) state the subject matter of the anticipated action, if any, and the petitioner's interest therein; (f) if suit is anticipated, either:	**RULE 27. DEPOSITIONS TO PERPETUATE TESTIMONY** **(a) Before an Action Is Filed.** **(1) *Petition.*** A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show: **(A)** that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought; **(B)** the subject matter of the expected action and the petitioner's interest; **(C)** the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it; **(D)** the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and **(E)** the name, address, and expected substance of the testimony of each deponent. **(2) *Notice and Service.*** At least 21 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice

(1) state the names of the persons petitioner expects to have interests adverse to petitioner's in the anticipated suit, and the addresses and telephone numbers for such persons; or (2) state that the names, addresses, and telephone numbers of persons petitioner expects to have interests adverse to petitioner's in the anticipated suit cannot be ascertained through diligent inquiry, and describe those persons; (g) state the names, addresses and telephone numbers of the persons to be deposed, the substance of the testimony that the petitioner expects to elicit from each, and the petitioner's reasons for desiring to obtain the testimony of each; and (h) request an order authorizing the petitioner to take the depositions of the persons named in the petition. **202.3 Notice and Service.** (a) **Personal service on witnesses and persons named.** At least 15 days before the date of the hearing on the petition, the petitioner must serve the petition and a notice of the hearing – in accordance with Rule 21a - on all persons petitioner seeks to depose and, if suit is anticipated, on all persons petitioner expects to have interests adverse to petitioner's in the anticipated suit. (b) **Service by publication on persons not named.** (1) **Manner.** Unnamed persons described in the petition whom the petitioner expects to have interests adverse to petitioner's in the anticipated suit, if any, may be served by publication with the petition and notice of the hearing. The notice must state the place for the hearing and the time it will be held, which must be more than 14	may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies. **(3) *Order and Examination.*** If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken under these rules, and the court may issue orders like those authorized by Rules 34 and 35. A reference in these rules to the court where an action is pending means, for purposes of this rule, the court where the petition for the deposition was filed. **(4) *Using the Deposition.*** A deposition to perpetuate testimony may be used under Rule 32(a) in any later-filed district-court action involving the same subject matter if the deposition either was taken under these rules or, although not so taken, would be admissible in evidence in the courts of the state where it was taken. **(b) Pending Appeal.** **(1) *In General.*** The court where a judgment has been

days after the first publication of the notice. The petition and notice must be published once each week for two consecutive weeks in the newspaper of broadest circulation in the county in which the petition is filed, or if no such newspaper exists, in the newspaper of broadest circulation in the nearest county where a newspaper is published. (2) **Objection to depositions taken on notice by publication.** Any interested party may move, in the proceeding or by bill of review, to suppress any deposition, in whole or in part, taken on notice by publication, and may also attack or oppose the deposition by any other means available. (c) **Service in probate cases.** A petition to take a deposition in anticipation of an application for probate of a will, and notice of the hearing on the petition, may be served by posting as prescribed by Section 33(f)(2) of the Probate Code. The notice and petition must be directed to all parties interested in the testator's estate and must comply with the requirements of Section 33(c) of the Probate Code insofar as they may be applicable. (d) **Modification by order.** As justice or necessity may require, the court may shorten or lengthen the notice periods under this rule and may extend the notice period to permit service on any expected adverse party. **202.4 Order.** (a) **Required findings.** The court must order a deposition to be taken if, but only if, it finds that: (1) allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an	rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court. **(2) *Motion.*** The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court. The motion must show: **(A)** the name, address, and expected substance of the testimony of each deponent; and **(B)** the reasons for perpetuating the testimony. **(3) *Court Order.*** If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in a pending district-court action. **(c) Perpetuation by an Action.** This rule does not limit a court's power to entertain an action to perpetuate testimony.

anticipated suit; or (2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure. (b) **Contents.** The order must state whether a deposition will be taken on oral examination or written questions. The order may also state the time and place at which a deposition will be taken. If the order does not state the time and place at which a deposition will be taken, the petitioner must notice the deposition as required by Rules 199 or 200. The order must contain any protections the court finds necessary or appropriate to protect the witness or any person who may be affected by the procedure. **202.5 Manner of Taking and Use.** Except as otherwise provided in this rule, depositions authorized by this rule are governed by the rules applicable to depositions of non-parties in a pending suit. The scope of discovery in depositions authorized by this rule is the same as if the anticipated suit or potential claim had been filed. A court may restrict or prohibit the use of a deposition taken under this rule in a subsequent suit to protect a person who was not served with notice of the deposition from any unfair prejudice or to prevent abuse of this rule.	

IV. Depositions

Tex. R. Civ. P. 199-201, 203	Fed. R. Civ. P. 28, 30-32
RULE 199. DEPOSITIONS UPON ORAL EXAMINATION **199.1 Oral Examination; Alternative Methods of Conducting or Recording.** (a) **Generally.** A party may take the testimony of any person or entity by deposition on oral examination before any officer authorized by law to take depositions. The testimony, objections, and any other statements during the deposition must be recorded at the time they are given or made. (b) **Depositions by telephone or other remote electronic means.** A party may take an oral deposition by telephone or other remote electronic means if the party gives reasonable prior written notice of intent to do so. For the purposes of these rules, an oral deposition taken by telephone or other remote electronic means is considered as having been taken in the district and at the place where the witness is located when answering the questions. The officer taking the deposition may be located with the party noticing the deposition instead of with the witness if the witness is placed under oath by a person who is present with the witness and authorized to administer oaths in that jurisdiction. (c) **Non-stenographic recording.** Any party may cause a deposition upon oral examination to be recorded by other than stenographic means, including videotape recording. The party requesting the non-stenographic recording will be responsible for obtaining a person authorized by law to administer the oath and for assuring that the recording will be intelligible, accurate,	**RULE 28. PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN** **(a) Within the United States.** **(1)** ***In General.*** Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before: **(A)** an officer authorized to administer oaths either by federal law or by the law in the place of examination; or **(B)** a person appointed by the court where the action is pending to administer oaths and take testimony. **(2)** ***Definition of "Officer".*** The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a). **(b) In a Foreign Country.** **(1)** ***In General.*** A deposition may be taken in a foreign country: **(A)** under an applicable treaty or convention; **(B)** under a letter of request, whether or not captioned a "letter rogatory"; **(C)** on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or **(D)** before a person commissioned by the court to administer any necessary oath and take

and trustworthy. At least five days prior to the deposition, the party must serve on the witness and all parties a notice, either in the notice of deposition or separately, that the deposition will be recorded by other than stenographic means. This notice must state the method of non-stenographic recording to be used and whether the deposition will also be recorded stenographically. Any other party may then serve written notice designating another method of recording in addition to the method specified, at the expense of such other party unless the court orders otherwise. **199.2 Procedure for Noticing Oral Depositions.** (a) **Time to notice deposition.** A notice of intent to take an oral deposition must be served on the witness and all parties a reasonable time before the deposition is taken. An oral deposition may be taken outside the discovery period only by agreement of the parties or with leave of court. (b) **Content of notice.** (1) **Identity of witness; organizations.** The notice must state the name of the witness, which may be either an individual or a public or private corporation, partnership, association, governmental agency, or other organization. If an organization is named as the witness, the notice must describe with reasonable particularity the matters on which examination is requested. In response, the organization named in the notice must - a reasonable time before the deposition - designate one or more individuals to testify on its behalf and set forth, for each individual designated, the matters on which the individual will testify. Each individual designated must testify as to matters that are known or reasonably	testimony. **(2) *Issuing a Letter of Request or a Commission.*** A letter of request, a commission, or both may be issued: **(A)** on appropriate terms after an application and notice of it; and **(B)** without a showing that taking the deposition in another manner is impracticable or inconvenient. **(3) *Form of a Request, Notice, or Commission.*** When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken. **(4) *Letter of Request—Admitting Evidence.*** Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States. **(c) Disqualification.** A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action. **RULE 30. DEPOSITIONS BY ORAL EXAMINATION** **(a) When a Deposition May Be Taken.** **(1) *Without Leave.*** A party may, by oral questions, depose any person, including a party, without leave of

available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized by these rules. (2) **Time and place.** The notice must state a reasonable time and place for the oral deposition. The place may be in: (A) the county of the witness's residence; (B) the county where the witness is employed or regularly transacts business in person; (C) the county of suit, if the witness is a party or a person designated by a party under Rule 199.2(b)(1); (D) the county where the witness was served with the subpoena, or within 150 miles of the place of service, if the witness is not a resident of Texas or is a transient person; or (E) subject to the foregoing, at any other convenient place directed by the court in which the cause is pending. (3) **Alternative means of conducting and recording.** The notice must state whether the deposition is to be taken by telephone or other remote electronic means and identify the means. If the deposition is to be recorded by nonstenographic means, the notice may include the notice required by Rule 199.1(c). (4) **Additional attendees.** The notice may include the notice concerning additional attendees required by Rule 199.5(a)(3). (5) **Request for production of documents.** A notice may include a request that the witness produce at the deposition documents or tangible things within the	court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45. **(2)** ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2): **(A)** if the parties have not stipulated to the deposition and: **(i)** the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants; **(ii)** the deponent has already been deposed in the case; or **(iii)** the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or **(B)** if the deponent is confined in prison. **(b) Notice of the Deposition; Other Formal Requirements.** **(1)** ***Notice in General.*** A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to

scope of discovery and within the witness's possession, custody, or control. If the witness is a nonparty, the request must comply with Rule 205 and the designation of materials required to be identified in the subpoena must be attached to, or included in, the notice. The nonparty's response to the request is governed by Rules 176 and 205. When the witness is a party or subject to the control of a party, document requests under this subdivision are governed by Rules 193 and 196.

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

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

199.5 Examination, Objection, and Conduct During Oral Depositions.
(a) **Attendance.**
(1) **Witness.** The witness must remain in attendance from day to day until the deposition is begun and which the person belongs.
(2) ***Producing Documents.*** If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.
(3) ***Method of Recording.***
(A) *Method Stated in the Notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.
(B) *Additional Method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.
(4) ***By Remote Means.*** The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.
(5) ***Officer's Duties.***

completed. (2) **Attendance by party.** A party may attend an oral deposition in person, even if the deposition is taken by telephone or other remote electronic means. If a deposition is taken by telephone or other remote electronic means, the party noticing the deposition must make arrangements for all persons to attend by the same means. If the party noticing the deposition appears in person, any other party may appear by telephone or other remote electronic means if that party makes the necessary arrangements with the deposition officer and the party noticing the deposition. (3) **Other attendees.** If any party intends to have in attendance any persons other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the oral deposition, that party must give reasonable notice to all parties, either in the notice of deposition or separately, of the identity of the other persons. (b) **Oath; examination.** Every person whose deposition is taken by oral examination must first be placed under oath. The parties may examine and cross-examine the witness. Any party, in lieu of participating in the examination, may serve written questions in a sealed envelope on the party noticing the oral deposition, who must deliver them to the deposition officer, who must open the envelope and propound them to the witness. (c) **Time limitation.** No side may examine or cross-examine an individual witness for more than six hours. Breaks during depositions do not count against this limitation. (d) **Conduct during the oral deposition; conferences.** The oral	**(A)** *Before the Deposition.* Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes: **(i)** the officer's name and business address; **(ii)** the date, time, and place of the deposition; **(iii)** the deponent's name; **(iv)** the officer's administration of the oath or affirmation to the deponent; and **(v)** the identity of all persons present. **(B)** *Conducting the Deposition; Avoiding Distortion.* If the deposition is recorded non-stenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques. **(C)** *After the Deposition.* At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters. **(6)** ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership,

deposition must be conducted in the same manner as if the testimony were being obtained in court during trial. Counsel should cooperate with and be courteous to each other and to the witness. The witness should not be evasive and should not unduly delay the examination. Private conferences between the witness and the witness's attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during agreed recesses and adjournments. If the lawyers and witnesses do not comply with this rule, the court may allow in evidence at trial statements, objections, discussions, and other occurrences during the oral deposition that reflect upon the credibility of the witness or the testimony. (e) **Objections.** Objections to questions during the oral deposition are limited to "Objection, leading" and "Objection, form." Objections to testimony during the oral deposition are limited to "Objection, non-responsive." These objections are waived if not stated as phrased during the oral deposition. All other objections need not be made or recorded during the oral deposition to be later raised with the court. The objecting party must give a clear and concise explanation of an objection if requested by the party taking the oral deposition, or the objection is waived. Argumentative or suggestive objections or explanations waive objection and may be grounds for terminating the oral deposition or assessing costs or other sanctions. The officer taking the oral deposition will not rule on objections but must record them for ruling by the court. The officer taking the oral deposition must not fail to record testimony because an objection has been made. (f) **Instructions not to answer.** An attorney may instruct a	an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules. **(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.** **(1) *Examination and Cross-Examination.*** The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer. **(2) *Objections.*** An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated

witness not to answer a question during an oral deposition only if necessary to preserve a privilege, comply with a court order or these rules, protect a witness from an abusive question or one for which any answer would be misleading, or secure a ruling pursuant to paragraph (g). The attorney instructing the witness not to answer must give a concise, non-argumentative, non-suggestive explanation of the grounds for the instruction if requested by the party who asked the question. (g) **Suspending the deposition.** If the time limitations for the deposition have expired or the deposition is being conducted or defended in violation of these rules, a party or witness may suspend the oral deposition for the time necessary to obtain a ruling. (h) **Good faith required.** An attorney must not ask a question at an oral deposition solely to harass or mislead the witness, for any other improper purpose, or without a good faith legal basis at the time. An attorney must not object to a question at an oral deposition, instruct the witness not to answer a question, or suspend the deposition unless there is a good faith factual and legal basis for doing so at the time. **199.6 Hearing on Objections.** Any party may, at any reasonable time, request a hearing on an objection or privilege asserted by an instruction not to answer or suspension of the deposition; provided the failure of a party to obtain a ruling prior to trial does not waive any objection or privilege. The party seeking to avoid discovery must present any evidence necessary to support the objection or privilege either by testimony at the hearing or by affidavits served on opposing parties at least seven days before the hearing. If the court determines that an *in camera* review of some or all of the	concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3). **(3) *Participating Through Written Questions.*** Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim. **(d) Duration; Sanction; Motion to Terminate or Limit.** **(1) *Duration.*** Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination. **(2) *Sanction.*** The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent. **(3) *Motion to Terminate or Limit.*** **(A)** *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is

requested discovery is necessary to rule, answers to the deposition questions may be made in camera, to be transcribed and sealed in the event the privilege is sustained, or made in an affidavit produced to the court in a sealed wrapper.

RULE 200. DEPOSITIONS UPON WRITTEN QUESTIONS

200.1 Procedure for Noticing Deposition Upon Written Questions.

(a) **Who may be noticed; when.** A party may take the testimony of any person or entity by deposition on written questions before any person authorized by law to take depositions on written questions. A notice of intent to take the deposition must be served on the witness and all parties at least 20 days before the deposition is taken. A deposition on written questions may be taken outside the discovery period only by agreement of the parties or with leave of court. The party noticing the deposition must also deliver to the deposition officer a copy of the notice and of all written questions to be asked during the deposition.

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

200.2 Compelling Witness to Attend.

A party may compel the witness to attend the deposition on written questions by serving the witness with a subpoena under

being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) *Order.* The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) *Award of Expenses.* Rule 37(a)(5) applies to the award of expenses.

(e) Review by the Witness; Changes.

(1) ***Review; Statement of Changes.*** On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) ***Changes Indicated in the Officer's Certificate.*** The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.

(1) ***Certification and Delivery.*** The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony.

Rule 176. If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the deposition notice upon the party's attorney has the same effect as a subpoena served on the witness. **200.3 Questions and Objections.** (a) **Direct questions.** The direct questions to be propounded to the witness must be attached to the notice. (b) **Objections and additional questions.** Within ten days after the notice and direct questions are served, any party may object to the direct questions and serve cross-questions on all other parties. Within five days after cross-questions are served, any party may object to the cross-questions and serve redirect questions on all other parties. Within three days after redirect questions are served, any party may object to the redirect questions and serve re-cross questions on all other parties. Objections to re-cross questions must be served within five days after the earlier of when re-cross questions are served or the time of the deposition on written questions. (c) **Objections to form of questions.** Objections to the form of a question are waived unless asserted in accordance with this subdivision. **200.4 Conducting the Deposition Upon Written Questions.** The deposition officer must: take the deposition on written questions at the time and place designated; record the testimony of the witness under oath in response to the questions; and prepare, certify, and deliver the deposition transcript in accordance with Rule 203. The deposition officer has authority when necessary to summon and swear an interpreter to facilitate the taking of the deposition.	The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration. **(2) *Documents and Tangible Things.*** **(A)** *Originals and Copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may: **(i)** offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or **(ii)** give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition. **(B)** *Order Regarding the Originals.* Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

RULE 201. DEPOSITIONS IN FOREIGN JURISDICTIONS FOR USE IN TEXAS PROCEEDINGS; DEPOSITIONS IN TEXAS FOR USE IN FOREIGN PROCEEDINGS

201.1 Depositions in Foreign Jurisdictions for Use in Texas Proceedings.

(a) **Generally.** A party may take a deposition on oral examination or written questions of any person or entity located in another state or a foreign country for use in proceedings in this State. The deposition may be taken by:

(1) notice;

(2) letter rogatory, letter of request, or other such device;

(3) agreement of the parties; or

(4) court order.

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

(c) **By letter rogatory.** On motion by a party, the court in which an action is pending must issue a letter rogatory on terms that are just and appropriate, regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter must:

(1) be addressed to the appropriate authority in the jurisdiction in which the deposition is to be taken;

(2) request and authorize that authority to summon the witness before the authority at a time and place stated in the letter for examination on oral or written

(3) *Copies of the Transcript or Recording.* Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) *Notice of Filing.* A party who files the deposition must promptly notify all other parties of the filing.

(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses. A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

RULE 31. DEPOSITIONS BY WRITTEN QUESTIONS

(a) When a Deposition May Be Taken.

(1) *Without Leave.* A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more

questions; and (3) request and authorize that authority to cause the witness's testimony to be reduced to writing and returned, together with any items marked as exhibits, to the party requesting the letter rogatory. (d) **By letter of request or other such device.** On motion by a party, the court in which an action is pending, or the clerk of that court, must issue a letter of request or other such device in accordance with an applicable treaty or international convention on terms that are just and appropriate. The letter or other device must be issued regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter or other device must: (1) be in the form prescribed by the treaty or convention under which it is issued, as presented by the movant to the court or clerk; and (2) must state the time, place, and manner of the examination of the witness. (e) **Objections to form of letter rogatory, letter of request, or other such device.** In issuing a letter rogatory, letter of request, or other such device, the court must set a time for objecting to the form of the device. A party must make any objection to the form of the device in writing and serve it on all other parties by the time set by the court, or the objection is waived. (f) **Admissibility of evidence.** Evidence obtained in response to a letter rogatory, letter of request, or other such device is not inadmissible merely because it is not a verbatim transcript, or the testimony was not taken under oath, or for any similar departure from the requirements for depositions taken within this State under these rules. (g) **Deposition by electronic means.** A deposition in another	than 10 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants; **(ii)** the deponent has already been deposed in the case; or **(iii)** the party seeks to take a deposition before the time specified in Rule 26(d); or **(B)** if the deponent is confined in prison. **(3)** ***Service; Required Notice.*** A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken. **(4)** ***Questions Directed to an Organization.*** A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6). **(5)** ***Questions from Other Parties.*** Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times. **(b) Delivery to the Officer; Officer's Duties.** The party who

jurisdiction may be taken by telephone, video conference, teleconference, or other electronic means under the provisions of Rule 199. **201.2 Depositions in Texas for Use in Proceedings in Foreign Jurisdictions.** If a court of record of any other state or foreign jurisdiction issues a mandate, writ, or commission that requires a witness's oral or written deposition testimony in this State, the witness may be compelled to appear and testify in the same manner and by the same process used for taking testimony in a proceeding pending in this State. **RULE 203. SIGNING, CERTIFICATION AND USE OF ORAL AND WRITTEN DEPOSITIONS** **203.1 Signature and Changes.** (a) **Deposition transcript to be provided to witness.** The deposition officer must provide the original deposition transcript to the witness for examination and signature. If the witness is represented by an attorney at the deposition, the deposition officer must provide the transcript to the attorney instead of the witness. (b) **Changes by witness; signature.** The witness may change responses as reflected in the deposition transcript by indicating the desired changes, in writing, on a separate sheet of paper, together with a statement of the reasons for making the changes. No erasures or obliterations of any kind may be made to the original deposition transcript. The witness must then sign the transcript under oath and return it to the deposition officer. If the witness does not return the transcript to the deposition	noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in Rule 30(c), (e), and (f) to: **(1)** take the deponent's testimony in response to the questions; **(2)** prepare and certify the deposition; and **(3)** send it to the party, attaching a copy of the questions and of the notice. **(c) Notice of Completion or Filing.** **(1)** ***Completion.*** The party who noticed the deposition must notify all other parties when it is completed. **(2)** ***Filing.*** A party who files the deposition must promptly notify all other parties of the filing. **RULE 32. USING DEPOSITIONS IN COURT PROCEEDINGS** **(a) Using Depositions.** **(1)** ***In General.*** At a hearing or trial, all or part of a deposition may be used against a party on these conditions: **(A)** the party was present or represented at the taking of the deposition or had reasonable notice of it; **(B)** it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and **(C)** the use is allowed by Rule 32(a)(2) through (8). **(2)** ***Impeachment and Other Uses.*** Any party may use a deposition to contradict or impeach the testimony given

officer within 20 days of the date the transcript was provided to the witness or the witness's attorney, the witness may be deemed to have waived the right to make the changes.

(c) **Exceptions.** The requirements of presentation and signature under this subdivision do not apply:

(1) if the witness and all parties waive the signature requirement;

(2) to depositions on written questions; or

(3) to non-stenographic recordings of oral depositions.

203.2 Certification.

The deposition officer must file with the court, serve on all parties, and attach as part of the deposition transcript or non-stenographic recording of an oral deposition a certificate duly sworn by the officer stating:

(a) that the witness was duly sworn by the officer and that the transcript or non-stenographic recording of the oral deposition is a true record of the testimony given by the witness;

(b) that the deposition transcript, if any, was submitted to the witness or to the attorney for the witness for examination and signature, the date on which the transcript was submitted, whether the witness returned the transcript, and if so, the date on which it was returned.

(c) that changes, if any, made by the witness are attached to the deposition transcript;

(d) that the deposition officer delivered the deposition transcript or nonstenographic recording of an oral deposition in accordance with Rule 203.3;

(e) the amount of time used by each party at the deposition;

(f) the amount of the deposition officer's charges for preparing

by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

(3) *Deposition of Party, Agent, or Designee.* An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(4) *Unavailable Witness.* A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used.

(5) *Limitations on Use.*

(A) *Deposition Taken on Short Notice.* A deposition must not be used against a party who, having received less than 14 days' notice of the

the original deposition transcript, which the clerk of the court must tax as costs; and (g) that a copy of the certificate was served on all parties and the date of service. **203.3 Delivery.** (a) **Endorsement; to whom delivered.** The deposition officer must endorse the title of the action and "Deposition of (name of witness)" on the original deposition transcript (or a copy, if the original was not returned) or the original nonstenographic recording of an oral deposition, and must return: (1) the transcript to the party who asked the first question appearing in the transcript, or (2) the recording to the party who requested it. (b) **Notice.** The deposition officer must serve notice of delivery on all other parties. (c) **Inspection and copying; copies.** The party receiving the original deposition transcript or non-stenographic recording must make it available upon reasonable request for inspection and copying by any other party. Any party or the witness is entitled to obtain a copy of the deposition transcript or non-stenographic recording from the deposition officer upon payment of a reasonable fee. **203.4 Exhibits.** At the request of a party, the original documents and things produced for inspection during the examination of the witness must be marked for identification by the deposition officer and annexed to the deposition transcript or non-stenographic recording. The person producing the materials may produce copies instead of originals if the party gives all other parties fair	deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place—and this motion was still pending when the deposition was taken. **(B)** *Unavailable Deponent; Party Could Not Obtain an Attorney.* A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition. **(6)** ***Using Part of a Deposition.*** If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts. **(7)** ***Substituting a Party.*** Substituting a party under Rule 25 does not affect the right to use a deposition previously taken. **(8)** ***Deposition Taken in an Earlier Action.*** A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence. **(b) Objections to Admissibility.** Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the

opportunity at the deposition to compare the copies with the originals. If the person offers originals rather than copies, the deposition officer must, after the conclusion of the deposition, make copies to be attached to the original deposition transcript or non-stenographic recording, and then return the originals to the person who produced them. The person who produced the originals must preserve them for hearing or trial and make them available for inspection or copying by any other party upon seven days' notice. Copies annexed to the original deposition transcript or non-stenographic recording may be used for all purposes.

203.5 Motion to Suppress.

A party may object to any errors and irregularities in the manner in which the testimony is transcribed, signed, delivered, or otherwise dealt with by the deposition officer by filing a motion to suppress all or part of the deposition. If the deposition officer complies with Rule 203.3 at least one day before the case is called to trial, with regard to a deposition transcript, or 30 days before the case is called to trial, with regard to a non-stenographic recording, the party must file and serve a motion to suppress before trial commences to preserve the objections.

203.6 Use.

(a) **Non-stenographic recording; transcription.** A non-stenographic recording of an oral deposition, or a written transcription of all or part of such a recording, may be used to the same extent as a deposition taken by stenographic means. However, the court, for good cause shown, may require that the party seeking to use a non-stenographic recording or

admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) Form of Presentation. Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

(d) Waiver of Objections.

(1) ***To the Notice.*** An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) ***To the Officer's Qualification.*** An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(A) before the deposition begins; or

(B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) ***To the Taking of the Deposition.***

(A) *Objection to Competence, Relevance, or Materiality.* An objection to a deponent's competence--or to the competence, relevance, or materiality of testimony--is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) *Objection to an Error or Irregularity.* An objection to an error or irregularity at an oral examination is waived if:

written transcription first obtain a complete transcript of the deposition recording from a certified court reporter. The court reporter's transcription must be made from the original or a certified copy of the deposition recording. The court reporter must, to the extent applicable, comply with the provisions of this rule, except that the court reporter must deliver the original transcript to the attorney requesting the transcript, and the court reporter's certificate must include a statement that the transcript is a true record of the non-stenographic recording. The party to whom the court reporter delivers the original transcript must make the transcript available, upon reasonable request, for inspection and copying by the witness or any party. (b) **Same proceeding.** All or part of a deposition may be used for any purpose in the same proceeding in which it was taken. If the original is not filed, a certified copy may be used. "Same proceeding" includes a proceeding in a different court but involving the same subject matter and the same parties or their representatives or successors in interest. A deposition is admissible against a party joined after the deposition was taken if: (1) the deposition is admissible pursuant to Rule 804(b)(1) of the Rules of Evidence, or (2) that party has had a reasonable opportunity to redepose the witness and has failed to do so. (c) **Different proceeding.** Depositions taken in different proceedings may be used as permitted by the Rules of Evidence.	**(i)** it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and **(ii)** it is not timely made during the deposition. **(C)** *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it. **(4)** ***To Completing and Returning the Deposition.*** An objection to how the officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

V. Stipulations about Discovery Procedure

Tex. R. Civ. P. 191.1, 191.2	Fed. R. Civ. P. 29
191.1 Modification of Procedures Except where specifically prohibited, the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit by the agreement of the parties or by court order for good cause. An agreement of the parties is enforceable if it complies with Rule 11 or, as it affects an oral deposition, if it is made a part of the record of the deposition. **191.2 Conference.** Parties and their attorneys are expected to cooperate in discovery and to make any agreements reasonably necessary for the efficient disposition of the case. All discovery motions or requests for hearings relating to discovery must contain a certificate by the party filing the motion or request that a reasonable effort has been made to resolve the dispute without the necessity of court intervention and the effort failed.	**RULE 29. STIPULATIONS ABOUT DISCOVERY PROCEDURE** Unless the court orders otherwise, the parties may stipulate that: **(a)** a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition; and **(b)** other procedures governing or limiting discovery be modified—but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

VI. Interrogatories

Tex. R. Civ. P. 197	Fed. R. Civ. P. 33
RULE 197. INTERROGATORIES TO PARTIES **197.1 Interrogatories.** A party may serve on another party - no later than 30 days before the end of the discovery period - written interrogatories to inquire about any matter within the scope of discovery except matters covered by Rule 195. An interrogatory may inquire whether a party makes a specific legal or factual contention and may ask the responding party to state the legal theories and to describe in general the factual bases for the party's claims or defenses, but interrogatories may not be used to require the responding party to marshal all of its available proof or the proof the party intends to offer at trial. **197.2 Response to Interrogatories.** (a) **Time for response.** The responding party must serve a written response on the requesting party within 30 days after service of the interrogatories, except that a defendant served with interrogatories before the defendant's answer is due need not respond until 50 days after service of the interrogatories. (b) **Content of response.** A response must include the party's answers to the interrogatories and may include objections and assertions of privilege as required under these rules. (c) **Option to produce records.** If the answer to an interrogatory may be derived or ascertained from public records, from the responding party's business records, or from a compilation, abstract or summary of the responding party's business records,	**RULE 33. INTERROGATORIES TO PARTIES** **(a) In General.** **(1)** ***Number.*** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2). **(2)** ***Scope.*** An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time. **(b) Answers and Objections.** **(1)** ***Responding Party.*** The interrogatories must be answered: **(A)** by the party to whom they are directed; or **(B)** if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party. **(2)** ***Time to Respond.*** The responding party must serve its answers and any objections within 30 days after

and the burden of deriving or ascertaining the answer is substantially the same for the requesting party as for the responding party, the responding party may answer the interrogatory by specifying and, if applicable, producing the records or compilation, abstract or summary of the records. The records from which the answer may be derived or ascertained must be specified in sufficient detail to permit the requesting party to locate and identify them as readily as can the responding party. If the responding party has specified business records, the responding party must state a reasonable time and place for examination of the documents. The responding party must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them. (d) **Verification required; exceptions.** A responding party - not an agent or attorney as otherwise permitted by Rule 14 - must sign the answers under oath except that: (1) when answers are based on information obtained from other persons, the party may so state, and (2) a party need not sign answers to interrogatories about persons with knowledge of relevant facts, trial witnesses, and legal contentions. **197.3 Use.** Answers to interrogatories may be used only against the responding party. An answer to an interrogatory inquiring about matters described in Rule 194.2(c) and (d) that has been amended or supplemented is not admissible and may not be used for impeachment.	being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. **(3) *Answering Each Interrogatory.*** Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath. **(4) *Objections.*** The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure. **(5) *Signature.*** The person who makes the answers must sign them, and the attorney who objects must sign any objections. **(c) Use.** An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence. **(d) Option to Produce Business Records.** If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by: **(1)** specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and **(2)** giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

VII. Production and Inspection

Tex. R. Civ. P. 196	Fed. R. Civ. P. 34
RULE 196. REQUESTS FOR PRODUCTION AND INSPECTION TO PARTIES; REQUESTS AND MOTIONS FOR ENTRY UPON PROPERTY **196.1 Request for Production and Inspection to Parties.** (a) **Request.** A party may serve on another party--no later than 30 days before the end of the discovery period--a request for production or for inspection, to inspect, sample, test, photograph and copy documents or tangible things within the scope of discovery. (b) **Contents of request.** The request must specify the items to be produced or inspected, either by individual item or by category, and describe with reasonable particularity each item and category. The request must specify a reasonable time (on or after the date on which the response is due) and place for production. If the requesting party will sample or test the requested items, the means, manner and procedure for testing or sampling must be described with sufficient specificity to inform the producing party of the means, manner, and procedure for testing or sampling. (c) **Requests for production of medical or mental health records regarding nonparties.** (1) **Service of request on nonparty.** If a party requests another party to produce medical or mental health records regarding a nonparty, the requesting party must serve the nonparty with the request for production under Rule 21a. (2) **Exceptions.** A party is not required to serve the	**RULE 34. PRODUCING DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND TANGIBLE THINGS, OR ENTERING ONTO LAND, FOR INSPECTION AND OTHER PURPOSES** **(a) In General.** A party may serve on any other party a request within the scope of Rule 26(b): **(1)** to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control: **(A)** any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or **(B)** any designated tangible things; or **(2)** to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it. **(b) Procedure.** **(1)** ***Contents of the Request*****.** The request: **(A)** must describe with reasonable particularity each item or category of items to be inspected;

request for production on a nonparty whose medical records are sought if: (A) the nonparty signs a release of the records that is effective as to the requesting party; (B) the identity of the nonparty whose records are sought will not directly or indirectly be disclosed by production of the records; or (C) the court, upon a showing of good cause by the party seeking the records, orders that service is not required. (3) **Confidentiality.** Nothing in this rule excuses compliance with laws concerning the confidentiality of medical or mental health records. **196.2 Response to Request for Production and Inspection.** (a) **Time for response.** The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request. (b) **Content of response.** With respect to each item or category of items, the responding party must state objections and assert privileges as required by these rules, and state, as appropriate, that: (1) production, inspection, or other requested action will be permitted as requested; (2) the requested items are being served on the requesting party with the response; (3) production, inspection, or other requested action will take place at a specified time and place, if the responding party is objecting to the time and place of	**(B)** must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and **(C)** may specify the form or forms in which electronically stored information is to be produced. **(2) *Responses and Objections*.** **(A)** *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. **(B)** *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response. **(C)** *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit

production; or (4) no items have been identified - after a diligent search - that are responsive to the request. **196.3 Production.** (a) **Time and place of production.** Subject to any objections stated in the response, the responding party must produce the requested documents or tangible things within the person's possession, custody or control at either the time and place requested or the time and place stated in the response, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them. (b) **Copies.** The responding party may produce copies in lieu of originals unless a question is raised as to the authenticity of the original or in the circumstances it would be unfair to produce copies in lieu of originals. If originals are produced, the responding party is entitled to retain the originals while the requesting party inspects and copies them. (c) **Organization.** The responding party must either produce documents and tangible things as they are kept in the usual course of business or organize and label them to correspond with the categories in the request. **196.4 Electronic or Magnetic Data.** To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is	inspection of the rest. **(D)** *Responding to a Request for Production of Electronically Stored Information.* The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use. **(E)** *Producing the Documents or Electronically Stored Information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information: **(i)** A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request; **(ii)** If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and **(iii)** A party need not produce the same electronically stored information in more than one form. **(c) Nonparties.** As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

reasonably available to the responding party in its ordinary course of business. If the responding party cannot - through reasonable efforts - retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information. **196.5 Destruction or Alteration.** Testing, sampling or examination of an item may not destroy or materially alter an item unless previously authorized by the court. **196.6 Expenses of Production.** Unless otherwise ordered by the court for good cause, the expense of producing items will be borne by the responding party and the expense of inspecting, sampling, testing, photographing, and copying items produced will be borne by the requesting party. **196.7 Request of Motion for Entry Upon Property.** (a) **Request or motion.** A party may gain entry on designated land or other property to inspect, measure, survey, photograph, test, or sample the property or any designated object or operation thereon by serving - no later than 30 days before the end of any applicable discovery period - (1) a request on all parties if the land or property belongs to a party, or (2) a motion and notice of hearing on all parties and the	

nonparty if the land or property belongs to a nonparty. If the identity or address of the nonparty is unknown and cannot be obtained through reasonable diligence, the court must permit service by means other than those specified in Rule 21a that are reasonably calculated to give the nonparty notice of the motion and hearing. (b) **Time, place, and other conditions.** The request for entry upon a party's property, or the order for entry upon a nonparty's property, must state the time, place, manner, conditions, and scope of the inspection, and must specifically describe any desired means, manner, and procedure for testing or sampling, and the person or persons by whom the inspection, testing, or sampling is to be made. (c) **Response to request for entry.** (1) **Time to respond.** The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request. (2) **Content of response.** The responding party must state objections and assert privileges as required by these rules, and state, as appropriate, that: (A) entry or other requested action will be permitted as requested; (B) entry or other requested action will take place at a specified time and place, if the responding party is objecting to the time and place of production; or (C) entry or other requested action cannot be	

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

VIII. Physical and Mental Examinations

Tex. R. Civ. P. 204	Fed. R. Civ. P. 35
RULE 204. PHYSICAL AND MENTAL EXAMINATION **204.1 Motion and Order Required.** (a) **Motion.** A party may - no later than 30 days before the end of any applicable discovery period - move for an order compelling another party to: (1) submit to a physical or mental examination by a qualified physician or a mental examination by a qualified psychologist; or (2) produce for such examination a person in the other party's custody, conservatorship or legal control. (b) **Service.** The motion and notice of hearing must be served on the person to be examined and all parties. (c) **Requirements for obtaining order.** The court may issue an order for examination only for good cause shown and only in the following circumstances: (1) when the mental or physical condition (including the blood group) of a party, or of a person in the custody, conservatorship or under the legal control of a party, is in controversy; or (2) except as provided in Rule 204.4, an examination by a psychologist may be ordered when the party responding to the motion has designated a psychologist as a testifying expert or has disclosed a psychologist's records for possible use at trial. (d) **Requirements of order.** The order must be in writing and must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be	**RULE 35. PHYSICAL AND MENTAL EXAMINATION** **(a) Order for an Examination.** **(1)** ***In General.*** The court where the action is pending may order a party whose mental or physical condition--including blood group--is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control. **(2)** ***Motion and Notice; Contents of the Order.*** The order: **(A)** may be made only on motion for good cause and on notice to all parties and the person to be examined; and **(B)** must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it. **(b) Examiner's Report.** **(1)** ***Request by the Party or Person Examined.*** The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined. **(2)** ***Contents.*** The examiner's report must be in writing and must set out in detail the examiner's findings,

made. **204.2 Report of Examining Physician or Psychologist.** (a) **Right to report.** Upon request of the person ordered to be examined, the party causing the examination to be made must deliver to the person a copy of a detailed written report of the examining physician or psychologist setting out the findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery of the report, upon request of the party causing the examination, the party against whom the order is made must produce a like report of any examination made before or after the ordered examination of the same condition, unless the person examined is not a party and the party shows that the party is unable to obtain it. The court on motion may limit delivery of a report on such terms as are just. If a physician or psychologist fails or refuses to make a report the court may exclude the testimony if offered at the trial. (b) **Agreements; relationship to other rules**. This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance with the provisions of any other rule. **204.3 Effect of No Examination.** If no examination is sought either by agreement or under this subdivision, the party whose physical or mental condition is in controversy must not comment to the court or jury concerning the party's willingness to submit to an examination, or on the	including diagnoses, conclusions, and the results of any tests. **(3) *Request by the Moving Party.*** After delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them. **(4) *Waiver of Privilege.*** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony about all examinations of the same condition. **(5) *Failure to Deliver a Report.*** The court on motion may order—on just terms—that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial. **(6) *Scope.*** This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

right or failure of any other party to seek an examination. **204.4 Cases Arising Under Titles II or V, Family Code.** In cases arising under Family Code Titles II or V, the court may - on its own initiative or on motion of a party - appoint: (a) one or more psychologists or psychiatrists to make any and all appropriate mental examinations of the children who are the subject of the suit or of any other parties, and may make such appointment irrespective of whether a psychologist or psychiatrist has been designated by any party as a testifying expert; (b) one or more experts who are qualified in paternity testing to take blood, body fluid, or tissue samples to conduct paternity tests as ordered by the court. **204.5 Definitions.** For the purpose of this rule, a psychologist is a person licensed or certified by a state or the District of Columbia as a psychologist.	

IX. Admissions

Tex. R. Civ. P. 198	Fed. R. Civ. P. 36
RULE 198. REQUESTS FOR ADMISSIONS **198.1 Request for Admissions.** A party may serve on another party - no later than 30 days before the end of the discovery period - written requests that the other party admit the truth of any matter within the scope of discovery, including statements of opinion or of fact or of the application of law to fact, or the genuineness of any documents served with the request or otherwise made available for inspection and copying. Each matter for which an admission is requested must be stated separately. **198.2 Response to Requests for Admissions.** (a) **Time for response.** The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request. (b) **Content of response.** Unless the responding party states an objection or asserts a privilege, the responding party must specifically admit or deny the request or explain in detail the reasons that the responding party cannot admit or deny the request. A response must fairly meet the substance of the request. The responding party may qualify an answer, or deny a request in part, only when good faith requires. Lack of information or knowledge is not a proper response unless the responding party states that a reasonable inquiry was made but that the information known or easily obtainable is insufficient	**RULE 36. REQUESTS FOR ADMISSIONS** **(a) Scope and Procedure.** **(1)** ***Scope.*** A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to: **(A)** facts, the application of law to fact, or opinions about either; and **(B)** the genuineness of any described documents. **(2)** ***Form; Copy of a Document.*** Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying. **(3)** ***Time to Respond; Effect of Not Responding.*** A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court. **(4)** ***Answer.*** If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or

to enable the responding party to admit or deny. An assertion that the request presents an issue for trial is not a proper response. (c) **Effect of failure to respond.** If a response is not timely served, the request is considered admitted without the necessity of a court order. **198.3 Effect of Admissions; Withdrawal or Amendment.** Any admission made by a party under this rule may be used solely in the pending action and not in any other proceeding. A matter admitted under this rule is conclusively established as to the party making the admission unless the court permits the party to withdraw or amend the admission. The court may permit the party to withdraw or amend the admission if: (a) the party shows good cause for the withdrawal or amendment; and (b) the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved by permitting the party to amend or withdraw the admission.	deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny. **(5) *Objections.*** The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for trial. **(6) *Motion Regarding the Sufficiency of an Answer or Objection.*** The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses. **(b) Effect of an Admission; Withdrawing or Amending It.** A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other

	proceeding.

X. Sanctions

Tex. R. Civ. P. 215	Fed. R. Civ. P. 37
RULE 215. ABUSE OF DISCOVERY; SANCTIONS **215.1 Motion for Sanctions or Order Compelling Discovery.** A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows: (a) **Appropriate court.** On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, an application for an order will be made to the court in which the action is pending. (b) **Motion.** (1) If a party or other deponent which is a corporation or other entity fails to make a designation under Rules 199.2(b)(1) or 200.1(b); or (2) if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails: (A) to appear before the officer who is to take his deposition, after being served with a proper notice; or (B) to answer a question propounded or submitted upon oral examination or upon written questions; or (3) if a party fails:	**RULE 37 – FAILURE TO MAKE DISCLOSURES OR TO COOPERATE IN DISCOVERY; SANCTIONS** **(a) Motion for an Order Compelling Disclosure or Discovery.** **(1) *In General*.** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action. **(2) *Appropriate Court*.** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken. **(3) *Specific Motions*.** **(A)** *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. **(B)** *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if: **(i)** a deponent fails to answer a question asked under Rule 30or 31; **(ii)** a corporation or other entity fails to make a designation under Rule

(A) to serve answers or objections to interrogatories submitted under Rule 197, after proper service of the interrogatories; or (B) to answer an interrogatory submitted under Rule 197; or (C) to serve a written response to a request for inspection submitted under Rule 196, after proper service of the request; or (D) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 196; the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by Rule 215.2(b) without the necessity of first having obtained a court order compelling such discovery. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order. If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule 192.6. (c) **Evasive or incomplete answer.** For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer. (d) **Disposition of motion to compel: award of expenses.** If the	30(b)(6) or 31(a)(4); **(iii)** a party fails to answer an interrogatory submitted under Rule 33; or **(iv)** a party <u>fails to produce documents or</u> fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34. **(C)** *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order. **(4)** ***Evasive or Incomplete Disclosure, Answer, or Response*****.** For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond. **(5)** ***Payment of Expenses; Protective Orders*****.** **(A)** *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if: **(i)** the movant filed the motion before

motion is granted, the court shall, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment. If the motion is denied, the court may, after opportunity for hearing, require the moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner. In determining the amount of reasonable expenses, including attorney fees, to be awarded in connection with a motion, the trial court shall award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or in opposing a motion which is denied. (e) **Providing person's own statement.** If a party fails to comply with any person's written request for the person's own statement as provided in Rule 192.3(h), the person who made the request may move for an order compelling compliance. If the motion is granted, the movant may recover the expenses	attempting in good faith to obtain the disclosure or discovery without court action; **(ii)** the opposing party's nondisclosure, response, or objection was substantially justified; or **(iii)** other circumstances make an award of expenses unjust. **(B)** *If the Motion Is Denied*. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust. **(C)** *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion. **(b) Failure to Comply with a Court Order.** **(1)** ***Sanctions Sought in the District Where the Deposition Is Taken*****.** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may

incurred in obtaining the order, including attorney fees, which are reasonable in relation to the amount of work reasonably expended in obtaining the order.

215.2 Failure to Comply with Order or with Discovery Request.
(a) **Sanctions by court in district where deposition is taken.** If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.
(b) **Sanctions by court in which action is pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rules 199.2(b)(1) or 200.1(b) to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under Rules 204 or 215.1, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

(1) an order disallowing any further discovery of any kind or of a particular kind by the disobedient party;
(2) an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;
(3) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
(4) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or

be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.
(2) *Sanctions Sought in the District Where the Action Is Pending*.

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
(iii) striking pleadings in whole or in part;
(iv) staying further proceedings until the order is obeyed;
(v) dismissing the action or proceeding in whole or in part;
(vi) rendering a default judgment against

prohibiting him from introducing designated matters in evidence; (5) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party; (6) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination; (7) when a party has failed to comply with an order under Rule 204 requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination. (8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment. (c) **Sanction against nonparty for violation of Rules 196.7 or 205.3.** If a nonparty fails to comply with an order under Rules 196.7 or 205.3, the court which made the order may treat the failure to obey as contempt of court.	the disobedient party; or **(vii)** treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination. **(B)** *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)—(vi), unless the disobedient party shows that it cannot produce the other person. **(C)** *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust. **(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.** **(1)** ***Failure to Disclose or Supplement*****.** If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard: **(A)** may order payment of the reasonable

215.3 Abuse of Discovery Process in Seeking, Making, or Resisting Discovery.
If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after notice and hearing, impose any appropriate sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of Rule 215.2(b). Such order of sanction shall be subject to review on appeal from the final judgment.

215.4 Failure to Comply with Rule 198
(a) **Motion.** A party who has requested an admission under Rule 198 may move to determine the sufficiency of the answer or objection. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of Rule 198, it may order either that the matter is admitted or that an amended answer be served. The provisions of Rule 215.1(d) apply to the award of expenses incurred in relation to the motion.
(b) **Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 198 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an

expenses, including attorney's fees, caused by the failure;
(B) may inform the jury of the party's failure; and
(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi).

(2) *Failure to Admit*. If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:
(A) the request was held objectionable under Rule 36(a);
(B) the admission sought was of no substantial importance;
(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or
(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) *In General*.

(A) *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if:
(i) a party or a party's officer, director, or managing agent—or a person designated

order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 193, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit. **215.5 Failure of Party or Witness to Attend to or Serve Subpoena; Expenses.** (a) **Failure of party giving notice to attend.** If the party giving the notice of the taking of an oral deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees. (b) **Failure of witness to attend.** If a party gives notice of the taking of an oral deposition of a witness and the witness does not attend because of the fault of the party giving the notice, if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees. **215.6 Exhibits to Motions and Responses.** Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.	under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or **(ii)** a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response. **(B)** *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action. **(2)** ***Unacceptable Excuse for Failing to Act*.** A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c). **(3)** ***Types of Sanctions*.** Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)—(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust. **(e) Failure to <u>Preserve</u> Electronically Stored Information.** <u>If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it,</u>

[PROPOSED RULE: **RULE 215.7 Spoliation** (a) *Motion for Order Granting Spoliation Remedies.* A party, upon reasonable notice to other parties, may move for an order seeking spoliation remedies if: (1) another party intentionally or negligently breached a duty to preserve a document or tangible thing—as described by Rule 192.3(b)—that may be material and relevant to a claim or defense; (2) the document or tangible thing cannot be reproduced, restored, or replaced through additional discovery; and (3) the movant is unfairly prejudiced as a result. The motion should be filed reasonably promptly after the discovery of the spoliation. (b) *Standards.* (1) The court must consider the spoliation motion outside the presence of the jury, as provided in Texas Rule of Evidence 104. The court must determine the spoliation motion based on the pleadings, any stipulations of the parties, any affidavits, documents or other testimony filed by a party, discovery materials, and any oral testimony. Unless the court orders otherwise, if the movant will be relying on affidavits, the movant must file any affidavits at least fourteen days before the hearing date and if the non-movant will be relying on affidavits, the non-movant must file any controverting affidavits at least seven days before the hearing date. (2) To find spoliation, the court must find that the allegedly spoliating party had a duty to preserve a	and it cannot be restored or replaced through additional discovery, the court: **(1)** upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or **(2)** only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: **(A)** presume that the lost information was unfavorable to the party; **(B)** instruct the jury that it may or must presume the information was unfavorable to the party; or **(C)** dismiss the action or enter a default judgment. **(f) Failure to Participate in Framing a Discovery Plan.** If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

document or tangible thing that may be material and relevant to a claim or defense and breached that duty by intentionally or negligently destroying the document or tangible thing or by failing to take reasonable steps to preserve the document or tangible thing. (3) If the court finds that spoliation occurred, the remedies ordered by the court must be proportionate to the wrongdoing and not excessive. The court should weigh the spoliating party's culpability and the prejudice to the nonspoliating party based on the relevance of the spoliated evidence to key issues in the case, the harmful effect of the evidence on the spoliating party's case, the degree of helpfulness of the evidence to the nonspoliating party's case, and whether the evidence is cumulative of other available evidence. (4) In the order, the court must specify the conduct that formed the basis or bases for its ruling. (c) *Spoliation Remedies.* If the court finds that spoliation occurred, the court may make such orders in regard to the spoliation as are just, and among others the following[1]: (1) If the court finds that a nonspoliating party is prejudiced because of the loss of the document or tangible thing, then the court may order one or more of the following remedies: (A) awarding the nonspoliating, prejudiced party the reasonable expenses, including attorneys' fees and costs, caused by the spoliation; or (B) excluding evidence. (2) If the court finds that the spoliating party acted intentionally or acted negligently and caused the	

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

nonspoliating party to be irreparably deprived of any meaningful ability to present a claim or defense, then the court may order an instruction to the jury regarding the spoliation in addition to the remedies in (c)(1). If the court submits a spoliation instruction to the jury, then evidence of the circumstances surrounding the spoliation may be admissible at trial. The admissibility at trial of evidence of the circumstances surrounding the spoliation is governed by the Texas Rules of Evidence. (3) If the court finds that a party acted with intent to spoliate, then in addition to the remedies set forth in (c)(1) and (c)(2), the court may order one or more of the following remedies: (A) finding that the lost document or tangible thing was unfavorable to the spoliating party; (B) striking the spoliating party's pleadings; (C) dismissing the spoliating party's claims or defenses; or (D) entering a default judgment in part or in full against the spoliating party. The remedies in this section are in addition to the remedies available under Rules 215.2 and 215.3.]	

Matched Comparison; TRCP and FRCP

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*Underlined text indicates amendments to the Federal Rules of Civil Procedure, effective on December 1, 2015

*Proposed amendments to the Texas Rules of Civil Procedure are underlined and marked as follows: [PROPOSED CHANGE: . . .]

*Proposed Texas Rule of Civil Procedure on spoliation is indicated as follows: [PROPOSED RULE: . . .]

I. General Rules And Disclosures

Tex. R. Civ. P. 190-194, 205	Fed. R. Civ. P. 26
Rule 190. DISCOVERY LIMITATIONS	**RULE 26. DUTY TO DISCLOSE; GENERAL PROVISIONS GOVERNING DISCOVERY**
190.1 Discovery Control Plan Required. Every case must be governed by a discovery control plan as provided in this Rule. A plaintiff must allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under Level 1, 2, or 3 of this Rule.	*(closest provision)* **(f) Conference of the Parties; Planning for Discovery.** **(1)** ***Conference Timing****.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b). **(2)** ***Conference Content; Parties' Responsibilities****.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person. **(3)** ***Discovery Plan****.* A discovery plan must state the

	parties' views and proposals on: **(A)** what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made; **(B)** the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues; **(C)** any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced; **(D)** any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502; **(E)** what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and **(F)** any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c). **(4)** ***Expedited Schedule****.* If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule: **(A)** require the parties' conference to occur less than 21 days before the scheduling conference is

	held or a scheduling order is due under Rule 16(b); and **(B)** require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.
190.2 Discovery Control Plan - Expedited Actions and Divorces Involving $50,000 or Less (Level 1) (a) **Application.** This subdivision applies to: (1) any suit that is governed by the expedited actions process in Rule 169; and (2) unless the parties agree that rule 190.3 should apply or the court orders a discovery control plan under Rule 190.4, any suit for divorce not involving children in which a party pleads that the value of the marital estate is more than zero but not more than $ 50,000.	(*No directly related provision dividing lawsuits by levels)*
(b) **Limitations**. Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations: (1) **Discovery period**. All discovery must be conducted during the discovery period, which begins when the suit is filed and continues until 180 days after the date the first request for discovery of any kind is served on a party.	*(closest provisions)* **(a) Required Disclosures.** **(1)** ***Initial Disclosure.*** **(C)** *Time for Initial Disclosures—In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery

	plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure. **(D)** *Time for Initial Disclosures—For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order. **(d) Timing and Sequence of Discovery.** **(1)** ***Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order. **(2)** ***Early Rule 34 Requests***. **(A)** *Time to Deliver*. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered: **(i)** to that party by any other party, and **(ii)** by that party to any plaintiff or to any other party that has been served. **(B)** *When Considered Served.* The request is considered to have been served at the first Rule 26(f) conference. **(3)** ***Sequence.*** Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice: **(A)** methods of discovery may be used in any

	sequence; and **(B)** discovery by one party does not require any other party to delay its discovery.
(2) **Total time for oral depositions.** Each party may have no more than six hours in total to examine and cross-examine all witnesses in oral depositions. The parties may agree to expand this limit up to ten hours in total, but not more except by court order. The court may modify the deposition hours so that no party is given unfair advantage. (3) **Interrogatories.** Any party may serve on any other party no more than 15 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory. (4) **Requests for Production.** Any party may serve on any other party no more than 15 written requests for production. Each discrete subpart of a request for production is considered a separate request for production. (5) **Requests for Admissions.** Any party may serve on any other party no more than 15 written requests for admissions. Each discrete subpart of a request for admission is considered a separate request for admission. (6) **Requests for Disclosure.** In addition to the content subject to disclosure under Rule 194.2, a party may request disclosure of all documents, electronic information, and tangible items that the disclosing party	*(closest provision)* **(b) Discovery Scope and Limits** **(2)** ***Limitations on Frequency and Extent.*** **(A)** *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. *(See Fed. R. Civ. P. 30 and 31 below, setting limits on the number of depositions; Fed. R. Civ. P. 33 below, setting limits on the number of interrogatories)*

has in its possession, custody, or control and may use to support its claims or defenses. A request for disclosure made pursuant to this paragraph is not considered a request for production. (c) **Reopening Discovery**. If a suit is removed from the expedited actions process in Rule 169 or, in a divorce, the filing of a pleading renders this subdivision no longer applicable, the discovery period reopens, and discovery must be completed within the limitations provided in Rules 190.3 or 190.4, whichever is applicable. Any person previously deposed may be redeposed. On motion of any party, the court should continue the trial date if necessary to permit completion of discovery.	
190.3 Discovery Control Plan - By Rule (Level 2) (a) **Application**. Unless a suit is governed by a discovery control plan under Rules 190.2 or 190.4, discovery must be conducted in accordance with this subdivision. (b) **Limitations.** Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations: (1) **Discovery period**. All discovery must be conducted during the discovery period, which begins when suit is filed and continues until: (A) 30 days before the date set for trial, in cases under the Family Code; or (B) in other cases, the earlier of (i) 30 days before the date set for trial, or (ii) nine months after the earlier of the date of the first oral deposition or the due date of the first response to written	(*No directly related provision dividing lawsuits by levels)* *(closest provisions)* **(a) Required Disclosures.** **(1)** ***Initial Disclosure.*** **(C)** *Time for Initial Disclosures—In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery

discovery.	plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure. **(D)** *Time for Initial Disclosures—For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order. **(d) Timing and Sequence of Discovery.** **(1)** ***Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order. **(2)** ***Early Rule 34 Requests***. **(A)** *Time to Deliver*. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered: **(i)** to that party by any other party, and **(ii)** by that party to any plaintiff or to any other party that has been served. **(B)** *When Considered Served.* The request is considered to have been served at the first Rule 26(f) conference. **(3)** ***Sequence.*** Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice: **(A)** methods of discovery may be used in any

	sequence; and **(B)** discovery by one party does not require any other party to delay its discovery.
(2) **Total time for oral depositions.** Each side may have no more than 50 hours in oral depositions to examine and cross-examine parties on the opposing side, experts designated by those parties, and persons who are subject to those parties' control. "Side" refers to all the litigants with generally common interests in the litigation. If one side designates more than two experts, the opposing side may have an additional six hours of total deposition time for each additional expert designated. The court may modify the deposition hours and must do so when a side or party would be given unfair advantage. (3) **Interrogatories.** Any party may serve on any other party no more than 25 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory.	*(closest provision)* **(b) Discovery Scope and Limits** **(2)** ***Limitations on Frequency and Extent.*** **(A)** *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. *(See Fed. R. Civ. P. 30 and 31 below, setting limits on the number of depositions; Fed. R. Civ. P. 33 below, setting limits on the number of interrogatories)*
190.4 Discovery Control Plan - By Order (Level 3) (a) **Application.** The court must, on a party's motion, and may, on its own initiative, order that discovery be conducted in accordance with a discovery control plan tailored to the circumstances of the specific suit. The parties may submit an agreed order to the court for its consideration. The court should act on a party's motion or agreed order under this subdivision	(*No directly related provision dividing lawsuits by levels; see provisions above relating to discovery plans and limits)*

as promptly as reasonably possible. (b) **Limitations.** The discovery control plan ordered by the court may address any issue concerning discovery or the matters listed in Rule 166, and may change any limitation on the time for or amount of discovery set forth in these rules. The discovery limitations of Rule 190.2, if applicable, or otherwise of Rule 190.3 apply unless specifically changed in the discovery control plan ordered by the court. The plan must include: (1) a date for trial or for a conference to determine a trial setting; (2) a discovery period during which either all discovery must be conducted or all discovery requests must be sent, for the entire case or an appropriate phase of it; (3) appropriate limits on the amount of discovery; and (4) deadlines for joining additional parties, amending or supplementing pleadings, and designating expert witnesses.	
190.5 Modification of Discovery Control Plan The court may modify a discovery control plan at any time and must do so when the interest of justice requires. Unless a suit is governed by the expedited actions process in Rule 169, the court must allow additional discovery: (a) related to new, amended or supplemental pleadings, or new information disclosed in a discovery response or in an amended or supplemental response, if: (1) the pleadings or responses were made after the deadline for completion of discovery or so nearly before that deadline that an adverse party does not have an adequate opportunity to conduct discovery related to the new matters, and	*(closest provisions)* **(d) Timing and Sequence of Discovery.** **(1)** ***Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order. **(2)** ***Early Rule 34 Requests***. **(A)** *Time to Deliver*. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered: **(i)** to that party by any other party, and **(ii)** by that party to any plaintiff or to any other party that has been served.

(2) the adverse party would be unfairly prejudiced without such additional discovery; (b) regarding matters that have changed materially after the discovery cutoff if trial is set or postponed so that the trial date is more than three months after the discovery period ends.	**(B)** *When Considered Served.* The request is considered to have been served at the first Rule 26(f) conference. **(3)** ***Sequence.*** Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice: **(A)** methods of discovery may be used in any sequence; and **(B)** discovery by one party does not require any other party to delay its discovery. **(e) Supplementing Disclosures and Responses.** **(1)** ***In General.*** A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response: **(A)** in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or **(B)** as ordered by the court. **(2)** ***Expert Witness****.* For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

190.6 Certain Types of Discovery Excepted This rule's limitations on discovery do not apply to or include discovery conducted under Rule 202 ("Depositions Before Suit or to Investigate Claims"), or Rule 621a ("Discovery and Enforcement of Judgment"). But Rule 202 cannot be used to circumvent the limitations of this rule.	*(no directly related provision)*
RULE 191. MODIFYING DISCOVERY PROCEDURES AND LIMITATIONS; CONFERENCE REQUIREMENT; SIGNING DISCLOSURES; DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS; FILING REQUIREMENTS	
191.1 Modification of Procedures Except where specifically prohibited, the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit by the agreement of the parties or by court order for good cause. An agreement of the parties is enforceable if it complies with Rule 11 or, as it affects an oral deposition, if it is made a part of the record of the deposition.	*(no directly related provision)*
191.2 Conference. Parties and their attorneys are expected to cooperate in discovery and to make any agreements reasonably necessary for the efficient disposition of the case. All discovery motions or requests for hearings relating to discovery must contain a certificate by the party filing the motion or request that a reasonable effort has been made to resolve the dispute without the necessity of court intervention and the effort failed.	*(closest provision)* **(f) Conference of the Parties; Planning for Discovery.** **(1) *Conference Timing*.** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

	(2) ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.
191.3 Signing of Disclosures, Discovery Requests, Notices, Responses, and Objections (a) **Signature required.** Every disclosure, discovery request, notice, response, and objection must be signed: (1) by an attorney, if the party is represented by an attorney, and must show the attorney's State Bar of Texas identification number, address, telephone number, and fax number, if any; or (2) by the party, if the party is not represented by an attorney, and must show the party's address, telephone number, and fax number, if any. (b) **Effect of signature on disclosure.** The signature of an attorney or party on a disclosure constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete	*(closest provision)* **(g) Signing Disclosures and Discovery Requests, Responses, and Objections.** **(1)** ***Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry: **(A)** with respect to a disclosure, it is complete and correct as of the time it is made; and **(B)** with respect to a discovery request,

and correct as of the time it is made. (c) **Effect of signature on discovery request, notice, response, or objection.** The signature of an attorney or party on a discovery request, notice, response, or objection constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, notice, response, or objection: (1) is consistent with the rules of civil procedure and these discovery rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) has a good faith factual basis; (3) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) is not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.	response, or objection, it is: **(i)** consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law; **(ii)** not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and **(iii)** neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.
(d) **Effect of failure to sign.** If a request, notice, response, or objection is not signed, it must be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, notice, response, or objection. A party is not required to take any action with respect to a request or notice that is not signed.	**(2)** ***Failure to Sign.*** Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.
(e) **Sanctions.** If the certification is false without substantial justification, the court may, upon motion or its own initiative, impose on the person who made the certification, or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under Chapter 10 of the Civil Practice and	**(3)** ***Sanction for Improper Certification****.* If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses,

Remedies Code.	including attorney's fees, caused by the violation.
191.4 Filing of Discovery Materials. (a) **Discovery materials not to be filed.** The following discovery materials must not be filed: (1) discovery requests, deposition notices, and subpoenas required to be served only on parties; (2) responses and objections to discovery requests and deposition notices, regardless on whom the requests or notices were served; (3) documents and tangible things produced in discovery; and (4) statements prepared in compliance with Rule 193.3(b) or (d). (b) **Discovery materials to be filed.** The following discovery materials must be filed: (1) discovery requests, deposition notices, and subpoenas required to be served on nonparties; (2) motions and responses to motions pertaining to discovery matters; and (3) agreements concerning discovery matters, to the extent necessary to comply with Rule 11. (c) **Exceptions.** Notwithstanding paragraph (a): (1) the court may order discovery materials to be filed; (2) a person may file discovery materials in support of or in opposition to a motion or for other use in a court proceeding; and (3) a person may file discovery materials necessary for a proceeding in an appellate court. (d) **Retention requirement for persons.** Any person required to	*(No directly related provision)*

serve discovery materials not required to be filed must retain the original or exact copy of the materials during the pendency of the case and any related appellate proceedings begun within six months after judgment is signed, unless otherwise provided by the trial court. (e) **Retention requirement for courts.** The clerk of the court shall retain and dispose of deposition transcripts and depositions upon written questions as directed by the Supreme Court. **191.5 Service of Discovery Materials.** Every disclosure, discovery request, notice, response, and objection required to be served on a party or person must be served on all parties of record. **RULE 192. PERMISSIBLE DISCOVERY: FORMS AND SCOPE; WORK PRODUCT; PROTECTIVE ORDERS; DEFINITIONS** **192.1 Forms of Discovery.** Permissible forms of discovery are: (a) requests for disclosure; (b) requests for production and inspection of documents and tangible things; (c) requests and motions for entry upon and examination of real property; (d) interrogatories to a party; (e) requests for admission; (f) oral or written depositions; and (g) motions for mental or physical examinations.	*(No directly related provision)*

192.2 Sequence of Discovery. The permissible forms of discovery may be combined in the same document and may be taken in any order or sequence.	**(d) Timing and Sequence of Discovery.** **(3) *Sequence.*** Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice: **(A)** methods of discovery may be used in any sequence; and **(B)** discovery by one party does not require any other party to delay its discovery.
192.3 Scope of Discovery. (a) **Generally.** In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.	**(b) Discovery Scope and Limits.** **(1) *Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.
(b) **Documents and tangible things.** A party may obtain discovery of the existence, description, nature, custody, condition, location, and contents of documents and tangible things (including papers, books, accounts, drawings, graphs,	*(closest provision)* **(a) Required Disclosures** **(1) *Initial Disclosure.*** **(A)** *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a

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.	party must, without awaiting a discovery request, provide to the other parties: **(ii)** a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
(c) **Persons with knowledge of relevant facts.** A party may obtain discovery of the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case. [PROPOSED CHANGE: <u>A responding party may not satisfy its obligations to provide the addresses and telephone numbers of persons having knowledge of relevant facts by providing the address and telephone number of counsel.</u>] A person has knowledge of relevant facts when that person has or may have knowledge of any discoverable matter. The person need not have admissible information or personal knowledge of the facts. An expert is "a person with knowledge of relevant facts" only if that knowledge was obtained firsthand or if it was not obtained in preparation for trial or in anticipation of litigation.	*(closest provision)* **(a) Required Disclosures.** (**1) Initial Disclosure.** **(A)** *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties: **(i)** the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
(d) **Trial witnesses.** A party may obtain discovery of the name, address, and telephone number of any person who is expected to be called to testify at trial. This paragraph does not apply to rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial.	*(closest provisions)* **(a) Required Disclosures.** **(2) *Disclosure of Expert Testimony*.** **(A)** *In General*. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it

[PROPOSED CHANGE: <u>If requested by interrogatory, and unless the court orders otherwise, at least 45 days before trial a party must provide the name and, if not previously provided, the address, and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises.</u>] (e) **Testifying and consulting experts.** The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable. A party may discover the following information regarding a testifying expert or regarding a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert: (1) the expert's name, address, and telephone number; (2) the subject matter on which a testifying expert will testify; (3) the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was acquired; (4) the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them; (5) any bias of the witness; (6) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony; (7) the expert's current resume and bibliography.	may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. **(B)** *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain: **(i)** a complete statement of all opinions the witness will express and the basis and reasons for them; **(ii)** the facts or data considered by the witness in forming them; **(iii)** any exhibits that will be used to summarize or support them; **(iv)** the witness's qualifications, including a list of all publications authored in the previous 10 years; **(v)** a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and **(vi)** a statement of the compensation to be paid for the study and testimony in the case. **(C)** *Witnesses Who Do Not Provide a Written Report*. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must

	state: **(i)** the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and **(ii)** a summary of the facts and opinions to which the witness is expected to testify. **(D)** *Time to Disclose Expert Testimony*. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made: **(i)** at least 90 days before the date set for trial or for the case to be ready for trial; or **(ii)** if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure. **(E)** *Supplementing the Disclosure*. The parties must supplement these disclosures when required under Rule 26(e). **(3)** ***Pretrial Disclosures.*** **(A)** *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

	(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises; **(ii)** the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and **(iii)** an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises. **(B)** *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

	(4) ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.
(f) **Indemnity and insuring agreements.** Except as otherwise provided by law, a party may obtain discovery of the existence and contents of any indemnity or insurance agreement under which any person may be liable to satisfy part or all of a judgment rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the indemnity or insurance agreement is not by reason of disclosure admissible in evidence at trial.	*(closest provision)* **(a) Required Disclosures.** **(1)** ***Initial Disclosure.*** **(A)** *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties: **(iv)** for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.
(g) **Settlement agreements.** A party may obtain discovery of the existence and contents of any relevant portions of a settlement agreement. Information concerning a settlement agreement is not by reason of disclosure admissible in evidence at trial.	*(no directly related provision)*
(h) **Statements of persons with knowledge of relevant facts.** A party may obtain discovery of the statement of any person with knowledge of relevant facts--a "witness statement"-regardless of when the statement was made. A witness statement is (1) a written statement signed or otherwise adopted or approved in writing by the person making it, or (2) a stenographic,	*(no directly related provision)*

mechanical, electrical, or other type of recording of a witness's oral statement, or any substantially verbatim transcription of such a recording. Notes taken during a conversation or interview with a witness are not a witness statement. Any person may obtain, upon written request, his or her own statement concerning the lawsuit, which is in the possession, custody or control of any party.	
(i) **Potential parties.** A party may obtain discovery of the name, address, and telephone number of any potential party.	*(no directly related provision)*
(j) **Contentions.** A party may obtain discovery of any other party's legal contentions and the factual bases for those contentions.	*(no directly related provision)*
192.4 Limitations on Scope of Discovery. The discovery methods permitted by these rules should be limited by the court if it determines, on motion or on its own initiative and on reasonable notice, that: (a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or (b) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.	**(b) Discovery Scope and Limits.** **(2) *Limitations on Frequency and Extent.*** **(A)** *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. **(B)** *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not

	reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery. **(C)** *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: **(i)** the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; **(ii)** the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or **(iii)** the proposed discovery <u>is outside the scope permitted by Rule 26(b)(1).</u>
192.5 Work Product. (a) **Work product defined.** Work product comprises: (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or (2) a communication made in anticipation of litigation or	*(closest provisions)* **(b) Discovery Scope and Limits.** **(3)** ***Trial Preparation: Materials*.** **(A)** *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer,

for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents. (b) **Protection of work product.** (1) **Protection of core work product--attorney mental processes**. Core work product - the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories - is not discoverable. (2) **Protection of other work product**. Any other work product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means. (3) **Incidental disclosure of attorney mental processes**. It is not a violation of subparagraph (1) if disclosure ordered pursuant to subparagraph (2) incidentally discloses by inference attorney mental processes otherwise protected under subparagraph (1). (4) **Limiting disclosure of mental processes.** If a court orders discovery of work product pursuant to subparagraph (2), the court must--insofar as possible--protect against disclosure of the mental impressions, opinions, conclusions, or legal theories not otherwise discoverable. (c) **Exceptions.** Even if made or prepared in anticipation of litigation or for trial, the following is not work product	or agent). But, subject to Rule 26(b)(4), those materials may be discovered if: **(i)** they are otherwise discoverable under Rule 26(b)(1); and **(ii)** the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. **(B)** *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation. **(C)** *Previous Statement*. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either: **(i)** a written statement that the person has signed or otherwise adopted or approved; or **(ii)** a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

protected from discovery: (1) information discoverable under Rule 192.3 concerning experts, trial witnesses, witness statements, and contentions; (2) trial exhibits ordered disclosed under Rule 166 or Rule 190.4; (3) the name, address, and telephone number of any potential party or any person with knowledge of relevant facts; (4) any photograph or electronic image of underlying facts (e.g., a photograph of the accident scene) or a photograph or electronic image of any sort that a party intends to offer into evidence; and (5) any work product created under circumstances within an exception to the attorney-client privilege in Rule 503(d) of the Rules of Evidence. (d) **Privilege.** For purposes of these rules, an assertion that material or information is work product is an assertion of privilege.	**(4) *Trial Preparation: Experts*.** **(A)** *Deposition of an Expert Who May Testify*. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided. **(B)** *Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded. **(C)** *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses*. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications: **(i)** relate to compensation for the expert's study or testimony; **(ii)** identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or **(iii)** identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. **(D)** *Expert Employed Only for Trial Preparation*.

	Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only: (i) as provided in Rule 35(b); or (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means. **(E)** *Payment*. Unless manifest injustice would result, the court must require that the party seeking discovery: (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and (ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions. **(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*** **(A)** *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents,

	communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim. **(B)** *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.
192.6 Protective Order. (a) **Motion.** A person from whom discovery is sought, and any other person affected by the discovery request, may move within the time permitted for response to the discovery request for an order protecting that person from the discovery sought.	**(c) Protective Orders.** **(1)** ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the

A person should not move for protection when an objection to written discovery or an assertion of privilege is appropriate, but a motion does not waive the objection or assertion of privilege. If a person seeks protection regarding the time or place of discovery, the person must state a reasonable time and place for discovery with which the person will comply. A person must comply with a request to the extent protection is not sought unless it is unreasonable under the circumstances to do so before obtaining a ruling on the motion. (b) **Order.** To protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may - among other things - order that: (1) the requested discovery not be sought in whole or in part; (2) the extent or subject matter of discovery be limited; (3) the discovery not be undertaken at the time or place specified; (4) the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court; (5) the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a.	court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: **(A)** forbidding the disclosure or discovery; **(B)** specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; **(C)** prescribing a discovery method other than the one selected by the party seeking discovery; **(D)** forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters; **(E)** designating the persons who may be present while the discovery is conducted; **(F)** requiring that a deposition be sealed and opened only on court order; **(G)** requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and **(H)** requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs. **(2)** ***Ordering Discovery***. If a motion for a protective order is wholly or partly denied, the court may, on just

	terms, order that any party or person provide or permit discovery. **(3) *Awarding Expenses*.** Rule 37(a)(5) applies to the award of expenses.
192.7 Definitions. As used in these rules (a) *Written discovery* means requests for disclosure, requests for production and inspection of documents and tangible things, requests for entry onto property, interrogatories, and requests for admission. (b) *Possession, custody, or control* of an item means that the person either has physical possession of the item or has a right to possession of the item that is equal or superior to the person who has physical possession of the item. (c) A *testifying expert* is an expert who may be called to testify as an expert witness at trial. (d) A *consulting expert* is an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert.	*(no directly related provision)*
RULE 193. WRITTEN DISCOVERY: RESPONSE; OBJECTION; ASSERTION OF PRIVILEGE; SUPPLEMENTATION AND AMENDMENT; FAILURE TO TIMELY RESPOND; PRESUMPTION OF AUTHENTICITY	

193.1 Responding to Written Discovery; Duty to Make Complete Response. A party must respond to written discovery in writing within the time provided by court order or these rules. When responding to written discovery, a party must make a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made. The responding party's answers, objections, and other responses must be preceded by the request to which they apply.	*(no directly related provision)*
193.2 Objecting to Written Discovery (a) **Form and time for objections.** A party must make any objection to written discovery in writing - either in the response or in a separate document - within the time for response. The party must state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request. (b) **Duty to respond when partially objecting; objection to time or place of production.** A party must comply with as much of the request to which the party has made no objection unless it is unreasonable under the circumstances to do so before obtaining a ruling on the objection. If the responding party objects to the requested time or place of production, the responding party must state a reasonable time and place for complying with the request and must comply at that time and place without further request or order. (c) **Good faith basis for objection.** A party may object to written discovery only if a good faith factual and legal basis for the objection exists at the time the objection is made. (d) **Amendment.** An objection or response to written discovery may be amended or supplemented to state an objection or	*(no directly related provisions, however the following provisions concern objecting to initial disclosures or pretrial disclosures)* **(a) Required Disclosures.** **(1)** ***Initial Disclosure.*** **(C)** *Time for Initial Disclosures—In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure. **(D)** *Time for Initial Disclosures—For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or

basis that, at the time the objection or response initially was made, either was inapplicable or was unknown after reasonable inquiry. (e) **Waiver of objection.** An objection that is not made within the time required, or that is obscured by numerous unfounded objections, is waived unless the court excuses the waiver for good cause shown. (f) **No objection to preserve privilege.** A party should not object to a request for written discovery on the grounds that it calls for production of material or information that is privileged but should instead comply with Rule 193.3. A party who objects to production of privileged material or information does not waive the privilege but must comply with Rule 193.3 when the error is pointed out.	court order. **(E)** *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures. **(3) Pretrial Disclosures.** **(B)** *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.
193.3 Asserting a Privilege A party may preserve a privilege from written discovery in accordance with this subdivision.	*(closest provision)* **(b) Discovery Scope and Limits.** **(5) *Claiming Privilege or Protecting Trial-Preparation Materials.***

(a) **Withholding privileged material or information.** A party who claims that material or information responsive to written discovery is privileged may withhold the privileged material or information from the response. The party must state--in the response (or an amended or supplemental response) or in a separate document--that: (1) information or material responsive to the request has been withheld, (2) the request to which the information or material relates, and (3) the privilege or privileges asserted. (b) **Description of withheld material or information.** After receiving a response indicating that material or information has been withheld from production, the party seeking discovery may serve a written request that the withholding party identify the information and material withheld. Within 15 days of service of that request, the withholding party must serve a response that: (1) describes the information or materials withheld that, without revealing the privileged information itself or otherwise waiving the privilege, enables other parties to assess the applicability of the privilege, and (2) asserts a specific privilege for each item or group of items withheld. (c) **Exemption.** Without complying with paragraphs (a) and (b), a party may withhold a privileged communication to or from a lawyer or lawyer's representative or a privileged document of a lawyer or lawyer's representative (1) created or made from the point at which a party consults a lawyer with a view to obtaining professional legal services from the lawyer in the prosecution or	**(A)** *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim. **(B)** *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

defense of a specific claim in the litigation in which discovery is requested, and (2) concerning the litigation in which the discovery is requested. (d) **Privilege not waived by production**. A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if - within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made - the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.	
193.4 Hearing and Ruling on Objections and Assertions of Privilege. (a) **Hearing.** Any party may at any reasonable time request a hearing on an objection or claim of privilege asserted under this rule. The party making the objection or asserting the privilege must present any evidence necessary to support the objection or privilege. The evidence may be testimony presented at the hearing or affidavits served at least seven days before the hearing or at such other reasonable time as the court permits. If the court determines that an *in camera* review of some or all of the requested discovery is necessary, that material or information must be segregated and produced to the court in a sealed wrapper within a reasonable time following the hearing.	*(No directly related provision)*

(b) **Ruling.** To the extent the court sustains the objection or claim of privilege, the responding party has no further duty to respond to that request. To the extent the court overrules the objection or claim of privilege, the responding party must produce the requested material or information within 30 days after the court's ruling or at such time as the court orders. A party need not request a ruling on that party's own objection or assertion of privilege to preserve the objection or privilege. (c) **Use of material or information withheld under claim of privilege.** A party may not use--at any hearing or trial--material or information withheld from discovery under a claim of privilege, including a claim sustained by the court, without timely amending or supplementing the party's response to that discovery.	
193.5 Amending or Supplementing Responses to Written Discovery. (a) **Duty to amend or supplement.** If a party learns that the party's response to written discovery was incomplete or incorrect when made, or, although complete and correct when made, is no longer complete and correct, the party must amend or supplement the response: (1) to the extent that the written discovery sought the identification of persons with knowledge of relevant facts, trial witnesses, or expert witnesses, and (2) to the extent that the written discovery sought other information, unless the additional or corrective information has been made known to the other parties in writing, on the record at a deposition, or through other discovery responses. (b) **Time and form of amended or supplemental response**. An	*(closest provision)* **(e) Supplementing Disclosures and Responses.** **(1)** ***In General.*** A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response: **(A)** in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or **(B)** as ordered by the court. **(2)** ***Expert Witness****.* For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the

amended or supplemental response must be made reasonably promptly after the party discovers the necessity for such a response. Except as otherwise provided by these rules, it is presumed that an amended or supplemental response made less than 30 days before trial was not made reasonably promptly. An amended or supplemental response must be in the same form as the initial response and must be verified by the party if the original response was required to be verified by the party, but the failure to comply with this requirement does not make the amended or supplemental response untimely unless the party making the response refuses to correct the defect within a reasonable time after it is pointed out.	report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.
193.6 Failing to Timely Respond - Effect on Trial (a) **Exclusion of evidence and exceptions.** A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that: (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties. (b) **Burden of establishing exception.** The burden of establishing good cause or the lack of unfair surprise or unfair prejudice is on the party seeking to introduce the evidence or call the witness. A finding of good cause or of the lack of unfair	*(No directly related provision)*

surprise or unfair prejudice must be supported by the record. (c) **Continuance.** Even if the party seeking to introduce the evidence or call the witness fails to carry the burden under paragraph (b), the court may grant a continuance or temporarily postpone the trial to allow a response to be made, amended, or supplemented, and to allow opposing parties to conduct discovery regarding any new information presented by that response.	
193.7 Production of Documents Self-Authenticating A party's production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial unless - within ten days or a longer or shorter time ordered by the court, after the producing party has actual notice that the document will be used - the party objects to the authenticity of the document, or any part of it, stating the specific basis for objection. An objection must be either on the record or in writing and must have a good faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity.	*(No directly related provision)*
RULE 194. REQUESTS FOR DISCLOSURE	*(Full Required Disclosures, partially quoted above, are included here)*
194.1 Request. A party may obtain disclosure from another party of the information or material listed in Rule 194.2 by serving the other party - no later than 30 days before the end of any applicable discovery period - the following request: "Pursuant to Rule 194,	**(a) Required Disclosures.** **(1) *Initial Disclosure.*** **(A)** *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a

you are requested to disclose, within 30 days of service of this request, the information or material described in Rule [state rule, e.g., 194.2, or 194.2(a), (c), and (f), or 194.2(d)-(g)]." **194.2 Content.** A party may request disclosure of any or all of the following: (a) the correct names of the parties to the lawsuit; (b) the name, address, and telephone number of any potential parties; (c) the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial); (d) the amount and any method of calculating economic damages; (e) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case; (f) for any testifying expert: (1) the expert's name, address, and telephone number; (2) the subject matter on which the expert will testify; (3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information; (4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party: (A) all documents, tangible things, reports, models, or data compilations that have been	discovery request, provide to the other parties: **(i)** the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment; **(ii)** a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment; **(iii)** a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and **(iv)** for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible

provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and (B) the expert's current resume and bibliography; (g) any indemnity and insuring agreements described in Rule 192.3(f); (h) any settlement agreements described in Rule 192.3(g); (i) any witness statements described in Rule 192.3(h); (j) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills; (k) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party; (l) the name, address, and telephone number of any person who may be designated as a responsible third party. **194.3 Response.** The responding party must serve a written response on the requesting party within 30 days after service of the request, except that: (a) a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request, and (b) a response to a request under Rule 194.2(f) is governed by Rule 195. **194.4 Production.**	judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment. **(B)** *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure: **(i)** an action for review on an administrative record; **(ii)** a forfeiture action in rem arising from a federal statute; **(iii)** a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence; **(iv)** an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision; **(v)** an action to enforce or quash an administrative summons or subpoena; **(vi)** an action by the United States to recover benefit payments; **(vii)** an action by the United States to collect on a student loan guaranteed by the United States; **(viii)** a proceeding ancillary to a proceeding in another court; and **(ix)** an action to enforce an arbitration award. **(C)** *Time for Initial Disclosures—In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f)

Copies of documents and other tangible items ordinarily must be served with the response. But if the responsive documents are voluminous, the response must state a reasonable time and place for the production of documents. The responding party must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them. **194.5 No Objection or Assertion of Work Product.** No objection or assertion of work product is permitted to a request under this rule. **194.6 Certain Responses Not Admissible.** A response to requests under Rule 194.2(c) and (d) that has been changed by an amended or supplemental response is not admissible and may not be used for impeachment.	conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure. **(D)** *Time for Initial Disclosures—For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order. **(E)** *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures. **(2) *Disclosure of Expert Testimony*.** **(A)** *In General*. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. **(B)** *Witnesses Who Must Provide a Written*

	Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain: **(i)** a complete statement of all opinions the witness will express and the basis and reasons for them; **(ii)** the facts or data considered by the witness in forming them; **(iii)** any exhibits that will be used to summarize or support them; **(iv)** the witness's qualifications, including a list of all publications authored in the previous 10 years; **(v)** a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and **(vi)** a statement of the compensation to be paid for the study and testimony in the case. **(C)** *Witnesses Who Do Not Provide a Written Report*. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state: **(i)** the subject matter on which the witness is expected to present evidence

	under Federal Rule of Evidence 702, 703, or 705; and **(ii)** a summary of the facts and opinions to which the witness is expected to testify. **(D)** *Time to Disclose Expert Testimony*. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made: **(i)** at least 90 days before the date set for trial or for the case to be ready for trial; or **(ii)** if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure. **(E)** *Supplementing the Disclosure*. The parties must supplement these disclosures when required under Rule 26(e). **(3)** ***Pretrial Disclosures.*** **(A)** *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment: **(i)** the name and, if not previously provided, the address and telephone number of each witness—separately

	identifying those the party expects to present and those it may call if the need arises; **(ii)** the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and **(iii)** an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises. **(B)** *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause. **(4)** ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

RULE 205. DISCOVERY FROM NON-PARTIES **205.1 Forms of Discovery; Subpoena Requirement.** A party may compel discovery from a nonparty--that is, a person who is not a party or subject to a party's control--only by obtaining a court order under Rules 196.7, 202, or 204, or by serving a subpoena compelling: (a) an oral deposition; (b) a deposition on written questions; (c) a request for production of documents or tangible things, pursuant to Rule 199.2(b)(5) or Rule 200.1(b), served with a notice of deposition on oral examination or written questions; and (d) a request for production of documents and tangible things under this rule. **205.2 Notice.** A party seeking discovery by subpoena from a nonparty must serve, on the nonparty and all parties, a copy of the form of notice required under the rules governing the applicable form of discovery. A notice of oral or written deposition must be served before or at the same time that a subpoena compelling attendance or production under the notice is served. A notice to produce documents or tangible things under Rule 205.3 must be served at least 10 days before the subpoena compelling production is served. **205.3 Production of Documents and Tangible Things Without Deposition.**	*(See Fed. R. Civ. P. 45, which governs subpoenas)*

(a) **Notice; subpoena.** A party may compel production of documents and tangible things from a nonparty by serving - reasonable time before the response is due but no later than 30 days before the end of any applicable discovery period - the notice required in Rule 205.2 and a subpoena compelling production or inspection of documents or tangible things. (b) **Contents of notice.** The notice must state: (1) the name of the person from whom production or inspection is sought to be compelled; (2) a reasonable time and place for the production or inspection; and (3) the items to be produced or inspected, either by individual item or by category, describing each item and category with reasonable particularity, and, if applicable, describing the desired testing and sampling with sufficient specificity to inform the nonparty of the means, manner, and procedure for testing or sampling. (c) **Requests for production of medical or mental health records of other non-parties.** If a party requests a nonparty to produce medical or mental health records of another nonparty, the requesting party must serve the nonparty whose records are sought with the notice required under this rule. This requirement does not apply under the circumstances set forth in Rule 196.1(c)(2). (d) **Response.** The nonparty must respond to the notice and subpoena in accordance with Rule 176.6. (e) **Custody, inspection and copying.** The party obtaining the production must make all materials produced available for inspection by any other party on reasonable notice, and must furnish copies to any party who requests at that party's expense.	

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

II. Experts

Tex. R. Civ. P. 195	Fed. R. Civ. P. 26(a) (2), (b) (4), (e)
RULE 195. DISCOVERY REGARDING TESTIFYING EXPERT WITNESSES **195.1 Permissible Discovery Tools.** A party may request another party to designate and disclose information concerning testifying expert witnesses only through a request for disclosure under Rule 194 and through depositions and reports as permitted by this rule. **195.2 Schedule for Designating Experts.** Unless otherwise ordered by the court, a party must designate experts - that is, furnish information requested under Rule 194.2(f) - by the later of the following two dates: 30 days after the request is served, or (a) with regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery period; (b) with regard to all other experts, 60 days before the end of the discovery period.	**RULE 26. DUTY TO DISCLOSE; GENERAL PROVISIONS GOVERNING DISCOVERY** **(a) Required Disclosures.** **(2) *Disclosure of Expert Testimony*.** **(A)** *In General*. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. **(B)** *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain: **(i)** a complete statement of all opinions the witness will express and the basis and reasons for them; **(ii)** the facts or data considered by the witness in forming them; **(iii)** any exhibits that will be used to summarize or support them; **(iv)** the witness's qualifications, including a list of all publications authored in the previous 10 years;

	(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and **(vi)** a statement of the compensation to be paid for the study and testimony in the case. **(C)** *Witnesses Who Do Not Provide a Written Report*. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state: **(i)** the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and **(ii)** a summary of the facts and opinions to which the witness is expected to testify. **(D)** *Time to Disclose Expert Testimony*. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made: **(i)** at least 90 days before the date set for trial or for the case to be ready for trial; or **(ii)** if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

	(E) *Supplementing the Disclosure*. The parties must supplement these disclosures when required under Rule 26(e).
195.3 Scheduling Depositions. (a) **Experts for party seeking affirmative relief.** A party seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition as follows: (1) **If no report furnished.** If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is not produced when the expert is designated, then the party must make the expert available for deposition reasonably promptly after the expert is designated. If the deposition cannot--due to the actions of the tendering party--reasonably be concluded more than 15 days before the deadline for designating other experts, that deadline must be extended for other experts testifying on the same subject. (2) **If report furnished.** If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is produced when the expert is designated, then the party need not make the expert available for deposition until reasonably promptly after all other experts have been designated. (b) **Other experts.** A party not seeking affirmative relief must make an expert retained by, employed by, or otherwise in the	**(b) Discovery Scope and Limits.** **(4)** ***Trial Preparation: Experts*****.** **(A)** *Deposition of an Expert Who May Testify*. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided. **(B)** *Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded. **(C)** *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses*. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications: **(i)** relate to compensation for the expert's study or testimony; **(ii)** identify facts or data that the party's attorney provided and that the expert

control of the party available for deposition reasonably promptly after the expert is designated and the experts testifying on the same subject for the party seeking affirmative relief have been deposed. **195.4 Oral Deposition.** In addition to disclosure under Rule 194, a party may obtain discovery concerning the subject matter on which the expert is expected to testify, the expert's mental impressions and opinions, the facts known to the expert (regardless of when the factual information was acquired) that relate to or form the basis of the testifying expert's mental impressions and opinions, and other discoverable matters, including documents not produced in disclosure, only by oral deposition of the expert and by a report prepared by the expert under this rule.	considered in forming the opinions to be expressed; or **(iii)** identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. **(D)** *Expert Employed Only for Trial Preparation*. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only: (i) as provided in Rule 35(b); or (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.
195.5 Court-Ordered Reports. If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert have not been recorded and reduced to tangible form, the court may order these matters reduced to tangible form and produced in addition to the deposition.	*(No directly related provision)*
195.6 Amendment and Supplementation. A party's duty to amend and supplement written discovery regarding a testifying expert is governed by Rule 193.5. If an	**(e) Supplementing Disclosures and Responses.** **(1)** ***In General.*** A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory,

expert witness is retained by, employed by, or otherwise under the control of a party, that party must also amend or supplement any deposition testimony or written report by the expert, but only with regard to the expert's mental impressions or opinions and the basis for them.	request for production, or request for admission—must supplement or correct its disclosure or response: **(A)** in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or **(B)** as ordered by the court. **(2)** ***Expert Witness****.* For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.
195.7 Cost of Expert Witnesses. When a party takes the oral deposition of an expert witness retained by the opposing party, all reasonable fees charged by the expert for time spent in preparing for, giving, reviewing, and correcting the deposition must be paid by the party that retained the expert.	**(b) Discovery Scope and Limits.** **(4)** ***Trial Preparation: Experts*****.** **(E)** *Payment*. Unless manifest injustice would result, the court must require that the party seeking discovery: (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and (ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

III. Pre-Suit Depositions and Depositions Pending Appeal

Tex. R. Civ. P. 202	Fed. R. Civ. P. 27
RULE 202. DEPOSITIONS BEFORE SUIT OR TO INVESTIGATE CLAIMS **202.1 Generally.** A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either: (a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or (b) to investigate a potential claim or suit. **202.2 Petition** The petition must: (a) be verified; (b) be filed in a proper court of any county: (1) where venue of the anticipated suit may lie, if suit is anticipated; or (2) where the witness resides, if no suit is yet anticipated; (c) be in the name of the petitioner; (d) state either: (1) that the petitioner anticipates the institution of a suit in which the petitioner may be a party; or (2) that the petitioner seeks to investigate a potential claim by or against petitioner; (e) state the subject matter of the anticipated action, if any, and the petitioner's interest therein;	**Rule 27. DEPOSITIONS TO PERPETUATE TESTIMONY** **(a) Before an Action Is Filed.** **(1) *Petition.*** A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. **(a) Before an Action Is Filed.** **(1) *Petition.*** A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show: **(A)** that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought; **(B)** the subject matter of the expected action and the petitioner's interest; **(C)** the facts that the petitioner wants to

(f) if suit is anticipated, either: (1) state the names of the persons petitioner expects to have interests adverse to petitioner's in the anticipated suit, and the addresses and telephone numbers for such persons; or (2) state that the names, addresses, and telephone numbers of persons petitioner expects to have interests adverse to petitioner's in the anticipated suit cannot be ascertained through diligent inquiry, and describe those persons; (g) state the names, addresses and telephone numbers of the persons to be deposed, the substance of the testimony that the petitioner expects to elicit from each, and the petitioner's reasons for desiring to obtain the testimony of each; and (h) request an order authorizing the petitioner to take the depositions of the persons named in the petition.	establish by the proposed testimony and the reasons to perpetuate it; **(D)** the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and **(E)** the name, address, and expected substance of the testimony of each deponent.
202.3 Notice and Service. (a) **Personal service on witnesses and persons named.** At least 15 days before the date of the hearing on the petition, the petitioner must serve the petition and a notice of the hearing – in accordance with Rule 21a - on all persons petitioner seeks to depose and, if suit is anticipated, on all persons petitioner expects to have interests adverse to petitioner's in the anticipated suit. (b) **Service by publication on persons not named.** (1) **Manner.** Unnamed persons described in the petition whom the petitioner expects to have interests adverse to petitioner's in the anticipated suit, if any, may be served by publication with the petition and notice of the hearing. The notice must state the place for the hearing	**(2)** ***Notice and Service.*** At least 21 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies.

and the time it will be held, which must be more than 14 days after the first publication of the notice. The petition and notice must be published once each week for two consecutive weeks in the newspaper of broadest circulation in the county in which the petition is filed, or if no such newspaper exists, in the newspaper of broadest circulation in the nearest county where a newspaper is published. (2) **Objection to depositions taken on notice by publication.** Any interested party may move, in the proceeding or by bill of review, to suppress any deposition, in whole or in part, taken on notice by publication, and may also attack or oppose the deposition by any other means available. (c) **Service in probate cases.** A petition to take a deposition in anticipation of an application for probate of a will, and notice of the hearing on the petition, may be served by posting as prescribed by Section 33(f)(2) of the Probate Code. The notice and petition must be directed to all parties interested in the testator's estate and must comply with the requirements of Section 33(c) of the Probate Code insofar as they may be applicable. (d) **Modification by order.** As justice or necessity may require, the court may shorten or lengthen the notice periods under this rule and may extend the notice period to permit service on any expected adverse party.	
202.4 Order. (a) **Required findings.** The court must order a deposition to be taken if, but only if, it finds that: (1) allowing the petitioner to take the requested	**(3) *Order and Examination.*** If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order that designates or describes the persons whose depositions

deposition may prevent a failure or delay of justice in an anticipated suit; or (2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure. (b) **Contents.** The order must state whether a deposition will be taken on oral examination or written questions. The order may also state the time and place at which a deposition will be taken. If the order does not state the time and place at which a deposition will be taken, the petitioner must notice the deposition as required by Rules 199 or 200. The order must contain any protections the court finds necessary or appropriate to protect the witness or any person who may be affected by the procedure.	may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken under these rules, and the court may issue orders like those authorized by Rules 34 and 35. A reference in these rules to the court where an action is pending means, for purposes of this rule, the court where the petition for the deposition was filed.
202.5 Manner of Taking and Use. Except as otherwise provided in this rule, depositions authorized by this rule are governed by the rules applicable to depositions of non-parties in a pending suit. The scope of discovery in depositions authorized by this rule is the same as if the anticipated suit or potential claim had been filed. A court may restrict or prohibit the use of a deposition taken under this rule in a subsequent suit to protect a person who was not served with notice of the deposition from any unfair prejudice or to prevent abuse of this rule.	**(4) *Using the Deposition.*** A deposition to perpetuate testimony may be used under Rule 32(a) in any later-filed district-court action involving the same subject matter if the deposition either was taken under these rules or, although not so taken, would be admissible in evidence in the courts of the state where it was taken.
(No directly related provision)	**(b) Pending Appeal.** **(1) *In General.*** The court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to

	perpetuate their testimony for use in the event of further proceedings in that court. **(2) *Motion.*** The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court. The motion must show: **(A)** the name, address, and expected substance of the testimony of each deponent; and **(B)** the reasons for perpetuating the testimony. **(3) *Court Order.*** If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in a pending district-court action. **(c) Perpetuation by an Action.** This rule does not limit a court's power to entertain an action to perpetuate testimony.

IV. Depositions

Tex. R. Civ. P. 199-201, 203	Fed. R. Civ. P. 28, 30-32
RULE 199. DEPOSITIONS UPON ORAL EXAMINATION **199.1 Oral Examination; Alternative Methods of Conducting or Recording.** (a) **Generally.** A party may take the testimony of any person or entity by deposition on oral examination before any officer authorized by law to take depositions. The testimony, objections, and any other statements during the deposition must be recorded at the time they are given or made. ***(See Rule 201 below)***	**RULE 28. PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN** **(a) Within the United States.** **(1)** ***In General.*** Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before: **(A)** an officer authorized to administer oaths either by federal law or by the law in the place of examination; or **(B)** a person appointed by the court where the action is pending to administer oaths and take testimony. **(2)** ***Definition of "Officer".*** The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a). **(b) In a Foreign Country.** **(1)** ***In General.*** A deposition may be taken in a foreign country: **(A)** under an applicable treaty or convention; **(B)** under a letter of request, whether or not captioned a "letter rogatory"; **(C)** on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or **(D)** before a person commissioned by the court

	to administer any necessary oath and take testimony. **(2)** ***Issuing a Letter of Request or a Commission.*** A letter of request, a commission, or both may be issued: **(A)** on appropriate terms after an application and notice of it; and **(B)** without a showing that taking the deposition in another manner is impracticable or inconvenient. **(3)** ***Form of a Request, Notice, or Commission.*** When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken. **(4)** ***Letter of Request—Admitting Evidence.*** Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States. **(c) Disqualification.** A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action.

(No directly related provision)	**RULE 30. DEPOSITIONS BY ORAL EXAMINATION** **(a) When a Deposition May Be Taken.** **(1)** ***Without Leave.*** A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45. **(2)** ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2): **(A)** if the parties have not stipulated to the deposition and: **(i)** the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants; **(ii)** the deponent has already been deposed in the case; or **(iii)** the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or **(B)** if the deponent is confined in prison.

(b) **Depositions by telephone or other remote electronic means.** A party may take an oral deposition by telephone or other remote electronic means if the party gives reasonable prior written notice of intent to do so. For the purposes of these rules, an oral deposition taken by telephone or other remote electronic means is considered as having been taken in the district and at the place where the witness is located when answering the questions. The officer taking the deposition may be located with the party noticing the deposition instead of with the witness if the witness is placed under oath by a person who is present with the witness and authorized to administer oaths in that jurisdiction. (c) **Non-stenographic recording.** Any party may cause a deposition upon oral examination to be recorded by other than stenographic means, including videotape recording. The party requesting the non-stenographic recording will be responsible for obtaining a person authorized by law to administer the oath and for assuring that the recording will be intelligible, accurate, and trustworthy. At least five days prior to the deposition, the party must serve on the witness and all parties a notice, either in the notice of deposition or separately, that the deposition will be recorded by other than stenographic means. This notice must state the method of non-stenographic recording to be used and whether the deposition will also be recorded stenographically. Any other party may then serve written notice designating another method of recording in addition to the method specified, at the expense of such other party unless the court orders otherwise.	*(closest provision)* **(b) Notice of the Deposition; Other Formal Requirements.** **(3) *Method of Recording.*** **(A)** *Method Stated in the Notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition. **(B)** *Additional Method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise. **(4) *By Remote Means.*** The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions. **(5) *Officer's Duties.*** **(A)** *Before the Deposition.* Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:

	(i) the officer's name and business address; **(ii)** the date, time, and place of the deposition; **(iii)** the deponent's name; **(iv)** the officer's administration of the oath or affirmation to the deponent; and **(v)** the identity of all persons present. **(B)** *Conducting the Deposition; Avoiding Distortion.* If the deposition is recorded non-stenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques. **(C)** *After the Deposition.* At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.
199.2 Procedure for Noticing Oral Depositions. (a) **Time to notice deposition.** A notice of intent to take an oral deposition must be served on the witness and all parties a reasonable time before the deposition is taken. An oral deposition may be taken outside the discovery period only by agreement of the parties or with leave of court.	**(b) Notice of the Deposition; Other Formal Requirements.** **(1)** ***Notice in General.*** A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown,

(b) **Content of notice.** (1) **Identity of witness; organizations.** The notice must state the name of the witness, which may be either an individual or a public or private corporation, partnership, association, governmental agency, or other organization. If an organization is named as the witness, the notice must describe with reasonable particularity the matters on which examination is requested. In response, the organization named in the notice must - a reasonable time before the deposition - designate one or more individuals to testify on its behalf and set forth, for each individual designated, the matters on which the individual will testify. Each individual designated must testify as to matters that are known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized by these rules. (2) **Time and place.** The notice must state a reasonable time and place for the oral deposition. The place may be in: (A) the county of the witness's residence; (B) the county where the witness is employed or regularly transacts business in person; (C) the county of suit, if the witness is a party or a person designated by a party under Rule 199.2(b)(1); (D) the county where the witness was served with the subpoena, or within 150 miles of the place of service, if the witness is not a resident of Texas or is a transient person; or (E) subject to the foregoing, at any other	the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

convenient place directed by the court in which the cause is pending. (3) **Alternative means of conducting and recording.** The notice must state whether the deposition is to be taken by telephone or other remote electronic means and identify the means. If the deposition is to be recorded by nonstenographic means, the notice may include the notice required by Rule 199.1(c).	**(3)** ***Method of Recording.*** **(A)** *Method Stated in the Notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition. **(B)** *Additional Method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise. **(4)** ***By Remote Means.*** The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.
(4) **Additional attendees.** The notice may include the notice concerning additional attendees required by Rule 199.5(a)(3).	*(No directly related provision)*

(5) **Request for production of documents.** A notice may include a request that the witness produce at the deposition documents or tangible things within the scope of discovery and within the witness's possession, custody, or control. If the witness is a nonparty, the request must comply with Rule 205 and the designation of materials required to be identified in the subpoena must be attached to, or included in, the notice. The nonparty's response to the request is governed by Rules 176 and 205. When the witness is a party or subject to the control of a party, document requests under this subdivision are governed by Rules 193 and 196.	*(closest provision)***(b) Notice of the Deposition; Other Formal Requirements.** **(2)** ***Producing Documents.*** If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition
199.3 Compelling Witness to Attend. A party may compel the witness to attend the oral deposition by serving the witness with a subpoena under Rule 176. If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the notice of oral deposition upon the party's attorney has the same effect as a subpoena served on the witness.	**(6)** ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does

	not preclude a deposition by any other procedure allowed by these rules. **RULE 30(a)(1) *Without Leave.*** . . . The deponent's attendance may be compelled by subpoena under Rule 45.
199.4 Objections to Time and Place of Oral Deposition. A party or witness may object to the time and place designated for an oral deposition by motion for protective order or by motion to quash the notice of deposition. If the motion is filed by the third business day after service of the notice of deposition, an objection to the time and place of a deposition stays the oral deposition until the motion can be determined.	*(No directly related provision)*
199.5 Examination, Objection, and Conduct During Oral Depositions. (a) **Attendance.** (1) **Witness.** The witness must remain in attendance from day to day until the deposition is begun and completed. (2) **Attendance by party.** A party may attend an oral deposition in person, even if the deposition is taken by telephone or other remote electronic means. If a deposition is taken by telephone or other remote electronic means, the party noticing the deposition must make arrangements for all persons to attend by the same means. If the party noticing the deposition appears in person, any other party may appear by	*(Closest provision)* **(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.** **(1) *Examination and Cross-Examination.*** The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

telephone or other remote electronic means if that party makes the necessary arrangements with the deposition officer and the party noticing the deposition. (3) **Other attendees.** If any party intends to have in attendance any persons other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the oral deposition, that party must give reasonable notice to all parties, either in the notice of deposition or separately, of the identity of the other persons. (b) **Oath; examination.** Every person whose deposition is taken by oral examination must first be placed under oath. The parties may examine and cross-examine the witness. Any party, in lieu of participating in the examination, may serve written questions in a sealed envelope on the party noticing the oral deposition, who must deliver them to the deposition officer, who must open the envelope and propound them to the witness.	
(c) **Time limitation.** No side may examine or cross-examine an individual witness for more than six hours. Breaks during depositions do not count against this limitation. (d) **Conduct during the oral deposition; conferences.** The oral deposition must be conducted in the same manner as if the testimony were being obtained in court during trial. Counsel should cooperate with and be courteous to each other and to the witness. The witness should not be evasive and should not unduly delay the examination. Private conferences between the witness and the witness's attorney during the actual taking of	**(d) Duration; Sanction; Motion to Terminate or Limit.** **(1) *Duration.*** Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination. **(2) *Sanction.*** The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who

the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during agreed recesses and adjournments. If the lawyers and witnesses do not comply with this rule, the court may allow in evidence at trial statements, objections, discussions, and other occurrences during the oral deposition that reflect upon the credibility of the witness or the testimony.	impedes, delays, or frustrates the fair examination of the deponent. **(3) *Motion to Terminate or Limit.*** **(A)** *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order. **(B)** *Order.* The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending. **(C)** *Award of Expenses.* Rule 37(a)(5) applies to the award of expenses.
(e) **Objections.** Objections to questions during the oral deposition are limited to "Objection, leading" and "Objection, form." Objections to testimony during the oral deposition are limited to "Objection, non-responsive." These objections are waived if not stated as phrased during the oral deposition. All other objections need not be made or recorded during the oral deposition to be later raised with the court. The objecting party must give a clear and concise explanation of an objection if	**(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.** **(2) *Objections.*** An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken

requested by the party taking the oral deposition, or the objection is waived. Argumentative or suggestive objections or explanations waive objection and may be grounds for terminating the oral deposition or assessing costs or other sanctions. The officer taking the oral deposition will not rule on objections but must record them for ruling by the court. The officer taking the oral deposition must not fail to record testimony because an objection has been made. (f) **Instructions not to answer.** An attorney may instruct a witness not to answer a question during an oral deposition only if necessary to preserve a privilege, comply with a court order or these rules, protect a witness from an abusive question or one for which any answer would be misleading, or secure a ruling pursuant to paragraph (g). The attorney instructing the witness not to answer must give a concise, non-argumentative, non-suggestive explanation of the grounds for the instruction if requested by the party who asked the question.	subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).
(g) **Suspending the deposition.** If the time limitations for the deposition have expired or the deposition is being conducted or defended in violation of these rules, a party or witness may suspend the oral deposition for the time necessary to obtain a ruling. (h) **Good faith required.** An attorney must not ask a question at an oral deposition solely to harass or mislead the witness, for any other improper purpose, or without a good faith legal basis at the time. An attorney must not object to a question at an oral deposition, instruct the witness not to answer a question, or suspend the deposition unless there is a good faith factual and legal basis for doing so at the time.	*(Closest provisions)* **(d)(3) *Motion to Terminate or Limit.*** **(A)** *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order. **(B)** *Order.* The court may order that the

	deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending. **(C)** *Award of Expenses.* Rule 37(a)(5) applies to the award of expenses.
199.6 Hearing on Objections. Any party may, at any reasonable time, request a hearing on an objection or privilege asserted by an instruction not to answer or suspension of the deposition; provided the failure of a party to obtain a ruling prior to trial does not waive any objection or privilege. The party seeking to avoid discovery must present any evidence necessary to support the objection or privilege either by testimony at the hearing or by affidavits served on opposing parties at least seven days before the hearing. If the court determines that an *in camera* review of some or all of the requested discovery is necessary to rule, answers to the deposition questions may be made in camera, to be transcribed and sealed in the event the privilege is sustained, or made in an affidavit produced to the court in a sealed wrapper.	*(No directly related provision)*
(See Tex. R. Civ. P. 203 below)	**(e) Review by the Witness; Changes.** **(1)** ***Review; Statement of Changes.*** On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which: **(A)** to review the transcript or recording; and

(See Tex. R. Civ. P. 203 below)	**(B)** if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them. **(2)** ***Changes Indicated in the Officer's Certificate.*** The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period. **(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.** **(1)** ***Certification and Delivery.*** The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration. **(2)** ***Documents and Tangible Things.*** **(A)** *Originals and Copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may: **(i)** offer copies to be marked, attached to

(no directly related provision)	the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or **(ii)** give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition. **(B)** *Order Regarding the Originals.* Any party may move for an order that the originals be attached to the deposition pending final disposition of the case. **(3)** ***Copies of the Transcript or Recording.*** Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent. **(4)** ***Notice of Filing.*** A party who files the deposition must promptly notify all other parties of the filing. **(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses.** A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to: **(1)** attend and proceed with the deposition; or **(2)** serve a subpoena on a nonparty deponent, who consequently did not attend.

RULE 200. DEPOSITIONS UPON WRITTEN QUESTIONS

200.1 Procedure for Noticing Deposition Upon Written Questions.

(a) **Who may be noticed; when.** A party may take the testimony of any person or entity by deposition on written questions before any person authorized by law to take depositions on written questions. A notice of intent to take the deposition must be served on the witness and all parties at least 20 days before the deposition is taken. A deposition on written questions may be taken outside the discovery period only by agreement of the parties or with leave of court. The party noticing the deposition must also deliver to the deposition officer a copy of the notice and of all written questions to be asked during the deposition.

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

(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(3) ***Participating Through Written Questions.*** Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

RULE 31. DEPOSITIONS BY WRITTEN QUESTIONS

(a) When a Deposition May Be Taken.

(1) ***Without Leave.*** A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take a deposition

	before the time specified in Rule 26(d); or **(B)** if the deponent is confined in prison. **(3)** ***Service; Required Notice.*** A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken. **(4)** ***Questions Directed to an Organization.*** A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6). **(5)** ***Questions from Other Parties.*** Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times.
200.2 Compelling Witness to Attend. A party may compel the witness to attend the deposition on written questions by serving the witness with a subpoena under Rule 176. If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the deposition notice upon the party's attorney has	*(See above)* **(a)(1)** ***Without Leave.*** . . . The deponent's attendance may be compelled by subpoena under Rule 45.

the same effect as a subpoena served on the witness.	
200.3 Questions and Objections. (a) **Direct questions.** The direct questions to be propounded to the witness must be attached to the notice. (b) **Objections and additional questions.** Within ten days after the notice and direct questions are served, any party may object to the direct questions and serve cross-questions on all other parties. Within five days after cross-questions are served, any party may object to the cross-questions and serve redirect questions on all other parties. Within three days after redirect questions are served, any party may object to the redirect questions and serve re-cross questions on all other parties. Objections to re-cross questions must be served within five days after the earlier of when re-cross questions are served or the time of the deposition on written questions. (c) **Objections to form of questions.** Objections to the form of a question are waived unless asserted in accordance with this subdivision.	*(closest provision)* **RULE 32.(d)(3)(C)** *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it.
200.4 Conducting the Deposition Upon Written Questions. The deposition officer must: take the deposition on written questions at the time and place designated; record the testimony of the witness under oath in response to the questions; and prepare, certify, and deliver the deposition transcript in accordance with Rule 203. The deposition officer has authority when necessary to summon and swear an interpreter to facilitate the taking of the deposition.	**(b) Delivery to the Officer; Officer's Duties.** The party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in Rule 30(c), (e), and (f) to: **(1)** take the deponent's testimony in response to the questions; **(2)** prepare and certify the deposition; and **(3)** send it to the party, attaching a copy of the questions

	and of the notice. **(c) Notice of Completion or Filing.** **(1)** ***Completion.*** The party who noticed the deposition must notify all other parties when it is completed. **(2)** ***Filing.*** A party who files the deposition must promptly notify all other parties of the filing.
RULE 201. DEPOSITIONS IN FOREIGN JURISDICTIONS FOR USE IN TEXAS PROCEEDINGS; DEPOSITIONS IN TEXAS FOR USE IN FOREIGN PROCEEDINGS **201.1 Depositions in Foreign Jurisdictions for Use in Texas Proceedings.** (a) **Generally.** A party may take a deposition on oral examination or written questions of any person or entity located in another state or a foreign country for use in proceedings in this State. The deposition may be taken by: (1) notice; (2) letter rogatory, letter of request, or other such device; (3) agreement of the parties; or (4) court order. (b) **By notice.** A party may take the deposition by notice in accordance with these rules as if the deposition were taken in this State, except that the deposition officer may be a person authorized to administer oaths in the place where the deposition is taken. (c) **By letter rogatory.** On motion by a party, the court in which an action is pending must issue a letter rogatory on terms that are just and appropriate, regardless of whether any other	**RULE 28(b) In a Foreign Country.** **(1)** ***In General.*** A deposition may be taken in a foreign country: **(A)** under an applicable treaty or convention; **(B)** under a letter of request, whether or not captioned a "letter rogatory"; **(C)** on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or **(D)** before a person commissioned by the court to administer any necessary oath and take testimony. **(2)** ***Issuing a Letter of Request or a Commission.*** A letter of request, a commission, or both may be issued: **(A)** on appropriate terms after an application and notice of it; and **(B)** without a showing that taking the deposition in another manner is impracticable or inconvenient. **(3)** ***Form of a Request, Notice, or Commission.*** When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of

manner of obtaining the deposition is impractical or inconvenient. The letter must: (1) be addressed to the appropriate authority in the jurisdiction in which the deposition is to be taken; (2) request and authorize that authority to summon the witness before the authority at a time and place stated in the letter for examination on oral or written questions; and (3) request and authorize that authority to cause the witness's testimony to be reduced to writing and returned, together with any items marked as exhibits, to the party requesting the letter rogatory. (d) **By letter of request or other such device.** On motion by a party, the court in which an action is pending, or the clerk of that court, must issue a letter of request or other such device in accordance with an applicable treaty or international convention on terms that are just and appropriate. The letter or other device must be issued regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter or other device must: (1) be in the form prescribed by the treaty or convention under which it is issued, as presented by the movant to the court or clerk; and (2) must state the time, place, and manner of the examination of the witness. (e) **Objections to form of letter rogatory, letter of request, or other such device.** In issuing a letter rogatory, letter of request, or other such device, the court must set a time for objecting to the form of the device. A party must make any objection to the form of the device in writing and serve it on all other parties by the time set by the court, or the objection is waived.	request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken.

(f) **Admissibility of evidence.** Evidence obtained in response to a letter rogatory, letter of request, or other such device is not inadmissible merely because it is not a verbatim transcript, or the testimony was not taken under oath, or for any similar departure from the requirements for depositions taken within this State under these rules.	**(4)** ***Letter of Request—Admitting Evidence.*** Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States.
(g) **Deposition by electronic means.** A deposition in another jurisdiction may be taken by telephone, video conference, teleconference, or other electronic means under the provisions of Rule 199.	
201.2 Depositions in Texas for Use in Proceedings in Foreign Jurisdictions. If a court of record of any other state or foreign jurisdiction issues a mandate, writ, or commission that requires a witness's oral or written deposition testimony in this State, the witness may be compelled to appear and testify in the same manner and by the same process used for taking testimony in a proceeding pending in this State.	*(No directly related provision)*
RULE 203. SIGNING, CERTIFICATION AND USE OF ORAL AND WRITTEN DEPOSITIONS **203.1 Signature and Changes.** (a) **Deposition transcript to be provided to witness.** The deposition officer must provide the original deposition transcript to the witness for examination and signature. If the witness is represented by an attorney at the deposition, the deposition officer must provide the transcript to the attorney instead of the witness.	**RULE 30(e) Review by the Witness; Changes.** **(1)** ***Review; Statement of Changes.*** On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which: **(A)** to review the transcript or recording; and **(B)** if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(b) **Changes by witness; signature.** The witness may change responses as reflected in the deposition transcript by indicating the desired changes, in writing, on a separate sheet of paper, together with a statement of the reasons for making the changes. No erasures or obliterations of any kind may be made to the original deposition transcript. The witness must then sign the transcript under oath and return it to the deposition officer. If the witness does not return the transcript to the deposition officer within 20 days of the date the transcript was provided to the witness or the witness's attorney, the witness may be deemed to have waived the right to make the changes. (c) **Exceptions.** The requirements of presentation and signature under this subdivision do not apply: (1) if the witness and all parties waive the signature requirement; (2) to depositions on written questions; or (3) to non-stenographic recordings of oral depositions.	**(2)** ***Changes Indicated in the Officer's Certificate.*** The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.
203.2 Certification. The deposition officer must file with the court, serve on all parties, and attach as part of the deposition transcript or non-stenographic recording of an oral deposition a certificate duly sworn by the officer stating: (a) that the witness was duly sworn by the officer and that the transcript or non-stenographic recording of the oral deposition is a true record of the testimony given by the witness; (b) that the deposition transcript, if any, was submitted to the witness or to the attorney for the witness for examination and signature, the date on which the transcript was submitted, whether the witness returned the transcript, and if so, the date	**RULE 30(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.** **(1)** ***Certification and Delivery.*** The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under

on which it was returned. (c) that changes, if any, made by the witness are attached to the deposition transcript; (d) that the deposition officer delivered the deposition transcript or nonstenographic recording of an oral deposition in accordance with Rule 203.3; (e) the amount of time used by each party at the deposition; (f) the amount of the deposition officer's charges for preparing the original deposition transcript, which the clerk of the court must tax as costs; and (g) that a copy of the certificate was served on all parties and the date of service.	conditions that will protect it against loss, destruction, tampering, or deterioration.
203.3 Delivery. (a) **Endorsement; to whom delivered.** The deposition officer must endorse the title of the action and "Deposition of (name of witness)" on the original deposition transcript (or a copy, if the original was not returned) or the original nonstenographic recording of an oral deposition, and must return: (1) the transcript to the party who asked the first question appearing in the transcript, or (2) the recording to the party who requested it. (b) **Notice.** The deposition officer must serve notice of delivery on all other parties. (c) **Inspection and copying; copies.** The party receiving the original deposition transcript or non-stenographic recording must make it available upon reasonable request for inspection and copying by any other party. Any party or the witness is entitled to obtain a copy of the deposition transcript or non-stenographic recording from the deposition officer upon payment of a reasonable fee.	*(copied from above)* **RULE 30(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.** **(1) *Certification and Delivery.*** The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

203.4 Exhibits. At the request of a party, the original documents and things produced for inspection during the examination of the witness must be marked for identification by the deposition officer and annexed to the deposition transcript or non-stenographic recording. The person producing the materials may produce copies instead of originals if the party gives all other parties fair opportunity at the deposition to compare the copies with the originals. If the person offers originals rather than copies, the deposition officer must, after the conclusion of the deposition, make copies to be attached to the original deposition transcript or non-stenographic recording, and then return the originals to the person who produced them. The person who produced the originals must preserve them for hearing or trial and make them available for inspection or copying by any other party upon seven days' notice. Copies annexed to the original deposition transcript or non-stenographic recording may be used for all purposes.	*(closest provision)* **RULE 30(f)(2)** ***Documents and Tangible Things.*** **(A)** *Originals and Copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may: **(i)** offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or **(ii)** give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition. **(B)** *Order Regarding the Originals.* Any party may move for an order that the originals be attached to the deposition pending final disposition of the case. **(3)** ***Copies of the Transcript or Recording.*** Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

203.5 Motion to Suppress. A party may object to any errors and irregularities in the manner in which the testimony is transcribed, signed, delivered, or otherwise dealt with by the deposition officer by filing a motion to suppress all or part of the deposition. If the deposition officer complies with Rule 203.3 at least one day before the case is called to trial, with regard to a deposition transcript, or 30 days before the case is called to trial, with regard to a non-stenographic recording, the party must file and serve a motion to suppress before trial commences to preserve the objections.	**(4) *Notice of Filing.*** A party who files the deposition must promptly notify all other parties of the filing. *(Closest provisions)* **RULE 32(b) Objections to Admissibility.** Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying. **RULE 32(c) Form of Presentation.** Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise. **RULE 32(d) Waiver of Objections.** **(1) *To the Notice.*** An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice. **(2) *To the Officer's Qualification.*** An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made: **(A)** before the deposition begins; or **(B)** promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known. **(3) *To the Taking of the Deposition.*** **(A)** *Objection to Competence, Relevance, or Materiality.* An objection to a deponent's competence--or to the competence, relevance,

	or materiality of testimony--is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time. **(B)** *Objection to an Error or Irregularity.* An objection to an error or irregularity at an oral examination is waived if: **(i)** it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and **(ii)** it is not timely made during the deposition. **(C)** *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it. **(4)** ***To Completing and Returning the Deposition.*** An objection to how the officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

203.6 Use. (a) **Non-stenographic recording; transcription.** A non-stenographic recording of an oral deposition, or a written transcription of all or part of such a recording, may be used to the same extent as a deposition taken by stenographic means. However, the court, for good cause shown, may require that the party seeking to use a non-stenographic recording or written transcription first obtain a complete transcript of the deposition recording from a certified court reporter. The court reporter's transcription must be made from the original or a certified copy of the deposition recording. The court reporter must, to the extent applicable, comply with the provisions of this rule, except that the court reporter must deliver the original transcript to the attorney requesting the transcript, and the court reporter's certificate must include a statement that the transcript is a true record of the non-stenographic recording. The party to whom the court reporter delivers the original transcript must make the transcript available, upon reasonable request, for inspection and copying by the witness or any party. (b) **Same proceeding.** All or part of a deposition may be used for any purpose in the same proceeding in which it was taken. If the original is not filed, a certified copy may be used. "Same proceeding" includes a proceeding in a different court but involving the same subject matter and the same parties or their representatives or successors in interest. A deposition is admissible against a party joined after the deposition was taken if: (1) the deposition is admissible pursuant to Rule 804(b)(1) of the Rules of Evidence, or (2) that party has had a reasonable opportunity to	**RULE 32. USING DEPOSITIONS IN COURT PROCEEDINGS** *(Closest provisions)* **(a) Using Depositions.** **(1)** ***In General.*** At a hearing or trial, all or part of a deposition may be used against a party on these conditions: **(A)** the party was present or represented at the taking of the deposition or had reasonable notice of it; **(B)** it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and **(C)** the use is allowed by Rule 32(a)(2) through (8). **(2)** ***Impeachment and Other Uses.*** Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence. **(3)** ***Deposition of Party, Agent, or Designee.*** An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4). **(4)** ***Unavailable Witness.*** A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds: **(A)** that the witness is dead; **(B)** that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

redepose the witness and has failed to do so.	**(C)** that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment; **(D)** that the party offering the deposition could not procure the witness's attendance by subpoena; or **(E)** on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used. **(5)** ***Limitations on Use.*** **(A)** *Deposition Taken on Short Notice.* A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place—and this motion was still pending when the deposition was taken. **(B)** *Unavailable Deponent; Party Could Not Obtain an Attorney.* A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition. **(6)** ***Using Part of a Deposition.*** If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in

	fairness should be considered with the part introduced, and any party may itself introduce any other parts. **(7) *Substituting a Party.*** Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.
(c) **Different proceeding**. Depositions taken in different proceedings may be used as permitted by the Rules of Evidence.	*(closest provision)* **(8) *Deposition Taken in an Earlier Action.*** A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.
(See Rule 203.5 above)	**(b) Objections to Admissibility.** Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying. **(c) Form of Presentation.** Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise. **(d) Waiver of Objections.** **(1) *To the Notice.*** An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice. **(2) *To the Officer's Qualification.*** An objection based on

	disqualification of the officer before whom a deposition is to be taken is waived if not made: **(A)** before the deposition begins; or **(B)** promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known. **(3)** ***To the Taking of the Deposition.*** **(A)** *Objection to Competence, Relevance, or Materiality.* An objection to a deponent's competence--or to the competence, relevance, or materiality of testimony--is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time. **(B)** *Objection to an Error or Irregularity.* An objection to an error or irregularity at an oral examination is waived if: **(i)** it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and **(ii)** it is not timely made during the deposition.
(reproduced from above) Rule 200.3(c) **Objections to form of questions.** Objections to the form of a question are waived unless asserted in accordance with this subdivision.	**(C)** *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for

(See Rule 203.5 above)	serving responsive questions or, if the question is a recross-question, within 7 days after being served with it. **(4)** ***To Completing and Returning the Deposition.*** An objection to how the officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

V. Stipulations about Discovery Procedure

Tex. R. Civ. P. 191.1, 191.2	Fed. R. Civ. P. 29
191.1 Modification of Procedures Except where specifically prohibited, the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit by the agreement of the parties or by court order for good cause. An agreement of the parties is enforceable if it complies with Rule 11 or, as it affects an oral deposition, if it is made a part of the record of the deposition. **191.2 Conference.** Parties and their attorneys are expected to cooperate in discovery and to make any agreements reasonably necessary for the efficient disposition of the case. All discovery motions or requests for hearings relating to discovery must contain a certificate by the party filing the motion or request that a reasonable effort has been made to resolve the dispute without the necessity of court intervention and the effort failed.	**RULE 29. STIPULATIONS ABOUT DISCOVERY PROCEDURE** Unless the court orders otherwise, the parties may stipulate that: **(a)** a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition; and **(b)** other procedures governing or limiting discovery be modified—but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

VI. Interrogatories

Tex. R. Civ. P. 197	Fed. R. Civ. P. 33
RULE 197. INTERROGATORIES TO PARTIES **197.1 Interrogatories.** A party may serve on another party - no later than 30 days before the end of the discovery period - written interrogatories to inquire about any matter within the scope of discovery except matters covered by Rule 195. An interrogatory may inquire whether a party makes a specific legal or factual contention and may ask the responding party to state the legal theories and to describe in general the factual bases for the party's claims or defenses, but interrogatories may not be used to require the responding party to marshal all of its available proof or the proof the party intends to offer at trial. **197.2 Response to Interrogatories.** (a) **Time for response.** The responding party must serve a written response on the requesting party within 30 days after service of the interrogatories, except that a defendant served with interrogatories before the defendant's answer is due need not respond until 50 days after service of the interrogatories. (b) **Content of response.** A response must include the party's answers to the interrogatories and may include objections and assertions of privilege as required under these rules.	**RULE 33. INTERROGATORIES TO PARTIES** *(Closest provision)* **(a) In General.** **(1)** ***Number.*** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2). **(2)** ***Scope.*** An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time. **(b) Answers and Objections.** **(1)** ***Responding Party.*** The interrogatories must be answered: **(A)** by the party to whom they are directed; or **(B)** if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party. **(2)** ***Time to Respond.*** The responding party must serve

	its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. **(3)** ***Answering Each Interrogatory.*** Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath. **(4)** ***Objections.*** The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure. **(5)** ***Signature.*** The person who makes the answers must sign them, and the attorney who objects must sign any objections.
(c) **Option to produce records.** If the answer to an interrogatory may be derived or ascertained from public records, from the responding party's business records, or from a compilation, abstract or summary of the responding party's business records, and the burden of deriving or ascertaining the answer is substantially the same for the requesting party as for the responding party, the responding party may answer the interrogatory by specifying and, if applicable, producing the records or compilation, abstract or summary of the records. The records from which the answer may be derived or ascertained must be specified in sufficient detail to permit the requesting party to locate and identify them as readily as can the responding party. If the responding party has specified business records, the responding party must state a reasonable time and place for examination of the documents. The responding party	**(d) Option to Produce Business Records.** If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by: **(1)** specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and **(2)** giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them.	
(d) **Verification required; exceptions.** A responding party - not an agent or attorney as otherwise permitted by Rule 14 - must sign the answers under oath except that: (1) when answers are based on information obtained from other persons, the party may so state, and (2) a party need not sign answers to interrogatories about persons with knowledge of relevant facts, trial witnesses, and legal contentions.	*(copied from above)***(b)(5) *Signature.*** The person who makes the answers must sign them, and the attorney who objects must sign any objections.
197.3 Use. Answers to interrogatories may be used only against the responding party. An answer to an interrogatory inquiring about matters described in Rule 194.2(c) and (d) that has been amended or supplemented is not admissible and may not be used for impeachment.	**(c) Use.** An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence.

VII. Production and Inspection

Tex. R. Civ. P. 196	Fed. R. Civ. P. 34
RULE 196. REQUESTS FOR PRODUCTION AND INSPECTION TO PARTIES; REQUESTS AND MOTIONS FOR ENTRY UPON PROPERTY **196.1 Request for Production and Inspection to Parties.** (a) **Request.** A party may serve on another party--no later than 30 days before the end of the discovery period--a request for production or for inspection, to inspect, sample, test, photograph and copy documents or tangible things within the scope of discovery.	**RULE 34. PRODUCING DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND TANGIBLE THINGS, OR ENTERING ONTO LAND, FOR INSPECTION AND OTHER PURPOSES** **(a) In General.** A party may serve on any other party a request within the scope of Rule 26(b): **(1)** to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control: **(A)** any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or **(B)** any designated tangible things; or **(2)** to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) **Contents of request.** The request must specify the items to be produced or inspected, either by individual item or by category, and describe with reasonable particularity each item and category. The request must specify a reasonable time (on or after the date on which the response is due) and place for production. If the requesting party will sample or test the requested items, the means, manner and procedure for testing or sampling must be described with sufficient specificity to inform the producing party of the means, manner, and procedure for testing or sampling.	**(b) Procedure.** **(1)** ***Contents of the Request*****.** The request: **(A)** must describe with reasonable particularity each item or category of items to be inspected; **(B)** must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and **(C)** may specify the form or forms in which electronically stored information is to be produced.
(c) **Requests for production of medical or mental health records regarding nonparties.** (1) **Service of request on nonparty.** If a party requests another party to produce medical or mental health records regarding a nonparty, the requesting party must serve the nonparty with the request for production under Rule 21a. (2) **Exceptions.** A party is not required to serve the request for production on a nonparty whose medical records are sought if: (A) the nonparty signs a release of the records that is effective as to the requesting party; (B) the identity of the nonparty whose records are sought will not directly or indirectly be disclosed by production of the records; or (C) the court, upon a showing of good cause by the party seeking the records, orders that service is not required. (3) **Confidentiality.** Nothing in this rule excuses compliance with laws concerning the confidentiality of	*(closest provision)* **(c) Nonparties.** As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection. *(Also see Fed. R. Civ. P. 26(b)(1), (5) for discovery scope and limits and Fed. R. Civ. P. 26(c) for protective orders)*

medical or mental health records. **196.2 Response to Request for Production and Inspection.** (a) **Time for response.** The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request. (b) **Content of response.** With respect to each item or category of items, the responding party must state objections and assert privileges as required by these rules, and state, as appropriate, that: (1) production, inspection, or other requested action will be permitted as requested; (2) the requested items are being served on the requesting party with the response; (3) production, inspection, or other requested action will take place at a specified time and place, if the responding party is objecting to the time and place of production; or (4) no items have been identified - after a diligent search - that are responsive to the request. **196.3 Production.** (a) **Time and place of production.** Subject to any objections stated in the response, the responding party must produce the requested documents or tangible things within the person's	**(2) *Responses and Objections*.** **(A)** *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. **(B)** *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response. **(C)** *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest. **(D)** *Responding to a Request for Production of Electronically Stored Information.* The response

possession, custody or control at either the time and place requested or the time and place stated in the response, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them. (b) **Copies.** The responding party may produce copies in lieu of originals unless a question is raised as to the authenticity of the original or in the circumstances it would be unfair to produce copies in lieu of originals. If originals are produced, the responding party is entitled to retain the originals while the requesting party inspects and copies them. (c) **Organization.** The responding party must either produce documents and tangible things as they are kept in the usual course of business or organize and label them to correspond with the categories in the request. **196.4 Electronic or Magnetic Data.** To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot - through reasonable efforts - retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to	may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use. **(E)** *Producing the Documents or Electronically Stored Information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information: **(i)** A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request; **(ii)** If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and **(iii)** A party need not produce the same electronically stored information in more than one form.

retrieve and produce the information. **196.5 Destruction or Alteration.** Testing, sampling or examination of an item may not destroy or materially alter an item unless previously authorized by the court. **196.6 Expenses of Production.** Unless otherwise ordered by the court for good cause, the expense of producing items will be borne by the responding party and the expense of inspecting, sampling, testing, photographing, and copying items produced will be borne by the requesting party. **196.7 Request of Motion for Entry Upon Property.** (a) **Request or motion.** A party may gain entry on designated land or other property to inspect, measure, survey, photograph, test, or sample the property or any designated object or operation thereon by serving - no later than 30 days before the end of any applicable discovery period - (1) a request on all parties if the land or property belongs to a party, or (2) a motion and notice of hearing on all parties and the nonparty if the land or property belongs to a nonparty. If the identity or address of the nonparty is unknown and cannot be obtained through reasonable diligence, the court must permit service by means other than those specified in Rule 21a that are reasonably calculated to give the nonparty notice of the motion and hearing. (b) **Time, place, and other conditions.** The request for entry	*(No directly related provision)* *(No directly related provision)* *(Closest provision, copied from above)* **(a) In General.** A party may serve on any other party a request within the scope of Rule 26(b): **(2)** to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it. *[Federal rules do not have additional separate procedures related to entry on land or property.]*

upon a party's property, or the order for entry upon a nonparty's property, must state the time, place, manner, conditions, and scope of the inspection, and must specifically describe any desired means, manner, and procedure for testing or sampling, and the person or persons by whom the inspection, testing, or sampling is to be made. (c) **Response to request for entry.** (1) **Time to respond.** The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request. (2) **Content of response.** The responding party must state objections and assert privileges as required by these rules, and state, as appropriate, that: (A) entry or other requested action will be permitted as requested; (B) entry or other requested action will take place at a specified time and place, if the responding party is objecting to the time and place of production; or (C) entry or other requested action cannot be permitted for reasons stated in the response. (d) **Requirements for order for entry on nonparty's property.** An order for entry on a nonparty's property may issue only for good cause shown and only if the land, property, or object thereon as to which discovery is sought is relevant to the subject matter of the action.	

VIII. Physical and Mental Examinations

Tex. R. Civ. P. 204.1	Fed. R. Civ. P. 35
RULE 204. PHYSICAL AND MENTAL EXAMINATION **204.1 Motion and Order Required.** (a) **Motion.** A party may - no later than 30 days before the end of any applicable discovery period - move for an order compelling another party to: (1) submit to a physical or mental examination by a qualified physician or a mental examination by a qualified psychologist; or (2) produce for such examination a person in the other party's custody, conservatorship or legal control. (b) **Service.** The motion and notice of hearing must be served on the person to be examined and all parties. (c) **Requirements for obtaining order.** The court may issue an order for examination only for good cause shown and only in the following circumstances: (1) when the mental or physical condition (including the blood group) of a party, or of a person in the custody, conservatorship or under the legal control of a party, is in controversy; or (2) except as provided in Rule 204.4, an examination by a psychologist may be ordered when the party responding to the motion has designated a psychologist as a testifying expert or has disclosed a psychologist's records for possible use at trial. (d) **Requirements of order.** The order must be in writing and	**RULE 35. PHYSICAL AND MENTAL EXAMINATION** **(a) Order for an Examination.** **(2)** ***Motion and Notice; Contents of the Order.*** The order: **(A)** may be made only on motion for good cause and on notice to all parties and the person to be examined; and **(B)** must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it. **(a) (1)** ***In General.*** The court where the action is pending may order a party whose mental or physical condition--including blood group--is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. **204.2 Report of Examining Physician or Psychologist.** (a) **Right to report.** Upon request of the person ordered to be examined, the party causing the examination to be made must deliver to the person a copy of a detailed written report of the examining physician or psychologist setting out the findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery of the report, upon request of the party causing the examination, the party against whom the order is made must produce a like report of any examination made before or after the ordered examination of the same condition, unless the person examined is not a party and the party shows that the party is unable to obtain it. The court on motion may limit delivery of a report on such terms as are just. If a physician or psychologist fails or refuses to make a report the court may exclude the testimony if offered at the trial. (b) **Agreements; relationship to other rules**. This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance with the provisions of any other rule. **204.3 Effect of No Examination.** If no examination is sought either by agreement or under this subdivision, the party whose physical or mental condition is in	**(b) Examiner's Report.** **(1) *Request by the Party or Person Examined.*** The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined. **(2) *Contents.*** The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests. **(3) *Request by the Moving Party.*** After delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them. **(4) *Waiver of Privilege.*** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony about all examinations of the same condition.

controversy must not comment to the court or jury concerning the party's willingness to submit to an examination, or on the right or failure of any other party to seek an examination.	**(5)** ***Failure to Deliver a Report.*** The court on motion may order—on just terms—that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial. **(6)** ***Scope.*** This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.
204.4 Cases Arising Under Titles II or V, Family Code. In cases arising under Family Code Titles II or V, the court may - on its own initiative or on motion of a party - appoint: (a) one or more psychologists or psychiatrists to make any and all appropriate mental examinations of the children who are the subject of the suit or of any other parties, and may make such appointment irrespective of whether a psychologist or psychiatrist has been designated by any party as a testifying expert; (b) one or more experts who are qualified in paternity testing to take blood, body fluid, or tissue samples to conduct paternity tests as ordered by the court.	
204.5 Definitions. For the purpose of this rule, a psychologist is a person licensed or certified by a state or the District of Columbia as a psychologist.	

IX. Admissions

Tex. R. Civ. P. 198	Fed. R. Civ. P. 36
RULE 198. REQUESTS FOR ADMISSIONS **198.1 Request for Admissions.** A party may serve on another party - no later than 30 days before the end of the discovery period - written requests that the other party admit the truth of any matter within the scope of discovery, including statements of opinion or of fact or of the application of law to fact, or the genuineness of any documents served with the request or otherwise made available for inspection and copying. Each matter for which an admission is requested must be stated separately.	**RULE 36. REQUESTS FOR ADMISSIONS** **(a) Scope and Procedure.** **(1)** ***Scope.*** A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to: **(A)** facts, the application of law to fact, or opinions about either; and **(B)** the genuineness of any described documents. **(2)** ***Form; Copy of a Document.*** Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.
198.2 Response to Requests for Admissions. (a) **Time for response.** The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request. ****[198.2(b) moved below]**** (c) **Effect of failure to respond.** If a response is not timely served, the request is considered admitted without the necessity of a court order.	**(3)** ***Time to Respond; Effect of Not Responding.*** A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

(b) **Content of response.** Unless the responding party states an objection or asserts a privilege, the responding party must specifically admit or deny the request or explain in detail the reasons that the responding party cannot admit or deny the request. A response must fairly meet the substance of the request. The responding party may qualify an answer, or deny a request in part, only when good faith requires. Lack of information or knowledge is not a proper response unless the responding party states that a reasonable inquiry was made but that the information known or easily obtainable is insufficient to enable the responding party to admit or deny. An assertion that the request presents an issue for trial is not a proper response.	**(4)** ***Answer.*** If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny. **(5)** ***Objections.*** The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for trial. **(6)** ***Motion Regarding the Sufficiency of an Answer or Objection.*** The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses.

198.3 Effect of Admissions; Withdrawal or Amendment. Any admission made by a party under this rule may be used solely in the pending action and not in any other proceeding. A matter admitted under this rule is conclusively established as to the party making the admission unless the court permits the party to withdraw or amend the admission. The court may permit the party to withdraw or amend the admission if: (a) the party shows good cause for the withdrawal or amendment; and (b) the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved by permitting the party to amend or withdraw the admission.	**(b) Effect of an Admission; Withdrawing or Amending It.** A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

X. Sanctions

Tex. R. Civ. P. 215	Fed. R. Civ. P. 37
RULE 215. ABUSE OF DISCOVERY; SANCTIONS	**RULE 37. FAILURE TO MAKE DISCLOSURES OR TO COOPERATE IN DISCOVERY; SANCTIONS**
215.1 Motion for Sanctions or Order Compelling Discovery. A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows:	**(a) Motion for an Order Compelling Disclosure or Discovery.** **(1) *In General*.** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.
(a) **Appropriate court.** On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, an application for an order will be made to the court in which the action is pending.	**(2) *Appropriate Court*.** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.
(b) **Motion.** (1) If a party or other deponent which is a corporation or other entity fails to make a designation under Rules 199.2(b)(1) or 200.1(b); or (2) if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails: (A) to appear before the officer who is to take his	*(Closest provisions)* **(3) *Specific Motions*.** **(A)** *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. **(B)** *To Compel a Discovery Response.* A party seeking discovery may move for an order

deposition, after being served with a proper notice; or (B) to answer a question propounded or submitted upon oral examination or upon written questions; or (3) if a party fails: (A) to serve answers or objections to interrogatories submitted under Rule 197, after proper service of the interrogatories; or (B) to answer an interrogatory submitted under Rule 197; or (C) to serve a written response to a request for inspection submitted under Rule 196, after proper service of the request; or (D) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 196; the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by Rule 215.2(b) without the necessity of first having obtained a court order compelling such discovery. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order. If the court denies the motion in whole or in part, it may make such protective order as it would have been	compelling an answer, designation, production, or inspection. This motion may be made if: **(i)** a deponent fails to answer a question asked under Rule 30or 31; **(ii)** a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4); **(iii)** a party fails to answer an interrogatory submitted under Rule 33; or **(iv)** a party <u>fails to produce documents or</u> fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34. **(C)** *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

empowered to make on a motion pursuant to Rule 192.6.	
(c) **Evasive or incomplete answer.** For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.	**(4)** ***Evasive or Incomplete Disclosure, Answer, or Response*****.** For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.
(d) **Disposition of motion to compel: award of expenses.** If the motion is granted, the court shall, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment. If the motion is denied, the court may, after opportunity for hearing, require the moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.	**(5)** ***Payment of Expenses; Protective Orders*****.** **(A)** *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if: **(i)** the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; **(ii)** the opposing party's nondisclosure, response, or objection was substantially justified; or **(iii)** other circumstances make an award

In determining the amount of reasonable expenses, including attorney fees, to be awarded in connection with a motion, the trial court shall award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or in opposing a motion which is denied.	of expenses unjust. **(B)** *If the Motion Is Denied*. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust. **(C)** *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.
(e) **Providing person's own statement.** If a party fails to comply with any person's written request for the person's own statement as provided in Rule 192.3(h), the person who made the request may move for an order compelling compliance. If the motion is granted, the movant may recover the expenses incurred in obtaining the order, including attorney fees, which are reasonable in relation to the amount of work reasonably expended in obtaining the order.	*(No directly related provision)*

215.2 Failure to Comply with Order or with Discovery Request. (a) **Sanctions by court in district where deposition is taken.** If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.	**(b) Failure to Comply with a Court Order.** **(1)** ***Sanctions Sought in the District Where the Deposition Is Taken*****.** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.
(b) **Sanctions by court in which action is pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rules 199.2(b)(1) or 200.1(b) to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under Rules 204 or 215.1, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following: (1) an order disallowing any further discovery of any kind or of a particular kind by the disobedient party; (2) an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him; (3) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the	**(2)** ***Sanctions Sought in the District Where the Action Is Pending*****.** **(A)** *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following: **(i)** directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; **(ii)** prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

order; (4) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence; (5) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party; (6) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;	**(iii)** striking pleadings in whole or in part; **(iv)** staying further proceedings until the order is obeyed; **(v)** dismissing the action or proceeding in whole or in part; **(vi)** rendering a default judgment against the disobedient party; or **(vii)** treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.
(7) when a party has failed to comply with an order under Rule 204 requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.	**(B)** *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)—(vi), unless the disobedient party shows that it cannot produce the other person.
(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to	**(C)** *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

review on appeal from the final judgment.	
(No directly related provision)	**(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.** **(1)** ***Failure to Disclose or Supplement*****.** If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard: **(A)** may order payment of the reasonable expenses, including attorney's fees, caused by the failure; **(B)** may inform the jury of the party's failure; and **(C)** may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi).
(c) **Sanction against nonparty for violation of Rules 196.7 or 205.3.** If a nonparty fails to comply with an order under Rules 196.7 or 205.3, the court which made the order may treat the failure to obey as contempt of court.	*(No directly related provision)*
215.3 Abuse of Discovery Process in Seeking, Making, or Resisting Discovery. If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is	*(No directly related provision)*

unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after notice and hearing, impose any appropriate sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of Rule 215.2(b). Such order of sanction shall be subject to review on appeal from the final judgment. **215.4 Failure to Comply with Rule 198** (a) **Motion.** A party who has requested an admission under Rule 198 may move to determine the sufficiency of the answer or objection. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of Rule 198, it may order either that the matter is admitted or that an amended answer be served. The provisions of Rule 215.1(d) apply to the award of expenses incurred in relation to the motion. (b) **Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 198 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 193, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe	**(2) *Failure to Admit*.** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless: **(A)** the request was held objectionable under Rule 36(a); **(B)** the admission sought was of no substantial importance; **(C)** the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or **(D)** there was other good reason for the failure to admit.

that he might prevail on the matter, or (4) there was other good reason for the failure to admit.	
215.5 Failure of Party or Witness to Attend to or Serve Subpoena; Expenses. (a) **Failure of party giving notice to attend.** If the party giving the notice of the taking of an oral deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees. (b) **Failure of witness to attend.** If a party gives notice of the taking of an oral deposition of a witness and the witness does not attend because of the fault of the party giving the notice, if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.	*(Closest provision)***(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.** **(1)** ***In General*****.** **(A)** *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if: **(i)** a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or **(ii)** a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response. **(B)** *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action. **(2)** ***Unacceptable Excuse for Failing to Act*****.** A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable,

	unless the party failing to act has a pending motion for a protective order under Rule 26(c). **(3) *Types of Sanctions*.** Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)—(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.
215.6 Exhibits to Motions and Responses. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.	*(No directly related provision)*
[PROPOSED RULE: **RULE 215.7 Spoliation** (a) *Motion for Order Granting Spoliation Remedies.* A party, upon reasonable notice to other parties, may move for an order seeking spoliation remedies if: (1) another party intentionally or negligently breached a duty to preserve a document or tangible thing—as described by Rule 192.3(b)—that may be material and relevant to a claim or defense; (2) the document or tangible thing cannot be reproduced, restored, or replaced through additional discovery; and (3) the movant is unfairly prejudiced as a result. The motion should be filed reasonably promptly after	**(e) Failure to Preserve Electronically Stored Information.** If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: **(1)** upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or **(2)** only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: **(A)** presume that the lost information was

the discovery of the spoliation. (b) *Standards.* (1) The court must consider the spoliation motion outside the presence of the jury, as provided in Texas Rule of Evidence 104. The court must determine the spoliation motion based on the pleadings, any stipulations of the parties, any affidavits, documents or other testimony filed by a party, discovery materials, and any oral testimony. Unless the court orders otherwise, if the movant will be relying on affidavits, the movant must file any affidavits at least fourteen days before the hearing date and if the non-movant will be relying on affidavits, the non-movant must file any controverting affidavits at least seven days before the hearing date. (2) To find spoliation, the court must find that the allegedly spoliating party had a duty to preserve a document or tangible thing that may be material and relevant to a claim or defense and breached that duty by intentionally or negligently destroying the document or tangible thing or by failing to take reasonable steps to preserve the document or tangible thing. (3) If the court finds that spoliation occurred, the remedies ordered by the court must be proportionate to the wrongdoing and not excessive. The court should weigh the spoliating party's culpability and the prejudice to the nonspoliating party based on the relevance of the spoliated evidence to key issues in the case, the harmful effect of the evidence on the spoliating party's case, the degree of helpfulness of the evidence to the nonspoliating party's case, and whether the evidence is	unfavorable to the party; **(B)** instruct the jury that it may or must presume the information was unfavorable to the party; or **(C)** dismiss the action or enter a default judgment.

cumulative of other available evidence. (4) In the order, the court must specify the conduct that formed the basis or bases for its ruling. (c) *Spoliation Remedies.* If the court finds that spoliation occurred, the court may make such orders in regard to the spoliation as are just, and among others the following[1]: (1) If the court finds that a nonspoliating party is prejudiced because of the loss of the document or tangible thing, then the court may order one or more of the following remedies: (A) awarding the nonspoliating, prejudiced party the reasonable expenses, including attorneys' fees and costs, caused by the spoliation; or (B) excluding evidence. (2) If the court finds that the spoliating party acted intentionally or acted negligently and caused the nonspoliating party to be irreparably deprived of any meaningful ability to present a claim or defense, then the court may order an instruction to the jury regarding the spoliation in addition to the remedies in (c)(1). If the court submits a spoliation instruction to the jury, then evidence of the circumstances surrounding the spoliation may be admissible at trial. The admissibility at trial of evidence of the circumstances surrounding the spoliation is governed by the Texas Rules of Evidence. (3) If the court finds that a party acted with intent to spoliate, then in addition to the remedies set forth in (c)(1) and (c)(2), the court may order one or more of the following remedies: (A) finding that the lost document or tangible	

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

thing was unfavorable to the spoliating party; (B) striking the spoliating party's pleadings; (C) dismissing the spoliating party's claims or defenses; or (D) entering a default judgment in part or in full against the spoliating party. The remedies in this section are in addition to the remedies available under Rules 215.2 and 215.3.]	
(No directly related provision)	**(f) Failure to Participate in Framing a Discovery Plan.** If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

Memorandum

To: SCAC
From: Jim M. Perdue,Jr.
Date: October 8, 2015
Re: Report to Supreme Court Advisory Committee re Deliberations of Subcommittee re: Decision on Judge Tom Pollard's Request Concerning Compensated ADR for Constitutional and County Court Judges

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This report is an outline of the information to help the committee prepare for the analysis of issue number 4 in the "Referral of Rules Issues" letter. Issue 4 is entitled "ADR and the Constitutional County Judges." There is no conclusion section as this is a conglomeration of research to help best prepare the SCAC in arriving at their own independent opinion and conclusion concerning these issues. The subcommittee did not vote on the issue and does not bring any recommendation forth. It appears there are potential stake holders in the issue that may merit input into the consideration by the entire committee.

Issue #4 for 10/16/15 Meeting: ADR and Constitutional County Court Judges

The Court has received the attached letter from the Hon. Tom Pollard, county judge of Kerr County. Judge Pollard points out that under Canons 4(F)-(G) and 6(B)(3) of the Code of Judicial Conduct, a constitutional county court judge is permitted to maintain a private law practice but is prohibited from acting as an arbitrator or mediator for compensation. Judge Pollard asks the Court to revise the Code of Judicial Conduct to permit a constitutional county court judge to serve as an arbitrator or mediator for compensation in a case that is not pending before the judge. The Court requests the Advisory Committee's recommendations on whether and how the Code should be amended to permit a constitutional county court judge to serve as a private arbitrator or mediator.

Judge Pollard's Specific Request

Judge Pollard requests an update to canon 4F by adding: "Constitutional County Judges may be mediators and/or arbitrators for compensation SO LONG AS the matters being mediated and/or arbitrated are not, and never have been, pending in said Judge's Court."

Discussion on the Relevant Code of Judicial Conduct Sections and any other applicable and relevant legal research

Canon 4(F) states the following: "An active full-time judge shall not act as an arbitrator or mediator for compensation outside the judicial system, but a judge may encourage settlement in the performance of official duties." TEX.CODE JUD. CONDUCT, CANON 4(F). Canon 4(G) states: "A judge shall not practice law except as permitted by statute or this Code. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family." *Id*. at 4(G)

Canon 6(B)(3) lays out an exception for county judges concerning Canon 4(G), and states the following:

> A County Judge who performs judicial functions shall comply with all provisions of this Code except the judge is not required to comply:
> . . .
> (3) with Canon 4G, except practicing law in the court on which he or she serves or in any court subject to the appellate jurisdiction of the county court, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.
> *Id*. at 6(B)(3).

Judge Pollard is asking the advisory committee to take note of Canon 4(G) and the exception given to county judges outlined in Canon 6(B)(3), and then try to apply a similar sort of exception to Canon 4(F) to allow judges to also mediate and arbitrate for compensation.

In brief, Canon 4F prohibits a judge from acting as an arbitrator or mediator. However, it contains qualifications not in Canon 4F of the Model Code. Texas Canon 4F begins by including only active full-time judges (which seems like overkill, since Canon 6 specifies the applicability of all of the Canons), while the Model Code does not (apparently relying on its Canon 6 to address the applicability of various sections to retired judges). The Texas version specifies that the judge is not to act as an arbitrator or mediator for compensation outside the judicial system, while the

Model Code version does not (its reference to "private capacity" seems a synonym for "outside the judicial system"). Texas' Canon 4F provides that a judge may encourage settlement in the performance of official duties; the Model Code says that in commentary.

Texas Judicial Ethics Advisory Opinions make clear that the permission to encourage settlement does not include the judge actually mediating cases in order to expedite the settlement process or conducting settlement conferences for cases filed in his court or in other courts in which he conveys settlement offers and asks questions. Op. No. 120 (1988); *Compare* Op. No. 62 (1982) (serving as consultant for compensation for private nonprofit corporation probably would not contravene Canon 4F); Op. No. 212 (1988), http://www.txcourts.gov/media/678096/JudicialEthicsOpinions.pdf. These advisory opinions tend to allude to the idea focused around compensation for such mediation or arbitration as being at the forefront of the disallowance. However, Judge Pollard did specifically request that part of the amendment read "*so long as* the matters being mediated and/or arbitrated are not, and never have been, pending in said Judge's Court " (emphasis added).

In deciding in an early opinion that a trial judge may not appoint another sitting judge to serve pro bono as a mediator of a dispute that is the subject of a pending case, the Judicial Ethics Committee looked to the language of the 1990 Model Code:

> Texas Canon 5E [now Canon 4F], which prohibits an active full-time judge from acting as a mediator for compensation outside the judicial system but permits a judge to encourage settlement in the performance of official duties, should be construed to have the meaning stated by the corresponding ABA Code provision, which provides that a judge shall not act as a mediator in a private capacity. ABA Canon 4F. Texas Canon 5E [now Canon 4F] does not permit a judge to be a mediator without compensation outside the judicial system. A judge's statutory duty to encourage parties to attempt out of court procedures to resolve a dispute does not imply authority to act as a statutory mediator.
> Op. No. 161 (1993).

The Committee revisited that topic five years later and concluded that a sitting judge may, without compensation, serve as a mediator:

> In light of this growing reliance on ADR procedures as an adjunct to traditional forms of adjudication, and in light of the favorable experience of many judges in encouraging and participating in alternative dispute resolution procedures, we withdraw in its entirety our former Opinion 161 and find in the Code no prohibition against an active judge serving as a mediator or arbitrator without compensation so long as the judge follows the guidelines of Canon 3B(8)(b).
> Op. No. 233 (1998). Canon 3(B)(8)(b) states:
>
> A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:
>
> . . .
> (b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;
>
> TEX. CODE JUD. CONDUCT, CANON 3(B)(8)(b).

One of the main arguments against allowing judges to mediate and/or arbitrate for compensation seems to be that an active judge may have too much on his plate to give his most efficient attention to any ADR he or she is going to get involved in. The Canons, along with the stated advisory opinions, indicate that amendments have been made, and possibly will continue to be made, as the reliance on ADR continues to grow. Moreover, in accordance with Canon 3(B)(8)(b), so long as there is correct notice and consent in these forms of arbitrations and/or mediations, then each parties should be well aware of the conditions of having an active judge take on their ADR, of which little concerns compensation.

The Judicial Ethics Committee has twice been asked whether a former district judge, qualified to accept judicial assignments, may act as a mediator or arbitrator when not on judicial assignment. The Committee initially considered such a judge to be the same as a "retired judge subject to recall," and said the judge could act as a mediator or arbitrator so long as not on judicial assignment. Op. No. 99 (1987). A year later the Committee compared a former district judge with a senior judge and said she could act as a mediator or arbitrator as long as she refrained from performing judicial services at the time. Op. No. 124 (1988). These advisory opinions thus seem to be leaning towards disallowing an actively busy judge from engaging in ADR.

One argument to be made for amending Canon 4(F) in the manner Judge Pollard requests would be that Canon 6 exempts from Canon 4F "Justices of the Peace, unless the court on which the judge serves has jurisdiction of the matter or parties involved in the arbitration or mediation." TEX. CODE JUD. CONDUCT, CANON 6(C)(1)(c); *Compare* Op. No. 208 (1997). Opinion no. 208 states that a justice of peace may serve as a CASA (Court appointed special advocate) in the county in which she serves as a justice of the peace. However, he or she must always comply with Canon 3A (requiring that the judicial duties of a judge take precedence over the judge's other activities). So the argument can be made that there have been provisions to allow Justices of the Peace to be arbitrators and mediators, which the proposed amendment seeks for "Constitutional County Judges", so long as we make sure the court on which the judge serves does not have jurisdiction over the matter, which is also alluded to in Judge Pollard's amendment request.

THE COUNTY COURT
OF
KERR COUNTY, TEXAS

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COUNTY JUDGE
TOM POLLARD

COURT COORDINATOR
JODY GRINSTEAD

COMMISSIONERS COURT
H. A. "BUSTER" BALDWIN, PCT. 1
TOM MOSER, PCT. 2
JONATHAN LETZ, PCT. 3
BRUCE OEHLER, PCT. 4

May 12, 2015

Clerk of the Court
Supreme Court of the State of Texas
P. O. Box 12248
Austin, Texas 78711

Attn: Ms. Martha Newton

Re: Request for Revision/update of Cannon 4 F. of the Texas Code of Judicial Conduct

Dear Ms. Newton:

Background:

I am, and have been for 48 years, a licensed Texas Attorney as well as the duly elected constitutional County Judge of Kerr County, Texas. I estimate that 65% of my time involves handling judicial matters such as guardianships, probates, mental health commitments and I am the judge of the juvenile court. The balance of my time, 35% or so, is spent on administrative/non-judicial matters for Kerr County, Texas*.

The Texas Code of Judicial Conduct, Canon 4 F provides that "An active ***full-time*** (emphasis added) judge shall not act as an arbitrator or mediator for compensation outside the judicial system, but a judge may encourage settlement in the performance of official duties."

I note that I am permitted to have a private law practice for compensation so long as it does not relate to a matter pending in my Court, per Canon 4G and Canon 6 B(3).

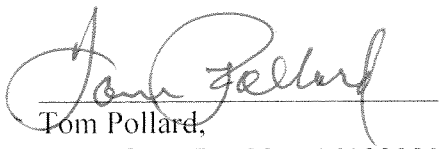
REQUEST:

I respectfully request that the Texas Supreme Court review and update the Texas Code of Judicial Conduct, specifically Canon 4F. by adding the following sentence (or similar language to the same effect), to-wit:

> "Constitutional County Judges may be mediators and/or arbitrators for compensation so long as the matters being mediated and/or arbitrated are not, and never have been, pending in said Judge's Court.

Thank you very much!.

Sincerely,



Tom Pollard,
Texas State Bar No.: 16100000
Kerr County Judge

Encl: (as stated)

* See attached general description of the Kerr County Judge judicial and administrative duties.

County Judge

The Texas Constitution vests broad judicial and administrative powers in the position of County Judge, who presides over a five-member commissioner's court, which has budgetary and administrative authority over county government operations.

The County Judge handles such widely varying matters as hearings for beer and wine license applications, hearing on admittance to state hospitals for the mentally ill and mentally handicapped, juvenile work permits and temporary guardianships for special purposes. The judge is also responsible for calling elections, posting election notices and for receiving and canvassing the election returns. The county judge may also perform marriages.

A County Judge in Texas may have judicial responsibility for certain criminal, civil and probate matters - responsibility for these functions vary from county to county. In those counties in which the judge has judicial responsibilities, the judge has appellate jurisdiction over matters arising from the justice courts. In Kerr County, when the office of County Judge is held by a licensed attorney, the County Judge has traditionally been the Presiding Judge of the Probate, Mental Health and Juvenile dockets. The County Judge is also head of civil defense and disaster relief, county welfare and in counties with a population of under 225,000 the judge prepares the county budget along with the County Auditor's Office.

William V. Dorsaneo III
Chief Justice John and Lena Hickman Distinguished Faculty Fellow
and Professor of Law

To: Members of the Texas Supreme Court Advisory Committee
cc: Chief Justice Nathan L. Hecht, Chip Babcock, Pam Baron, Justice Brett Busby, Blake Hawthorne, Martha Newton, Marti Walker
From: William V. Dorsaneo, III
Subject: Appellate Rule 49 (Item 1 of Chief Justice Hecht's Referral of Rules Issues letter to Mr. Charles L. "Chip" Babcock dated April 18, 2016)
Date: May 25, 2016

The Court has requested that the Committee draft amendments to clarify when a motion for en banc reconsideration may be filed. Currently, as amended in 2008, Rule 49.7 states that a motion for en banc reconsideration may be filed "within 15 days after the court of appeals' judgment or order, or *when permitted*, within 15 days after the court of appeals denial of the party's last timely filed motion for rehearing or en banc reconsideration." Chief Justice Hecht's letter states that "the 'when permitted' language has caused confusion among practitioners and courts."

The purpose of this memorandum is to explain the genesis of the troublesome "when permitted" language by reference to the recommendations made to the Texas Supreme Court in 2008 by the Appellate Rules Subcommittee and the Committee as a whole.

In Miscellaneous Docket No. 08-9017, which was published in 71 Tex. B.J. 286-297 (2008), the Advisory Committee's recommendations for rehearing and en banc reconsideration practice appears in Rule 19 (Plenary Power of the Courts of Appeals and Expiration of Term), Rule 49 (Motion for Rehearing and En Banc Reconsideration) and Rule 53 (Petition for Review). Excerpts from Miscellaneous Docket No. 08-9017 are attached to this memorandum.

Rule 19 was amended to make it clear that a motion for en banc reconsideration should not be considered as a type of motion for rehearing and to

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overrule the Court's opinion in City of San Antonio v. Hartman, 201 S.W.3d 667 (Tex. 2006) to that limited extent.

Rule 49 was redrafted, as reflected in the Comment to 2008 Changes "to include a specific subdivision (Rule 49.6) governing the filing of a motion for en banc reconsideration as distinguished from motions for (panel) rehearing. As recommended by the Committee and as initially ordered by the Court in the first sentence of proposed rule 49.6 of Misc. Docket No. 08-9017:

- A motion for en banc reconsideration can be filed "as a separate motion, with or without filing a motion for rehearing within 15 days after the court of appeals' judgment or order is rendered." This is what happened in the *Hartman* case and it is the primary reason why the Court ruled that San Antonio's "Motion for Rehearing En Banc" was classified as a motion for rehearing, albeit one governed by special rules. Otherwise, the Court would have been required to dismiss San Antonio's appeal "because the City filed its petition for review too late." *See Id.*

  But in order to make the filing of San Antonio's petition for review timely, the Court developed another concept by holding as follows:

  > Unlike other motions for rehearing, en banc reconsideration may be requested at any time while the court of appeals retains plenary power.

  See Id. at 671.

While these somewhat contradictory holdings in *Hartman* are clever and salvaged San Antonio's appeal, they did not solve the overall practice problem of the relationship of rehearing practice to motions for en banc reconsideration. As shown in the next bullet point, the next sentence of proposed Appellate Rule 49.6 was designed to do so.

- "Alternatively, a motion for en banc reconsideration may be filed by a party no later than 15 days after the overruling of the same party's last timely filed motion for rehearing."

- Thereafter, under Rule 53.7 (Time and Place of Filing) a petition for review is timely if "filed with the Supreme Court within 45 days after the following . . . (2) the date of the court of appeals' last ruling on all timely filed motions for rehearing and all timely filed motions for en banc reconsideration."

  Under the approach recommended by the Committee, one normal sequence of events would be:

  - court of appeals judgment or order;

  - motion for panel rehearing within 15 days of signing judgment or order;

  - order overruling motion for panel rehearing;

  - motion for en banc reconsideration "no later than 15 days of the overruling of the same party's last timely filed motion for rehearing;

  - petition for review filed within 45 days after court of appeals last ruling on "all timely filed motions for rehearing and all timely filed motions for en banc reconsideration."

Obviously, someone perceived or identified a problem or problems with the Committee's recommended draft as set forth in Misc. Docket No. 08-9017. The 2008 addition of the "when permitted" language in current Appellate Rule 49.7 is probably not the solution. Copies of Misc. Docket Nos. 08-9115 and of Misc. Docket No. 08-9115a are also attached to this memorandum.

Query: Is it possible that the simple deletion of "when permitted" is a sufficient solution? Probably not.

Best regards,

William V. Dorsaneo, III

(5) in civil cases, except for motions for rehearing and motions for en banc reconsideration of panel decisions, contain or be accompanied by a certificate stating that the filing party conferred or made a reasonable attempt to confer with other parties about the merits of the motion and whether those parties oppose the motion.

10.2 Evidence on Motions. A motion need not be verified unless it depends on the following types of facts, in which case the motion must be supported by affidavit or other satisfactory evidence. The types of facts requiring proof are those that are:

(a) not in the record;

(b) not within the court's knowledge in its official capacity; ~~or~~ and

(c) not within the personal knowledge of the attorney signing the motion.

Comment to 2008 change: It is presumed that non-movants will oppose the relief sought in motions for rehearing and motions for en banc reconsideration. To encourage consistent application of the certificate-of-conference requirement, Rule 10.1(a)(5) is amended—and Rule 49.11 is added—to exempt those motions from the certificate requirement.

Rule 19. Plenary Power of the Courts of Appeals and Expiration of Term

19.1 Plenary Power of Courts of Appeals. A court of appeals' plenary power over its judgment expires:

(a) 60 days after judgment if no timely filed ~~motion to extend time or~~ motion for rehearing, timely filed motion for en banc reconsideration, or timely filed motion to extend time to file a motion for rehearing or for en banc reconsideration is then pending.

(b) 30 days after the court overrules all timely filed motions for rehearing, ~~including~~ all timely filed motions for en banc reconsideration of a panel's decision under Rule 49.~~7~~6, and all timely motions to extend time to file a motion for rehearing or a motion for en banc reconsideration.

Comment to 2008 change: The provisions of Rule 19 governing the courts of appeals' plenary power are revised in conjunction with the amendments to Rules 49 and 53.7 concerning motions for en banc reconsideration.

Comment to 2008 changes: Effective January 1, 2003, Rule 47 was amended to discontinue in civil cases, on a prospective basis, the practice of allowing courts of appeals to designate opinions as either "published" or "unpublished." Rule 47.7 was amended to eliminate the prior prohibition against citing unpublished opinions and to clarify that, in civil cases, only unpublished opinions issued prior to the 2003 amendment would lack precedential value, because following the 2003 amendment such cases were not to be designated either as published or unpublished. But the phrase "opinions not designated for publication," which was intended to apply only to opinions affirmatively designated "do not publish," could be misread as suggesting that all opinions in civil cases published after 2002—none of which should be affirmatively designated for publication—lack precedential value. The 2008 amendments clarify that, with respect to civil cases, only opinions issued prior to the 2003 amendment and affirmatively designated "do not publish" should be considered "unpublished" cases lacking precedential value. The provisions governing citation of unpublished opinions in criminal cases are substantively unchanged; Rules 47.2 and 47.7. are amended to clarify that memorandum opinions are subject to those rules.

Rule 49. Motion ~~and Further Motion~~ for Rehearing and En Banc Reconsideration

49.1 Motion for Rehearing. A motion for rehearing may be filed within 15 days after the court of appeals' judgment or order is rendered. The motion must clearly state the points relied on for the rehearing. After a motion for rehearing is decided, another motion for rehearing may be filed within 15 days of the court's action only if the court:

(a) modifies its judgment;

(b) vacates its judgment and renders a new judgment; or

(c) issues an opinion in overruling a motion for rehearing.

~~**49.5 Further Motion for Rehearing.** After a motion for rehearing is decided, a further motion for rehearing may be filed within 15 days of the court's action if the court:~~

~~(a) modifies its judgment;~~

~~(b) vacates its judgment and renders a new judgment; or~~

~~(c) issues an opinion in overruling a motion for rehearing.~~

49.65 Amendments. A motion for rehearing or a motion for en banc reconsideration may be amended as a matter of right anytime before the 15-day period allowed for filing the motion expires, and with leave of the court, anytime before the court of appeals decides the motion.

49.76 En Banc Reconsideration. A party may file a motion for en banc reconsideration, as a separate motion, with or without filing a motion for

rehearing, within 15 days after the court of appeals' judgment or order is rendered. Alternatively, a motion for en banc reconsideration may be filed by a party no later than 15 days after the overruling of the same party's last timely filed motion for rehearing. While the court has plenary power, as provided in Rule 19, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision. If a majority orders reconsideration, the panel's judgment or order does not become final, and the case will be resubmitted to the court for en banc review and disposition.

49.87 **Extension of Time.** A court of appeals may extend the time for filing a motion for rehearing or a ~~further motion for rehearing~~ motion for en banc reconsideration if a party files a motion complying with Rule 10.5(b) no later than 15 days after the last date for filing the motion.

49.98 **Not Required for Review.** A motion for rehearing is not required to preserve error and is not a prerequisite to filing:

(a) a motion for en banc reconsideration as provided by Rule 49.6;

(b) a petition for review in the Supreme Court; or

(c) a petition for discretionary review ~~in~~ to the Court of Criminal Appeals ~~nor is it required to preserve error~~.

49.~~10~~9 **Length of Motion and Response.** A motion or response must be no longer than 15 pages.

49.10 **Relationship to Petition for Review.** A party may not file a motion for rehearing in the court of appeals after that party has filed a petition for review in the Supreme Court unless the court of appeals modifies its opinion or judgment after the petition for review is filed. The filing of a petition for review does not preclude another party from filing a motion for rehearing or the court of appeals from ruling on the motion. If a motion for rehearing is timely filed after a petition for review is filed, the petitioner must immediately notify the Supreme Court clerk of the filing of the motion, and must notify the clerk when the last timely filed motion is overruled by the court of appeals.

49.11 **Certificate of Conference Not Required.** A certificate of conference is not required for a motion for rehearing or for a motion for en banc reconsideration of a panel's decision.

Comment to 2008 changes: Rule 49 is revised in several respects. Former Rule 49.5 is relocated to Rule 49.1, which omits the former rule's "further" motion language but retains its provisions limiting the circumstances in which another rehearing motion can be filed. Former Rule 49.7, now Rule 49.6, is amended to include procedures governing the filing a motion for en banc reconsideration. New Rule 49.10 consists of those provisions of former Rule 53.7(b) that address motions for rehearing; the provisions of Rule 53.7(b) that address petitions for review are

retained. New Rule 49.11 mirrors Rule 10.1(a)(5)'s new provision exempting motions for rehearing and motions for en banc reconsideration from the certificate-of-conference requirement.

Rule 50. Reconsideration on Petition for Discretionary Review

Within 60 ~~30~~ days after a petition for discretionary review is ~~has been~~ filed with the clerk of the court of appeals that delivered the decision, ~~a majority of~~ the justices who participated in the decision may, as provided by subsection (a), ~~summarily~~ reconsider and correct or modify the court's opinion or judgment. Within the same period of time, any of the justices who participated in the decision may issue a concurring or dissenting opinion.

(a) If the court's original opinion or judgment is corrected or modified, that ~~the original~~ opinion or judgment is ~~must be~~ withdrawn and the modified or corrected opinion or judgment is ~~must be~~ substituted as the opinion or judgment of the court. No further opinions may be issued by the court of appeals. The original petition for discretionary review is not dismissed by operation of law, unless the filing party files a new petition in the court of appeals. In the alternative, the petitioning party shall submit to the court of appeals copies of the corrected or modified opinion or judgment as an amendment to the original petition.

(b) Any party may then file with the court of appeals a new petition for discretionary review seeking review of the corrected or modified opinion or judgment, including any dissents or concurrences, under Rule 68.2.

Rule 52. Original Proceedings

52.3 Form and Contents of Petition. ~~All factual statements in the petition must be verified by affidavit made on personal knowledge by an affiant competent to testify to the matters stated.~~ The petition must, under appropriate headings and in the order here indicated, contain the following:

(d) *Statement of the Case.* The petition must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following:

(5) if the petition is filed in the Supreme Court after a petition requesting the same relief was filed in the court of appeals:

(D) the citation of the court's opinion~~, if available, or a statement that the opinion was unpublished~~;

(g) *Statement of Facts.* The petition must state concisely and without argument the facts pertinent to the issues or points presented. Every statement of fact in the petition must be supported by citation to competent

evidence included in ~~The statement must be supported by references to~~ the appendix or record.

(i) *Certification.* The person filing the petition must certify that he or she has reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.

(~~j~~)(k) *Appendix.* (no change to rule text)

52.6 Length of Petition, Response, and Reply. Excluding those pages containing the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the statement of jurisdiction, the issues presented, the signature, the proof of service, the certification, and the appendix, the petition and response must not exceed 50 pages each if filed in the court of appeals, or 15 pages each if filed in the Supreme Court. A reply may be no longer than 25 pages if filed in the court of appeals or 8 pages if filed in the Supreme Court, exclusive of the items stated above. The court may, on motion, permit a longer petition, response, or reply.

Comment to 2008 changes: Rule 47 was amended effective January 1, 2003 to eliminate in civil cases, on a prospective basis, the former distinction between "published" and "unpublished" decisions. Rule 52.3(d)(5)(D) is now amended to recognize that an opinion in a civil appeal decided after 2002 should not be described as "unpublished" in the statement of the case even if the opinion was not published in the South Western Reporter, because Rule 47 no longer authorizes the courts of appeals to designate an opinion in a civil appeal either as "published" or "unpublished." If no South Western Reporter citation is available, a LEXIS or Westlaw citation may be provided.

Rule 52.3 is further amended to delete the requirement of verifying all factual statements by affidavit. Instead, the filer must certify that all factual statements are supported by citation to competent evidence in the appendix or record.

Rule 53. Petition for Review

53.2 Contents of Petition

(d) *Statement of the Case.* The petition must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following:

(8) the citation for the court of appeals' opinion~~, if available, or a statement that the opinion was unpublished~~; and

(9) the disposition of the case by the court of appeals, including the court's disposition of any motions for rehearing or motions for en banc reconsideration. If any motions for rehearing or motions for

en banc reconsideration are pending in the court of appeals at the time the petition for review is filed, that information also must be included in the statement of the case.

53.7 Time and Place of Filing

(a) *Petition.* Unless the Supreme Court for good cause orders an earlier filing deadline, ~~T~~the petition must be filed with the Supreme Court within 45 days after the following:

(1) the date the court of appeals rendered judgment, if no motion for rehearing or motion for en banc reconsideration is timely filed; or

(2) the date of the court of appeals' last ruling on all timely filed motions for rehearing and all timely filed motions for en banc reconsideration.

(b) *Premature filing.* ~~A party may not file a motion for rehearing in the court of appeals after that party has filed a petition for review in the Supreme Court unless the court of appeals modifies its opinion or judgment after the petition for review is filed. The filing of a petition for review does not preclude another party from filing a motion for rehearing or the court of appeals from ruling on the motion. If a motion for rehearing is timely filed after a petition for review is filed, the petitioner must immediately notify the Supreme Court clerk of the filing of the motion, and must notify the clerk when the last timely filed motion is overruled by the court of appeals.~~ A petition filed before the last ruling on all timely filed motions for rehearing and motions for en banc reconsideration is treated as having been filed on the date of, but after, the last ruling on any such motion. If a party files a petition for review while a motion for rehearing or motion for en banc reconsideration is pending in the court of appeals, the party must include that information in its petition for review, as required by Rule 53.2(d)(9).

Comment to 2008 change: Rule 53.7(a) is amended to clarify that (1) the Supreme Court may shorten the time for filing a petition for review, and (2) the timely filing of a motion for en banc reconsideration tolls the commencement of the 45-day period for filing a petition for review until the motion is overruled. Rule 53.2(d)(9) is amended to require a party that prematurely files a petition for review to notify the Supreme Court of any panel rehearing or en banc reconsideration motions still pending in the court of appeals. Rule 53.7(b) is revised to reference this new requirement and to relocate to new Rule 49.10 those provisions governing motions for rehearing. Rule 53.2(d)(8) is amended to delete the outdated reference to unpublished opinions in civil cases, similar to the change made to Rule 52.3(d)(5)(D).

47.7 is revised to clarify that, with respect to civil cases, only opinions issued prior to the 2003 amendment and affirmatively designated "do not publish" should be considered "unpublished" cases lacking precedential value. All opinions and memorandum opinions in civil cases issued after the 2003 amendment have precedential value. The provisions governing citation of unpublished opinions in criminal cases are substantively unchanged. Subdivisions 47.2 and 47.7 are amended to clarify that memorandum opinions are subject to those rules.

Rule 49. Motion for Rehearing and En Banc Reconsideration

49.5 Further Motion for Rehearing. After a motion for rehearing is decided, a further motion for rehearing may be filed within 15 days of the court's action if the court:

(a) modifies its judgment;

(b) vacates its judgment and renders a new judgment; or

(c) issues a different opinion.

49.6 Amendments. A motion for rehearing or en banc reconsideration may be amended as a matter of right anytime before the 15-day period allowed for filing the motion expires, and with leave of the court, anytime before the court of appeals decides the motion.

49.7 En Banc Reconsideration. A party may file a motion for en banc reconsideration as a separate motion, with or without filing a motion for rehearing. The motion must be filed within 15 days after the court of appeals' judgment or order, or when permitted, within 15 days after the court of appeals' denial of the party's last timely filed motion for rehearing or en banc consideration. While the court has plenary power, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision. If a majority orders reconsideration, the panel's judgment or order does not become final, and the case will be resubmitted to the court for en banc review and disposition.

49. 8 Extension of Time. A court of appeals may extend the time for filing a motion for rehearing or en banc reconsideration if a party files a motion complying with Rule 10.5(b) no later than 15 days after the last date for filing the motion.

* * *

49.11 Relationship to Petition for Review. A party may not file a motion for rehearing or en banc reconsideration in the court of appeals after that party has filed a petition for review in the Supreme Court unless the court of appeals modifies its opinion or judgment after the petition for review is filed. The filing of a petition for review does not preclude another party from filing a motion for rehearing or en banc reconsideration or preclude the court of appeals from ruling on the motion. If a motion for rehearing or en banc reconsideration is timely filed after a petition for review is filed, the petitioner must immediately notify the Supreme Court clerk of the filing of the motion, and must notify the clerk when the last timely filed motion is overruled by the court of appeals.

49.12 Certificate of Conference Not Required. A certificate of conference is not required for a motion for rehearing or en banc reconsideration of a panel's decision.

Comment to 2008 change: Rule 49 is revised to treat a motion for en banc reconsideration as a motion for rehearing and to include procedures governing the filing of a motion for en banc reconsideration. Subdivision 49.5(c) is amended to clarify that a further motion for rehearing may be filed if the court issues a different opinion, irrespective of whether the opinion is issued in connection with the overruling of a prior motion for rehearing. Issuance of a new opinion that is not substantially different should not occasion a further motion for rehearing, but a motion's lack of merit does not affect appellate deadlines. The provisions of former Rule 53.7(b) that address motions for rehearing are moved to new subdivision 49.11 without change, leaving the provisions of Rule 53.7(b) that address petitions for review undisturbed. Subdivision 49.12 mirrors Rule 10.1(a)(5) in excepting motions for rehearing and motions for en banc reconsideration from the certificate-of-conference requirement.

Rule 50. Reconsideration on Petition for Discretionary Review

Within 60 days after a petition for discretionary review is filed with the clerk of the court of appeals that delivered the decision, the justices who participated in the decision may, as provided by subsection (a), reconsider and correct or modify the court's opinion or judgment. Within the same period of time, any of the justices who participated in the decision may issue a concurring or dissenting opinion.

(a) If the court's original opinion or judgment is corrected or modified, that opinion or judgment is withdrawn and the modified or corrected opinion or judgment is substituted as the opinion or judgment of the court. No further opinions may be issued by the court of appeals. The original petition for discretionary review is not dismissed by operation of law, unless the filing party files a new petition in the court

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 08- 9115a.

TECHNICAL CORRECTIONS TO THE AMENDMENTS TO THE TEXAS RULES OF APPELLATE PROCEDURE

ORDERED that:

1. The amendments to the Texas Rules of Appellate Procedure promulgated by Order dated August 20, 2008, in Misc. Docket No. 08-9115, are corrected as follows, effective September 1, 2008.

2. In the comment under Rule 9, the reference to Section 109.022(d) of the Family Code is changed to Section 109.002(d) of the Family Code.

3. In the first sentence of Subdivision 28.1(d), the second reference to the term "Rule" is removed.

4. The letter "s" is removed from the term "changes" in the comment under Subdivision 38.4, the phrase "regarding oral argument" is removed from the comment under Subdivision 38.4, and the comments for Subdivisions 38.1 and 38.4 are combined and placed at the end of Rule 38.

5. In the second sentence of Subdivision 49.7, the phrase "en banc consideration" is changed to "en banc reconsideration."

6. The Clerk is directed to:

   a. file a copy of this Order with the Secretary of State;

   b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

   c. send a copy of this Order to each member of the Legislature before December 1; and

   d. submit a copy of this Order for publication in the *Texas Register*.

SIGNED AND ENTERED this 25th day of August, 2008.

Wallace B. Jefferson, Chief Justice

Nathan L. Hecht, Justice

Harriet O'Neill, Justice

J. Dale Wainwright, Justice

Scott Brister, Justice

David M. Medina, Justice

Paul W. Green, Justice

Phil Johnson, Justice

Don R. Willett, Justice

William V. Dorsaneo III
Chief Justice John and Lena Hickman Distinguished Faculty Fellow
and Professor of Law

To: SCAC Advisory Committee, Chief Justice Nathan L. Hecht, Chip Babcock, Pam Baron, Justice Brett Busby, Blake Hawthorne, Martha Newton, and Marti Walker
From: Bill Dorsaneo
Subject: Proposed Appellate Sealing Rule and Civil Procedure Rule 76a
Date: May 27, 2016

Here is the latest draft of the proposed appellate sealing rule together with proposed companion amendments for Civil Procedure Rule 76a. In this draft of the proposed appellate sealing rule, the entire subject of filing documents under seal in an appellate court has been moved to the end of subdivision 9.2 as paragraph (d).

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Rule 9. Documents Generally. (Suggested Revisions) (1/7/2016)

9.1 Signing

. . .

9.2 Filing

. . .

(d) Filing documents Under Seal.

(1) Eligible Documents. Documents may be filed under seal in an appellate court if the documents:

(A) were sealed by a temporary or a final order of the trial court;

(B) are subject to a motion to seal or to unseal court records filed in the trial court; or

(C) are subject to a motion filed in the appellate court to seal the documents submitted for filing in the appellate court.

(2) Submission of Documents. The documents must be submitted for filing in paper form in a sealed envelope labeled by the style of the case, the case numbers in the trial court and the appellate court, and a brief description of the contents of the envelope. A copy of the sealing order or the motion to seal the documents must be attached to the sealed envelope.

(3) Contents of Motion to Seal Documents. A motion filed in an appellate court for a sealing order for documents submitted for filing in the appellate court must:

(A) identify the documents without disclosing their contents;

(B) contain specific facts [supported by affidavit] showing a compelling need for sealing the documents to prevent harm to a specific interest of the movant before a hearing can be held;

(C) explain why the documents were not sealed by an order of the trial court; and

(D) identify the persons who may be given access to the documents filed under seal in the appellate court.

(4) Response to Motion. Any party to the proceeding in the appellate court may file a response to the motion [supported by affidavit] within ___ days after the motion is filed.

(5) Appellate Court Rulings. The appellate court's order may:

(A) deny the motion to seal if the court determines that the movant is not entitled to file the documents under seal in the appellate court;

(B) abate the appeal until the trial court rules on a pending motion to seal or unseal court records filed in the trial court;

(C) abate the appeal, issue a temporary sealing order concerning the documents submitted for filing under seal in the appellate court and order the trial court to decide whether documents not filed in the trial court or that were not filed under seal in the trial court are court records that may be sealed in the proceeding in accordance with the standards and the procedures for sealing court records contained in Civil Procedure Rule 76a and, transmit the trial court's order and findings of fact to the appellate court; or

(D) abate the appeal, rule on any complaint made in the appellate court about the trial court's order (or portion of an order or judgment) sealing, refusing to seal, or unsealing of documents as court records by the trial court's order, or direct the trial court to take other action to determine the issues presented in the appellate court.

(6) Contents of Temporary Sealing Order. A temporary sealing order must identify the documents submitted for filing under seal without disclosing their contents, identify the persons, if any, who may be given access to the documents filed under seal in the appellate court, specify the terms and conditions of access to the documents, if any, and decide whether the documents not filed in the trial court or not filed under seal in the trial court are court records that should be sealed under the standards and procedures for sealing court records contained in Civil Procedure Rule 76a.

6. *Order on Motion to Seal Court Records*. A motion relating to sealing or unsealing court records shall be decided by written order, open to the public, which shall state: the style and number of the case; the specific reasons for finding and concluding whether the showing required by paragraph 1 has been made; the specific portions of court records which are to be sealed; *specify who can have access to the records*; and the time period for which the sealed portions of the court records are to be sealed. The order shall not be included in any judgment or order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

8. *Appeal* [Procedures]

(a) Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order.

(b) *Documents that have been sealed by an order of the trial court or are subject to a motion to seal filed in the trial court may be filed in a sealed envelope as part of the appellate record in an appeal or an original proceeding pending in the appellate court.*

(c) The appellate court may [abate an appeal and] order the trial court to *determine whether documents not filed in the trial court or that were not filed under seal in the trial court are court records that may be sealed in the proceeding in accordance with the standard and the procedures for sealing court records contained in this rule.* The appellate court may abate the appeal and order the trial court to direct that further notice be given, or to hold further hearings, or to make additional findings.

William V. Dorsaneo III
Chief Justice John and Lena Hickman Distinguished Faculty Fellow
and Professor of Law

To:	Members of the Texas Supreme Court Advisory Committee
cc:	Chief Justice Nathan L. Hecht, Chip Babcock, Pam Baron, Justice Brett Busby, Blake Hawthorne, Martha Newton, Marti Walker
From:	SCAC Appellate Rules Subcommittee
Subject:	Latest (6/6/2016) Version of Proposed Rule on Sealing Documents and Appellate Proposed Revisions to Rule 76a
Date:	June 8, 2016

This draft rule combines earlier drafts into one document to facilitate discussion at our meeting on June 10, 2016.

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Rule 9. Documents Generally. (Alternative Draft) (6/9/2016)

(d) Filing Documents Under Seal.

(1) Motion to Seal Documents. A party may move an appellate court to seal documents filed or submitted for filing in the appellate court in connection with an appeal or an original proceeding pending in the appellate court.

(2) Submission of Documents The documents must be submitted for filing in paper form in a sealed envelope labeled with the style of the case, the case numbers in the trial court and the appellate court, and a brief description of the contents of the envelope. A copy of the sealing order or the motion to seal the documents must be attached to the sealed envelope.

(3) Contents of Motion to Seal Documents. A motion filed in an appellate court to seal documents that have been submitted for filing in the appellate court must:

(A) [identify *or* describe] each document sufficiently to enable the appellate court and the other parties to understand the motion;

(B) state whether any of the documents have been sealed by a temporary or a final order of the trial court;

(C) state whether any of the documents that have not been sealed in the trial court have not been submitted for filing in the trial court or for filing under seal in the trial court;

(D) state whether a motion to seal [or to unseal] any of the documents is pending in the trial court;

(E) state whether any of the documents are court records under Texas Rule of Civil Procedure 76a.2;

(F) if a temporary sealing order is sought of any court records as defined in Texas Rule of Civil Procedure 76a.2, state specific facts [supported by affidavit] showing why the court records should be temporarily sealed under Texas Rule of Civil Procedure 76a.5; [to prevent harm to a specific interest of the movant before a hearing can be held to determine whether a sealing order should be granted under Texas Rule of Civil Procedure 76a.1 and 2;]

(G) if a temporary sealing order is sought of any documents that are not court records under Texas Rule of Civil Procedure 76a.2, state specific facts [supported by affidavit] showing a need for sealing the documents to prevent harm to a specific interest of the movant before a hearing can be held;

(H) state specific facts [supported by affidavit] showing why any of the documents that are court records should be sealed, pending the determination of the proceedings in the appellate court, under Texas Rule of Civil Procedure 76a.1 and 2; [to protect a specific, serious and substantial interest of the movant which clearly outweighs the presumption of openness that applies to court records, any probable adverse public health and safety; and that no less restrictive means than adequately and effectively protect the specific interests asserted];

(I) state specific facts [supported by affidavit] showing why any documents that are not court records under Texas Rule of Civil Procedure 76a.2 should be sealed by the appellate court pending a decision of the appeal or original proceeding in the appellate court;

(J) identify the person or persons who may be given access to the documents filed under seal or submitted for filing under seal in the appellate court; and

(K) state the terms and conditions of access to the documents filed under seal in the appellate court by the persons given access to the documents sealed in the appellate court.

(4) Response to Motion. Any party to the proceeding in the appellate court may file a response to the motion [supported by affidavit] within ___ days after the motion is filed.

(5) Appellate Court Rulings. The appellate court may take any of the following actions:

(A) deny the motion to seal after considering the motion to seal and any response if the court determines that the movant is not entitled to file the documents under seal in the appellate court;

(B) temporarily seal documents that are not court records under Texas Rule of Civil Procedure Rule 76a.2, pending a decision on the merits or further consideration of the appeal or original proceeding in the appellate court;

(C) temporarily seal documents submitted for filing under seal in the appellate court, decide whether documents not filed in the trial court or that were not filed under seal in the trial court are court records, whether they may be sealed in the proceeding in accordance with the standards and the procedures for sealing court records in Texas Rule of Civil Procedure 76a or refer the motion to the trial court with instructions to hear evidence and make findings of fact addressed to these issues and transmit the trial court's findings of fact and conclusions of law to the appellate court;

(D) abate the appeal or original proceeding for a reasonable time to allow the trial court to rule on a pending motion to seal or unseal documents filed in the trial court;

[(E) order the trial court to comply with Texas Rule of Civil Procedure 76a.3 and 4 and to make findings of fact and conclusions of law as to whether any of the documents that are court records as defined in the Texas Rule of Civil Procedure 76a.2 should be sealed under Texas Rule of Civil Procedure 76a.1 and 2]; and

(F) rule on any complaint made in the appellate court about the trial court's orders (or portion of any order or judgment) sealing, refusing to seal, or unsealing of any documents submitted for filing or filed under seal in the appellate court, direct the trial court to take other action to determine the issues presented in the appellate court, and decide merits of the motion to seal documents.

(6) Contents of Sealing Order. A sealing order must identify the documents submitted for filing under seal without disclosing their contents, identify the persons, if any, who may be given access to the documents filed under seal in the appellate court, specify the terms and conditions of access to the documents, if any, and decide whether the documents should be temporarily sealed under Rule 76a(5) or state why the documents should be permanently sealed under the standards and procedures for sealing court records contained in Civil Procedure Rule 76a.1 and 2.

RULE 76a. SEALING COURT RECORDS

1. Standard for Sealing Court Records. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon the general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

2 Court Records. For purposes of this rule, court records means:

(a) all documents of any nature filed in connection with any matter before any civil court, except:

(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(2) documents in court files to which access is otherwise restricted by law;

(3) documents filed in an action originally arising under the Family Code.

(b) settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.

(c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

3. Notice. Court records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating: that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sea ling of court records; the specific time and place of the hearing; the style and number of the case; a brief but specific description of both the nature of the case and the records which are sought to be sealed; and the identity of the movant. Immediately after posting such notice, the movant shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.

4. Hearing. A hearing, open to the public, on a motion to seal court records shall be held in open court as soon as practicable, but not less than fourteen days after the motion is filed and notice is posted. Any party may participate in the hearing. Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed by Rule 120a.

5. Temporary Sealing Order. A temporary sealing order may issue upon motion and notice to any parties who have answered in the case pursuant to Rules 21 and 21a upon a showing of compelling need from specific facts shown by affidavit or by verfied petition that Immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing held as ot herwise provided herein. The temporary order

shall set the time for the hearing required by paragraph 4 and shall direct that the movant immediately give the public notice required by paragraph 3. The court may modify or withdraw any temporary order upon motion by any party or intervenor, notice to the parties, and hearing conducted as soon as practicable. Issuance of a temporary order shall not reduce in any way the burden of proof of a party requesting sealing at the hearing required by paragraph 4.

6. Order on Motion to Seal Court Records. A motion relating to sealing or unsealing court records shall be decided by written order, open to the public, which shall state: the style and number of the case; the specific reasons for finding and concluding whether the showing required by paragraph 1 has been made; the specific portions of court records which are to be sealed; and the time period for which the sealed portions of the court records are to be sealed. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

7. Continuing Jurisdiction. Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdicion to enforce, alter, or vacate that order. An order sealing or unsealing court records shall not be reconsidered on motion of any party or intervenor who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order. Such circumstances need not be related to the case in which the order was issued. However, the burden of making the showing required by paragraph 1 shall always be on the party seeking to seal records.

8. Appeal. Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

9. Application. Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(a) all court records filed or exchanged after the effective date;

(b) any motion to alter or vacate an order restricting access to court records, issued before the effective date.

Texas Rule of Civil Procedure 183

The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

Proposed Texas Rule of Civil Procedure 183

(a) Except as otherwise provided by law, the court may appoint a qualified interpreter for court proceedings. The court shall determine a reasonable fee for the interpreter's services.

(b) Interpreters and translation services provided through the court or paid out of funds provided by law shall be provided free of charge and not taxed as costs. Except as otherwise provided by law, the reasonable fees for an appointed or privately retained interpreter may be taxed as court costs. In no case shall the court tax those fees as court costs against a person of limited proficiency in English unless the court finds in writing that the person can easily afford the fees and that the assessment does not otherwise impair access to the judicial process.

(c) "Limited proficiency in English" shall mean the person does not speak English as a primary language or has a limited ability read, write, speak or understanding English.

Drafting notes:

1. Subsection (c) definition is drawn from DOJ guidelines.

2. Absent another law, subsection (b) applies the general rule on taxing costs. Interpreters provided through the court are free to all. Interpreting services by court appointed and privately hired interpreters cannot be taxed against an LEP person. However, I have paraphrased the exception from the ABA standard. The concept is interpreter's fees may be taxed against an LEP person only if (i) the person is well-resourced to afford it easily, and (ii) it does not generally impair access to justice.

3. A party that hires an interpreter bears that expense. That litigation expense can be shifted only under subsection (b) or some other law.

4. Subsection (a) restates the current rule's first sentence. It provides an independent method for appointment. I added the word "qualified" to ensure use of competent interpreters.

To: Subcommittee on TRCP 183

Date: June 1, 2016

Fm: Roger Hughes

Re: Changes to TRCP 183 on taxation of interpreters' fees as court costs.

1. The subcommittee has been charged to examine TRCP 183 concerning taxing interpreter's fees as court costs. The DOJ 2010 letter asserts that interpreting services should be free, at least to "limited English proficient" (LEP) persons who are parties or witnesses.

   I perceive we have some options for change:
   a. Amend TRCP 183 to provide that interpreting services for court proceedings will be provided free of charge
      i. to all parties and witnesses,
      ii. to all LEP parties and witnesses,
      iii. to all LEP parties and witness in a specific range of civil cases such as family law, juvenile cases, contempt, or as otherwise provided by law, or
      iv. to all LEP parties and witness in all civil [non-criminal] matters.
   b. Courts shall provide for free interpreting by bilingual staff, court interpreters, CART, or telephone services. Otherwise the party that requests a private interpreter shall pay the fee or those fees shall be taxed as costs.
   c. An Interpreter's fees shall be taxed as costs against an LEP party only upon determination that this is fair and the LEP can easily afford it.

2. The DOJ's position is that language barriers deny access to services and programs funded by federal monies under 42 U.S.C. §2000d. Apparently the DOJ concern is that charging LEP persons to for interpreting services denies them access to the legal system.
3. Section 2000d provides that agencies receiving federal funds may no exclude on the basis of race, color, or national origin persons from participation in, deny the benefits of, or subject them to discrimination in anyactivity or program receiving funds. 28 C.F.R. §42.104(a) generally

prohibits exclusion from participation in the program on the basis of race, national origin, etc. Section 42.104(b) prohibits providing any service in a manner different that is provided to others or use criteria for services in order to exclude them. In 2000, Executive Order 13166 was issued, which directed federal agencies that fund state programs must publish guidelines to give LEP persons meaningful access. The DOJ simultaneously published general guidelines (67 Red. Reg. 41455, 6/18/2002) and regulations (28 C.F.R. §42.104, et seq.) for funded programs to develop LEP plans..

4. Under the regulations it is a form of discrimination on the basis of race or national origin to fail to provide meaningful access to their activities for LEP persons. The federal Executive Order, guidelines, and regulation does not dictate how access may be provided. The level and type of access requires the agency assess:
    a. The number of LEP persons eligible and likely to be encountered
    b. The frequency of contact between LEP persons and the program
    c. The importance of the program or activity to people's lives, and
    d. The agency's resources and the costs.
5. The guidelines allows agencies to consider bilingual staff, contract services, telephone interpreters, family and friends, etc. The guidelines for courts (67 Fed. Reg. 41471) give examples:
    a. Appointed counsel should be proficient in the LEP's language
    b. Use of competent, certified interpreters for formal proceedings
    c. Sharing interpreters with other agencies for obscure language
    d. Telephone translation services; use of language professors
    e. State certification of translators
    f. Multi-lingual forms and notices

6. The interpreter landscape:
    a. The federal courts hire their own interpreters or contract for them. Many states have state funded interpreters for courts. Either the state or a department of the judiciary hires them. Texas and many states have an agency that provides standards and certifies interpreters. However, Texas leaves hiring and funding to each county.
    b. There are many options for interpretation services:
        i. Bi-lingual court staff
        ii. Court interpreters hired by the county

iii. Contract or private practice interpreters
iv. Telephone translation services: interpreters available over the phone
v. CART: court reporting service that provides immediate translation in English onto a screen

7. Texas laws are not uniform on interpreters and taxing their fees.
   a. TRCP 183 provides (1) the court *may* appoint an interpreter and fix the interpreter's fees, (2) fees *shall* be paid as provided by law or by one of the parties as the court may direct, and (3) fees *may* be taxed as costs in the court's discretion. [emphasis added]. It is based on FRCP 43(d).
   b. Tex. Civ. Prac. & Rem. Code §31.007(b) – the judgment may include in the judgment all costs, including interpreters appointed pursuant to the rules or statutes. TRCP 131 provides the successful party shall recover costs; TRCP 141 provides the court must have good cause not to award costs to the successful party.
   c. Tex. Civ. Prac. & Rem. Code ch. 21 addresses interpreters for the deaf and Spanish language. The Spanish interpreter subchap B applies only to counties on the Mexican border or are part of a judicial district that borders on Mexico. Tex. Civ. Prac. & Rem. Code §21.021. Upon determination of need by a district judge, the commissioner's court shall appoint for that district court an interpreter as needed to carry our court functions. Tex. Civ. Prac. & Rem. Code §22.022. In county courts at law, the judge may appoint an official interpreter for that court, but the commissioner's court prescribes the duties. Tex. Civ. Prac. & Rem. Code §21.031. In both cases, the clerk of the court collects a $3 interpreter's fee that goes to the county general fund. Tex. Civ. Prac. & Rem. Code §21.051.
   d. Tex. Gov't Code ch. 57 addresses interpreters for the deaf and individuals who cannot communicate in English, as well as regulates the certification of interpreters. Section 57.002 provides (a) a court must appoint a certified court interpreter or a CART provider on written motion by a party or an witness in civil or crimination cases before that court, (b) the court may do so on its own motion. In cases subject to Tex. Civ. Prac. & Rem. Code ch. 21 the court may appointed an unlicensed interpreter. CART is a court reporting service that provides immediate translation into English.

e. In mental health proceedings, the court shall order payment of compensation to court-appointed personnel, include language and sign interpreters, to be taxed as costs. Tex. Health & Safety Code §571.017. The county pays the court costs, but is reimbursed by the patient. Tex. Health & Safety Code §571.018.

f. In guardianship cases, if the court appoints an attorney ad litem for the proposed ward, it shall appoint a language or sign interpreter if needed to ensure effective communication between the ward and attorney. Tex. Estates Code, §1054.005. The interpreter's fees are court costs which can assessed against the party seeking guardianship or the ward's estate. Tex. Estates Code §1155.151.

8. Recognized LAPs on taxing interpreting as costs:

a. ABA Model Plan, Standard §2.3 – Courts must provide access to services without charge and may assess the costs only in a manner consistent with fairness, access, to justice, and integrity of the judicial process. Commentary: The priority is to provide without charge to low and moderate income LEP persons, to avoid chilling their access. Assessing costs should be limited to "well resourced" parties. [Note: Standard §6.2 – courts should provide language access for LEP persons in civil suits who are ordered to participate in court-mandated services or are eligible for court-offered programs.]

b. Colorado: Free for all parties. State hires interpreters and allocates them among the court; courts must share them.

c. Hawaii: Free for all parties, but party can hire one at that party's cost.

d. Rhode Island: Courts cannot charge or assess. Office of Court Administration must hire qualified interpreters and pay for them.

e. Texas Supreme Court/OCA – in 2014 the Court and OCA adopted an LAP applicable only to themselves, not courts generally. It provides interpretation without cost, but only through bilingual staff.

f. Bexar, Harris, El Paso and Travis County LAPs. Bexar's plan states that staff interpreters are free for court proceedings. Harris County says it will provider interpreters free in criminal, juvenile, contempt, and parental termination proceedings; it will provide them free if funds are available for domestic violence, elder abuse, and family law case. Also court interpreters will translated documents for free if funds are available. El Paso and Travis provide interpreters at no

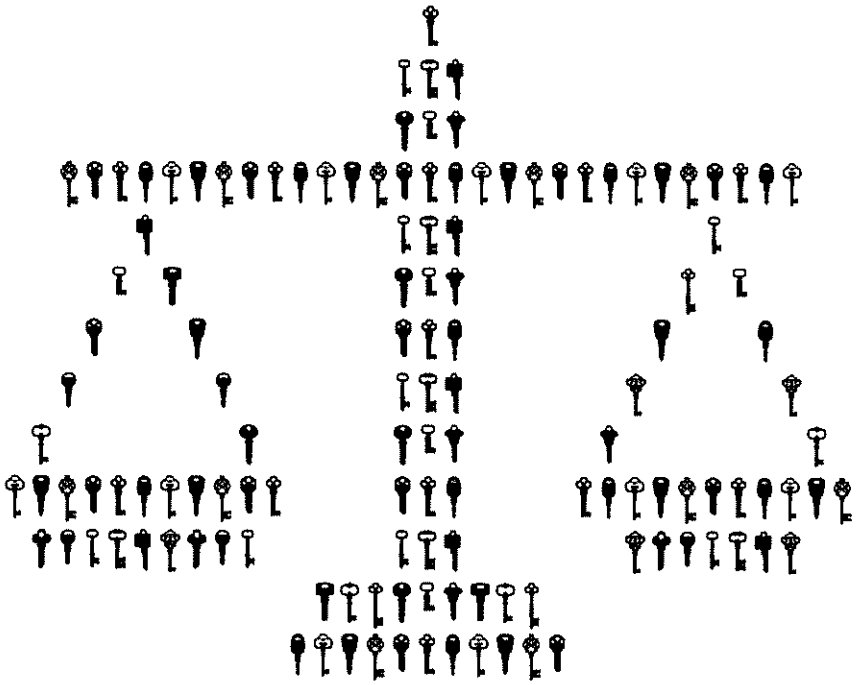
cost in criminal and quasi-criminal matter. If funding is available, interpreters provided free in domestic violence, elder abuse, and family law matters. Otherwise El Paso and Travis say the costs for interpreters in civil case is taxed at judge's discretion.

9. I perceived the following problems under TRCP 183:
    a. In most cases, the judge has discretion to fix the fee and decide who pays it. The judge need not select an interpreter under contract to the county. In counties covered by TCRPC 21.021, the judge is not required to selected licensed interpreters or CART. This creates the possibility the judge will select either licensed interpreters in private practice or court staff, and assess significant fees for their service.
    b. Funding for interpreting services currently is (a) county hires and pays, or (b) court appoints and taxes the fees. Texas does not require counties hire interpreters. No state-wide agency provides or coordinates retention of interpreters for all courts.
    c. TRCP 183 does not authorize the judge to order payment of interpreter's fees from county's funds. This forces judge to tax fees of non-staff interpreters to the LEP. *See In re Tovar*, 2010 WL 2376921, 2010 Tex. App. LEXIS 4467 (Tex. App.—Tyler 2010, orig. proc.)(in Smith Court divorce case, no abuse of discretion to order indigent LEP to pay for court appointed Spanish interpreter in advance).
    d. TRCP 183 applies only to court proceedings. It does not address related proceedings, e.g., mediation, depositions, etc.

10. A solution must keep in mind the following:
    a. The change is to benefit LEPs, not all parties. Taxing interpreting fees against a party proficient in English does not deny an LEP access to the legal system.
    b. Unfunded mandates. Judges cannot force the county or the state to hire and pay for interpreters. However, the DOJ has approved use of bi-lingual staff and family and friends who can demonstrate proficiency to translate. Moreover, low-cost telephone services are available.
    c. Judges may have some discretion to tax interpreting fees against LEPs that can easily afford it.

d. The need for translation is diverse. There will be a need for a variety of Asian European, and African interpreters.
e. Amending TRCP 183 will affect local court LAPs.

American Bar Association



Standards *for* Language Access *in* Courts

Standing Committee on Legal Aid and Indigent Defendants

FEBRUARY 2012

2.3 Courts should provide language access services without charge, and may assess or recoup the cost of such services only in a manner that is consistent with principles of fairness, access to justice and integrity of the judicial process, and that comports with legal requirements.

Commentary

Language access services ensure that all persons have equal access to justice and that information essential for the efficiency and integrity of legal proceedings can be understood by both English speakers and those who are LEP. Many states and courts, as well as the federal government, have endorsed these principles by passing laws and promulgating rules and guidance that expressly require the provision of language access services in both civil and criminal cases regardless of indigency.[12] See Standard 1 for a full examination of these principles and relevant law and jurisprudence.

Courts should avoid placing the burden of paying for language access disproportionately on LEP individuals in a manner that discourages access to court by LEP persons or inhibits requests for language services necessary to enable LEP persons to participate fully in proceedings. The cost of language services, if imposed, should not unduly impact LEP persons. The court may assess or recoup those costs from a well-resourced party who has the ability to pay, as appropriate and where allowed by law. Whatever test the court applies to determine if costs should be assessed or recouped, it cannot have a chilling effect on the rights of the LEP person to access the court system. In all cases, the court has an institutional interest in having adequate language services to capture evidence accurately and determine cases fairly on the merits.

Best Practices

There is broad agreement that justice cannot be achieved in any adjudicatory setting (whether civil or criminal) when persons affected by the proceedings do not comprehend them, when persons with information that is essential to a fair outcome cannot convey that information, when the judge or jury do not have an accurate understanding of relevant evidence, or when persons are subject to a different outcome or penalty, or are denied an otherwise available option or treatment, based only on their language ability. Because language services are essential to the fair and efficient operation of the courts, expenses associated with providing those services should be considered routine, necessary expenses and included in budget requests for judicial

12. See Fn. 2, Laura Abel, Language Access in State Courts (2009), pp. 67-68 (identifying Idaho, Kansas, Kentucky, Maine, Minnesota, Nebraska, New Jersey, New York, Oregon and Wisconsin as states in which the courts pay for interpreters without imposing a means test and without assessing interpreter costs on the parties), available at www.brennancenter.org; Colo. Ch. J. Dir. 06-03, (June 2011); COSCA White Paper Appendix A.; DOJ Guidance and Letter from Thomas E. Perez, Assistant Attorney General, to Chief Justices and State Court Administrators 2 (Aug. 16, 2010), http://www.justice.gov/crt/lep/final_courts_ltr_081610.pdf [hereinafter "Letter to Chief Justices and State Court Administrators"].

administration and as part of other court efforts seeking adequate funds for court operations. Courts may seek necessary increases in funding of judicial budgets, or grants from the federal government or other sources.[13] Courts may include the cost of language access services in the calculation for determining filing fees for all users.

Recognizing that adequate funding might not be immediately available, implementation of these Standards in all tribunals and proceedings may need to be phased over a period of time, and priority should be given to providing interpreter services without charge to low and moderate income persons and unrepresented litigants. Assessment or recoupment of the cost of interpreter services, where allowed by law, should be limited to well-resourced parties who have the ability to pay such costs, because fees imposed upon LEP persons have the strong potential to chill recourse to the courts and inhibit the use of language access services that are necessary or beneficial to the fair administration of justice.

An example of a situation where a court may, where allowed by law, assess or recoup the cost of language access services would be when, in a specific civil proceeding, language access services are provided for the benefit of a well-resourced non-LEP individual or corporate party. In such a situation, the cost of language services can be imposed on that individual/corporation without chilling court access or disproportionately burdening LEP individuals and most would agree that it is fair to require that party to bear the costs, for example, of presenting the testimony of an LEP expert witness. If the well-resourced party was himself/herself LEP, the court would need to evaluate the circumstances to ensure that any assessment of costs would be consistent with the principles articulated in this Standard.

In considering whether to provide an interpreter without charge, courts should be mindful that the poverty/indigency threshold is unrealistically low. For that reason, any effort by a court to impose fees on particular persons and litigants should take into consideration that the cost of interpreter services will burden most people of modest or even "middle class" means, and of many small or moderate-size businesses. Litigants in those categories will not be treated on a par with persons who do not require language services and will effectively be denied access to justice, if they are unable or dissuaded from using the courts, because they are subject to up-front fees or know that they will be assessed fees under an after-the-fact recoupment mechanism.

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13. See, e.g., Colorado Judicial Branch, FY 2010-11, Joint Budget Committee Hearing Agenda (Nov. 18, 2010), p. 3 (showing interpreter costs as 2% of the judiciary's general fund allocation); http://www.courts.state.co.us/userfiles/file/Administration/Financial_Services/Judicial%20 2012%20Hearing%20Agenda%20-%20FINAL.pdf; Wisconsin Court System, Biennial Budget Summary: Court-Related Items (July 1, 2011), p. 16 (allocating a portion of the Justice Information Systems Surcharge for court interpreter costs), http://www.wicourts.gov/courts/overview/docs/budgetsummary.pdf; Texas Courts Online, Remote Interpreter Project, (describing use of federal Violence Against Women Act funding for remote interpretation project), http://www.courts.state.tx.us/oca/dvra/trip.asp.

Federal Register

Wednesday,
August 16, 2000

Part V

The President

Executive Order 13166—Improving Access to Services for Persons With Limited English Proficiency

Department of Justice

Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons With Limited English Proficiency; Notice

Federal Register
Vol. 65, No. 159
Wednesday, August 16, 2000

Presidential Documents

Title 3—

The President

Executive Order 13166 of August 11, 2000

Improving Access to Services for Persons With Limited English Proficiency

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to improve access to federally conducted and federally assisted programs and activities for persons who, as a result of national origin, are limited in their English proficiency (LEP), it is hereby ordered as follows:

Section 1. *Goals.*

The Federal Government provides and funds an array of services that can be made accessible to otherwise eligible persons who are not proficient in the English language. The Federal Government is committed to improving the accessibility of these services to eligible LEP persons, a goal that reinforces its equally important commitment to promoting programs and activities designed to help individuals learn English. To this end, each Federal agency shall examine the services it provides and develop and implement a system by which LEP persons can meaningfully access those services consistent with, and without unduly burdening, the fundamental mission of the agency. Each Federal agency shall also work to ensure that recipients of Federal financial assistance (recipients) provide meaningful access to their LEP applicants and beneficiaries. To assist the agencies with this endeavor, the Department of Justice has today issued a general guidance document (LEP Guidance), which sets forth the compliance standards that recipients must follow to ensure that the programs and activities they normally provide in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of title VI of the Civil Rights Act of 1964, as amended, and its implementing regulations. As described in the LEP Guidance, recipients must take reasonable steps to ensure meaningful access to their programs and activities by LEP persons.

Sec. 2. *Federally Conducted Programs and Activities.*

Each Federal agency shall prepare a plan to improve access to its federally conducted programs and activities by eligible LEP persons. Each plan shall be consistent with the standards set forth in the LEP Guidance, and shall include the steps the agency will take to ensure that eligible LEP persons can meaningfully access the agency's programs and activities. Agencies shall develop and begin to implement these plans within 120 days of the date of this order, and shall send copies of their plans to the Department of Justice, which shall serve as the central repository of the agencies' plans.

Sec. 3. *Federally Assisted Programs and Activities.*

Each agency providing Federal financial assistance shall draft title VI guidance specifically tailored to its recipients that is consistent with the LEP Guidance issued by the Department of Justice. This agency-specific guidance shall detail how the general standards established in the LEP Guidance will be applied to the agency's recipients. The agency-specific guidance shall take into account the types of services provided by the recipients, the individuals served by the recipients, and other factors set out in the LEP Guidance. Agencies that already have developed title VI guidance that the Department of Justice determines is consistent with the LEP Guidance shall examine their existing guidance, as well as their programs and activities, to determine if additional guidance is necessary to comply with this order. The Department of Justice shall consult with the agencies in creating their guidance and, within 120 days of the date of this order,

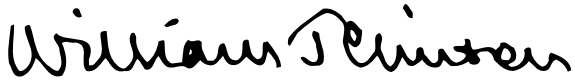
each agency shall submit its specific guidance to the Department of Justice for review and approval. Following approval by the Department of Justice, each agency shall publish its guidance document in the **Federal Register** for public comment.

Sec. 4. *Consultations.*

In carrying out this order, agencies shall ensure that stakeholders, such as LEP persons and their representative organizations, recipients, and other appropriate individuals or entities, have an adequate opportunity to provide input. Agencies will evaluate the particular needs of the LEP persons they and their recipients serve and the burdens of compliance on the agency and its recipients. This input from stakeholders will assist the agencies in developing an approach to ensuring meaningful access by LEP persons that is practical and effective, fiscally responsible, responsive to the particular circumstances of each agency, and can be readily implemented.

Sec. 5. *Judicial Review.*

This order is intended only to improve the internal management of the executive branch and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers or employees, or any person.



THE WHITE HOUSE,
August 11, 2000.

[FR Doc. 00–20938
Filed 8–15–00; 8:45 am]
Billing code 3195–01–P

DEPARTMENT OF JUSTICE

Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons With Limited English Proficiency; Policy Guidance

AGENCY: Civil Rights Division, Department of Justice.

ACTION: Policy guidance document.

SUMMARY: This Policy Guidance Document entitled ''Enforcement of Title VI of the Civil Rights Act of 1964 '' National Origin Discrimination Against Persons with Limited English Proficiency (LEP Guidance)'' is being issued pursuant to authority granted by Executive Order 12250 and Department of Justice Regulations. It addresses the application of Title VI's prohibition on national origin discrimination when information is provided only in English to persons with limited English proficiency. This policy guidance does not create new obligations, but rather, clarifies existing Title VI responsibilities. The purpose of this document is to set forth general principles for agencies to apply in developing guidelines for services to individuals with limited English proficiency. The Policy Guidance Document appears below.

DATES: Effective August 11, 2000.

ADDRESSES: Coordination and Review Section, Civil Rights Division, P.O. Box 66560, Washington, D.C. 20035–6560.

FOR FURTHER INFORMATION CONTACT: Merrily Friedlander, Chief, Coordination and Review Section, Civil Rights Division, (202) 307–2222.

Helen L. Norton,

Counsel to the Assistant Attorney General, Civil Rights Division.

Office of the Assistant Attorney General

Washington, D.C. 20530

August 11, 2000.

TO: Executive Agency Civil Rights Officers

FROM: Bill Lann Lee, Assistant Attorney General, Civil Rights Division

SUBJECT: Policy Guidance Document: *Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons With Limited English Proficiency* (''LEP Guidance'')

This policy directive concerning the enforcement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq., as amended*, is being issued pursuant to the authority granted by Executive Order No. 12250 [1] and Department of Justice regulations.[2] It addresses the application to recipients of federal financial assistance of Title VI's prohibition on national origin discrimination when information is provided only in English to persons who do not understand English. This policy guidance does not create new obligations but, rather, clarifies existing Title VI responsibilities.

Department of Justice Regulations for the Coordination of Enforcement of Non-discrimination in Federally Assisted Programs (Coordination Regulations), 28 C.F.R. 42.401 *et seq.*, direct agencies to ''publish title VI guidelines for each type of program to which they extend financial assistance, where such guidelines would be appropriate to provide detailed information on the requirements of Title VI.'' 28 CFR § 42.404(a). The purpose of this document is to set forth general principles for agencies to apply in developing such guidelines for services to individuals with limited English proficiency (LEP). It is expected that, in developing this guidance for their federally assisted programs, agencies will apply these general principles, taking into account the unique nature of the programs to which they provide federal financial assistance.

A federal aid recipient's failure to assure that people who are not proficient in English can effectively participate in and benefit from programs and activities may constitute national origin discrimination prohibited by Title VI. In order to assist agencies that grant federal financial assistance in ensuring that recipients of federal financial assistance are complying with their responsibilities, this policy directive addresses the appropriate compliance standards. Agencies should utilize the standards set forth in this Policy Guidance Document to develop specific criteria applicable to review the programs and activities for which they offer financial assistance. The Department of Education [3] already has established policies, and the Department of Health and Human Services (HHS) [4] has been developing guidance in a manner consistent with Title VI and this Document, that applies to their specific programs receiving federal financial assistance.

Background

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal financial assistance from discriminating against or otherwise excluding individuals on the basis of race, color, or national origin in any of their activities. Section 601 of Title VI, 42 U.S.C. § 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The term ''program or activity'' is broadly defined. 42 U.S.C. § 2000d–4a.

Consistent with the model Title VI regulations drafted by a Presidential task force in 1964, virtually every executive agency that grants federal financial assistance has promulgated regulations to implement Title VI. These regulations prohibit recipients from ''restrict[ing] an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program'' and ''utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination'' or have ''the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.''

In *Lau* v. *Nichols*, 414 U.S. 563 (1974), the Supreme Court interpreted these provisions as requiring that a federal financial recipient take steps to ensure that language barriers did not exclude LEP persons from effective participation in its benefits and services. *Lau* involved a group of students of Chinese origin who did not speak English to whom the recipient provided the same services—an education provided solely in English—that it provided students who did speak English. The Court held that, under these circumstances, the school's practice violated the Title VI prohibition against discrimination on

[1] 42 U.S.C. § 2000d–1 note.

[2] 28 C.F.R. § 0.51.

[3] Department of Education policies regarding the Title VI responsibilities of public school districts with respect to LEP children and their parents are reflected in three Office for Civil Rights policy documents: (1) the May 1970 memorandum to school districts, ''Identification of Discrimination and Denial of Services on the Basis of National Origin,'' (2) the December 3, 1985, guidance document, ''The Office for Civil Rights' Title VI Language Minority Compliance Procedures,'' and (3) the September 1991 memorandum, ''Policy Update on Schools Obligations Toward National Origin Minority Students with Limited English Proficiency.'' These documents can be found at the Department of Education website at www.ed.gov/office/OCR.

[4] The Department of Health and Human Services is issuing policy guidance titled: ''Title VI Prohibition Against National Origin Discrimination As It Affects Persons With Limited English Proficiency.'' This policy addresses the Title VI responsibilities of HHS recipients to individuals with limited English proficiency.

the basis of national origin. The Court observed that ''[i]t seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination banned by'' the Title VI regulations.[5] Courts have applied the doctrine enunciated in *Lau* both inside and outside the education context. It has been considered in contexts as varied as what languages drivers' license tests must be given in or whether material relating to unemployment benefits must be given in a language other than English.[6]

Link Between National Origin And Language

For the majority of people living in the United States, English is their native language or they have acquired proficiency in English. They are able to participate fully in federally assisted programs and activities even if written and oral communications are exclusively in the English language.

The same cannot be said for the remaining minority who have limited English proficiency. This group includes persons born in other countries, some children of immigrants born in the United States, and other non-English or limited English proficient persons born in the United States, including some Native Americans. Despite efforts to learn and master English, their English language proficiency may be limited for some time.[7] Unless grant recipients take steps to respond to this difficulty, recipients effectively may deny those who do not speak, read, or understand English access to the benefits and services for which they qualify.

Many recipients of federal financial assistance recognize that the failure to provide language assistance to such persons may deny them vital access to services and benefits. In some instances, a recipient's failure to remove language barriers is attributable to ignorance of the fact that some members of the community are unable to communicate in English, to a general resistance to change, or to a lack of awareness of the obligation to address this obstacle.

In some cases, however, the failure to address language barriers may not be simply an oversight, but rather may be attributable, at least in part, to invidious discrimination on the basis of national origin and race. While there is not always a direct relationship between an individual's language and national origin, often language does serve as an identifier of national origin.[8] The same sort of prejudice and xenophobia that may be at the root of discrimination against persons from other nations may be triggered when a person speaks a language other than English.

> Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility * * *. It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.[9]

While Title VI itself prohibits only intentional discrimination on the basis of national origin,[10] the Supreme Court has consistently upheld agency regulations prohibiting unjustified discriminatory effects.[11] The Department of Justice has consistently adhered to the view that the significant discriminatory effects that the failure to provide language assistance has on the basis of national origin, places the treatment of LEP individuals comfortably within the ambit of Title VI and agencies' implementing regulations.[12] Also, existing language barriers potentially may be rooted in invidious discrimination. The Supreme Court in *Lau* concluded that a recipient's failure to take affirmative steps to provide ''meaningful opportunity'' for LEP individuals to participate in its programs and activities violates the recipient's obligations under Title VI and its regulations.

All Recipients Must Take Reasonable Steps To Provide Meaningful Access

Recipients who fail to provide services to LEP applicants and beneficiaries in their federally assisted programs and activities may be discriminating on the basis of national origin in violation of Title VI and its implementing regulations. Title VI and its regulations require recipients to take reasonable steps to ensure ''meaningful'' access to the information and services they provide. What constitutes reasonable steps to ensure meaningful access will be contingent on a number of factors. Among the factors to be considered are the number or proportion of LEP persons in the eligible service population, the frequency with which LEP individuals come in contact with the program, the importance of the service provided by the program, and the resources available to the recipient.

(1) Number or Proportion of LEP Individuals

Programs that serve a few or even one LEP person are still subject to the Title VI obligation to take reasonable steps to provide meaningful opportunities for access. However, a factor in determining the reasonableness of a recipient's efforts is the number or proportion of people who will be excluded from the benefits or services absent efforts to remove language barriers. The steps that are reasonable for a recipient who serves one LEP person a year may be different than those expected from a recipient that serves several LEP persons each day. But even those who serve very few LEP persons on an infrequent basis should utilize this balancing analysis to determine whether reasonable steps are

[5] 414 U.S. at 568. Congress manifested its approval of the *Lau* decision requirements concerning the provision of meaningful education services by enacting provisions in the Education Amendments of 1974, Pub. L. No. 93–380, §§ 105, 204, 88 Stat. 503–512, 515 codified at 20 U.S.C. 1703(f), and the Bilingual Education Act, 20 U.S.C. 7401 *et seq*., which provided federal financial assistance to school districts in providing language services.

[6] For cases outside the educational context, *see, e.g.*, *Sandoval* v. *Hagan*, 7 F. Supp. 2d 1234 (M.D. Ala. 1998), *affirmed*, 197 F.3d 484, (11th Cir. 1999), *rehearing and suggestion for rehearing en banc denied*, 211 F.3d 133 (11th Cir. Feb. 29, 2000) (Table, No. 98–6598–II), *petition for certiorari filed* May 30, 2000 (No. 99–1908) (giving drivers' license tests only in English violates Title VI); and *Pabon* v. *Levine*, 70 F.R.D. 674 (S.D.N.Y. 1976) (summary judgment for defendants denied in case alleging failure to provide unemployment insurance information in Spanish violated Title VI).

[7] Certainly it is important to achieve English language proficiency in order to fully participate at every level in American society. As we understand the Supreme Court's interpretation of Title VI's prohibition of national origin discrimination, it does not in any way disparage use of the English language.

[8] As the Supreme Court observed, ''[l]anguage permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond.'' *Hernandez* v. *New York,* 500 U.S. 352, 370 (1991) (plurality opinion).

[9] *Id*. at 371 (plurality opinion).

[10] *Alexander* v. *Choate,* 469 U.S. 287, 293 (1985).

[11] Id. at 293–294; *Guardians Ass'n* v. *Civil Serv. Comm'n,* 463 U.S. 582, 584 n.2 (1983) (White, J.), 623 n.15 (Marshall, J.), 642–645 (Stevens, Brennan, Blackmun, JJ.); *Lau* v. *Nichols,* 414 U.S. at 568; *id.* at 571 (Stewart, J., concurring in result). In a July 24, 1994, memorandum to Heads of Departments and Agencies that Provide Federal Financial Assistance concerning ''Use of the Disparate Impact Standard in Administrative Regulations Under Title VI of the Civil Rights Act of 1964,'' the Attorney General stated that each agency ''should ensure that the disparate impact provisions of your regulations are fully utilized so that all persons may enjoy equally the benefits of federally financed programs.''

[12] The Department's position with regard to written language assistance is articulated in 28 CFR § 42.405(d)(1), which is contained in the Coordination Regulations, 28 CFR Subpt. F, issued in 1976. These Regulations ''govern the respective obligations of Federal agencies regarding enforcement of title VI.'' 28 CFR § 42.405. Section 42.405(d)(1) addresses the prohibitions cited by the Supreme Court in *Lau*.

possible and if so, have a plan of what to do if a LEP individual seeks service under the program in question. This plan need not be intricate; it may be as simple as being prepared to use one of the commercially available language lines to obtain immediate interpreter services.

(2) Frequency of Contact with the Program

Frequency of contacts between the program or activity and LEP individuals is another factor to be weighed. For example, if LEP individuals must access the recipient's program or activity on a daily basis, *e.g.*, as they must in attending elementary or secondary school, a recipient has greater duties than if such contact is unpredictable or infrequent. Recipients should take into account local or regional conditions when determining frequency of contact with the program, and should have the flexibility to tailor their services to those needs.

(3) Nature and Importance of the Program

The importance of the recipient's program to beneficiaries will affect the determination of what reasonable steps are required. More affirmative steps must be taken in programs where the denial or delay of access may have life or death implications than in programs that are not as crucial to one's day-to-day existence. For example, the obligations of a federally assisted school or hospital differ from those of a federally assisted zoo or theater. In assessing the effect on individuals of failure to provide language services, recipients must consider the importance of the benefit to individuals both immediately and in the long-term. A decision by a federal, state, or local entity to make an activity compulsory, such as elementary and secondary school attendance or medical inoculations, serves as strong evidence of the program's importance.

(4) Resources Available

The resources available to a recipient of federal assistance may have an impact on the nature of the steps that recipients must take. For example, a small recipient with limited resources may not have to take the same steps as a larger recipient to provide LEP assistance in programs that have a limited number of eligible LEP individuals, where contact is infrequent, where the total cost of providing language services is relatively high, and/or where the program is not crucial to an individual's day-to-day existence. Claims of limited resources from large entities will need to be well-substantiated.[13]

Written vs. Oral Language Services

In balancing the factors discussed above to determine what reasonable steps must be taken by recipients to provide meaningful access to each LEP individual, agencies should particularly address the appropriate mix of written and oral language assistance. Which documents must be translated, when oral translation is necessary, and whether such services must be immediately available will depend upon the factors previously mentioned.[14] Recipients often communicate with the public in writing, either on paper or over the Internet, and written translations are a highly effective way of communicating with large numbers of people who do not speak, read or understand English. While the Department of Justice's Coordination Regulation, 28 CFR § 42.405(d)(1), expressly addresses requirements for provision of written language assistance, a recipient's obligation to provide meaningful opportunity is not limited to written translations. Oral communication between recipients and beneficiaries often is a necessary part of the exchange of information. Thus, a recipient that limits its language assistance to the provision of written materials may not be allowing LEP persons ''effectively to be informed of or to participate in the program'' in the same manner as persons who speak English.

In some cases, ''meaningful opportunity'' to benefit from the program requires the recipient to take steps to assure that translation services are promptly available. In some circumstances, instead of translating all of its written materials, a recipient may meet its obligation by making available oral assistance, or by commissioning written translations on reasonable request. It is the responsibility of federal assistance-granting agencies, in conducting their Title VI compliance activities, to make more specific judgments by applying their program expertise to concrete cases.

Conclusion

This document provides a general framework by which agencies can determine when LEP assistance is required in their federally assisted programs and activities and what the nature of that assistance should be. We expect agencies to implement this document by issuing guidance documents specific to their own recipients as contemplated by the Department of Justice Coordination Regulations and as HHS and the Department of Education already have done. The Coordination and Review Section is available to assist you in preparing your agency-specific guidance. In addition, agencies should provide technical assistance to their recipients concerning the provision of appropriate LEP services.

[FR Doc. 00–20867 Filed 8–15–00; 8:45 am]

BILLING CODE 4410–13–P

[13] Title VI does not require recipients to remove language barriers when English is an essential aspect of the program (such as providing civil service examinations in English when the job requires person to communicate in English, *see Frontera* v. *Sindell,* 522 F.2d 1215 (6th Cir. 1975)), or there is another ''substantial legitimate justification for the challenged practice.'' *Elston* v. *Talladega County Bd. of Educ.,* 997 F.2d 1394, 1407 (11th Cir. 1993). Similar balancing tests are used in other nondiscrimination provisions that are concerned with effects of an entity's actions. For example, under Title VII of the Civil Rights Act of 1964, employers need not cease practices that have a discriminatory effect if they are ''consistent with business necessity'' and there is no ''alternative employment practice'' that is equally effective. 42 U.S.C. § 2000e–2(k). Under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, recipients do not need to provide access to persons with disabilities if such steps impose an undue burden on the recipient. *Alexander* v. *Choate,* 469 U.S. at 300. Thus, in situations where all of the factors identified in the text are at their nadir, it may be ''reasonable'' to take no affirmative steps to provide further access.

[14] Under the four-part analysis, for instance, Title VI would not require recipients to translate documents requested under a state equivalent of the Freedom of Information Act or Privacy Act, or to translate all state statutes or notices of rulemaking made generally available to the public. The focus of the analysis is the nature of the information being communicated, the intended or expected audience, and the cost of providing translations. In virtually all instances, one or more of these criteria would lead to the conclusion that recipients need not translate these types of documents.

local, tribal, and foreign law enforcement agencies; Federal/State probation and judicial offices; Congress; contract and consulting physicians, including hospitals; and attorneys for claimants.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

The Attorney General has exempted this system from subsections (c)(3) and (4), (d), (e)(2), (e)(3), (e)(4)(H), (e)(8), (f) and (g) of the Privacy Act pursuant to 5 U.S.C. 552a(j). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553(b), (c) and (e) and have been published in the **Federal Register** and codified at 28 CFR 16.97(a) and (b).

[FR Doc. 02–15299 Filed 6–17–02; 8:45 am]

BILLING CODE 4410–05–P

DEPARTMENT OF JUSTICE

Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons

AGENCY: Department of Justice.

ACTION: Policy guidance document.

SUMMARY: The Department of Justice (DOJ) adopts final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons (DOJ Recipient LEP Guidance). The DOJ Recipient LEP Guidance is issued pursuant to Executive Order 13166, and supplants existing guidance on the same subject originally published at 66 FR 3834 (January 16, 2001).

DATES: Effective June 12, 2002.

FOR FURTHER INFORMATION CONTACT: Merrily A. Friedlander, Chief, Coordination and Review Section, Civil Rights Division, 950 Pennsylvania Avenue, NW–NYA, Washington, DC 20530. Telephone 202–307–2222; TDD: 202–307–2678.

SUPPLEMENTARY INFORMATION: Under DOJ regulations implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, *et seq.* (Title VI), recipients of Federal financial assistance have a responsibility to ensure meaningful access to their programs and activities by persons with limited English proficiency (LEP). *See* 28 CFR 42.104(b)(2). Executive Order 13166, reprinted at 65 FR 50121 (August 16, 2000), directs each Federal agency that extends assistance subject to the requirements of Title VI to publish guidance for its respective recipients clarifying that obligation. Executive Order 13166 further directs that all such guidance documents be consistent with the compliance standards and framework detailed in DOJ Policy Guidance entitled ''Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency.'' *See* 65 FR 50123 (August 16, 2000).

Initial guidance on DOJ recipients' obligations to take reasonable steps to ensure access by LEP persons was published on January 16, 2001. *See* 66 FR 3834. That guidance document was republished for additional public comment on January 18, 2002. *See* 67 FR 2671. Based on public comments filed in response to the January 18, 2002 republication, DOJ published revised draft guidance for public comment on April 18, 2002. *See* 67 FR 19237.

DOJ received 24 comments in response to its April 18, 2002 publication of revised draft guidance on DOJ recipients' obligations to take reasonable steps to ensure access to programs and activities by LEP persons. The comments reflected the views of individuals, organizations serving LEP populations, organizations favoring the use of the English language, language assistance service providers, and state agencies. While many comments identified areas for improvement and/or revision, the overall response to the draft DOJ Recipient LEP Guidance was favorable. Taken together, a majority of the comments described the draft guidance as incorporating ''reasonable standards'' or ''helpful provisions'' providing ''useful suggestions instead of mandatory requirements'' reflecting ''common sense'' and a ''more measured tone'' over prior LEP guidance documents.

Two of the comments urged withdrawal of the draft guidance as unsupported by law. In response, the Department notes here as it did in the draft Recipient LEP Guidance published on April 18, 2002 that the Department's commitment to implement Title VI through regulations reaching language barriers is long-standing and is unaffected by recent judicial action precluding *individuals* from bringing judicial actions seeking to enforce those agency regulations. See 67 FR at 19238–19239. This particular policy guidance clarifies existing statutory and regulatory requirements for LEP persons by providing a description of the factors recipients should consider in fulfilling their responsibilities to LEP persons.

Of the remaining 22 comments, three supported adoption of the draft guidance as published, and 19, while supportive of the guidance and the Department's leadership in this area, suggested modifications which would, in their view, either (1) clarify the application of the flexible compliance standard incorporated by the draft guidance to particular areas or situations, or (2) provide a more definitive statement of the minimal compliance standards in this area. Several areas were raised in more than one comment. In the order most often raised, those common areas of comment were (1) recipient language assistance plans, (2) use of informal interpreters, (3) written translation safe harbors, and (4) cost considerations. The comments in each of these area are summarized and discussed below.

Recipient Language Assistance Plans. A large number of comments recommended that written language assistance plans (LEP Plans) be required of all recipients. The Department is cognizant of the value of written LEP plans in documenting a recipient's compliance with its obligation to ensure meaningful access by LEP persons, and in providing a framework for the provision of reasonable and necessary language assistance to LEP persons. The Department is also aware of the related training, operational, and planning benefits most recipients would derive from the generation and maintenance of an updated written language assistance plan for use by its employees. In the large majority of cases, the benefits flowing from a written language assistance plan has caused or will likely cause recipients to develop, with varying degrees of detail, such written plans. Even small recipients with limited contact with LEP persons would likely benefit from having a plan in place to assure that, when the need arises, staff have a written plan to turn to—even if it is only how to access a telephonic or community-based interpretation service—when determining what language services to provide and how to provide them.

However, the fact that the vast majority of the Department's recipients already have or will likely develop a written LEP plan to reap its many benefits does not necessarily mean that every recipient, however small its staff, limited its resources, or focused its services, will realize the same benefits and thus must follow an identical path. Without clear evidence suggesting that the absence of written plans for every single recipient is impeding accomplishment of the goal of meaningful access, the Department elects at this juncture to strongly recommend but not require written language assistance plans. The

Department stresses in this regard that neither the absence of a requirement of written LEP plans in all cases nor the election by an individual recipient against drafting a plan obviates the underlying obligation on the part of each recipient to provide, consistent with Title VI, the Title VI regulations, and the DOJ Recipient LEP Guidance, reasonable, timely, and appropriate language assistance to the LEP populations each serves.

While the Department continues to believe that the Recipient LEP Guidance strikes the correct balance between recommendations and requirements in this area, the Department has revised the introductory paragraph of Section VII of the Recipient LEP Guidance to acknowledge a recipient's discretion in drafting a written LEP plan yet to emphasize the many benefits that weigh in favor of such a written plan in the vast majority of cases.

Informal Interpreters. As in the case of written LEP plans, a large number of the comments urged the incorporation of more definitive language strongly discouraging or severely limiting the use of informal interpreters such as family members, guardians, caretakers, friends, or fellow inmates or detainees. Some recommended that the draft guidance be revised to prohibit the use of informal interpreters except in limited or emergency situations. A common sub-theme running through many of these comments was a concern regarding the technical and ethical competency of such interpreters to ensure meaningful and appropriate access at the level and of the type contemplated under the DOJ Recipient LEP Guidance.[1]

As in the case of written LEP plans, the Department believes that the DOJ Recipient LEP Guidance provides sufficient guidance to allow recipients to strike the proper balance between the many situations where the use of informal interpreters is inappropriate, and the few situations where the transitory and/or limited use of informal interpreters is necessary and appropriate in light of the nature of a service or benefit being provided and the factual context in which that service or benefit is being provided. Nonetheless, the Department concludes that the potential for the inappropriate use of informal interpreters or, conversely, its unnecessary avoidance, can be minimized through additional clarifications in the DOJ Recipient LEP Guidance. Towards that end, the subsection titled ''Use of Family Members, Friends, Other Inmates, or Other Detainees as Interpreters' of Section VI.A. of the DOJ Recipient LEP Guidance has been revised to include guardians and caretakers among the potential class of informal interpreters, to note that beneficiaries who elect to provide their own informal interpreter do so at their own expense, to clarify that reliance on informal interpreters should not be part of any recipient LEP plan, and to expand the discussion of the special considerations that should guide a recipient's limited reliance on informal interpreters.

Safe Harbors. Several comments focused on safe harbor and vital documents provisions of the written translations section of the DOJ Recipient LEP Guidance.[2] A few comments observed that the safe harbor standard set out in the Recipient LEP Guidance was too high, potentially permitting recipients to avoid translating several critical types of vital documents (*e.g.,* notices of denials of benefits or rights, leases, rules of conduct, *etc.*). In contrast, another comment pointed to this same standard as support for the position that the safe harbor provision was too low, potentially requiring a large recipient to incur extraordinary fiscal burdens to translate all documents associated with the program or activity.

The decision as to what program-related documents should be translated into languages other than English is a difficult one. While documents generated by a recipient may be helpful in understanding a program or activity, not all are critical or vital to ensuring meaningful access by beneficiaries generally and LEP persons specifically. Some documents may create or define legally enforceable rights or responsibilities on the part of individual beneficiaries (*e.g.,* leases, rules of conduct, notices of benefit denials, *etc.*). Others, such as application or certification forms, solicit important information required to establish or maintain eligibility to participate in a Federally-assisted program or activity. And for some programs or activities, written documents may be the core benefit or service provided by the program or activity. Moreover, some programs or activities may be specifically focused on providing benefits or services to significant LEP populations. Finally, a recipient may elect to solicit vital information orally as a substitute for written documents. For example, many state unemployment insurance programs are transitioning away from paper-based application and certification forms in favor of telephone-based systems. Also, certain languages (*e.g.,* Hmong) are oral rather than written, and thus a high percentage of such LEP speakers will likely be unable to read translated documents or written instructions since it is only recently that such languages have been converted to a written form. Each of these factors should play a role in deciding what documents should be translated, what target languages other than English are appropriate, or even whether more effective alternatives to a continued reliance on written documents to obtain or process vital information exist.

As has been emphasized elsewhere, the Recipient LEP Guidance is not intended to provide a definitive answer governing the translation of written documents for all recipients applicable in all cases. Rather, in drafting the safe harbor and vital documents provisions of the Recipient LEP Guidance, the Department sought to provide one, but not necessarily the only, point of reference for when a recipient should consider translations of documents (or the implementation of alternatives to such documents) in light of its particular program or activity, the document or information in question, and the potential LEP populations served. In furtherance of this purpose, the safe harbor and vital document provisions of the Recipient LEP Guidance have been revised to clarify the elements of the flexible translation standard, and to acknowledge that distinctions can and should be made between frequently-encountered and less commonly-encountered languages when identifying languages for translation.

Costs Considerations. A number of comments focused on cost considerations as an element of the Department's flexible four-factor analysis for identifying and addressing the language assistance needs of LEP

[1] A few comments urged the Department to incorporate language detailing particular interpretation standards or approaches. The Department declines to set, as part of the DOJ Recipient LEP Guidance, professional or technical standards for interpretation applicable to all recipients in every community and in all situations. General guidelines for translator and interpreter competency are already set forth in the guidance. Technical and professional standards and necessary vocabulary and skills for court interpreters and interpreters in custodial interrogations, for instance, would be different from those for emergency service interpreters, or, in turn, those for interpreters in educational programs for correctional facilities. Thus, recipients, beneficiaries, and associations of professional interpreters and translators should collaborate in identifying the applicable professional and technical interpretation standards that are appropriate for particular situations.

[2] One comment pointed out that current demographic information based on the 2000 Census or other data was not readily available to assist recipients in identifying the number or proportion of LEP persons and the significant language groups among their otherwise eligible beneficiaries. The Department is aware of this potential difficulty and is, among other things, working with the Census Bureau, among other entities, to increase the availability of such demographic data.

persons. While none urged that costs be excluded, some comments expressed concern that a recipient could use cost as a basis for avoiding otherwise reasonable and necessary language assistance to LEP persons. In contrast, a few comments suggested that the flexible fact-dependent compliance standard incorporated by the DOJ Recipient LEP Guidance, when combined with the desire of most recipients to avoid the risk of noncompliance, could lead some large, state-wide recipients to incur unnecessary or inappropriate fiscal burdens in the face of already strained program budgets. The Department is mindful that cost considerations could be inappropriately used to avoid providing otherwise reasonable and necessary language assistance. Similarly, cost considerations could be inappropriately ignored or minimized to justify the provision of a particular level or type of language service where less costly equally effective alternatives exist. The Department also does not dismiss the possibility that the identified need for language services might be quite costly for certain types of recipients in certain communities, particularly if they have not been keeping up with the changing needs of the populations they serve over time.

The potential for possible abuse of cost considerations by some does not, in the Department's view, justify its elimination as a factor in all cases when determining the appropriate ''mix'' of reasonable language assistance services determined necessary under the DOJ Recipient LEP Guidance to ensure meaningful access by LEP persons to Federally assisted programs and activities. The Department continues to believe that costs are a legitimate consideration in identifying the reasonableness of particular language assistance measures, and that the DOJ Recipient LEP Guidance identifies the appropriate framework through which costs are to be considered.

In addition to the four larger concerns noted above, the Department has substituted, where appropriate, technical or stylistic changes that more clearly articulate, in the Department's view, the underlying principle, guideline, or recommendation detailed in the Guidance. In addition, the Guidance has been modified to expand the definition of ''courts'' to include administrative adjudications conducted by a recipient; to acknowledge that English language instruction is an important adjunct to (but not substitute for) the obligation to ensure access to Federally assisted programs and activities by all eligible persons; and to clarify the Guidance's application to activities undertaken by a recipient either voluntarily or under contract in support of a Federal agency's functions.

After appropriate revision based on a careful consideration of the comments, with particular focus on the common concerns summarized above, the Department adopts final ''Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons.'' The text of this final guidance document appears below.

It has been determined that this Guidance, which supplants existing Guidance on the same subject previously published at 66 FR 3834 (January 16, 2001), does not constitute a regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. 553.

Dated: June 12, 2002.

R. Alexander Acosta,

Principal Deputy Assistant Attorney General, Civil Rights Division.

I. Introduction

Most individuals living in the United States read, write, speak and understand English. There are many individuals, however, for whom English is not their primary language. For instance, based on the 2000 census, over 26 million individuals speak Spanish and almost 7 million individuals speak an Asian or Pacific Island language at home. If these individuals have a limited ability to read, write, speak, or understand English, they are limited English proficient, or ''LEP.'' While detailed data from the 2000 census has not yet been released, 26% of all Spanish-speakers, 29.9% of all Chinese-speakers, and 28.2% of all Vietnamese-speakers reported that they spoke English ''not well'' or ''not at all'' in response to the 1990 census.

Language for LEP individuals can be a barrier to accessing important benefits or services, understanding and exercising important rights, complying with applicable responsibilities, or understanding other information provided by Federally funded programs and activities. The Federal Government funds an array of services that can be made accessible to otherwise eligible LEP persons. The Federal Government is committed to improving the accessibility of these programs and activities to eligible LEP persons, a goal that reinforces its equally important commitment to promoting programs and activities designed to help individuals learn English. Recipients should not overlook the long-term positive impacts of incorporating or offering English as a Second Language (ESL) programs in parallel with language assistance services. ESL courses can serve as an important adjunct to a proper LEP plan. However, the fact that ESL classes are made available does not obviate the statutory and regulatory requirement to provide meaningful access for those who are not yet English proficient. Recipients of Federal financial assistance have an obligation to reduce language barriers that can preclude meaningful access by LEP persons to important government services.[1]

In certain circumstances, failure to ensure that LEP persons can effectively participate in or benefit from Federally assisted programs and activities may violate the prohibition under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d and Title VI regulations against national origin discrimination. The purpose of this policy guidance is to assist recipients in fulfilling their responsibilities to provide meaningful access to LEP persons under existing law. This policy guidance clarifies existing legal requirements for LEP persons by providing a description of the factors recipients should consider in fulfilling their responsibilities to LEP persons.[2] These are the same criteria DOJ will use in evaluating whether recipients are in compliance with Title VI and Title VI regulations.

The Department of Justice's role under Executive Order 13166 is unique. The Order charges DOJ with responsibility for providing LEP Guidance to other Federal agencies and for ensuring consistency among each agency-specific guidance. Consistency among Departments of the Federal government is particularly important. Inconsistency or contradictory guidance could confuse recipients of Federal funds and needlessly increase costs without rendering the meaningful access for LEP persons that this

[1] DOJ recognizes that many recipients had language assistance programs in place prior to the issuance of Executive Order 13166. This policy guidance provides a uniform framework for a recipient to integrate, formalize, and assess the continued vitality of these existing and possibly additional reasonable efforts based on the nature of its program or activity, the current needs of the LEP populations it encounters, and its prior experience in providing language services in the community it serves.

[2] The policy guidance is not a regulation but rather a guide. Title VI and its implementing regulations require that recipients take responsible steps to ensure meaningful access by LEP persons. This guidance provides an analytical framework that recipients may use to determine how best to comply with statutory and regulatory obligations to provide meaningful access to the benefits, services, information, and other important portions of their programs and activities for individuals who are limited English proficient.

Guidance is designed to address. As with most government initiatives, this requires balancing several principles. While this Guidance discusses that balance in some detail, it is important to note the basic principles behind that balance. First, we must ensure that Federally-assisted programs aimed at the American public do not leave some behind simply because they face challenges communicating in English. This is of particular importance because, in many cases, LEP individuals form a substantial portion of those encountered in Federally-assisted programs. Second, we must achieve this goal while finding constructive methods to reduce the costs of LEP requirements on small businesses, small local governments, or small non-profits that receive Federal financial assistance.

There are many productive steps that the Federal government, either collectively or as individual grant agencies, can take to help recipients reduce the costs of language services without sacrificing meaningful access for LEP persons. Without these steps, certain smaller grantees may well choose not to participate in Federally assisted programs, threatening the critical functions that the programs strive to provide. To that end, the Department plans to continue to provide assistance and guidance in this important area. In addition, DOJ plans to work with representatives of law enforcement, corrections, courts, administrative agencies, and LEP persons to identify and share model plans, examples of best practices, and cost-saving approaches. Moreover, DOJ intends to explore how language assistance measures, resources and cost-containment approaches developed with respect to its own Federally conducted programs and activities can be effectively shared or otherwise made available to recipients, particularly small businesses, small local governments, and small non-profits. An interagency working group on LEP has developed a Web site, *www.lep.gov,* to assist in disseminating this information to recipients, Federal agencies, and the communities being served.

Many commentators have noted that some have interpreted the case of *Alexander* v. *Sandoval,* 532 U.S. 275 (2001), as impliedly striking down the regulations promulgated under Title VI that form the basis for the part of Executive Order 13166 that applies to Federally assisted programs and activities. We have taken the position that this is not the case, and will continue to do so. Accordingly, we will strive to ensure that Federally assisted programs and activities work in a way that is effective for all eligible beneficiaries, including those with limited English proficiency.

II. Legal Authority

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, provides that no person shall ''on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.'' Section 602 authorizes and directs Federal agencies that are empowered to extend Federal financial assistance to any program or activity ''to effectuate the provisions of [section 601] * * * by issuing rules, regulations, or orders of general applicability.'' 42 U.S.C. 2000d–1.

Department of Justice regulations promulgated pursuant to section 602 forbid recipients from ''utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.'' 28 CFR 42.104(b)(2).

The Supreme Court, in *Lau* v. *Nichols,* 414 U.S. 563 (1974), interpreted regulations promulgated by the former Department of Health, Education, and Welfare, including a regulation similar to that of DOJ, 45 CFR 80.3(b)(2), to hold that Title VI prohibits conduct that has a disproportionate effect on LEP persons because such conduct constitutes national-origin discrimination. In *Lau,* a San Francisco school district that had a significant number of non-English speaking students of Chinese origin was required to take reasonable steps to provide them with a meaningful opportunity to participate in Federally funded educational programs.

On August 11, 2000, Executive Order 13166 was issued. ''Improving Access to Services for Persons with Limited English Proficiency,'' 65 FR 50121 (August 16, 2000). Under that order, every Federal agency that provides financial assistance to non-Federal entities must publish guidance on how their recipients can provide meaningful access to LEP persons and thus comply with Title VI regulations forbidding funding recipients from ''restrict[ing] an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program'' or from ''utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.''

On that same day, DOJ issued a general guidance document addressed to ''Executive Agency Civil Rights Officers'' setting forth general principles for agencies to apply in developing guidance documents for recipients pursuant to the Executive Order. ''Enforcement of Title VI of the Civil Rights Act of 1964 National Origin Discrimination Against Persons With Limited English Proficiency,'' 65 FR 50123 (August 16, 2000) (''DOJ LEP Guidance'').

Subsequently, Federal agencies raised questions regarding the requirements of the Executive Order, especially in light of the Supreme Court's decision in *Alexander* v. *Sandoval,* 532 U.S. 275 (2001). On October 26, 2001, Ralph F. Boyd, Jr., Assistant Attorney General for the Civil Rights Division, issued a memorandum for ''Heads of Departments and Agencies, General Counsels and Civil Rights Directors.'' This memorandum clarified and reaffirmed the DOJ LEP Guidance in light of *Sandoval.*[3] The Assistant Attorney General stated that because *Sandoval* did not invalidate any Title VI regulations that proscribe conduct that has a disparate impact on covered groups—the types of regulations that form the legal basis for the part of Executive Order 13166 that applies to Federally assisted programs and activities—the Executive Order remains in force.

Pursuant to Executive Order 13166, DOJ developed its own guidance document for recipients and initially

[3] The memorandum noted that some commentators have interpreted *Sandoval* as impliedly striking down the disparate-impact regulations promulgated under Title VI that form the basis for the part of Executive Order 13166 that applies to Federally assisted programs and activities. *See, e.g., Sandoval,* 532 U.S. at 286, 286 n.6 (''[W]e assume for purposes of this decision that section 602 confers the authority to promulgate disparate-impact regulations; * * * We cannot help observing, however, how strange it is to say that disparate-impact regulations are 'inspired by, at the service of, and inseparably intertwined with ' Sec. 601 * * * when Sec. 601 permits the very behavior that the regulations forbid.''). The memorandum, however, made clear that DOJ disagreed with the commentators' interpretation. *Sandoval* holds principally that there is no private right of action to enforce Title VI disparate-impact regulations. It did not address the validity of those regulations or Executive Order 13166 or otherwise limit the authority and responsibility of Federal grant agencies to enforce their own implementing regulations.

issued it on January 16, 2001. ''Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons,'' 66 FR 3834 (January 16, 2001) (''LEP Guidance for DOJ Recipients''). Because DOJ did not receive significant public comment on its January 16, 2001 publication, the Department republished on January 18, 2002 its existing guidance document for additional public comment. ''Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons,'' 67 FR 2671 (January 18, 2002). The Department has since received substantial public comment.

This guidance document is thus published pursuant to Executive Order 13166 and supplants the January 16, 2001 publication in light of the public comment received and Assistant Attorney General Boyd's October 26, 2001 clarifying memorandum.

III. Who Is Covered?

Department of Justice regulations, 28 CFR 42.104(b)(2), require all recipients of Federal financial assistance from DOJ to provide meaningful access to LEP persons.[4] Federal financial assistance includes grants, training, use of equipment, donations of surplus property, and other assistance. Recipients of DOJ assistance include, for example:

- Police and sheriffs' departments
- Departments of corrections, jails, and detention facilities, including those recipients that house detainees of the Immigration and Naturalization Service
- Courts [5]
- Certain non profit agencies with law enforcement, public safety, and victim assistance missions;
- Other entities with public safety and emergency service missions.

Subrecipients likewise are covered when Federal funds are passed through from one recipient to a subrecipient.

Coverage extends to a recipient's entire program or activity, *i.e.,* to all parts of a recipient's operations. This is true even if only one part of the recipient receives the Federal assistance.[6]

Example: DOJ provides assistance to a state department of corrections to improve a particular prison facility. All of the operations of the entire state department of corrections—not just the particular prison—are covered.

Finally, some recipients operate in jurisdictions in which English has been declared the official language. Nonetheless, these recipients continue to be subject to Federal non-discrimination requirements, including those applicable to the provision of Federally assisted services to persons with limited English proficiency.

IV. Who Is a Limited English Proficient Individual?

Individuals who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English can be limited English proficient, or ''LEP,'' entitled to language assistance with respect to a particular type of service, benefit, or encounter.

Examples of populations likely to include LEP persons who are encountered and/or served by DOJ recipients and should be considered when planning language services include, but are not limited to:

- Persons who are in the custody of the recipient, including juveniles, detainees, wards, and inmates.
- Persons subject to or serviced by law enforcement activities, including, for example, suspects, violators, witnesses, victims, those subject to immigration-related investigations by recipient law enforcement agencies, and community members seeking to participate in crime prevention or awareness activities.
- Persons who encounter the court system.
- Parents and family members of the above.

V. How Does a Recipient Determine the Extent of Its Obligation To Provide LEP Services?

Recipients are required to take reasonable steps to ensure meaningful access to their programs and activities by LEP persons. While designed to be a flexible and fact-dependent standard, the starting point is an individualized assessment that balances the following four factors: (1) The number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and (4) the resources available to the grantee/recipient and costs. As indicated above, the intent of this guidance is to suggest a balance that ensures meaningful access by LEP persons to critical services while not imposing undue burdens on small business, small local governments, or small nonprofits.

After applying the above four-factor analysis, a recipient may conclude that different language assistance measures are sufficient for the different types of programs or activities in which it engages. For instance, some of a recipient's activities will be more important than others and/or have greater impact on or contact with LEP persons, and thus may require more in the way of language assistance. The flexibility that recipients have in addressing the needs of the LEP populations they serve does not diminish, and should not be used to minimize, the obligation that those needs be addressed. DOJ recipients should apply the following four factors to the various kinds of contacts that they have with the public to assess language needs and decide what reasonable steps they should take to ensure meaningful access for LEP persons.

(1) The Number or Proportion of LEP Persons Served or Encountered in the Eligible Service Population

One factor in determining what language services recipients should provide is the number or proportion of LEP persons from a particular language group served or encountered in the eligible service population. The greater the number or proportion of these LEP persons, the more likely language services are needed. Ordinarily, persons ''eligible to be served, or likely to be directly affected, by'' a recipient's program or activity are those who are served or encountered in the eligible service population. This population will be program-specific, and includes persons who are in the geographic area that has been approved by a Federal grant agency as the recipient's service area. However, where, for instance, a precinct serves a large LEP population, the appropriate service area is most likely the precinct, and not the entire population served by the department. Where no service area has previously been approved, the relevant service area may be that which is approved by state or local authorities or designated by the

[4] Pursuant to Executive Order 13166, the meaningful access requirement of the Title VI regulations and the four-factor analysis set forth in the DOJ LEP Guidance are to additionally apply to the programs and activities of Federal agencies, including the Department of Justice.

[5] As used in this guidance, the word ''court'' or ''courts'' includes administrative adjudicatory systems or administrative hearings administered or conducted by a recipient.

[6] However, if a Federal agency were to decide to terminate Federal funds based on noncompliance with Title VI or its regulations, only funds directed to the particular program or activity that is out of compliance would be terminated. 42 U.S.C. 2000d–1.

recipient itself, provided that these designations do not themselves discriminatorily exclude certain populations. Appendix A provides examples to assist in determining the relevant service area. When considering the number or proportion of LEP individuals in a service area, recipients should consider LEP parent(s) when their English-proficient or LEP minor children and dependents encounter the legal system.

Recipients should first examine their prior experiences with LEP encounters and determine the breadth and scope of language services that were needed. In conducting this analysis, it is important to include language minority populations that are eligible for their programs or activities but may be underserved because of existing language barriers. Other data should be consulted to refine or validate a recipient's prior experience, including the latest census data for the area served, data from school systems and from community organizations, and data from state and local governments.[7] Community agencies, school systems, religious organizations, legal aid entities, and others can often assist in identifying populations for whom outreach is needed and who would benefit from the recipients' programs and activities were language services provided.

(2) The Frequency With Which LEP Individuals Come in Contact With the Program

Recipients should assess, as accurately as possible, the frequency with which they have or should have contact with an LEP individual from different language groups seeking assistance. The more frequent the contact with a particular language group, the more likely that enhanced language services in that language are needed. The steps that are reasonable for a recipient that serves an LEP person on a one-time basis will be very different than those expected from a recipient that serves LEP persons daily. It is also advisable to consider the frequency of different types of language contacts. For example, frequent contacts with Spanish-speaking people who are LEP may require certain assistance in Spanish. Less frequent contact with different language groups may suggest a different and less intensified solution. If an LEP individual accesses a program or service on a daily basis, a recipient has greater duties than if the same individual's program or activity contact is unpredictable or infrequent. But even recipients that serve LEP persons on an unpredictable or infrequent basis should use this balancing analysis to determine what to do if an LEP individual seeks services under the program in question. This plan need not be intricate. It may be as simple as being prepared to use one of the commercially-available telephonic interpretation services to obtain immediate interpreter services. In applying this standard, recipients should take care to consider whether appropriate outreach to LEP persons could increase the frequency of contact with LEP language groups.

(3) The Nature and Importance of the Program, Activity, or Service Provided by the Program

The more important the activity, information, service, or program, or the greater the possible consequences of the contact to the LEP individuals, the more likely language services are needed. The obligations to communicate rights to a person who is arrested or to provide medical services to an ill or injured inmate differ, for example, from those to provide bicycle safety courses or recreational programming. A recipient needs to determine whether denial or delay of access to services or information could have serious or even life-threatening implications for the LEP individual. Decisions by a Federal, State, or local entity to make an activity compulsory, such as particular educational programs in a correctional facility or the communication of Miranda rights, can serve as strong evidence of the program's importance.

(4) The Resources Available to the Recipient and Costs

A recipient's level of resources and the costs that would be imposed on it may have an impact on the nature of the steps it should take. Smaller recipients with more limited budgets are not expected to provide the same level of language services as larger recipients with larger budgets. In addition, ''reasonable steps'' may cease to be reasonable where the costs imposed substantially exceed the benefits.

Resource and cost issues, however, can often be reduced by technological advances; the sharing of language assistance materials and services among and between recipients, advocacy groups, and Federal grant agencies; and reasonable business practices. Where appropriate, training bilingual staff to act as interpreters and translators, information sharing through industry groups, telephonic and video conferencing interpretation services, pooling resources and standardizing documents to reduce translation needs, using qualified translators and interpreters to ensure that documents need not be ''fixed'' later and that inaccurate interpretations do not cause delay or other costs, centralizing interpreter and translator services to achieve economies of scale, or the formalized use of qualified community volunteers, for example, may help reduce costs.[8] Recipients should carefully explore the most cost-effective means of delivering competent and accurate language services before limiting services due to resource concerns. Large entities and those entities serving a significant number or proportion of LEP persons should ensure that their resource limitations are well-substantiated before using this factor as a reason to limit language assistance. Such recipients may find it useful to be able to articulate, through documentation or in some other reasonable manner, their process for determining that language services would be limited based on resources or costs.

This four-factor analysis necessarily implicates the ''mix'' of LEP services required. Recipients have two main ways to provide language services: Oral interpretation either in person or via telephone interpretation service (hereinafter ''interpretation'') and written translation (hereinafter ''translation''). Oral interpretation can range from on-site interpreters for critical services provided to a high volume of LEP persons to access through commercially-available telephonic interpretation services. Written translation, likewise, can range from translation of an entire document to translation of a short description of the document. In some cases, language services should be made available on an expedited basis while in others the LEP individual may be referred to another office of the recipient for language assistance.

The correct mix should be based on what is both necessary and reasonable in light of the four-factor analysis. For

[7] The focus of the analysis is on lack of English proficiency, not the ability to speak more than one language. Note that demographic data may indicate the most frequently spoken languages other than English and the percentage of people who speak that language who speak or understand English less than well. Some of the most commonly spoken languages other than English may be spoken by people who are also overwhelmingly proficient in English. Thus, they may not be the languages spoken most frequently by limited English proficient individuals. When using demographic data, it is important to focus in on the languages spoken by those who are not proficient in English.

[8] Small recipients with limited resources may find that entering into a bulk telephonic interpretation service contract will prove cost effective.

instance, a police department in a largely Hispanic neighborhood may need immediate oral interpreters available and should give serious consideration to hiring some bilingual staff. (Of course, many police departments have already made such arrangements.) In contrast, there may be circumstances where the importance and nature of the activity and number or proportion and frequency of contact with LEP persons may be low and the costs and resources needed to provide language services may be high—such as in the case of a voluntary general public tour of a courthouse—in which pre-arranged language services for the particular service may not be necessary. Regardless of the type of language service provided, quality and accuracy of those services can be critical in order to avoid serious consequences to the LEP person and to the recipient. Recipients have substantial flexibility in determining the appropriate mix.

VI. Selecting Language Assistance Services

Recipients have two main ways to provide language services: oral and written language services. Quality and accuracy of the language service is critical in order to avoid serious consequences to the LEP person and to the recipient.

A. Oral Language Services (Interpretation)

Interpretation is the act of listening to something in one language (source language) and orally translating it into another language (target language). Where interpretation is needed and is reasonable, recipients should consider some or all of the following options for providing competent interpreters in a timely manner:

Competence of Interpreters. When providing oral assistance, recipients should ensure competency of the language service provider, no matter which of the strategies outlined below are used. Competency requires more than self-identification as bilingual. Some bilingual staff and community volunteers, for instance, may be able to communicate effectively in a different language when communicating information directly in that language, but not be competent to interpret in and out of English. Likewise, they may not be able to do written translations.

Competency to interpret, however, does not necessarily mean formal certification as an interpreter, although certification is helpful. When using interpreters, recipients should ensure that they:

Demonstrate proficiency in and ability to communicate information accurately in both English and in the other language and identify and employ the appropriate mode of interpreting (*e.g.,* consecutive, simultaneous, summarization, or sight translation);

Have knowledge in both languages of any specialized terms or concepts peculiar to the entity's program or activity and of any particularized vocabulary and phraseology used by the LEP person; [9] and understand and follow confidentiality and impartiality rules to the same extent the recipient employee for whom they are interpreting and/or to the extent their position requires.

Understand and adhere to their role as interpreters without deviating into a role as counselor, legal advisor, or other roles (particularly in court, administrative hearings, or law enforcement contexts).

Some recipients, such as courts, may have additional self-imposed requirements for interpreters. Where individual rights depend on precise, complete, and accurate interpretation or translations, particularly in the contexts of courtrooms and custodial or other police interrogations, the use of certified interpreters is strongly encouraged.[10] Where such proceedings are lengthy, the interpreter will likely need breaks and team interpreting may be appropriate to ensure accuracy and to prevent errors caused by mental fatigue of interpreters.

While quality and accuracy of language services is critical, the quality and accuracy of language services is nonetheless part of the appropriate mix of LEP services required. The quality and accuracy of language services in a prison hospital emergency room, for example, must be extraordinarily high, while the quality and accuracy of language services in a bicycle safety class need not meet the same exacting standards.

Finally, when interpretation is needed and is reasonable, it should be provided in a timely manner. To be meaningfully effective, language assistance should be timely. While there is no single definition for ''timely'' applicable to all types of interactions at all times by all types of recipients, one clear guide is that the language assistance should be provided at a time and place that avoids the effective denial of the service, benefit, or right at issue or the imposition of an undue burden on or delay in important rights, benefits, or services to the LEP person. For example, when the timeliness of services is important, such as with certain activities of DOJ recipients providing law enforcement, health, and safety services, and when important legal rights are at issue, a recipient would likely not be providing meaningful access if it had one bilingual staffer available one day a week to provide the service. Such conduct would likely result in delays for LEP persons that would be significantly greater than those for English proficient persons. Conversely, where access to or exercise of a service, benefit, or right is not effectively precluded by a reasonable delay, language assistance can likely be delayed for a reasonable period.

Hiring Bilingual Staff. When particular languages are encountered often, hiring bilingual staff offers one of the best, and often most economical, options. Recipients can, for example, fill public contact positions, such as 911 operators, police officers, guards, or program directors, with staff who are bilingual and competent to communicate directly with LEP persons in their language. If bilingual staff are also used to interpret between English speakers and LEP persons, or to orally interpret written documents from English into another language, they should be competent in the skill of interpreting. Being bilingual does not necessarily mean that a person has the ability to interpret. In addition, there may be times when the role of the bilingual employee may conflict with the role of an interpreter (for instance, a bilingual law clerk would probably not be able to perform effectively the role of a courtroom or administrative hearing interpreter and law clerk at the same time, even if the law clerk were a qualified interpreter). Effective management strategies, including any appropriate adjustments in assignments and protocols for using bilingual staff, can ensure that bilingual staff are fully and appropriately utilized. When bilingual staff cannot meet all of the language service obligations of the recipient, the recipient should turn to other options.

[9] Many languages have ''regionalisms,'' or differences in usage. For instance, a word that may be understood to mean something in Spanish for someone from Cuba may not be so understood by someone from Mexico. In addition, because there may be languages which do not have an appropriate direct interpretation of some courtroom or legal terms and the interpreter should be so aware and be able to provide the most appropriate interpretation. The interpreter should likely make the recipient aware of the issue and the interpreter and recipient can then work to develop a consistent and appropriate set of descriptions of these terms in that language that can be used again, when appropriate.

[10] For those languages in which no formal accreditation or certification currently exists, courts and law enforcement agencies should consider a formal process for establishing the credentials of the interpreter.

Hiring Staff Interpreters. Hiring interpreters may be most helpful where there is a frequent need for interpreting services in one or more languages. Depending on the facts, sometimes it may be necessary and reasonable to provide on-site interpreters to provide accurate and meaningful communication with an LEP person.

Contracting for Interpreters. Contract interpreters may be a cost-effective option when there is no regular need for a particular language skill. In addition to commercial and other private providers, many community-based organizations and mutual assistance associations provide interpretation services for particular languages. Contracting with and providing training regarding the recipient's programs and processes to these organizations can be a cost-effective option for providing language services to LEP persons from those language groups.

Using Telephone Interpreter Lines. Telephone interpreter service lines often offer speedy interpreting assistance in many different languages. They may be particularly appropriate where the mode of communicating with an English proficient person would also be over the phone. Although telephonic interpretation services are useful in many situations, it is important to ensure that, when using such services, the interpreters used are competent to interpret any technical or legal terms specific to a particular program that may be important parts of the conversation. Nuances in language and non-verbal communication can often assist an interpreter and cannot be recognized over the phone. Video teleconferencing may sometimes help to resolve this issue where necessary. In addition, where documents are being discussed, it is important to give telephonic interpreters adequate opportunity to review the document prior to the discussion and any logistical problems should be addressed.

Using Community Volunteers. In addition to consideration of bilingual staff, staff interpreters, or contract interpreters (either in-person or by telephone) as options to ensure meaningful access by LEP persons, use of recipient-coordinated community volunteers, working with, for instance, community-based organizations may provide a cost-effective supplemental language assistance strategy under appropriate circumstances. They may be particularly useful in providing language access for a recipient's less critical programs and activities. To the extent the recipient relies on community volunteers, it is often best to use volunteers who are trained in the information or services of the program and can communicate directly with LEP persons in their language. Just as with all interpreters, community volunteers used to interpret between English speakers and LEP persons, or to orally translate documents, should be competent in the skill of interpreting and knowledgeable about applicable confidentiality and impartiality rules. Recipients should consider formal arrangements with community-based organizations that provide volunteers to address these concerns and to help ensure that services are available more regularly.

Use of Family Members, Friends, Other Inmates, or Other Detainees as Interpreters. Although recipients should not plan to rely on an LEP person's family members, friends, or other informal interpreters to provide meaningful access to important programs and activities, where LEP persons so desire, they should be permitted to use, at their own expense, an interpreter of their own choosing (whether a professional interpreter, family member, friend, other inmate, other detainee) in place of or as a supplement to the free language services expressly offered by the recipient. LEP persons may feel more comfortable when a trusted family member, friend, or other inmate acts as an interpreter. In addition, in exigent circumstances that are not reasonably foreseeable, temporary use of interpreters not provided by the recipient may be necessary. However, with proper planning and implementation, recipients should be able to avoid most such situations.

Recipients, however, should take special care to ensure that family, legal guardians, caretakers, and other informal interpreters are appropriate in light of the circumstances and subject matter of the program, service or activity, including protection of the recipient's own administrative or enforcement interest in accurate interpretation. In many circumstances, family members (especially children), friends, other inmates or other detainees are not competent to provide quality and accurate interpretations. Issues of confidentiality, privacy, or conflict of interest may also arise. LEP individuals may feel uncomfortable revealing or describing sensitive, confidential, or potentially embarrassing medical, law enforcement (*e.g.,* sexual or violent assaults), family, or financial information to a family member, friend, or member of the local community.[11] In addition, such informal interpreters may have a personal connection to the LEP person or an undisclosed conflict of interest, such as the desire to protect themselves or another perpetrator in a domestic violence or other criminal matter. For these reasons, when oral language services are necessary, recipients should generally offer competent interpreter services free of cost to the LEP person. For DOJ recipient programs and activities, this is particularly true in a courtroom, administrative hearing, pre- and post-trial proceedings, situations in which health, safety, or access to important benefits and services are at stake, or when credibility and accuracy are important to protect an individual's rights and access to important services.

An example of such a case is when police officers respond to a domestic violence call. In such a case, use of family members or neighbors to interpret for the alleged victim, perpetrator, or witnesses may raise serious issues of competency, confidentiality, and conflict of interest and is thus inappropriate. While issues of competency, confidentiality, and conflict of interest in the use of family members (especially children), friends, other inmates or other detainees often make their use inappropriate, the use of these individuals as interpreters may be an appropriate option where proper application of the four factors would lead to a conclusion that recipient-provided services are not necessary. An example of this is a voluntary educational tour of a courthouse offered to the public. There, the importance and nature of the activity may be relatively low and unlikely to implicate issues of confidentiality, conflict of interest, or the need for accuracy. In addition, the resources needed and costs of providing language services may be high. In such a setting, an LEP person's use of family, friends, or others may be appropriate.

If the LEP person voluntarily chooses to provide his or her own interpreter, a recipient should consider whether a record of that choice and of the recipient's offer of assistance is appropriate. Where precise, complete,

[11] For example, special circumstances of confinement may raise additional serious concerns regarding the voluntary nature, conflicts of interest, and privacy issues surrounding the use of inmates and detainees as interpreters, particularly where an important right, benefit, service, disciplinary concern, or access to personal or law enforcement information is at stake. In some situations, inmates could potentially misuse information they obtained in interpreting for other inmates. In addition to ensuring competency and accuracy of the interpretation, recipients should take these special circumstances into account when determining whether an inmate or detainee makes a knowing and voluntary choice to use another inmate or detainee as an interpreter.

and accurate interpretations or translations of information and/or testimony are critical for law enforcement, adjudicatory, or legal reasons, or where the competency of the LEP person's interpreter is not established, a recipient might decide to provide its own, independent interpreter, even if an LEP person wants to use his or her own interpreter as well. Extra caution should be exercised when the LEP person chooses to use a minor as the interpreter. While the LEP person's decision should be respected, there may be additional issues of competency, confidentiality, or conflict of interest when the choice involves using children as interpreters. The recipient should take care to ensure that the LEP person's choice is voluntary, that the LEP person is aware of the possible problems if the preferred interpreter is a minor child, and that the LEP person knows that a competent interpreter could be provided by the recipient at no cost.

B. Written Language Services (Translation)

Translation is the replacement of a written text from one language (source language) into an equivalent written text in another language (target language).

What Documents Should be Translated? After applying the four-factor analysis, a recipient may determine that an effective LEP plan for its particular program or activity includes the translation of vital written materials into the language of each frequently-encountered LEP group eligible to be served and/or likely to be affected by the recipient's program.

Such written materials could include, for example:

- Consent and complaint forms
- Intake forms with the potential for important consequences
- Written notices of rights, denial, loss, or decreases in benefits or services, parole, and other hearings
- Notices of disciplinary action
- Notices advising LEP persons of free language assistance
- Prison rule books
- Written tests that do not assess English language competency, but test competency for a particular license, job, or skill for which knowing English is not required
- Applications to participate in a recipient's program or activity or to receive recipient benefits or services.

Whether or not a document (or the information it solicits) is ''vital'' may depend upon the importance of the program, information, encounter, or service involved, and the consequence to the LEP person if the information in question is not provided accurately or in a timely manner. For instance, applications for bicycle safety courses should not generally be considered vital, whereas applications for drug and alcohol counseling in prison could be considered vital. Where appropriate, recipients are encouraged to create a plan for consistently determining, over time and across its various activities, what documents are ''vital'' to the meaningful access of the LEP populations they serve.

Classifying a document as vital or non-vital is sometimes difficult, especially in the case of outreach materials like brochures or other information on rights and services. Awareness of rights or services is an important part of ''meaningful access.'' Lack of awareness that a particular program, right, or service exists may effectively deny LEP individuals meaningful access. Thus, where a recipient is engaged in community outreach activities in furtherance of its activities, it should regularly assess the needs of the populations frequently encountered or affected by the program or activity to determine whether certain critical outreach materials should be translated. Community organizations may be helpful in determining what outreach materials may be most helpful to translate. In addition, the recipient should consider whether translations of outreach material may be made more effective when done in tandem with other outreach methods, including utilizing the ethnic media, schools, religious, and community organizations to spread a message.

Sometimes a document includes both vital and non-vital information. This may be the case when the document is very large. It may also be the case when the title and a phone number for obtaining more information on the contents of the document in frequently-encountered languages other than English is critical, but the document is sent out to the general public and cannot reasonably be translated into many languages. Thus, vital information may include, for instance, the provision of information in appropriate languages other than English regarding where a LEP person might obtain an interpretation or translation of the document.

Into What Languages Should Documents be Translated? The languages spoken by the LEP individuals with whom the recipient has contact determine the languages into which vital documents should be translated. A distinction should be made, however, between languages that are frequently encountered by a recipient and less commonly-encountered languages. Many recipients serve communities in large cities or across the country. They regularly serve LEP persons who speak dozens and sometimes over 100 different languages. To translate all written materials into all of those languages is unrealistic. Although recent technological advances have made it easier for recipients to store and share translated documents, such an undertaking would incur substantial costs and require substantial resources. Nevertheless, well-substantiated claims of lack of resources to translate all vital documents into dozens of languages do not necessarily relieve the recipient of the obligation to translate those documents into at least several of the more frequently-encountered languages and to set benchmarks for continued translations into the remaining languages over time. As a result, the extent of the recipient's obligation to provide written translations of documents should be determined by the recipient on a case-by-case basis, looking at the totality of the circumstances in light of the four-factor analysis. Because translation is a one-time expense, consideration should be given to whether the upfront cost of translating a document (as opposed to oral interpretation) should be amortized over the likely lifespan of the document when applying this four-factor analysis.

Safe Harbor. Many recipients would like to ensure with greater certainty that they comply with their obligations to provide written translations in languages other than English. Paragraphs (a) and (b) outline the circumstances that can provide a ''safe harbor'' for recipients regarding the requirements for translation of written materials. A ''safe harbor'' means that if a recipient provides written translations under these circumstances, such action will be considered strong evidence of compliance with the recipient's written-translation obligations.

The failure to provide written translations under the circumstances outlined in paragraphs (a) and (b) does not mean there is non-compliance. Rather, they provide a common starting point for recipients to consider whether and at what point the importance of the service, benefit, or activity involved; the nature of the information sought; and the number or proportion of LEP persons served call for written translations of commonly-used forms into frequently-encountered languages other than English. Thus, these paragraphs merely provide a guide for recipients that would like greater certainty of compliance than can be

provided by a fact-intensive, four-factor analysis.

Example: Even if the safe harbors are not used, if written translation of a certain document(s) would be so burdensome as to defeat the legitimate objectives of its program, the translation of the written materials is not necessary. Other ways of providing meaningful access, such as effective oral interpretation of certain vital documents, might be acceptable under such circumstances.

Safe Harbor. The following actions will be considered strong evidence of compliance with the recipient's written-translation obligations:

(a) The DOJ recipient provides written translations of vital documents for each eligible LEP language group that constitutes five percent or 1,000, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered. Translation of other documents, if needed, can be provided orally; or

(b) If there are fewer than 50 persons in a language group that reaches the five percent trigger in (a), the recipient does not translate vital written materials but provides written notice in the primary language of the LEP language group of the right to receive competent oral interpretation of those written materials, free of cost.

These safe harbor provisions apply to the translation of written documents only. They do not affect the requirement to provide meaningful access to LEP individuals through competent oral interpreters where oral language services are needed and are reasonable. For example, correctional facilities should, where appropriate, ensure that prison rules have been explained to LEP inmates, at orientation, for instance, prior to taking disciplinary action against them.

Competence of Translators. As with oral interpreters, translators of written documents should be competent. Many of the same considerations apply. However, the skill of translating is very different from the skill of interpreting, and a person who is a competent interpreter may or may not be competent to translate.

Particularly where legal or other vital documents are being translated, competence can often be achieved by use of certified translators. Certification or accreditation may not always be possible or necessary.[12] Competence can often be ensured by having a second, independent translator ''check'' the work of the primary translator. Alternatively, one translator can translate the document, and a second, independent translator could translate it back into English to check that the appropriate meaning has been conveyed. This is called ''back translation.''

Translators should understand the expected reading level of the audience and, where appropriate, have fundamental knowledge about the target language group's vocabulary and phraseology. Sometimes direct translation of materials results in a translation that is written at a much more difficult level than the English language version or has no relevant equivalent meaning.[13] Community organizations may be able to help consider whether a document is written at a good level for the audience. Likewise, consistency in the words and phrases used to translate terms of art, legal, or other technical concepts helps avoid confusion by LEP individuals and may reduce costs. Creating or using already-created glossaries of commonly-used terms may be useful for LEP persons and translators and cost effective for the recipient. Providing translators with examples of previous accurate translations of similar material by the recipient, other recipients, or Federal agencies may be helpful.

While quality and accuracy of translation services is critical, the quality and accuracy of translation services is nonetheless part of the appropriate mix of LEP services required. For instance, documents that are simple and have no legal or other consequence for LEP persons who rely on them may use translators that are less skilled than important documents with legal or other information upon which reliance has important consequences (including, e.g., information or documents of DOJ recipients regarding certain law enforcement, health, and safety services and certain legal rights).

The permanent nature of written translations, however, imposes additional responsibility on the recipient to ensure that the quality and accuracy permit meaningful access by LEP persons.

VII. Elements of Effective Plan on Language Assistance for LEP Persons

After completing the four-factor analysis and deciding what language assistance services are appropriate, a recipient should develop an implementation plan to address the identified needs of the LEP populations they serve. Recipients have considerable flexibility in developing this plan. The development and maintenance of a periodically-updated written plan on language assistance for LEP persons (''LEP plan'') for use by recipient employees serving the public will likely be the most appropriate and cost-effective means of documenting compliance and providing a framework for the provision of timely and reasonable language assistance. Moreover, such written plans would likely provide additional benefits to a recipient's managers in the areas of training, administration, planning, and budgeting. These benefits should lead most recipients to document in a written LEP plan their language assistance services, and how staff and LEP persons can access those services. Despite these benefits, certain DOJ recipients, such as recipients serving very few LEP persons and recipients with very limited resources, may choose not to develop a written LEP plan. However, the absence of a written LEP plan does not obviate the underlying obligation to ensure meaningful access by LEP persons to a recipient's program or activities. Accordingly, in the event that a recipient elects not to develop a written plan, it should consider alternative ways to articulate in some other reasonable manner a plan for providing meaningful access. Entities having significant contact with LEP persons, such as schools, religious organizations, community groups, and groups working with new immigrants can be very helpful in providing important input into this planning process from the beginning.

The following five steps may be helpful in designing an LEP plan and are typically part of effective implementation plans.

(1) Identifying LEP Individuals Who Need Language Assistance

The first two factors in the four-factor analysis require an assessment of the number or proportion of LEP individuals eligible to be served or

[12] For those languages in which no formal accreditation currently exists, a particular level of membership in a professional translation association can provide some indicator of professionalism.

[13] For instance, there may be languages which do not have an appropriate direct translation of some courtroom or legal terms and the translator should be able to provide an appropriate translation. The translator should likely also make the recipient aware of this. Recipients can then work with translators to develop a consistent and appropriate set of descriptions of these terms in that language that can be used again, when appropriate. Recipients will find it more effective and less costly if they try to maintain consistency in the words and phrases used to translate terms of art and legal or other technical concepts. Creating or using already-created glossaries of commonly used terms may be useful for LEP persons and translators and cost effective for the recipient. Providing translators with examples of previous translations of similar material by the recipient, other recipients, or Federal agencies may be helpful.

encountered and the frequency of encounters. This requires recipients to identify LEP persons with whom it has contact.

One way to determine the language of communication is to use language identification cards (or ''I speak cards''), which invite LEP persons to identify their language needs to staff. Such cards, for instance, might say ''I speak Spanish'' in both Spanish and English, ''I speak Vietnamese'' in both English and Vietnamese, etc. To reduce costs of compliance, the Federal government has made a set of these cards available on the Internet. The Census Bureau ''I speak card'' can be found and downloaded at *http://www.usdoj.gov/crt/cor/13166.htm*. When records are normally kept of past interactions with members of the public, the language of the LEP person can be included as part of the record. In addition to helping employees identify the language of LEP persons they encounter, this process will help in future applications of the first two factors of the four-factor analysis. In addition, posting notices in commonly encountered languages notifying LEP persons of language assistance will encourage them to self-identify.

(2) Language Assistance Measures

An effective LEP plan would likely include information about the ways in which language assistance will be provided. For instance, recipients may want to include information on at least the following:

- Types of language services available.
- How staff can obtain those services.
- How to respond to LEP callers.
- How to respond to written communications from LEP persons.
- How to respond to LEP individuals who have in-person contact with recipient staff.
- How to ensure competency of interpreters and translation services.

(3) Training Staff

Staff should know their obligations to provide meaningful access to information and services for LEP persons. An effective LEP plan would likely include training to ensure that:

- Staff know about LEP policies and procedures.
- Staff having contact with the public (or those in a recipient's custody) are trained to work effectively with in-person and telephone interpreters.

Recipients may want to include this training as part of the orientation for new employees. It is important to ensure that all employees in public contact positions (or having contact with those in a recipient's custody) are properly trained. Recipients have flexibility in deciding the manner in which the training is provided. The more frequent the contact with LEP persons, the greater the need will be for in-depth training. Staff with little or no contact with LEP persons may only have to be aware of an LEP plan. However, management staff, even if they do not interact regularly with LEP persons, should be fully aware of and understand the plan so they can reinforce its importance and ensure its implementation by staff.

(4) Providing Notice to LEP Persons

Once an agency has decided, based on the four factors, that it will provide language services, it is important for the recipient to let LEP persons know that those services are available and that they are free of charge. Recipients should provide this notice in a language LEP persons will understand. Examples of notification that recipients should consider include:

- Posting signs in intake areas and other entry points. When language assistance is needed to ensure meaningful access to information and services, it is important to provide notice in appropriate languages in intake areas or initial points of contact so that LEP persons can learn how to access those language services. This is particularly true in areas with high volumes of LEP persons seeking access to certain health, safety, or law enforcement services or activities run by DOJ recipients. For instance, signs in intake offices could state that free language assistance is available. The signs should be translated into the most common languages encountered. They should explain how to get the language help.[14]
- Stating in outreach documents that language services are available from the agency. Announcements could be in, for instance, brochures, booklets, and in outreach and recruitment information. These statements should be translated into the most common languages and could be ''tagged'' onto the front of common documents.
- Working with community-based organizations and other stakeholders to inform LEP individuals of the recipients' services, including the availability of language assistance services.
- Using a telephone voice mail menu. The menu could be in the most common languages encountered. It should provide information about available language assistance services and how to get them.
- Including notices in local newspapers in languages other than English.
- Providing notices on non-English-language radio and television stations about the available language assistance services and how to get them.
- Presentations and/or notices at schools and religious organizations.

(5) Monitoring and Updating the LEP Plan

Recipients should, where appropriate, have a process for determining, on an ongoing basis, whether new documents, programs, services, and activities need to be made accessible for LEP individuals, and they may want to provide notice of any changes in services to the LEP public and to employees. In addition, recipients should consider whether changes in demographics, types of services, or other needs require annual reevaluation of their LEP plan. Less frequent reevaluation may be more appropriate where demographics, services, and needs are more static. One good way to evaluate the LEP plan is to seek feedback from the community.

In their reviews, recipients may want to consider assessing changes in:

- Current LEP populations in service area or population affected or encountered.
- Frequency of encounters with LEP language groups.
- Nature and importance of activities to LEP persons.
- Availability of resources, including technological advances and sources of additional resources, and the costs imposed.
- Whether existing assistance is meeting the needs of LEP persons.
- Whether staff knows and understands the LEP plan and how to implement it.
- Whether identified sources for assistance are still available and viable.

In addition to these five elements, effective plans set clear goals, management accountability, and opportunities for community input and planning throughout the process.

VIII. Voluntary Compliance Effort

The goal for Title VI and Title VI regulatory enforcement is to achieve voluntary compliance. The requirement to provide meaningful access to LEP persons is enforced and implemented by DOJ through the procedures identified in the Title VI regulations. These procedures include complaint

[14] The Social Security Administration has made such signs available at http://www.ssa.gov/multilanguage/langlist1.htm. These signs could, for example, be modified for recipient use.

investigations, compliance reviews, efforts to secure voluntary compliance, and technical assistance.

The Title VI regulations provide that DOJ will investigate whenever it receives a complaint, report, or other information that alleges or indicates possible noncompliance with Title VI or its regulations. If the investigation results in a finding of compliance, DOJ will inform the recipient in writing of this determination, including the basis for the determination. DOJ uses voluntary mediation to resolve most complaints. However, if a case is fully investigated and results in a finding of noncompliance, DOJ must inform the recipient of the noncompliance through a Letter of Findings that sets out the areas of noncompliance and the steps that must be taken to correct the noncompliance. It must attempt to secure voluntary compliance through informal means. If the matter cannot be resolved informally, DOJ must secure compliance through the termination of Federal assistance after the DOJ recipient has been given an opportunity for an administrative hearing and/or by referring the matter to a DOJ litigation section to seek injunctive relief or pursue other enforcement proceedings. DOJ engages in voluntary compliance efforts and provides technical assistance to recipients at all stages of an investigation. During these efforts, DOJ proposes reasonable timetables for achieving compliance and consults with and assists recipients in exploring cost-effective ways of coming into compliance. In determining a recipient's compliance with the Title VI regulations, DOJ's primary concern is to ensure that the recipient's policies and procedures provide meaningful access for LEP persons to the recipient's programs and activities.

While all recipients must work toward building systems that will ensure access for LEP individuals, DOJ acknowledges that the implementation of a comprehensive system to serve LEP individuals is a process and that a system will evolve over time as it is implemented and periodically reevaluated. As recipients take reasonable steps to provide meaningful access to Federally assisted programs and activities for LEP persons, DOJ will look favorably on intermediate steps recipients take that are consistent with this Guidance, and that, as part of a broader implementation plan or schedule, move their service delivery system toward providing full access to LEP persons. This does not excuse noncompliance but instead recognizes that full compliance in all areas of a recipient's activities and for all potential language minority groups may reasonably require a series of implementing actions over a period of time. However, in developing any phased implementation schedule, DOJ recipients should ensure that the provision of appropriate assistance for significant LEP populations or with respect to activities having a significant impact on the health, safety, legal rights, or livelihood of beneficiaries is addressed first. Recipients are encouraged to document their efforts to provide LEP persons with meaningful access to Federally assisted programs and activities.

IX. Application to Specific Types of Recipients

Appendix A of this Guidance provides examples of how the meaningful access requirement of the Title VI regulations applies to law enforcement, corrections, courts, and other recipients of DOJ assistance.

A. State and Local Law Enforcement

Appendix A further explains how law enforcement recipients can apply the four factors to a range of encounters with the public. The responsibility for providing language services differs with different types of encounters.

Appendix A helps recipients identify the population they should consider when considering the types of services to provide. It then provides guidance and examples of applying the four factors. For instance, it gives examples on how to apply this guidance to:

- Receiving and responding to requests for help
- Enforcement stops short of arrest and field investigations
- Custodial interrogations
- Intake/detention Community outreach

B. Departments of Corrections

Appendix A also helps departments of corrections understand how to apply the four factors. For instance, it gives examples of LEP access in:

- Intake
- Disciplinary action
- Health and safety
- Participation in classes or other programs affecting length of sentence
- English as a Second Language (ESL) Classes
- Community corrections programs

C. Other Types of Recipients

Appendix A also applies the four factors and gives examples for other types of recipients. Those include, for example:

- Courts
- Juvenile Justice Programs
- Domestic Violence Prevention/ Treatment Programs

Appendix A—Application of LEP Guidance for DOJ Recipients to Specific Types of Recipients

While a wide range of entities receive Federal financial assistance through DOJ, most of DOJ's assistance goes to law enforcement agencies, including state and local police and sheriffs' departments, and to state departments of corrections. Sections A and B below provide examples of how these two major types of DOJ recipients might apply the four-factor analysis. Section C provides examples for other types of recipients. The examples in this Appendix are not meant to be exhaustive and may not apply in many situations.

The requirements of the Title VI regulations, as clarified by this Guidance, supplement, but do not supplant, constitutional and other statutory or regulatory provisions that may require LEP services. Thus, a proper application of the four-factor analysis and compliance with the Title VI regulations does not replace constitutional or other statutory protections mandating warnings and notices in languages other than English in the criminal justice context. Rather, this Guidance clarifies the Title VI regulatory obligation to address, in appropriate circumstances and in a reasonable manner, the language assistance needs of LEP individuals beyond those required by the Constitution or statutes and regulations other than the Title VI regulations.

A. State and Local Law Enforcement

For the vast majority of the public, exposure to law enforcement begins and ends with interactions with law enforcement personnel discharging their duties while on patrol, responding to a request for services, talking to witnesses, or conducting community outreach activities. For a much smaller number, that exposure includes a visit to a station house. And for an important but even smaller number, that visit to the station house results in one's exposure to the criminal justice, judicial, or juvenile justice systems.

The common thread running through these and other interactions between the public and law enforcement is the exchange of information. Where police and sheriffs' departments receive Federal financial assistance, these departments have an obligation to provide LEP services to LEP individuals to ensure that they have meaningful access to the system, including, for example, understanding rights and accessing police assistance. Language barriers can, for instance, prevent victims from effectively reporting crimes to the police and hinder police investigations of reported crimes. For example, failure to communicate effectively with a victim of domestic violence can result in reliance on the batterer or a minor child and failure to identify and protect against harm.

Many police and sheriffs' departments already provide language services in a wide variety of circumstances to obtain information effectively, to build trust and

relationships with the community, and to contribute to the safety of law enforcement personnel. For example, many police departments already have available printed Miranda rights in languages other than English as well as interpreters available to inform LEP persons of their rights and to interpret police interviews.[1] In areas where significant LEP populations reside, law enforcement officials already may have forms and notices in languages other than English or they may employ bilingual law enforcement officers, intake personnel, counselors, and support staff. These experiences can form a strong basis for applying the four-factor analysis and complying with the Title VI regulations.

1. General Principles

The touchstone of the four-factor analysis is reasonableness based upon the specific purposes, needs, and capabilities of the law enforcement service under review and an appreciation of the nature and particularized needs of the LEP population served. Accordingly, the analysis cannot provide a single uniform answer on how service to LEP persons must be provided in all programs or activities in all situations or whether such service need be provided at all. Knowledge of local conditions and community needs becomes critical in determining the type and level of language services needed.

Before giving specific examples, several general points should assist law enforcement in correctly applying the analysis to the wide range of services employed in their particular jurisdictions.

a. Permanent Versus Seasonal Populations

In many communities, resident populations change over time or season. For example, in some resort communities, populations swell during peak vacation periods, many times exceeding the number of permanent residents of the jurisdiction. In other communities, primarily agricultural areas, transient populations of workers will require increased law enforcement services during the relevant harvest season. This dynamic demographic ebb and flow can also dramatically change the size and nature of the LEP community likely to come into contact with law enforcement personnel. Thus, law enforcement officials may not want to limit their analysis to numbers and percentages of permanent residents. In assessing factor one—the number or proportion of LEP individuals—police departments should consider any significant but temporary changes in a jurisdiction's demographics.

Example: A rural jurisdiction has a permanent population of 30,000, 7% of which is Hispanic. Based on demographic data and on information from the contiguous school district, of that number, only 15% are estimated to be LEP individuals. Thus, the total estimated permanent LEP population is 315 or approximately 1% of the total permanent population. Under the four-factor analysis, a sheriffs' department could reasonably conclude that the small number of LEP persons makes the affirmative translation of documents and/or employment of bilingual staff unnecessary. However, during the spring and summer planting and harvest seasons, the local population swells to 40,000 due to the influx of seasonal agricultural workers. Of this transitional number, about 75% are Hispanic and about 50% of that number are LEP individuals. This information comes from the schools and a local migrant worker community group. Thus, during the harvest season, the jurisdiction's LEP population increases to over 10% of all residents. In this case, the department may want to consider whether it is required to translate vital written documents into Spanish. In addition, this increase in LEP population during those seasons makes it important for the jurisdiction to review its interpretation services to ensure meaningful access for LEP individuals.

b. Target Audiences

For most law enforcement services, the target audience is defined in geographic rather than programmatic terms. However, some services may be targeted to reach a particular audience (*e.g.*, elementary school children, elderly, residents of high crime areas, minority communities, small business owners/operators). Also, within the larger geographic area covered by a police department, certain precincts or portions of precincts may have concentrations of LEP persons. In these cases, even if the overall number or proportion of LEP individuals in the district is low, the frequency of contact may be foreseeably higher for certain areas or programs. Thus, the second factor—frequency of contact—should be considered in light of the specific program or the geographic area being served.

Example: A police department that receives funds from the DOJ Office of Justice Programs initiates a program to increase awareness and understanding of police services among elementary school age children in high crime areas of the jurisdiction. This program involves ''Officer in the Classroom'' presentations at elementary schools located in areas of high poverty. The population of the jurisdiction is estimated to include only 3% LEP individuals. However, the LEP population at the target schools is 35%, the vast majority of whom are Vietnamese speakers. In applying the four-factor analysis, the higher LEP language group populations of the target schools and the frequency of contact within the program with LEP students in those schools, not the LEP population generally, should be used in determining the nature of the LEP needs of that particular program. Further, because the Vietnamese LEP population is concentrated in one or two main areas of town, the police department should consider whether to apply the four-factor analysis to other services provided by the police department.

c. Importance of Service/Information

Given the critical role law enforcement plays in maintaining quality of life and property, traditional law enforcement and protective services rank high on the critical/non-critical continuum. However, this does not mean that information about, or provided by, each of the myriad services and activities performed by law enforcement officials must be equally available in languages other than English. While clearly important to the ultimate success of law enforcement, certain community outreach activities do not have the same direct impact on the provision of core law enforcement services as the activities of 911 lines or law enforcement officials' ability to respond to requests for assistance while on patrol, to communicate basic information to suspects, etc. Nevertheless, with the rising importance of community partnerships and community-based programming as a law enforcement technique, the need for language services with respect to these programs should be considered in applying the four-factor analysis.

d. Interpreters

Just as with other recipients, law enforcement recipients have a variety of options for providing language services. Under certain circumstances, when interpreters are required and recipients should provide competent interpreter services free of cost to the LEP person, LEP persons should be advised that they may choose either to secure the assistance of an interpreter of their own choosing, at their own expense, or a competent interpreter provided by the recipient.

If the LEP person decides to provide his or her own interpreter, the provision of this choice to the LEP person and the LEP person's election should be documented in any written record generated with respect to the LEP person. While an LEP person may sometimes look to bilingual family members or friends or other persons with whom they are comfortable for language assistance, there are many situations where an LEP person might want to rely upon recipient-supplied interpretative services. For example, such individuals may not be available when and where they are needed, or may not have the ability to interpret program-specific technical information. Alternatively, an individual may feel uncomfortable revealing or describing sensitive, confidential, or potentially embarrassing medical, law enforcement (e.g., sexual or violent assaults), family, or financial information to a family member, friend, or member of the local community. Similarly, there may be situations where a recipient's own interests justify the provision of an interpreter regardless of whether the LEP individual also provides his or her own interpreter. For example, where precise, complete and accurate translations of information and/or testimony are critical for law enforcement, adjudicatory or legal reasons, a recipient might decide to provide its own, independent interpreter, even if an LEP person wants to use their own interpreter as well.

In emergency situations that are not reasonably foreseeable, the recipient may have to temporarily rely on non-recipient-provided language services. Reliance on children is especially discouraged unless

[1] The Department's Federal Bureau of Investigation makes written versions of those rights available in several different languages. Of course, where literacy is of concern, these are most useful in assisting an interpreter in using consistent terms when providing Miranda warnings orally.

there is an extreme emergency and no preferable interpreters are available.

While all language services need to be competent, the greater the potential consequences, the greater the need to monitor interpretation services for quality. For instance, it is important that interpreters in custodial interrogations be highly competent to translate legal and other law enforcement concepts, as well as be extremely accurate in their interpretation. It may be sufficient, however, for a desk clerk who is bilingual but not skilled at interpreting to help an LEP person figure out to whom he or she needs to talk about setting up a neighborhood watch.

2. Applying the Four-Factor Analysis Along the Law Enforcement Continuum

While all police activities are important, the four-factor analysis requires some prioritizing so that language services are targeted where most needed because of the nature and importance of the particular law enforcement activity involved. In addition, because of the ''reasonableness'' standard, and frequency of contact and resources/costs factors, the obligation to provide language services increases where the importance of the activity is greater.

Under this framework, then, critical areas for language assistance could include 911 calls, custodial interrogation, and health and safety issues for persons within the control of the police. These activities should be considered the most important under the four-factor analysis. Systems for receiving and investigating complaints from the public are important. Often very important are routine patrol activities, receiving non-emergency information regarding potential crimes, and ticketing. Community outreach activities are hard to categorize, but generally they do not rise to the same level of importance as the other activities listed. However, with the importance of community partnerships and community-based programming as a law enforcement technique, the need for language services with respect to these programs should be considered in applying the four-factor analysis. Police departments have a great deal of flexibility in determining how to best address their outreach to LEP populations.

a. Receiving and Responding to Requests for Assistance

LEP persons must have meaningful access to police services when they are victims of or witnesses to alleged criminal activity. Effective reporting systems transform victims, witnesses, or bystanders into assistants in law enforcement and investigation processes. Given the critical role the public plays in reporting crimes or directing limited law enforcement resources to time-sensitive emergency or public safety situations, efforts to address the language assistance needs of LEP individuals could have a significant impact on improving responsiveness, effectiveness, and safety.

Emergency service lines for the public, or 911 lines, operated by agencies that receive Federal financial assistance must be accessible to persons who are LEP. This will mean different things to different jurisdictions. For instance, in large cities with significant LEP communities, the 911 line may have operators who are bilingual and capable of accurately interpreting in high stress situations. Smaller cities or areas with small LEP populations should still have a plan for serving callers who are LEP, but the LEP plan and implementation may involve a telephonic interpretation service that is fast enough and reliable enough to attend to the emergency situation, or include some other accommodation short of hiring bilingual operators.

Example: A large city provides bilingual operators for the most frequently encountered languages, and uses a commercial telephone interpretation service when it receives calls from LEP persons who speak other languages. Ten percent of the city's population is LEP, and sixty percent of the LEP population speaks Spanish. In addition to 911 service, the city has a 311 line for non-emergency police services. The 311 Center has Spanish speaking operators available, and uses a language bank, staffed by the city's bilingual city employees who are competent translators, for other non-English-speaking callers. The city also has a campaign to educate non-English speakers when to use 311 instead of 911. These actions constitute strong evidence of compliance.

b. Enforcement Stops Short of Arrest and Field Investigations

Field enforcement includes, for example, traffic stops, pedestrian stops, serving warrants and restraining orders, Terry stops, activities in aid of other jurisdictions or Federal agencies (e.g., fugitive arrests or INS detentions), and crowd/traffic control. Because of the diffuse nature of these activities, the reasonableness standard allows for great flexibility in providing meaningful access. Nevertheless, the ability of law enforcement agencies to discharge fully and effectively their enforcement and crime interdiction mission requires the ability to communicate instructions, commands, and notices. For example, a routine traffic stop can become a difficult situation if an officer is unable to communicate effectively the reason for the stop, the need for identification or other information, and the meaning of any written citation. Requests for consent to search are meaningless if the request is not understood. Similarly, crowd control commands will be wholly ineffective where significant numbers of people in a crowd cannot understand the meaning of law enforcement commands.

Given the wide range of possible situations in which law enforcement in the field can take place, it is impossible to equip every officer with the tools necessary to respond to every possible LEP scenario. Rather, in applying the four factors to field enforcement, the goal should be to implement measures addressing the language needs of significant LEP populations in the most likely, common, and important situations, as consistent with the recipients' resources and costs.

Example: A police department serves a jurisdiction with a significant number of LEP individuals residing in one or more precincts, and it is routinely asked to provide crowd control services at community events or demonstrations in those precincts. If it is otherwise consistent with the requirements of the four-factor analysis, the police department should assess how it will discharge its crowd control duties in a language-appropriate manner. Among the possible approaches are plans to assign bilingual officers, basic language training of all officers in common law enforcement commands, the use of devices that provide audio commands in the predictable languages, or the distribution of translated written materials for use by officers.

Field investigations include neighborhood canvassing, witness identification and interviewing, investigative or Terry stops, and similar activities designed to solicit and obtain information from the community or particular persons. Encounters with LEP individuals will often be less predictable in field investigations. However, the jurisdiction should still assess the potential for contact with LEP individuals in the course of field investigations and investigative stops, identify the LEP language group(s) most likely to be encountered, and provide, if it is consistent with the four-factor analysis, its officers with sufficient interpretation and/or translation resources to ensure that lack of English proficiency does not impede otherwise proper investigations or unduly burden LEP individuals.

Example: A police department in a moderately large city includes a precinct that serves an area which includes significant LEP populations whose native languages are Spanish, Korean, and Tagalog. Law enforcement officials could reasonably consider the adoption of a plan assigning bilingual investigative officers to the precinct and/or creating a resource list of department employees competent to interpret and ready to assist officers by phone or radio. This could be combined with developing language-appropriate written materials, such as consents to searches or statements of rights, for use by its officers where LEP individuals are literate in their languages. In certain circumstances, it may also be helpful to have telephonic interpretation service access where other options are not successful and safety and availability of phone access permit.

Example: A police department receives Federal financial assistance and serves a predominantly Hispanic neighborhood. It routinely sends officers on domestic violence calls. The police department is in a state in which English has been declared the official language. The police therefore determine that they cannot provide language services to LEP persons. Thus, when the victim of domestic violence speaks only Spanish and the perpetrator speaks English, the officers have no way to speak with the victim so they only get the perpetrator's side of the story. The failure to communicate effectively with the victim results in further abuse and failure to charge the batterer. The police department should be aware that despite the state's official English law, the Title VI regulations apply to it. Thus, the police department should provide meaningful access for LEP persons.

c. Custodial Interrogations

Custodial interrogations of unrepresented LEP individuals trigger constitutional rights that this Guidance is not designed to address. Given the importance of being able to communicate effectively under such circumstances, law enforcement recipients should ensure competent and free language services for LEP individuals in such situations. Law enforcement agencies are strongly encouraged to create a written plan on language assistance for LEP persons in this area. In addition, in formulating a plan for effectively communicating with LEP individuals, agencies should strongly consider whether qualified independent interpreters would be more appropriate during custodial interrogations than law enforcement personnel themselves.[2]

Example: A large city police department institutes an LEP plan that requires arresting officers to procure a qualified interpreter for any custodial interrogation, notification of rights, or taking of a formal statement where the suspect's legal rights could be adversely impacted. When considering whether an interpreter is qualified, the LEP plan discourages use of police officers as interpreters in interrogations except under circumstances in which the LEP individual is informed of the officer's dual role and the reliability of the interpretation is verified, such as, for example, where the officer has been trained and tested in interpreting and tape recordings are made of the entire interview. In determining whether an interpreter is qualified, the jurisdiction uses the analysis noted above. These actions would constitute strong evidence of compliance.

d. Intake/Detention

State or local law enforcement agencies that arrest LEP persons should consider the inherent communication impediments to gathering information from the LEP arrestee through an intake or booking process. Aside from the basic information, such as the LEP arrestee's name and address, law enforcement agencies should evaluate their ability to communicate with the LEP arrestee about his or her medical condition. Because medical screening questions are commonly used to elicit information on the arrestee's medical needs, suicidal inclinations, presence of contagious diseases, potential illness, resulting symptoms upon withdrawal from certain medications, or the need to segregate the arrestee from other prisoners, it is important for law enforcement agencies to consider how to communicate effectively with an LEP arrestee at this stage. In jurisdictions with few bilingual officers or in situations where the LEP person speaks a language not encountered very frequently, telephonic interpretation services may provide the most cost effective and efficient method of communication.

e. Community Outreach

Community outreach activities increasingly are recognized as important to the ultimate success of more traditional duties. Thus, an application of the four-factor analysis to community outreach activities can play an important role in ensuring that the purpose of these activities (to improve police/community relations and advance law enforcement objectives) is not thwarted due to the failure to address the language needs of LEP persons.

Example: A police department initiates a program of domestic counseling in an effort to reduce the number or intensity of domestic violence interactions. A review of domestic violence records in the city reveals that 25% of all domestic violence responses are to minority areas and 30% of those responses involve interactions with one or more LEP persons, most of whom speak the same language. After completing the four-factor analysis, the department should take reasonable steps to make the counseling accessible to LEP individuals. For instance, the department could seek bilingual counselors (for whom they provided training in translation) for some of the counseling positions. In addition, the department could have an agreement with a local university in which bilingual social work majors who are competent in interpreting, as well as language majors who are trained by the department in basic domestic violence sensitivity and counseling, are used as interpreters when the in-house bilingual staff cannot cover the need. Interpreters under such circumstances should sign a confidentiality agreement with the department. These actions constitute strong evidence of compliance.

Example: A large city has initiated an outreach program designed to address a problem of robberies of Vietnamese homes by Vietnamese gangs. One strategy is to work with community groups and banks and others to help allay traditional fears in the community of putting money and other valuables in banks. Because a large portion of the target audience is Vietnamese speaking and LEP, the department contracts with a bilingual community liaison competent in the skill of translating to help with outreach activities. This action constitutes strong evidence of compliance.

B. Departments of Corrections/Jails/ Detention Centers

Departments of corrections that receive Federal financial assistance from DOJ must provide LEP prisoners [3] with meaningful access to benefits and services within the program. In order to do so, corrections departments, like other recipients, must apply the four-factor analysis.

1. General Principles

Departments of corrections also have a wide variety of options in providing translation services appropriate to the particular situation. Bilingual staff competent in interpreting, in person or by phone, pose one option. Additionally, particular prisons may have agreements with local colleges and universities, interpreter services, and/or community organizations to provide paid or volunteer competent translators under agreements of confidentiality and impartiality. Telephonic interpretation services may offer a prudent oral interpreting option for prisons with very few and/or infrequent prisoners in a particular language group. Reliance on fellow prisoners is generally not appropriate. Reliance on fellow prisoners should only be an option in unforeseeable emergency circumstances; when the LEP inmate signs a waiver that is in his/her language and in a form designed for him/her to understand; or where the topic of communication is not sensitive, confidential, important, or technical in nature and the prisoner is competent in the skill of interpreting.

In addition, a department of corrections that receives Federal financial assistance would be ultimately responsible for ensuring that LEP inmates have meaningful access within a prison run by a private or other entity with which the department has entered into a contract. The department may provide the staff and materials necessary to provide required language services, or it may choose to require the entity with which it contracted to provide the services itself.

2. Applying the Four Factors Along the Corrections Continuum

As with law enforcement activities, critical and predictable contact with LEP individuals poses the greatest obligation for language services. Corrections facilities have somewhat greater abilities to assess the language needs of those they encounter, although inmate populations may change rapidly in some areas. Contact affecting health and safety, length of stay, and discipline likely present the most critical situations under the four-factor analysis.

a. Assessment

Each department of corrections that receives Federal financial assistance should assess the number of LEP prisoners who are in the system, in which prisons they are located, and the languages he or she speaks. Each prisoner's LEP status, and the language he or she speaks, should be placed in his or her file. Although this Guidance and Title VI are not meant to address literacy levels, agencies should be aware of literacy problems so that LEP services are provided in a way that is meaningful and useful (*e.g.,* translated written materials are of little use to a nonliterate inmate). After the initial assessment, new LEP prisoners should be identified at intake or orientation, and the data should be updated accordingly.

b. Intake/Orientation

Intake/Orientation plays a critical role not merely in the system's identification of LEP prisoners, but in providing those prisoners with fundamental information about their

[2] Some state laws prohibit police officers from serving as interpreters during custodial interrogation of suspects.

[3] In this Guidance, the terms ''prisoners'' or ''inmates'' include all of those individuals, including Immigration and Naturalization Service (INS) detainees and juveniles, who are held in a facility operated by a recipient. Certain statutory, regulatory, or constitutional mandates/rights may apply only to juveniles, such as educational rights, including those for students will disabilities or limited English proficiency. Because a decision by a recipient or a federal, state, or local entity to make an activity compulsory serves as strong evidence of the program's importance, the obligation to provide language services may differ depending upon whether the LEP person is a juvenile or an adult inmate.

obligations to comply with system regulations, participate in education and training, receive appropriate medical treatment, and enjoy recreation. Even if only one prisoner doesn't understand English, that prisoner should likely be given the opportunity to be informed of the rules, obligations, and opportunities in a manner designed effectively to communicate these matters. An appropriate analogy is the obligation to communicate effectively with deaf prisoners, which is most frequently accomplished through sign language interpreters or written materials. Not every prison will use the same method for providing language assistance. Prisons with large numbers of Spanish-speaking LEP prisoners, for example, may choose to translate written rules, notices, and other important orientation material into Spanish with oral instructions, whereas prisons with very few such inmates may choose to rely upon a telephonic interpretation service or qualified community volunteers to assist.

Example: The department of corrections in a state with a 5% Haitian Creole-speaking LEP corrections population and an 8% Spanish-speaking LEP population receives Federal financial assistance to expand one of its prisons. The department of corrections has developed an intake video in Haitian Creole and another in Spanish for all of the prisons within the department to use when orienting new prisoners who are LEP and speak one of those languages. In addition, the department provides inmates with an opportunity to ask questions and discuss intake information through either bilingual staff who are competent in interpreting and who are present at the orientation or who are patched in by phone to act as interpreters. The department also has an agreement whereby some of its prisons house a small number of INS detainees. For those detainees or other inmates who are LEP and do not speak Haitian Creole or Spanish, the department has created a list of sources for interpretation, including department staff, contract interpreters, university resources, and a telephonic interpretation service. Each person receives at least an oral explanation of the rights, rules, and opportunities. These actions constitute strong evidence of compliance. Example:

A department of corrections that receives Federal financial assistance determines that, even though the state in which it resides has a law declaring English the official language, it should still ensure that LEP prisoners understand the rules, rights, and opportunities and have meaningful access to important information and services at the state prisons. Despite the state's official English law, the Title VI regulations apply to the department of corrections.

c. Disciplinary Action

When a prisoner who is LEP is the subject of disciplinary action, the prison, where appropriate, should provide language assistance. That assistance should ensure that the LEP prisoner had adequate notice of the rule in question and is meaningfully able to understand and participate in the process afforded prisoners under those circumstances. As noted previously, fellow inmates should generally not serve as interpreters in disciplinary hearings.

d. Health and Safety

Prisons providing health services should refer to the Department of Health and Human Services' guidance [4] regarding health care providers' Title VI and Title VI regulatory obligations, as well as with this Guidance.

Health care services are obviously extremely important. How access to those services is provided depends upon the four-factor analysis. If, for instance, a prison serves a high proportion of LEP individuals who speak Spanish, then the prison health care provider should likely have available qualified bilingual medical staff or interpreters versed in medical terms. If the population of LEP individuals is low, then the prison may choose instead, for example, to rely on a local community volunteer program that provides qualified interpreters through a university. Due to the private nature of medical situations, only in unpredictable emergency situations or in non-emergency cases where the inmate has waived rights to a non-inmate interpreter would the use of other bilingual inmates be appropriate.

e. Participation Affecting Length of Sentence

If a prisoner's LEP status makes him/her unable to participate in a particular program, such a failure to participate should not be used to adversely impact the length of stay or significantly affect the conditions of imprisonment. Prisons have options in how to apply this standard. For instance, prisons could: (1) Make the program accessible to the LEP inmate; (2) identify or develop substitute or alternative, language-accessible programs, or (3) waive the requirement.

Example: State law provides that otherwise eligible prisoners may receive early release if they take and pass an alcohol counseling program. Given the importance of early release, LEP prisoners should, where appropriate, be provided access to this prerequisite in some fashion. How that access is provided depends on the three factors other than importance. If, for example, there are many LEP prisoners speaking a particular language in the prison system, the class could be provided in that language for those inmates. If there were far fewer LEP prisoners speaking a particular language, the prison might still need to ensure access to this prerequisite because of the importance of early release opportunities. Options include, for example, use of bilingual teachers, contract interpreters, or community volunteers to interpret during the class, reliance on videos or written explanations in a language the inmate understands, and/or modification of the requirements of the class to meet the LEP individual's ability to understand and communicate.

f. ESL Classes

States often mandate English-as-a-Second language (ESL) classes for LEP inmates. Nothing in this Guidance indicates how recipients should address such mandates. But recipients should not overlook the long-term positive impacts of incorporating or offering ESL programs in parallel with language assistance services as one possible strategy for ensuring meaningful access. ESL courses can serve as an important adjunct to a proper LEP plan in prisons because, as prisoners gain proficiency in English, fewer language services are needed. However, the fact that ESL classes are made available does not obviate the need to provide meaningful access for prisoners who are not yet English proficient.

g. Community Corrections

This guidance also applies to community corrections programs that receive, directly or indirectly, Federal financial assistance. For them, the most frequent contact with LEP individuals will be with an offender, a victim, or the family members of either, but may also include witnesses and community members in the area in which a crime was committed.

As with other recipient activities, community corrections programs should apply the four factors and determine areas where language services are most needed and reasonable. Important oral communications include, for example: interviews; explaining conditions of probations/release; developing case plans; setting up referrals for services; regular supervision contacts; outlining violations of probations/parole and recommendations; and making adjustments to the case plan. Competent oral language services for LEP persons are important for each of these types of communication. Recipients have great flexibility in determining how to provide those services.

Just as with all language services, it is important that language services be competent. Some knowledge of the legal system may be necessary in certain circumstances. For example, special attention should be given to the technical interpretation skills of interpreters used when obtaining information from an offender during pre-sentence and violation of probation/parole investigations or in other circumstances in which legal terms and the results of inaccuracies could impose an enormous burden on the LEP person.

In addition, just as with other recipients, corrections programs should identify vital written materials for probation and parole that should be translated when a significant number or proportion of LEP individuals that speak a particular language is encountered. Vital documents in this context could include, for instance: probation/parole department descriptions and grievance procedures, offender rights information, the pre-sentence/release investigation report, notices of alleged violations, sentencing/release orders, including conditions of parole, and victim impact statement questionnaires.

C. Other Types of Recipients

DOJ provides Federal financial assistance to many other types of entities and programs, including, for example, courts, juvenile justice programs, shelters for victims of domestic violence, and domestic violence prevention programs. The Title VI regulations and this Guidance apply to those

[4] A copy of that guidance can be found on the HHS Web site at *http://www.hhs.gov/ocr/lep.* and at *http://www.usdoj.gov/crt/cor.*

entities. Examples involving some of those recipients follow: [5]

1. Courts

Application of the four-factor analysis requires recipient courts to ensure that LEP parties and witnesses receive competent language services, consistent with the four-factor analysis. At a minimum, every effort should be taken to ensure competent interpretation for LEP individuals during all hearings, trials, and motions during which the LEP individual must and/or may be present. When a recipient court appoints an attorney to represent an LEP defendant, the court should ensure that either the attorney is proficient in the LEP person's language or that a competent interpreter is provided during consultations between the attorney and the LEP person.

Many states have created or adopted certification procedures for court interpreters. This is one way for recipients to ensure competency of interpreters. Where certification is available, courts should consider carefully the qualifications of interpreters who are not certified. Courts will not, however, always be able to find a certified interpreter, particularly for less frequently encountered languages. In a courtroom or administrative hearing setting, the use of informal interpreters, such as family members, friends, and caretakers, would not be appropriate.

Example: A state court receiving DOJ Federal financial assistance has frequent contact with LEP individuals as parties and witnesses, but has experienced a shortage in certified interpreters in the range of languages encountered. State court officials work with training and testing consultants to broaden the number of certified interpreters available in the top several languages spoken by LEP individuals in the state. Because resources are scarce and the development of tests expensive, state court officials decide to partner with other states that have already established agreements to share proficiency tests and to develop new ones together. The state court officials also look to other existing state plans for examples of: codes of professional conduct for interpreters; mandatory orientation and basic training for interpreters; interpreter proficiency tests in Spanish and Vietnamese language interpretation; a written test in English for interpreters in all languages covering professional responsibility, basic legal term definitions, court procedures, etc. They are considering working with other states to expand testing certification programs in coming years to include several other most frequently encountered languages. These actions constitute strong evidence of compliance.

Many individuals, while able to communicate in English to some extent, are still LEP insofar as ability to understand the terms and precise language of the courtroom. Courts should consider carefully whether a person will be able to understand and communicate effectively in the stressful role of a witness or party and in situations where knowledge of language subtleties and/or technical terms and concepts are involved or where key determinations are made based on credibility.

Example: Judges in a county court receiving Federal financial assistance have adopted a voir dire for determining a witness' need for an interpreter. The voir dire avoids questions that could be answered with ''yes'' or ''no.'' It includes questions about comfort level in English, and questions that require active responses, such as: ''How did you come to court today?'' etc. The judges also ask the witness more complicated conceptual questions to determine the extent of the person's proficiency in English. These actions constitute strong evidence of compliance.

Example: A court encounters a domestic violence victim who is LEP. Even though the court is located in a state where English has been declared the official language, it employs a competent interpreter to ensure meaningful access. Despite the state's official English law, the Title VI regulations apply to the court.

When courts experience low numbers or proportions of LEP individuals from a particular language group and infrequent contact with that language group, creation of a new certification test for interpreters may be overly burdensome. In such cases, other methods should be used to determine the competency of interpreters for the court's purposes.

Example: A witness in a county court in a large city speaks Urdu and not English. The jurisdiction has no court interpreter certification testing for Urdu language interpreters because very few LEP individuals encountered speak Urdu and there is no such test available through other states or organizations. However, a non-certified interpreter is available and has been given the standard English-language test on court processes and interpreter ethics. The judge brings in a second, independent, bilingual Urdu-speaking person from a local university, and asks the prospective interpreter to interpret the judge's conversation with the second individual. The judge then asks the second Urdu speaker a series of questions designed to determine whether the interpreter accurately interpreted their conversation. Given the infrequent contact, the low number and proportion of Urdu LEP individuals in the area, and the high cost of providing certification tests for Urdu interpreters, this ''second check'' solution may be one appropriate way of ensuring meaningful access to the LEP individual.

Example: In order to minimize the necessity of the type of intense judicial intervention on the issue of quality noted in the previous example, the court administrators in a jurisdiction, working closely with interpreter and translator associations, the bar, judges, and community groups, have developed and disseminated a stringent set of qualifications for court interpreters. The state has adopted a certification test in several languages. A questionnaire and qualifications process helps identify qualified interpreters even when certified interpreters are not available to meet a particular language need. Thus, the court administrators create a pool from which judges and attorneys can choose. A team of court personnel, judges, interpreters, and others have developed a recommended interpreter oath and a set of frequently asked questions and answers regarding court interpreting that have been provided to judges and clerks. The frequently asked questions include information regarding the use of team interpreters, breaks, the types of interpreting (consecutive, simultaneous, summary, and sight translations) and the professional standards for use of each one, and suggested questions for determining whether an LEP witness is effectively able to communicate through the interpreter. Information sessions on the use of interpreters are provided for judges and clerks. These actions constitute strong evidence of compliance.

Another key to successful use of interpreters in the courtroom is to ensure that everyone in the process understands the role of the interpreter.

Example: Judges in a recipient court administer a standard oath to each interpreter and make a statement to the jury that the role of the interpreter is to interpret, verbatim, the questions posed to the witness and the witness' response. The jury should focus on the words, not the non-verbals, of the interpreter. The judges also clarify the role of the interpreter to the witness and the attorneys. These actions constitute strong evidence of compliance.

Just as corrections recipients should take care to ensure that eligible LEP individuals have the opportunity to reduce the term of their sentence to the same extent that non-LEP individuals do, courts should ensure that LEP persons have access to programs that would give them the equal opportunity to avoid serving a sentence at all.

Example: An LEP defendant should be given the same access to alternatives to sentencing, such as anger management, batterers' treatment and intervention, and alcohol abuse counseling, as is given to non-LEP persons in the same circumstances.

Courts have significant contact with the public outside of the courtroom. Providing meaningful access to the legal process for LEP individuals might require more than just providing interpreters in the courtroom. Recipient courts should assess the need for language services all along the process, particularly in areas with high numbers of unrepresented individuals, such as family, landlord-tenant, traffic, and small claims courts.

Example: Only twenty thousand people live in a rural county. The county superior court receives DOJ funds but does not have a budget comparable to that of a more-populous urbanized county in the state. Over 1000 LEP Hispanic immigrants have settled in the rural county. The urbanized county also has more than 1000 LEP Hispanic immigrants. Both counties have ''how to'' materials in English helping unrepresented individuals negotiate the family court processes and providing information for

[5] As used in this appendix, the word ''court'' or ''courts'' includes administrative adjudicatory systems or administrative hearings administered or conducted by a recipient.

victims of domestic violence. The urban county has taken the lead in developing Spanish-language translations of materials that would explain the process. The rural county modifies these slightly with the assistance of family law and domestic violence advocates serving the Hispanic community, and thereby benefits from the work of the urban county. Creative solutions, such as sharing resources across jurisdictions and working with local bar associations and community groups, can help overcome serious financial concerns in areas with few resources.

There may be some instances in which the four-factor analysis of a particular portion of a recipient's program leads to the conclusion that language services are not currently required. For instance, the four-factor analysis may not necessarily require that a purely voluntary tour of a ceremonial courtroom be given in languages other than English by courtroom personnel, because the relative importance may not warrant such services given an application of the other factors. However, a court may decide to provide such tours in languages other than English given the demographics and the interest in the court. Because the analysis is fact-dependent, the same conclusion may not be appropriate with respect to all tours.

Just as with police departments, courts and/or particular divisions within courts may have more contact with LEP individuals than an assessment of the general population would indicate. Recipients should consider that higher contact level when determining the number or proportion of LEP individuals in the contact population and the frequency of such contact.

Example: A county has very few residents who are LEP. However, many Vietnamese-speaking LEP motorists go through a major freeway running through the county that connects two areas with high populations of Vietnamese speaking LEP individuals. As a result, the Traffic Division of the county court processes a large number of LEP persons, but it has taken no steps to train staff or provide forms or other language access in that Division because of the small number of LEP individuals in the county. The Division should assess the number and proportion of LEP individuals processed by the Division and the frequency of such contact. With those numbers high, the Traffic Division may find that it needs to provide key forms or instructions in Vietnamese. It may also find, from talking with community groups, that many older Vietnamese LEP individuals do not read Vietnamese well, and that it should provide oral language services as well. The court may already have Vietnamese-speaking staff competent in interpreting in a different section of the court; it may decide to hire a Vietnamese-speaking employee who is competent in the skill of interpreting; or it may decide that a telephonic interpretation service suffices.

2. Juvenile Justice Programs

DOJ provides funds to many juvenile justice programs to which this Guidance applies. Recipients should consider LEP parents when minor children encounter the legal system. Absent an emergency, recipients are strongly discouraged from using children as interpreters for LEP parents.

Example: A county coordinator for an anti-gang program operated by a DOJ recipient has noticed that increasing numbers of gangs have formed comprised primarily of LEP individuals speaking a particular foreign language. The coordinator may choose to assess the number of LEP youths at risk of involvement in these gangs, so that she can determine whether the program should hire a counselor who is bilingual in the particular language and English, or provide other types of language services to the LEP youths.

When applying the four factors, recipients encountering juveniles should take into account that certain programs or activities may be even more critical and difficult to access for juveniles than they would be for adults. For instance, although an adult detainee may need some language services to access family members, a juvenile being detained on immigration-related charges who is held by a recipient may need more language services in order to have access to his or her parents.

3. Domestic Violence Prevention/Treatment Programs

Several domestic violence prevention and treatment programs receive DOJ financial assistance and thus must apply this Guidance to their programs and activities. As with all other recipients, the mix of services needed should be determined after conducting the four-factor analysis. For instance, a shelter for victims of domestic violence serving a largely Hispanic area in which many people are LEP should strongly consider accessing qualified bilingual counselors, staff, and volunteers, whereas a shelter that has experienced almost no encounters with LEP persons and serves an area with very few LEP persons may only reasonably need access to a telephonic interpretation service. Experience, program modifications, and demographic changes may require modifications to the mix over time.

Example: A shelter for victims of domestic violence is operated by a recipient of DOJ funds and located in an area where 15 percent of the women in the service area speak Spanish and are LEP. Seven percent of the women in the service area speak various Chinese dialects and are LEP. The shelter uses competent community volunteers to help translate vital outreach materials into Chinese (which is one written language despite many dialects) and Spanish. The shelter hotline has a menu providing key information, such as location, in English, Spanish, and two of the most common Chinese dialects. Calls for immediate assistance are handled by the bilingual staff. The shelter has one counselor and several volunteers fluent in Spanish and English. Some volunteers are fluent in different Chinese dialects and in English. The shelter works with community groups to access interpreters in the several Chinese dialects that they encounter. Shelter staff train the community volunteers in the sensitivities of domestic violence intake and counseling. Volunteers sign confidentiality agreements. The shelter is looking for a grant to increase its language capabilities despite its tiny budget. These actions constitute strong evidence of compliance.

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DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Computer Associates International, Inc.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America* v. *Computer Associates International, Inc. and Platinum technology International, inc.,* Civil Action No. 1:01CV02062 (GK). On September 28, 2001, the United States filed a Complaint alleging that the Defendants' conduct surrounding the acquisition of Platinum *technology* International, *inc.* by Computer Associates International, Inc. (CA) violated Section 1 of the Sherman Act (15 U.S.C. 1) and section 7a of the Clayton Act (15 U.S.C. 18(a)), commonly known as the Hart-Scott-Rodino (''HSR'') Act. The Complaint alleges that the Defendants violated Section 1 of the Sherman Act by entering into an agreement that restricted Platinum's ability to offer price discounts to customers during the time period before they consummated their merger. The proposed Final Judgment enjoins CA and future merger partners from engaging in similar conduct. The proposed Final Judgment also requires that the Defendants pay a civil penalty to resolve the HSR Act violation. The civil penalty component of the proposed Final Judgment is not open to public comment. Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice in Washington, DC, in Room 200, 325 Seventh Street, NW., on the Department of Justice Web site at *http://www.usdoj.gov/atr,* and at the Office of the Clerk of the United States District Court for the District of Columbia, 333 Constitution Avenue, NW., Washington, DC 20001.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments

Common Language Access Questions, Technical Assistance, and Guidance for Federally Conducted and Federally Assisted Programs

Federal Coordination and Compliance Section
Civil Rights Division
U.S. Department of Justice

August 2011

COMMON LANGUAGE ACCESS QUESTIONS, TECHNICAL ASSISTANCE, AND GUIDANCE FOR FEDERALLY CONDUCTED AND FEDERALLY ASSISTED PROGRAMS

A. Why must my agency designate a primary contact person for services to limited English proficient (LEP) persons in my agency?

- In his Memorandum for Heads of Department Components regarding Language Access Obligations Under Executive Order 13166 and his Memorandum for Heads of Federal Agencies regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166, the Attorney General directed federal agencies to appoint a language access coordinator. This individual is responsible for ensuring that the agency adheres to its language access plan, policy directives, and procedures to provide meaningful access to LEP persons. The language access coordinator should report to a high-ranking official within the agency. The coordinator is responsible for language assistance services and may delegate duties but should retain ultimate responsibility for oversight, performance, and implementation of the language access plan. Federal agencies with multiple offices and divisions may find that each component or field office should designate an individual as a local language access coordinator. The language access plan should set forth the name and contact information of the responsible official(s). The language access coordinator should consider creating a working group of key stakeholders to assist in implementing and creating language access procedures for the agency. *See Language Access Assessment and Planning Tool for Federally Conducted and Federally Assisted Programs*

B. What are my agency's responsibilities with respect to providing Federal Financial Assistance?

- In his Memorandum for Heads of Federal Agencies regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166, the Attorney General directed federal agencies that provide Federal financial assistance to draft recipient guidance.
- Federal financial assistance includes, but is not limited to, grants and loans of federal funds; grants or donations of federal property; training; details of federal personnel; or any agreement, arrangement, or other contract which has as one of its purposes the provision of assistance. For instance, the Department of Justice provides federal financial assistance to several agencies, primarily state and local law enforcement agencies, and departments of corrections.
- Federal agencies providing federal financial assistance should obtain information and maintain records that ensure that they can determine which entities have received such assistance, including a list of subgrantees, and for what purpose the assistance has been provided.
- Federal agencies that provide Federal financial assistance must ensure that recipients of Federal financial assistance acknowledge and agree that they will comply (and require

any subgrantees, contractors, successors, transferees, and assignees to comply) with applicable provisions of Federal laws and policies prohibiting discrimination, including but not limited to Title VI of the Civil Rights Act of 1964, as amended, which prohibits recipients from discriminating on the basis of race, color, or national origin (including language) (42 U.S.C. 2000d et seq.). Model assurance language can be found at http://www.justice.gov/crt/about/cor/draft_assurance_language.pdf.

- Federal agencies that provide Federal financial assistance must require recipients to obtain these assurances from their subrecipients and must maintain systems that can record and track the recipient's agreement with these assurances (28 CFR 42.105 et seq.).
- Federal agencies have a variety of mechanisms for securing recipient compliance with Title VI, including, but not limited to, executing assurances of nondiscrimination, conducting periodic compliance reviews, conducting complaint-based investigations, noncomplaint-based investigations, negotiating settlement agreements, and taking judicial action. These mechanisms are in addition to any programmatic compliance specific to the agency providing Federal financial assistance.
- Agencies must ensure that communications with recipients, including at the conclusion of a term of financial assistance documenting satisfaction with financial assistance deliverables, do not imply that the recipient was or is in compliance with Title VI.

C. Would it be helpful to have agreements with other federal agencies, subcomponents, field or district offices to provide language assistance services?

- Agreements with other subcomponents, field or district offices, or federal agencies can be a cost-effective approach to language assistance services. For example, many intelligence community components have arrangements with the National Virtual Translation Center (NVTC) to provide translations.
    - Is your agreement with the other entity in writing?
    - Is it a reciprocal arrangement?
    - How long is the agreement in place?
    - How do you ensure that both parties to the agreement are satisfied? Is there an opportunity to revisit the agreement?
- Agreements between agencies to provide interpretation or translation must also consider who will serve as interpreters or translators. For example, an agency must still ensure that any interpreter or translator working on behalf of the agency is competent.
- Generally, if your agency continues to seek language assistance services from a specific agency, you may consider drafting a written language assistance services agreement with that agency. A written document can clarify each entity's role and responsibility and can serve to memorialize and document the arrangement. This can be especially useful in the event of changes in staffing.

D. Why is it important to have a Language Access Implementation Plan, Policy Directives, and Procedures in place?

- In his Memorandum for Heads of Federal Agencies regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166,

the Attorney General directed each federal agency to develop and implement a system by which LEP persons can meaningfully access the agency's services.

- A **Language Access Implementation Plan** helps management and staff understand their roles and responsibilities with respect to overcoming language barriers for LEP individuals. The plan is a management document that outlines how the agency has or will define language assistance tasks, set deadlines and priorities, assign responsibility, and allocate the resources necessary to come into or maintain compliance with language access requirements. It describes how the agency will effectuate the service delivery standards delineated in the policy directives, including the manner by which it will address the language service and resource needs identified in a self-assessment.
- **Language Policy Directives** set forth standards, operating principles, and guidelines that govern the delivery of language appropriate services. Policy directives may come in different forms but are designed to require the agency and its staff to ensure meaningful access. Policy directives should be made publicly available.
- **Language Access Procedures** are the "how to" for staff. They specify for staff the steps to follow to provide language services, gather data, and deliver services to LEP individuals. Procedures can be set forth in handbooks, intranet sites, desk references, reminders at counters, notations on telephone references, and the like.

E. Why is it important to modify or update your Language Access Implementation Plan and related Language Access Procedures?

- In his Memorandum for Heads of Federal Agencies regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166, the Attorney General asked each federal agency to evaluate and/or update your current response to LEP needs by, among other things, conducting an inventory of languages most frequently encountered, identifying the primary channels of contact with LEP community members (whether telephonic, in person, correspondence, web-based, etc.), and reviewing agency programs and activities for language accessibility.
- Agencies may need to update program operations, services provided, outreach activities, and other mission-specific activities to reflect current language needs. For example, changes in demographics, types of services provided, or the economy may impact the number and languages spoken by LEP individuals who participate in your agency's program or activities.
- Agencies should, where appropriate, have a process for determining, on an ongoing basis, whether new documents, programs, services, and activities need to be made accessible for LEP individuals, and they may want to provide notice of any changes in services to the LEP public and to employees.
- Each agency should establish a schedule to periodically evaluate and update agency LEP services and LEP policies, plans, and protocols. At a minimum, periodic reviews should occur on a biannual basis.

F. What are resources that might be helpful in creating, modifying, or updating a Federal agency's Language Access Implementation Plan, Policy Directives or Procedures?

- View federal agency plans, DOJ guidance documents, and other resources at www.lep.gov
- Consult with the Civil Rights Division, Federal Coordination and Compliance Section, http://www.justice.gov/crt/about/cor/
- Consult with frontline staff, management, or others in your office to evaluate the language services needed
- Consult with internal divisions or regional offices to assess how they provide language services
- Consult with outside experts to assess how they provide language services
- Consult with the public, non-profit organizations and other community stakeholders
- Obtain help in constructing multilingual websites at http://www.usa.gov/webcontent/multilingual/index.shtml

G. Why is it important to monitor the effectiveness of your Language Access Implementation Plan?

- It is important to monitor the effectiveness of your Language Access Implementation Plan in order to ensure that LEP individuals have meaningful access to agency programs or activities. In his Memorandum for Heads of Federal Agencies regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166, the Attorney General emphasized the need to evaluate your current response to LEP individuals. As some strategies may prove more effective than others, ongoing monitoring can help an agency fine-tune the provision of language assistance services and can potentially realize cost-savings over time.
- Some federal agencies may designate a committee or staff person to be the language access coordinator responsible for monitoring and evaluating your agency's Language Access Implementation Plan. Monitoring the effectiveness of your Plan may include:
    - Analyzing current and historical data on language assistance usage, including languages served;
    - Observing the provision of language assistance services through audits or testing;
    - Surveying staff on how often they use language assistance services, if they believe there should be changes in the way services are provided or the providers that are used, and if they believe that the language assistance services in place are meeting the needs of the LEP communities in your service area;
    - Conducting customer satisfaction surveys of LEP applicants and beneficiaries based on their actual experience of accessing the agency's programs, benefits or services;
    - Soliciting feedback from community-based organizations and other stakeholders about the agency's effectiveness and performance in ensuring meaningful access for LEP individuals;
    - Updating community demographics and needs by engaging school districts, faith communities, refugee resettlement agencies, and other local resources;
    - Considering new resources including funding, collaborations with other agencies, human resources, and other mechanisms for ensuring improved access for LEP individuals; and

- Monitoring your agency's response rate to complaints or suggestions by LEP individuals, community members and employees regarding language assistance services provided.

H. Why is it important to publish your Language Access Policy Directives or inform members of the public about the availability of language assistance services?

- In his Memorandum for Heads of Federal Agencies regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166, the Attorney General asked each federal agency to notify the public, through mechanisms that will reach the LEP communities it serves, of its LEP policies and LEP access-related developments. Examples of methods for publicizing LEP access information include, but are not limited to, posting on agency websites, issuing print and broadcast notifications, providing relevant information at "town hall" style meetings, and issuing press releases. Agencies should consult with their information technology specialists, civil rights personnel, and public affairs personnel to develop a multi-pronged strategy to achieve maximum and effective notification to LEP communities.

- Other methods for publicizing language assistance services include:
  - Posting signs in intake areas and other entry points;
  - Stating in outreach documents that language services are available from the agency;
  - Using a telephone voice mail menu to provide information about available language assistance services and how to get them;
  - Working with community-based organizations and other stakeholders to inform LEP individuals of the agency's services, including the availability of language assistance services; and,
  - Including notices in local and ethnic media.
- Agencies should provide notice about its language assistance services in languages LEP persons will understand.

I. Why is it important for Federal agencies to consult with or seek input from non-governmental organizations such as faith-based groups, civic groups, civil rights organizations, etc.?

- When language services are not readily available at a given agency or an LEP individual does not know about the availability of language assistance services, LEP individuals will be less likely to participate in or benefit from an agency's programs and services. As a result, many LEP persons may not seek out agency benefits, programs, and services; may not offer vital assistance in investigations or information that would help determine entitlement or eligibility for benefits; may not file complaints; and may not have access to critical information provided by the agency because of limited access to language services.
- Organizations that have significant contact with LEP persons, such as schools, religious organizations, community groups, and groups working with new immigrants can be very

helpful in linking LEP persons to an agency's programs and its language assistance services.

- Community-based organizations provide important input into the language access planning process and can often assist in identifying populations for whom outreach is needed and who would benefit from the agency's programs and activities were language services provided.
- Community-based organizations may also be useful in recommending which outreach materials the agency should translate. As documents are translated, community-based organizations may be able to help consider whether the documents are written at an appropriate level for the audience.
- Community-based organizations may also provide valuable feedback to the agency to help the agency determine whether its language assistance services are effective in overcoming language barriers for LEP persons.

J. Why is it necessary to develop standard ways to identify non-English speakers or LEP populations for whom you would provide language assistance?

- In his Memorandum for Heads of Federal Agencies regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166, the Attorney General requested that each federal agency identify LEP contact situations and take the necessary steps to provide meaningful access. Agency staff should be able to, among other tasks, identify LEP contact situations, determine primary language of LEP individuals, and effectively utilize available options to assist in interpersonal, electronic, print, and other methods of communication between the agency and LEP individuals.
- Staff at the point of first contact with an individual must determine whether that person is LEP, must determine his/her primary language, and procure the appropriate language assistance services. Standardizing the method for identifying an LEP person and his/her language helps an agency provide consistent and meaningful access to the program or activity sought. An individual's primary language will be identified and documented utilizing one or more of the following methods:

    1) Use of "I Speak" Language Identification Cards; an example of such a card from the U.S. Census Bureau is available at: http://www.justice.gov/crt/lep/resources/ISpeakCards2004.pdf;
    2) Use of a language identification poster displayed in the reception or intake area;
    3) Verification of foreign language proficiency by qualified bilingual staff (in-person, telephonically, or through video interpretation services);
    4) Verification of foreign language proficiency by a qualified interpreter (in-person, telephonically, or through video interpretation services); or,
    5) Self-identification by the LEP individual or identification by a companion.

K. Why is it important to track the number of LEP individuals that your agency has served or who have participated in your program or activity:

- Creating a record of language assistance services can help inform agencies with respect to whether there should be changes to the quantity or type of language assistance services. For instance, agencies may decide to hire qualified bilingual staff for positions in which there is a high-incidence language need.
- Agencies should keep a record of the number of LEP individuals served, the primary language spoken by each LEP person encountered, and the type of language assistance provided (oral or written) during each encounter, if any.
- Procurement offices should also consider preparing for management an annual estimate of the cost of translation and interpretation services within the agency. This will help management ensure that resources are appropriately allocated to the most critical programs, geographic areas, or languages.

L. What are the types of language assistances services available?

- There are two primary types of language assistance services: oral and written.
    - Oral language assistance service may come in the form of "in-language" communication (a demonstrably qualified bilingual staff member communicating directly in an LEP person's language) or interpreting. Interpretation can take place in-person, through a telephonic interpreter, or via internet or video interpreting. An interpreter is a person who renders a message spoken in one language into one or more languages. An interpreter must be competent and have knowledge in both languages of the relevant terms or concepts particular to the program or activity and the dialect and terminology used by the LEP individual. Depending upon the circumstances, language assistance services may call upon interpreters to provide simultaneous interpretation of proceedings so that an LEP person understands what is happening in that proceeding, or to interpret an interview or conversation with an LEP person in a consecutive fashion. Interpreter competency requires more than self-identification as bilingual. "Some bilingual staff and community volunteers, for instance, may be able to communicate effectively in a different language when communicating information directly in that language, but may not be competent to interpret in and out of English."[1] Agencies should avoid using family members, children, friends, and untrained volunteers as interpreters because it is difficult to ensure that they interpret accurately and lack ethical conflicts.
    - Translation is the replacement of written text from one language into another. A translator also must be qualified and trained. Federal agencies may need to identify and translate vital documents to ensure LEP individuals have meaningful access to important written information. Vital written documents include, but are not limited to, consent and complaint forms; intake and application forms with the potential for important consequences; written notices of rights; notices of denials, losses, or decreases in benefits or services; notice of disciplinary action; signs; and notices advising LEP individuals of free language assistance services. Agencies should proactively translate vital written documents into the frequently encountered languages of LEP groups eligible to be served or likely to be affected

[1] Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg., 41,455, 41,461 (June 18, 2002).

by the benefit program or service. Agencies should also put in place processes for handling written communication with LEP individuals in less frequently encountered languages.

M. Hiring bilingual staff:

- In his Memorandum for Heads of Federal Agencies regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166, the Attorney General asked each federal agency to assess, when considering hiring criteria, the extent to which non-English language proficiency would be necessary for particular positions or to fulfill an agency's mission. For example, an agency should determine whether the agency would benefit from including non-English language skills and competence thresholds in certain job vacancy announcements, retention policies, performance appraisals, promotion plans or criteria, and position descriptions.
- An agency should consider language-sensitive deployment of qualified bilingual staff and interpreters to match skills with language needs. Senior management may also consider establishing appropriate adjustments in assignments and protocols for using bilingual staff who are employed in the agency to ensure that bilingual staff are fully and appropriately utilized.

N. How do you assess your current staff's ability to provide language assistance services?

- Quality and accuracy of the language assistance service provided by the agency is critical in order to avoid serious consequences to the LEP person and to the agency.
- Agencies must ensure that all bilingual or contracted personnel who serve as interpreters:
  - Demonstrate proficiency and ability to communicate information accurately in both English and in the other language and identify and employ the appropriate mode of interpreting (e.g. consecutive, simultaneous, summarization, or sight translation);
  - Have knowledge in both languages of any specialized terms or concepts peculiar to the Agency's program or activity and of any particularized vocabulary and phraseology used by the LEP person;
  - Understand and follow confidentiality, impartiality, and ethical rules to the same extent the Division employee for whom they are interpreting and/or to the extent their position requires;
  - Understand and adhere to their role as interpreters without deviating into a role as counselor, legal advisor, or other roles.
- Bilingual staff who communicate directly in language with LEP persons must also demonstrate proficiency in the target language and have knowledge in both languages of any specialized terms or concepts peculiar to the Agency's program or activity and of any particularized vocabulary and phraseology used by the LEP person.
- An agency should also ensure that all bilingual or contracted personnel who serve as translators understand the expected reading level of the audience and, where appropriate, have fundamental knowledge about the target language group's vocabulary and phraseology.

- An agency should periodically check the quality of translations by having a second, independent translator "check" the work of the primary translator. An agency should also consider community input and the use of audits to maintain and improve its ability to provide timely and accurate language assistance.
- Agencies may consider developing language assessment protocols to ensure that current and prospective bilingual employees who elect to use their language skills as part of their job are appropriately qualified to serve as interpreters or translators.

O. Understanding how to prioritize the languages that you should consistently accommodate using existing internal structures versus languages where you may need to seek external language assistance services to communicate with LEP individuals:

- The languages spoken by the LEP individuals with whom the agency has contact determine the languages accommodated by your agency. A distinction should be made, however, between languages that are frequently encountered by an agency and less commonly-encountered languages. Many agencies serve communities in large cities or across the country. They regularly serve LEP persons who speak dozens and sometimes over 100 different languages. To provide language assistance services, both oral and written, to all of those languages may not be possible using in-house resources. Therefore, it is important to distinguish between establishing a system for communicating with LEP individuals who speak frequently-encountered languages (e.g. hiring bilingual staff members) versus enabling access to a telephonic interpretation service for LEP individuals who speak less commonly-encountered languages.
- The extent of an agency's obligation to provide language assistance services in multiple languages is determined by the agency on a case-by-case basis, looking at the totality of the circumstances in light of four factors:
    - the number or proportion of LEP persons served or encountered in the eligible service population;
    - the frequency with which LEP individuals come in contact with the program;
    - the nature and importance of the program, activity, or service provided by the program; and,
    - the resources available to the agency and costs

P. Using contracted interpreters or translators when your agency cannot meet the demand for language assistance services:

- When an agency cannot meet its language assistance services needs in-house, or when there are case- or management-related reasons to seek non-staff assistance, agencies typically contract with private translation or interpretation firms. An agency must ensure that any contract for language assistance services will specify responsibilities, assign liability, set pay rates, and lay out the ways in which difficulties or disputes are resolved. For example, contracted language assistance service providers must have:
    - qualified and competent translators and interpreters, including mechanisms to ensure confidentiality and avoid conflicts of interest;
    - an ability to meet the agency's demand for interpreters;

- an ability to meet the agency's demand for translation;
- reasonable cancellation fees;
- on-time service delivery;
- an acceptable emergency response time;
- rational scheduling of qualified interpreters;
- rapid rates of connection to interpreters via the telephone, electronically, or by video; and,
- effective complaint resolution when translation or interpretation errors occur.

- Potential bidders for language assistance services contracts should also be required to commit to an adequate quality control process for all deliverables. This can include a process where multiple linguists review all translations before delivery. Contractors should detail their (and their independent contractors') capabilities with translation memory software. Contractors must also include the discounted prices in their final proposal that would result from using the translation memory software.

Q. Critical staff training on language access issues:

- Staff will not be able to provide meaningful access to LEP individuals if they do not receive training on language access policies and procedures, including how to access language assistance services. For policies and procedures to be effective, new and existing staff should periodically receive training on the content of the language access policy, identifying language access needs, and providing language assistance services to LEP individuals. This staff training should be mandatory for staff who have the potential to interact or communicate with LEP individuals, staff whose job it is to arrange for language support services, and managers. Training should include making procedures clear and readily available to ensure seamless provision of language assistance services.
- Bilingual staff members who communicate "in-language" to LEP individuals, or who serve as interpreters or translators should be assessed and receive regular training on proper interpreting and translation techniques, ethics, specialized terminology, and other topics as needed. Without regular assessment and training, bilingual staff may not be able to provide the language access services necessary to ensure LEP individuals have meaningful access to your agency's program.

R. Monitoring language assistance services provided in your agency:

- An agency may also consider evaluating the actual experience of accessing services from the perspective of an LEP individual. This can be accomplished by managers and supervisors through regular observation of interactions between agency staff and LEP individuals. Periodic client satisfaction surveys may also be used to assess whether LEP individuals are satisfied with the level of service provided to them. .
- Agencies may also maintain partnerships with local community-based organizations and rely upon these connections for reports of inadequate language access or other language-related complaints.

S. Establishing a process for LEP individuals to provide feedback if they are denied services because of their lack of English proficiency:

- An agency must also ensure that its process for receiving feedback from LEP individuals is transparent and accessible to LEP persons. Any LEP individual must be able to communicate his or her comments or suggestions regarding the failure to provide language access or any other agency criticism. And, of course, investigations of such complaints must involve appropriate language assistance services for LEP persons or witnesses.
- Agencies should maintain a record of feedback received and any resolution based on LEP individual's comments or suggestions.

T. Resource-sharing when translating documents:

- In his Memorandum for Heads of Federal Agencies regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166, the Attorney General asked each federal agency to collaborate with other agencies to share translation resources, improve efficiency, standardize federal terminology, and streamline processes for obtaining community feedback on the accuracy and quality of professional translations for mass distribution. This affirms the General Accountability Office's (GAO) April 2010 report on Language Access: Selected Agencies Can Improve Services to Limited English Proficient Persons which notes that collaboration among federal agencies to improve LEP access through planning and providing language access could be enhanced. For example, agreements with other subcomponents, components, or federal agencies can be a cost-effective approach to language assistance services. Many intelligence community components have arrangements with the National Virtual Translation Center (NVTC) to provide translations.

U. Identifying and prioritizing documents for translation:

- Agencies should prioritize translating vital documents. A document will be considered vital if it contains information that is critical for accessing the agency's program or activities, or is required by law. Vital documents include, but are not limited to:
    - Documents that must be provided by law;
    - Complaint, consent, release or waiver forms;
    - Claim or application forms;
    - Conditions of settlement or resolution agreements;
    - Letters or notices pertaining to the reduction, denial, or termination of services or programs or that require a response from the LEP person;
    - Time-sensitive notice, including notice of hearing, upcoming grand jury or deposition appearance, or other investigation or litigation-related deadlines;
    - Form or written material related to individual rights;
    - Notice of rights, requirements, or responsibilities; and,
    - Notices regarding the availability of free language assistance services for LEP individuals.

V. Translating disaster-preparedness or emergency information:

- In his Memorandum for Heads of Federal Agencies regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166, the Attorney General stated that, "[w]hen in an emergency or in the course of routine business matters, the success of government efforts to effectively communicate with members of the public depends on the widespread and nondiscriminatory availability of accurate, timely, and vital information." Swift and accurate communication with the general public is critical during major disasters and public-health emergencies. Consequently, an agency should ensure that LEP individuals have meaningful access to disaster-preparedness and emergency information.

W. Understanding when/how to make your website more accessible to LEP persons:

- Providing appropriate access to people with limited English proficiency is one of the requirements for managing your agency's website. An agency may determine how much information it needs to provide in other languages, based on an assessment of its website visitors.
- Public website content and electronic documents that contain vital information about agency programs and services should be translated into frequently-encountered languages to ensure meaningful access by LEP individuals.
- The use of machine or automatic translations is strongly discouraged even if a disclaimer is added. If an agency decides to use software-assisted translation, it is important to have the translation reviewed by a qualified language professional before posting it to the website to ensure that the translation correctly communicates the message.
- In his Memorandum for Heads of Federal Agencies regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166, the Attorney General asked each federal agency to provide a link to materials posted on your website to the Federal Coordination and Compliance Section so that it can be posted on LEP.gov.
- More information on building multilingual websites can be found at: http://www.usa.gov/webcontent/multilingual/index.shtml

X. Cross-agency federal resources regarding language assistance:

- View federal agency plans, DOJ guidance documents, and other resources at www.lep.gov
- Consult with the Civil Rights Division, Federal Coordination and Compliance Section, http://www.justice.gov/crt/about/cor/
- Contact the National Virtual Translation Center for help in obtaining translations, http://www.nvtc.gov/
- Obtain help in constructing multilingual websites at http://www.usa.gov/webcontent/multilingual/index.shtml
- Participate in the Federal Interagency Working Group on Limited English Proficiency by visiting http://www.lep.gov/iwglep.htm and sending an email to DOJLAWG@usdoj.gov
- Participate in the Interagency Language Roundtable, http://www.govtilr.org/

28 CFR 42.104

This document is current through the June 1, 2016 issue of the Federal Register

Code of Federal Regulations > ***TITLE 28 -- JUDICIAL ADMINISTRATION*** > ***CHAPTER I -- DEPARTMENT OF JUSTICE*** > ***PART 42 -- NONDISCRIMINATION; EQUAL EMPLOYMENT OPPORTUNITY; POLICIES AND PROCEDURES*** > ***SUBPART C -- NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS -- IMPLEMENTATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 H1***

§ 42.104 Discrimination prohibited.

(a) General. No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this subpart applies.

(b) Specific discriminatory actions prohibited. (1) A recipient to which this subpart applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:

(i) Deny an individual any disposition, service, financial aid, or benefit provided under the program;

(ii) Provide any disposition, service, financial aid, or benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any disposition, service, financial aid, or benefit under the program;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any disposition, service, financial aid, or benefit under the program;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which individuals must meet in order to be provided any disposition, service, financial aid, function or benefit provided under the program; or

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section).

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2)A recipient, in determining the type of disposition, services, financial aid, benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such will be provided under any

such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.

(3) In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this subpart applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this subpart.

(4) For the purposes of this section the disposition, services, financial aid, or benefits provided under a program receiving Federal financial assistance shall be deemed to include all portions of the recipient's program or activity, including facilities, equipment, or property provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in this paragraph and in paragraph (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(6)

(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

(c) Employment practices.

(1) Whenever a primary objective of the Federal financial assistance to a program to which this subpart applies, is to provide employment, a recipient of such assistance may not (directly or through contractual or other arrangements) subject any individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff, or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities). That prohibition also applies to programs as to which a primary objective of the Federal financial assistance is (i) to assist individuals, through employment, to meet expenses incident to the commencement or continuation of their education or training, or (ii) to provide work experience which

contributes to the education or training of the individuals involved. The requirements applicable to construction employment under any such program shall be those specified in or pursuant to part III of Executive Order 11246 or any Executive order which supersedes it.

(2) In regard to Federal financial assistance which does not have providing employment as a primary objective, the provisions of paragraph (c)(1) of this section apply to the employment practices of the recipient if discrimination on the ground of race, color, or national origin in such employment practices tends, on the ground of race, color, or national origin, to exclude persons from participation in, to deny them the benefits of or to subject them to discrimination under the program receiving Federal financial assistance. In any such case, the provisions of paragraph (c)(1) of this section shall apply to the extent necessary to assure equality of opportunity to and nondiscriminatory treatment of beneficiaries.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE SUBPART:

42 U.S.C. 2000d-2000d-7; E.O. 12250, *45 FR 72995,* 3 CFR, 1980 Comp., p. 298.

History

[31 FR 10265, July 29, 1966, as amended by *38 FR 17955,* July 5, 1973; *68 FR 51334, 51364,* Aug. 26, 2003]

Annotations

Notes

[EFFECTIVE DATE NOTE:

68 FR 51334, 51364, Aug. 26, 2003, amended paragraph (b)(1), and revised paragraph (b)(4), effective Sept. 25, 2003.]

Case Notes

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --

Alexander v Sandoval (2001, US) 149 L Ed 2d 517, 121 S Ct 1511

LexisNexis® Notes

Civil Rights Law : General Overview

Civil Rights Law : Civil Rights Acts : Civil Rights Act of 1964
Civil Rights Law : Federally Assisted Programs : Discriminatory Intent
Civil Rights Law : Federally Assisted Programs : Enforcement
Civil Rights Law : Federally Assisted Programs : Federal Assistance
Civil Rights Law : Federally Assisted Programs : Scope
Governments : State & Territorial Governments : Claims By & Against
Labor & Employment Law : Discrimination : Disparate Impact : Statutory Application : General Overview
Labor & Employment Law : Discrimination : National Origin Discrimination : Federal & State Interrelationships
Public Health & Welfare Law : Housing & Public Buildings : General Overview
Public Health & Welfare Law : Social Services : General Overview

Civil Rights Law : General Overview

Clyburn v. Shields, 2002 U.S. App. LEXIS 5752 (2d Cir Mar. 29, 2002).
Overview: *Where the law school applicant's complaint that the use of the law school admissions test as a criterion for admission was discriminatory was insufficient to state a claim, the law school's motion to dismiss was granted.*

- The use of criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race is prohibited under *28 C.F.R. § 42.104(b)(2)*. *Go To Headnote*

Maryland State Conf. of NAACP Branches v. Maryland Dep't of State Police, 72 F. Supp. 2d 560, 1999 U.S. Dist. LEXIS 16613 (D Md Sept. 30, 1999).
Overview: *In class action suit against State Police alleging discriminatory stops of minority motorists, defendants' motion for summary junction denied in part. Defendants had standing and alleged a claim for supervisory liability.*

- No program receiving financial assistance through the Department of Justice shall utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin. *28 C.F.R. § 42.104(b)(2)*. *Go To Headnote*

Civil Rights Law : Civil Rights Acts : Civil Rights Act of 1964

S. Camden Citizens In Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 505, 2001 U.S. Dist. LEXIS 5988 (D NJ May 10, 2001).
Overview: *U.S. Supreme Court's decision did not preclude plaintiffs from pursuing their claim for disparate impact discrimination, in violation of the EPA's implementing regulations to Title VI. Thus, the motion to vacate was denied.*

- *28 C.F.R. § 42.104(b)(2)* prohibits recipients of federal funds from, inter alia, utilizing criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin. *Go To Headnote*

Alexander v. Sandoval, 532 U.S. 275, 69 U.S.L.W. 4250, 121 S. Ct. 1511, 149 L. Ed. 2d 517, 2001 U.S. LEXIS 3367 (Apr. 24, 2001).
Overview: *No private right of action existed to enforce regulations which prohibited discriminatory impact of conduct by federal funding recipients, since implementing statute only prohibited intentional discrimination in federal programs.*

- The disparate-impact regulations of the United States Department of Justice, *28 C.F.R. § 42.104(b)(2) (1999)*, and the United States Department of Transportation, *49 C.F.R. § 21.5(b)(2) (2000)*, do not simply apply § 601 of Title VI of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000d* et seq., since they indeed forbid conduct that § 601 of Title VI permits, and therefore the private right of action to enforce § 601 of Title VI does not include a private right to enforce these regulations. A private plaintiff may not bring a suit based on a regulation against a defendant for acts not prohibited by the text of the statute. *Go To Headnote*

Rodriguez v. California Highway Patrol, 89 F. Supp. 2d 1131, 2000 U.S. Dist. LEXIS 3062 (ND Cal Mar. 13, 2000).
Overview: *In a racial discrimination action, a government defendant could not prove it was entitled to statutory immunity at the demurrer stage. However, state law claims against defendant were dismissed pursuant to its sovereign immunity.*

- The regulations implementing Title VI of the Civil Rights Act of 1964 provide that no program receiving federal assistance through the Department of Justice shall utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin. *28 C.F.R. § 42.104(b)(2)*. *Go To Headnote*

Civil Rights Law : Federally Assisted Programs : Discriminatory Intent

Nat'l Multi Hous. Council v. Jackson, 539 F. Supp. 2d 425, 2008 U.S. Dist. LEXIS 24822 (DDC Mar. 28, 2008).
Overview: *HUD's motion for a judgment on the pleadings was granted because two landlord groups lacked standing to challenge a policy guidance since invalidation of the policy guidance would not redress their claimed injury; the guidance took pains to identify its function as fleshing out existing responsibilities, rather than creating new ones.*

- *28 C.F.R. § 42.104(b)(2)* states that a federally funded program may not utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of

defeating, or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin. *Go To Headnote*

- The Department of Housing and Urban Development (HUD) has adopted the same operative language found in *28 C.F.R. § 42.104(b)(2)* to govern recipients of funding for housing, accommodations, facilities, services, financial aid, or other benefits which will be provided under any funded program or activity. *24 C.F.R. § 1.4(b)(2)(i)*. Thus, a ″disparate impact″ theory of discrimination is and has been available under the duly promulgated Title VI of the Civil Rights Act of 1964 regulations of both the Department of Justice and HUD for 35 years. *Go To Headnote*

Civil Rights Law : Federally Assisted Programs : Enforcement

Alexander v. Sandoval, 532 U.S. 275, 69 U.S.L.W. 4250, 121 S. Ct. 1511, 149 L. Ed. 2d 517, 2001 U.S. LEXIS 3367 (Apr. 24, 2001).
Overview: *No private right of action existed to enforce regulations which prohibited discriminatory impact of conduct by federal funding recipients, since implementing statute only prohibited intentional discrimination in federal programs.*

- The disparate-impact regulations of the United States Department of Justice, *28 C.F.R. § 42.104(b)(2) (1999)*, and the United States Department of Transportation, *49 C.F.R. § 21.5(b)(2) (2000)*, do not simply apply § 601 of Title VI of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000d* et seq., since they indeed forbid conduct that § 601 of Title VI permits, and therefore the private right of action to enforce § 601 of Title VI does not include a private right to enforce these regulations. A private plaintiff may not bring a suit based on a regulation against a defendant for acts not prohibited by the text of the statute. *Go To Headnote*

Civil Rights Law : Federally Assisted Programs : Federal Assistance

S. Camden Citizens In Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 505, 2001 U.S. Dist. LEXIS 5988 (D NJ May 10, 2001).
Overview: *U.S. Supreme Court's decision did not preclude plaintiffs from pursuing their claim for disparate impact discrimination, in violation of the EPA's implementing regulations to Title VI. Thus, the motion to vacate was denied.*

- *28 C.F.R. § 42.104(b)(2)* prohibits recipients of federal funds from, inter alia, utilizing criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin. *Go To Headnote*

Farm Labor Org. Comm. v. Ohio State Highway Patrol, 95 F. Supp. 2d 723, 2000 U.S. Dist. LEXIS 6068 (ND Ohio Apr. 20, 2000).
Overview: *Motorists stated viable equal protection claim against state highway patrol and individuals based on alleged practice of interrogating motorists concerning their immigration status because of motorists' Hispanic appearance.*

- *28 C.F.R. § 42.104 (b)*, promulgated under Title VI of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000d* et seq. (Title VI), provides that a federally funded program or activity cannot provide any disposition to an individual which is different, or is provided in a different manner based on that individual's race, color or national original. ″Disposition″ is defined as any treatment, handling, decision, sentencing, confinement, or other prescription of conduct. *28 C.F.R. § 42.102(j)*. Clearly, the process of questioning motorists about their immigration status constitutes a ″disposition″ within the meaning of Title VI. *Go To Headnote*

Rodriguez v. California Highway Patrol, 89 F. Supp. 2d 1131, 2000 U.S. Dist. LEXIS 3062 (ND Cal Mar. 13, 2000).
Overview: *In a racial discrimination action, a government defendant could not prove it was entitled to statutory immunity at the demurrer stage. However, state law claims against defendant were dismissed pursuant to its sovereign immunity.*

- The regulations implementing Title VI of the Civil Rights Act of 1964 provide that no program receiving federal assistance through the Department of Justice shall utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin. *28 C.F.R. § 42.104(b)(2)*. *Go To Headnote*

Civil Rights Law : Federally Assisted Programs : Scope

Farm Labor Org. Comm. v. Ohio State Highway Patrol, 95 F. Supp. 2d 723, 2000 U.S. Dist. LEXIS 6068 (ND Ohio Apr. 20, 2000).
Overview: *Motorists stated viable equal protection claim against state highway patrol and individuals based on alleged practice of interrogating motorists concerning their immigration status because of motorists' Hispanic appearance.*

- *28 C.F.R. § 42.104 (b)*, promulgated under Title VI of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000d* et seq. (Title VI), provides that a federally funded program or activity cannot provide any disposition to an individual which is different, or is provided in a different manner based on that individual's race, color or national original. ″Disposition″ is defined as any treatment, handling, decision, sentencing, confinement, or other prescription of conduct. *28 C.F.R. § 42.102(j)*. Clearly, the process of questioning motorists about their immigration status constitutes a ″disposition″ within the meaning of Title VI. *Go To Headnote*

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Overview: *In a racial discrimination action, a government defendant could not prove it was entitled to statutory immunity at the demurrer stage. However, state law claims against defendant were dismissed pursuant to its sovereign immunity.*

- The regulations implementing Title VI of the Civil Rights Act of 1964 provide that no program receiving federal assistance through the Department of Justice shall utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin. *28 C.F.R. § 42.104(b)(2)*. *Go To Headnote*

Governments : State & Territorial Governments : Claims By & Against

Farm Labor Org. Comm. v. Ohio State Highway Patrol, 95 F. Supp. 2d 723, 2000 U.S. Dist. LEXIS 6068 (ND Ohio Apr. 20, 2000).
Overview: *Motorists stated viable equal protection claim against state highway patrol and individuals based on alleged practice of interrogating motorists concerning their immigration status because of motorists' Hispanic appearance.*

- *28 C.F.R. § 42.104 (b)*, promulgated under Title VI of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000d* et seq. (Title VI), provides that a federally funded program or activity cannot provide any disposition to an individual which is different, or is provided in a different manner based on that individual's race, color or national original. ″Disposition″ is defined as any treatment, handling, decision, sentencing, confinement, or other prescription of conduct. *28 C.F.R. § 42.102(j)*. Clearly, the process of questioning motorists about their immigration status constitutes a ″disposition″ within the meaning of Title VI. *Go To Headnote*

Labor & Employment Law : Discrimination : Disparate Impact : Statutory Application : General Overview

Am. Ass'n of People With Disabilities v. Harris, 605 F.3d 1124, 2010 U.S. App. LEXIS 9615 (11th Cir May 11, 2010), substituted opinion at *647 F.3d 1093, 2011 U.S. App. LEXIS 15455, 23 Fla. L. Weekly Fed. C 159, 25 Am. Disabilities Cas. (BNA) 467 (11th Cir. Fla. 2011).*
Overview: *Where disabled voters asserted claims under 42 U.S.C.S. § 12133* and the Rehabilitation Act, *29 U.S.C.S. § 794,* based on inaccessible voting machines, the court of appeals found that *42 U.S.C.S. § 15481*(a)(3) and *28 C.F.R. § 35.151(b)* did not provide for a private cause of action against state election officials, and their injunction was dissolved.

- Section 601 of Title VI of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000d,* contained a provision prohibiting discrimination in covered programs or activities on the basis of race, color, or national origin. Section 602 of Title VI of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000d-1,* authorized federal agencies to effectuate § 2000d, by promulgating regulations. One regulation promulgated under § 2000d-1 prohibited funding recipients from using criteria or methods of administration that had the effect of discriminating based on race, color, or national origin. *28 C.F.R. § 42.104(b)(2)*. *Go To Headnote*

Labor & Employment Law : Discrimination : National Origin Discrimination : Federal & State Interrelationships

Sandoval v. Hagan, 197 F.3d 484, 1999 U.S. App. LEXIS 30722 (11th Cir Nov. 30, 1999).
Overview: *Official policy of English-only driver's license exams constituted disparate impact on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964, and suit was not barred by U.S. Const. amend. XI.*

- Department of Transportation and Department of Justice regulations prohibit grant recipients from employing criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their national origin. *49 C.F.R. § 21.5(b)(2)*; *28 C.F.R. § 42.104(b)(2)*. *Go To Headnote*

Public Health & Welfare Law : Housing & Public Buildings : General Overview

Nat'l Multi Hous. Council v. Jackson, 539 F. Supp. 2d 425, 2008 U.S. Dist. LEXIS 24822 (DDC Mar. 28, 2008).
Overview: *HUD's motion for a judgment on the pleadings was granted because two landlord groups lacked standing to challenge a policy guidance since invalidation of the policy guidance would not redress their claimed injury; the guidance took pains to identify its function as fleshing out existing responsibilities, rather than creating new ones.*

- The Department of Housing and Urban Development (HUD) has adopted the same operative language found in *28 C.F.R. § 42.104(b)(2)* to govern recipients of funding for housing, accommodations, facilities, services, financial aid, or other benefits which will be provided under any funded program or activity. *24 C.F.R. § 1.4(b)(2)(i)*. Thus, a ″disparate impact″ theory of discrimination is and has been available under the duly promulgated Title VI of the Civil Rights Act of 1964 regulations of both the Department of Justice and HUD for 35 years. *Go To Headnote*

Public Health & Welfare Law : Social Services : General Overview

Nat'l Multi Hous. Council v. Jackson, 539 F. Supp. 2d 425, 2008 U.S. Dist. LEXIS 24822 (DDC Mar. 28, 2008).
Overview: *HUD's motion for a judgment on the pleadings was granted because two landlord groups lacked standing to challenge a policy guidance since invalidation of the policy guidance would not redress their claimed injury; the guidance took pains to identify its function as fleshing out existing responsibilities, rather than creating new ones.*

- The Department of Housing and Urban Development (HUD) has adopted the same operative language found in *28 C.F.R. § 42.104(b)(2)* to govern recipients of funding for housing, accommodations, facilities, services, financial aid, or other benefits which will be provided under any funded program or activity. *24 C.F.R. § 1.4(b)(2)(i)*. Thus, a ″disparate impact″ theory of discrimination is and has been available under the duly promulgated Title VI of the Civil Rights Act of 1964 regulations of both the Department of Justice and HUD for 35 years. *Go To Headnote*

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE CHAPTER:

CROSS REFERENCES: Customs Service, Department of the Treasury: See Customs Duties, 19 CFR chapter I.

Internal Revenue Service, Department of the Treasury: See Internal Revenue Service, 26 CFR chapter I.

Employees' Benefits: See title 20.

Federal Trade Commission: See Commercial Practices, 16 CFR chapter I.

Other regulations issued by the Department of Justice appear in title 4; title 8; title 21; title 45; title 48.

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 42 procedural limitations, see: *61 FR 42556,* Aug. 16, 1996.]

NOTES APPLICABLE TO ENTIRE SUBPART:

h1 See also *28 CFR 50.3*. Guidelines for enforcement of Title VI, Civil Rights Act.

Supreme Court of Texas
Language Access Plan

I. Legal Basis and Purpose

This document serves as the plan for the Supreme Court of Texas ("the Court") to provide to persons with limited English proficiency ("LEP") services that are in compliance with Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*; 45 C.F.R. § 80.1 *et seq.*; and 28 C.F.R. § 42.101–42.112). The purpose of this plan is to provide a framework for the provision of timely and reasonable language assistance to LEP persons who have contact with the Court.

This LEP plan was developed to ensure meaningful access to the Court's services for persons with limited English proficiency. Access services for persons with hearing loss are covered under the Americans with Disabilities Act rather than Title VI of the Civil Rights Act, and therefore will not be addressed in this plan.

II. Needs Assessment

Public hearings before the Court are at the highest appellate level in the State of Texas, and they tend to involve oral arguments among attorneys and judges. To date, the need for LEP services has been quite limited.

Nonetheless, the Court will make every effort to provide services to persons with LEP. The following list shows the top foreign languages that are most frequently used in Texas, from current U.S. Census Bureau statistics.[1]

1. Spanish
2. Vietnamese
3. Chinese
4. Korean

III. Language Assistance Resources

The Court has designated its Clerk as the primary point of contact for all LEP services. All staff will be trained to direct anyone inquiring about LEP services to the Clerk. The Court is taking reasonable steps to ensure that LEP individuals have meaningful access to all services, though the Court has generally received very limited requests for assistance in languages other than English. LEP individuals may contact the Court's personnel via the phone, the Clerk's office reception counter, e-mail, or other means.

1. **Spoken-language services.** The most common point of service is at the Clerk's office's

[1] U.S Census Bureau; American Community Survey, 2008-2012 American Community Survey 5-Year Estimates, Table B16001; generated by Marco Hanson of the Office of Court Administration using American FactFinder; <http://factfinder2.census.gov>; (4 March 2014).

reception counter or telephone calls to the Clerk's office. Bilingual assistance is provided at the reception counter and by phone by the placement of bilingual staff as is practical. The Court can also call on other bilingual staff from elsewhere in the building to assist at the reception counter or by phone. To facilitate communication between LEP individuals and staff, the Court will use the following resources to the extent they are available within the Court's funding restrictions:

- Bilingual employees;
- "I Speak" cards, to identify the individual's primary language;
- When appropriate, Language Line, Lionbridge, and other companies that are available to provide assistance through remote interpretation and translation. These contractors provide interpretation services via the telephone in over 170 languages; and
- Guidance from the Office of Court Administration's Language Access Coordinator.

2. **Written documents.** The Court will utilize its staff and other resources to begin the process of:

- Translating key forms, FAQs, and parts of the Court's homepage, intended for the general public, into Spanish; and
- Provide translations into English of Spanish-language forms and letters received by the Court.

IV. Staff Training

The Court is committed to providing LEP training opportunities for all staff members. Training and learning opportunities currently offered by the Court will be expanded or continued as needed. Those opportunities include:

- Training for current employees to make them aware of the Court's Language Access Plan;
- Diversity training, cultural competency training; and
- New employee orientation training on language access for public-facing employees.

V. Public Notification and Evaluation of Language Access Plan

The Court's Language Access Plan is subject to approval by the Justices of the Court. Any revisions to the plan will be submitted to the full Court for approval. Copies of the plan will be provided to the public on request, and the Court will post this plan on its public website. Periodically, the General Counsel in consultation with the Clerk will assess whether changes to the plan are needed. The plan will remain in effect unless modified or updated. Periodic assessments may include identification of any problem areas and development of corrective action strategies. Elements of the assessment may include:

- Number of LEP persons requesting assistance and cost to the Court of providing this access;
- Assessment of current language needs to determine if additional services or translated

materials should be provided;

- Solicitation and review of feedback from LEP communities and advocacy groups;
- Assessment of whether staff adequately understand LEP policies and procedures and how to carry them out; and
- Review of feedback from staff.

Language Access Plan
April 1, 2014

Office of Court Administration

David Slayton
Administrative Director

Office of Court Administration
State of Texas

Language Access Plan

I. Legal Basis and Purpose

This document serves as the plan for the Office of Court Administration (OCA) to provide to persons with limited English proficiency (LEP) services that are in compliance with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.; 45 C.F.R. §80.1 et seq.; and 28 C.F.R. §42.101–42.112). The purpose of this plan is to provide a framework for the provision of timely and reasonable language assistance to LEP persons who come in contact with OCA. Under Chapter 72 of the Texas Government Code, the mission of the OCA is to provide resources and information for the efficient administration of the judicial branch of Texas, which is not a unified court system.

This LEP plan was developed to ensure meaningful access to OCA services for persons with limited English proficiency. Access services for persons with hearing loss are covered under the Americans with Disabilities Act rather than Title VI of the Civil Rights Act, and therefore will not be addressed in this plan.

II. Needs Assessment

OCA will make every effort to provide services to all LEP persons. The following list shows the top foreign languages that are most frequently used in Texas, from current U.S. Census Bureau statistics.[1]

1. Spanish
2. Vietnamese
3. Chinese
4. Korean

III. Language Assistance Resources

OCA has designated its Language Access Coordinator as the primary point of contact for all LEP services. All staff will be trained to direct anyone inquiring about LEP services to that coordinator. OCA is taking reasonable steps to ensure that LEP individuals have meaningful access to all services, though OCA's mission of providing services to the judiciary rather than the public has generally resulted in very limited requests for assistance in languages other than English. LEP individuals may come in contact with OCA personnel via the phone, the reception counter, e-mail or other means.

[1] U.S Census Bureau; American Community Survey, 2008-2012 American Community Survey 5-Year Estimates, Table B16001; generated by Marco Hanson; using American FactFinder; <http://factfinder2.census.gov>; (4 March 2014).

1. **Spoken-language services.** The most common points of service are at OCA's reception counter and at the administrative boards that regulate court interpreters, court reporters, guardians and process servers. Bilingual assistance is provided at the reception counter by the placement of bilingual staff as is practical. OCA can also call on other bilingual staff from elsewhere in the building to assist at the reception counter. To facilitate communication between LEP individuals and staff, OCA will use the following resources to the degree that resources are available:

    - Bilingual employees;
    - "I Speak" cards, to identify the individual's primary language; and
    - When appropriate, Language Line, Lionbridge and other companies are available to provide assistance through remote interpretation and translation. These contractors provide interpretation services via the telephone in over 170 languages.

2. **Written documents.** OCA's Language Access staff will:

    - Translate key forms and OCA webpages, intended for the general public, into Spanish; and
    - Provide translations into English of Spanish-language forms and letters received by OCA.

IV. Staff Training

OCA is committed to providing LEP training opportunities for all staff members. Training and learning opportunities currently offered by OCA will be expanded or continued as needed. Those opportunities include:

- Training for current employees on OCA's Language Access Plan;
- Designated staff attending statewide and national conferences on language access or conferences that include sessions dedicated to topics on language access; and
- New employee orientation training on language access

V. Public Notification and Evaluation of Language Access Plan

The OCA Language Access Plan is subject to approval by the Administrative Director of OCA. Any revisions to the plan will be submitted to the director for approval. Copies of the plan will be provided to the public on request, and OCA will post this plan on its public website. Once each year, the Language Access Coordinator will assess whether changes to the plan are needed. The plan will remain in effect unless modified or updated. Period assessments may include identification of any problem areas and development of corrective action strategies. Elements of the assessment may include:

- Number of LEP persons requesting assistance and cost to OCA of providing this access;
- Assessment of current language needs to determine if additional services or translated materials should be provided;
- Solicitation and review of feedback from LEP communities and advocacy groups;

- Assessment of whether staff adequately understand LEP policies and procedures and how to carry them out; and
- Review of feedback from staff training sessions.

Language Access Plan effective date: April 1, 2014

Approved by: David Slayton, OCA Administrative Director

Memorandum

To: Justice Nathan Hecht
Martha Newton

From: Tracy Christopher

Date: June 13, 2016

Re: Rules conflicts

Our court has had two cases involving an apparent conflict between the Justice Court rules and the District and County Court rules governing a de novo appeal from an eviction from JP court.

Rule 510.12 states "An eviction case appealed to county court will be subject to trial at any time after the expiration of 8 days after the date the transcript is filed in the county court." This conflicts with the general rule requiring 45 days notice for trial (Rule 245). While we could certainly construe the two rules and conclude that the more specific rule applies, it raises another problem—the jury demand. A jury demand in JP court needs to be on file 3 days before trial (Rule 510.7), while a jury demand in county court requires 30 days (Rule 216). There is nothing importing the 3 day demand into county court. It then becomes impossible for a person with only 8 days notice of trial to timely request a jury.

I understand the desire to deal with these cases promptly but it would be good to cross reference 510.12 and 245, and to amend 510.10 to include a 3 day jury demand for the de novo appeal, notwithstanding rule 216.

My suggestions are:

Amend Rule 510.12

"Notwithstanding Rule 245, a~~A~~n eviction case appealed to county court will be subject to trial at any time after the expiration of 8 days after the date the transcript is filed in the county court."

Amend Rule 510.10 to add a new section (c) and renumber (c) to (d)

(c) *Jury Trial Demanded.* Notwithstanding Rule 216, any party may file a written demand for trial by jury by making a request to the county court at least 3 days before the trial date. The demand must be accompanied by payment of a jury fee or by filing a sworn statement of inability to pay the jury fee.

Thank you for considering these changes.

MEMORANDUM

DATE: June 8, 2016

TO: Chip Babcock

FROM: O. Carl Hamilton, Jr.

SUBJECT: Garnishment Rule

The subcommittee was asked to look at the Garnishment Rule to see if it met due process requirements in view of the Georgia court decisions previously attached.

At the last meeting it was suggested that we provide the judgment debtor with examples of some exempt properties or have a comment to the rule.

Attached is a revised draft with some examples of exempt property and a second version without the examples. A comment has not yet been drafted because of some uncertainty as to what is exempt. Only pages four through seven are attached since they involve the changes.

Some statutes specify funds or property are exempt from garnishment. For example:

Current wages for personal service are exempt from garnishment (§ *63.004, CPRC).* Insurance and annuity benefits are specifically exempt from garnishment (*Texas Insurance Code*, § *1108.051).* Medical benefits, income benefits, death benefits or burial benefits based on a compensable injury (such as workers' compensation) are specifically exempt from garnishment (*Texas Labor Code, Section 408.201 and 401.011).* Texas Property Code § 42.001 specifically provides that some personal property designated in § 42.002 is exempt from garnishment, attachment, execution, or other seizure. This language suggests that garnishment is a form of seizure.

Other statutes such as Texas Property Code § 42.0021 (stock bonus, pension, profit sharing, retirement and annuity) and 42.0022 (college savings plans) do not specifically exempt property from garnishment but instead exempt the subject property from attachment, execution, and "seizure."

Texas Property Code § 43.002 exempts the real property of the state, state agencies, and political subdivisions of the state from attachment, execution, and forced sale. Garnishment is not specifically referenced in this statute, yet several courts have held that governmental entities are generally immune from garnishment. See, *Delta County Levee Improv. Dist. No. 2 v. Leonard*, 516 S.W.2d 911 (Tex. 1974) (Levee Improvement District); *Willacy County Water Control & Improv. Dist. v. Abendroth*, 177 S.W.2d 936

(Tex. 1944) (Water Control and Improvement District); *Addison v. Addison*, 530 S.W.2d 920 (Tex. Civ. App. Houston 1st Dist. 1975, no writ) (state university); National Surety Corp. v. Friendswood Ind. School Dist., 433 S.W.2d 690, 694 (Tex. 1968)(School Districts and Boards); City of Sherman v. Shobe, 94 Tex. 126, 58 S.W. 949-950 (1900)(Counties).

The above cases pre-date § 43.002 of the Texas Property Code. Since the courts had previously held that government entities were immune from garnishment, one would suppose that the legislature, when enacting § 43.002 in 1979, would have included "garnishment," but it did not.

If we draft a comment to list examples of exempt properties, do we include stock bonus, pension, profit-sharing, retirement, annuity and college savings plans, which are not exempt from "garnishment" per se, but are exempt from "seizure" on the grounds that garnishment is a form of seizure?

Also, do we assume that government entities may be subject to garnishment because Texas Property Code § 43.002 does not include "garnishment," and hence the only defense a government entity would have would be immunity?

We have not done an exhaustive search of the federal and state statutes to see what other funds or property may be exempt. The debtor should consult a lawyer to do the research.

Tex. Prop. Code § 42.001

This document is current through the 2015 regular session, 84th Legislature.

Texas Statutes & Codes Annotated by LexisNexis® > Property Code > Title 5 Exempt Property and Liens > Subtitle A Property Exempt From Creditor's Claims > Chapter 42 Personal Property

Sec. 42.001. Personal Property Exemption.

(a) Personal property, as described in Section 42.002, is exempt from garnishment, attachment, execution, or other seizure if:

(1) the property is provided for a family and has an aggregate fair market value of not more than $100,000 , exclusive of the amount of any liens, security interests, or other charges encumbering the property; or

(2) the property is owned by a single adult, who is not a member of a family, and has an aggregate fair market value of not more than $50,000 , exclusive of the amount of any liens, security interests, or other charges encumbering the property.

(b) The following personal property is exempt from seizure and is not included in the aggregate limitations prescribed by Subsection (a):

(1) current wages for personal services, except for the enforcement of court-ordered child support payments;

(2) professionally prescribed health aids of a debtor or a dependent of a debtor;

(3) alimony, support, or separate maintenance received or to be received by the debtor for the support of the debtor or a dependent of the debtor; and

(4) a religious bible or other book containing sacred writings of a religion that is seized by a creditor other than a lessor of real property who is exercising the lessor's contractual or statutory right to seize personal property after a tenant breaches a lease agreement for or abandons the real property.

(c) Except as provided by Subsection (b)(4), this section does not prevent seizure by a secured creditor with a contractual landlord's lien or other security in the property to be seized.

(d) Unpaid commissions for personal services not to exceed 25 percent of the aggregate limitations prescribed by Subsection (a) are exempt from seizure and are included in the aggregate.

(e) A religious bible or other book described by Subsection (b)(4) that is seized by a lessor of real property in the exercise of the lessor's contractual or statutory right to seize personal property after a tenant breaches a lease agreement for the real property or abandons the real property may not be included in the aggregate limitations prescribed by Subsection (a).

History

Enacted by Acts 1983, 68th Leg., ch. 576 (S.B. 748), § 1, effective January 1, 1984; am. Acts 1991, 72nd Leg., ch. 175 (S.B. 654), § 1, effective May 24, 1991; am. Acts 1997, 75th Leg., ch. 1046 (S.B. 1098), § 1, effective September 1, 1997; am. Acts 2007, 80th Leg., ch. 444 (H.B. 167), § 1, effective September 1, 2007; am. Acts 2015, 84th Leg., ch. HB2706 (H.B. 2706), § 1, effective September 1, 2015.

Tex. Prop. Code § 42.002

This document is current through the 2015 regular session, 84th Legislature.

Texas Statutes & Codes Annotated by LexisNexis® > Property Code > Title 5 Exempt Property and Liens > Subtitle A Property Exempt From Creditor's Claims > Chapter 42 Personal Property

Sec. 42.002. Personal Property.

(a) The following personal property is exempt under Section 42.001(a):

(1) home furnishings, including family heirlooms;

(2) provisions for consumption;

(3) farming or ranching vehicles and implements;

(4) tools, equipment, books, and apparatus, including boats and motor vehicles used in a trade or profession;

(5) wearing apparel;

(6) jewelry not to exceed 25 percent of the aggregate limitations prescribed by Section 42.001(a);

(7) two firearms;

(8) athletic and sporting equipment, including bicycles;

(9) a two-wheeled, three-wheeled, or four-wheeled motor vehicle for each member of a family or single adult who holds a driver's license or who does not hold a driver's license but who relies on another person to operate the vehicle for the benefit of the nonlicensed person;

(10) the following animals and forage on hand for their consumption:

(A) two horses, mules, or donkeys and a saddle, blanket, and bridle for each;

(B) 12 head of cattle;

(C) 60 head of other types of livestock; and

(D) 120 fowl; and

(11) household pets.

(b) Personal property, unless precluded from being encumbered by other law, may be encumbered by a security interest under Subchapter B, Chapter 9, Business & Commerce Code, or Subchapter F, Chapter 501, Transportation Code, or by a lien fixed by other law, and the security interest or lien may not be avoided on the ground that the property is exempt under this chapter.

History

Enacted by Acts 1983, 68th Leg., ch. 576 (S.B. 748), § 1, effective January 1, 1984; am. Acts 1991, 72nd Leg., ch. 175 (S.B. 654), § 1, effective May 24, 1991; am. Acts 1993, 73rd Leg., ch. 216 (H.B. 1828), § 1, effective May 17, 1993; am. Acts 1997, 75th Leg., ch. 165 (S.B. 898), § 30.245, effective September 1, 1997; am. Acts 1999, 76th Leg., ch. 414 (S.B. 1058), § 2.36, effective July 1, 2001; am. Acts 1999, 76th Leg., ch. 846 (H.B. 1805), § 1, effective August 30, 1999.

Tex. Prop. Code § 42.0021

This document is current through the 2015 regular session, 84th Legislature.

Texas Statutes & Codes Annotated by LexisNexis® > Property Code > Title 5 Exempt Property and Liens > Subtitle A Property Exempt From Creditor's Claims > Chapter 42 Personal Property

Sec. 42.0021. Additional Exemption for Certain Savings Plans.

(a) In addition to the exemption prescribed by Section 42.001, a person's right to the assets held in or to receive payments, whether vested or not, under any stock bonus, pension, annuity, deferred compensation, profit-sharing, or similar plan, including a retirement plan for self-employed individuals, or a simplified employee pension plan, an individual retirement account or individual retirement annuity, including an inherited individual retirement account, individual retirement annuity, Roth IRA, or inherited Roth IRA, or a health savings account, and under any annuity or similar contract purchased with assets distributed from that type of plan or account, is exempt from attachment, execution, and seizure for the satisfaction of debts to the extent the plan, contract, annuity, or account is exempt from federal income tax, or to the extent federal income tax on the person's interest is deferred until actual payment of benefits to the person under Section 223, 401(a), 403(a), 403(b), 408(a), 408A, 457(b), or 501(a), Internal Revenue Code of 1986, including a government plan or church plan described by Section 414(d) or (e), Internal Revenue Code of 1986. For purposes of this subsection, the interest of a person in a plan, annuity, account, or contract acquired by reason of the death of another person, whether as an owner, participant, beneficiary, survivor, coannuitant, heir, or legatee, is exempt to the same extent that the interest of the person from whom the plan, annuity, account, or contract was acquired was exempt on the date of the person's death. If this subsection is held invalid or preempted by federal law in whole or in part or in certain circumstances, the subsection remains in effect in all other respects to the maximum extent permitted by law.

(b) Contributions to an individual retirement account that exceed the amounts permitted under the applicable provisions of the Internal Revenue Code of 1986 and any accrued earnings on such contributions are not exempt under this section unless otherwise exempt by law. Amounts qualifying as nontaxable rollover contributions under Section 402(a)(5), 403(a)(4), 403(b)(8), or 408(d)(3) of the Internal Revenue Code of 1986 before January 1, 1993, are treated as exempt amounts under Subsection (a). Amounts treated as qualified rollover contributions under Section 408A, Internal Revenue Code of 1986, are treated as exempt amounts under Subsection (a). In addition, amounts qualifying as nontaxable rollover contributions under Section 402(c), 402(e)(6), 402(f), 403(a)(4), 403(a)(5), 403(b)(8), 403(b)(10), 408(d)(3), or 408A of the Internal Revenue Code of 1986 on or after January 1, 1993, are treated as exempt amounts under Subsection (a). Amounts qualifying as nontaxable rollover contributions under Section 223(f)(5) of the Internal Revenue Code of 1986 on or after January 1, 2004, are treated as exempt amounts under Subsection (a).

(c) Amounts distributed from a plan, annuity, account, or contract entitled to an exemption under Subsection (a) are not subject to seizure for a creditor's claim for 60 days after the date of distribution if the amounts qualify as a nontaxable rollover contribution under Subsection (b).

(d) A participant or beneficiary of a plan, annuity, account, or contract entitled to an exemption under Subsection (a), other than an individual retirement account or individual retirement annuity, is not prohibited from granting a valid and enforceable security interest in the participant's or beneficiary's right to the assets held in or to receive payments under the exempt plan, annuity, account, or contract to secure a loan to the participant or beneficiary from the exempt plan, annuity, account, or contract, and the right to the assets held in or to receive payments from the plan, annuity, account, or contract is subject

to attachment, execution, and seizure for the satisfaction of the security interest or lien granted by the participant or beneficiary to secure the loan.

(e) If Subsection (a) is declared invalid or preempted by federal law, in whole or in part or in certain circumstances, as applied to a person who has not brought a proceeding under Title 11, United States Code, the subsection remains in effect, to the maximum extent permitted by law, as to any person who has filed that type of proceeding.

(f) A reference in this section to a specific provision of the Internal Revenue Code of 1986 includes a subsequent amendment of the substance of that provision.

History

Enacted by Acts 1987, 70th Leg., ch. 376 (H.B. 736), § 1, effective September 1, 1987; am. Acts 1989, 71st Leg., ch. 1122 (H.B. 2295), § 1, effective September 1, 1989; am. Acts 1995, 74th Leg., ch. 963 (H.B. 3207), § 1, effective August 28, 1995; am. Acts 1999, 76th Leg., ch. 106 (H.B. 76), § 1, effective September 1, 1999; am. Acts 2005, 79th Leg., ch. 130 (H.B. 330), § 1, effective May 24, 2005; am. Acts 2005, 79th Leg., ch. 130 (H.B. 330), § 2, effective May 24, 2005; am. Acts 2011, 82nd Leg., ch. 933 (S.B. 1810), § 1, effective June 17, 2011; am. Acts 2013, 83rd Leg., ch. 91 (S.B. 649), § 2, effective September 1, 2013.

Annotations

Notes

STATUTORY NOTES

Editor's Notes.

Acts 2011, 82nd Leg., ch. 933 (S.B. 1810), § 3 provides: "The changes made by this Act are intended to clarify rather than change existing law."

Effect of amendments.

2005 amendment, substituted "Certain Savings Plans" for "Retirement Plan" in the section heading; added "and under any health savings account described by Section 223 of the Internal Revenue Code of 1996" in the first sentence of (a); and added the last sentence in (b).

2011 amendment, rewrote (a), which, regarding any retirement annuity or account described by Section 403(b) or 408A of the Internal Revenue Code of 1986, stated that a government or church plan or contract is exempt under the federal employee retirement income security Act of 1974; added "annuity, account" in (c); in (d), substituted "plan, annuity, account, or contract entitled to an exemption under Subsection (a), other than an individual retirement account or individual retirement annuity" for "stock bonus, pension, profit-sharing, retirement plan, or government plan," substituted "exempt plan, annuity, account, or contract" for "plan" after "payments under the" and after "beneficiary from the," and added "annuity, account, or contract" before "is subject to"; and made a stylistic change.

2013 amendment, added "Roth IRA, or inherited Roth IRA" before "or a health" in the first sentence of (a); in the first sentence of (b), deleted "other than contributions to a Roth IRA described in Section 408A, Internal Revenue Code of 1986, or an annuity" after "retirement account" and substituted "permitted" for "deductible"; and made a related change.

Tex. Prop. Code § 42.0022

This document is current through the 2015 regular session, 84th Legislature.

Texas Statutes & Codes Annotated by LexisNexis® > *Property Code* > *Title 5 Exempt Property and Liens* > *Subtitle A Property Exempt From Creditor's Claims* > *Chapter 42 Personal Property*

Sec. 42.0022. Exemption for College Savings Plans.

(a) In addition to the exemption prescribed by Section 42.001, a person's right to the assets held in or to receive payments or benefits under any of the following is exempt from attachment, execution, and seizure for the satisfaction of debts:

(1) any fund or plan established under Subchapter F, Chapter 54, Education Code, including the person's interest in a prepaid tuition contract;

(2) any fund or plan established under Subchapter G, Chapter 54, Education Code, including the person's interest in a savings trust account; or

(3) any qualified tuition program of any state that meets the requirements of Section 529, Internal Revenue Code of 1986, as amended.

(b) If any portion of this section is held to be invalid or preempted by federal law in whole or in part or in certain circumstances, this section remains in effect in all other respects to the maximum extent permitted by law.

History

Enacted by *Acts 2003, 78th Leg., ch. 113 (S.B. 1588), § 1*, effective September 1, 2003.

Annotations

Notes

STATUTORY NOTES

Applicability.

Acts 2003, 78th Leg., ch. 113 (S.B. 1588), § 2 provides: "The change in law made by this Act applies to a person's right to the assets held in or to receive payments or benefits under any fund, plan, or program described by *Section 42.0022, Property Code*, as added by this Act, on and after the effective date of this Act without regard to whether any money and other property was contributed to or paid in connection with the fund, plan, or program to establish the person's right to those assets, payments, or benefits before, on, or after the effective date of this Act [September 1, 2003]."

Tex. Prop. Code § 43.002

This document is current through the 2015 regular session, 84th Legislature.

Texas Statutes & Codes Annotated by LexisNexis® > *Property Code* > *Title 5 Exempt Property and Liens* > *Subtitle A Property Exempt From Creditor's Claims* > *Chapter 43 Exempt Public Property*

Sec. 43.002. Exempt Property.

The real property of the state, including the real property held in the name of state agencies and funds, and the real property of a political subdivision of the state are exempt from attachment, execution, and forced sale. A judgment lien or abstract of judgment may not be filed or perfected against the state, a unit of state government, or a political subdivision of the state on property owned by the state, a unit of state government, or a political subdivision of the state; any such judgment lien or abstract of judgment is void and unenforceable.

History

Enacted by *Acts 1997, 75th Leg., ch. 159 (H.B. 833), § 1*, effective May 20, 1997.

Annotations

Case Notes

Constitutional Law: Bill of Rights: Fundamental Rights: Eminent Domain & Takings

Governments: State & Territorial Governments: Property

Real Property Law: Inverse Condemnation: Defenses

Constitutional Law: Bill of Rights: Fundamental Rights: Eminent Domain & Takings

1. Property owners association's pleadings were sufficient to establish a potential inverse condemnation or "takings" claim arising from the university's non-payment of annual maintenance fees, Tex. Const. art. I, § 17; Tex. *Prop. Code Ann. § 43.002* was a defense to foreclosure, but did not divest the courts of jurisdiction to hear a takings claim. *Tex. S. Univ. v. Cape Conroe Prop. Owners Ass'n, 245 S.W.3d 626, 2008 Tex. App. LEXIS 495 (Tex. App. Beaumont 2008, no pet.)*

Governments: State & Territorial Governments: Property

2. Trial court did not err in granting the city's plea to the jurisdiction to the company's suit for judicial foreclosure of its mechanic's lien, given that (1) the court did not agree that a suit like this was not the equivalent of a suit for money damages, and (2) Tex. *Prop. Code Ann. § 43.002* protected the government's ownership of real property. *Linbeck Constr. Corp. v. City of Grand Prairie, 293 S.W.3d 896, 2009 Tex. App. LEXIS 6253 (Tex. App. Dallas 2009)*, reh'g denied, *No. 05-08-00650-CV, 2009 Tex. App. LEXIS 7820 (Tex. App. Dallas Sept. 23, 2009)*, pet. denied *No. 09-0937, 2011 Tex. LEXIS 44 (Tex. Jan. 14, 2011)*.

(b) This section does not apply to a plaintiff who replevies the property.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

SUBCHAPTER D. CARE AND MANAGEMENT OF SEQUESTERED PROPERTY

§ 62.061. Officer's Liability and Duty of Care

(a) An officer who executes a writ of sequestration shall care for and manage in a prudent manner the sequestered property he retains in custody.

(b) If the officer entrusts sequestered property to another person, the officer is responsible for the acts of that person relating to the property.

(c) The officer is liable for injuries to the sequestered property resulting from his neglect or mismanagement or from the neglect or mismanagement of a person to whom he entrusts the property.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 62.062. Compensation of Officer

(a) An officer who retains custody of sequestered property is entitled to just compensation and reasonable charges to be determined by the court that issued the writ.

(b) The officer's compensation and charges shall be taxed and collected as a cost of suit.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 62.063. Indemnification of Officer for Money Spent

If an officer is required to expend money in the security, management, or care of sequestered property, he may retain possession of the property until the money is repaid by the party seeking to replevy the property or by that party's agent or attorney.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

CHAPTER 63. GARNISHMENT

Section
63.001. Grounds.
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§ 63.001. Grounds

A writ of garnishment is available if:

(1) an original attachment has been issued;

(2) a plaintiff sues for a debt and makes affidavit stating that:

(A) the debt is just, due, and unpaid;

(B) within the plaintiff's knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the debt; and

(C) the garnishment is not sought to injure the defendant or the garnishee; or

(3) a plaintiff has a valid, subsisting judgment and makes an affidavit stating that, within the plaintiff's knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the judgment.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 63.002. Who May Issue

The clerk of a district or county court or a justice of the peace may issue a writ of garnishment returnable to his court.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 63.003. Effect of Service

(a) After service of a writ of garnishment, the garnishee may not deliver any effects or pay any debt to the defendant. If the garnishee is a corporation or joint-stock company, the garnishee may not permit or recognize a sale or transfer of shares or an interest alleged to be owned by the defendant.

(b) A payment, delivery, sale, or transfer made in violation of Subsection (a) is void as to the amount of the debt, effects, shares, or interest necessary to satisfy the plaintiff's demand.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 63.004. Current Wages Exempt

Except as otherwise provided by state or federal law, current wages for personal service are not subject to garnishment. The garnishee shall be discharged from the garnishment as to any debt to the defendant for current wages.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1997, 75th Leg., ch. 466, § 1, eff. Sept. 1, 1997.

§ 63.005. Place for Trial

(a) If a garnishee other than a foreign corporation is not a resident of the county in which the original

Tex. Lab. Code § 401.011

This document is current through the 2015 regular session, 84th Legislature.

Texas Statutes & Codes Annotated by LexisNexis® > Labor Code > Title 5 Workers' Compensation > Subtitle A Texas Workers' Compensation Act > Chapter 401 General Provisions > Subchapter B Definitions

Sec. 401.011. General Definitions.

In this subtitle:

(1) "Adjuster" means a person licensed under Chapter 4101, Insurance Code.

(2) "Administrative violation" means a violation of this subtitle, a rule adopted under this subtitle, or an order or decision of the commissioner that is subject to penalties and sanctions as provided by this subtitle.

(3) "Agreement" means the resolution by the parties to a dispute under this subtitle of one or more issues regarding an injury, death, coverage, compensability, or compensation. The term does not include a settlement.

(4) "Alien" means a person who is not a citizen of the United States.

(5) "Benefit" means a medical benefit, an income benefit, a death benefit, or a burial benefit based on a compensable injury.

(5-a) "Case management" means a collaborative process of assessment, planning, facilitation, and advocacy for options and services to meet an individual's health needs through communication and application of available resources to promote quality, cost-effective outcomes.

(6) "Certified self-insurer" means a private employer granted a certificate of authority to self-insure, as authorized by this subtitle, for the payment of compensation.

(7) "Child" means a son or daughter. The term includes an adopted child or a stepchild who is a dependent of the employee.

(8) "Commissioner" means the commissioner of workers' compensation.

(9) "Commute" means to pay in a lump sum.

(10) "Compensable injury" means an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle.

(11) "Compensation" means payment of a benefit.

(12) "Course and scope of employment" means an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. The term includes an activity conducted on the premises of the employer or at other locations. The term does not include:

(A) transportation to and from the place of employment unless:

(i) the transportation is furnished as a part of the contract of employment or is paid for by the employer;

(ii) the means of the transportation are under the control of the employer; or

Tex. Lab. Code § 408.201

This document is current through the 2015 regular session, 84th Legislature.

Texas Statutes & Codes Annotated by LexisNexis® > Labor Code > Title 5 Workers' Compensation > Subtitle A Texas Workers' Compensation Act > Chapter 408 Workers' Compensation Benefits > Subchapter K Protection of Rights to Benefits

Sec. 408.201. Benefits Exempt from Legal Process.

Benefits are exempt from:

(1) garnishment;

(2) attachment;

(3) judgment; and

(4) other actions or claims.

History

Enacted by Acts 1993, 73rd Leg., ch. 269 (H.B. 752), § 1, effective September 1, 1993.

Annotations

Case Notes

Contracts Law: Remedies: Specific Performance

Family Law: Marital Termination & Spousal Support: Dissolution & Divorce: Property Distribution: General Overview

Workers' Compensation & SSDI: Administrative Proceedings: Settlements

Workers' Compensation & SSDI: Benefit Determinations: General Overview

Workers' Compensation & SSDI: Remedies Under Other Laws: Federal Employees' Compensation Act

Contracts Law: Remedies: Specific Performance

1. Where the parties reached a settlement agreement in a workers' compensation case, the trial court signed a final judgment in accordance with the settlement agreement providing that claimant was entitled to supplemental income benefits for the first, second, and third quarters, but was not entitled to benefits for the fourth quarter; in subsequent proceedings, the trial court had the authority to order specific performance of the settlement agreement. To the extent that the trial court ordered claimant to cooperate with the employer's carrier in presenting a DWC-24 Form to the Texas Department of Insurance, Division of Workers' Compensation for its approval, the order was not void. In re Gallardo, No. 13-14-00203-CV, 2015 Tex. App. LEXIS 1550 (Tex. App. Corpus Christi Feb. 19, 2015).

Family Law: Marital Termination & Spousal Support: Dissolution & Divorce: Property Distribution: General Overview

2. Under former Tex. Rev. Civ. Stat. Ann. arts. 8306-8309, benefits were for loss of earning capacity for a certain number of weeks in the future and to the extent that the benefits relate to a period of time following a

Tex. Ins. Code § 1108.051

This document is current through the 2015 regular session, 84th Legislature.

Texas Statutes & Codes Annotated by LexisNexis® > Insurance Code > Title 7 Life Insurance and Annuities > Subtitle A Life Insurance In General > Chapter 1108 Benefits Exempt From Seizure > Subchapter B Exemptions From Seizure

Sec. 1108.051. Exemptions for Certain Insurance and Annuity Benefits.

(a) Except as provided by Section 1108.053, this section applies to any benefits, including the cash value and proceeds of an insurance policy, to be provided to an insured or beneficiary under:

(1) an insurance policy or annuity contract issued by a life, health, or accident insurance company, including a mutual company or fraternal benefit society; or

(2) an annuity or benefit plan used by an employer or individual.

(b) Notwithstanding any other provision of this code, insurance or annuity benefits described by Subsection (a):

(1) inure exclusively to the benefit of the person for whose use and benefit the insurance or annuity is designated in the policy or contract; and

(2) are fully exempt from:

(A) garnishment, attachment, execution, or other seizure;

(B) seizure, appropriation, or application by any legal or equitable process or by operation of law to pay a debt or other liability of an insured or of a beneficiary, either before or after the benefits are provided; and

(C) a demand in a bankruptcy proceeding of the insured or beneficiary.

History

Enacted by Acts 2001, 77th Leg., ch. 1419 (H.B. 2811), § 2, effective June 1, 2003.

Annotations

Notes

STATUTORY NOTES

Revisor's Notes.

(1) Section 1, V.T.I.C. Article 21.22, refers to "money or benefits." The revised law omits the references to "money" because, in context, "money" is included within the meaning of "benefits." Similar changes have been made throughout the chapter.

(2) Section 1, V.T.I.C. Article 21.22, refers to money or benefits to be "paid or rendered." The revised law substitutes "provided" for "rendered" because "provided" is synonymous with "rendered," and the former is more commonly used. The revised law also omits the reference to "paid" because "paid" is included within the meaning of "provided." Similar changes have been made throughout the chapter.

(5) *Amount of Property to be Garnished.* The order must state the maximum dollar amount to be satisfied by garnishment.

(6) *Safekeeping.* The order must command that the property be kept safe and preserved subject to further order of the court.

(7) *No Bond Required.* No bond shall be required to be posted by the applicant for a writ of garnishment after final judgment.

(8) *Respondent's Replevy Bond.* The order must set the amount of the respondent's replevy bond equal to the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court.

(9) *Multiple Writs.* Writs may issue at the same time, or in succession, without requiring the return of the prior writ or writs. Writs may be sent to different counties for service by the sheriffs, constables, or other persons authorized by Rule 103 or Rule 536 to serve the writs. In the event multiple writs are issued, the applicant must inform the officers or persons to whom the writs are delivered that multiple writs are outstanding.

Rule GARN 4 (619). Case Docketed

When the foregoing requirements of these rules have been complied with, the clerk or justice of the peace shall docket the case in the name of the applicant as plaintiff and of the garnishee as defendant, and shall immediately issue a writ of garnishment directed to the garnishee.

Rule GARN 5 (620). Contents of Writ of Garnishment

(a) *General Requirements.* A writ of garnishment must be dated and signed by the clerk or the justice of the peace, bear the seal of the court, and be directed to the garnishee.

(b) *Command of Writ.* The writ must command the garnishee to:

(1) appear before the court out of which the writ is issued at 10 o'clock a.m. of the Monday next following the expiration of twenty days from the date the writ was served, ~~if the writ is issued out of the district or county court, or the Monday next after the expiration of ten days from the date the writ was served, if the writ is issued out of the justice court;~~ and

(2) answer under oath:

(A) what, if anything, the garnishee was indebted to the respondent as of the date the writ was served;

(B) what, if anything, the garnishee is indebted to the respondent as of the date the garnishee is required to appear pursuant to the writ;

(C) what effects, if any, of the respondent the garnishee had in its possession as of the date the writ was served;

(D) what effects, if any, of the respondent the garnishee has in its possession as of the date the garnishee is required to appear pursuant to the writ; and

(E) what other persons, if any, within the garnishee's knowledge, are indebted to the respondent or have in their possession effects belonging to the respondent.

(c) *Form of Writ.* The following form of writ may be issued, but any form used must contain the Notice to Respondent.

"The State of Texas.

"To _____, Garnishee, greetings:

"Whereas, in the _____ Court of _____ County (if a justice court, state also the number of the precinct), in a certain cause wherein _____ is plaintiff and _____ is defendant in the underlying proceeding and Respondent in this proceeding, the plaintiff, claiming an indebtedness against _____[Respondent] of _____ dollars, besides interest and costs of suit, has applied for a writ of garnishment against you; therefore you are hereby commanded to be and appear before that court at _____ in said county (if the writ is issued from the county or district court, here proceed: 'at 10 o'clock a.m. on the Monday next following the expiration of twenty days from the date of service hereof.' If the writ is issued from a justice of the peace court, here proceed: 'at 10 o'clock a.m. on the Monday next after the expiration of ten days from the date of service hereof.' In either event, proceed as follows:) then and there to answer under oath: (a) what, if anything, the garnishee was indebted to ____[Respondent] as of the date the writ was served; (b) what, if anything, the garnishee is indebted to [Respondent] as of the date the garnishee is required to appear pursuant to the writ; (c) what effects, if any, of [Respondent] the garnishee had in its possession as of the date the writ was served; (d) what effects, if any, of _____[Respondent] the garnishee has in its possession as of the date the garnishee is required to appear pursuant to the writ; and (e) what other persons, if any, within the garnishee's knowledge, are indebted to [Respondent] or have in their possession effects belonging to [Respondent]. You are further commanded NOT to pay to[Respondent] any debt or to deliver to [Respondent] any effects, pending further order of this court. Herein fail not, but make due answer as the law directs."

(d) *Notice to Respondent.* The face of the writ must display, in not less than 12-point type and in a manner calculated to advise a reasonably attentive person, the following notice:

"To_____, Respondent:

"YOU ARE HEREBY NOTIFIED THAT PROPERTY ALLEGED TO BE OWNED BY YOU HAS BEEN GARNISHED. GARNISHMENT IS A COURT PROCEEDING WHEREBY AN ALLEGED CREDITOR OF YOURS IS SEEKING TO ACQUIRE FUNDS OR PROPERTY FROM THE ONE WHO HOLDS YOUR FUNDS OR PROPERTY (THE GARNISHEE). IF YOU CLAIM ANY RIGHTS IN THE FUNDS OR PROPERTY, YOU ARE ADVISED:

"YOUR FUNDS OR PROPERTY MAY BE EXEMPT FROM GARNISHMENT UNDER FEDERAL OR STATE LAW. FOR EXAMPLE, CURRENT WAGES FOR PERSONAL SERVICE, CERTAIN PERSONAL PROPERTY, WORKERS' COMPENSATION BENEFITS, AND BENEFITS OF A LIFE, HEALTH, OR ACCIDENT INSURANCE POLICY OR ANNUITY ARE SOME OF THE EXEMPTIONS WHICH YOU MAY BE ABLE TO CLAIM. IT MAY BE IN YOUR BEST INTEREST TO CONSULT A LAWYER TO DETERMINE IF YOUR PROPERTY IS EXEMPT.

"PENDING A DECISION IN THE GARNISHMENT PROCEEDINGS, YOU CANNOT REGAIN POSSESSION OF YOUR FUNDS OR PROPERTY UNLESS YOU FILE A BOND, WHICH IS CASH OR OTHER SECURITY IN AN AMOUNT SET BY THE COURT.

YOU ALSO HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF YOUR FUNDS OR PROPERTY BY FILING A MOTION WITH THE COURT TO DISSOLVE OR MODIFY THE WRIT OF GARNISHMENT ON THE GROUNDS THAT YOUR FUNDS OR PROPERTY ARE EXEMPT FROM GARNISHMENT OR FOR OTHER GROUNDS.

(e) *Return of Writ.* The writ must be made returnable to the court that ordered the issuance of the writ in the same manner as a citation.

PROPOSED COMMENT TO RULE **GARN 5(b)(2) (620(b)(2)).** This rule has been modified to make clear that the garnishee must account for property of the respondent in the garnishee's possession or knowledge on two dates—the date the writ was served, and the date the garnishee is required to appear pursuant to the writ. *See First Nat'l Bank in Dallas v. Banco Longoria, S.A.,* 356 S.W.2d 192 (Tex. Civ. App.—San Antonio 1962, writ ref'd n.r.e.) (affirming judgment against garnishee that failed to account for funds held on both the date the writ was served and the date the garnishee was to answer pursuant to the writ).

PROPOSED COMMENT TO RULE **GARN 5(e) (620(c)).** The form of the writ has been modified as to justice courts to be consistent with **GARN 5(b)(2) (620(b)(2)).**

RULE GARN 6 (621). Delivery, Service, and Return of Writ

(a) *Delivery of Writ.* The clerk or justice of the peace issuing a writ of garnishment must deliver the writ to:

~~(1) the sheriff, constable, or other person authorized by Rule 103 or Rule 536; or~~

(2) the applicant, who must then deliver the writ to the sheriff, constable, or other person authorized by Rule 103 or Rule 536.

(b) *Service on Garnishee.* The sheriff, constable, or other person authorized by Rule 103 or Rule 536 who receives the writ of garnishment must immediately proceed to serve the writ by delivering a copy of it to the garnishee; however, only a sheriff or constable may serve a writ of garnishment that requires the actual taking of possession of property. If the garnishee is a financial institution, service of the writ is governed by the service provisions of the Texas Finance Code.

(c) *Return of Writ.* The return must be in writing and signed by the sheriff, constable, or other person authorized by Rule 103 or Rule 536 who served the writ. The return must be delivered to the applicant who must file it ~~filed~~ with the issuing clerk or justice of the peace without delay. ~~in the same manner as a citation.~~

(d) *Service on Respondent.* Immediately ~~As soon as practicable~~ following service of the writ on the garnishee, the applicant must serve the respondent with a copy of the writ of garnishment, the application, accompanying affidavits, and orders of the court. Service may be in any manner prescribed for service of citation or as provided in Rule 21a. A certificate of service evidencing service of a copy of the writ on the respondent by the applicant must be on file with the court for at least 10 days prior to the entry of a judgment on the garnishment.

PROPOSED COMMENT TO RULE **GARN 6 (621):** See Section 63.008 of the Texas Civil Practice and Remedies Code and Section 59.008 of the Texas Finance Code.

Rule GARN 7 (622). Respondent's Replevy Rights

(a) *Where Filed.* At any time before judgment, if the garnished property has not been previously claimed or sold, the respondent may replevy some or all of the property, or the proceeds from the sale of the property if it has been sold under order of the court, by filing a replevy bond with the court and serving the applicant with a copy of the bond. All motions regarding the garnished property must be filed with the court having jurisdiction of the suit.

(b) *Amount and Form of Respondent's Replevy Bond.* The respondent's replevy bond must be made payable to the applicant in the amount set by the court's order with sufficient surety or sureties, as provided by law, to be approved by the court. The bond must be conditioned on the respondent satisfying, to the extent of the penal amount of the bond, any judgment that may be rendered against the respondent in the suit.

(c) *Other Security.* In lieu of a bond, the respondent may deposit cash or other security in compliance with Rule 14c.

(5) *Amount of Property to be Garnished.* The order must state the maximum dollar amount to be satisfied by garnishment.

(6) *Safekeeping.* The order must command that the property be kept safe and preserved subject to further order of the court.

(7) *No Bond Required.* No bond shall be required to be posted by the applicant for a writ of garnishment after final judgment.

(8) *Respondent's Replevy Bond.* The order must set the amount of the respondent's replevy bond equal to the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court.

(9) *Multiple Writs.* Writs may issue at the same time, or in succession, without requiring the return of the prior writ or writs. Writs may be sent to different counties for service by the sheriffs, constables, or other persons authorized by Rule 103 or Rule 536 to serve the writs. In the event multiple writs are issued, the applicant must inform the officers or persons to whom the writs are delivered that multiple writs are outstanding.

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(2) answer under oath:

(A) what, if anything, the garnishee was indebted to the respondent as of the date the writ was served;

(B) what, if anything, the garnishee is indebted to the respondent as of the date the garnishee is required to appear pursuant to the writ;

(C) what effects, if any, of the respondent the garnishee had in its possession as of the date the writ was served;

(D) what effects, if any, of the respondent the garnishee has in its possession as of the date the garnishee is required to appear pursuant to the writ; and

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"Whereas, in the _____ Court of _____ County (if a justice court, state also the number of the precinct), in a certain cause wherein _____ is plaintiff and _____ is defendant in the underlying proceeding and Respondent in this proceeding, the plaintiff, claiming an indebtedness against _____[Respondent] of _____ dollars, besides interest and costs of suit, has applied for a writ of garnishment against you; therefore you are hereby commanded to be and appear before that court at _____ in said county (if the writ is issued from the county or district court, here proceed: 'at 10 o'clock a.m. on the Monday next following the expiration of twenty days from the date of service hereof.' If the writ is issued from a justice of the peace court, here proceed: 'at 10 o'clock a.m. on the Monday next after the expiration of ten days from the date of service hereof.' In either event, proceed as follows:) then and there to answer under oath: (a) what, if anything, the garnishee was indebted to ____[Respondent] as of the date the writ was served; (b) what, if anything, the garnishee is indebted to [Respondent] as of the date the garnishee is required to appear pursuant to the writ; (c) what effects, if any, of [Respondent] the garnishee had in its possession as of the date the writ was served; (d) what effects, if any, of _____[Respondent] the garnishee has in its possession as of the date the garnishee is required to appear pursuant to the writ; and (e) what other persons, if any, within the garnishee's knowledge, are indebted to [Respondent] or have in their possession effects belonging to [Respondent]. You are further commanded NOT to pay to[Respondent] any debt or to deliver to [Respondent] any effects, pending further order of this court. Herein fail not, but make due answer as the law directs."

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"YOUR FUNDS OR PROPERTY MAY BE EXEMPT FROM GARNISHMENT UNDER FEDERAL OR STATE LAW. IT MAY BE IN YOUR BEST INTEREST TO CONSULT A LAWYER TO DETERMINE IF YOUR PROPERTY IS EXEMPT.

"PENDING A DECISION IN THE GARNISHMENT PROCEEDINGS, YOU CANNOT REGAIN POSSESSION OF YOUR FUNDS OR PROPERTY UNLESS YOU FILE A BOND, WHICH IS CASH OR OTHER SECURITY IN AN AMOUNT SET BY THE COURT.

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PROPOSED COMMENT TO RULE GARN 5(d):

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(b) *Service on Garnishee.* The sheriff, constable, or other person authorized by Rule 103 or Rule 536 who receives the writ of garnishment must immediately proceed to serve the writ by delivering a copy of it to the garnishee; however, only a sheriff or constable may serve a writ of garnishment that requires the actual taking of possession of property. If the garnishee is a financial institution, service of the writ is governed by the service provisions of the Texas Finance Code.

(c) *Return of Writ.* The return must be in writing and signed by the sheriff, constable, or other person authorized by Rule 103 or Rule 536 who served the writ. The return must be delivered to the applicant who must file it ~~filed~~ with the issuing clerk or justice of the peace without delay. ~~in the same manner as a citation.~~

(d) *Service on Respondent.* Immediately ~~As soon as practicable~~ following service of the writ on the garnishee, the applicant must serve the respondent with a copy of the writ of garnishment, the application, accompanying affidavits, and orders of the court. Service may be in any manner prescribed for service of citation or as provided in Rule 21a. A certificate of service evidencing service of a copy of the writ on the respondent by the applicant must be on file with the court for at least 10 days prior to the entry of a judgment on the garnishment.

PROPOSED COMMENT TO RULE **GARN 6 (621):** See Section 63.008 of the Texas Civil Practice and Remedies Code and Section 59.008 of the Texas Finance Code.

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(a) *Where Filed.* At any time before judgment, if the garnished property has not been previously claimed or sold, the respondent may replevy some or all of the property, or the proceeds from the sale of the property if it has been sold under order of the court, by filing a replevy bond with the court and serving the applicant with a copy of the bond. All motions regarding the garnished property must be filed with the court having jurisdiction of the suit.

(b) *Amount and Form of Respondent's Replevy Bond.* The respondent's replevy bond must be made payable to the applicant in the amount set by the court's order with sufficient surety or sureties, as provided by law, to be approved by the court. The bond must be conditioned on the respondent satisfying, to the extent of the penal amount of the bond, any judgment that may be rendered against the respondent in the suit.

(c) *Other Security.* In lieu of a bond, the respondent may deposit cash or other security in compliance with Rule 14c.