DISCOVERY IN MID-SIZED CASES UNDER THE NEW RULES

1. INTRODUCTION

The revisions made to the Texas Rules of Civil Procedure effective January 1, 1999, are going to cause sweeping changes to the way discovery is conducted and litigated. The stated intent contained in the commentaries to these revisions is to “clarify and streamline discovery procedures and to reduce costs and delays associated with discovery practice.” (Explanatory statement accompanying the 1999 amendment to the Rules of Civil Procedure governing discovery.) These changes were the result of a belief that discovery had been misused to deny justice to parties by making the cost of litigation unaffordable and indefinitely stalling the resolution of cases. Id. The answer to whether the rules will actually effectuate their stated purpose will not be known for some time. However, in the first several years of practice under the new rules before case law is developed for guidance, it can be expected that the new rules will have the opposite effect of their stated intent. In an attempt to try and level the playing field among litigants, the new rules have placed limits on the amount of discovery which is permitted in any particular case. These limitations are set forth in three levels of discovery control plans. Tex.R.Civ.P. 190.1. This paper will address discovery under Level 2 discovery control plan in conjunction with the other changes to the Texas Rules of Civil Procedure.

II. PICK YOUR PLAN

Under the new rules, a Plaintiff is required to pick which discovery plan they are going to operate under at the same time they file their original petition. See Id. Specifically, Texas Rule of Civil Procedure 190.1 requires a plaintiff to “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.” Id. This original pleading will govern, at least for a period of time, at what level discovery will be conducted. Although the rules do not specifically mention whether the defendant has the same obligation, it is probably appropriate practice to plead what discovery level the defendant believes the case should operate on in his answer/counter-petition. The new rules provide criteria for assisting the practitioner in deciding which discovery control level is appropriate.

1. Criteria for a Level 1 Discovery Control Plan

190.2 — Discovery Control Plan — Suits Involving $50,000 or Less (Level 1)

(1) Application. This subdivision applies to:

(a) any suit in which all plaintiffs affirmatively plead that they seek only monetary relief aggregating $50,000 or less,
excluding costs, pre-judgment interest and attorneys’ fees; and

(b) 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.

2. Exceptions. This subdivision does not apply if:

(a) the parties agree that Rule 190.3 should apply;

(b) a discovery control plan is ordered by the court under Rule 190.4;

(c) any party files a pleading or an amended or supplemental pleading that seeks relief other than that to which this subdivision applies.

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

An ambiguity in the criteria for a Level 1 discovery control plan concerns the interpretation of Rule 190.2(a)(2). This section of the rule is presumably designed to place divorcing litigants who have a small estate and no children under a Level 1 discovery control plan. The first question that

outweighs any prejudice to an opposing party.

The Level 1 discovery control plan is designed for small cases and is presumably the type of case the Supreme Court was concerned about being bogged down with unnecessary discovery. Several things to note about the criteria under this discovery plan. First, the aggregate claims of all Plaintiffs cannot exceed $50,000. While the stakes in such a suit are comparatively low, this aggregate requirement could have a tactical impact under which discovery level the case is litigated when two plaintiffs have varying views about the amount of damages they are seeking. In a law suit in which the claimed damages might be slightly above $50,000, tactically the plaintiff might want to go ahead and plead for less so as to avoid the additional cost and expense of litigating the case under a Level 2 discovery control plan. It is also important to note under the criteria for Level 1 discovery control plan, that the $50,000 monetary relief sought excludes cost, pre-judgment interest, and attorney’s fees. Accordingly, a claim by plaintiff or defense counsel that the costs and attorney’s fees they have spent prosecuting or defending the case is going to push their recovery up over $50,000 will not be enough to bump the case out of a Level 1 discovery control plan.

An ambiguity in the criteria for a Level 1 discovery control plan concerns the interpretation of Rule 190.2(a)(2). This section of the rule is presumably designed to place divorcing litigants who have a small estate and no children under a Level 1 discovery control plan. The first question that

arises is: what is the marital estate? If the marital estate is equivalent to the community estate of the parties, it is possible that a spouse could claim a great deal of separate property, vastly exceeding $50,000 while still saying that the marital estate is under that number. What plan is appropriate if, in fact, the marital
estate is negative. Many divorces involve parties who have accumulated a substantial number of assets, but whose liabilities exceed them. Presumably, this type of case would be litigated under a Level 2 discovery control plan because the value of the marital estate is not more than zero.

B. Criteria for a Level 2 Discovery Control Plan

190.3 Discovery Control Plan — By Rule (Level 2)

(1) 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.

As is evident from the above rule, a Level 2 discovery control plan is the default plan for all cases. That is, it is going to apply when the requirements of a level 1 case are not met and when the Court does not order its own discovery control plan under the provisions for Level 3. It is very likely that the vast majority of cases are going to be litigated under this level. This statement assumes, of course, that most courts do not automatically go to some type of standard discovery control plan order for all of their cases. The Level 2 discovery control plan appears to be appropriate for: (1) any cases involving children; (2) any case in which the aggregate claims of the Plaintiff are more than $50,000 - presumably this would also apply to any counter-claim that the Defendants asserted; (3) claims for injunctive relief; and (4) suits seeking something other than monetary relief (i.e. specific performance). As is obvious, this will encompass the vast majority of law suits. However, whether the discovery allowed by Level 2 becomes the “standard” under which most cases are done will largely depend upon the Texas trial court’s use of discovery control plan orders (Level 3 discovery).

3. Criteria for a Level 3 Discovery Control Plan

190.4 Discovery Control Plan - By Order (Level 3)

(1) 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.

Discovery under a Level 3 control plan is discovery that is conducted and controlled by a specific court order. See Tex.R.Civ.P. 190.4. Texas Rule of Civil Procedure 190.4 contemplates that the discovery control plan will be tailored to the circumstances of the specific suit. Except in extremely large or complicated cases, this is not likely to happen. Courts with dockets that are already overcrowded simply are not going to have the time to structure a discovery control plan to suit the requirements of each suit. Rather, there is a possibility that courts will go the other direction and you will see cookie-cutter discovery control plan orders issued by a large
number of courts.

Based on the language of Texas Rule of Civil Procedure 190.4, if you want a discovery plan order issued by a court, you are going to get one. Upon a party’s motion, the court must implement a discovery control plan. Id. The drafters of this section apparently convinced that the courts will not move quickly in response to a request for a discovery control plan, left in the provision that judges should act “as promptly as reasonably possible” in addressing these issues. Id. One of the principal reasons that many litigants, and perhaps judges as well, will not embrace discovery under Level 3 is that any discovery control plan order is required to include a trial date. Accordingly, if your original petition states that you would like to operate under Level 3 of the discovery rules, you may have a trial date staring you in the face very quickly. While a court ordered discovery plan can address any issue concerning discovery, under Texas Rule of Civil Procedure 190.4 the plan must include: (1) a trial date; (2) a discovery period during which all discovery must be conducted; (3) appropriate limits on the amount of discovery; (4) deadlines for joining additional parties; (5) amending or supplementing pleadings; and (6) designating expert witnesses. Tex.R.Civ.P. 190.4(b). There is no guidance under the rules for what appropriate limits on the amount of discovery should be. They could very well be the same as under discovery control plan Level 2. Tex.R.Civ.P. 190.4(b). Seeking a discovery control order instead of choosing to operate under Level 1 or Level 2, may largely depend on: (1) your judge’s views on discovery (how he or she will implement that in a discovery control plan); (2) whether you can get a custom made

control plan order; and (3) how that order will tactically affect your case.

III. THE RULES OF THE GAME - DISCOVERY UNDER LEVEL 2

The limitations for discovery on Level 2 control plans are governed by Texas Rules of Civil Procedure 190.3(b) which provides as follows:

1. 190.3 Discovery Control Plan — By Rule (Level 2).

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

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

(1) 30 days before the date set for trial, in cases under the Family Code; or

(2) in other cases, the earlier of

(a) 30 days before trial, or

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

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.

(c) **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.

### B. The Discovery Period

A plain reading of Texas Rule of Civil Procedure 190.3(b)(1) makes it clear that a very specific period is contemplated by which discovery must be complete. The rule makes a distinction between cases arising under the Family Code and other civil cases. In non-family law cases, discovery must be complete at the earlier of: (1) 30 days before trial; or (2) nine months after the first deposition or written response to discovery is due. Cases arising under the Family Code must have discovery complete 30 days before trial.

3. **Oral Depositions Under Level 2**

The new Rules of Civil Procedure place specific time limits for the taking of oral depositions under both discovery control plans 1 and 2. Under Level 1, each party may have no more than six hours in total to examine and cross-examine all witnesses. Tex.R.Civ.P. 190.2(c)(2). The parties may agree to expand this total to up to 10 hours in total, but no more except by court order. Id. The time limits for oral depositions allowed under Level 2 are significantly greater than those under Level 1. Each side (as distinguished from party in Level 1) may have no more than 50 hours of time to examine and cross-examine: (1) parties on the opposing side; (2) experts designated by those parties; (3) and persons who are subject to those parties’ control.

These limitations create several questions as well as creating new headaches for attorneys. First, who is going to keep track of the actual time used in depositions, who is talking when, breaks, objections, etc. Presumably, all deposition transcripts will now have to have a running listing of accumulated time on each line. It is obviously going to fall to the attorneys to actually calculate how much time each side used. Disputes over these calculations are going to be inevitable.

The fifty hour time limit only applies to select categories of witnesses. Accordingly, there is no time limitation upon taking depositions of individuals who don’t fall into one of those categories. Discovery battles are going to arise over whether or not individuals should be included in the categories contemplated by 190.3(b)(2). Specifically, the
rule contemplates that depositions taken of individuals “who are subject to those parties’ control” are to be included in the fifty hour time limit. The phrase, “persons who are subject to those parties’ control” is not defined. Tactically, a party may want to claim that a certain witness is under their control so as to run up the other party’s limited deposition time. However, if you make the claim that a person is subject to your control under Texas Rule of Civil Procedure 199.3, the service of a subpoena on a party’s attorney is the same as serving the witness. Conversely, although a stretch, the opposing party may claim that simply because you can produce someone as a witness does not mean they are under your control and therefore subject to the fifty hour time limit. Until case law is developed, there will be no real answer to what this phrase means.

The fifty hour time limit for taking oral depositions can be significantly increased if the other party designates more than two experts. Tex.R.Civ.P. 190.3(b)(2). For each additional expert over two that is designated, the opposing party receives an additional six hours of total deposition time. It is important to note that the additional six hours does not have to be spent taking the deposition of a particular expert who is over the limit. It can be used on any witness. See Id. This provision of the rule may help limit the listing of experts merely for tactical reasons and limit it to experts who are going to be testifying. In some mid-sized and larger firms, it has become common practice to list all of the attorneys in the firm as a testifying expert on fees in the case. This practice will have to come to a quick end unless you intend to give your opponents a significant edge in the amount of depositions they can take.

4. Interrogatories Under Level 2

Under both discovery control plan Level 1 and 2, a party is limited to no more than 25 written interrogatories. Tex.R.Civ.P. 190.3(b)(3). This harsh limitation, however, is tempered by the fact that interrogatories asking a party to identify or authenticate documents are not included in the 25. Further, if these interrogatories can be asked in addition to the information gained through disclosure (disclosure, governed by Texas Rule of Civil Procedure 194, allows discovery similar to what standard interrogatories would request. (A sample form is included in the appendix.) Once again, the new rules do not provide significantly more guidance than the old rule on what constitutes more than one interrogatory. Texas Rule of Civil Procedure 190.3(b)(3) states that each discreet subpart of an interrogatory is considered a separate interrogatory. The comments to this rule state that not every separate factual inquiry is a discreet subpart. The comments go on to cite Braden v. Downey and state that a “discreet subpart” is in general, one that calls for information that is not logically or factually related to the primary interrogatory. Braden 811 S.W.2d 922, 927-928 (Tex. 1991). From the definitions cited in the commentaries, it appears that the discovery battles over how many interrogatories you have actually asked are not going to end any time soon.
## IV. SUMMARY OF DISCOVERY CONTROL PLANS UNDER THE 1999 DISCOVERY RULES

<table>
<thead>
<tr>
<th></th>
<th>LEVEL 1</th>
<th>LEVEL 2</th>
<th>LEVEL 3</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>APPLICATION</strong></td>
<td>(1) $50,000 maximum in controversy, exclusive of any costs, interest, or attorneys fees; OR (2) divorce with no children and estate is more than $0 but less than $50,000.</td>
<td>Applies if neither Level 1 nor Level 3 apply (e.g. suits involving children, more than $50,000, injunctions).</td>
<td>Applies when ordered by the court. Can be requested by party or implemented by court.</td>
</tr>
<tr>
<td><strong>DISCOVERY PERIOD</strong></td>
<td>Begins when suit is filed. Ends 30 days prior to trial.</td>
<td>Begins when suit is filed. Ends earlier of (1) 30 days prior to trial OR (2) earlier of 9 months after the first deposition or due date of response to written discovery. (Family law cases use only 30 day rule - 9 mo. rule doesn't apply.)</td>
<td>Set by court order and per Rule 166.</td>
</tr>
<tr>
<td><strong>ORAL DEPOSITIONS</strong></td>
<td>Each party gets 6 hours total for direct &amp; cross of all witnesses. Parties may agree to increase to 10 hours, but not more without court order.</td>
<td>Each side gets 50 hours for deposition of parties, parties’ experts or persons subject to parties’ control. Each side gets 6 additional hours for each additional expert designated by the opposing side.</td>
<td>Set by court order and per Rule 166.</td>
</tr>
<tr>
<td><strong>INTERROGATORIES</strong></td>
<td>25 per party to any other party; questions seeking to identify or authenticate documents are unlimited.</td>
<td>25 per party to any other party; questions seeking to identify or authenticate documents are unlimited.</td>
<td>Set by court order and per Rule 166.</td>
</tr>
</tbody>
</table>
V. CHANGING YOUR DISCOVERY PLAN LEVEL

   The new rules of discovery expressly permit a party to change their discovery level plan. This is true regardless of whether a party is operating under a discovery control plan level 1, 2 or 3. If you originally file under Level 1, is this a judicial admission that your case is not worth more than $50,000?

1. Going From Level 1 to Level 2 or 3

   A party or their opponents may change the discovery control plan level from 1 to 2 or 3 merely by filing an amended or supplemental pleading which seeks relief other than what the criteria for Level 1 discovery allows. That is, if a Plaintiff or Plaintiffs amended or supplemented their petition to allege more than $50,000 in monetary damages, they would no longer be subject to a Level 1 plan. See Tex.R.Civ.P. 190.2(a)(1). This amendment, though, is subject to a requirement that it may not be filed without leave of court less than 45 days before trial. Tex.R.Civ.P. 190.2(b)(3). When such an amended or supplemental pleading is filed, the discovery period reopens and additional discovery can be completed under the limitations provided by Texas Rules of Civil Procedure 190.3 or 190.4, as applicable. The specific Level 1 control plan section dealing with reopening of the discovery, appears to give a party an automatic continuance when a jump is made out of a Level 1 discovery control plan. Texas Rule of Civil Procedure 190.2(d), in part, provides “on motion of any party, the court should continue the trial date if necessary to permit completion of discovery.” The potential for gamesmanship with respect to this section is obvious. This may be tempered somewhat by the new rules concerning effects of signing pleadings. See Tex.R.Civ.P. 191.3. When an amended or supplemental pleading is filed, taking the case out of a Level 1 discovery plan, it will operate under the provisions and limitation of a Level 2 discovery plan unless a party or the court specifically implements a court-ordered discovery plan under Level 3.

2. Modifying the Level 2 or 3 Discovery Control Plan

   Rule 190.5 controls modification of discovery control plans in general. Rule 190.5 provides as follows:

   **190.5 - Modification of Discovery Control Plan.** The court may modify a discovery control plan at any time and must do so when the interest of justice requires. The court must allow additional discovery:

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

   (a) 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

   (b) the adverse party would be
unfairly prejudiced without
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.

This rule would appear to provide a
very relaxed standard for courts to modify a
discovery control plan. The rule allows a
court to modify a discovery control plan at any
time and makes it mandatory in certain
instances. Texas Rule of Civil Procedure
190.5 appears to set out two mandatory
standards for when courts must modify a
discovery plan. The first is simply that a court
“must do so when the interest of justice
requires.” Id. This phrase is not defined and
could encompass almost anything.
Immediately following that phrase, the rule
sets out a series of criteria for when a
discovery plan must be modified. Id. A court
must modify a discovery plan when a party
makes a showing that: (1) he/she received an
amended or supplemental pleading, or new
information in a discovery response; (2) the
pleadings or additional information were
made after the discovery cut-off date or so
close to the deadline as to make discovery on
the issue impossible; and (3) a party would be
prejudiced without the additional discovery.
Potentially, this rule could help prevent
parties from laying behind the log with certain
claims and filing them at the last minute,
because the other party will probably get
additional time and capability to conduct
discovery. Conversely, this provision also
may provide some type of out for any party
seeking a continuance who jumps on any
small new piece of information and claims
such additional discovery; they are going to be unfairly prejudiced and
need a continuance for time to do discovery
on it.

VI. CHANGES IN DISCOVERY
REGARDLESS OF LEVEL

The following sections are not
designed as a comprehensive
treatment of the change they address
in the new rules. Rather, they are
included to give the practitioner an
overview of other discovery changes
regardless of the discovery control
plan level.

1. Scope of Discovery

The standard for the scope of
discovery remains the same as under the
former rules. However there are several
major changes in what is discoverable. First,
trial witnesses are now discoverable.
Tex.R.Civ.P. 192.3(d). This applies to any
person who is expected to be called to testify
at trial. It does not apply to rebuttal or
impeaching witnesses when the necessity of
their testimony cannot be anticipated.
Second, as for persons with knowledge of
relevant facts, it is permissible to ask for the
general connection of such person to the
case. Tex.R.Civ.P. 192(c). Third, all witness
statements are now discoverable.
Tex.R.Civ.P. 192(h) As witness statement is
defined as (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’ oral statement, or any
substantially verbatim transcription of such recording. Id. Notes taken during a conversation or interview are not witness statements. Id.

The rules also clarify that an expert who acquires knowledge of relevant facts for trial or in anticipation of litigation is not a person with knowledge of relevant facts as to those facts.

The new Texas Rules of Civil Procedure also mandate when a court should further restrict discovery. Tex.R.Civ.P. 192.4. Discovery can be limited by the court on its own initiative or on reasonable notice if either (1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other, more convenient, less burdensome, or less expensive source; or (2) the burden or expense of the discovery outweighs its likely benefit. Id. Whether this section goes too far in view of the other restrictions placed on discovery will depend on how it is implemented by the trial courts.

2. Discovery and Experts

The rules have also changed significantly with respect to designation and discovery of experts. A party is only allowed to discover information regarding experts through a request for disclosure, deposition, or expert report. Tex.R.Civ.P. 195.1 Thus, a party cannot send additional interrogatories or request for production seeking more information about the experts. A party is limited to the questions in the request for disclosure, information obtainable in deposition, and information provided in a written report.

A party seeking affirmative relief must furnish the information requested regarding testifying experts pursuant to a request for
disclosure by the later of: (1) 30 days after the request is served; or (2) 90 days before the end of the discovery period. Tex.R.Civ.P. 195.2. All other experts must be disclosed by the later of: (1) 30 days after the request is served; or (2) 60 days before the end of the discovery period. Id. Experts must be made available for deposition as follows:

<table>
<thead>
<tr>
<th>PARTY SEEKING AFFIRMATIVE RELIEF</th>
<th>If a report is furnished at disclosure, need not make expert available until all other experts are designated.</th>
</tr>
</thead>
<tbody>
<tr>
<td>PARTY NOT SEEKING AFFIRMATIVE RELIEF</td>
<td>Must make experts available reasonably promptly after designated and after experts of the party seeking affirmative relief have been deposed.</td>
</tr>
</tbody>
</table>

Table based upon Tex.R.Civ.P. 195.3(a)
C. Privileges

The procedures for protecting confidential information has changed under the new rules. A party that preserves a privilege may now withhold the privileged information from the response, but must state that information has been withheld, to which request the information relates, and what privilege is asserted. Tex.R.Civ.P 193.3(a). This may be done within the response (or supplementation) or it may be done by a separate document called a withholding statement. Id.

After receiving a withholding statement, the party seeking discovery may request what information was withheld. Tex.R.Civ.P. 193.3(b). Then, within 15 days of service of the request, the withholding party must serve a response that describes what is withheld and asserts the specific privilege for each item withheld. Id. A party may withhold any privilege document relating to an attorney’s services concerning that particular case without complying with the requirements of Texas Rule of Civil Procedure 193.3(a) and (b).

Privileges are no longer waived by production. You can just ask for the privileged information or document back within 10 days and assert the particular privilege. Tex.R.Civ.P. 193.3(d). The party seeking production must then return the information or document pending a ruling by the court on the privilege. Id. Privileges regarding work product are not addressed in his paper.

D. Procedures - Signing, Filing, and

1. Asserting a Privilege

Supplementing Discovery; Subpoenas

1. Signing Discovery

The effect of signing off on discovery pleadings has been somewhat changed. As under the former rules, a certificate of conference must accompany any motion or request for hearing relating to discovery. Tex.R.Civ.P. 191.2. The party filing the motion or requesting the hearing must certify that "reasonable efforts have been made to resolve the dispute without the necessity of court intervention and the efforts failed." Id.

An attorney or party (if not represented by counsel) must sign every disclosure, discovery request, notice, response and objection under the new rules. Tex.R.Civ.P. 191.3(a). Signature certifies that the document is not unreasonable, burdensome or expensive, consistent with the rules, and not meant for harassment. Tex.R.Civ.P. 191.3(b). If the document is not signed, the error should be pointed out. If the error is not correct after a reasonable time, the document may be stricken. Tex.R.Civ.P. 191.3(d). This rule also allows a new ground for sanctions for filing a frivolous pleading if the certification is false without substantial justification. Tex.R.Civ.P. 191.3 (e).

2. Filing Discovery Materials

In an effort to avoid overloading the court’s file with discovery, the filing requirements for discovery have changed.
The following table is a synopsis of the new requirements.
### DISCOVERY MATERIAL NOT TO BE FILED:

<table>
<thead>
<tr>
<th>DISCOVERY MATERIAL NOT TO BE FILED:</th>
<th>DISCOVERY MATERIAL TO BE FILED:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discovery requests and deposition notices served only on parties</td>
<td>Discovery requests and deposition notices served on non-parties</td>
</tr>
<tr>
<td>Subpoenas served only on parties</td>
<td>Subpoenas served on non-parties</td>
</tr>
<tr>
<td>Responses and objections to discovery requests and deposition notices regardless on whom they were served</td>
<td>Motions and responses to motions pertaining to discovery matters</td>
</tr>
<tr>
<td>Documents produced in discovery</td>
<td>Agreements concerning discovery matters pursuant to Rule 11</td>
</tr>
<tr>
<td>Privileged statements per Rule 193.3(b) or (d)</td>
<td></td>
</tr>
</tbody>
</table>

Table is based on Tex.R.Civ.P. 191.4.

There are several exceptions to the above general rules: (1) the court may order discovery materials filed; (2) a person may file discovery materials in support of or in opposition to a motion for other use in a court proceeding; and (3) a person may file discovery materials as needed for proceedings in appellate court. Discovery materials that are not filed with the Court under these rules must be retained while the case is pending, during the appellate process, and for 6 months thereafter.

### 3. Supplementing Discovery

The new rules provide that discovery must be supplemented "reasonably promptly" upon the discovery of new material. Tex.R.Civ.P. 193.5(b). It is presumed that a supplementation made less than 30 days prior to trial is not "reasonably promptly." Id. This standard applies to all written discovery, but no formal supplementation is required if the information was otherwise provided through other means, except as to persons with knowledge of relevant facts, trial witnesses, and expert witnesses. Tex.R.Civ.P. 193.5(a).

If a party fails to respond/amend/supplement, then the evidence is excluded unless good cause exists for the failure or unless the failure will not unfairly surprise or prejudice the other parties. Tex.R.Civ.P. 193.6(a). Even if neither of these exceptions to exclusion is proved, the Court may still grant a continuance to allow time for the response. Tex.R.Civ.P. 193.6(c).

### 4. Subpoenas

A person may now be served with a “discovery subpoena” and commanded to produce documents or other tangible things at a location designated in the subpoena. The rules regarding subpoenas have also changed, making subpoenas an improved discovery tool. However, a person may or may not be required to appear or produce documents for
trial or discovery at a location more than 150 miles away. Now the following people can issue a subpoena.

1. Clerk of the Court;
2. Attorney authorized to practice in the State of Texas;
3. An officer authorized to take depositions in the State of Texas.

Tex.R.Civ.P. 176.4.

A subpoena may be served at any place within Texas by any sheriff, constable, or any person who is not a party and is 18 years or older. Objection to producing any documents specified in the subpoena may be submitted in writing before the time specified for compliance. Tex.R.Civ.P. 176.6(d). The objecting person need not comply with the portion of the subpoena to which he objected. Id. A new change in lodging objections is that the protective order can be filed in the court where the action is pending or in a district court in the county where the subpoena was served. Tex.R.Civ.P. 176.6(e). A person who is commanded to appear at a trial may lodge an objection by filing a motion for protective order at or before the time of the appearance.

5. Written Discovery

1. Request for Disclosure

The 1999 discovery rules created a new type of discovery, the Request for Disclosure. This is a set of 11 standard questions which are not objectionable. A request must specific with reasonable particularity the items to be produced or inspected, either by individual item or category. Tex.R.Civ.P. 196.1(b). Further, it must set forth a reasonable time and place for production. 

See Tex.R.Civ.P. 194.5. As a general rule, a failure to respond fully to a Request for Disclosure would be an abuse of the discovery process subject to sanctions. The disclosure includes so-called contention interrogatories, although the responding party is not required to "marshal all evidence to be presented at trial." Tex.R.Civ.P. 194.2(c). Also, the standard disclosure requires a statement of the connection to the case of each person with knowledge of relevant facts.

The request must be sent at least 30 days prior to the end of the applicable discovery period. Tex.R.Civ.P. 194.1. A party must respond to the request within 30 days of service of such request. Tex.R.Civ.P. 194.3.

A sample Request for Disclosure is set forth as Exhibit "A".

2. Requests for Production.

The rules for Requests for Production have been clarified to eliminate much of the objections usually launched. A request for production must be served on the responding party no later than 30 days prior to the end of the discovery period, and it is due within 30 days after service of the request. Tex.R.Civ.P. 196.1(a).
tangible things" are now defined as "papers, books, accounts, drawings, graphs, charts, photographs, electronic, or videotape recordings, data and data compilations." Tex.R.Civ.P. 192.3(b). Any definition in a request that is broader than this definition is objectionable.

A responding party must state objections and assert privileges as provided in these rules, and state one of the following responses:

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.

Tex.R.Civ.P. 196.2(b).

The expense of producing items will be borne by the responding party. Any expense of inspecting, sampling, testing, photographing, and copying items produced will be borne by the requesting party. Tex.R.Civ.P. 196.6.

3. Interrogatories

There are only a few minor changes to the rules for interrogatories which are not discussed at other places in this article. First, a party must serve discovery on the responding party so that the responding party has sufficient time to answer before the end of the applicable discovery period. Tex.R.Civ.P. 197.1. Further, a responding party may produce documents in lieu of answering a question. Tex.R.Civ.P. 197.2(c).

Most importantly, however, the debate as to verification of supplements has been settled. The new rule is that when the original response has to be verified, the supplement must be verified. Tex.R.Civ.P. 197.2(d). However, a party is not required to sign answers relating to persons with knowledge of relevant facts, trial witnesses and legal contentions. Id. When answers are based upon information obtained from other parties, the verification may state such. Id.

F. Depositions

1. Oral Depositions

The most substantive change to the rules regarding oral depositions relates to the conduct during the deposition. Now, a deposition must be conducted as if it were court testimony. Tex.R.Civ.P. 199.5(d). Private conferences during the deposition between the attorney and the witness are improper except to determine whether to assert a privilege; however, conferences may be held during agreed recesses and adjournments. Id. The remedy for violation of this provision is to allow testimony and evidence at trial regarding the conduct in order to reflect on the credibility of the witness. Id.

The only objections allowed during a deposition are as follows:
• "Objection, leading."
• "Objection, form."

An objection to the form includes speculation, narrative answer, vague, confusing, ambiguous or assumes facts not in evidence. A witness must generally answer questions subject to objection. These objections are waived if not stated in exactly this way during the deposition. Tex.R.Civ.P. 199.5(e). Upon request, the objecting party must give a clear and concise explanation of the objection or the objection is waived. Argumentative or suggestive objections waive the objection and may be grounds for terminating the deposition. Id.

An attorney may instruct a witness not to answer a question only to preserve a privilege, comply with a court order or the rules, protect a witness from an abusive question, or secure a ruling as to a violation of the rules. Tex.R.Civ.P. 199.5(f). An abusive question is one that inquires into matters clearly beyond the scope of discovery or that are argumentative, repetitious, or harassing. Comments to Tex.R.Civ.P. 199. At 4.

Any party may request a hearing on the objections, but the failure to obtain a ruling does not waive the objection or privilege. Tex.R.Civ.P. 199.6. At a hearing on objections or privilege, the party seeking to avoid the discovery must present evidence either by testimony or affidavit served 7 days prior to the hearing. Id.

No one side may examine a particular witness for more than six hours. Tex.R.Civ.P. 199.5(c). The court reporter must file a certification with the court stating the amount of time used by each party at the deposition.

• "Objection, non-responsive."

2. Written Depositions

A notice of written deposition must be served at least 20 days before the deposition, and the deposition must be taken during the discovery period unless the parties agree otherwise or leave of court is obtained. Tex.R.Civ.P. 200.1(a). If a witness is one subject to the control of a party, the deposition notice may be served on the attorney representing that party. Tex.R.Civ.P. 200.2.

Following receipt of the notice of deposition, all other parties have 10 days to submit cross-questions or object to the direct examination questions. Tex.R.Civ.P. 200.2(b). Then, the noticing party has 5 days to object to the cross-questions or submit redirect questions. Id. The responding parties have 3 days thereafter to object to the redirect or submit re-cross questions. Id. Any re-cross or further objections must be served within 5 days or at the time of the deposition. Id.

G. Discovery From Non-Parties

A party may compel discovery from a non-party (a person who is not a party nor subject to the control of a party) only by court order or subpoena. Tex.R.Civ.P. 205.1. When non-party discovery is requested by subpoena, it can only compel the following:

1. An oral deposition;
2. A written deposition;
3. A request for production of documents served with a notice of deposition; and

A party may compel production of documents from non-parties by serving the non-party with a subpoena and the notice as set forth above setting the time for response at least 30 days prior to the end of the applicable discovery period. Tex.R.Civ.P. 205.3. A party requesting production from a non-party must reimburse the non-party's reasonable cost of production. Tex.R.Civ.P. 205.3(f).

4. A request for production of documents under Rule 205. Id.

VII. CONCLUSION

Only time will tell if the new rules can accomplish their lofty goal of streamlining discovery and making the courts accessible for all litigants. The discovery control plans contained in these rules are an attempt to put litigants on an even footing with respect to the discovery process. It appears that, barring a great surge in the number of pretrial scheduling orders issued, the vast majority of cases litigated in Texas will do so under discovery control plan Level 2. A Level 2 discovery control plan should provide adequate discovery in most cases. However, all rules are subject to manipulation and, until case law is in place to supplement our understanding of these rules, the road ahead may be rocky for a while.