

**SYLLABUS FOR PRETRIAL PROCEDURE
PROFESSOR SCHWARTZ**

SPRING 2019

Welcome to Texas Pretrial Procedure! This is a valuable course, but it is full of detail that simply has to be learned. Nevertheless, you will be much more capable as a lawyer than you would be without it.

The successful practice of law requires a variety of skill sets. Not all of us have the skills to successfully practice law. I have seen some of the smartest people I have ever encountered fail at the law. The most basic skill set is knowing the language of the law. Procedure is the structure of the law. No idea, no matter how powerful, will ever become the law unless it is presented in a way courts decide cases. That is procedure.

Below is a list of readings from the casebook and other sources. The list is not exhaustive. There will be certain other readings, and it may at times become necessary to deviate from the syllabus. I will attempt to let you know sufficiently in advance if this occurs.

BOOK(S)

Dorsaneo, Thornburg, Carlson & Crump, Texas Civil Procedure: Pretrial Litigation, 2018-2019
ISBN 978-1-5310-1242-7
e-ISBN 978-1-5310-1243-4

Texas Rules of Civil Procedure; Michigan Legal Publishing Ltd., 2018 Edition
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If you do not want to buy a rule book, you can download the rules from the internet:

<http://www.txcourts.gov/media/1435952/trcp-all-updated-with-amendments-effective-january-1-2018.pdf>

I have also attached to this syllabus a handout titled, “Texas Pretrial Procedure – Texas Rules” for Spring 2019. These are some of the most important rules that we will discuss.

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**MY POLICIES FOR CONDUCTING CLASS
PROFESSOR SCHWARTZ**

NOTE: Some of you may be tempted to scan over the below policies, or simply skip them altogether. This is inadvisable, and may put you at a disadvantage when it comes to your final exam.

1. Welcome to the course in Texas Pretrial Procedure! This is an important subject to study; it isn’t always fascinating, but it is among those in which your hard work is most likely to be rewarded when you practice law. Unfortunately, most of this class will be lecture, but I encourage class participation because one of the values of a law school is that it teaches you to “think like a lawyer.”
2. Consider carefully before taking this course. This is the third year I am teaching this course. Each year I strongly solicit candid evaluations. I earnestly want to learn what I am doing right and what I can do to improve my teaching. Unfortunately, I received intense criticism for my examination. I have reviewed those criticisms with genuine introspection and after careful thought, I have rejected those criticisms.

3. You are responsible for knowing everything that is covered in class, and everything in the assigned reading materials. If you feel that it is wrong to teach that the Federal Rule of intervention is different from the Texas Rule of intervention because this is a class on Texas Procedure, you should drop this course. If you believe it is unnecessary to know that California employs an entirely different approach from Texas regarding the release of unknown claims, you should drop this class (and get the best malpractice policy available to you once you start your practice). If you think being informed that aggressive and unprofessional tactics are sometimes called “Rambo tactics” (a term that comes from the lead character in four movies starring Sylvester Stallone) is inappropriate, good luck to you – but please do not take this course.

I have been a lawyer for over 40 years, and I have had the opportunity to enjoy much success and suffer many failures. During this time, I have learned one fundamental truth about the practice of law: it is not for everyone. If it is not for you, this is an excellent time to find out and do something that is fulfilling to you personally. You would be wise to read and re-read the paragraphs above and decide if you want to be in this class and if you want to practice litigation in the State of Texas. By the way, there are 254 counties in Texas. If you plan on practicing law in Texas you should know this fact.

In my class, we will approach litigation issues like a real-world lawyer. Real law does not come in PowerPoints, outlines to memorize, and bullet points. A guy with a pretty good reputation in the law once said, “The life of the law has not been logic; it has been experience.” If you want to live your life as a professional, you ought to know who that guy was. In my class we talk about why we have certain rules, where the rules come from, and what the consequences (good and bad) of a particular rule are.

4. It is necessary to implement policies or rules for such a class. Therefore, please understand the businesslike tone of the following items. My longtime personal opinion is that law schools fail to teach professionalism. Law schools might teach you law and even teach you legal ethics, but they utterly fail, in my view, to teach you how to be a respected and professional lawyer. You may hear lawyers talk in military terms and invoke medieval battle tactics to describe their role. This talk makes my heart sink; this is not the middle ages. Litigation is a modern dispute resolution mechanism that has justice as its aim; it replaces trial by combat. Accordingly, (1) you are free to criticize any idea, you are free to destroy any argument, and you are encouraged to prove the professor wrong, but (2) you are never free to criticize another person or to act unprofessionally in this class. You should consider this class as the first day of your professional life.
5. You need not communicate with me concerning the reasons for your absences. If you are absent, I always assume you have a good reason. As long as you comply with the law school’s attendance requirements, I do not need to know the reason. The university requires me to record attendance and I will. But, you should know that missing class will place you in a severe disadvantage at exam time because the exam is heavily weighted toward the matters discussed in class.

6. You need not communicate with me concerning your unpreparedness. It is your responsibility to read forward in the casebook according to the syllabus so as to be prepared for class. Unless I indicate otherwise, we shall go straight through the syllabus. I personally think the class will be worthless to you without preparation, but you paid for this class. I will tell you frankly that my experience regarding class preparation has been very disappointing. If you want to waste your money, that is your choice. But, before you make that choice, I encourage you to watch the Academy award winning film, The Paper Chase. In that movie (made long before cell phones), Professor Kingsfield tells Mr. Hart, “Mr. Hart, here is a dime. Take it, call your mother, and tell her there is serious doubt about you ever becoming a lawyer.”
7. Final Examination; Grading. Your grade for the course will be determined by an anonymous final examination, except if you are disrespectful to another student in my class, in which case your grade will be adjusted downward. The exam will be short answer. I have determined not to use the long essay format because I have come to the unfortunate conclusion that there is too high a correlation between typing skills and scores. At the exam, I will provide you with a fresh copy of the rules you will need during the examination. No other materials are allowed. The exam will be closed book.

Anything covered in class or in the assigned reading (or even in this syllabus) is fair game. The exam will be short answer and will probably be around 200 questions (give or take). The final grades are based on a curve. Last year, it was fairly easy to identify the A to B+ exams, the middle performing exams, and the “I do not care who Jack Ruby was” exams. (*Texas v. Ruby* is one of the most significant Texas cases involving the effect of pretrial publicity on the right to a fair trial.) If you do not know who Jack Ruby was, you can learn in this year’s class. If you do not care or do not think that this information is relevant, prepare yourself for a low grade.
8. Attendance. It is required that you comply with the law school’s attendance requirements, which mandate 80% attendance. In order to encourage class attendance and participation, I will include questions on the examination about matters we discussed in class that are not in the book. I will also include the following question on your examination: “Did you submit a written evaluation for this course? Yes or No.”
9. Seating Chart. Please pick a seat on the first day of class and sit in that seat for the remainder of the semester.
10. Cell Phones and Computers. I hate them. One of the biggest disappointments of teaching this course has been looking at the class and seeing a sea of laptop computers staring back at me. I am a Life Member of the American Law Institute. I am a Fellow of the American College of Trial Lawyers. I was the Chairman of the Board of the State Bar of Texas. I served for six years on the Commission for Lawyer Discipline. I have seen some things. Do you really want to stare at a computer screen in preference to talking to me about the law? Most judges will allow computers in their courtroom, but almost all jurors hate seeing a lawyer’s face in a computer while they are being told to listen to the testimony. Your choice.
11. How to contact me. I am not on Facebook, LinkedIn, or Twitter. I do not know what Snapchat is. If you need to contact me about a class matter, my email address is: schwartz@skadden.com

12. Disability. Any student with a disability requiring accommodation should let me know (except as to the exam, for which accommodation is to be arranged through the law school administration).
13. SEXUAL ASSAULT AND HARASSMENT POLICY. The university is committed to a zero-tolerance policy regarding sexual assault and harassment. The university employs full-time professional staff to assist students who are victims of these pernicious acts. Professors and staff are not authorized to maintain complaints and information regarding complaints as confidential. We are obligated to report all complaints we receive to the proper authority. Only persons specifically authorized by the university may maintain a complainant's confidentiality.
14. CAPS. Counseling and Psychological Services (CAPS) can help students who are having difficulties managing stress, adjusting to the demands of a professional program, or feeling sad and hopeless. You can reach CAPS (www.uh.edu/caps) by calling 713-743-5454 during and after business hours for routine appointments or if you or someone you know is in crisis. No appointment is necessary for the "Let's Talk" program, a drop-in consultation service at convenient locations and hours around campus.
http://www.uh.edu/caps/outreach/lets_talk.html

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CLASS ASSIGNMENTS

Class #1

I. THE PRE-LITIGATION PHASE

Contingent Fee Contract and Notes; Reneker article; One-, Two-, and Four-Year Limitations Statutes; S.V. v. R.V.

1.02. INITIATING THE ATTORNEY-CLIENT RELATIONSHIP

A. FEES AND FEE CONTRACTS

- Text, 4-6; Notes (13)

- CONTINGENT FEE CONTRACT (14) AND NOTES

B. AVOIDING CONFLICTS OF INTEREST

-Text, [1] 18-19; Text [f]-[g], 20

1.03. CASE EVALUATION, ACCEPTANCE, SETTLEMENT

Class #2

1.04. PRE-LITIGATION FACT-GATHERING

-Text, 24

1.05. PRELIMINARY PROCEDURES

-Text, 32

1.06 LIMITATIONS

-Text and Statutes, 36-37 (ONE-, TWO-, AND FOUR-YEAR STATUTES AND RESIDUAL STATUTE, P. 42)

-Text and S.V. V. R.V. (45); Notes 1-4 (52)

Class #3

II. EMERGENCY AND INTERIM RELIEF

Monroe v. GMAC

2.01. TRO'S AND INJUNCTIONS

-Rules 682-83, 692 (1st sentence)

-J. WEBER, SO YOU NEED A TRO (59); Text 63; *Charter Medical Corp. v. Miller* (64)

2.02. OTHER INTERIM RELIEF (FOR CREDITORS)

A. SEQUESTRATION

-Text, 65; Statutes, 65; MONROE V. GMAC (68)

B. LIS PENDENS

-Text and statute, 70-71

C. SELF-HELP REPOSSESSION

-Text, 71

2.03. INTERIM RELIEF FOR THE UNSECURED CREDITOR

-Text, 72

-Text 74-75

2.04. WRONGFUL USE OF SPECIAL REMEDIES

-*Barfield v. Brogdon* (81)

Class #4

III. SUBJECT-MATTER JURISDICTION

3.01. OVERVIEW OF TEXAS COURTS

-Text, 87; Chart, 88

3.02. CONSTITUTIONAL AND STATUTORY OVERVIEW

-Text, 88-99; Text 99-105

-Summary 105; Rule 500.3(a), (d) (selected Justice Ct. rules)

3.03. AMOUNT IN CONTROVERSY

-Text, 107-108; *United Services Automobile Ass'n v. Brite* (108); Notes 2-4 (111-12)

Class #5

-Text (112-115)

3.04. COMPETING JURISDICTIONAL GRANTS

A. DISTRICT COURT LAND-TITLE GRANT V. JUSTICE COURT EVICTION

-Text, 119; *Dass Inc. v. Benjie Smith* (119); Notes 1, 2, 5 (122-23)

B. PROBATE JURISDICTION

-Text, 124 (2 paragraphs this page only)

IV. PERSONAL JURISDICTION

(*Guardian Royal*, *CMMC*, and *Michiana* cases and most of Note 1, but read *Moki Mac* case in Note); *PHC Minder v. Kimberly-Clark*; *Choice Auto Brokers v. Dawson*; Notes, 199; *In re Florenza*; *Grabell* article, 215; *Bavarian Autohouse v. Holland*; *Dawson-Austin v. Dawson*; *In re General Electric*; pp. 259-267.

Moki Mac v. Drugg (176); Notes 1-4 (221); *McKanna v. Edgar*; *Special Appearance Form*

4.01. GENERAL PRINCIPLES (A FIRST-YEAR REVIEW)

-Text, pp. 147-50; Text, bottom 150

Class #6

4.02. TEXAS PERSONAL JURISDICTION

A. THE GENERAL LONG-ARM STATUTE

-Text and Statutes 151-52; Notes 1, 3, 4, 5, 6, 9 (152-56)

B. SPECIFIC JURISDICTION

-Text, 158; *Moki Mac River Expeditions v. Drugg* (Note case, 178-79)

C. GENERAL JURISDICTION

-Text, 182; *MOKI MAC RIVER EXPEDITIONS V. DRUGG* (182); *DAIMLER AG V. BAUMAN* (note case) (191)

-Note 1 (188)

4.03 THE FAMILY- CODE LONG-ARM STATUTES

-Text and statute 198-99; Note 2 (205) (mentioning UCCJEA); Note 6 (205-09) (summarizing PKPA)

4.04. SERVICE OF PROCESS

A. DUE PROCESS REQUIREMENTS

-Text, 209; *Peralta v. Heights Med. Ctr.* (210)

Class #7

B. TEXAS STATUTES AND RULES

1. Strict Compliance

-Rule 106; Text, 213; *Wilson v. Dunn* (214); NOTES 1-4 (218-19)

2, 3, 4. Techniques, Waiver, Limitations

-Rules 99, 103 (1st sentence), 107; Text, 219-26

5. Citation by Publication

-Text, 227-28

C. SECRETARY OF STATE SERVICE

-Text, 229; *McKanna v. Edgar* (229); Text, 230-31; *Campus Investments, Inc. v. Cudlever* (232); Rule 108; Text, 233

4.05. CHALLENGING JURISDICTION

A. SPECIAL APPEARANCE

-Rules 120a, 122; Text, 235; SPECIAL APPEARANCE FORM (236); Notes 1-3 (238)

Class #8

B. FORUM NON CONVENIENS

-Text and statute (252-55)

APPENDIX: Personal Jurisdiction and the Texas Bar Exam (263)

V. VENUE

Ruiz v. Conoco; Wilson v. Texas Parks and Wildlife.

In re Missouri Pacific RR; Velasco v. Texas Kenworth Co.

5.01. THE BASIC VENUE SCHEME (GENERAL RULE)

-Text and statutes, 269-70

A. DEFENDANT'S RESIDENCE

-Text, 270; *Mijares v. Perez* (270) and notes

B. DEFENDANT'S PRINCIPAL OFFICE (ENTITIES)

-Text and statute (bottom 272); *In re Missouri Pacific RR Co.* (273); Notes 2-3

C. SUBSTANTIAL PART OF EVENTS OR OMISSIONS

1. Torts: Text (279); *Velasco v. Texas Kenworth Co.* (279); Note, 281

2. Contracts: *KW Construction v. Stephens & Sons Concrete Contractors* (282); Note (287)

D. CONVENIENCE TRANSFERS

-Text, 287-88

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5.02. EXCEPTIONS TO THE GENERAL RULE

A. TYPES OF EXCEPTIONS – Text, 289

B. MANDATORY AND PERMISSIVE EXCEPTIONS – Text and statutes, 290-95

C. MULTIPLE CLAIMS AND PARTIES

1. *Multiple Claims: A Word about Joinder* (296); Text, 296

2. *Multiple Defendants*: Text and statutes, 298

3. *Multiple Plaintiffs; Intervention*: Text and statute, 299; *Surgitek, Bristol-Myers Corp. v. Abel* (300); Notes 1-2

D. COUNTERCLAIMS, CROSS-CLAIMS, AND THIRD-PARTY CLAIMS

-Note about Joinder, 304; Text and statute, 304

Class #10

5.03. LITIGATING VENUE RIGHTS

-Rule 86; Rule 87(2)(a); Rule 87(3)(a); Text and forms, 305-10

-*Carlile v. RLS Legal Solutions* (311); Notes 1-3

-Text on Appellate Review (317)

5.04. CONTRACTING FOR VENUE

-Text (325).

5.05. CHANGE OF VENUE FOR IMPARTIAL TRIAL

-Rule 257; Text, 326; Notes

5.06. MULTIDISTRICT LITIGATION

-Text and statute, 329-333

Class #11

VI. PLEADINGS

Willock v. Bui; Weingartens v. Price; Birchfield v. Texarkana Memorial Hosp;; §§ C-D 383-84; Texas Dep. Of Parks v. Miranda; Bauer v. Valley Bank; Greenhalgh v. Service Lloyds Ins. Co.; Royal Typewriter Co. v. Vestal; City of Houston v. Crabb; Notes, 368; McKamey v. Kinnear; Wyatt v. Shaw Plumbing Co., Echols v. Bloom; Panditi v. Apostle.

6.01. HISTORICAL BACKGROUND – Text (341)

6.02. OVERVIEW OF PLEADINGS – 343-44

6.03.-04. PLAINTIFF'S PETITION

-Sample Petition (345); Notes

A. GENERAL PRINCIPLES AND FORMAL ELEMENTS – Text, 348; Rule 21(b-d, f) (filing, including electronic; service); Rule 47 (contents)

B. PLEADING A "CAUSE OF ACTION"

-Text, 349-50 (to end of [1])

-Text on Fair Notice, 352; Rules 45, 47; *Castleberry v. Goolsby Bldg. Corp.* (352); *CITY OF HOUSTON V. CRABB* (353); Notes 1-4, 354

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- Text on Fair Notice (365); Petition, Answer, Order, Amended Petition (365-70); NOTES, 370-71
- Rule 56; Text, 371; Note 1, 372
- Rule 47; Text on Demand for Relief (376)
- Rule 13; Text and Statutes on Certifications and Sanctions (377)

6.05. MOTIONS TO DISMISS (“NO BASIS”)

- Rule 91a.1, 91a.7; Text [A]-[B], 383-85

6.06. DEFENDANT’S ANSWER

A.-B. CONTENTS AND FUNCTION

- Text, 387

C. SPECIAL EXCEPTIONS

- Rules 90-91; Text, 388; McKAMEY v. KINNEAR (389)
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Class #13

- Notes 1-4 (392); Notes 7-8 (393-95)

D. PLEA IN ABATEMENT

- Text, 397; WYATT V. SHAW PLUMBING CO. (397); Notes 1, 3

E. PLEA TO THE JURISDICTION

- Text, 401; Note 1 (407)

F. THE GENERAL DENIAL (WHICH MEANS, “PROVE IT”)

- Rule 92 (1st paragraph); Text, 409; *Bahr v. Kohr* (409); Notes

G. SPECIAL DENIALS – Text, 411

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2. *Verified Denials (Execution)*: Text, 415; Note 1 (416)
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H. AFFIRMATIVE DEFENSES

- Rule 94; Text, 419; ECHOLS V. BLOOM (420)
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6.07. AMENDED AND SUPPLEMENTAL PLEADINGS

- Text, 423; *Burnett v. File* (424)
- Text on Supplemental Pleadings, 430; Note 2 (432); R. 66, 67 (trial amendment)

6.08. SPECIALIZED PLEADINGS

A. THE SWORN ACCOUNT

- Text, 433; Rule 185; PANDITI V. APOSTLE (433): first two paragraphs, Text, 435-36; Text on Defenses, 438; Sample Petition, 439

B. TRESPASS TO TRY TITLE

-Rules 783, 788, 791; Text part [D], 442-45

C. EVICTION

-Rule 510.3, 510.5

D. EXPEDITED ACTIONS

-Rule 169(a)(1), (d)

APPENDIX: Pleadings and the Texas Bar Exam

VII. PARTIES (SELECTED ISSUES ONLY)

Various Text and Notes; Ingersoll-Rand v. Valero Energy; Notes (465); In re Union Carbide; Clayton v. Mony Life Ins. Co.; Brookes v. Northglen Ass'n; Notes 3-5; Southwestern Refining Co. v Bernal

7.01. PERMISSIVE JOINDER OF CLAIMS

-Text (451)

7.02. PERMISSIVE JOINDER BY PLAINTIFF

-Rule 40; Text, 452; *Russell v. Hartford Ins. Co.* (452); Note 5 (458)

7.03. JOINDER BY DEFENDANT

A. COUNTERCLAIMS

-Rule 97(a); Text, 459

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-Jack H. Brown Co. v. Northwest Sign Co. (464)

B. CROSSCLAIMS

-Rule 97(e); Text 471; Note 1-2

7.04. PERMISSIVE JOINDER BY DEFENDANTS: THIRD PARTY ACTION

-Rule 38(a); Text (473)

7.05. INTERVENTION

-Text, 478; Rule 60

7.06. INTERPLEADER

-Text, 484; Rule 43 (1st sentence only); Notes 1-2 (489)

7.07. COMPULSORY JOINDER

-Text, 490; Rule 39(a)

7.08. CLASS ACTIONS

-Text, 496; Rule 42(a), b3)

VIII. PRECLUSION

A. CLAIM PRECLUSION: MERGER AND BAR OR RES JUDICATA

-Text at § 8.01 (517); Text beginning bottom of page (517-518); *Barr v. Resolution Trust Corp.* (519)

B. ISSUE PRECLUSION: COLLATERAL ESTOPPEL

-Text (529)

C. PARTIES BOUND

-Text (534); *Benson v. Wanda Petroleum Co.* (534).

Class #16

IX. DISCOVERY: PURPOSES, SCOPE, USES

In re CSX Corp.; *In re Dana Corp.*; *Axelton, Inc. v. McIlhany*; *Tom L. Scott, Inc. v. McIlhany*; *Evidence Rules*, 604-06

In re National Lloyds Ins. Co.; *In re Team Transport*; *Lindsey v. O'Neill*; *In re Continental General Tire*

9.01. INTRODUCTION

-Text, 551-56

9.02. DISCOVERY AND ATTORNEY OBLIGATIONS

-Dorsaneo Text, 557; Texas Lawyer's Creed, 558-64

9.03 "RELEVANT," "NOT PRIVILEGED"

A. THE "REASONABLY CALCULATED" STANDARD

-Rule 192; Text, 562; *K-Mart v. Sanderson* (562); *IN RE NATIONAL LLOYD'S INS. CO.* (567); Notes 2, 4 (569)

-Text on Witnesses, etc., 570; Notes 1, 3 on Insurance and Settlements, 574

B. PRIVILEGE AND OTHER LIMITS

-Text on Work Product, 579; *National Tank Co. v. Brotherton* (580)

Class #17

-Text on Witness Statements, 585; *IN RE TEAM TRANSPORT* (586); Notes, 585; Notes 2, 3

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-Text on Expert Witnesses, 590; *LINDSEY V. O'NEILL* (591)

-Text on Other Privileges, 600; Text on Constitutional Privileges, 601; Text on Attorney-Client Privilege, 602; down to bottom 602, but not including the rule itself; Notes 1-2 (605)

-Text on Trade Secrets, 605; *IN RE CONTINENTAL GENERAL TIRE* (606)

9.04. PRESERVATION AND WAIVER OF PRIVILEGES

A. WRITTEN DISCOVERY

-Rules 193.2-.3(a-b); Text, 616-619

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-*IN RE DUPONT* (619)

B. INVOLUNTARY AND INADVERTENT DISCLOSURE

-Text, 625

C. WAIVER BY OFFENSIVE USE – Text, 627

APPENDIX: Scope of Discovery

X. DISCOVERY--THE INDIVIDUAL DEVICES

Stelly v. Papania (662); Text, 694

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Alvarado v. Farah Mfg. Co; *Transamerican Natural Gas v. Powell*

10.01. INTRODUCTION

-Text note, 633; Text note, 635

Class #19

10.02. DISCOVERY DEVICES

A. WRITTEN DISCOVERY

(1) *Requests For Disclosure*: Rule 194; Text, 638; NOTES 1, 4 (639)

(2) *Interrogatories*: Rule 197; Text, 640

(3) *Requests For Production and Inspection*: Rule 196; Text, 641; In re Kuntz; NOTES 1, 3, 4

-Rule 196.4; Text, 647; IN RE WEEKLEY HOMES (648); NOTES 1-3

Class #20

(4) *Third Party Subpoenas*: Rule 176; Text (659); Notes 1-3 (670)

(5) *Requests For Admissions*: Rule 198; Text, 661; Rule 4 (computing time); WHEELER V. GREEN (664); Notes 2, 3, 5

B. ORAL AND NON-WRITTEN DISCOVERY

(1) *Depositions*: Text, 668; Text, 668-669; Notice of Deposition Form, 669; Notes 1, 3; Subpoena Form (671)

-Rules 191, 195.4, 196(2)(a), 199, 203

-Notes 5, 6, 7, 9, 10 (672-77)

-NOTE 8 ON APEX DEPOSITIONS, 674

Class #21

-Text, 677; Notes, 678

-Rule 202.1(a)-(b) (depositions before suit)

-Text, 679; Notes, 680

(2) *Motions For Physical or Mental Examination*: Rule 204(c); Text, 682; *Coates v. Whittington* (682); Note 1

10.03 AMENDMENT AND SUPPLEMENTATION

-Rules 193.5-.6, 195.6, 215.5; ALVARADO V. FARAH MFG. CO. (687); Notes 1, 3, 6, 8

10.04 SANCTIONS

-Rule 215.1(a), (d); 215.2(b); 215.4(b); Text, 695; TRANSAMERICAN NATURAL GAS V. POWELL (695); Notes 2, 5, 6, 7

APPENDIX: Discovery Devices and the Texas Bar Exam

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XI. DISPOSITION WITHOUT TRIAL

Various Text and Notes; Mathis v. Bocell (730); Cooper v. Circle Ten Council.

Science Spectrum v. Martinez; Moore v. K-Mart; Kerlin v. Arias

11.01. DEFAULT [AND DISMISSAL]

-Rule 165(a) (1st 3 sentences); Rules 239, 239a, 241, 243; Text, 713; *Morgan v. Compugraphic Corp.* (714); Notes 1, 3, 5

11.02. SUMMARY JUDGMENT

A. STANDARDS

-Text, 719; Rule 166a (c), (f)

-SCIENCE SPECTRUM, INC. V. MARTINEZ (722)

-Text on No Evidence Motions (724); Rule 166a(i); MOORE V. K-MART INC. (725)

Class #23

-Notes (730); Text on Hybrid Motions (731)

B. PROCEDURE AND EVIDENCE

-Text, 731; KERLIN V. ARIAS (731)

-Text, 733; Notes, 740

APPENDIX: Disposition without Trial and the Bar Exam

XII. SETTLEMENT AND ADR

Knutston v. Morton Foods Inc. in Note 1 (756); Robert Wise Article (772)

12.01. EFFECTS OF SETTLEMENT

-Text, 751; Tex, 753; *McMillen v. Klingensmith* (757)

Class #24

-KNUTSON V. MORTON FOODS INC. IN NOTE 1 (760); Notes 2-3 (through p. 765)

-Rule 167.2(a), 167.4(a)-(b) (offer of settlement)

-Rule 11; *Leal v. Cortez* (765); Notes 1, 3

12.02. ADR

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-ROBERT K. WISE ARTICLE (777)

-Text on Arbitration (783-89)

-Text on Other Types of ADR (789-91)

APPENDIX: ADR

TEXAS PRETRIAL PROCEDURE

TEXAS RULES

SPRING 2019

PROFESSOR SCHWARTZ

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RULE 9. NUMBER OF COUNSEL HEARD

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

RULE 10. WITHDRAWAL OF ATTORNEY

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

Notes and Comments

Comment to 1990 change: The amendment repeals the present rule and clarifies the requirements for withdrawal.

RULE 11. AGREEMENTS TO BE IN WRITING

Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.

Notes and Comments

Comment to 1988 change: The amendment makes it clear that Rule 11 is subject to modification by any other Rule of Civil Procedure.

RULE 12. ATTORNEY TO SHOW AUTHORITY

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

RULE 13. EFFECT OF SIGNING PLEADINGS, MOTIONS AND OTHER PAPERS; SANCTIONS

The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both.

Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. "Groundless" for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.

Notes and Comments

Comment to 1990 change: To require notice and hearing before a court determines to impose sanctions, to specify that any sanction imposed be appropriate, and to eliminate the 90-day "grace" period provided in the former version of the rule.

RULE 14. AFFIDAVIT BY AGENT

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

the courtroom only in the following circumstances:

- (a) in accordance with guidelines promulgated by the Supreme Court for civil cases, or
- (b) when broadcasting, televising, recording, or photographing will not unduly distract participants or impair the dignity of the proceedings and the parties have consented, and consent to being depicted or recorded is obtained from each witness whose testimony will be broadcast, televised, or photographed, or
- (c) the broadcasting, televising, recording, or photographing of investiture, or ceremonial proceedings.

RULE 19. NON-ADJOURNMENT OF TERM

Every term of court shall commence and convene by operation of law at the time fixed by statute without any act, order, or formal opening by a judge or other official thereof, and shall continue to be open at all times until and including the last day of the term unless sooner adjourned by the judge thereof.

RULE 20. MINUTES READ AND SIGNED

On the last day of the session, the minutes shall be read, corrected and signed in open court by the judge. Each special judge shall sign the minutes of such proceedings as were had by him.

RULE 21. FILING AND SERVING PLEADINGS AND MOTIONS

- (a) Filing and Service Required. Every pleading, plea, motion, or application to the court for an order, whether in the form of a motion, plea, or other form of request, unless presented during a hearing or trial, must be filed with the clerk of the court in writing, must state the grounds therefor, must set forth the relief or order sought, and at the same time a true copy must be served on all other parties, and must be noted on the docket.
- (b) Service of Notice of Hearing. An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, must be served upon all other parties not less than three days before the time specified for the hearing, unless otherwise provided by these rules or shortened by the court.
- (c) Multiple Parties. If there is more than one other party represented by different attorneys, one copy of each pleading must be served on each attorney in charge.
- (d) Certificate of Service. The party or attorney of record, must certify to the court compliance with this rule in writing over signature on the filed pleading, plea, motion, or application.

- (e) Additional Copies. After one copy is served on a party, that party may obtain another copy of the same pleading upon tendering reasonable payment for copying and delivering.
- (f) Electronic Filing.
 - (1) Requirement. Except in juvenile cases under Title 3 of the Family Code and truancy cases under Title 3A of the Family Code, attorneys must electronically file documents in courts where electronic filing has been mandated. Attorneys practicing in courts where electronic filing is available but not mandated and unrepresented parties may electronically file documents, but it is not required.
 - (2) Email Address. The email address of an attorney or unrepresented party who electronically files a document must be included on the document.
 - (3) Mechanism. Electronic filing must be done through the electronic filing manager established by the Office of Court Administration and an electronic filing service provider certified by the Office of Court Administration.
 - (4) Exceptions.
 - (A) Wills are not required to be filed electronically.
 - (B) The following documents must not be filed electronically:
 - (i) documents filed under seal or presented to the court in camera; and
 - (ii) documents to which access is otherwise restricted by law or court order.
 - (C) For good cause, a court may permit a party to file other documents in paper form in a particular case.
 - (5) Timely Filing. Unless a document must be filed by a certain time of day, a document is considered timely filed if it is electronically filed at any time before midnight (in the court's time zone) on the filing deadline. An electronically filed document is deemed filed when transmitted to the filing party's electronic filing service provider, except:
 - (A) if a document is transmitted on a Saturday, Sunday, or legal holiday, it is deemed filed on the next day that is not a Saturday, Sunday, or legal holiday; and
 - (B) if a document requires a motion and an order allowing its filing, the document is deemed filed on the date that the motion is granted.

RULE 36. DIFFERENT OFFICIALS AND BONDSMEN

In suits by the State upon the official bond of a State officer, any subordinate officer who has given bond, payable either to the State or such superior officer, to cover all or part of the default sued for, together with the sureties on his official bond, may be joined as defendants with such superior officer and his bondsmen whenever it is alleged in the petition that both of such officers are liable for the money sued for.

RULE 37. ADDITIONAL PARTIES

Before a case is called for trial, additional parties necessary or proper parties to the suit, may be brought in, either by the plaintiff or the defendant, upon such terms as the court may prescribe; but not at a time nor in a manner to unreasonably delay the trial of the case.

RULE 38. THIRD-PARTY PRACTICE

- (a) **When Defendant May Bring in Third Party.** At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a citation and petition to be served upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party petition not later than thirty (30) days after he serves his original answer. Otherwise, he must obtain leave on motion upon notice to all parties to the action. The person served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim under the rules applicable to the defendant, and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 97. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses and his counterclaims and cross-claims. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or who may be liable to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant.
- (b) **When Plaintiff May Bring in Third Party.** When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.
- (c) This rule shall not be applied, in tort cases, so as to permit the joinder of a liability or indemnity insurance company, unless such company is by statute or contract liable to the

person injured or damaged.

- (d) This rule shall not be applied so as to violate any venue statute, as venue would exist absent this rule.

RULE 39. JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

- (a) **Persons to Be Joined If Feasible.** A person who is subject to service of process shall be joined as a party in the action if
 - (1) in his absence complete relief cannot be accorded among those already parties, or
 - (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may
 - (i) as a practical matter impair or impede his ability to protect that interest or
 - (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.
- (b) **Determination by Court Whenever Joinder Not Feasible.** If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.
- (c) **Pleading Reasons for Nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.
- (d) **Exception of Class Actions.** This rule is subject to the provisions of Rule 42.

RULE 40. PERMISSIVE JOINDER OF PARTIES

- (a) **Permissive Joinder.** All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same

transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

- (b) **Separate Trials.** The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

RULE 41. MISJOINDER OR NON-JOINDER OF PARTIES

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added, or suits filed separately may be consolidated, or actions which have been improperly joined may be severed and each ground of recovery improperly joined may be docketed as a separate suit between the same parties, by order of the court on motion of any party or on its own initiative at any stage of the action, before the time of submission to the jury or to the court if trial is without a jury, on such terms as are just. Any claim against a party may be severed and proceeded with separately.

RULE 42. CLASS ACTIONS

- (a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if
 - (1) the class is so numerous that joinder of all members is impracticable,
 - (2) there are questions of law or fact common to the class,
 - (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
 - (4) the representative parties will fairly and adequately protect the interests of the class.
- (b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
 - (1) the prosecution of separate actions by or against individual members of the class would create a risk of

- (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
 - (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
- (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
- (3) the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to these issues include:
 - (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
 - (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
 - (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
 - (D) the difficulties likely to be encountered in the management of a class action
- (c) **Determination by Order Whether to Certify a Class Action; Notice and Membership in Class.**
 - (1)
 - (A) When a person sues or is sued as a representative of a class, the court must -- at an early practicable time -- determine by order whether to certify the action as a class action.
 - (B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 42 (g).
 - (C) An order under Rule 42 (c)(1) may be altered or amended before final judgment. The court may order the naming of additional parties in order to insure the adequacy of representation.
 - (D) An order granting or denying certification under Rule 42(b)(3) must state:
 - (i) the elements of each claim or defense asserted in the pleadings;

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 42(h) and (i). (h) Procedure for determining Attorney Fees Award. In an action certified as a class action, the court may award attorney fees in accordance with subdivision (i) and nontaxable costs authorized by law or by agreement of the parties as follows:

- (1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion, subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
- (2) Objections to Motion. A class member, or a party from whom payment is sought, may object to the motion.
- (3) Hearing and Findings. The court must hold a hearing in open court and must find the facts and state its conclusions of law on the motion. The court must state its findings and conclusions in writing or orally on the record.

(i) **Attorney's Fees Award.**

- (1) In awarding attorney fees, the court must first determine a lodestar figure by multiplying the number of hours reasonably worked times a reasonable hourly rate. The attorney fees award must be in the range of 25% to 400% of the lodestar figure. In making these determinations, the court must consider the factors specified in Rule 1.04(b), Tex. Disciplinary R. Prof. Conduct.
- (2) If any portion of the benefits recovered for the class are in the form of coupons or other noncash common benefits, the attorney fees awarded in the action must be in cash and noncash amounts in the same proportion as the recovery for the class.

(j) **Effective Date.** Rule 42(i) applies only in actions filed after September 1, 2003.

RULE 43. INTERPLEADER

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way

limit the joinder of parties permitted in any other rules.

RULE 44. MAY APPEAR BY NEXT FRIEND

Minors, lunatics, idiots, or persons non compos mentis who have no legal guardian may sue and be represented by "next friend" under the following rules:

- (1) Such next friend shall have the same rights concerning such suits as guardians have, but shall give security for costs, or affidavits in lieu thereof, when required.
- (2) Such next friend or his attorney of record may with the approval of the court compromise suits and agree to judgments, and such judgments, agreements and compromises, when approved by the court, shall be forever binding and conclusive upon the party plaintiff in such suit.

SECTION 4. PLEADING

A. General

RULE 45. DEFINITION AND SYSTEM

Pleadings in the district and county courts shall

- (a) be by petition and answer;
- (b) consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense. That an allegation be evidentiary or be of legal conclusion shall not be grounds for objection when fair notice to the opponent is given by the allegations as a whole; and
- (c) contain any other matter which may be required by any law or rule authorizing or regulating any particular action or defense.

Pleadings that are not filed electronically must be in writing, on paper measuring approximately 8 ½ inches by 11 inches, and signed by the party or his attorney. The use of recycled paper is strongly encouraged.

All pleadings shall be construed so as to do substantial justice.

RULE 46. PETITION AND ANSWER; EACH ONE INSTRUMENT OF WRITING

The original petition, first supplemental petition, second supplemental petition, and every other, shall each be contained in one instrument of writing, and so with the original answer and each of

the supplemental answers.

RULE 47. CLAIMS FOR RELIEF

An original pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim, shall contain

- (a) a short statement of the cause of action sufficient to give fair notice of the claim involved;
- (b) a statement that the damages sought are within the jurisdictional limits of the court;
- (c) except in suits governed by the Family Code, a statement that the party seeks:
 - (1) only monetary relief of \$100,000 or less, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees; or
 - (2) monetary relief of \$100,000 or less and non-monetary relief; or
 - (3) monetary relief over \$100,000 but not more than \$200,000; or
 - (4) monetary relief over \$200,000 but not more than \$1,000,000; or
 - (5) monetary relief over \$1,000,000; and
- (d) a demand for judgment for all the other relief to which the party deems himself entitled.

Relief in the alternative or of several different types may be demanded; provided, further, that upon special exception the court shall require the pleader to amend so as to specify the maximum amount claimed. A party that fails to comply with (c) may not conduct discovery until the party's pleading is amended to comply.

Comment to 2013 change: Rule 47 is amended to require a more specific statement of the relief sought by a party. The amendment requires parties to plead into or out of the expedited actions process governed by Rule 169, added to implement section 22.004(h) of the Texas Government Code. Except in a suit governed by the Family Code, the Property Code, the Tax Code, or Chapter 74 of the Civil Practice & Remedies Code, a suit in which the original petition contains the statement in paragraph (c)(1) is governed by the expedited actions process. The further specificity in paragraphs (c)(2)-(5) is to provide information regarding the nature of cases filed and does not affect a party's substantive rights.

RULE 48. ALTERNATIVE CLAIMS FOR RELIEF

A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are

made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based upon legal or equitable grounds or both.

RULE 49. WHERE SEVERAL COUNTS

Where there are several counts in the petition, and entire damages are given, the verdict or judgment, as the case may be, shall be good, notwithstanding one or more of such counts may be defective.

RULE 50. PARAGRAPHS, SEPARATE STATEMENTS

All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings, so long as the pleading containing such paragraph has not been superseded by an amendment as provided by Rule 65. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

RULE 51. JOINDER OF CLAIMS AND REMEDIES

- (a) **Joinder of Claims.** The plaintiff in his petition or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 39, 40, and 43 are satisfied. There may be a like joinder of cross claims or third-party claims if the requirements of Rules 38 and 97, respectively, are satisfied.
- (b) **Joinder of Remedies.** Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. This rule shall not be applied in tort cases so as to permit the joinder of a liability or indemnity insurance company, unless such company is by statute or contract directly liable to the person injured or damaged.

RULE 52. ALLEGING A CORPORATION

An allegation that a corporation is incorporated shall be taken as true, unless denied by the affidavit of the adverse party, his agent or attorney, whether such corporation is a public or private

corporation and however created.

RULE 53. SPECIAL ACT OR LAW

A pleading founded wholly or in part on any private or special act or law of this State or of the Republic of Texas need only recite the title thereof, the date of its approval, and set out in substance so much of such act or laws as may be pertinent to the cause of action or defense.

RULE 54. CONDITIONS PRECEDENT

In pleading the performance or occurrence of conditions precedent, it shall be sufficient to aver generally that all conditions precedent have been performed or have occurred. When such performances or occurrences have been so plead, the party so pleading same shall be required to prove only such of them as are specifically denied by the opposite party.

RULE 55. JUDGMENT

In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it shall be sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

RULE 56. SPECIAL DAMAGE

When items of special damage are claimed, they shall be specifically stated.

RULE 57. SIGNING OF PLEADINGS

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, with his State Bar of Texas identification number, address, telephone number, email address, and if available, fax number. A party not represented by an attorney shall sign his pleadings, state his address, telephone number, email address, and, if available, fax number.

RULE 58. ADOPTION BY REFERENCE

Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion, so long as the pleading containing such statements has not been superseded by an amendment as provided by Rule 65.

RULE 59. EXHIBITS AND PLEADING

Notes, accounts, bonds, mortgages, records, and all other written instruments, constituting, in whole or in part, the claim sued on, or the matter set up in defense, may be made a part of the pleadings by copies thereof, or the originals, being attached or filed and referred to as such, or by copying the same in the body of the pleading in aid and explanation of the allegations in the petition or answer made in reference to said instruments and shall be deemed a part thereof for all purposes. Such pleadings shall not be deemed defective because of the lack of any allegations which can be supplied from said exhibit. No other instrument of writing shall be made an exhibit in the pleading.

RULE 60. INTERVENOR'S PLEADINGS

Any party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party.

RULE 61. TRIAL: INTERVENORS: RULES APPLY TO ALL PARTIES

These rules of pleading shall apply equally, so far as it may be practicable to intervenors and to parties, when more than one, who may plead separately.

RULE 62. AMENDMENT DEFINED

The object of an amendment, as contra-distinguished from a supplemental petition or answer, is to add something to, or withdraw something from, that which has been previously pleaded so as to perfect that which is or may be deficient, or to correct that which has been incorrectly stated by the party making the amendment, or to plead new matter, additional to that formerly pleaded by the amending party, which constitutes an additional claim or defense permissible to the suit.

RULE 63. AMENDMENTS AND RESPONSIVE PLEADINGS

Parties may amend their pleadings, respond to pleadings on file of other parties, file suggestions of death and make representative parties, and file such other pleas as they may desire by filing such pleas with the clerk at such time as not to operate as a surprise to the opposite party; provided, that any pleadings, responses or pleas offered for filing within seven days of the date of trial or thereafter, or after such time as may be ordered by the judge under Rule 166, shall be filed only after leave of the judge is obtained, which leave shall be granted by the judge unless there is a showing that such filing will operate as a surprise to the opposite party.

RULE 64. AMENDED INSTRUMENT

The party amending shall point out the instrument amended, as "original petition," or "plaintiff's first supplemental petition," or as "original answer," or "defendant's first supplemental answer" or

shall be regarded as denied unless expressly admitted.

SECTION 4. PLEADING

C. Pleadings of Defendant

RULE 83. ANSWER; ORIGINAL AND SUPPLEMENTAL; INDORSEMENT

The answer of defendant shall consist of an original answer, and such supplemental answers as may be necessary, in the course of pleading by the parties to the suit. The original answer and the supplemental answers shall be indorsed, so as to show their respective positions in the process of pleading, as "original answer," "defendant's first supplemental answer," "defendant's second supplemental answer," and so on, to be successively numbered, named and indorsed.

RULE 84. ANSWER MAY INCLUDE SEVERAL MATTERS

The defendant in his answer may plead as many several matters, whether of law or fact, as he may think necessary for his defense, and which may be pertinent to the cause, and such matters shall be heard in such order as may be directed by the court, special appearance and motion to transfer venue, and the practice thereunder being excepted herefrom.

RULE 85. ORIGINAL ANSWER; CONTENTS

The original answer may consist of motions to transfer venue, pleas to the jurisdiction, in abatement, or any other dilatory pleas; of special exceptions, of general denial, and any defense by way of avoidance or estoppel, and it may present a cross-action, which to that extent will place defendant in the attitude of a plaintiff. Matters in avoidance and estoppel may be stated together, or in several special pleas, each presenting a distinct defense, and numbered so as to admit of separate issues to be formed on them.

RULE 86. MOTION TO TRANSFER VENUE

1. **Time to File.** An objection to improper venue is waived if not made by written motion filed prior to or concurrently with any other plea, pleading or motion except a special appearance motion provided for in Rule 120a. A written consent of the parties to transfer the case to another county may be filed with the clerk of the court at any time. A motion to transfer venue because an impartial trial cannot be had in the county where the action is pending is governed by the provisions of Rule 257.
2. **How to File.** The motion objecting to improper venue may be contained in a separate instrument filed concurrently with or prior to the filing of the movant's first responsive pleading or the motion may be combined with other objections and defenses and included

in the movant's first responsive pleading.

3. **Requisites of Motion.** The motion, and any amendments to it, shall state that the action should be transferred to another specified county of proper venue because:

- (a) The county where the action is pending is not a proper county; or
- (b) Mandatory venue of the action in another county is prescribed by one or more specific statutory provisions which shall be clearly designated or indicated.

The motion shall state the legal and factual basis for the transfer of the action and request transfer of the action to a specific county of mandatory or proper venue. Verification of the motion is not required. The motion may be accompanied by supporting affidavits as provided in Rule 87.

4. **Response and Reply.** Except as provided in paragraph 3(a) of Rule 87, a response to the motion to transfer is not required. Verification of a response is not required.
5. **Service.** A copy of any instrument filed pursuant to Rule 86 shall be served in accordance with Rule 21a.

RULE 87. DETERMINATION OF MOTION TO TRANSFER

1. **Consideration of Motion.** The determination of a motion to transfer venue shall be made promptly by the court and such determination must be made in a reasonable time prior to commencement of the trial on the merits. The movant has the duty to request a setting on the motion to transfer. Except on leave of court each party is entitled to at least 45 days notice of a hearing on the motion to transfer.

Except on leave of court, any response or opposing affidavits shall be filed at least 30 days prior to the hearing of the motion to transfer. The movant is not required to file a reply to the response but any reply and any additional affidavits supporting the motion to transfer must, except on leave of court, be filed not later than 7 days prior to the hearing date.

2. **Burden of Establishing Venue.**

- (a) **In General.** A party who seeks to maintain venue of the action in a particular county in reliance upon Section 15.001 (General Rule), Sections 15.011-15.017 (Mandatory Venue), Sections 15.031-15.040 (Permissive Venue), or Sections 15.061 and 15.062 (Multiple Claims), Civil Practice and Remedies Code, has the burden to make proof, as provided in paragraph 3 of this rule, that venue is maintainable in the county of suit. A party who seeks to transfer venue of the action to another specified county under Section 15.001 (General Rule), Sections 15.011-15.017 (Mandatory Venue), Sections 15.031-15.040 (Permissive Venue), or Sections 15.061 and 15.062 (Multiple Claims), Civil Practice and Remedies Code,

has the burden to make proof, as provided in paragraph 3 of this rule, that venue is maintainable in the county to which transfer is sought. A party who seeks to transfer venue of the action to another specified county under Sections 15.011-15.017, Civil Practice and Remedies Code on the basis that a mandatory venue provision is applicable and controlling has the burden to make proof, as provided in paragraph 3 of this rule, that venue is maintainable in the county to which transfer is sought by virtue of one or more mandatory venue exceptions.

- (b) **Cause of Action.** It shall not be necessary for a claimant to prove the merits of a cause of action, but the existence of a cause of action, when pleaded properly, shall be taken as established as alleged by the pleadings. When the defendant specifically denies the venue allegations, the claimant is required, by prima facie proof as provided in paragraph 3 of this rule, to support such pleading that the cause of action taken as established by the pleadings, or a part of such cause of action, accrued in the county of suit. If a defendant seeks transfer to a county where the cause of action or a part thereof accrued, it shall be sufficient for the defendant to plead that if a cause of action exists, then the cause of action or part thereof accrued in the specific county to which transfer is sought, and such allegation shall not constitute an admission that a cause of action in fact exists. But the defendant shall be required to support his pleading by prima facie proof as provided in paragraph 3 of this rule, that, if a cause of action exists, it or a part thereof accrued in the county to which transfer is sought.
- (c) **Other Rules.** A motion to transfer venue based on the written consent of the parties shall be determined in accordance with Rule 255. A motion to transfer venue on the basis that an impartial trial cannot be had in the courts where the action is pending shall be determined in accordance with Rules 258 and 259.

3. **Proof.**

- (a) **Affidavits and Attachments.** All venue facts, when properly pleaded, shall be taken as true unless specifically denied by the adverse party. When a venue fact is specifically denied, the party pleading the venue fact must make prima facie proof of that venue fact; provided, however, that no party shall ever be required for venue purposes to support prima facie proof the existence of a cause of action or part thereof, and at the hearing the pleadings of the parties shall be taken as conclusive on the issues of existence of a cause of action. Prima facie proof is made when the venue facts are properly pleaded and an affidavit, and any duly proved attachments to the affidavit, are filed fully and specifically setting forth the facts supporting such pleading. Affidavits shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.
- (b) **The Hearing.** The court shall determine the motion to transfer venue on the basis of the pleadings, any stipulations made by and between the parties and such affidavits and attachments as may be filed by the parties in accordance with the

If a motion to transfer venue is sustained, the cause shall not be dismissed, but the court shall transfer said cause to the proper court; and the costs incurred prior to the time such suit is filed in the court to which said cause is transferred shall be taxed against the plaintiff. The clerk shall make up a transcript of all the orders made in said cause, certifying thereto officially under the seal of the court, and send it with the original papers in the cause to the clerk of the court to which the venue has been changed. Provided, however, if the cause be severable as to parties defendant and shall be ordered transferred as to one or more defendants but not as to all, the clerk, instead of sending the original papers, shall make certified copies of such filed papers as directed by the court and forward the same to the clerk of the court to which the venue has been changed. After the cause has been transferred, as above provided for the clerk of the court to which the cause has been transferred shall mail notification to the plaintiff or his attorney that transfer of the cause has been completed, that the filing fee in the proper court is due and payable within thirty days from the mailing of such notification, and that the case may be dismissed if the filing fee is not timely paid; and if such filing fee is timely paid, the cause will be subject to trial at the expiration of thirty days after the mailing of notification to the parties or their attorneys by the clerk that the papers have been filed in the court to which the cause has been transferred; and if the filing fee is not timely paid, any court of the transferee county to which the case might have been assigned, upon its own motion or the motion of a party, may dismiss the cause without prejudice to the refiling of same.

RULE 90. WAIVER OF DEFECTS IN PLEADING

General demurrers shall not be used. Every defect, omission or fault in a pleading either of form or of substance, which is not specifically pointed out by exception in writing and brought to the attention of the judge in the trial court before the instruction or charge to the jury or, in a non-jury case, before the judgment is signed, shall be deemed to have been waived by the party seeking reversal on such account; provided that this rule shall not apply as to any party against whom default judgment is rendered.

RULE 91. SPECIAL EXCEPTIONS

A special exception shall not only point out the particular pleading excepted to, but it shall also point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations in the pleading excepted to.

RULE 91a. DISMISSAL OF BASELESS CAUSES OF ACTION

91a.1 Motion and Grounds. Except in a case brought under the Family Code or a case governed by Chapter 14 of the Texas Civil Practice and Remedies Code, a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them do not entitle the claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.

91a.2 Contents of Motion. A motion to dismiss must state that it is made pursuant to this rule, must identify each cause of action to which it is addressed, and must state specifically the reasons the cause of action has no basis in law, no basis in fact, or both.

91a.3 Time for Motion and Ruling. A motion to dismiss must be:

- (a) filed within 60 days after the first pleading containing the challenged cause of action is served on the movant;
- (b) filed at least 21 days before the motion is heard; and
- (c) granted or denied within 45 days after the motion is filed.

91a.4 Time for Response. Any response to the motion must be filed no later than 7 days before the date of the hearing.

91a.5 Effect of Nonsuit or Amendment; Withdrawal of Motion.

- (a) The court may not rule on a motion to dismiss if, at least 3 days before the date of the hearing, the respondent files a nonsuit of the challenged cause of action, or the movant files a withdrawal of the motion.
- (b) If the respondent amends the challenged cause of action at least 3 days before the date of the hearing, the movant may, before the date of the hearing, file a withdrawal of the motion or an amended motion directed to the amended cause of action.
- (c) Except by agreement of the parties, the court must rule on a motion unless it has been withdrawn or the cause of action has been nonsuited in accordance with (a) or (b). In ruling on the motion, the court must not consider a nonsuit or amendment not filed as permitted by paragraphs (a) or (b).
- (d) An amended motion filed in accordance with (b) restarts the time periods in this rule.

91a.6 Hearing; No Evidence Considered. Each party is entitled to at least 14 days' notice of the hearing on the motion to dismiss. The court may, but is not required to, conduct an oral hearing on the motion. Except as required by 91a.7, the court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59.

91a.7 Award of Costs and Attorney Fees Required. Except in an action by or against a governmental entity or a public official acting in his or her official capacity or under color of law, the court must award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court. The court must consider evidence regarding costs and fees in determining the award.

91a.8 Effect on Venue and Personal Jurisdiction. This rule is not an exception to the pleading requirements of Rules 86 and 120a, but a party does not, by filing a motion to dismiss pursuant to this rule or obtaining a ruling on it, waive a special appearance or a motion to transfer venue. By filing a motion to dismiss, a party submits to the Court's jurisdiction only in proceedings on the motion and is bound by the court's ruling, including an award of attorney fees and costs against the party.

91a.9 Dismissal Procedure Cumulative. This rule is in addition to, and does not supersede or affect, other procedures that authorize dismissal.

Comment to 2013 change: Rule 91a is a new rule implementing section 22.004(g) of the Texas Government Code, which was added in 2011 and calls for rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence. A motion to dismiss filed under this rule must be ruled on by the court within 45 days unless the motion, pleading, or cause of action is withdrawn, amended, or nonsuited as specified in 91a.5. If an amended motion is filed in response to an amended cause of action in accordance with 91a.5(b), the court must rule on the motion within 45 days of the filing of the amended motion and the respondent must be given an opportunity to respond to the amended motion. The term "hearing" in the rule includes both submission and an oral hearing. Attorney fees awarded under 91a.7 are limited to those associated with challenged cause of action, including fees for preparing or responding to the motion to dismiss.

RULE 92. GENERAL DENIAL

A general denial of matters pleaded by the adverse party which are not required to be denied under oath, shall be sufficient to put the same in issue. When the defendant has pleaded a general denial, and the plaintiff shall afterward amend his pleading, such original denial shall be presumed to extend to all matters subsequently set up by the plaintiff.

When a counterclaim or cross-claim is served upon a party who has made an appearance in the action, the party so served, in the absence of a responsive pleading, shall be deemed to have pleaded a general denial of the counterclaim or cross-claim, but the party shall not be deemed to have waived any special appearance or motion to transfer venue. In all other respects the rules prescribed for pleadings of defensive matter are applicable to answers to counterclaims and cross-claims.

RULE 93. CERTAIN PLEAS TO BE VERIFIED

A pleading setting up any of the following matters, unless the truth of such matters appear of record, shall be verified by affidavit.

1. That the plaintiff has not legal capacity to sue or that the defendant has not legal capacity to be sued.
2. That the plaintiff is not entitled to recover in the capacity in which he sues, or that the defendant is not liable in the capacity in which he is sued.
3. That there is another suit pending in this State between the same parties involving the same claim.
4. That there is a defect of parties, plaintiff or defendant.
5. A denial of partnership as alleged in any pleading as to any party to the suit.
6. That any party alleged in any pleading to be a corporation is not incorporated as alleged.
7. Denial of the execution by himself or by his authority of any instrument in writing, upon which any pleading is founded, in whole or in part and charged to have been executed by him or by his authority, and not alleged to be lost or destroyed. Where such instrument in writing is charged to have been executed by a person then deceased, the affidavit shall be sufficient if it states that the affiant has reason to believe and does believe that such instrument was not executed by the decedent or by his authority. In the absence of such a sworn plea, the instrument shall be received in evidence as fully proved.
8. A denial of the genuineness of the indorsement or assignment of a written instrument upon which suit is brought by an indorsee or assignee and in the absence of such a sworn plea, the indorsement or assignment thereof shall be held as fully proved. The denial required by this subdivision of the rule may be made upon information and belief.
9. That a written instrument upon which a pleading is founded is without consideration, or that the consideration of the same has failed in whole or in part.
10. A denial of an account which is the foundation of the plaintiff's action, and supported by affidavit.
11. That a contract sued upon is usurious. Unless such plea is filed, no evidence of usurious interest as a defense shall be received.
12. That notice and proof of loss or claim for damage has not been given as alleged. Unless such plea is filed such notice and proof shall be presumed and no evidence to the contrary shall be admitted. A denial of such notice or such proof shall be made specifically and with particularity.
13. In the trial of any case appealed to the court from the Industrial Accident Board the

following, if pleaded, shall be presumed to be true as pleaded and have been done and filed in legal time and manner, unless denied by verified pleadings:

- (a) Notice of injury.
- (b) Claim for Compensation.
- (c) Award of the Board.
- (d) Notice of intention not to abide by the award of the Board.
- (e) Filing of suit to set aside the award.
- (f) That the insurance company alleged to have been the carrier of the workers' compensation insurance at the time of the alleged injury was in fact the carrier thereof.
- (g) That there was good cause for not filing claim with the Industrial Accident Board within the one year period provided by statute.
- (h) Wage rate.

A denial of any of the matters set forth in subdivisions (a) or (g) of paragraph 13 may be made on information and belief.

Any such denial may be made in original or amended pleadings; but if in amended pleadings the same must be filed not less than seven days before the case proceeds to trial. In case of such denial the things so denied shall not be presumed to be true, and if essential to the case of the party alleging them, must be proved.

- 14. That a party plaintiff or defendant is not doing business under an assumed name or trade name as alleged.
- 15. In the trial of any case brought against an automobile insurance company by an insured under the provisions of an insurance policy in force providing protection against uninsured motorists, an allegation that the insured has complied with all the terms of the policy as a condition precedent to bringing the suit shall be presumed to be true unless denied by verified pleadings which may be upon information and belief.
- 16. Any other matter required by statute to be pleaded under oath.

RULE 94. AFFIRMATIVE DEFENSES

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction,

arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. Where the suit is on an insurance contract which insures against certain general hazards, but contains other provisions limiting such general liability, the party suing on such contract shall never be required to allege that the loss was not due to a risk or cause coming within any of the exceptions specified in the contract, nor shall the insurer be allowed to raise such issue unless it shall specifically allege that the loss was due to a risk or cause coming within a particular exception to the general liability; provided that nothing herein shall be construed to change the burden of proof on such issue as it now exists.

RULE 95. PLEAS OF PAYMENT

When a defendant shall desire to prove payment, he shall file with his plea an account stating distinctly the nature of such payment, and the several items thereof; failing to do so, he shall not be allowed to prove the same, unless it be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof.

RULE 96. NO DISCONTINUANCE

Where the defendant has filed a counterclaim seeking affirmative relief, the plaintiff shall not be permitted by a discontinuance of his suit, to prejudice the right of the defendant to be heard on such counterclaim.

RULE 97. COUNTERCLAIM AND CROSS-CLAIM

- (a) **Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction; provided, however, that a judgment based upon a settlement or compromise of a claim of one party to the transaction or occurrence prior to a disposition on the merits shall not operate as a bar to the continuation or assertion of the claims of any other party to the transaction or occurrence unless the latter has consented in writing that said judgment shall operate as a bar.
- (b) **Permissive Counterclaims.** A pleading may state as a counterclaim any claim against an opposing party whether or not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.
- (c) **Counterclaim Exceeding Opposing Claim.** A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount

or different in kind from that sought in the pleading of the opposing party, so long as the subject matter is within the jurisdiction of the court.

- (d) **Counterclaim Maturing or Acquired After Pleading.** A claim which either matured or was acquired by the pleader after filing his pleading may be presented as a counterclaim by amended pleading.
- (e) **Cross-Claim Against Co-Party.** A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.
- (f) **Additional Parties.** Persons other than those made parties to the original action may be made parties to a third party action, counterclaim or cross-claim in accordance with the provisions of Rules 38, 39 and 40.
- (g) Tort shall not be the subject of set-off or counterclaim against a contractual demand nor a contractual demand against tort unless it arises out of or is incident to or is connected with same.
- (h) **Separate Trials; Separate Judgments.** If the court orders separate trials as provided in Rule 174, judgment on a counterclaim or cross-claim may be rendered when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

RULE 98. SUPPLEMENTAL ANSWERS

The defendant's supplemental answers may contain special exceptions, general denial, and the allegations of new matter not before alleged by him, in reply to that which has been alleged by the plaintiff.

SECTION 5. CITATION

RULE 99. ISSUANCE AND FORM OF CITATION

- a. **Issuance.** Upon the filing of the petition, the clerk, when requested, shall forthwith issue a citation and deliver the citation as directed by the requesting party. The party requesting citation shall be responsible for obtaining service of the citation and a copy of the petition. Upon request, separate or additional citations shall be issued by the clerk. The clerk must retain a copy of the citation in the court's file.
- b. **Form.** The citation shall (1) be styled "The State of Texas," (2) be signed by the clerk under seal of court, (3) contain name and location of the court, (4) show date of filing of

the petition, (5) show date of issuance of citation, (6) show file number, (7) show names of parties, (8) be directed to the defendant, (9) show the name and address of attorney for plaintiff, otherwise the address of plaintiff, (10) contain the time within which these rules require the defendant to file a written answer with the clerk who issued citation, (11) contain address of the clerk, and (12) shall notify the defendant that in case of failure of defendant to file and answer, judgment by default may be rendered for the relief demanded in the petition. The citation shall direct the defendant to file a written answer to the plaintiff's petition on or before 10:00 a.m. on the Monday next after the expiration of twenty days after the date of service thereof. The requirement of subsections 10 and 12 of this section shall be in the form set forth in section c of this rule.

- c. **Notice.** The citation shall include the following notice to the defendant: "You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you."
- d. **Copies.** The party filing any pleading upon which citation is to be issued and served shall furnish the clerk with a sufficient number of copies thereof for use in serving the parties to be served, and when copies are so furnished the clerk shall make no charge for the copies.

[RULE 100. Repealed effective January 1, 1988]

[RULE 101. Repealed effective January 1, 1988]

[RULE 102. Repealed effective January 1, 1988]

RULE 103. WHO MAY SERVE

Process—including citation and other notices, writs, orders, and other papers issued by the court—may be served anywhere by (1) any sheriff or constable or other person authorized by law, (2) any person authorized by law or by written order of the court who is not less than eighteen years of age, or (3) any person certified under order of the Supreme Court. Service by registered or certified mail and citation by publication must, if requested, be made by the clerk of the court in which the case is pending. But no person who is a party to or interested in the outcome of a suit may serve any process in that suit, and, unless otherwise authorized by a written court order, only a sheriff or constable may serve a citation in an action of forcible entry and detainer, a writ that requires the actual taking of possession of a person, property or thing, or process requiring that an enforcement action be physically enforced by the person delivery the process. The order authorizing a person to serve process may be made without written motion and no fee may be imposed for issuance of such order.

[RULE 104. Repealed effective January 1, 1988]

RULE 105. DUTY OF OFFICER OR PERSON RECEIVING

The officer or authorized person to whom process is delivered shall endorse thereon the day and hour on which he received it, and shall execute and return the same without delay.

RULE 106. METHOD OF SERVICE

- (a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized by Rule 103 by
 - (1) delivering to the defendant, in person, a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached thereto, or
 - (2) mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached thereto.
- (b) Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted under either (a)(1) or (a)(2) at the location named in such affidavit but has not been successful, the court may authorize service
 - (1) by leaving a true copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit, or
 - (2) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.

RULE 107. RETURN OF SERVICE

- (a) The officer or authorized person executing the citation must complete a return of service. The return may, but need not, be endorsed on or attached to the citation.
- (b) The return, together with any documents to which it is attached, must include the following information:
 - (1) the cause number and case name;
 - (2) the court in which the case is filed;
 - (3) a description of what was served;

- (4) the date and time the process was received for service;
 - (5) the person or entity served;
 - (6) the address served;
 - (7) the date of service or attempted service;
 - (8) the manner of delivery of service or attempted service;
 - (9) the name of the person who served or attempted to serve the process;
 - (10) if the person named in (9) is a process server certified under order of the Supreme Court, his or her identification number and the expiration date of his or her certification; and
 - (11) any other information required by rule or law.
- (c) When the citation was served by registered or certified mail as authorized by Rule 106, the return by the officer or authorized person must also contain the return receipt with the addressee's signature.
- (d) When the officer or authorized person has not served the citation, the return shall show the diligence used by the officer or authorized person to execute the same and the cause of failure to execute it, and where the defendant is to be found, if ascertainable.
- (e) The officer or authorized person who serves or attempts to serve a citation must sign the return. If the return is signed by a person other than a sheriff, constable, or the clerk of the court, the return must either be verified or be signed under penalty of perjury. A return signed under penalty of perjury must contain the statement below in substantially the following form:

"My name is _____, my date of birth is _____, and
(First) (Middle) (Last)

my address is _____, _____, _____, _____, and
(Street) (City) (State) (Zip Code)

_____. I declare under penalty of perjury that the foregoing is true and correct.
(Country)

Executed in _____ County, State of _____, on the _____ day of _____,
(Month)

_____.
Year

_____."

(Declarant)

- (f) Where citation is executed by an alternative method as authorized by Rule 106, proof of service shall be made in the manner ordered by the court.
- (g) The return and any document to which it is attached must be filed with the court and may be filed electronically or by facsimile, if those methods of filing are available.
- (h) No default judgment shall be granted in any cause until proof of service as provided by this rule or by Rules 108 or 108a, or as ordered by the court in the event citation is executed by an alternative method under Rule 106, shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment.

RULE 108. SERVICE IN ANOTHER STATE

Where the defendant is absent from the State, or is a nonresident of the State, the form of notice to such defendant of the institution of the suit shall be the same as prescribed for citation to a resident defendant; and such notice may be served by any disinterested person who is not less than eighteen years of age, in the same manner as provided in Rule 106 hereof. The return of service in such cases shall be completed in accordance with Rule 107. A defendant served with such notice shall be required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with a citation within this State to the full extent that he may be required to appear and answer under the Constitution of the United States in an action either in rem or in personam.

RULE 108a. SERVICE OF PROCESS IN FOREIGN COUNTRIES

- (1) **Manner.** Service of process may be effected upon a party in a foreign country if service of the citation and petition is made:
 - (a) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or
 - (b) as directed by the foreign authority in response to a letter rogatory or a letter of request; or
 - (c) in the manner provided by Rule 106; or
 - (d) pursuant to the terms and provisions of any applicable treaty or convention; or
 - (e) by diplomatic or consular officials when authorized by the United States Department of State; or
 - (f) by any other means directed by the court that is not prohibited by the law of the country where service is to be made.

The method for service of process in a foreign country must be reasonably calculated, under all of the circumstances, to give actual notice of the proceedings to the defendant in time to answer and defend. A defendant served with process under this rule shall be required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with citation within this state to the full extent that he may be required to appear and answer under the Constitution of the United States or under any applicable convention or treaty in an action either in rem or in personam.

- (2) **Return.** Proof of service may be made as prescribed by the law of the foreign country, by order of the court, by Rule 107, or by a method provided in any applicable treaty or convention.

RULE 109. CITATION BY PUBLICATION

When a party to a suit, his agent or attorney, shall make oath that the residence of any party defendant is unknown to affiant, and to such party when the affidavit is made by his agent or attorney, or that such defendant is a transient person, and that after due diligence such party and the affiant have been unable to locate the whereabouts of such defendant, or that such defendant is absent from or is a nonresident of the State, and that the party applying for the citation has attempted to obtain personal service of nonresident notice as provided for in Rule 108, but has been unable to do so, the clerk shall issue citation for such defendant for service by publication. In such cases it shall be the duty of the court trying the case to inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant or to obtain service of nonresident notice, as the case may be, before granting any judgment on such service.

RULE 109a. OTHER SUBSTITUTED SERVICE

Whenever citation by publication is authorized, the court may, on motion, prescribe a different method of substituted service, if the court finds, and so recites in its order, that the method so prescribed would be as likely as publication to give defendant actual notice. When such method of substituted service is authorized, the return of the officer executing the citation shall state particularly the manner in which service is accomplished, and shall attach any return receipt, returned mail, or other evidence showing the result of such service. Failure of defendant to respond to such citation shall not render the service invalid. When such substituted service has been obtained and the defendant has not appeared, the provisions of Rules 244 and 329 shall apply as if citation had been served by publication.

RULE 110. EFFECT OF RULES ON OTHER STATUTES

Where by statute or these rules citation by publication is authorized and the statute or rules do not specify the requisites of such citation or the method of service thereof, or where they direct that such citation be issued or served as in other civil actions, the provisions of these rules shall govern.

memorandum signed by him, or by his duly authorized agent or attorney, after suit is brought, sworn to before a proper officer other than an attorney in the case, and filed among the papers of the cause, and such waiver or acceptance shall have the same force and effect as if the citation had been issued and served as provided by law. The party signing such memorandum shall be delivered a copy of plaintiff's petition, and the receipt of the same shall be acknowledged in such memorandum. In every divorce action such memorandum shall also include the defendant's mailing address.

RULE 119a. COPY OF DECREE

The district clerk shall forthwith mail a certified copy of the final divorce decree or order of dismissal to the party signing a memorandum waiving issuance or service of process. Such divorce decree or order of dismissal shall be mailed to the signer of the memorandum at the address stated in such memorandum or to the office of his attorney of record.

RULE 120. ENTERING APPEARANCE

The defendant may, in person, or by attorney, or by his duly authorized agent, enter an appearance in open court. Such appearance shall be noted by the judge upon his docket and entered in the minutes, and shall have the same force and effect as if the citation had been duly issued and served as provided by law.

RULE 120a. SPECIAL APPEARANCE

1. Notwithstanding the provisions of Rules 121, 122 and 123, a special appearance may be made by any party either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amenable to process issued by the courts of this State. A special appearance may be made as to an entire proceeding or as to any severable claim involved therein. Such special appearance shall be made by sworn motion filed prior to motion to transfer venue or any other plea, pleading or motion; provided however, that a motion to transfer venue and any other plea, pleading, or motion may be contained in the same instrument or filed subsequent thereto without waiver of such special appearance; and may be amended to cure defects. The issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes, shall not constitute a waiver of such special appearance. Every appearance, prior to judgment, not in compliance with this rule is a general appearance.
2. Any motion to challenge the jurisdiction provided for herein shall be heard and determined before a motion to transfer venue or any other plea or pleading may be heard. No determination of any issue of fact in connection with the objection to jurisdiction is a determination of the merits of the case or any aspect thereof.

3. The court shall determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony. The affidavits, if any, shall be served at least seven days before the hearing, shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Should it appear to the satisfaction of the court at any time that any of such affidavits are presented in violation of Rule 13, the court shall impose sanctions in accordance with that rule.

4. If the court sustains the objection to jurisdiction, an appropriate order shall be entered. If the objection to jurisdiction is overruled, the objecting party may thereafter appear generally for any purpose. Any such special appearance or such general appearance shall not be deemed a waiver of the objection to jurisdiction when the objecting party or subject matter is not amenable to process issued by the courts of this State.

RULE 121. ANSWER IS APPEARANCE

An answer shall constitute an appearance of the defendant so as to dispense with the necessity for the issuance or service of citation upon him.

RULE 122. CONSTRUCTIVE APPEARANCE

If the citation or service thereof is quashed on motion of the defendant, such defendant shall be deemed to have entered his appearance at ten o'clock a.m. on the Monday next after the expiration of twenty (20) days after the day on which the citation or service is quashed, and such defendant shall be deemed to have been duly served so as to require him to appear and answer at that time, and if he fails to do so, judgment by default may be rendered against him.

RULE 123. REVERSAL OF JUDGMENT

Where the judgment is reversed on appeal or writ of error for the want of service, or because of defective service of process, no new citation shall be issued or served, but the defendant shall be presumed to have entered his appearance to the term of the court at which the mandate shall be filed.

A party who abandons any part of his claim or defense, as contained in the pleadings, may have that fact entered of record, so as to show that the matters therein were not tried.

RULE 165a. DISMISSAL FOR WANT OF PROSECUTION

1. **Failure to Appear.** A case may be dismissed for want of prosecution on failure of any party seeking affirmative relief to appear for any hearing or trial of which the party had notice. Notice of the court's intention to dismiss and the date and place of the dismissal hearing shall be sent by the clerk to each attorney of record, and to each party not represented by an attorney and whose address is shown on the docket or in the papers on file, by posting same in the United States Postal Service. At the dismissal hearing, the court shall dismiss for want of prosecution unless there is good cause for the case to be maintained on the docket. If the court determines to maintain the case on the docket, it shall render a pretrial order assigning a trial date for the case and setting deadlines for the joining of new parties, all discovery, filing of all pleadings, the making of a response or supplemental responses to discovery and other pretrial matters. The case may be continued thereafter only for valid and compelling reasons specifically determined by court order. Notice of the signing of the order of dismissal shall be given as provided in Rule 306a. Failure to mail notices as required by this rule shall not affect any of the periods mentioned in Rule 306a except as provided in that rule.
2. **Non-Compliance With Time Standards.** Any case not disposed of within time standards promulgated by the Supreme Court under its Administrative Rules may be placed on a dismissal docket.
3. **Reinstatement.** A motion to reinstate shall set forth the grounds therefor and be verified by the movant or his attorney. It shall be filed with the clerk within 30 days after the order of dismissal is signed or within the period provided by Rule 306a. A copy of the motion to reinstate shall be served on each attorney of record and each party not represented by an attorney whose address is shown on the docket or in the papers on file. The clerk shall deliver a copy of the motion to the judge, who shall set a hearing on the motion as soon as practicable. The court shall notify all parties or their attorneys of record of the date, time and place of the hearing.

The court shall reinstate the case upon finding after a hearing that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained.

In the event for any reason a motion for reinstatement is not decided by signed written order within seventy-five days after the judgment is signed, or, within such other time as may be allowed by Rule 306a, the motion shall be deemed overruled by operation of law. If a motion to reinstate is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to reinstate the case until 30 days after all such timely filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

4. **Cumulative Remedies.** This dismissal and reinstatement procedure shall be cumulative of the rules and laws governing any other procedures available to the parties in such cases. The same reinstatement procedures and timetable are applicable to all dismissals for want of prosecution including cases which are dismissed pursuant to the court's inherent power, whether or not a motion to dismiss has been filed.

SECTION 8. PRE-TRIAL PROCEDURE

RULE 166. PRE-TRIAL CONFERENCE

In an appropriate action, to assist in the disposition of the case without undue expense or burden to the parties, the court may in its discretion direct the attorneys for the parties and the parties or their duly authorized agents to appear before it for a conference to consider:

- (a) All pending dilatory pleas, motions and exceptions;
- (b) The necessity or desirability of amendments to the pleadings;
- (c) A discovery schedule;
- (d) Requiring written statements of the parties' contentions;
- (e) Contested issues of fact and the simplification of the issues;
- (f) The possibility of obtaining stipulations of fact;
- (g) The identification of legal matters to be ruled on or decided by the court;
- (h) The exchange of a list of direct fact witnesses, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before the time of trial, who will be called to testify at trial, stating their address and telephone number, and the subject of the testimony of each such witness;
- (i) The exchange of a list of expert witnesses who will be called to testify at trial, stating their address and telephone number, and the subject of the testimony and opinions that will be proffered by each expert witness;
- (j) Agreed applicable propositions of law and contested issues of law;
- (k) Proposed jury charge questions, instructions, and definitions for a jury case or proposed findings of fact and conclusions of law for a nonjury case;
- (l) The marking and exchanging of all exhibits that any party may use at trial and stipulation to the authenticity and admissibility of exhibits to be used at trial;

- (m) Written trial objections to the opposite party's exhibits, stating the basis for each objection;
- (n) The advisability of a preliminary reference of issues to a master or auditor for findings to be used as evidence when the trial is to be by jury;
- (o) The settlement of the case, and to aid such consideration, the court may encourage settlement;
- (p) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the pretrial conference, the amendments allowed to the pleadings, the time within which same may be filed, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions, agreements of counsel, or rulings of the court; and such order when issued shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or extend it to all actions.

Pretrial proceedings in multidistrict litigation may also be governed by Rules 11 and 13 of the Rules of Judicial Administration.

RULE 166a. SUMMARY JUDGMENT

- (a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.
- (b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
- (c) **Motion and Proceedings Thereon.** The motion for summary judgment shall state the specific grounds therefor. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public

records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response. Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

- (d) **Appendices, References and Other Use of Discovery Not Otherwise on File.** Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty-one days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.
- (e) **Case Not Fully Adjudicated on Motion.** If summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the judge may at the hearing examine the pleadings and the evidence on file, interrogate counsel, ascertain what material fact issues exist and make an order specifying the facts that are established as a matter of law, and directing such further proceedings in the action as are just.
- (f) **Form of Affidavits; Further Testimony.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.
- (g) **When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.
- (h) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the

affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

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

[RULE 166b. Repealed effective January 1, 1999]

[RULE 166c. Repealed effective January 1, 1999]

RULE 167. OFFER OF SETTLEMENT; AWARD OF LITIGATION COSTS

167.1. Generally.

Certain litigation costs may be awarded against a party who rejects an offer made substantially in accordance with this rule to settle a claim for monetary damages - including a counterclaim, crossclaim, or third-party claim - except in:

- (a) a class action;
- (b) a shareholder's derivative action;
- (c) an action by or against the State, a unit of state government, or a political subdivision of the State;
- (d) an action brought under the Family Code;
- (e) an action to collect workers' compensation benefits under title 5, subtitle A of the Labor Code; or
- (f) an action filed in a justice of the peace court or small claims court.

167.2. Settlement Offer

- (a) *Defendant's declaration a prerequisite; deadline.* A settlement offer under this rule may not be made until a defendant -- a party against whom a claim for monetary damages is made -- files a declaration invoking this rule. When a defendant files such a declaration, an offer or offers may be made under this rule to settle only those claims by and against that defendant. The declaration must be filed no later than 45 days before the case is set for

conventional trial on the merits.

- (b) *Requirements of an offer.* A settlement offer must:
 - (1) be in writing;
 - (2) state that it is made under Rule 167 and Chapter 42 of the Texas Civil Practice and Remedies Code;
 - (3) identify the party or parties making the offer and the party or parties to whom the offer is made;
 - (4) state the terms by which all monetary claims - including any attorney fees, interest, and costs that would be recoverable up to the time of the offer - between the offeror or offerors on the one hand and the offeree or offerees on the other may be settled;
 - (5) state a deadline - no sooner than 14 days after the offer is served - by which the offer must be accepted;
 - (6) be served on all parties to whom the offer is made.
- (c) *Conditions of offer.* An offer may be made subject to reasonable conditions, including the execution of appropriate releases, indemnities, and other documents. An offeree may object to a condition by written notice served on the offeror before the deadline stated in the offer. A condition to which no such objection is made is presumed to have been reasonable. Rejection of an offer made subject to a condition determined by the trial court to have been unreasonable cannot be the basis for an award of litigation costs under this rule.
- (d) *Non-monetary and excepted claims not included.* An offer must not include non-monetary claims and other claims to which this rule does not apply.
- (e) *Time limitations.* An offer may not be made:
 - (1) before a defendant's declaration is filed;
 - (2) within 60 days after the appearance in the case of the offeror or offeree, whichever is later;
 - (3) within 14 days before the date the case is set for a conventional trial on the merits, except that an offer may be made within that period if it is in response to, and within seven days of, a prior offer.
- (f) *Successive offers.* A party may make an offer after having made or rejected a prior offer. A rejection of an offer is subject to imposition of litigation costs under this rule only if the offer is more favorable to the offeree than any prior offer.

167.3. Withdrawal, Acceptance, and Rejection of Offer

- (a) *Withdrawal of offer.* An offer can be withdrawn before it is accepted. Withdrawal is effective when written notice of the withdrawal is served on the offeree. Once an unaccepted offer has been withdrawn, it cannot be accepted or be the basis for awarding litigation costs under this rule.
- (b) *Acceptance of offer.* An offer that has not been withdrawn can be accepted only by written notice served on the offeror by the deadline stated in the offer. When an offer is accepted, the offeror or offeree may file the offer and acceptance and may move the court to enforce the settlement.
- (c) *Rejection of offer.* An offer that is not withdrawn or accepted is rejected. An offer may also be rejected by written notice served on the offeror by the deadline stated in the offer.
- (d) *Objection to offer made before an offeror's joinder or designation of responsible third party.* An offer made before an offeror joins another party or designates a responsible third party may not be the basis for awarding litigation costs under this rule against an offeree who files an objection to the offer within 15 days after service of the offeror's pleading or designation.

167.4. Awarding Litigation Costs

- (a) *Generally.* If a settlement offer made under this rule is rejected, and the judgment to be awarded on the monetary claims covered by the offer is significantly less favorable to the offeree than was the offer, the court must award the offeror litigation costs against the offeree from the time the offer was rejected to the time of judgment.
- (b) *"Significantly less favorable" defined.* A judgment award on monetary claims is significantly less favorable than an offer to settle those claims if:
 - (1) the offeree is a claimant and the judgment would be less than 80 percent of the offer; or
 - (2) the offeree is a defendant and the judgment would be more than 120 percent of the offer.
- (c) *Litigation costs.* Litigation costs are the expenditures actually made and the obligations actually incurred - directly in relation to the claims covered by a settlement offer under this rule - for the following:
 - (1) court costs;
 - (2) reasonable deposition costs, in cases filed on or after September 1, 2011;
 - (3) reasonable fees for not more than two testifying expert witnesses; and

- (c) *Hearing required.* The court must, upon request, conduct a hearing on a request for an award of litigation costs, at which the affected parties may present evidence.

167.6. Evidence Not Admissible

Evidence relating to an offer made under this rule is not admissible except for purposes of enforcing a settlement agreement or obtaining litigation costs. The provisions of this rule may not be made known to the jury by any means.

167.7. Other Settlement Offers Not Affected

This rule does not apply to any offer made in a mediation or arbitration proceeding. A settlement offer not made in compliance with this rule, or a settlement offer not made under this rule, or made in an action to which this rule does not apply, cannot be the basis for awarding litigation costs under this rule as to any party. This rule does not limit or affect a party's right to make a settlement offer that does not comply with this rule, or in an action to which this rule does not apply.

[RULE 167a. Repealed effective January 1, 1999]

RULE 168. PERMISSION TO APPEAL

On a party's motion or on its own initiative, a trial court may permit an appeal from an interlocutory order that is not otherwise appealable, as provided by statute. Permission must be stated in the order to be appealed. An order previously issued may be amended to include such permission. The permission must identify the controlling question of law as to which there is a substantial ground for difference of opinion, and must state why an immediate appeal may materially advance the ultimate termination of the litigation.

Comment to 2011 change: Rule 168 is a new rule, added to implement amendments to section 51.014(d)-(f) of the Texas Civil Practice and Remedies Code. Rule 168 applies only to cases filed on or after September 1, 2011. Rule 168 clarifies that the trial court's permission to appeal should be included in the order to be appealed rather than in a separate order. Rule of Appellate Procedure 28.3 sets out the corollary requirements for permissive appeals in the courts of appeals.

RULE 169. EXPEDITED ACTIONS

- (a) *Application.*

- (1) The expedited actions process in this rule applies to a suit in which all claimants, other than counter-claimants, affirmatively plead that they seek only monetary relief aggregating \$100,000 or less, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees.

- (2) The expedited actions process does not apply to a suit in which a party has filed a claim governed by the Family Code, the Property Code, the Tax Code, or Chapter 74 of the Civil Practice & Remedies Code.
- (b) *Recovery.* In no event may a party who prosecutes a suit under this rule recover a judgment in excess of \$100,000, excluding post-judgment interest.
- (c) *Removal from Process.*
 - (1) A court must remove a suit from the expedited actions process:
 - (A) on motion and a showing of good cause by any party; or
 - (B) if any claimant, other than a counter-claimant, files a pleading or an amended or supplemental pleading that seeks any relief other than the monetary relief allowed by (a)(1).
 - (2) A pleading, amended pleading, or supplemental pleading that removes a suit from the expedited actions process may not be filed without leave of court unless it is filed before the earlier of 30 days after the discovery period is closed or 30 days before the date set for trial. Leave to amend may be granted only if good cause for filing the pleading outweighs any prejudice to an opposing party.
 - (3) If a suit is removed from the expedited actions process, the court must reopen discovery under Rule 190.2(c).
- (d) *Expedited Actions Process.*
 - (1) Discovery. Discovery is governed by Rule 190.2.
 - (2) Trial Setting; Continuances. On any party's request, the court must set the case for a trial date that is within 90 days after the discovery period in Rule 190.2(b)(1) ends. The court may continue the case twice, not to exceed a total of 60 days.
 - (3) Time Limits for Trial. Each side is allowed no more than eight hours to complete jury selection, opening statements, presentation of evidence, examination and cross-examination of witnesses, and closing arguments. On motion and a showing of good cause by any party, the court may extend the time limit to no more than twelve hours per side.
 - (A) The term "side" has the same definition set out in Rule 233.
 - (B) Time spent on objections, bench conferences, bills of exception, and challenges for cause to a juror under Rule 228 are not included in the time limit.

- (4) Alternative Dispute Resolution.
 - (A) Unless the parties have agreed not to engage in alternative dispute resolution, the court may refer the case to an alternative dispute resolution procedure once, and the procedure must:
 - (i) not exceed a half-day in duration, excluding scheduling time;
 - (ii) not exceed a total cost of twice the amount of applicable civil filing fees; and
 - (iii) be completed no later than 60 days before the initial trial setting.
 - (B) The court must consider objections to the referral unless prohibited by statute.
 - (C) The parties may agree to engage in alternative dispute resolution other than that provided for in (A).
- (5) Expert Testimony. Unless requested by the party sponsoring the expert, a party may only challenge the admissibility of expert testimony as an objection to summary judgment evidence under Rule 166a or during the trial on the merits. This paragraph does not apply to a motion to strike for late designation.

Comments to 2013 change:

1. Rule 169 is a new rule implementing section 22.004(h) of the Texas Government Code, which was added in 2011 and 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.

2. The expedited actions process created by Rule 169 is mandatory; any suit that falls within the definition of 169(a)(1) is subject to the provisions of the rule.

3. In determining whether there is good cause to remove the case from the process or extend the time limit for trial, the court should consider factors such as whether the damages sought by multiple claimants against the same defendant exceed in the aggregate the relief allowed under 169(a)(1), whether a defendant has filed a compulsory counterclaim in good faith that seeks relief other than that allowed under 169(a)(1), the number of parties and witnesses, the complexity of the legal and factual issues, and whether an interpreter is necessary.

4. Rule 169(b) specifies that a party who prosecutes a suit under this rule cannot recover a judgment in excess of \$100,000. Thus, the rule in *Greenhalgh v. Service Lloyds Ins. Co.*, 787 S.W.2d 938 (Tex. 1990), does not apply if a jury awards damages in excess of \$100,000 to the party. The limitation of 169(b) does not apply to a counter-claimant that seeks relief other than that allowed under 169(a)(1).

5. The discovery limitations for expedited actions are set out in Rule 190.2, which is also amended to implement section 22.004(h) of the Texas Government Code.

[RULE 170. Repealed effective April 1, 1984]

RULE 171. MASTER IN CHANCERY

The court may, in exceptional cases, for good cause appoint a master in chancery, who shall be a citizen of this State, and not an attorney for either party to the action, nor related to either party, who shall perform all of the duties required of him by the court, and shall be under orders of the court, and have such power as the master of chancery has in a court of equity.

The order of references to the master may specify or limit his powers, and may direct him to report only upon particular issues, or to do or perform particular acts, or to receive and report evidence only and may fix the time and place for beginning and closing the hearings, and for the filing of the master's report. Subject to the limitations and specifications stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of books, papers, vouchers, documents and other writings applicable thereto. He may rule upon the admissibility of evidence, unless otherwise directed by the order of reference and has the authority to put witnesses on oath, and may, himself, examine them, and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner as provided for a court sitting in the trial of a case.

The clerk of the court shall forthwith furnish the master with a copy of the order of reference.

The parties may procure the attendance of witnesses before the master by the issuance and service of process as provided by law and these rules.

The court may confirm, modify, correct, reject, reverse or recommit the report, after it is filed, as the court may deem proper and necessary in the particular circumstances of the case. The court shall award reasonable compensation to such master to be taxed as costs of suit.

RULE 172. AUDIT

When an investigation of accounts or examination of vouchers appears necessary for the purpose of justice between the parties to any suit, the court shall appoint an auditor or auditors to state the accounts between the parties and to make report thereof to the court as soon as possible. The auditor shall verify his report by his affidavit stating that he has carefully examined the state of the account between the parties, and that his report contains a true statement thereof, so far as the same

[RULE 177. Repealed effective January 1, 1999]

[RULE 177a. Repealed effective January 1, 1999]

[RULE 178. Repealed effective January 1, 1999]

[RULE 179. Repealed effective January 1, 1999]

RULE 180. REFUSAL TO TESTIFY

Any witness refusing to give evidence may be committed to jail, there to remain without bail until such witness shall consent to give evidence.

RULE 181. PARTY AS WITNESS

Either party to a suit may examine the opposing party as a witness, and shall have the same process to compel his attendance as in the case of any other witness.

[RULE 182. Repealed effective January 1, 1988]

[RULE 182a. Repealed effective January 1, 1988]

RULE 183. INTERPRETERS

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.

[RULE 184. Repealed effective September 1, 1990]

[RULE 184A. Repealed effective September 1, 1990]

RULE 185. SUIT ON ACCOUNT

When any action or defense is founded upon an open account or other claim for goods, wares and

merchandise, including any claim for a liquidated money demand based upon written contract or founded on business dealings between the parties, or is for personal service rendered, or labor done or labor or materials furnished, on which a systematic record has been kept, and is supported by the affidavit of the party, his agent or attorney taken before some officer authorized to administer oaths, to the effect that such claim is, within the knowledge of affiant, just and true, that it is due, and that all just and lawful offsets, payments and credits have been allowed, the same shall be taken as prima facie evidence thereof, unless the party resisting such claim shall file a written denial, under oath. A party resisting such a sworn claim shall comply with the rules of pleading as are required in any other kind of suit, provided, however, that if he does not timely file a written denial, under oath, he shall not be permitted to deny the claim, or any item therein, as the case may be. No particularization or description of the nature of the component parts of the account or claim is necessary unless the trial court sustains special exceptions to the pleadings.

SECTION 9. EVIDENCE AND DISCOVERY

B. Discovery

[RULES 186 to 186b. Repealed effective April 1, 1984]

[RULE 187. Repealed effective January 1, 1999]

[RULE 188. Repealed effective January 1, 1999]

[RULE 189. Repealed effective April 1, 1984]

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

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.

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 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 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 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 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. 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 first-hand 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 rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial.
- (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 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.

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 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 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;
 - (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

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 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 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 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 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.

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.

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 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 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 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.

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, 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.

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 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.

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, 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 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 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 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 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 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 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.

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 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 202. Repealed effective January 1, 1999; see, Rules 199.1 and 203.6] 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:
 - (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.

- (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.

[RULE 203. Repealed effective January 1, 1999; see, Rules 176.8 and 215]

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 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 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 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 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.

[RULE 204. Repealed effective January 1, 1999; see, Rule 199.5]

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 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 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.

[RULE 205. Repealed effective January 1, 1999; see, Rule 203.1 et seq.]

- (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.

[RULE 206 to 208. Repealed effective January 1, 1999]

[RULE 208a. Repealed effective April 1, 1984]

[RULE 209. Repealed effective January 1, 1999]

[RULES 210 to 214. Repealed effective April 1, 1984]

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:
 - (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 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 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 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.

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 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.

SECTION 10. - THE JURY IN COURT

RULE 216. REQUEST AND FEE FOR JURY TRIAL

- a. **Request.** No jury trial shall be had in any civil suit, unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance.
- b. **Jury Fee.** Unless otherwise provided by law, a fee of ten dollars if in the district court and five dollars if in the county court must be deposited with the clerk of the court within the time for making a written request for a jury trial. The clerk shall promptly enter a

SECTION 11. TRIAL OF CAUSES

A. Appearance and Procedure

RULE 237. APPEARANCE DAY

If a defendant, who has been duly cited, is by the citation required to answer on a day which is in term time, such day is appearance day as to him. If he is so required to answer on a day in vacation, he shall plead or answer accordingly, and the first day of the next term is appearance day as to him.

RULE 237a. CASES REMANDED FROM FEDERAL COURT

When any cause is removed to the Federal Court and is afterwards remanded to the state court, the plaintiff shall file a certified copy of the order of remand with the clerk of the state court and shall forthwith give written notice of such filing to the attorneys of record for all adverse parties. All such adverse parties shall have fifteen days from the receipt of such notice within which to file an answer. No default judgment shall be rendered against a party in a removed action remanded from federal court if that party filed an answer in federal court during removal.

RULE 238. CALL OF APPEARANCE DOCKET

On the appearance day of a particular defendant and at the hour named in the citation, or as soon thereafter as may be practicable, the court or clerk in open court shall call, in their order, all the cases on the docket in which such day is appearance day as to any defendant, or, the court or clerk failing therein, any such case shall be so called on request of the plaintiff's attorney.

RULE 239. JUDGMENT BY DEFAULT

Upon such call of the docket, or at any time after a defendant is required to answer, the plaintiff may in term time take judgment by default against such defendant if he has not previously filed an answer, and provided that the return of service shall have been on file with the clerk for the length of time required by Rule 107.

RULE 239a. NOTICE OF DEFAULT JUDGMENT

At or immediately prior to the time an interlocutory or final default judgment is rendered, the party taking the same or his attorney shall certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken, which certificate shall be filed among the papers in the cause. Immediately upon the signing of the judgment, the clerk shall mail written notice thereof to the party against whom the judgment was rendered at the address shown in the certificate, and note the fact of such mailing on the docket. The notice shall state the number and

style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, and the date of the signing of the judgment. Failure to comply with the provisions of this rule shall not affect the finality of the judgment.

RULE 240. WHERE ONLY SOME ANSWER

Where there are several defendants, some of whom have answered or have not been duly served and some of whom have been duly served and have made default, an interlocutory judgment by default may be entered against those who have made default, and the cause may proceed or be postponed as to the others.

RULE 241. ASSESSING DAMAGES ON LIQUIDATED DEMANDS

When a judgment by default is rendered against the defendant, or all of several defendants, if the claim is liquidated and proved by an instrument in writing, the damages shall be assessed by the court, or under its direction, and final judgment shall be rendered therefor, unless the defendant shall demand and be entitled to a trial by jury.

[RULE 242. Repealed effective December 31, 1941]

RULE 243. UNLIQUIDATED DEMANDS

If the cause of action is unliquidated or be not proved by an instrument in writing, the court shall hear evidence as to damages and shall render judgment therefor, unless the defendant shall demand and be entitled to a trial by jury in which case the judgment by default shall be noted, a writ of inquiry awarded, and the cause entered on the jury docket.

RULE 244. ON SERVICE BY PUBLICATION

Where service has been made by publication, and no answer has been filed nor appearance entered within the prescribed time, the court shall appoint an attorney to defend the suit in behalf of the defendant, and judgment shall be rendered as in other cases; but, in every such case a statement of the evidence, approved and signed by the judge, shall be filed with the papers of the cause as a part of the record thereof. The court shall allow such attorney a reasonable fee for his services, to be taxed as part of the costs.

RULE 245. ASSIGNMENT OF CASES FOR TRIAL

The court may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than forty-five days to the parties of a first setting for trial, or by

- (y) “Sworn” means signed in front of someone authorized to take oaths, such as a notary, or signed under penalty of perjury. Filing a false sworn document can result in criminal prosecution.
- (z) “Third party claim” is a claim brought by a party being sued against someone who is not yet a party to the case.

RULE 500.3. APPLICATION OF RULES IN JUSTICE COURT CASES

- (a) *Small Claims Case.* A small claims case is a lawsuit brought for the recovery of money damages, civil penalties, personal property, or other relief allowed by law. The claim can be for no more than \$10,000, excluding statutory interest and court costs but including attorney fees, if any. Small claims cases are governed by Rules 500-507 of Part V of the Rules of Civil Procedure.
- (b) *Debt Claim Case.* A debt claim case is a lawsuit brought to recover a debt by an assignee of a claim, a debt collector or collection agency, a financial institution, or a person or entity primarily engaged in the business of lending money at interest. The claim can be for no more than \$10,000, excluding statutory interest and court costs but including attorney fees, if any. Debt claim cases in justice court are governed by Rules 500-507 and 508 of Part V of the Rules of Civil Procedure. To the extent of any conflict between Rule 508 and the rest of Part V, Rule 508 applies.
- (c) *Repair and Remedy Case.* A repair and remedy case is a lawsuit filed by a residential tenant under Chapter 92, Subchapter B of the Texas Property Code to enforce the landlord’s duty to repair or remedy a condition materially affecting the physical health or safety of an ordinary tenant. The relief sought can be for no more than \$10,000, excluding statutory interest and court costs but including attorney fees, if any. Repair and remedy cases are governed by Rules 500-507 and 509 of Part V of the Rules of Civil Procedure. To the extent of any conflict between Rule 509 and the rest of Part V, Rule 509 applies.
- (d) *Eviction Case.* An eviction case is a lawsuit brought to recover possession of real property under Chapter 24 of the Texas Property Code, often by a landlord against a tenant. A claim for rent may be joined with an eviction case if the amount of rent due and unpaid is not more than \$10,000, excluding statutory interest and court costs but including attorney fees, if any. Eviction cases are governed by Rules 500-507 and 510 of Part V of the Rules of Civil Procedure. To the extent of any conflict between Rule 510 and the rest of Part V, Rule 510 applies.
- (e) *Application of Other Rules.* The other Rules of Civil Procedure and the Rules of Evidence do not apply except:
 - (1) when the judge hearing the case determines that a particular rule must be followed to ensure that the proceedings are fair to all parties; or

in the county court.

RULE 509.9. EFFECT OF WRIT OF POSSESSION

If a judgment for the landlord for possession of the residential rental property becomes final, any order to repair or remedy a condition is vacated and unenforceable.

RULE 510. EVICTION CASES

RULE 510.1. APPLICATION

Rule 510 applies to a lawsuit to recover possession of real property under Chapter 24 of the Texas Property Code.

RULE 510.2. COMPUTATION OF TIME FOR EVICTION CASES

Rule 500.5 applies to the computation of time in an eviction case. But if a document is filed by mail and not received by the court by the due date, the court may take any action authorized by these rules, including issuing a writ of possession requiring a tenant to leave the property.

RULE 510.3. PETITION

- (a) *Contents.* In addition to the requirements of Rule 502.2, a petition in an eviction case must be sworn to by the plaintiff and must contain:
 - (1) a description, including the address, if any, of the premises that the plaintiff seeks possession of;
 - (2) a description of the facts and the grounds for eviction;
 - (3) a description of when and how notice to vacate was delivered;
 - (4) the total amount of rent due and unpaid at the time of filing, if any; and
 - (5) a statement that attorney fees are being sought, if applicable.
- (b) *Where Filed.* The petition must be filed in the precinct where the premises is located. If it is filed elsewhere, the judge must dismiss the case. The plaintiff will not be entitled to a refund of the filing fee, but will be refunded any service fees paid if the case is dismissed before service is attempted.
- (c) *Defendants Named.* If the eviction is based on a written residential lease, the plaintiff must name as defendants all tenants obligated under the lease residing at the premises whom plaintiff seeks to evict. No judgment or writ of possession may issue or be executed against a tenant obligated under a lease and residing at the premises who is not named in

the petition and served with citation.

- (d) *Claim for Rent.* A claim for rent within the justice court's jurisdiction may be asserted in an eviction case.
- (e) *Only Issue.* The court must adjudicate the right to actual possession and not title. Counterclaims and the joinder of suits against third parties are not permitted in eviction cases. A claim that is not asserted because of this rule can be brought in a separate suit in a court of proper jurisdiction.

RULE 510.4. ISSUANCE, SERVICE, AND RETURN OF CITATION

- (a) *Issuance of Citation; Contents.* When a petition is filed, the court must immediately issue citation directed to each defendant. The citation must:
 - (1) be styled "The State of Texas";
 - (2) be signed by the clerk under seal of court or by the judge;
 - (3) contain the name, location, and address of the court;
 - (4) state the date of filing of the petition;
 - (5) state the date of issuance of the citation;
 - (6) state the file number and names of parties;
 - (7) state the plaintiff's cause of action and relief sought;
 - (8) be directed to the defendant;
 - (9) state the name and address of attorney for plaintiff, or if the plaintiff does not have an attorney, the address of plaintiff;
 - (10) state the day the defendant must appear in person for trial at the court issuing citation, which must not be less than 10 days nor more than 21 days after the petition is filed;
 - (11) notify the defendant that if the defendant fails to appear in person for trial, judgment by default may be rendered for the relief demanded in the petition;
 - (12) inform the defendant that, upon timely request and payment of a jury fee no later than 3 days before the day set for trial, the case will be heard by a jury;
 - (13) contain all warnings required by Chapter 24 of the Texas Property Code; and

- (A) deliver a copy of the citation with a copy of the petition attached to the premises by placing it through a door mail chute or slipping it under the front door; if neither method is possible, the officer may securely affix the citation to the front door or main entry to the premises; and
 - (B) deposit in the mail a copy of the citation with a copy of the petition attached, addressed to defendant at the premises and sent by first class mail.
- (4) Notation on Return. The constable, sheriff, or other person authorized by written court order must note on the return of service the date the citation was delivered and the date it was deposited in the mail.

RULE 510.5. REQUEST FOR IMMEDIATE POSSESSION

- (a) *Immediate Possession Bond.* The plaintiff may, at the time of filing the petition or at any time prior to final judgment, file a possession bond to be approved by the judge in the probable amount of costs of suit and damages that may result to defendant in the event that the suit has been improperly instituted, and conditioned that the plaintiff will pay defendant all such costs and damages that are adjudged against plaintiff.
- (b) *Notice to Defendant.* The court must notify a defendant that the plaintiff has filed a possession bond. The notice must be served in the same manner as service of citation and must inform the defendant that if the defendant does not file an answer or appear for trial, and judgment for possession is granted by default, an officer will place the plaintiff in possession of the property on or after the 7th day after the date defendant is served with the notice.
- (c) *Time for Issuance and Execution of Writ.* If judgment for possession is rendered by default and a possession bond has been filed, approved, and served under this rule, a writ of possession must issue immediately upon demand and payment of any required fees. The writ must not be executed before the 7th day after the date defendant is served with notice under (b).
- (d) *Effect of Appearance.* If the defendant files an answer or appears at trial, no writ of possession may issue before the 6th day after the date a judgment for possession is signed or the day following the deadline for the defendant to appeal the judgment, whichever is later.

RULE 510.6. TRIAL DATE; ANSWER; DEFAULT JUDGMENT

- (a) *Trial Date and Answer.* The defendant must appear for trial on the day set for trial in the citation. The defendant may, but is not required to, file a written answer with the court on or before the day set for trial in the citation.
- (b) *Default Judgment.* If the defendant fails to appear at trial and fails to file an answer before the case is called for trial, and proof of service has been filed in accordance with Rule

injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Every restraining order shall include an order setting a certain date for hearing on the temporary or permanent injunction sought.

RULE 681. TEMPORARY INJUNCTIONS: NOTICE

No temporary injunction shall be issued without notice to the adverse party.

RULE 682. SWORN PETITION

No writ of injunction shall be granted unless the applicant therefor shall present his petition to the judge verified by his affidavit and containing a plain and intelligible statement of the grounds for such relief.

RULE 683. FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Every order granting a temporary injunction shall include an order setting the cause for trial on the merits with respect to the ultimate relief sought. The appeal of a temporary injunction shall constitute no cause for delay of the trial.

RULE 684. APPLICANT'S BOND

In the order granting any temporary restraining order or temporary injunction, the court shall fix the amount of security to be given by the applicant. Before the issuance of the temporary restraining order or temporary injunction the applicant shall execute and file with the clerk a bond to the adverse party, with two or more good and sufficient sureties, to be approved by the clerk, in the sum fixed by the judge, conditioned that the applicant will abide the decision which may be made in the cause, and that he will pay all sums of money and costs that may be adjudged against him if the restraining order or temporary injunction shall be dissolved in whole or in part.

RULE 780. CITATION TO ISSUE

When such information is filed, the clerk shall issue citation as in civil actions, commanding the defendant to appear and answer the relator in an information in the nature of a quo warranto.

RULE 781. PROCEEDING AS IN CIVIL CASES

Every person or corporation who shall be cited as hereinbefore provided shall be entitled to all the rights in the trial and investigation of the matters alleged against him, as in other cases of trial of civil cases in this State. Either party may prosecute an appeal or writ of error from any judgment rendered, as in other civil cases, subject, however, to the provisions of Rule 42, Texas Rules of Appellate Procedure, and the appellate court shall give preference to such case, and hear and determine the same as early as practicable.

RULE 782. REMEDY CUMULATIVE

The remedy and mode of procedure hereby prescribed shall be construed to be cumulative of any now existing.

Section 8. Trespass to Try Title

RULE 783. REQUISITES OF PETITION

The petition shall state:

- (a) The real names of the plaintiff and defendant and their residences, if known.
- (b) A description of the premises by metes and bounds, or with sufficient certainty to identify the same, so that from such description possession thereof may be delivered, and state the county or counties in which the same are situated.
- (c) The interest which the plaintiff claims in the premises, whether it be a fee simple or other estate; and, if he claims an undivided interest, the petition shall state the same and the amount thereof.
- (d) That the plaintiff was in possession of the premises or entitled to such possession.
- (e) That the defendant afterward unlawfully entered upon and dispossessed him of such premises, stating the date, and withholds from him the possession thereof.
- (f) If rents and profits or damages are claimed, such facts as show the plaintiff to be

entitled thereto and the amount thereof.

- (g) It shall conclude with a prayer for the relief sought.

RULE 784. THE POSSESSOR SHALL BE DEFENDANT

The defendant in the action shall be the person in possession if the premises are occupied, or some person claiming title thereto in case they are unoccupied.

RULE 785. MAY JOIN AS DEFENDANTS, WHEN

The plaintiff may join as a defendant with the person in possession, any other person who, as landlord, remainderman, reversioner or otherwise, may claim title to the premises, or any part thereof, adversely to the plaintiff.

RULE 786. WARRANTOR, ETC., MAY BE MADE A PARTY

When a party is sued for lands, the real owner or warrantor may make himself, or may be made, a party defendant in the suit, and shall be entitled to make such defense as if he had been the original defendant in the action.

RULE 787. LANDLORD MAY BECOME DEFENDANT

When such action shall be commenced against a tenant in possession, the landlord may enter himself as the defendant, or he may be made a party on motion of such tenant; and he shall be entitled to make the same defense as if the suit had been originally commenced against him.

RULE 788. MAY FILE PLEA OF "NOT GUILTY" ONLY

The defendant in such action may file only the plea of "not guilty," which shall state in substance that he is not guilty of the injury complained of in the petition filed by the plaintiff against him, except that if he claims an allowance for improvements, he shall state the facts entitling him to the same.

RULE 789. PROOF UNDER SUCH PLEA

Under such plea of "not guilty" the defendant may give in evidence any lawful defense to the action except the defense of limitations, which shall be specially pleaded.

RULE 790. ANSWER TAKEN AS ADMITTING POSSESSION

Such plea or any other answer to the merits shall be an admission by the defendant, for the purpose of that action, that he was in possession of the premises sued for, or that he claimed title thereto at the time of commencing the action, unless he states distinctly in his answer the extent of his possession or claim, in which case it shall be an admission to such extent only.

RULE 791. MAY DEMAND ABSTRACT OF TITLE

After answer filed, either party may, by notice in writing, duly served on the opposite party or his attorney of record, not less than ten days before the trial of the cause, demand an abstract in writing of the claim or title to the premises in question upon which he relies.

RULE 792. TIME TO FILE ABSTRACT

Such abstract of title shall be filed with the papers of the cause that within thirty days after the service of the notice, or within such further time that the court on good cause shown may grant; and in default thereof, the court may, after notice and hearing prior to the beginning of trial, order that no written instruments which are evidence of the claim or title of such opposite party be given on trial.

RULE 793. ABSTRACT SHALL STATE, WHAT

The abstract mentioned in the two preceding rules shall state:

- (a) The nature of each document or written instrument intended to be used as evidence and its date; or
- (b) If a contract or conveyance, its date, the parties thereto and the date of the proof of acknowledgment, and before what officer the same was made; and
- (c) Where recorded, stating the book and page of the record.
- (d) If not recorded in the county when the trial is had, copies of such instrument, with the names of the subscribing witnesses, shall be included. If such unrecorded instrument be lost or destroyed it shall be sufficient to state the nature of such instrument and its loss or destruction.

RULE 794. AMENDED ABSTRACT

The court may allow either party to file an amended abstract of title, under the same rules, which authorize the amendment of pleadings so far as they are applicable; but in all cases the documentary evidence of title shall at the trial be confined to the matters contained in the abstract