

**HOW TO AVOID WAIVING ERROR  
UNDER THE NEW DISCOVERY RULES**

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**TABLE OF CONTENTS**

Introduction ..... A-1

**TRCP 190 – DISCOVERY CONTROL PLANS**

A. Discovery Control Plans ..... A-1

B. Level 1 Discovery Deadlines ..... A-1

C. Level 2 Discovery Deadlines ..... A-1

D. Don't Plead Level 3; Request It ..... A-1

E. What to Do With those "Pesky" Old Cases ..... A-2

**TRCP 191 – MODIFYING DISCOVERY PROCEDURES**

A. The power of TRCP 191.1 ..... A-2

**TRCP 192 – SCOPE OF DISCOVERY**

A. Witness Statements are Discoverable ..... A-2

B. Work Product ..... A-3

C. Trial Witnesses are Discoverable ..... A-3

D. Protective Orders ..... A-3

**RULE 193 – RESPONSES, OBJECTIONS, PRIVILEGES and SUPPLEMENTATION**

A. Duty to Respond ..... A-4

B. "Boilerplate" Objections ..... A-4

C. Asserting Privileges ..... A-4

D. Ruling on Objections or Privileges ..... A-5

E. No More Prophylactic Objections ..... A-5

F. No Waiver for Inadvertent Disclosure ..... A-5

G. Avoiding Waiver Concerning Disclosure or Supplementation ..... A-5

H.	Presumption of Authenticity of Documents.....	A-6
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**RULE 194 – DISCLOSURES**

A.	No Objections Allowed.....	A-6
B.	Time for Responding to Disclosures.....	A-7
C.	No Impeachment.....	A-7

**TRCP 195 – TESTIFYING EXPERTS**

A.	No Requests for Testifying Expert Information Through Interrogatories.....	A-7
B.	Timetable for Providing Testifying Expert Witness Information.....	A-8
C.	Deadlines for Depositions of Testifying Experts.....	A-8
D.	Preparation of Expert Reports.....	A-8

**TRCP 196 – REQUESTS FOR PRODUCTION**

A.	Responding to Requests for Production.....	A-8
B.	Discovery of Electronic and Magnetic Data.....	A-9
C.	Testing and Sampling.....	A-9

**TRCP 197 – INTERROGATORIES**

A.	Not all Interrogatory Answers Must Be Verified.....	A-9
B.	No Impeachment.....	A-9

**TRCP 199 – ORAL DEPOSITIONS**

A.	Private Conferences are Prohibited.....	A-9
B.	Limits on Objections.....	A-10
C.	Time Limits.....	A-10

D. Documents Requested at Deposition.....A-10  
E. Objections to Time and Place .....A-10

**TRCP 205 – NONPARTY DISCOVERY**

A. New Form of Discovery .....A-11  
B. Time Periods for Nonparty Discovery .....A-11

## HOW TO AVOID WAIVING ERROR UNDER THE NEW DISCOVERY RULES

### INTRODUCTION

This paper is a guide to the 1999 revisions of the Texas Rules of Civil Procedure pertaining to discovery. Some of the most pertinent changes in the rules are explored with an emphasis on avoiding traps and waiver created by the new requirements under the rules. Additionally, practice tips have been included in an effort to demonstrate some practical ways in which the rules can be applied.

### TRCP 190 – DISCOVERY CONTROL PLANS

#### A. Discovery Control Plans

TRCP 190 provides that every case filed after January 1, 1999 will be governed by a discovery control plan designed to limit the volume and burden of discovery. There are three levels of discovery control plans. The plaintiff must plead in the first numbered paragraph of its petition the particular discovery control plan that will govern the case. TRCP 190.1.

A plaintiff's failure to plead a discovery level is subject to special exceptions. TRCP 190, cmt. 1. The case automatically defaults to Level 2 if the plaintiff fails to plead a discovery level in its original petition. *Id.*

#### B. Level 1 Discovery Deadlines

Under Level 1, discovery must be completed 30 days before trial, meaning that responses must be in before the deadline. TRCP 190.2(c)(1). This means that parties must serve their requests no later than 60 days

before trial.

**\*\*Practice Tip:** Be careful if you allege Level 1 discovery. If you cap damages at \$50,000 and the jury comes back with more than that amount, you cannot get the court to award that greater amount through a post-verdict amendment. TRCP 190, cmt.2 & 190.2(b).

#### C. Level 2 Discovery Deadlines

The discovery deadlines under Level 2 have to be the most difficult and most fraught with peril if the practitioner is not extremely careful. In this author's opinion, the Rules Committee forgot that their motive in enacting these new rules was to make the rules simpler to follow and to avoid waiver problems. But I digress....

Level 2 is the basic default track. It will govern the majority of cases filed after January 1, 1999. Discovery in cases other than family law cases must be completed within the earlier of 30 days before trial or 9 months after the first oral deposition is taken or the due date of the first response to written discovery. TRCP 190.3(b)(1)(B). In family law cases, discovery must be complete 30 days before trial. TRCP 190.3(b)(1)(A).

#### D. Don't Plead Level 3; Request It

A plaintiff's pleading that the case is to be governed by Level 3 does not make Level 3 applicable because a case can only be a Level 3 case by court order. TRCP 190, cmt. 1. The court, on any party's motion, *must* order that

discovery be conducted under Level 3, which will allow the parties and the court to agree on deadlines. However, a Level 3 plan may simply adopt Level 1 or Level 2 restrictions. TRCP 190, cmt. 1. Until a Level 3 plan is ordered, a case that is not in Level 1 is in Level 2. *Id.*

#### **E. What to Do with Those "Pesky" Old Cases**

The discovery control plan provides the discovery period for all cases filed on or after January 1, 1999. What then do we do with cases filed before January 1, 1999?

The Supreme Court recognized this gap in the rules, and on December 31, 1998, issued an order making technical corrections to the new discovery rules. One of these technical corrections proscribes the discovery period for our "old" cases. In cases filed before January 1, 1999, the discovery period ends the date the case is set for trial.

**\*\*Practice Tip:** Unless the court orders otherwise, for cases filed before January 1, 1999, testifying experts must be designated 90 days and 60 days before trial, respectively. TRCP 195.2.

#### **TRCP 191 -- MODIFYING DISCOVERY PROCEDURES**

##### **A. The Power of TRCP 191.1**

The good thing about these new rules is that parties can "Rule 11" around virtually every one of them. Under TRCP 191.1, the procedures and limitations in the discovery rules may be modified in any suit by the agreement of the parties, except where

specifically prohibited. The agreement is enforceable as long as it complies with Rule 11.

If the agreement is made at an oral deposition, it is enforceable if it is made a part of the record of the deposition.

**\*\*Practice Tip:** If all parties agree, a deposition can be taken under the "old" rules.

#### **TRCP 192 -- SCOPE OF DISCOVERY**

##### **A. Witness Statements are Discoverable**

One of the major changes in the scope of discovery is the removal of "witness statements" from the list of exemptions to discovery. Effective January 1, 1999, verbatim statements of persons with knowledge of relevant facts are discoverable. TRCP 192.3(h). The definition of a witness statement is very exact...and very broad. Under TRCP 192.3(h), 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.

Even if made or prepared in anticipation of litigation, witness statements are not protected from discovery. TRCP 192.5(c)(1). Party statements, taken by its counsel, however, may be protected under the attorney-client privilege, even though the statement otherwise meets the definition of a witness statement.

TRCP 192.3(h) applies to all witness statements, even those taken prior to January 1,

1999. If requested, therefore, a party will have to turn over witness statements taken prior to the rule changes, if the statements meet the definition of "witness statement," even if prepared in anticipation of litigation, unless the statement can be protected under some other privilege.

#### **B. Work Product**

For the first time, the term "work product" is defined by the Rules. TRCP 192.5. Work product generally includes material and information that would have been "attorney work product" and "party communications" under the old rules. TRCP 192.5(a).

TRCP 192.5 also codifies standards for discovery of certain categories of work product. For example, "core work product," which is work product containing the attorney's mental impressions, conclusions, opinions, or legal theories, is never discoverable. TRCP 192.5(b)(1). Other types of work product are discoverable only upon a showing of substantial need and undue hardship. TRCP 192.5(b)(2). The court, in ordering such discovery, must protect against any disclosure of core work product to the extent possible. TRCP 192.5(b)(4). However, no violation of TRCP 192.5 occurs if the ordered disclosure reveals attorney mental processes by inference. TRCP 192.5(b)(3). Finally, an assertion of work product constitutes an assertion of privilege and shall be treated as such. TRCP 192.5(d).

#### **C. Trial Witnesses Are Discoverable**

The identity of trial witnesses are discoverable under the new rules. TRCP 192.3(d). A party may obtain the name, address, and telephone number of any person who is expected to be

called to testify at trial. *Id.* Like witness statements, the identity of trial witnesses is similarly not protected by the work product privilege, even if made in anticipation of litigation. TRCP 192.5(c)(1).

**\*\*Practice Tip:** Remember to save one of your 25 interrogatories to inquire about the identity of trial witnesses.

#### **D. Protective Orders**

TRCP 192.6 modifies the use of protective orders. First a person seeking protection must respond to the discovery request to the extent protection is not sought, unless it is unreasonable to do so before obtaining a ruling on the motion. TRCP 192.6(a). If a person seeks protection regarding the time or place of discovery, then he or she must state a reasonable time and place.

Second, a person should not move for a protective order when an objection or assertion of privilege under other rules is appropriate. TRCP 192.6(a). While following the privilege procedure under TRCP 193.3 is correct, asserting a motion for protective order does not waive the objection to written discovery or the assertion of privilege. This lack of waiver was included to avoid creating a "trap" or breeding satellite litigation concerning when protective orders versus objections are appropriate. Hecht & Pemberton at G-10.

TRCP 192.6 also permits a motion for protective order to avoid undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional or property rights. TRCP 192.6(b). While the new rules place an explicit limit on the scope of discovery, they incorporate a balancing test used to limit

discovery that expands on balancing tests based on common law. See TRCP 192.4. Therefore, the court can limit the scope or amount of discovery even further than that afforded by the rules if the court determines the case warrants it, balancing the burden or expense of the discovery against the 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. TRCP 192.4(b).

## **RULE 193 – RESPONSES, OBJECTIONS, PRIVILEGES, and SUPPLEMENTATION**

### **A. Duty to Respond**

Rule 193.2 requires the legal and factual bases for all objections to be stated and requires parties to comply with a request to the extent there is no objection. Similar to practice under the old rules, the new discovery rules still require that a party responding to written discovery assert its objections and privileges at or before the response is due. TRCP 193.2(a).

However, now a party must also make a good faith effort to respond to discovery to the extent no objection is made. In fact, when objecting, the party must state the extent to which he is refusing to respond to the request and must comply with so much of the request as to which the party made no objection unless it is unreasonable to do so before obtaining a ruling on the objection.

For example, if a party objects to a request for documents from a remote time period, the party should produce documents for more recent, relevant time periods, if possible. TRCP 193, cmt. 2. If a party objects to the

time or place of discovery, the party must state a reasonable time and place and then must comply with that time and place without further request or court order. TRCP 193.2(b).

### **B. "Boilerplate" Objections**

Boilerplate objections used to obscure applicable objections are not allowed under the new discovery rules. TRCP 193.2(e). Rule 193.2(e) provides that even a good objection may be waived if it is "obscured by numerous unfounded objections," unless good cause is shown. *Id.*

### **C. Asserting Privileges**

TRCP 193.3 provides a new procedure for withholding privileged documents and asserting privileges. Privilege claims are no longer made by objection. Now, when withholding privileged documents, material or information, the party must state, in either the response or in a separate document, that (1) information responsive to the written request has been withheld; (2) the request to which the information relates; and (3) the particular privilege(s) asserted. TRCP 193.3(a).

Upon written request of the party seeking discovery, the responding party must, within 15 days, prepare and serve a privilege log. The log must specify the following information: (1) the nature of the information withheld, without revealing the privileged information itself, but that enables other parties to assess the applicability of the privilege; and (2) the specific privilege(s) for each item or group of items withheld. TRCP 193.3(b).

These requirements, however, do not apply to attorney-client communications already withheld. TRCP 193.3(c). The party simply

withholds the information and asserts no claim of privilege. TRCP 193, cmt. 3.

**\*\*Practice Tip:** TRCP 193 contains a savings clause whereby a party does not waive its privileges by inadvertently asserting them in the form of an objection. TRCP 193.2(f). If the error is pointed out, however, you must restate your privilege assertions in the correct form. *Id.*

#### **D. Rulings on Objections or Privileges**

If the court sustains an objection or privilege assertion, the responding party has no further duty to respond to the request. TRCP 193.4(b). If the court overrules an objection or privilege claim, the responding party must produce the requested information within 30 days after the court's ruling or as the court otherwise orders.

A party does not need to request a ruling on the party's own objection or privilege assertion to preserve the objection or privilege. *Id.*

#### **E. No More Prophylactic Objections**

TRCP 193.2(d), along with 193.2(c), go a long way to eliminate the danger that lawyers seek to cure by asserting every conceivable objection, even as to documents and information that are not yet even in existence, out of an abundance of caution. TRCP 193.2(c) & (d) help to eliminate this practice by requiring parties to object or assert privileges only to the extent that a good faith basis for the objection or privilege claim exists at the time the objection or privilege claim is made. TRCP 193.2(d) allows parties to amend/supplement

to state objections or claims of privilege that either were inapplicable or were unknown at the time the initial objections or privilege claims were asserted.

#### **F. No Waiver for Inadvertent Disclosure**

TRCP 193.3(d) allows a producing party to reclaim a privilege over a document for which the party waived the privilege by inadvertently disclosing the information or documents. TRCP 193 allows the party to reclaim the privilege within 10 days of discovering the disclosure of privileged information or documents. TRCP 193.3(d).

If the producing party timely amends its response to assert a privilege, the requesting party must promptly return the specified material (and any copies) pending any ruling by the court denying the privilege.

#### **G. Avoiding Waiver Concerning Disclosure or Supplementation**

Possibly the biggest change to the discovery rules is the softening of the rigid automatic exclusion rule (old TRCP 215) for failure to timely disclose or supplement discovery. Now, under TRCP 193.6 the exclusion of evidence or of a witness due to late production may be defeated if the "court finds that (1) there was good cause for failure to make, amend, or supplement the discovery response; or (2) the failure to make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other party." TRCP 193.6(a).

With 3 exceptions, parties are also no longer required to formally supplement materials or information requested in discovery if the

materials or information previously have been made known to other parties in writing, on the record during a deposition, or through other discovery responses. TRCP 193.5(a). The exceptions are for (1) parties with knowledge of relevant facts, (2) identity of trial witnesses, and (3) identity of expert witnesses. *Id.*

Amendments and supplementation must be filed reasonably promptly after the party discovers the new information. The timing for the amended or supplemental response is presumed to be no later than 30 days before trial. TRCP 193.5(b).

Also, all amended and supplemental responses must be verified by the party if the original response required verification by the party. TRCP 193.5(b). Typically, that means that supplemental responses to interrogatories must be verified if the original responses had to be verified. TRCP 197.2(d).

The new rules also provide that there is no duty to supplement deposition testimony except as provided in Rule 195.6. TRCP 193, cmt. 5. TRCP 195.6 requires a party's testifying expert to supplement his or her responses concerning the expert's mental impressions or opinions and the basis for them. If a party withholds any material information based on a privilege claim, he or she may not use that information without timely amending or supplementing the party's response to that discovery. TRCP 193.4(c).

#### **H. Presumption of Authenticity of Documents**

Rule 193.7 provides for the self-authentication of documents produced in written discovery. To preserve error on the self-authentication of a particular document, however, the party producing the document and against whom the

document is to be used, must object to its authenticity within 10 days after the party has actual notice that the document will be used. TRCP 193.7. The objection, however, must have a good faith legal and factual basis.

This should eliminate the need of requiring a party to jump through the authentication hoops when attempting to use documents produced by the other side either at trial or in a summary judgment motion or response. Remember, however, the need to establish the document's admissibility under the Rules of Evidence is not eliminated by TRCP 193.7, only the need to establish the document's authenticity. TRCP 193, cmt. 7.

**\*\*Practice Tip:** To avoid eleventh hour challenges to authenticity of documents produced in discovery, the receiving party should send a notice following receipt of the documents to the other side stating that the documents produced will be used at trial. If the producing party fails to object in writing within 10 days, any challenge to authenticity is waived.

### **RULE 194 – DISCLOSURES**

#### **A. No Objections Allowed**

TRCP 194 establishes a new discovery tool, requests for disclosure, whereby parties can obtain basic, fundamental information about the lawsuit. The rule is loosely based on Federal Rule 26, but does not require automatic disclosure like the federal rule does. No objections or assertions of work product are permitted to a request for disclosure. TRCP

194.5. The only exception is in the rare case where a party can demonstrate, for example, that revealing a person's residence might result in harm to the person. TRCP 194, cmt. 1. This does not foreclose the party from asserting other applicable privileges, however.

**\*\*Practice Tip:** If you wonder whether you should send out a request for disclosure or just a comprehensive set of interrogatories, there is one important reason why you should always send requests for disclosure: Under the new rules, the only ways to get information about a testifying expert are through disclosure, deposition, and expert reports. Interrogatories can no longer be used to acquire information about testifying expert witnesses.

#### **B. Time for Responding to Disclosures**

With one exception, a party must serve written responses to requests for disclosure either within 30 days after service of the request, or if the request is served anytime before the defendant's answer is due, within 50 days after service of the request. TRCP 194.3.

The exception is for responding to a request for disclosure concerning testifying expert witnesses. TRCP 195.2 governs the timetables for responding to requests for disclosure concerning testifying expert witnesses.

#### **C. No Impeachment**

If a disclosure of the party's legal theories and

factual bases of its claims or defenses and the amount of economic damages claimed is either amended or supplemented during the discovery period, the prior information is not admissible and may not be used for impeachment. TRCP 194.6. These are, however, the only 2 categories of disclosure in which impeachment with prior responses is forbidden.

### **TRCP 195 -- TESTIFYING EXPERTS**

#### **A. No Requests for Testifying Expert Information through Interrogatories**

TRCP 195 governs the methods and timetables for obtaining discovery regarding testifying expert witnesses. It does not govern, however, the timetables and methods of discovering information about other experts such as consulting experts whose opinions have been reviewed by testifying experts. TRCP 195, cmt. 1.

The exclusive tools for discovering information about another party's testifying expert witnesses are: (1) disclosures, (2) depositions, and (3) expert reports. TRCP 195.1, 195.4. That means that a party can no longer inquire about discoverable information about testifying experts through interrogatories.

**\*\*Practice Tip:** Remember, however, to save one of your 25 interrogatories to inquire about discoverable *consulting* expert witnesses.

The only exception is for interrogatories that were served, but not answered, prior to January 1, 1999. In that case, the new rules require the party answer the interrogatory requesting information about testifying experts, and prohibit the responding party from stalling

by requesting that the party put the request in the form of a disclosure. It also means that the responding party is still obligated to amend or supplement its interrogatory as needed, in the same fashion as it would amend or supplement a response to a request for disclosure.

#### **B. Timetable for Providing Testifying Expert Witness Information**

TRCP 195.2 establishes a schedule for responding to requests for disclosure concerning testifying expert witnesses. Unless otherwise agreed to by the parties or ordered by the court, parties must furnish information requested under TRCP 194.2(f) by the later of 30 days after service of the requests or (1) 90 days before the end of the discovery period, with regard to experts testifying for a party seeking affirmative relief; or (2) 60 days before the end of the discovery period for all other experts. TRCP 195.2. Generally, that means that the plaintiff will have to designate its testifying experts 30 days before the defendant will have to designate its testifying experts.

**\*\*Practice Tip:** Unless ordered by the court, a party is only obligated to designate testifying experts when and if that information is requested in disclosure. TRCP 195.2. If a party requests no written discovery of another party, that party is not obligated to volunteer a list of testifying expert witnesses unless ordered to do so by the court.

#### **C. Deadlines for Depositions of Testifying Experts**

TRCP 195.3 establishes a schedule for

deposing testifying experts retained by or under the control of a party. The party seeking affirmative relief (generally the plaintiff) must designate and present experts for deposition before others have to designate their experts. TRCP 195.3(a)(1). But if the party seeking affirmative relief produces a report when designating an expert, the burden shifts to the other parties to designate their experts testifying on the same subject before the party seeking affirmative relief has to tender its experts for deposition. TRCP 195.3 & cmt. 3.

#### **D. Preparation of Expert Reports**

Courts may order preparation of experts reports under the new discovery rules. TRCP 195.5. Reports, however, are supplemental to, not a replacement for, depositions. *Id.*

### **TRCP 196 -- REQUESTS FOR PRODUCTION**

#### **A. Responding to Requests for Production**

In addition to the general rule of responding to a request for production, the new rules also require the responding party to state that either (1) production will be permitted as requested; (2) the requested items are being served on the requesting party with the response; (3) production will take place at a designated time and place, if the responding party objects to time or place; or (4) no items have been identified, after a diligent search, that are responsive to the request. TRCP 196.2. Parties may produce copies in lieu of originals unless a request of authenticity is raised. TRCP 196.3(b).

## **B. Discovery of Electronic and Magnetic Data**

TRCP 196.4 provides for the discovery of electronic or magnetic data, i.e., e-mail, voice mail, etc. Parties requesting this information must specify the form in which it should be produced. The responding party is under an obligation to comply if the requested data and form is "reasonably available" to the responding party in its ordinary course of business. The responding party may object if it cannot reasonably retrieve the information or produce it in the form requested.

Generally, an objection that the information is not reasonably available will not result in the responding party being exonerated from producing the information. The information will still have to be produced, however, the court will shift the fees to pay for the production to the requesting party.

## **C. Testing and Sampling**

If the requesting party plans to sample or test a requested item, it must specifically describe the means, manner and procedure for testing in the request. TRCP 196.1(b) & cmt. 2. Testing or sampling that is destructive or that materially alters an item is not permitted without prior court approval. TRCP 196.5.

## **TRCP 197 -- INTERROGATORIES**

### **A. Not all Interrogatory Answers Must be Verified**

Under the new rules, the verification requirement was modified in recognition of the reality that parties rarely have "personal knowledge" of much of the information in interrogatory answers to which they were

currently required to attest. Under TRCP 197.2(d)(2), parties must verify all answers except those concerning (1) persons with knowledge of relevant facts, (2) trial witnesses, and (3) legal contentions.

**\*\*Practice Tip:** Verification of interrogatory answers must be made by the party, not its attorney. TRCP 197, cmt. 2. However, sometimes you will run into a problem where you can't get your client to verify his interrogatory answers before they must be filed. In that case, go ahead and file the answers without verification. The failure to verify is only a form defect that will not impair the answers unless the party refuses to sign or verify the answers after the defect is pointed out. TRCP 193.5(b).

### **B. No Impeachment**

Just like with a request for disclosure, an answer to an interrogatory inquiring about a party's legal or factual contentions or economic damages that has been supplemented or amended is not admissible and may not be used for impeachment. TRCP 197.3.

## **TRCP 199 -- ORAL DEPOSITIONS**

### **A. Private Conferences are Prohibited**

Depositions under the new rules are to be conducted in the same manner as if the testimony were taken at trial. TRCP 199.5(d). Private conferences between the witness and his lawyer are prohibited except at breaks or for the purpose of determining whether a

privilege should be asserted. *Id.* If this rule is not followed, the court may admit into evidence at trial statements, discussions and other occurrences that reflect upon the credibility of the witness or the testimony. *Id.* Coaching objections are strictly prohibited.

### **B. Limits on Objections**

Objections to questions during the deposition are limited to: "Objection: form" and "Objection: leading." TRCP 199.5(e). Objections to testimony are limited to "Objection: nonresponsive." *Id.* These objections are waived if they are not stated as phrased, unless the deposing lawyer asks for clarification of the objection.

The deponent's lawyer may also instruct the witness not to answer a question that calls for privileged information, is abusive, or if any answer would be misleading. TRCP 199.5(f) & cmt. 4.

Argumentative or suggestive objections or explanations are prohibited, will waive the objection, and may be grounds for terminating the deposition. TRCP 199.5(e), (f).

### **C. Time Limits**

The new discovery rules limit each side to 6 hours to examine and cross-examine a witness in an oral deposition. TRCP 199.5(c). Breaks do not count against this limitation. The court reporter is now required to certify how much time each party spent during the deposition.

This author has also learned that court reporters are being instructed to shut the deposition down and refuse to transcribe testimony after the time limits have elapsed even if the deposition is not complete.

### **D. Documents Requested at Deposition**

Under the new rules a party may not secure documents from another party in less than 30 days. TRCP 196.2(a). Thus, when a party intends to request the production of documents from a party at the party's deposition, the notice must be sent at least 30 days before the date scheduled for the deposition. TRCP 199.2(b)(5). If the witness is a nonparty, these matters are governed by the nonparty discovery rule, TRCP 205.

**\*\*Practice Tip:** Consider the following alternatives to scheduling a party deposition with documents on 30 days' notice: (1) serve a request for production of documents on the party and schedule the party's deposition for the day after the responses are due; or (2) Rule 11 around the 30-day requirement.

### **E. Objections to Time and Place**

A party or witness may object to the time and place designated for an oral deposition. TRCP 199.4. The objection should be lodged in either a motion for protective order or by motion to quash the notice of deposition.

**\*\*Practice Tip:** If you object to the time and place of deposition, file your objections no later than 3 business days after service of the notice. If you do, the deposition will be automatically stayed until the court rules on your objection. TRCP 199.4.

## **TRCP 205 -- NONPARTY DISCOVERY**

### **A. New Form of Discovery**

TRCP 205 establishes a new form of nonparty discovery -- requests for production of documents by which a party can obtain documents from nonparties without the need for a motion or deposition. The party must reimburse the nonparty's reasonable costs of production. TRCP 205.3(f).

### **B. Time Periods for Nonparty Discovery**

Generally, a subpoena for a nonparty to appear at an oral or written deposition (with or without documents) is served at the same time as the notice of the deposition. TRCP 205.3. The rules also require that the notice and subpoena be served within a "reasonable time" before the date for compliance. TRCP 199.2(a).

If, however, a notice to produce documents is served on a nonparty without a request for an oral or written deposition, a notice to produce documents must be served at least 10 days before the subpoena compelling production is served. TRCP 205.2. Thus, under TRCP 205.2, a party who intends to secure documents from a nonparty without a deposition must serve the notice and subpoena separately. First, the party must serve the nonparty and all parties with the notice of the documents it wants the nonparty to produce; and then, 10 days later, the party must serve the subpoena on the nonparty. The purpose of TRCP 205.2 is to make sure a nonparty who receives a subpoena for documents does not produce them before the other parties have a chance to move for a protective order.