RULES UPDATE: WHAT'S NEW WITH THE TEXAS RULES OF CIVIL PROCEDURE, THE TEXAS RULES OF APPELLATE PROCEDURE, AND WHAT COULD BE ON THE HORIZON

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CHAPTER 23

Tracy Christopher was elected Chief Justice of the 14th Court of Appeals in November 2020. She first joined the Court when she was appointed as a Justice in December 2009. Prior to her appointment, Chief Justice Christopher was the judge of the 295th District Court for 15 years and was highly rated as a trial judge. She was honored as Appellate Judge of the Year by the Texas Association of Civil Trial and Appellate Specialists in 2013 and 2020. She also received the 2013 Texas Bar Foundation Outstanding Jurist Award for her work as a trial and appellate judge. She had previously been named Trial Judge of the Year by the Texas Association of Civil Trial and Appellate Specialists.

Prior to becoming a judge, she practiced law for 13 years with the law firms of Susman Godfrey (1986-1994) and Vinson & Elkins (1981-1986). She is board certified by the Texas Board of Legal Specialization in Civil Trial Law and Personal Injury Trial Law. Justice Christopher attended the University of Texas School of Law, graduating with honors in 1981, and the University of Notre Dame, graduating with honors in 1978.

She is currently a member of the Supreme Court Advisory Committee. The members are appointed by the Texas Supreme Court and the committee studies the Rules of Civil Procedure, the Rules of Evidence and the Rules of Appellate Procedure and proposes changes to improve them. She is the past chair of the Pattern Jury Charge Oversight Committee and a current member of the Pattern Jury Charge Business Committee. Members are appointed by the President of the State Bar of Texas and the committee studies the instructions given to a jury in trial.

Chief Justice Christopher has been married to Vance Christopher since 1981 and has three adult children and six grandchildren. She was formerly an active volunteer with both Boy Scouts and Girl Scouts. Chief Justice Christopher is a member of St. Vincent de Paul Church. She currently volunteers through her church and with the Houston Bar Association's charitable programs.

Alex Wilson Albright joined Alexander, Dubose & Jefferson LLP full time as a partner in 2017 after being of counsel to the firm since its inception. Alex assists trial counsel and represents clients in state and federal appellate courts throughout Texas. Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization, she regularly assists with complex procedural and jurisdictional issues at critical junctures in the trial court and on appeal.

For almost 30 years, Alex taught Texas Civil Procedure and first-year Civil Procedure as a faculty member at the University of Texas School of Law. She also served the law school as Associate Dean. She is a long-standing member of the American Law Institute (since 2002), the Texas Supreme Court Advisory Committee on Court Rules (since 1993), and the Texas Pattern Jury Charge Oversight Committee (since 2006).

She is the author of a leading casebook on Texas Civil Procedure, TEXAS COURTS: A SURVEY (Dallas: Imprimatur Press 2006-2018) and the co-author of HANDBOOK ON TEXAS DISCOVERY PRACTICE (St. Paul: Thomson/West 1999-2020).

Before beginning her teaching career, Alex served as law clerk to Judge Thomas M. Reavley of the U.S. Court of Appeals for the Fifth Circuit. She began her private practice at the law firm of Thompson & Knight in Dallas.

Alex graduated with a bachelor's degree in Economics, *summa cum laude*, Phi Beta Kappa, from Sewanee: The University of the South in 1977 and received her JD from the University of Texas School of Law, with high honors, Order of the Coif, Chancellors, in 1980.

She has always been active in community affairs and is now serving on the Board of Planned Parenthood of Greater Texas. She is married to Clint Parsley, and they have five adult children and two grandchildren.

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I. INTRODUCTION

Many thanks to Kennon Wooten of Scott Douglas & McConnico, LLP, for the use of her paper on the new rules.

Since 1939, the Supreme Court of Texas ("Court") has had broad authority to promulgate and amend rules governing practice and procedure in civil actions. *See* TEX. CONST. art. V, § 31(b) (directing the Court to "promulgate rules of civil procedure for all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts"); TEX. GOV'T CODE ANN. § 22.004 ("The supreme court has the full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant."). To ensure that this power is sufficiently robust, the Texas Legislature even allows the Court to repeal statutes through rules to the extent that the rules address procedural—as opposed to substantive—matters. *See id.* § 22.004(c) (providing that "a rule adopted by the [Court] repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed" and setting forth a procedure for repealing statutes through rules).

Generally, the Court must publish proposed new rules and proposed amendments to existing rules for sixty days before they become effective. *Id.* § 22.004(b). Proposed rule content is published in the *Texas Bar Journal* and in administrative orders posted on the Court's website (at http://www.txcourts.gov/supreme/administrative-orders.aspx). The Court invites public comments during this 60-day period, reviews comments received (with assistance from the Rules Attorney), and sometimes modifies proposed rule content in response to comments. In fact, the Court changed a significant issue in the discovery rules in response to comments from the bar by eliminating the requirement to detail non-economic damages in the initial disclosures.

In some instances, new rules and amendments to existing rules are prompted by legislative mandate. In other instances, the Court promulgates or amends rules on its own initiative, often because members of the bar and/or the general public have identified a need for change (e.g., to be more in line with comparable federal rules, to correspond with case-law developments, to simplify or modernize procedures, or to reflect changes in practice).

Recently, the Court has promulgated several rules in response to legislative mandates. This article addresses two sets of such rules: (1) the rules governing service of citation; and (2) the rules relating to expedited actions. This article also addresses amendments to discovery rules that were prompted by a combination of legislative directives and Supreme Court Advisory Committee (SCAC) recommendations. In addition, this article touches on amendments to the Texas citation rules to reflect certain amendments to the Texas discovery rules. It also addresses appellate-rule amendments prompted by suggestions from members of the bar. Finally, this article will discuss legislative proposals for the continued use of remote proceedings originally prompted by the COVID-19 pandemic.

II. EFFECTIVE DATES

Do not toss out your 2020 versions of the civil rules when the new versions are released; you will need both the old and the new versions for a while. The changes to Texas Rules of Civil Procedure 106 and 108a became effective on December 31, 2020, so these amendments apply to your currently pending civil cases. The amended version of Texas Rule of Appellate Procedure applies to motions for rehearing filed on or after January 1, 2021, so that change applies to your cases currently on appeal. All of the other changes to the Texas Rules of Civil Procedure discussed in this paper apply to cases filed on or after January 1, 2021.

III. CHANGES TO TEXAS RULES OF CIVIL PROCEDURE

A. Amended Service Rules

1. Impetus for Amendments

As technology has evolved, so have the rules for serving and notifying parties in litigation. The use of social media to effect service of process has garnered a great deal of attention in state and federal courts across the country over the last decade. The Texas Legislature considered a bill in 2013, but the bill never made it out of committee. Some Texas judges have informally permitted service by social media, and it has also been formally accepted in many states including California and New York. As of December 31, 2020, service by social media officially came to Texas.

The change was foreshadowed in 2019, when the Texas Legislature passed Senate Bill 891, an omnibus bill relating to the courts' operation and administration. SB 891 included several amendments to the Texas Civil Practice and Remedies Code designed to modernize certain procedural rules pertaining to notification and service. One of those amendments was to add Section 17.033, which provides:

SUBSTITUTED SERVICE THROUGH SOCIAL MEDIA PRESENCE.

a. If substituted service of citation is authorized under the Texas Rules of Civil Procedure, the court, in accordance with the rules adopted by the supreme court under Subsection (b), may prescribe as a method of service an electronic communication sent to the defendant through a social media presence.
b. The supreme court shall adopt rules to provide for the substituted service of citation by an electronic communication sent to a defendant through a social media presence.

TEX. CIV. PRAC. & REM. CODE ANN. § 17.033. SB 891 required the Court, not later than December 31, 2020, to "adopt rules to provide for the substituted service of citation by an electronic communication sent to a defendant through a social media presence." The statute authorizes service via social media only in actions commenced on or after the effective date of the implementing rules.

2. Overview of Amendments

a. Tex. R. Civ. P. 106: Method of Service

In accordance with the legislative mandate, the Court approved amendments to Texas Rule of Civil Procedure 106 on August 21, 2020.[1] The amended version of Rule 106 provides as follows:

RULE 106. METHOD OF SERVICE

a. Unless the citation or court order otherwise directs, the citation must be served by:

    1. delivering to the defendant, in person, a copy of the citation, showing the delivery date, and of the petition; or
    2. mailing to the defendant by registered or certified mail, return receipt requested, a copy of the citation and of the petition.

b. Upon motion supported by a statement—sworn to before a notary or made under penalty of perjury—listing any location where the defendant can probably be found and stating specifically the facts showing that service has been attempted under (a)(1) or (a)(2) at the location named in the statement but has not been successful, the court may authorize service:

    1. by leaving a copy of the citation and of the petition with anyone older than sixteen at the location specified in the statement; or
    2. in any other manner, including electronically by social media, email, or other technology, that the statement or other evidence shows will be reasonably effective to give the defendant notice of the suit.

The Court's comment to the 2020 change to Rule 106 is in **Appendix 1** and provides:

> Rule 106 is revised in response to section 17.033 of the Civil Practice and Remedies Code, which calls for rules to provide for substituted service of citation by social media. Amended Rule 106(b)(2) clarifies that a court may, in proper circumstances, permit service of citation electronically by social media, email, or other technology. In determining whether to permit electronic service of process, a court should consider whether the technology actually belongs to the defendant and whether the defendant regularly uses or recently used the technology. Other clarifying and stylistic changes have been made.

Under amended Rule 106, litigants may serve a defendant "electronically by social media, email, or other technology" if the traditional methods of service, such as personal service or substituted service through certified or registered mail, are unsuccessful. In other words, service via social media or email is available only with the court's approval upon a showing that attempts to serve the defendant in person or through certified mail have failed.

The Texas Rules of Civil Procedure have long recognized alternative methods of service when the traditional methods fail, such as service by publication in a newspaper or periodical of general circulation where the defendant is likely to reside. The new amendments update that long-standing rule to reflect new technologies.

While the amendments provide clarity, several questions about their operation remain open. For example, under what circumstances will courts approve service via "social media, email, or other technology"? What must a plaintiff show to establish that service via social media will be "reasonably effective to give the defendant notice of the suit"? The

[1] The order, which includes a redline showing the changes to Rules 106 and 108a, is attached to this paper at **Appendix 1**. On December 18, 2020, the Court issued its final approval of the amended rules in Misc. Docket No. 20-9148. The Court noted that it "has reviewed all comments received, and no additional changes have been made to the rules. This Order gives final approval to the amendments set forth in Misc. Docket No. 20-9103." *See* **Appendix 2**.

comment to Rule 106 provides some guidance: "In determining whether to permit electronic service of process, a court should consider whether the technology actually belongs to the defendant and whether the defendant regularly uses or recently used the technology." **Appendix 1** at 3.

The Court's comment addresses one of the primary concerns about service of process via social media—whether the targeted social media "profile" is real or fake. As one New York court observed, "anyone can make a Facebook profile using real, fake, or incomplete information, and thus, there is no way for the Court to confirm whether the [Facebook profile bearing the defendant's name] . . . is in fact the . . . [d]efendant to be served." *Fortunato v. Chase Bank USA, N.A*., 2012 WL 2086950, at *2 (S.D.N.Y. June 7, 2012).

Given these circumstances, courts that have permitted "backstop" service via Facebook have required the plaintiff to offer concrete evidence demonstrating that the social-media account at issue is regularly used and maintained by the defendant. This proof has included the age of the profile, the quantity and history of posts, and instances of direct communication with the subject through the specific social-media account. *See e.g.*, *St. Francis Assisi v. Kuwait Fin. House*, 2016 WL 5725002 (N.D. Cal. 2016) (allowing service on international defendant through Twitter, as the "method of service most likely to reach" the defendant); *D.R.I., Inc. v. Dennis*, 2004 WL 1237511 (S.D.N.Y. June 3, 2004) (permitting service by email on defendant whose whereabouts were unknown); *F.T.C. v. PCCa re247 Inc.*, 2013 WL 841037 (S.D.N.Y. Mar. 7, 2013) ("Where defendants run an online business, communicate with customers via email, and advertise their business on their Facebook pages, service by email and Facebook together presents a means highly likely to reach defendants."); *Baidoo v. Blood-Dzraku*, 48 Misc. 3d 309, 5 N.Y.S.3d 709 (2015) (holding that divorce summons can be served solely by private Facebook message to spouse's account); *cf. Fortunato v. Chase Bank USA, N.A.*, 2012 WL 2086950 (S.D.N.Y. 2012) (service of process through Facebook not sufficient absent evidence the account was maintained by the defendant); *Ferrarese v. Shaw*, 164 F. Supp. 3d 361 (E.D.N.Y. 2016) (service via Facebook and email not sufficient absent indication that defendant maintained those electronic functions, but permissible as additional method of service along with certified mail).

Another question that seems likely to arise is whether the intended recipient actually received the documents sent via email or social media. For example, a Facebook account could be active, but the user might only check their newsfeed and not their "messenger" account. Or a Twitter user might limit their use of the platform to only certain functions, thereby missing "tags" intended for them. Due-process concerns will remain paramount.

Finally, does the new Rule 106 place an additional burden upon agents for service of process—including corporate officers and directors—to keep a closer watch upon their emails and social-media accounts? Maybe. Managers of corporate Twitter, Facebook, and other social-media accounts should remain alert for service attempts. Additionally, as noted below, Rule 108 permits service on out-of-state defendants, including defendants not licensed to conduct business in Texas, pursuant to Rule 106. Thus, by way of example, emailing a Texas lawsuit to a director of an Alaska corporation may now constitute sufficient service of process.

b. Tex. R. Civ. P. 108a: Service of Process in Foreign Countries

The newly amended Rule 108a (as redlined in **Appendix 1**) provides as follows:

> RULE 108a. SERVICE OF PROCESS IN FOREIGN COUNTRIES
>
> a. *Method.* Service of process may be effected on a party in a foreign country if the citation and petition is served:
>
> 1. as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;
> 2. as the foreign authority directs in response to a letter rogatory or letter of request;
> 3. as provided by Rule 106(a);
> 4. pursuant to the terms and provisions of any applicable international agreement;
> 5. by diplomatic or consular officials when authorized by the United States Department of State; or
> 6. by other means not prohibited by international agreement or the foreign country's law, as the court orders.
>
> The method for service of process in a foreign country must be reasonably calculated, under all 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 must appear and answer in the same manner and time and under the same penalties as if the defendant had been personally served with citation within this state to the full extent that the defendant may be required to appear and answer under the Constitution of the United States or under any applicable international

> agreement in an action either in rem or in personam.
>
> b. *Return.* Proof of service may be made as prescribed by the foreign country's law, by court order, by Rule 107, or by a method provided in any applicable international agreement.

The Court's comment to the 2020 change to Rule 108a is as follows: "Rule 108a is revised to provide that 'other means' of service ordered under (a)(6) must not be prohibited by international agreement. Other clarifying and stylistic changes have been made." As indicated in the comment, the primary amendment to Rule 108a is to provide that international defendants may be served by "other means"—as well as by social media as authorized by Rule 106—so long as the "other means" of service is not prohibited by international agreement or the foreign country's law. The other amendments are stylistic or clarifying (i.e., non-substantive).

B. Amended Rules Relating to Expedited Actions

1. Background Regarding Expedited Actions Process

The expedited actions process stems from House Bill 274, which the 82nd Legislature enacted in 2011. In HB 274, the Legislature added subsection (h) to Section 22.004 of the Texas Government Code and mandated that the Court enact "rules to promote the prompt, efficient, and cost-effective resolution of civil actions in district courts, county courts at law, and statutory probate courts in which the amount in controversy, inclusive of all claims for damages of any kind, whether actual or exemplary, a penalty, attorney's fees, expenses, costs, interest, or any other type of damage of any kind, does not exceed $100,000." TEX. GOV'T CODE ANN. § 22.004(h). The Legislature provided further that the rules had to "address the need for lowering discovery costs in these actions and the procedure for ensuring that these actions will be expedited in the civil justice system." *Id.* Finally, in HB 274, the Legislature prohibited any conflicts between the rules to be enacted and "(1) Chapter 74 [of the] Civil Practice and Remedies Code; (2) the Family Code; (3) the Property Code; or (4) the Tax Code."

By order dated November 13, 2012 (Misc. Docket No. 12-9191), the Court issued proposed Texas Rules of Civil Procedure 47, 169, 190.2, and 190.5.[2] Rule 47 addresses pleading requirements, Rule 169 addresses the expedited actions process, and Rule 190 addresses discovery limitations.

Between November 2012 and February 2013, the Court invited public comments regarding its proposed rules. The Court received approximately 500 public comments in response. The bulk of the comments addressed two issues: (1) whether the expedited actions process should be mandatory—applying whenever the amount in controversy is $100,000 or less—or voluntary—applying only when parties opt for its application; and (2) whether and how the expedited actions process should impact alternative dispute resolution (ADR). Under the proposed rules, the process was mandatory. In support of the mandate, the Court reasoned that "the objectives of HB 274 cannot be achieved, or the benefits to the administration of justice realized, without rules that compel expedited procedures in smaller cases." Misc. Docket No. 12-9191 at 5. In regard to ADR, the proposed rule provided: "Unless the parties have agreed to engage in [ADR] or are required to do so by contract, the court must not—by order or local rule—require the parties to engage in [ADR]." Misc. Docket No. 12-9191 at 10. Most commentators opposed the mandatory nature of the proposed rules, and many opposed the ADR limits.

The Court made several changes in response to public comments. For example, it revised the ADR bar to allow one referral to ADR not to exceed a half-day in duration or cost more than twice the amount of the civil filing fees. The Court also added a comment to Rule 169 to list factors to consider when determining whether there is "good cause" that justifies an exemption from the expedited actions process or an extension of the time for a trial under the process. But the Court maintained the mandatory nature of the expedited actions process.

The final version of the original rules relating to expedited actions, along with associated comments, are in an order dated February 12, 2013—Misc. Docket No. 13-9022. Those rules took effect on March 1, 2013 and remained effective until January 1, 2021, when the amendments below took effect.

2. Impetus for Amendments to Rules Relating to Expedited Actions

The recent amendments to rules relating to expedited actions stem from Senate Bill 2342 (**Appendix 3**), which the 86th Legislature enacted in 2019. In SB 2342, the Legislature added subsection (h-1) to Section 22.004 of the Texas Government Code, which provides as follows:

> In addition to the rules adopted under Subsection (h), the supreme court shall adopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions

[2] The Court also issued amendments to Texas Rule of Evidence 902(10), but that rule is beyond the scope of this article.

> filed in county courts at law in which the amount in controversy does not exceed $250,000. The rules shall balance the need for lowering discovery costs in these actions against the complexity of and discovery needs in these actions. The supreme court may not adopt rules under this subsection that conflict with other statutory law.

TEX. GOV'T CODE ANN. § 22.004(h-1). Also in SB 2342, the Legislature amended the final sentence in section 22.004(h) of the Texas Government Code, as follows (with underlining reflecting additions and strikes reflecting deletions): "The supreme court may not adopt rules under this subsection that conflict with other statutory law ~~a provision of: (1) Chapter 74, Civil Practice and Remedies Code; (2) the Family Code; (3) the Property Code; or (4) the Tax Code~~." **Appendix 3** at 2. SB 2342 also amended Government Code provisions relating to the jurisdiction of, and jury practices in, county courts. Most notably for expedited actions, the Legislature increased statutory county courts' jurisdiction, as follows:

> In addition to other jurisdiction provided by law, a statutory county court exercising civil jurisdiction concurrent with the constitutional jurisdiction of the county court has concurrent jurisdiction with the district court in . . . civil cases in which the matter in controversy exceeds $500 but does not exceed $250,000 ~~$200,000~~, excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs, as alleged on the face of the petition . . . .

Id. (amending TEX. GOV'T CODE ANN. § 25.0003(c)(1)). Also of note, the Legislature added subsection (c) to Section 25.0007 of the Government Code, providing: "In a civil case pending in a statutory county court in which the matter in controversy exceeds $250,000, the jury shall be composed of 12 members unless all of the parties agree to a jury composed of a lesser number of jurors." TEX. GOV'T CODE ANN. § 25.0007(c). Although these legislative amendments address county courts at law (a.k.a. "statutory county courts"), the changes prompted rule amendments that apply both in and beyond those courts.

The Court has issued the following three orders containing (among other things) amendments to rules relating to expedited actions: (1) Misc. Docket No. 20-9070 (May 26, 2020) (containing proposed amendments to Texas Rule of Civil Procedure 47); (2) Misc. Docket No. 20-9101 (Aug. 21, 2020) (containing a final version of amended Texas Rule of Civil Procedure 47 that was effective between September 1, 2020 and January 1, 2021, as well as proposed amendments to Texas Rules of Civil Procedure 169 and 190.2); and (3) Misc. Docket No. 20-9153 (Dec. 23, 2020) (containing the final, current versions of amended Texas Rules of Civil Procedure 47, 169, and 190.2). For ease of reference, the third order (with the current rules) is appended hereto as **Appendix 4**.

As with the first round of rule-making for expedited actions, the Court invited public comments about the rules proposed in 2020 and received many comments in response. Some commentators addressed the fact that the proposed rules applied beyond county courts, while the underlying legislative amendments address county courts alone. The Court did not modify the rule's proposed text in response, but it amended its comment regarding the 2021 changes to Rule 169 by explaining as follows: "To ensure uniformity, and pursuant to section 22.004(b) of the Texas Government Code, Rule 169's application is not limited to suits filed in county courts at law; any suit that falls within the definition of subsection (a) [of Rule 169] is subject to the provisions of the rule." **Appendix 4** at 6.[3]

Originally, the initial disclosures contained a requirement that a party calculate each category of damages. That was similar to Federal Rules of Civil Procedure, rule 26(a)(1)(A)(iii). The Court amended that requirement and went back to the former Texas rule that requires a calculation only of economic damages.

3. Overview of Amendments to Rules Relating to Expedited Actions

a. Tex. R. Civ. P. 47: Claims for Relief

Texas Rule of Civil Procedure 47 generally applies to all civil suits, except suits governed by the

[3] Section 22.004(b) of the Texas Government Code provides as follows:

> The supreme court from time to time may promulgate a specific rule or rules of civil procedure, or an amendment or amendments to a specific rule or rules, to be effective at the time the supreme court deems expedient in the interest of a proper administration of justice. The rules and amendments to rules remain in effect unless and until disapproved by the legislature. The clerk of the supreme court shall file with the secretary of state the rules or amendments to rules promulgated by the supreme court under this subsection and shall mail a copy of those rules or amendments to rules to each registered member of the State Bar of Texas not later than the 60th day before the date on which they become effective. On receiving a written request from a member of the legislature, the secretary of state shall provide the member with electronic notifications when the supreme court has promulgated rules or amendments to rules under this section.

TEX. GOV'T CODE ANN. § 22.004(b).

Texas Family Code, regardless of the amount in controversy. *See generally* TEX. R. CIV. P. 47. In other words, it applies to suits that are, and are not, governed by the expedited actions process. But the recent amendments to Rule 47—in 2013 and in 2021—were driven primarily by the expedited actions process.

In 2013, Rule 47(c) was amended to provide that, "except in suits governed by the Family Code," an original pleading setting forth a claim for relief had to specify whether a party was seeking "(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." Misc. Docket No. 13-9022 (Feb. 12, 2013) (emphasis added). As explained above, the $100,000 limit in subpart (c)(1) came from Section 22.004(h) of the Government Code. Also in 2013, the Court added teeth to the new pleading requirements by providing that "[a] party that fails to comply with [the requirements] may not conduct discovery until the party's pleading is amended to comply." TEX. R. CIV. P. 47.

> Practice Tip: Regardless of whether a civil suit is governed by the expedited actions process, your original pleading setting forth a claim for relief—in any suit other than a suit governed by the Family Code—must contain the information required under Rule 47(c). You cannot conduct discovery unless your pleading contains this information.
>
> However, if you have a divorce case without children, and in which the marital estate is $250,000 or less, you can be in a Level 1 expedited action, and will need to plead that.

As amended effective January 1, 2021, Rule 47(c) requires "a statement that the party seeks: (1) *only monetary relief of $250,000 or less, excluding interest, statutory or punitive damages and penalties, and attorney fees and costs*; (2) monetary relief of $250,000 or less and non-monetary relief; (3) monetary relief over $250,000 but not more than $1,000,000; (4) monetary relief over $1,000,000; or (5) only non-monetary relief." TEX. R. CIV. P. 47(c) (emphasis added). The Court promulgated the following comment to explain the amendments: "Rule 47 is amended to implement section 22.004(h-1) of the Texas Government Code. A suit in which the original petition contains the statement in paragraph (c)(1) is governed by the expedited actions process in Rule 169." **Appendix 4** at 3. As indicated above, however, the $250,000 limit in subpart (c)(1) is derived from two different Texas Government Code provisions: (1) Section 22.004(h-1), which mandates "rules to promote the prompt, efficient, and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed $250,000"; and (2) Subpart 25.0003(c)(1), which sets forth circumstances in which statutory county courts have jurisdiction "in civil cases in which the matter in controversy exceeds $500 but *does not exceed $250,000, excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs*[.]" TEX. GOV'T CODE ANN. § 22.004(h); *id.* § 25.0003(c)(1) (emphasis added).

> Practice Tip: You cannot avoid the expedited actions process (addressed in Rule 169) or required disclosures (addressed in Rule 194) by omitting the pleading statement required by Rule 47(c). Whether the expedited actions process applies is dictated by Rule 169(a), and required disclosures—by their very nature—are designed to be made without any party "conducting" discovery through written requests (e.g., requests for production, requests for entry onto property, requests for admission, and interrogatories).

b. Tex. R. Civ. P. 169: Expedited Actions

Rule 169 sets forth the expedited actions process in Texas. The 2021 amendments to Rule 169 expanded the applicability of that process significantly by raising the monetary threshold as follows:

Former Rule 169(a)(1)	**Current Rule 169(a)**
"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*." (Emphasis added.)	"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 ***$250,000*** *or less,* ***excluding*** *interest, statutory or punitive damages and penalties, and attorney fees and costs*." (Emphasis added.)

Of note, the expedited actions process continues to apply solely to those cases in which claimants seek "only monetary relief." TEX. R. CIV. P. 169(a). In other words, if a party seeks any non-monetary relief, such as injunctive relief, the suit at hand will not be in the expedited actions process. In addition, counter-

claimants remain carved out of the applicability assessment in Rule 169(a), which precludes the possibility of defendants filing counterclaims to knock suits out of the expedited actions process.

Consistent with the current version of Section 22.004(h) of the Texas Government Code (as amended in SB 2342—**Appendix 3**), the Court also amended Rule 169(a) by removing former subpart (a)(2), which read as follows: "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." Misc. Docket No. 13-9022 (Feb. 12, 2013). But the Court added a comment to the 2021 change to make it clear that "certain suits are exempt from Rule 169's application by statute" and, as an example of such statutes, cited Sections 53.107 and 1053.105 of the Texas Estates Code. **Appendix 4** at 6. Another statute expressly exempting the expedited actions process is Section 82.0651 of the Texas Government Code, relating to civil liability for barratry. *See* TEX. GOV'T CODE ANN. § 82.0651(g) ("The expedited actions process created by Rule 169, Texas Rules of Civil Procedure, does not apply to an action under this section.").

Finally, to account for the increased monetary threshold in Rule 169(a), the Court amended Rule 169(b) to limit the recovery of "a party who prosecutes a suit under" Rule 169. TEX. R. CIV. P. 169(b).

Former Rule 169(b)	**Current Rule 169(b)**
"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."	"In no event may a party who prosecutes a suit under this rule recover a judgment in excess of $250,000, excluding interest, statutory or punitive damages and penalties, and attorney fees and costs."

As a reminder, comment 4 regarding the 2013 promulgation of Rule 169 states that "[t]he limitation in 169(b) does not apply to a counter-claimant that seeks relief other than that allowed under 169(a)(1)." Misc. Docket No. 13-9022 at 10.[4] This comment remains applicable and seemingly softens the impact on defendants who are unable to remove a suit from the expedited actions process simply by filing counterclaims that are valued at more than $250,000 or that seek non-monetary relief.

> Practice Tip: This is a significant change to the amount in controversy. While the former rule capped a judgment to $100,000, this new rule only caps actual damages at $250,000. A hypothetical judgment could be over $1,000,000 if a party proved and recovered significant punitive damages.

Aside from the amendments noted above, Rule 169 is unchanged. By way of example, the prior mechanisms for removing a suit from the expedited actions process remain intact. *See* TEX. R. CIV. P. 169(c). Thus, for example, any party (including a counter-claimant) can seek removal for good cause under (c)(1)(A). In addition, limits relating to trial, ADR, and experts remain intact. *See id.* 169(d)(2)–(5). Likewise, discovery in expedited actions continues to be governed by Rule 190.2—Level 1. *Id.* 169(d)(1). But, as explained below, Level 1 has been modified to expand discovery to a degree for expedited actions and for specified divorce suits.

> Practice Tip: While you may like the discovery limitations for the expedited actions, you may not like the "Time Limits for Trial" in section (d). You could ask to remove the suit from Rule 169 for that limited reason.

Now that virtually all county court cases will be expedited actions, it remains to be seen whether a trial court can set the cases timely under Rule 169(d)(2). Or will this lead to unnecessarily large dockets where cases are not reached? Even if the trial court can only grant a certain number of continuances, there is no guarantee that the case will actually be called to trial.

c. Tex. R. Civ. P. 190.2: Discovery Control Plan (Level 1)

Like Rule 169, Rule 190.2 was "amended to implement section 22.004(h-1) of the Texas Government Code. Level 1 discovery limitations now apply to a broader set of civil actions: expedited actions under Rule 169 . . . and divorces not involving children in which the value of the marital estate is not more than $250,000." TEX. R. CIV. P. 190.2, cmt. to 2021 change (**Appendix 4** at 8). Regarding divorces, the amendments to Rule 190.2(a)(2) broadened coverage by increasing the stated marital-estate value from $50,000 to $250,000, but the amendments did not change that this estate value is driven by a party's pleading. *See* TEX. R. CIV. P. 190.2(a)(2).

The 2021 amendments changed Level 1 discovery limitations in three ways. First, the

[4] The comment is also included in the complete set of Texas Rules of Civil Procedure posted on the Court's website, at https://www.txcourts.gov/rules-forms/rules-standards/.

discovery period is calculated differently—it now begins "when the first initial disclosures [addressed in amended Rule 194.2] are due" (as opposed to when the suit is filed), and it continues for 180 days after the first initial disclosures are due (as opposed to 180 days after the date the first request for discovery of any kind is served on a party). TEX. R. CIV. P. 190.2(b)(1).[5] Second, the limitation on oral-deposition hours has increased from six to twenty. *Id.* 190.2(b)(2). Third, the prior provision on requests for disclosure (in former Rule 190.2(b)(6)) has been removed and supplanted by the initial disclosures addressed in amended Rule 194.2 (explained further below).

> Practice Tip: If you are in a case governed by Level 1 but need discovery exceeding Level 1 limitations and cannot get it via agreement, you can seek judicial relief under Rule 190.5. This rule provides for the modification of a discovery control plan under certain circumstances.

C. Amended Discovery Rules

1. Impetus for Amendments

As discussed in connection with the rules related to expedited actions, the recent amendments to rules relating more broadly to discovery in non-expedited actions stem in part from SB 2342 (**Appendix 3**).[6] Certain SCAC materials reflect this rooting.[7] For example, in a memorandum regarding potential rule amendments to implement in response to SB 2342, SCAC members urged the Court to consider adopting several discovery-rule amendments that the SCAC had vetted previously and that it believed to be in line with SB 2342's call for "rules to promote the prompt, efficient and cost-effective resolution of civil actions[.]"[8] Those prior proposals include the following: (1) "[a]utomatic disclosures instead of a request for disclosure"; (2) "[n]o discovery with the petition"; (3) "Level 1 changes—increasing the amount to $100,000"; (4) "Level 2 changes—rewording the discovery period and adding a limit to the number of Requests For Production to 25"; and (5) "Changing the scope of discovery and limitations. (Rules 192.3 and 192.4)."[9] Of note, the prior vetting of those proposals was part of the SCAC's comprehensive analysis of the Texas discovery rules between 2016 and 2019. That broader analysis included, among other things, an assessment of comparable federal discovery rules and consideration of the extent to which Texas's discovery rules should be amended to be more consistent with the federal rules.[10]

Many discovery-rule amendments recommended by SCAC members remain pending with the Court. Whether the Court will adopt any of the additional recommendations remains to be seen. An entire book could be written about discovery-rule recommendations that have been made to the Court over the course of time. This article, however, focuses much more narrowly on the adopted amendments that took effect on January 1, 2021.

2. Overview of Amendments

The revised discovery rules have generated considerable discussion, both in comments regarding the proposals in Misc. Docket No. 20-9101 and in other public forums. In large part, the amendments are designed to align the Texas rules with the corresponding federal rules as to initial disclosures, expert disclosures, and pretrial disclosure of witnesses and exhibits, although the rules are not identical. Differences notwithstanding, to the extent that the new rules are based on corresponding federal rules (as noted by the Court itself), federal cases interpreting the rules will be helpful guidance for courts and parties in the event of disputes related to disclosures. *See, e.g.*, *In re State Farm Lloyds*, 520 S.W.3d 595, 613 (Tex. 2017) ("To be sure, there are differences in language between the Texas rule and the federal rule. But as we affirmed in *In re Weekley Homes* [*L.P.*, 295 S.W.3d 309, 316–17 (Tex. 2009) (orig. proceeding)], 'our rules as written are not inconsistent with the federal rules or the case law interpreting them,' even

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[5] The discovery period set forth in Rule 190.2 (Level 2) has also been amended to reference the date the first initial disclosures are due. *See* TEX. R. CIV. P. 190.2(b)(1) (providing that the discovery period begins "when the first initial disclosures are due" and, for cases other than cases under the Family Code, continues until "the earlier of (i) 30 days before the date set for trial, or (ii) nine months after the first initial disclosures are due").

[6] The Court's comments to the 2021 changes to Rules 190.1, 194, and 195 reflect this legislative underpinning. *See* **Appendix 4** at 8, 16, 18.

[7] SCAC meeting agendas, transcripts, and materials are available online at https://www.txcourts.gov/scac/meetings/.

[8] SCAC Rules 171–205 Subcom. Mem. at 1 (Feb. 26, 2020), available at https://www.txcourts.gov/media/1447107/scac-february-28-2020-meeting-notebook.pdf (last visited Mar. 12, 2021).

[9] *See id.*

[10] For exemplar materials addressing amendments considered, see the "Supplement" for the SCAC meeting on May 3-4, 2019, available at https://www.txcourts.gov/media/1444028/scac-may-3-4-2019-meeting-notebook.pdf. This Supplement includes materials reflecting the SCAC Discovery Subcommittee's extensive analysis of proposed amendments to the collective set of Texas discovery rules, as of February 2019. Over the years, potential discovery-rule amendments were discussed at length by SCAC members, who were not always of the same mind as to whether or how the Texas discovery rules should be changed.

though they may not 'mirror the federal language.'" (footnote omitted)); *In re Weekley Homes*, 295 S.W.3d at 316–17 (conceding that state discovery rules are not identical to federal rules, but "are not inconsistent," and "therefore we look to the federal rules for guidance"); *Farmers Grp., Inc. v. Lubin*, 222 S.W.3d 417, 425 (Tex. 2007) (looking to cases interpreting federal rules where Texas rules incorporate identical language).

The following discussion summarizes the amendments to Texas's discovery rules and points out differences between the new Texas rules and existing federal rules. Generally, the discussion does not cover existing requirements that were not changed or were changed only for consistency relating to internal references.

a. Forms, Timing, and Sequence of Discovery

Because initial disclosures are required under the amended discovery rules, Rule 192.1 (which addresses the permissible forms of discovery in Texas) has been amended to replace "requests for disclosure" with "required disclosures." TEX. R. CIV. P. 192.1(a). Similarly, references to "requests for disclosure" or "requests" generally elsewhere in the discovery rules have been updated to refer to "required disclosures" or to required discovery or material. *See* TEX. R. CIV. P. 192.7(a), 193.1, 193.3(a), 193.3(c), 193.4(a)–(b), 194.6, 195.1, and 195.2.

Rule 192.2 was amended to add the following statement: "Unless otherwise agreed to by the parties or ordered by the court, a party cannot serve discovery on another party until after the other party's initial disclosures are due." TEX. R. CIV. P. 192.2(a). Thus, by default, no discovery will be permitted in relation to another party until after that party's initial disclosures are due. Indeed, the content of the initial disclosures may negate the need for certain additional discovery or affect that discovery's nature or appropriate scope.

> Practice Tip: If you want to serve any type of discovery on a party before that party's initial disclosures are due in a case, you need a court order or an agreement among affected parties. The Texas rules do not include specific provisions for early requests, as in Federal Rule 26(d)(2).

Of note, the ability to modify discovery procedures by agreement or court order is not new. Rule 191.1 generally allows such modifications. But, unlike Rule 192.2(a), Rule 191.1 states that the agreements generally have to comply with Rule 11 and that court-ordered modifications require "good cause." TEX. R. CIV. P. 191.1. An open question is whether those requirements apply to Rule 192.2 agreements and orders. A plain, harmonious reading of Rules 11, 191.1, and 192.2(a) suggests that Rule 192.2 agreements should comply with the requirements set forth in Rule 191.1. The answer is less clear for the "good cause" requirement in Rule 191.1. To err on the side of caution, when seeking an order under Rule 192.2, a party should arm the court with good cause.

b. Disclosures

> Practice Tip: Texas disclosures are now modeled after disclosures in the federal rules and are separated into three distinct categories, each with its own rule—Initial Disclosures (Rule 194.2), Testifying Expert Disclosures (Rule 194.3), and Pretrial Disclosures (Rule 194.4).

i. Tex. R. Civ. P. 194.1: Duty to Disclose

As a preamble to the three separate disclosures now required, Rule 194.1 includes two requirements. First, parties have an affirmative duty to make the three categories of disclosures without waiting for a specific request from another party. TEX. R. CIV. P. 194.1(a). Second, to the extent any of the disclosures include responsive documents, electronically stored information, and tangible items, these materials must either be produced with the disclosures, or the disclosures must state a reasonable time and method for production and, "unless otherwise agreed or ordered by the court," they must be produced and made available for inspection at the time and in the method stated. *Id.* 194.1(b).

The Court's comment about the 2021 change provides that "[a] party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures." **Appendix 4** at 16. This caution is identical to the language in Federal Rule of Civil Procedure 26(a)(1)(E).

ii. Tex. R. Civ. P. 194.2: Initial Disclosures

The categories of information required in initial disclosures for non-family law cases remain largely the same, incorporating the same categories of information previously included in a request for disclosure pursuant to the former Rule 194.2, but with two notable changes. First, initial disclosures now include providing "a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the responding party has in its possession, custody, or control, and may use to support its claims or defenses, unless the use would be solely for impeachment[.]" TEX. R. CIV. P. 194.2(b)(6). This addition is the same as in Federal Rule of Civil Procedure 26(a)(1)(A)(ii). Second, the disclosure requirements relating to testifying experts have been removed entirely from Rule 194.2 and addressed in a new Rule 194.3 and amended Rule 195.5, effectively

making the expert disclosure a stand-alone disclosure (as explained in Section II.C.2.b(iii) below).

For specified family-law cases, Rule 194.2(c) includes multiple categories of information and documents that must be provided without waiting for a request. Subpart (c)(1) addresses required disclosures for "a suit for divorce, annulment, or to declare a marriage void," and subpart (c)(2) addresses required disclosures for "a suit in which child or spousal support is at issue[.]" TEX. R. CIV. P. 194.2(c)(1)–(2).

Unlike Federal Rule of Civil Procedure 26(a)(1)(C)—which links the timing of the initial disclosures to an early conference of the parties, the timing of which can vary depending on the specific court—the required initial disclosures under the amended Texas rules generally must be made "within 30 days after filing of the first answer or general appearance[.]" TEX. R. CIV. P. 194.2(a). But as in Federal Rule of Civil Procedure 26(a)(1)(D), for parties joined after the first answer/appearance, that party's deadline to make initial disclosures is "30 days after being served or joined." *Id.* In both instances, the deadline can be modified by the parties' agreement or a court order. *Id.* Additionally, the deadline for providing the first initial disclosures is now the triggering event for the running of the discovery periods in Level 1 and Level 2. *See* TEX. R. CIV. P. 190.2(b)(1) and 190.3(b)(1).

As noted above, a party generally cannot serve discovery on another party until after the other party's initial disclosures are due, unless the parties agree or the court orders otherwise. This restriction is similar (though not identical) to the restriction found in Federal Rule of Civil Procedure 26(d)(1). It effectively ends the practice of serving discovery with or in the original petition. For that reason, the Court deleted the 50-days-after-service deadlines for responding to discovery served on a defendant before the defendant's answer is due. *See, e.g.*, **Appendix 4** at 19–20 (redlining amendments to TEX. R. CIV. P. 196.2, 196.7, 197.2, and 198.2).

Federal Rule 26(a)(1) Initial Disclosures	**Texas Rule 194.2 Initial Disclosures**
• Due within 14 days of parties' Rule 26(f) conference • Later joined parties must serve disclosures within 30 days after being "served or joined" **(not after answer)** • No discovery requests until after Rule 26(f) conference, except early Rule 34 Requests for Production deemed served at time of Rule 26(f) conference	• Due 30 days after first answer or general appearance • Later joined parties have same deadline as under Federal Rule 26 • No discovery requests until after the first initial disclosures are due

Lastly, amended Rule 194.2(d) lists proceedings that are exempt from initial disclosures, though a court can order the parties to these types of proceedings to make particular disclosures and set the time for such disclosures. Exempted proceedings are as follows:

1. an action for review on an administrative record;
2. a forfeiture action arising from a state statute;
3. a petition for habeas corpus;
4. an action under the Family Code filed by or against the Title IV-D agency in a Title IV-D case;
5. a child protection action under Subtitle E, Title 5 of the Family Code;
6. a protective order action under Title 4 of the Texas Family Code;
7. other actions involving domestic violence; and
8. an action on appeal from a justice court.
9. TEX. R. CIV. P. 194.2(d).

Because initial disclosures, if required, may be due relatively quickly after service of citation or appearance in a case, Rule 99 has been amended to provide that every citation "must notify the defendant that the defendant may be required to make initial disclosures." TEX. R. CIV. P. 99(b)(13). In addition, Rule 99 has been amended to include the requisite language for that notice. *Id.* 99(c). To increase access to justice, that requisite language directs people to TexasLawHelp.org to learn more about the initial disclosures. *See id.*

> Practice Tip: Citations must notify the defendant that the defendant may be required to make initial disclosures. TEX. R. CIV. P. 99(b)(13); *see also id.* 99(c) (containing language for the notice).

iii. Tex. R. Civ. P. 194.3 and 195: Testifying Experts

Removed entirely from the new rule on initial disclosures (Rule 194.2), testifying-expert disclosures are in a separate category of disclosure in new Rule 194.3, providing, "In addition to the disclosures required by Rule 194.2, a party must disclose to the other parties testifying expert information as provided by Rule 195."

Rule 195.5(a)(1)–(4) includes the categories of information that must be disclosed and mimics the Federal Rules of Civil Procedure in some, but not all, respects. Rule 195.5(a)(1)–(4)(A) and 4(B) incorporates the existing disclosure categories for experts, and Rule 195.5(a)(4)(C), (D), and (E) add the federal requirement to provide a list of all publications authored in the previous ten years, the four-year testimony list, and a statement of compensation. Importantly, and unlike the federal rules, the Texas rule still does not require expert reports from any category of experts, though the court can order that an expert's information be "reduced to tangible form." *Cf.* FED. R. CIV. P. 26(a)(2)(B). However, there is no indication in the amended rule that parties cannot continue to include report requirements in a case-specific scheduling order or docket-control order.

Lastly, noted additions to Rule 195 (which were not in the proposed rules circulated for comment) are the protections carried over from Federal Rules of Civil Procedure 26(b)(4)(B) and (C) guarding against disclosure of certain communications with experts and all drafts of expert reports. TEX. R. CIV. P. 195.5(c)–(d). The only communications now discoverable are those that relate to compensation for the expert's work, identify facts or data that counsel provide and that the expert considers in forming her opinions, and identify any assumptions provided by counsel that the expert relies on in forming her opinions. Interestingly, the Court's comment to this change notes that these specific items "are added to clarify protections available," perhaps suggesting that some of these same protections were already afforded by the Texas rules. **Appendix 4** at 18.

Federal Rule 26(a)(2) Expert Disclosures	**Texas Rule 194.3 and 195 Expert Disclosures**
• Rule 26(a)(1)(B) requires reports for experts retained or specially employed to provide expert testimony in a case or one whose duties as the party's employee regularly involve giving expert testimony.	• No reports required. • Rule 195 adds categories of information in Federal Rule of Civil Procedure 26(a)(1)(B)(iv)–(vi). • Rule 195 adds "Trial-Preparation Protection" for draft reports and communications between a party's attorney and expert witnesses as in Federal Rule of Civil Procedure 26(b)(4)(B) and (C).

iv. Tex. R. Civ. P. 194.4: Pretrial Disclosures

Under new Rule 194.4, parties must serve *and file* witness and exhibit lists at least thirty days prior to trial, unless the court orders otherwise. The witness list must separately identify those witnesses a party expects to present and those who may be called if the need arises. Similarly, the exhibit list must separately identify those exhibits a party expects to offer and those it may offer if the need arises. *See* TEX. R. CIV. P. 194.4(a). These disclosures are identical to those in Federal Rule of Civil Procedure 26(a)(3)(A)(i) and (iii).

Although Rule 194.4 does not incorporate Federal Rule 26(a)(3)(A)(ii)'s language about the disclosure of witnesses whose testimony a party expects to present by deposition, those witnesses are still witnesses that should be disclosed pursuant to Rule 194.4(a)(1), and their proposed testimony will likely nevertheless be disclosed pursuant to standing orders, scheduling orders, and/or applicable local rules. If there is no such provision made for disclosure of this proposed testimony, consideration should be given to reaching an agreement among all parties for the disclosure or, if necessary, asking the court to provide a deadline for same under the authority provided in Rule 166 (relating to pretrial conferences).

Similarly, while Rule 194.4 incorporates the initial service and filing deadline, it does not incorporate the second deadline in Federal Rule of Civil Procedure 26(a)(3)(B) for the service and filing of objections to the pretrial lists. As with disclosure of proposed deposition testimony, however, it is reasonable to expect that objections will be handled according to each court's order, applicable local rules, or an agreement of the parties.

As with the initial disclosures addressed above, an action arising under the Texas Family Code filed by or against the Title IV-D agency in a Title IV-D case is exempt from pretrial disclosures, although a court can order the parties to make particular disclosures and set a deadline for same. *See* TEX. R. CIV. P. 194.4(c).

Federal Rule 26(a)(3) Expert Disclosures	**Texas Rule 194.4 Pretrial Disclosures**
• Pretrial disclosures served and filed at least 30 days before trial • Three disclosures: witness list, deposition testimony designations, and exhibit list • Responsive deadline for objections within 14 days after pretrial disclosures are made	• Same deadline as Federal Rule 26(a)(3), must be served and filed at least 30 days before trial • Two disclosures: witness list and exhibit list • No responsive deadline for objections

c. Privileges

A potentially important addition to the amended Texas discovery rules is the inclusion of required disclosures in the rule related to asserting privileges (Rule 193.3) and the rule relating to the hearing and ruling on objections and assertions of privilege (Rule 193.4). These amendments effectively bring into the rule itself what was previously only stated in the comments to the rules related to disclosures—that "a party may assert any applicable privileges other than work product using the procedures of Rule 193.3." TEX. R. CIV. P. 194, cmt. 1 to 1999 change. These amendments are also consistent with the Court's holding in *In re City of Dickinson*, that privileges (other than work product) can apply to information subject to disclosure. 568 S.W.3d 642, 647–48 (Tex. 2019) (quoting comment 1 to the 1999 change to Rule 194); *see also* TEX. R. CIV. P. 194.5 (no objection or assertion of work product is permitted to a disclosure).

> Practice Tip: When responding to initial disclosures, you can assert privileges other than the work-product privilege. *See* TEX. R. CIV. P. 193.3, 193.4, and 194.5.

Rule 193.3 has also been amended to clarify that a snap-back functions to recall privileged information from any party who obtained the information, not just from the party that requested the information. TEX. R. CIV. P. 193.3(d). This change ensures that parties who may not themselves request the information but nevertheless receive the information are also obligated to return the privileged information to the producing party.

IV. CHANGES TO TEXAS RULES OF APPELLATE PROCEDURE

A. Impetus for Amendment

The prior version of Texas Rule of Appellate Procedure 49.3 ("TRAP 49.3") provided that "[a] motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. Otherwise it must be denied." In the wake of the November 2018 election when many new justices were elected to Texas's intermediate appellate courts, TRAP 49.3 appeared to limit the ability of those new justices to vote to grant a motion for panel rehearing. One commentator noted that "a change in judgeship can actually hurt one's chances of obtaining relief via a motion for panel rehearing" because "[a] newly elected judge's vote cannot count toward a majority required to grant the motion for panel rehearing, and the outgoing justice is unable to reconsider the case."[11] Further, "if more than one justice on the panel is now a former justice, the motion for panel rehearing likely cannot be granted under Rule 49.3." *Id.* The amendments to TRAP 49.3, set forth in **Appendix 5**, address this issue.

B. Overview of Amendment to Tex. R. App. P. 49.3: Decision on Motion for Rehearing

On December 8, 2020, the Supreme Court of Texas and the Court of Criminal Appeals issued orders amending Texas Rule of Appellate Procedure 49.3, which now provides as follows:

> A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. Unless two justices who participated in the decision of the case agree on the disposition of the motion for rehearing, the chief justice of the court of appeals must assign a justice to replace any justice who participated in the panel decision but cannot participate in deciding the motion for rehearing. If rehearing is granted, the court or panel may dispose of the case with or without rebriefing and oral argument.

The amendment was preliminarily approved by the Supreme Court of Texas and the Court of Criminal Appeals in August 2020 and went through a public-comment period. The proposed amendment was revised only to say that the chief justice will assign a single justice rather than "additional justices" to replace any justice who is no longer on the court.[12] Thus, effective January 1, 2021, a newly elected justice may step into the shoes of an original panel member and rule on the motion for rehearing unless at least two justices from the original panel remain on the court and agree on the motion's disposition.

The rule leaves it up to the chief justice to determine how assignments under revised TRAP 49.3 will be handled. The First and Fourteenth appellate courts in Houston have an omnibus order outlining the procedure that the respective chief justices of those courts will use.[13]

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[11] *See Texas's Transitioning Judiciary: A Few Appellate and Ethical Considerations* by Michael J. Ritter, presented at San Antonio Bar Association Brown Bag Lunch Series (January 2019).

[12] *Compare* Order Amending Tex. R. App. P. 49.3, Misc. Docket Nos. 20-013 and 20-9105 (dated Aug. 21 and 25, 2020), *with* Final Approval of Amendments to Tex. R. App. P. 49.3, Misc. Docket Nos. 20-014 and 20-9141 (dated Dec. 8, 2020).

[13] The orders of the First and Fourteenth Courts of Appeals are available, respectively, at https://www.txcourts.gov/media/1451844/1st-coa-trap-493-order-signed-01012021.pdf and https://www.txcourts.gov/media/1451842/14th-coa-trap-493-order-signed-01012021.pdf. Each provides that if the two justices who remain on the panel cannot agree on the motion's disposition, the successor to the justice who is no longer on the court will be assigned to the panel for rehearing unless the successor justice is recused. If only a single justice remains on the panel, the

V. POTENTIAL NEW RULES ON THE HORIZON?

In addition to more potential changes to the discovery rules as noted above, the Court may consider new rules to govern continued remote proceedings after the COVID-19 pandemic is over. The Court has established a Remote Proceedings Task Force by order as follows:

1. In September 2020, the Public Trust and Confidence Committee of the Texas Judicial Council issued a report recommending that the Court remove any barriers to continuing remote online court proceedings and court innovations developed as a result of the COVID-19 pandemic. On September 24, 2020, the Texas Judicial Council adopted the report and recommendation.
2. In response, the Court orders the establishment of a Remote Proceedings Task Force to make recommendations to the Court.

The Task Force worked quickly to identify statutory or constitutional barriers to continued remote proceedings and provided that information to the Court on February 25, 2021. The Office of Court Administration and the Texas Judicial Council worked with the legislative branch to obtain needed changes to the various statutes. No bill got through the regular legislative session, however.

VI. CONCLUSION

The rule-making process is dynamic and never-ending in Texas. This article touches on just a few of the rules that have been amended in the recent past. All practitioners should keep in mind that the Court invites public comments regarding proposed rules. All orders containing proposed rules also contain guidance for submitting comments. Everyone should stay abreast of proposed rules and send comments about rules of interest.

successors to the justices who are no longer on the court will be assigned to the panel for the rehearing unless recused.