

**EXPERT WITNESSES:
DISCOVERY, DEADLINES AND OTHER ISSUES**

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EXPERT WITNESSES: DISCOVERY, PRIVILEGE AND OTHER ISSUES

I. SCOPE OF ARTICLE.

One writer described the dilemma between scientific evidence and legal proceedings as follows:

Science is about uncertainty, probability, convergence — largely peer-driven conversation — of tentative theories, imperfect proofs, criticisms, and revisions. Even a well-established scientific theory such as evolution — a fact for scientists — remains incomplete and subject to revision according to the discovery of new evidence.

Law, to the contrary, is about settling arguments now; it's an adversarial enterprise whose real goal is not truth so much as victory and closure with justice. While one death may be statistically insignificant from a scientific standpoint, juries might see that loss in quite different terms. Similarly, any evidence of carcinogenicity in experiments in lab animals might be too much for a jury to countenance, while scientists see the question as a matter of degree.¹

Indeed, the ancient Greeks and Romans pondered whether the pursuit of truth or the art of advocacy was the higher goal. Today, lawyers must present expert witnesses who are believable and reliable, but who must concede that science is a "study," subject to revision. This paper explores the general discovery rules regarding experts, what mistakes must be avoided when designating experts, and how to do everything possible to ensure that your expert will be permitted to testify.

II. SCOPE OF INFORMATION DISCOVERABLE REGARDING EXPERTS.

The Texas Rules of Civil Procedure ("the Rules") establish the scope of discoverable information. In particular, discoverable information includes "any matter that is not privileged and is relevant to the subject matter of the case, including inadmissible matters, so long as the request is reasonably calculated to lead to the discovery of admissible evidence." TEX. R. CIV. P. 192.3(a). Despite the Rules' provision of this definition, an issue invariably arises as to what information is actually discoverable. Fortunately, though, in the area of experts, the Rules do detail specific information that is discoverable. In particular, Rule 192.3(e) provides:

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

¹ Reidinger, Paul, "Blinded Me With Science," ABA Journal, September 1996.

whose mental impression or opinions have been reviewed by a testifying expert:

- (1) the expert's name, address, and telephone number;
- (2) the subject matter on which a testifying expert will testify;
- (3) the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was acquired;
- (4) the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them;
- (5) any bias of the witness;
- (6) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony; and
- (7) the expert's current resume and bibliography.

In addition, the Rules except specifically from the definition of "work product," and thereby include within the scope of permissible discovery, any "information discoverable under Rule 192.3 concerning experts" and "the name, address, and telephone number of any potential party or person with knowledge of relevant facts." TEX. R. CIV. P. 192.5(c)(1) and (3). Rule 192.3(c) expressly includes an expert as a person with knowledge of relevant facts, "if that knowledge was obtained first-hand or if it was not obtained in preparation for trial or in anticipation of litigation." A party may discover the expert's name, address, and telephone number and is entitled to a brief description of the expert's connection with the case.

III. PERMISSIBLE DISCOVERY TOOLS REGARDING TESTIFYING EXPERTS.

Rule 195 governs the methods for obtaining discovery regarding testifying expert witnesses. The exclusive tools for obtaining discovery concerning testifying expert witnesses are **disclosures**, **depositions** and **reports**. Rules 195.1 and 195.4 provide:

195.1 Permissible Discovery Tools. A party may request another party to designate and disclose information concerning testifying expert witnesses only through a request for **disclosure** under Rule 194 and through **depositions** and **reports** as permitted by this rule.

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

TEX. R. CIV. P. 195.1, 195.4 (emphasis added).

A. DISCLOSURES.

1. WHAT MUST BE DISCLOSED?

Permissible requests for disclosure concerning testifying experts are those listed in Rule 194.2(f). Although the rule does indicate that it refers to "any" testifying expert, that statement is not completely accurate. Instead, the disclosures required under Rule 194.2(f) can be categorized as disclosures required from any testifying experts, disclosures required from testifying experts who are retained by, employed by, or otherwise subject to the control of the responding parties, and disclosures required from testifying experts who are not retained by, employed by, or otherwise subject to the control of the responding parties. **As to any testifying expert**, parties may obtain disclosure of the expert's name, address, and telephone number and the subject matter on which the expert will testify. **If the testifying expert is retained by, employed by, or otherwise subject to the control of the responding party**, the requesting party may obtain also disclosure of the general substance of the expert's mental impressions, a brief summary of the bases for the opinions, all documents and tangible things provided to, reviewed by, or prepared by the expert in anticipation of the expert's testimony, and the expert's current resume and bibliography. **If the testifying expert is not retained by, employed by, or otherwise subject to the control of the responding party**, the requesting party may obtain only disclosures in the form of documents that reflect the general substance of the expert's mental impressions and a brief summary of the bases for the opinions.

2. WHEN MUST EXPERTS BE DESIGNATED (DISCLOSED)?

A docket control order with an expert designation date will control the deadline for a party to designate its experts.² If however no docket control order exists, expert designation and disclosure are covered under the rule relating to disclosures.

² See, e.g., *Scruggs Management Services, Inc. v. Panasonic Communications & Systems Co.*, No. 05-99-00518-CV, 2000 WL 1093230 (Tex. App. - Dallas Aug. 07, 2000, pet. denied) (not designated for publication). The trial court in this case entered a scheduling order with an expert designation deadline. Eleven months after the deadline, one of the parties tried to designate an expert. The trial court struck the untimely designated experts' affidavits. The court of appeals affirmed, holding that "the trial court entered a scheduling order, to which the parties agreed, setting various deadlines to better facilitate preparation of the matter for trial, including a deadline for designation of expert witnesses. A trial court has discretion to control its own docket, including imposing deadlines for the designation of expert witnesses."

Under Rule 194.1, a party may obtain disclosure from another party of the information or material listed in Rule 194.2 by serving the other party -- no later than 30 days before the end of any applicable discovery period -- the following request: "Pursuant to Rule 194, you are requested to disclose, within 30 days of service of this request, the information or material described in Rule [state rule, e.g. 194.2, or 194.2(a), (c), and (f), or 194.2(d)-(g).]"

Additionally, Rule 195.2 provides

195.2 Schedule for Designating Experts. Unless otherwise ordered by the court, a party must designate experts — that is, furnish information requested under Rule 194.2(f) — by the later of the following two dates: 30 days after the request is served, or --

- (a) with regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery period;
- (b) with regard to all other experts, 60 days before the end of the discovery period.

TEX. R. CIV. P. 195.2 (emphasis added).

This is confusing at best because the 90 and 60 day requirements are controlled by a determination of the applicable "discovery period," which is often a moving target.³ Despite this confusion, you can avoid missing an expert designation deadline by submitting an agreed scheduling order with specific dates for expert designations.

3. WHEN DO YOU OBJECT IF EXPERTS ARE NOT DESIGNATED (DISCLOSED)?

a. Generally.

In order to preserve an objection about an expert's testimony, a party must object to the evidence before trial or when the evidence is offered. *Crown Central Petroleum Corp. v. Coastal*

³ Rule 190 defines "Discovery Period." For Level 1 and 2 cases, the discovery period begins when the suit is filed. Each level has however a different ending point. In particular, for Level 1 cases, the discovery period ends 30 days before the date set for trial. For Level 2 cases, the discovery period ends on one of the following dates:

- (A) 30 days before the date set for trial, in cases under the Family Code; or
- (B) in other cases, the earlier of
 - (i) 30 days before the date set for trial, or
 - (ii) nine months after the earlier of the date of the first oral deposition or the due date of the first response to written discovery.

TEX. R. CIV. P. 190.3(b)(1). For Level 3 cases, the discovery period is dictated completely by court order.

Transport Co., Inc., 38 S.W.3d 180, 189 (Tex. App. - Houston [14th Dist.] 2001, pet. granted). A party cannot wait until the witness completes her testimony, without objection, and then ask the court on the next day to strike the testimony as a sanction for failure to disclose. *Aluminum Chemicals (Bolivia), Inc. v. Bechtel Corp.*, 28 S.W.3d 64, 69 (Tex. App.—Texarkana 2000, no pet.).

b. Attorneys' Fees Experts in Bench Trials.

Even if a party fails to disclose its attorneys' fees expert in violation of Rule 194, all is not lost. Section 38.004 of the Texas Civil Practices and Remedies Code provides that the trial court may take judicial notice of the usual and customary attorneys' fees and of the contents of the case file without receiving further evidence in a trial before the court. *See also, Flint & Assocs. v. International Pipe & Steel, Inc.*, 739 S.W.2d 622, 626 (Tex. App.—Dallas 1987, writ denied).

Similarly, in *Northwestern National County Mutual Ins. Co. v. Rodriguez*, the plaintiff failed to identify his counsel as an expert on attorneys' fees. 18 S.W.3d 718, 721 (Tex. App.—San Antonio 2000, pet. denied). The trial court allowed the attorney to testify. *Id.* The court of appeals held that although Rodriguez failed to identify her attorney in answers to interrogatories, the "circumstances of the case as a whole indicated that the trial court had good cause" to admit the testimony. *Id.* at 722. Specifically, the attorney did not have to be an expert to testify as to personal knowledge of his own work, the trial court could take judicial notice of the necessity and reasonableness of the attorneys' fees, and Northwestern was not unfairly surprised by the testimony because only one attorney worked on the plaintiff's case. *Id.*

c. Medical Malpractice.

Texas Civil Practice and Remedies Code Section 74.351 replaced Section 13.01 of the Texas Medical Liability Act. The revised code continues to require that within 180 days of filing suit, a medical malpractice plaintiff must file an expert report or face sanctions, including but not limited to a dismissal with prejudice. TEX. CIV. PRAC. & REM. CODE § 74.351(b). The expert report must provide "a fair summary of expert's opinions . . . regarding the applicable standards of care, the manner in which the care rendered by the physician . . . failed to meet the standards, and the causal relationship between that failure and the injury . . ." TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6).

In *Pfeiffer v. Jacobs*, the plaintiff's claims were dismissed with prejudice based on her failure to file an expert report within 180 days of her filing suit. 29 S.W.3d 193 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). Plaintiff argued that she filed a timely motion for an extension of that deadline. *Id.* at 195. The court of appeals held that although the Act provides a 30-day extension of the 180-day compliance period, plaintiff's motion for extension was filed more than 321 days after the day she initiated her suit. *Id.* at 197. "Because her motion was filed after the expiration of the 210-day extended deadline established by Section 13.01(f), her motion was not timely under that provision." *Id.* Moreover, plaintiff could not establish that her failure to meet the deadline was caused by accident or mistake, and was not intentional or the result of conscious indifference. *Id.* at 198. Rather, plaintiff admitted that she intentionally failed to file her report because her physician required a further examination. *Id.*

B. DEPOSITIONS.

1. When May Testifying Expert's Depositions be Taken?

Rule 195.3 establishes a schedule for depositions of **testifying experts** retained by, employed by, or otherwise subject to the control of a party. As a general rule, the party seeking affirmative relief must designate and present its experts for deposition before the other parties are required to designate their experts. Rule 195.3(a)(1) provides:

195.3 Scheduling Depositions.

(a) Experts for party seeking affirmative relief. A party seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition as follows:

(1) If no report furnished. If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is **not produced** when the expert is designated, then the party must make the expert available for deposition **reasonably promptly after the expert is designated. If the deposition cannot — due to the actions of the tendering party — reasonably be concluded more than 15 days before the deadline for designating other experts, that deadline must be extended** for other experts testifying on the same subject.

TEX. R. CIV. P. 195.3(a)(1) (emphasis added).

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 must tender their experts for deposition. Rule 195.3 provides:

(a) Experts for party seeking affirmative relief. A party seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition as follows:

* * *

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

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

TEX. R. CIV. P. 195.3(a)(2), (b) (emphasis added).

Moreover, Rule 195, Comment 3, provides:

In scheduling the designations and depositions of expert witnesses, the rule attempts to minimize unfair surprise and undue expense. A party seeking affirmative relief must either produce an expert's report or tender the expert for deposition before an opposing party is required to designate experts. A party who does not wish to incur the expense of a report may simply tender the expert for deposition, but a party who wishes an expert to have the benefit of an opposing party's expert's opinions before being deposed may trigger designation by providing a report. Rule 191.1 permits a trial court, for good cause, to modify the order or deadlines for designating and deposing experts and the allocation of fees and expenses.

Under this scheme, the rules:

- (1) require the party seeking affirmative relief — usually the plaintiff — to designate and/or present its experts for deposition first;
- (2) allow the defendants to obtain sufficient information from the plaintiff to enable them to obtain appropriate experts;
- (3) prevent the plaintiff from being unfairly surprised or “sandbagged”; and
- (4) allow the trial court the discretion, under Rule 191, to modify this schedule.

Rule 191 provides, however, that:

Except where specifically prohibited, the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit by the agreement of the parties or by court order for good cause. An agreement of the parties is enforceable if it complies with Rule 11 or, as it affects an oral deposition, if it is made a part of the record of the deposition.

In Justice Hecht's guide to the new discovery rules, he pointed out that one instance a modification by the trial court may be appropriate is if “one or more of the discrete contested issues on which expert testimony is required are raised by affirmative defenses rather than by primary liability claims.” Honorable Nathan L. Hecht & Robert H. Pemberton, *A Guide to the 1999 Texas Discovery*

Rules Revisions, II, B, p. G 14 (November 11, 1998), at <http://www.supreme.courts.state.tx.us/rules/tdr/dissupp.pdf>.

2. How Long Can The Deposition Last?

Rule 199.5(c) limits all depositions to 6 hours. It provides:

199.5 Examination, Objection, and Conduct During Oral Depositions.

* * *

(c) Time limitation. No side may examine or cross-examine an individual witness for more than six hours. Breaks during depositions do not count against this limitation.

Rule 190 also establishes time limits for depositions, including expert depositions, based on the applicable level of the case. Rule 190 provides the following with regard to Level 1 cases:

Rule 190. DISCOVERY LIMITATIONS

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

* * *

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

* * *

(2) Total time for oral depositions. Each party may have **no more than six hours** in total to **examine** and cross-examine **all witnesses** in oral depositions. The parties **may agree to expand this limit up to ten hours** in total, but not more except by court order. The court may modify the deposition hours so that no party is given unfair advantage.

TEX. R. CIV. P. 190.2 (emphasis added). Note, however, that if a Level 1 case becomes a Level 2 case, discovery may be reopened:

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

Because of the significant restrictions for a Level 1 case, most cases are designated as Level 2. For those cases, the rules provide:

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

* * *

(b) Limitations.

* * *

(2) Total time for oral depositions. Each side may have **no more than 50 hours in oral depositions to examine and cross-examine parties on the opposing side, experts designated by those parties, and persons who are subject to those parties' control.** "Side" refers to all the litigants with generally common interests in the litigation. **If one side designates more than two experts, the opposing side may have an additional six hours of total deposition time for each additional expert designated.** The court may modify the deposition hours and must do so when a side or party would be given unfair advantage.

TEX. R. CIV. P. 190.3 (emphasis added).

Level 3 cases are subject to orders tailored by the court. The parties may however submit to the court an agreed order that includes an agreed time limit on depositions. See TEX. R. CIV. P. 190.4(a). The determination of the time limit for the deposition of a testifying expert under a Level 3 is therefore left up to the parties and the court.

In addition to the rules detailed above, the Rules give the parties and the court some discretion to modify the discovery rules. Rule 191.1 provides:

191.1 Modification of Procedures. Except where specifically prohibited, the procedures and limitations set forth in the rules pertaining to discovery **may be modified in any suit by the agreement of the parties or by court order for good cause.** An agreement of the parties is enforceable if it complies with Rule 11 or, as it affects an oral deposition, if it is made a part of the record of the deposition.

TEX. R. CIV. P. 191.1 (emphasis added).

C. EXPERT REPORTS.

Expert reports may be furnished voluntarily under Rule 195.3 to alter the time for tendering the expert for deposition. Also, courts may order preparation of expert reports, as was the case under the former discovery rules. In that regard, Rule 195.5 provides:

Rule 195.5 Court-Ordered Reports. If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert have not been recorded and reduced to tangible form, the court may order these matters reduced to tangible form and produced in addition to the deposition.

As is evident by the conditional language included in this rule, a court-ordered report is however a supplement to, not a replacement for, depositions. Honorable Nathan L. Hecht & Robert H. Pemberton, *A Guide to the 1999 Texas Discovery Rules Revisions*, II, B, p. G 14 (November 11, 1998), at <http://www.supreme.courts.state.tx.us/rules/tdr/dissupp.pdf>. Further, such an order is proper only if “the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert have not been recorded and reduced to tangible form.” See TEX. R. CIV. P. 195.5.

D. SUPPLEMENTING EXPERT REPORTS AND DEPOSITIONS.

The general supplementation requirements of Rule 193.5 apply to written discovery regarding testifying expert witnesses under the control of a party. If an expert is retained by, employed by, or otherwise under the control of a party, that party must supplement the expert’s deposition testimony or written report, but only with regard to the expert’s mental impressions or opinions and the bases for them. See TEX. R. CIV. P. 195.6.

Rule 193.5 sets forth the standard for supplementation. In general, if a party’s discovery responses become incomplete or incorrect, it must supplement or amend its discovery responses no later than thirty days before trial. TEX. R. CIV. P. 193.5. If discovery responses are not timely supplemented or amended, the undisclosed evidence may not be introduced unless the trial court finds that good cause exists for the party’s failure to supplement or amend, or the failure to supplement or amend will not unfairly surprise or prejudice the other parties. TEX. R. CIV. P. 193.6(a); *Vingcard A.S. v. Merrimac Hospitality System, Inc.*, 59 S.W.3d 847, 854-56 (Tex. App.—Fort Worth 2001, pet. denied) (holding trial court erred by not excluding expert testimony because the party proffering the expert had provided the expert’s contact information and subject matter of testimony, but had never supplemented its discovery responses to include the other information required under the Rules regarding a testifying expert).

Rules 193.5 and 195.6 may not be used however to designate an expert for the first time, if the expert should have been designated in a previous response to discovery. *Ersek v. Davis & Davis*, 69 S.W.3d 268, 271 (Tex. App.—Austin 2002, pet. denied). In particular, in the circumstance that a party responds to a discovery request by stating he has not retained an expert at that time, and the time for designating an expert passes, that party may not then use Rules 193.5 and 195.6 to supplement his initial response to now designate an expert. See *id.*

IV. WHO PAYS THE EXPERT’S FEES AND EXPENSES?

Rule 195.7 specifies that if a party takes the oral deposition of an expert retained by,

employed by, or otherwise under the control of a party, **all reasonable fees** charged by the expert for time spent in preparing for, giving, reviewing, and correcting the deposition must be **paid by the party that retained the expert**. The cost of obtaining testimony from experts not under the control of a party is governed by Rules 176 and 205.

A. MEANS TO AVOID ABUSIVE USE OF RULE.

Conceivably, an opponent could take long expert depositions simply to run up the other sides' costs. The rules address this potential through the deposition time limits of Rules 190 and 199.5, the availability of protective orders under Rule 193.6, and the court's general power to modify discovery procedures and limitations under Rule 191.1.

B. SUIT BY EXPERT TO RECOVER FEES.

In *Welch v. Hrabar*, the Fourteenth Court of Appeals addressed an expert's suit to recover fees from the party that hired him. 110 S.W.3d 601 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). The expert sought to recover his unpaid fees through a breach of contract claim. *Id.* In the underlying case, the plaintiff hired a geoscience expert. *Id.* at 604. The plaintiff's agreement with the expert called for the plaintiff to pay the expert \$125 per hour plus 10% of any settlement. *Id.* The plaintiff neglected, though, to pay the expert. *Id.* As such, the expert filed suit to recover his fees. *Id.* The trial court awarded the expert's fees, but refused to award attorneys fees. *Id.* at 609-10. On appeal, the court reviewed the evidence and circumstances and agreed that the expert was due his fees, but disagreed with the trial court awarded attorneys fees. *Id.*

V. TESTIFYING EXPERTS NOT UNDER THE CONTROL OF A PARTY.

Depositions of experts who are not controlled by a party are governed by Rule 176, Subpoenas, Rule 205, Discovery From Nonparties, and the deposition rules. Rule 195, comment 2, provides:

This rule and Rule 194 do not address depositions of testifying experts who are not retained by, employed by, or otherwise subject to the control of the responding party, nor the production of the materials identified in Rule 192.3(e)(5) and (6) relating to such experts. Parties may obtain this discovery, however, through Rules 176 and 205.

Of particular significance in Rule 176, **SUBPOENAS**, is:

176.6 Response.

(a) Compliance required. Except as provided in this subdivision, a person served with a subpoena **must comply** with the command stated therein **unless discharged by the court or by the party summoning such witness**.

* * *

(c) Production of documents or tangible things. A person commanded to produce documents or tangible things need not appear in person at the time and place of production unless the person is also commanded to attend and give testimony, either in the same subpoena or a separate one. A person must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the demand. A person may withhold material or information claimed to be privileged but must comply with Rule 193.3. **A nonparty's production of a document authenticates the document for use against the nonparty** to the same extent as a party's production of a document is authenticated for use against the party under Rule 193.7.

(d) Objections. A person commanded to produce and permit inspection or copying of designated documents and things **may serve on the party requesting issuance of the subpoena — before the time specified for compliance — written objections** to producing any or all of the designated materials. A person **need not comply** with the part of a subpoena to which objection is made as provided in this paragraph unless ordered to do so by the court. **The party requesting the subpoena may move for such an order** at any time after an objection is made.

(e) Protective orders. A person commanded to appear at a deposition, hearing, or trial, or to produce and permit inspection and copying of designated documents and things, and any other person affected by the subpoena, **may move for a protective order** under Rule 192.6(b) — **before the time specified for compliance** — either in the court in which the action is pending or in a district court in the county where the subpoena was served. The person must serve the motion on all parties in accordance with Rule 21a. A person need not comply with the part of a subpoena from which protection is sought under this paragraph unless ordered to do so by the court. The party requesting the subpoena may seek such an order at any time after the motion for protection is filed.

(f) Trial subpoenas. A person commanded to attend and give testimony, or to produce documents or things, at a hearing or trial, **may object or move for protective order before the court at the time and place specified for compliance**, rather than under paragraphs (d) and (e).

176.7 Protection of Person from Undue Burden and Expense.

A party causing a subpoena to issue must take reasonable steps to avoid imposing undue burden or expense on the person served. In ruling on objections or motions for protection, the court must provide a person served with a subpoena an adequate time for compliance, protection from disclosure of privileged material or information, and protection from undue burden or expense. **The court may impose**

reasonable conditions on compliance with a subpoena, including compensating the witness for undue hardship.

176.8 Enforcement of Subpoena.

(a) Contempt. Failure by any person without adequate excuse **to obey a subpoena** served upon that person **may be deemed a contempt** of the court from which the subpoena is issued or a district court in the county in which the subpoena is served, and may be **punished by fine or confinement, or both.**

(b) Proof of payment of fees required for fine or attachment. A fine may not be imposed, nor a person served with a subpoena attached, for failure to comply with a subpoena without proof by affidavit of the party requesting the subpoena or the party's attorney of record that all fees due the witness by law were paid or tendered.

TEX. R. CIV. P. 176.6-.8 (emphasis added).

Under Rule 205, a party may subpoena production of documents and tangible things from nonparties without the need for a motion or oral or written deposition. TEX. R. CIV. P. 205 cmt. The nonparty discovery rule provides in pertinent part:

RULE 205. DISCOVERY FROM NONPARTIES

205.1 Forms of Discovery; Subpoena Requirement. A party **may compel discovery** from a nonparty — that is, a person who is not a party or subject to a party's control — **only by obtaining a court order** under Rules 196.7, 202, or 204, **or by serving a subpoena compelling:**

(a) an oral deposition;

(b) a deposition on written questions;

(c) a request for production of documents or tangible things, pursuant to Rule 199.2(b)(5) or Rule 200.1(b), **served with a notice of deposition** on oral examination or written questions; and

(d) a request for production of documents under this rule.

205.2 Notice. A party seeking discovery by subpoena from a nonparty must serve, on the nonparty and all parties, a copy of the form of notice required under the rules governing the applicable form of discovery. This notice must be served before or at the same time that the subpoena is served.

205.3 Production of Documents Without Deposition.

(a) Notice; subpoena. A party may compel production of documents from a nonparty by serving on the nonparty and all parties — a reasonable time before the response is due but no later than 30 days before the end of any applicable discovery period — the notice required in Rule 205.2 and a subpoena compelling production or inspection of documents or tangible things.

(b) Contents of notice. The notice must state:

(1) the **name of the person** from whom production or inspection is sought to be compelled;

(2) a **reasonable time and place** for the production or inspection; and

(3) **the items to be produced** or inspected, either by individual item or by category, describing each item and category with reasonable particularity, and, if applicable, describing the desired testing and sampling with sufficient specificity to inform the nonparty of the means, manner, and procedure for testing or sampling.

(c) Requests for production of medical or mental health records of other nonparties. If a party requests a nonparty to produce medical or mental health records of another nonparty, the requesting party **must serve the nonparty whose records are sought with the notice required under this rule.** This requirement does not apply under the circumstances set forth in Rule 196.1(c)(2).

(d) Response. The nonparty must respond to the notice and subpoena in accordance with Rule 176.6.

(e) Custody, inspection and copying. The party obtaining the production must make all materials produced available for inspection by any other party on reasonable notice, and **must furnish copies to any party who requests at that party's expense.** (emphasis added)

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

TEX. R. CIV. P. 205.1-.2 (emphasis added).

VI. CONSULTING EXPERTS.

Rule 192.3(e) provides that “[t]he identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not

discoverable.”⁴ Rule 192.3(e) provides that a party can however discover from a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert the same seven categories of information that are discoverable from a testifying expert. See TEX. R. CIV. P. 192.3(e)(1)-(7).

Rule 195 does not address specifically consulting experts. In its comments, it does provide however that “[i]nformation concerning purely consulting experts, of course, is not discoverable.” TEX. R. CIV. P. 195 cmt. 1. Further, while Rule 195 does not address specifically discovery of consulting experts whose opinions have been reviewed by testifying experts, it does refer to that category of experts in its comments, by stating:

This rule does not limit the permissible methods of discovery concerning consulting experts whose mental impressions or opinions have been reviewed by a testifying expert.

TEX. R. CIV. P. 195 cmt 1.

In addition, information about consulting experts relied on by testifying experts may be discovered now through deposition **or interrogatory**. See TEX. R. CIV. P. 195.1 (referring only to “testifying expert witnesses” with regard to its statement that expert information can be requested only through “a request for disclosure under Rule 194 and through depositions and reports”). Remember though that information about testifying experts is not discoverable by interrogatory. See TEX. R. CIV. P. 195.1.

The foregoing discussion may raise the question: What if a party designates an expert as a testifying expert, but wishes later to remove that designation and treat the expert instead as a purely consulting expert? This question was answered in *Castellanos v. Littlejohn*, 945 S.W.2d 236 (Tex. App.—San Antonio 1997, no writ). In that case, the evidence demonstrated that the plaintiff had “inadvertently” designated a consulting expert as a testifying expert. *Id.* at 237. The plaintiff later sought to de-designate the expert as a testifying expert and redesignate the expert as a consulting expert. *Id.* The defendant filed a motion to compel discovery from the expert, and the trial court granted that motion. *Id.* The plaintiff then filed a writ of mandamus with the court of appeals. *Id.* The *Castellanos* Court reviewed the record and concluded that:

The uncontroverted evidence before the trial court establishes that Dr. Perez was retained as a consulting-only expert and was designated as a testifying expert only because of a clerical error. The issue presented, therefore, is whether a party who has inadvertently listed a consulting-only expert as a testifying expert may “de-designate”

⁴ The Texas Supreme Court held that a consulting expert’s opinion is not discoverable even under the Texas Open Records Act. *In re City of Georgetown*, 53 S.W.2d 328, 334 (Tex. 2001). In that case, the *Austin American–Statesman* tried to obtain a report prepared by a consulting expert for the City of Georgetown in a suit arising from discharges at one of the City’s wastewater treatment plants. The City refused to produce the report, and the paper sought a writ of mandamus compelling disclosure. The Supreme Court concluded that Texas Rules of Civil Procedure 192.3(e) and 192.5 are “other laws” — as defined by the Texas Open Records Act — that except the documents from disclosure.

him to reflect his proper status. We believe the party can do so, so long as the “de-designation” does not constitute “an offensive and unacceptable use of discovery mechanisms” or “violate[] the clear purpose and policy underlying the rules of discovery.”

Id. at 239 (quoting *Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556, 560 n. 8 (Tex. 1990)).

VII. *DAUBERT*, *ROBINSON* AND OTHER QUALIFICATION ISSUES.

The *Daubert/Robinson* cases and their progeny⁵ are too numerous, and too complex to discuss in detail here. There are, however, several good articles about challenging expert testimony in Texas under *Daubert* and *Robinson*. Two of the best are:

- Brown, Honorable Harvey, “Limiting and Striking Expert Testimony: Recent Developments & Trends” presented at the Houston Bar Association’s Discovery & Evidence Institute, February 11, 1999, and originally presented to the 21st Annual Advanced Civil Trial Course; and
- Black, Bert, “Expert Evidence in the Wake of the *Daubert-Joiner-Kumho Tire* Trilogy,” presented at the State Bar of Texas Advanced Civil Trial Course, September 1999.

In general, the days when an expert could testify that he had a hunch, based on years of practical experience, are over. Judges are “gatekeepers” who must scrutinize the proposed testimony to ensure that the theories asserted by the purported experts can be tested, subjected to peer review and publication, are generally accepted within the relevant scientific community, and do not have a high error rate. Thus, in addition to trying to make the expert’s testimony interesting and memorable, trial lawyers must also review these significant cases to determine how to make the testimony admissible.

VIII. CONCLUSION.

Discovery regarding experts is very well defined under the Texas Rules of Civil Procedure. Who gets what, when, and where should no longer be disputed. Traps do exist however for the

⁵ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999); *E.I. duPont de Nemours and Co., Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995); *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997); *cert. denied*, 523 U.S. 1119 (1988); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998).

unwary. Expert designation deadlines are still confusing, and can be a moving target if trial dates are continued — as they often are. As always, there is no substitute for consulting the Rules when in doubt.