TAKING DEPOSITIONS
UNDER THE NEW RULES OF DISCOVERY

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I. OUTLINE OBJECTIVE

It is anticipated this paper will provide an easy to use overview of the new rules affecting deposition practice in Texas, including limitations on depositions, noticing depositions, scheduling expert depositions, objecting to the time and place of depositions, conducting depositions, the scope of discovery through depositions, and depositions before suit.

II. EFFECTIVE DATES

A. Discovery Control Plan Limitations.

1. The limitations imposed by Rule 190 ("Discovery control Plans") do not automatically affect cases pending on December 31, 1998.

2. The limitations imposed by Rule 190 apply automatically to cases filed on or after January 1, 1999.

3. A trial court retains the authority to impose Rule 190 limitations on depositions, in the interest of the fair administration of justice. [Final Approval of Revisions to the Texas Rules of Civil Procedure; Order No. 4b (November 9, 1998)].

B. Other Rules and Limitations.

1. All remaining rules affecting depositions are applicable to all depositions regardless of when the action was filed, effective January 1, 1999.

2. Rules regarding notices apply to all notices served on or after January 1, 1999.

a. Presumably this means that if a notice was served on December 30, 1998, for a party's deposition to take place 15 days later, and also included a request for documents of a party to be produced at the time of the deposition, the notice would not necessarily be automatically objectionable, because it arguably would have been proper at the time it was served.

b. By the same token, if the responding party did not file a motion to quash the above notice within 3 days of being served with it, the party would have to obtain a ruling on such a motion. [*See* Rule 199.4].

3. Rules regarding motions for protection and motions to quash apply to all such motions filed on or after January 1, 1999.

4. Rules regarding the conduct of depositions apply to all despositions taken or or after January 1, 1999.

III. LIMITATIONS

A. Level 1: Rule 190.2.

1. 6 hours per "party"

2. The parties may agree to increase time limits, but not beyond 10 hours per party, without a court order.

3. No depositions may be taken beyond the discovery period, except by agreement or court order. [Rule 109.2(c)(1)].

4. The court may modify the deposition hours so that no party is given unfair advantage. [Rule 109.2(c)(2)].

5. If the discovery period is reopened, a witness may be redeposed. [Rule 190.2(d)].

B. Level 2: Rule 190.3.

1. May parties modify the limitations under Level 2? Reconcile Rule 190.3(a) with Rule 191.1.

a. Rule 190.3(a) provides that the discovery limitations *must* be followed.

b. Nonetheless Rule 191.1 reserves the right to the parties to modify rules pertaining to depositions: The answer appears to be YES.

2. 50 hours per "side."

a. "Side" defined.

(1) "Side" refers to all the litigants with generally common interests in the litigation. [Rule 190.3(b)(2)].

(2) Comment 6.
The 50 hour limit only applies to deposing examination and cross-examination of the opposing side, including its designated experts and persons who are subject to the side's control. [Rule 190.3(b)(2)].

b. If one side designates more than two experts, the opposing side may have an additional 6 hours of total deposition time for each additional expert designated.

c. The court may modify the deposition hours and *must* do so when a side or party would be given unfair advantage.

d. While the 50 hours limit does not apply to written depositions, the comments made clear that depositions on written questions may not be used to circumvent the limitations on interrogatories under Levels 1 and 2. [Comment 5, Rule 190].

3. Depositions under Level 2 must be completed within the discovery control plan, which ends nine months after the earlier of the first response to written discovery or the first oral deposition. [Rule 190.3(b)(1)].

4. While tacitly the rules allow a notice of notice of deposition to be served with the petition (there is nothing in the rules proscribing such an approach) the practitioner should be aware that under Level 2, the discovery period will begin to run from the date of the first response to written discovery or the first oral deposition. [Rule 190.3(b)(1)(B)(ii)].

C. Level 3: Rule 190.4.

1. There are no *per se* limitations on depositions prescribed under Level 3.

2. The parties may agree to limitations, or the court may impose limitations as part of a discovery control plan.

3. If the parties do not agree on limitations, the limitations under Level 2 apply by default. [Rule 190.4(b)].

4. Level 2 limitations on depositions apply even if a party requests a Level 3 control plan, until the court enters a Level 3 order. [Technical Corrections issued December 31, 1998].

5. Court ordered Level 3 discovery control plan.

a. A court ordered discovery control plan under Level 3 *must* provide a "discovery period" during which all discovery, including depositions must be completed. [Rule 190.4(2)].

b. The court ordered discovery control plan under Level 3 *must* provide limits on discovery, presumably also on depositions. [Rule 190.4(3)].

c. A court, as part of a Level 3 control plan, may order that Level 2 limitations on discovery apply (i.e., the 50 hour limitation).

D. Rules Unaffected By Limitations.

1. The limitations on discovery under Rule 190 do not apply or include discovery conducted under Rule 202 ("Depositions Before Suit or to Investigate Claims") or Rule 621a ("Discovery and Enforcement of Judgment"). [Rule 190.6]

2. But, Rule 202 cannot be used to circumvent the limitations of Rule 190.

IV. NOTICING AND OBJECTING TO NOTICES OF DEPOSITIONS.

A. Filing.

1. *Neither* notices *nor* responses to notices are filed. [Rule 191.4(a)].

2. Notices and subpoenas regarding nonparties *must* be filed. [Rule 191.4(b)(1)].

3. Motions for protection and motions to quash *must* be filed. [Rule 191.4(b)(2)].

4. Agreements regarding depositions *must* be filed. [Rule 191.4(b)(3)].

5. Notices must be served on all parties of record. [Rule 191.5].

B. Timing.

1. There is no provision stating the earliest time a notice may be served.

2. Discovery may be taken in any sequence or order. [Rule 192.2].

3. A deposition may not be noticed for a date beyond the discovery period without an agreement or order of the court. [Rules 190.3(b), 190.4(b), and 199(2)(a)].

4. Question whether a court may provide in a discovery control plan that a deposition may be taken beyond the discovery period, if noticed before the conclusion of the discovery period. [*See* Comment 4; Rule 190].

5. A notice of a party must provide reasonable advance notice. Neither the rule nor the comments provides any more specific time period in this regard.

6. Experts.

a. An expert that is "employed" by a party is considered under the control of the party and presumably would be under the same requirements for advance notice as a notice of a party's deposition.

(1) Reasonable notice;

(2) No subpoena duces tecum required. [*See* Rule 196 regarding requests for production from parties].

b. A nonretained expert (i.e., one not specifically retained or employed by a party as an expert witness) would arguably be treated the same as a nonparty witness.

7. A notice of a party, including a request for production, must allow the responding party at least 30 days from the date of the notice within which to respond to the request for production.

8. A notice for a deposition on written questions must give at least 20 days advance notice.

9. A notice with subpoena for just documents, without written questions must provide at least 10 days advance notice.

10. A notice for an oral deposition of a nonparty has no requirements with regard to advance notice, but arguably must provide reasonable notice, even though this is not clearly expressed in the rules. If documents are subpoenaed, the witness must be served with notice 10 days before the subpoena is issued. [Technical Correction to Rule 205.2, December 31, 1998].

C. Content.

1. Individuals.

The name of the individual to be deposed, whether a person, an organization or corporation, must be stated in the notice.

2. Corporations and Organizations.

Designated Corporate Representatives. If an organization is named as a witness:

a. The notice must describe with reasonable particularity the topics on which examination is requested.

b. In response, the organization must designate one or more individuals to testify on its behalf:

(1) the response to the notice must be within a reasonable time before the deposition;

(2) for each individual designated, the response must state the matters on which the individual will testify;

(3) presumptively, the response should be in writing, although this is not expressly stated in the rule.

c. Each individual designated must testify as to matters that are known or reasonably available to the *organization*.

d. Merely because an individual is deposed as a representative does not preclude taking a deposition of the person in their individual capacity (or as a representative on other matters) by any other procedure authorized by the rules.

e. Each person designated as a representative constitutes a separate witness for purposes of the 6 hour limit per witness. [*See* Comment 2; Rule 199.5].

3. Time and Place.

This notice must state a reasonable time and place. The deposition may be noticed for the following places:

a. The county of the witness' residence;

b. the county where the witness is employed or regularly transacts business in person;

c. The county of suit, if the witness is a party or a person designated by a party under Rule 199.2(b)(1);

d. The county where the witness was served with the subpoena, or within 150 miles of the place of service, if the witness is not a resident of Texas or is a transient person; or

e. Subject to the foregoing, at any other convenient place directed by the court in which the cause is pending. [Rule 199.2(b)(2)].

4. Notice must state if an alternative means of recordation is to be employed.

5. Notice may include the notice concerning additional attendees required by Rule 199.5(a)(3).

6. Requests for Production.

A notice may contain a request for production:

a. Nonparty.

The request must comply with Rule 205 and the documents to be subpoenaed must be identified in the notice, or in an attachment.

b. Party.

When the witness is a party or subject to the control of a party, document requests are governed by Rules 193 and 196.

(1) The requesting party must provide at least 20 days from service, within which to respond to the request;

(2) The responding party must respond in writing;

(3) Rule 193 will govern objections and claims of privilege.

7. Compelling Attendance.

a. Nonparty.
The notice may request issuance of a subpoena pursuant to Rule 176. (*See* Subpoenas, below);

b. Parties.
A notice has the same effect as a subpoena with regard to a party or an individual under the party's control.

D. Objections to Time and Place [Rule 199.4].

1. An individual may object to the time and place specified in a notice by either a motion for protection or a motion to quash.

2. If the motion is filed by the 3rd business day after service of the notice, an objection to the time and place of a deposition stays the oral deposition until the motion can be determined.

V. CONDUCTING THE ORAL DEPOSITION [Rule 199.5]

A. Attendance [Rule 199.5(a)].
The witness must stay in attendance when the deposition is begun and until completed.

B. Time Limits [Rule 199.5(c)].
No side may examine or cross-examine an individual witness for more than six hours. Breaks during the depositions do not count against this limitation.

C. Conduct During the Deposition.

1. Guidelines.

a. The deposition must be conducted as though the testimony were being received in a courtroom during trial.

b. An attorney must not object to a question at an oral deposition, instruct the witness not to answer a question, or suspend the deposition unless there is a good faith factual and legal basis for doing so at the time.

c. Counsel should cooperate and be courteous to each other and to the witness.

d. The witness must not be evasive or unduly delay the deposition.

2. Conferences.

a. Private conferences between witness and witness' attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted.

b. Under the federal rules, it has been held that when a question is pending, neither the witness or the attorney may interrupt the deposition to confer. It was also held however that an attorney may consult with a witness during breaks in the deposition. *In re Stratosphere Corp. Securities Litigation*, 1998WL640325 (D. Nev. 1998).

c. Private conferences may be held during agreed recesses and adjournments.

3. Objections [Rule 199.5(e)].

a. Objections to *questions* during the oral deposition are limited to "Objection, leading" and "Objection, form."

(1) Comment
An objection to the form of a question include objections that the question calls for speculation, calls for a narrative answer, is vague, is confusing, or is ambiguous.

(2) Ordinarily, a witness must answer a question at a deposition subject to the objection.

b. Objections to *testimony* during the oral deposition are limited to "Objection, nonresponsive."

c. Waiver.

(1) The above objections are *waived* if not stated as phrased during the oral deposition.

(2) The objecting party must give a clear and concise explanation of the objection if requested by the party taking the oral deposition, or the objection is waived.

(3) Argumentative or suggestive objection or explanations waive objections and may be grounds for terminating the oral deposition.

4. Instructions Not to Answer [Rule 199.5(f)].

a. An attorney may instruct a witness not to answer a question during an oral deposition under the following circumstances:

(1) only if necessary to preserve a privilege;

(2) comply with a court order or the rules of discovery;

(3) protect a witness from an abusive question or one for which any answer would be misleading; or

(4) secure a ruling.

b. An objection may be inadequate if a question incorporates such unfair assumption or is worded so that any answer would necessarily be misleading, i.e., whether he has yet ceased conduct he denies ever doing.

c. Abusive questions include questions that inquire into matters (a) beyond the scope of discovery; (b) that are argumentative; (c) that are repetitious or harassing.

d. The attorney instructing the witness not to answer must give a concise, nonargumentative, nonsuggestive explanation of the grounds for the instruction if requested by the party who asked the question.

5. Suspending the Deposition.

a. If time limits have been exceeded;

b. If there has not been compliance with the rules of conduct.

D. Sanction for Noncompliance with Conduct Rules [R199.5(d)].

If the lawyers and witnesses do not comply with this rule, the court may allow in evidence at trial statements, objections, discussions, and other occurrences during the oral deposition that reflect upon the credibility of the witness or the testimony.

VI. SCOPE OF DEPOSITION DISCOVERY

A. No Express Changes.

1. Rules 192.3 continues generally to allow discovery regarding any matter that is relevant to the subject matter in the pending action.

2. No "Fishing"

a. Discovery devices are not allowed to be used to explore or "fish" for additional causes of action or theories of recovery. *Dillard Dept. Stores, Inc. v. Hall*, 909 S.W.2d 491 (Tex. 1995).

b. Fishing is not a proper use of any discovery device.

c. A question clearly beyond the scope of discovery may be considered abusive. [Comment 4; Rule 199].

B. Contentions.

1. Rule 192.3(j) provides that a party may obtain discovery of any other party's legal contentions and the factual basis for them, but does not require a marshaling of evidence. [*See* Comment 5; Rule 192].

2. The Texas Supreme Court has indirectly held that a party may inquire into another party's contentions during a deposition. *Braden v. Downey*, 811 S.W.2d 922 (Tex. 1991).

C. Any Individual.

1. *Non Compos Mentis*.
A party to a suit has the right to depose the opposing party even if that party has been declared *non compos mentis*. *Mobil Oil Corp. v. Floyd*, 810 S.W.2d 321 (Tex. App. – Beaumont 1991).

2. Attorneys.

a. An attorney may be an individual with knowledge of facts relevant to the subject matter of the lawsuit.

b. An attorney's deposition may be taken in a case even if he is representing parties in the action. *Smith, Wright & Weed v. Stone*, 818 S.W.2d 926 (Tex. App. – Houston [14th Dist.] 1991, orig. proceeding).

3. Apex.

a. Definition.

(1) An "apex" deposition is one taken of a corporate officer at the apex of the corporate hierarchy.

(2) The "apex" deposition rule is not just confined to the chief executive officer; it may also be applied to other "high level" corporate officers. *In re El Paso Healthcare System*, 969 S.W.2d 68 (Tex. App. – El Paso 1998).

b. *Crown Central* Guidelines.

(1) After a motion is filed for a protective order to prohibit the taking of a deposition of a "high corporate official," the trial court must determine whether the party seeking the deposition has shown the official has **any unique or superior personal knowledge** of discoverable information. *In re Bunch*, No. 05-98-01204-CV, 1998WL851123 (Tex. App. – Dallas, December 10, 1999).

(2) If unique or superior personal knowledge cannot be shown, then the trial court shall require the requesting party to **obtain the discovery through less intrusive means**. *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125 (Tex. 1995).

(a) It is not necessary to **first** attempt to obtain discovery through less intrusive means if the "apex" witness can be shown to have unique or superior knowledge. *Frozen Food Express Ind., Inc. v. Goodwin*, 921 S.W.2d 547 (Tex. App. – Beaumont 1996).

(b) Motion for protection granted when V.P. of operations had not been deposed prior to seeking discovery from the CEO because the trial court found that less intrusive methods had not been utilized. *In re Daisy Manufacturing Co., Inc.*, 976 S.W.2d 327 (Tex. App. – Corpus Christi 1998).

c. Application.

(1) The affidavit which accompanies the motion to quash must contain a **broad denial** of "any knowledge of relevant facts" according to the threshold requirements of *Crown Central*. *In re Columbia Rio Grande Healthcare, L.P.*, No. 13-98-440-CV, 1998WL667996 (Tex. App. – Corpus Christi, August 12, 1998).

VII. EXPERT DEPOSITIONS

A. Scope.

1. Discovery regarding experts may only be obtained through requests for disclosure, reports and depositions.

2. The following information may be obtained about an expert through depositions. [Rule 195.4].

a. Subject matter;

b. Mental impressions and opinions;

c. Facts known (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

d. Other discoverable matters, including documents not produced in disclosure (i.e., evidence of bias). [*See* Rule 192.3(e)(5)].

B. Scheduling.

1. 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:

a. If a report is not produced at time of designation, then the party must make the expert available for deposition reasonably promptly after the expert is designated.

b. If the deposition cannot – due the actions of the tendering party -- be concluded more than 15 days before the deadline for designating experts, that deadline must be extended for other experts testifying on the same subject.

c. If the report 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.

2. 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.

VIII. SUPPLEMENTATION

A. Timing.

1. Generally, there is no duty to supplement a deposition.

2. A general duty to supplement desposition testimony would impose too great a burden on the litigants; therefore, there is generally no duty to supplement deposition testimony. *Titus County Hospital District v. Lucas*, No. 98-0350, 1998WL716956 (Tex., October 15, 1998).

B. Experts.

If an expert witness is retained by, employed by, or otherwise under the control of a party, that party must supplement the expert's deposition testimony, but only with regard to the expert's mental impressions or opinions and the basis for them.

IX. SUBPOENAS

A. Reorganization.

Rule 176 consolidates and clarifies the rules governing trial and discovery subpoenas, which formerly were scattered throughout Rules 176-79 and 201.

B. Substantive Changes.

1. The subpoena range is now 150 miles from the county where the suit is pending. [Rule 176.3(a)].

2. Attorneys are now enabled to issue both trial and discovery subpoenas in order to reduce costs. [Rule 176.4(b)].

3. There is a general duty imposed on persons requesting subpoenas to avoid imposing undue burden and expense on the person served. [Rule 176.7].

4. A protective order may be sought by not only the person to whom the subpoena is directed, but also by **any person** affected by the subpoena. [Rule 176.6(b)].

C. Parties.

1. If the witness is a party or an employee or agent subject to the party's control, he/she can be compelled to produce documents and tangible things simply by service of the notice to take the deposition. [Rule 199.2(b)(5)].

2. If discovery is served on a party with a subpoena, the procedures for responding, objecting, asserting privileges and supplementing would be controlled by the rules governing discovery from the parties, not by those set forth in Rule 176.

D. Nonparties.

1. A party seeking discovery by subpoena from a nonparty must serve on the nonparty witness and all parties a copy of the form of notice required under the rules governing the applicable form of discovery. A notice of oral or written deposition must be served before or at the same time a subpoena compelling attendance or production under the notice is served. A notice to produce documents or tangible things under Rule 205.3 must be served at least 10 days before the subpoena compelling production is served. [Technical Correction No. 25, December 31, 1998].

2. A party may compel production of documents and tangible things from a nonparty without the need for a motion or a written or oral deposition by serving the notice required by Rule 205.2 and a subpoena. [Rules 205.1(d) and 205.3(a)].

X. DEPOSITIONS BEFORE SUIT

A. History.

1. Rule 202 incorporates repealed Rule 737 (bills of discovery) and broadens the scope of former Rule 187 (depositions to perpetuate testimony). It expressly permits discovery depositions prior to suit to investigate potential claims.

2. A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either:

a. to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or

b. to investigate a potential claim or suit. [Rule 202.1].

B. Scope.

1. Pre-suit investigatory depositions are allowed, but they are limited in the extent to which they can be used in a subsequent lawsuit if an eventual party did not receive notice of the deposition, to prevent taking unfair advantage of a witness or others.

2. The deposition may be used as a sworn statement to impeach the witness.

3. If Rule 202 is used abusively and/or to circumvent deposition notice requirements, the trial court is authorized to forbid the use of the deposition for any purpose, including impeachment. [Comment 2; Rule 202].

C. The Petition.

The petition must:

1. Be verified;

2. Be filed in a proper court of any county:

a. where venue of the anticipated suit may lie, if suit is anticipated; or

b. where the witness resides, if no suit is yet anticipated;

3. Be in the name of the petitioner;

4. State either:

a. the petitioner anticipates a suit; ***or***

b. the petitioner seeks to investigate a potential action, if any;

5. State the subject matter of the anticipated action, if any;

6. If suit is anticipated, there are more stringent requirements about who must be named in the petition and provided notice of the action. [*See* Rule 202.2(f)];

7. The expected testimony the petitioner expects to elicit and the reasons for obtaining the testimony must be stated in the petition;

8. An order must be requested.

D. Notice.

1. 15 days before the date of the hearing.

2. To all persons the petitioner seeks to depose.

3. If suit is anticipated, on all parties petitioner expects to have interests adverse to petitioner's anticipated suit.

4. The court may as justice requires lengthen or shorten the notice requirement.

E. The Order.

1. The court must order a deposition to be taken "if, but only if,"

a. taking the deposition will prevent a failure or delay of justice; ***or***

b. the benefit of taking the deposition outweighs the burden and expense.