

The Practitioner’s Guide to Properly Taking and Defending Depositions Under the Texas Discovery Rules

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I. DEPOSITIONS IN GENERAL

A deposition records sworn testimony taken outside the courtroom that is certified in conformity with the Texas Rules of Civil Procedure so that it is the equivalent to testimony given in the courtroom under oath. As a discovery device, depositions allow the questioning of witnesses before trial by oral questions asked by a party's attorney¹ or by written questions asked by a deposition officer (i.e., the person recording the deposition, usually a court reporter).²

¹ See TEX. R. CIV. P. 199; *cf. In re Amezaga*, 195 B.R. 221, 227 (Bankr. D.P.R. 1996) (“A deposition is a ‘question-and-answer conversation’ between the witness and deposing attorney to garner facts in relation to that witness’ actions and experiences.” (quoting *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993))). Oral depositions are discussed in Section II.

² See TEX. R. CIV. P. 200. Depositions upon written questions are discussed in Section III.

Depositions are central to civil litigation and perhaps the single most important discovery device.³ As one federal court somewhat cynically noted:

Depositions are the factual battleground where the vast majority of litigation actually takes place. It may safely be said that [Federal] Rule 30 has spawned a veritable cottage industry. The significance of depositions has grown geometrically over the years to the point where their pervasiveness now dwarfs both the time spent and the facts learned at the actual trial—assuming there is a trial, which there usually is not.⁴

After an action is commenced, depositions are used for a wide variety of purposes, including basic fact discovery, preserving the testimony of witnesses who might be unavailable for trial, and establishing facts needed for settlement or pretrial motions (e.g., summary judgment motions).⁵

³Luangisa v. Interface Operations, No. 2:11-cv-00951-RCJ-CWH, 2011 U.S. Dist. LEXIS 139700, at *17 (D. Nev. Dec. 5, 2011) (“Statistics show that fewer and fewer civil cases proceed all the way to trial. As a result, ‘[d]epositions are the factual battleground where the vast majority of litigation actually takes place.’”) (quoting *Hall*, 150 F.R.D. at 531); *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 185 (E.D. Pa. 2008) (“More than 98% of all civil cases filed in the federal courts result in disposition by way of settlement or pretrial adjudication. Very often, these results turn on evidence obtained during depositions. Thus, depositions play an extremely important role in the American system of justice.”); *Hall*, 150 F.R.D. at 531 n.12 (“The reality is that what is learned at depositions becomes the factual basis upon which most cases are disposed of—not by trial, but by settlement.”).

⁴*Hall*, 150 F.R.D. at 531; see also *Soliz v. State*, 97 S.W.3d 137, 144 n.33 (Tex. Crim. App. 2003) (“The stakes at a deposition can be high—or at least perceived to be high by the litigants and their counsel. When evaluating the strength of their client’s case, litigators often accord great weight to witnesses’ and attorneys’ performances during depositions. Thus, if an attorney’s client performs well while the opponent performs poorly, the attorney may attach a higher settlement value to the case. Moreover, deposition transcripts are often an important trial resource, sometimes substituting for live witnesses, and at other times serving as fodder for cross-examination and impeachment. Depositions are a dress rehearsal—and due to high settlement rates are often a substitute—for trial. Therefore, attorneys tend to attach more importance to depositions than to most ‘paper discovery.’”) (quoting A. Darby Dickerson, *Deposition Dilemmas: Vexatious Scheduling and Errata Sheets*, 12 GEO. J. LEGAL ETHICS 1, 3–4 (1998)).

⁵*Soliz*, 97 S.W.3d at 144–45 (“Depositions are widely used in civil lawsuits. They are used to reveal the strengths and weaknesses of a case. They are used as evidence in motions for summary judgment. They serve as evidence at trial without the necessity of showing that a witness is unable to testify. They can, under certain circumstances, be used in other lawsuits.”) (footnotes omitted); cf. *Kleppinger v. Tex. Dep’t of Transp.*, 283 F.R.D. 330, 335 (S.D. Tex. 2012) (“[W]hile one

Depositions also may be taken before suit is commenced to perpetuate the testimony of a person or to investigate a potential claim or suit.⁶ At trial, depositions generally are used as the testimony of unavailable witnesses and to cross-examine live witnesses and impeach their trial testimony to the extent it differs from their earlier deposition testimony.⁷

The most common type of deposition is the oral deposition, consisting of questions by the attorney for one party, answers by the deponent, and objections and cross-examination by the other parties' attorneys.⁸ Depositions generally can be taken without leave of court, although a deposition to perpetuate testimony or to investigate a potential claim or suit requires a court order.⁹ Once an action is commenced, the party noticing the deposition generally is not required to establish that the deponent has information about which the deponent can testify at trial.¹⁰ Indeed, one of discovery's important purposes is to ascertain who has such information. Of course, if the noticing party is proceeding in bad faith, the proper response is to move for protection under Texas Rule 192.6.¹¹

The Texas Rules relevant to depositions are Rules 176 (subpoenas), 190 (deposition time limits in an action),¹² 199 (oral depositions),¹³ 200 (depositions on written question),¹⁴ 201 (depositions in foreign jurisdictions

purpose of a deposition is for basic discovery, it is also utilized for the preservation of information, for the establishment of facts crucial to settlement or rulings on pretrial motions, and for potential impeachment purposes if a witness's testimony deviates at trial.”)

⁶TEX. R. CIV. P. 202.1 (“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.”). Depositions to perpetuate testimony or investigate a claim or suit are discussed in Section V.

⁷*Soliz*, 97 S.W.3d at 145 (“[Depositions] serve as evidence at trial without the necessity of showing that a witness is unable to testify.”).

⁸Oral depositions are governed by Texas Rule of Civil Procedure 199, which is discussed in Section II.

⁹TEX. R. CIV. P. 202. Presuit depositions are discussed in Section V.

¹⁰The principal exception to this rule is an “apex deposition.” Apex depositions are discussed in Section I.A.4.

¹¹TEX. R. CIV. P. 192.6(b)(1) (“To protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may—among other things—order that: (1) the requested discovery not be sought in whole or in part”).

¹²See *infra* Section II.G.1.

¹³See *infra* Section II.

¹⁴See *infra* Section III.

for use in Texas proceedings and depositions in Texas for use in foreign proceedings),¹⁵ 202 (depositions before suit or to investigate claims),¹⁶ 203 (signing, certification, and use of oral and written depositions),¹⁷ 205 (discovery from nonparties), and 215 (abuse of discovery and sanctions).

A. *Who Can Be Deposed*

1. In General

The testimony of “any person or entity” may be taken by oral examination or on written questions.¹⁸ This includes any natural person; any entity, irrespective of its nature (e.g., corporation, partnership, limited partnership, limited liability company, or association), as well as the entity’s officers, directors, employees, and agents; public officials; and any governmental entity, subdivision, body, or agency as well as its directors, officers, employees, and agents. This is made clear by Texas Rule 199.2(b)(1), which expressly provides that a deponent can be “either an individual or a public or private corporation, partnership, association, governmental agency, or other organization.”¹⁹ A party can even take his, her, or its own deposition.

¹⁵ See *infra* Section IV.

¹⁶ See *infra* Section V.

¹⁷ See *infra* Section VI.

¹⁸ TEX. R. CIV. P. 199.1(a) (“A party may take the testimony of any person or entity by deposition on oral examination before any officer authorized by law to take depositions.”); *id.* 200.1(a) (“A party may take the testimony of any person or entity by deposition on written questions before any person authorized by law to take depositions on written questions.”); see *id.* 176.6(b) (“If a subpoena commanding testimony is directed to a corporation, partnership, association, governmental agency, or other organization, and the matters on which examination is requested are described with reasonable particularity, the organization must designate one or more persons to testify on its behalf as to matters known or reasonably available to the organization.”); *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 127 (Tex. 1995) (parties are generally permitted to take the deposition of “any person” (quoting TEX. R. CIV. P. 200)); *In re West*, 346 S.W.3d 612, 615 (Tex. App.—El Paso 2009, orig. proceeding) (same).

¹⁹ TEX. R. CIV. P. 199.2(b)(1). This is confirmed by the facts that “person,” as defined by Section 311.005 of the Texas Government Code, “includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity” and that the “[t]he Code Construction Act applies to the Texas Rules of Civil Procedure . . .” *Simulis, L.L.C. v. G.E. Capital Corp.*, 276 S.W.3d 109, 113–14 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (quoting *In re Walkup*, 122 S.W.3d 215, 217 (Tex. App.—Houston [1st Dist.] 2003, no pet.)).

Importantly, Texas Rules 199 and 200 draw no distinction between depositions of parties and nonparties.²⁰ In contrast, interrogatories and requests for admission and disclosure can be addressed to parties only.²¹ Document requests pursuant to Texas Rule 196 also are limited to parties,²² but the substantial equivalent of a Texas Rule 196 production request can be obtained from a nonparty by serving a notice and subpoena pursuant to Texas Rules 205 and 176, respectively,²³ or, if the nonparty is to be deposed, by including a document request in the deposition notice and subpoena, which requires the nonparty witness to bring the requested documents to the deposition.²⁴

2. Attorneys

The fact that the proposed deponent is an attorney or even the attorney for the opposing party in the action is not an *absolute* bar to deposing the attorney, although the attorney-client and work-product privileges may provide bases for the attorney to refuse to answer some or all of the questions asked during the deposition.²⁵ Nonetheless, noticing the deposition of opposing counsel is viewed with disfavor. As noted by one Texas court:

Generally, an attorney of record in litigation is an advocate, not a fact witness, in the litigation process. As with compelling production of opposing counsel's litigation file, compelling a deposition of the opposing party's attorney of record concerning the subject matter of the litigation is

²⁰*In re Miscavige*, 436 S.W.3d 430, 437 (Tex. App.—Austin 2014, no pet.) (“[T]he Texas Rules of Civil Procedure do not distinguish between depositions of named parties and depositions of other individuals.”).

²¹TEX. R. CIV. P. 194.1 (requests for disclosure); *id.* 197.1 (interrogatories); *id.* 198.1 (requests for admission).

²²*Id.* 196.1(a).

²³*Id.* 176.2(b); *id.* 205.1(c); *id.* 205.3.

²⁴*Id.* 176.2; TEX. R. CIV. P. 205.1(a)–(b); *id.* 205.2.

²⁵This is made clear by Texas Rules 199.1(a) and 200.1(a), which provide that “any person” can be deposed. *Cf.* *State Nat’l Ins. Co. v. Khatri*, No. C-13-00433-LB, 2014 U.S. Dist. LEXIS 64549, at *17 (N.D. Cal. May 9, 2014) (“Assuming a party seeks relevant information, that party may depose ‘any person’ under [Federal] Rule 30(a)(1), and there is no express prohibition against deposing an attorney of record in a case.”); *Busey v. Richland Sch. Dist.*, No. 13-CV-5022-TOR, 2014 U.S. Dist. LEXIS 50579, at *4 (E.D. Wash. Apr. 10, 2014) (same); *Am. Cas. Co. v. Krieger*, 160 F.R.D. 582, 585 (S.D. Cal. 1995) (same).

inappropriate under most circumstances. Calling opposing counsel of record as a witness seriously disrupts the counsel's functioning as an advocate and may create a false impression that the advocate was improperly involved in the underlying issues in the litigation.²⁶

Accordingly, "compelling a deposition of an opposing party's attorney of record concerning the subject matter of the litigation is generally inappropriate, as work product concerns are implicated."²⁷ Federal courts similarly limit depositions of opposing counsel. One line of federal cases, based on *Shelton v. American Motors Corp.*, allows the deposition of opposing counsel only when "the party seeking to take the deposition has shown that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case."²⁸ Other federal courts, as exemplified by *In re Subpoena to Friedman*, have adopted a "flexible" approach to such depositions that takes into consideration all relevant facts and circumstances in determining whether the deposition would entail an inappropriate burden or hardship, including the need to depose the attorney, the attorney's role in connection with the matter on which discovery is sought, the extent of discovery already conducted, and the risk of encountering issues relating to the attorney-client and work-product privileges.²⁹

²⁶*In re Baytown Nissan Inc.*, 451 S.W.3d 140, 149–50 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (quoting *In re Baptist Hosps.*, 172 S.W.3d 136, 145 (Tex. App.—Beaumont 2005, no pet.)).

²⁷*In re Burroughs*, 203 S.W.3d 858, 860 (Tex. App.—Beaumont 2006 no pet.); *accord In re Baytown Nissan*, 451 S.W.3d at 149–50; *In re SouthPak Container Corp.*, 418 S.W.3d 360, 364 (Tex. App.—Dallas 2013, orig. proceeding), *decision reached on appeal by* McDonald Devin, PC v. Rice, No. 05-14-00938-CV, 2015 Tex. App. LEXIS 10992 (Tex. App.—Dallas Oct. 27, 2015); *In re Exxon Corp.*, 208 S.W.3d 70, 76 (Tex. App.—Beaumont 2006, no pet.); *In re Baptist*, 172 S.W.3d at 145.

²⁸805 F.2d 1323, 1327 (8th Cir. 1986) (citation omitted); *accord* Nationwide Mut. Ins. Co. v. Home Ins. Co., 278 F.3d 621, 628 (6th Cir. 2002); *Thiessen v. Gen. Elec. Capital Corp.*, 255 F.3d 1221, 1237 (10th Cir. 2001); *Theriot v. Parish of Jefferson*, 185 F.3d 477, 491 (5th Cir. 1999); *Mass. Mut. Life Ins. Co. v. Cerf*, 177 F.R.D. 472, 479 (N.D. Cal. 1998) (noting that *Shelton* is generally regarded as the leading federal case on attorney depositions).

²⁹*In re Subpoena to Friedman*, 350 F.3d 65, 72 (2d Cir. 2003); *accord* *Wilson v. O'Brien*, No. 07 C 3994, 2010 U.S. Dist. LEXIS 33721, at *7–8 (N.D. Ill. Apr. 6, 2010); *Younger Mfg. Co. v. Kaenon, Inc.*, 247 F.R.D. 586, 588 (C.D. Cal. 2007).

Although the few Texas courts that have considered the propriety of deposing opposing counsel have not adopted either test used by federal courts or set forth an alternative one,³⁰ as noted above, they have held that depositions of opposing counsel generally are “inappropriate” and disfavored.³¹ It is clear, however, that opposing counsel can be deposed when the attorney’s advice is used by the client as a defense or the attorney is a fact witness with unique knowledge, an actor (e.g., a defrauder), or the creator of relevant non-privileged records.³² In such circumstances, the deposition should be limited to those matters and not address the attorneys’ role in the action or any investigation of the incident at issue that would be work product.³³

³⁰E.g., *In re Baytown Nissan*, 451 S.W.3d at 149–50 (holding that the trial court abused its discretion in denying a protective order precluding the plaintiff from deposing the defendant’s attorney about a witness interview); *In re Exxon*, 208 S.W.3d at 77 (holding that the trial court abused its discretion in not granting a protective order precluding the deposition of the defendant’s general counsel regarding the defendant’s document production); *In re Burroughs*, 203 S.W.3d at 860 (holding that the trial court abused its discretion in compelling opposing counsel’s deposition); *In re Baptist*, 172 S.W.3d at 146 (holding that the trial court abused its discretion in not quashing a deposition notice for the opposing counsel’s deposition because he was not a fact witness).

³¹See cases cited *supra* note 30.

³²*In re SouthPak*, 418 S.W.3d at 364 (holding that a defense attorney could be deposed about matters learned while he was the defendants’ corporate secretary); cf. *Niagara Mohawk Power Corp. v. Stone & Webster Eng’g Corp.*, 125 F.R.D. 578, 593 n.4 (N.D.N.Y. 1989) (“There are instances where the deposition of an attorney is clearly appropriate. This is usually where the attorney is a fact witness or an actor, the creator of non-privileged records, or the attorney’s advice is used by the client as a defense.”); *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 85 n.2 (M.D.N.C. 1987) (same).

³³See *In re SouthPak*, 418 S.W.3d at 364 (holding that an order compelling defense counsel to testify was overbroad because it was not limited to matters learned by the attorney as the defendants’ corporate secretary). Of course, if an attorney is a fact witness in litigation, the attorney may not ethically be able to represent his or her client in that litigation. See TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 3.08, reprinted in TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (Tex. State Bar R. art. X, § 9) (indicating that a lawyer is generally prohibited from “accept[ing] or continu[ing] employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that [she] is or may be a witness necessary to establish an essential fact on behalf of [her] client”); *Anderson Producing v. Koch Oil Co.*, 929 S.W.2d 416, 418 (Tex. 1996) (“Subject to certain exceptions, Texas Disciplinary Rule of Professional Conduct 3.08 prohibits an attorney from representing a party in an adjudicatory proceeding if the attorney knows or believes that he or she may be a witness at trial.”).

The rule disfavoring depositions of opposing counsel is not limited to trial counsel. It also applies to any attorney involved the action's preparation for trial. "[C]ourts have found that 'the critical factor in determining whether the *Shelton* test applies is not the status of the lawyer as trial counsel, but the extent of the lawyer's involvement in the pending litigation[,]'"³⁴ with the goal being to protect the opposing party's trial strategy, work product, and attorney-client communications. The heightened protection does not apply, however, in other circumstances, such as when the attorney sought to be deposed is not trial counsel or assisting in the litigation, but rather, for example, represented the party in another unrelated, but relevant, action, was involved in the negotiation of the contract at issue, or provided relevant business advice to the party.³⁵ In

³⁴Nat'l W. Life Ins. Co. v. W. Nat'l Life Ins. Co., No. 09-cv-711, 2010 U.S. Dist. LEXIS 132024, at *10 (W.D. Tex. Dec. 13, 2010) (applying the rule to outside counsel who was assisting in litigation (quoting *Murphy v. Adelpia Recovery Trust*, No. 3:09-mc-105, 2009 U.S. Dist. LEXIS 122027, at *3 (N.D. Tex. Nov. 3, 2009)); *accord* *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1112 (10th Cir. 2001) (applying the rule to an in-house attorney involved in presuit investigation); *Massillon Mgmt., LLC v. Americold Realty Trust*, No. 5:08CV0799, 2009 U.S. Dist. LEXIS 22415, at *16–17 (N.D. Ohio Jan. 21, 2009) (applying the rule to a party's general counsel who was involved in presuit and trial strategy); *Malcolm D. Smithson & Christine B. Smithson Trusts v. Amerada Hess Corp.*, No. CIV-06-624 JB, 2007 U.S. Dist. LEXIS 97729, at *24 (D.N.M. Dec. 19, 2007) (applying the rule to in-house counsel assisting in the lawsuit); *In re Boxer Prop. Mgmt. Corp.*, No. 14-00579-CV, 2009 Tex. App. LEXIS 7279, at *17–18 (Tex. App.—Houston [14th Dist.] Sept. 3, 2009, no pet.) (mem. op.) (applying the rule to in-house attorneys); *In re Exxon*, 208 S.W.3d at 76 (applying the rule to defendant's general counsel).

³⁵*E.g.*, *In re SouthPak*, 418 S.W.3d at 364 (allowing the plaintiff to depose defense counsel regarding matters he learned as defendants' corporate secretary); *cf.* *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 730 (8th Cir. 2002) ("But *Shelton* was not intended to provide heightened protection to attorneys who represented a client in a completed case and then also happened to represent that same client in a pending case where the information known only by the attorneys regarding the prior concluded case was crucial. In such circumstances, the protection *Shelton* provides to opposing counsel only applies because opposing counsel is counsel in the instant case and not because opposing counsel had represented the client in the concluded case."); *Anserphone of New Orleans, Inc. v. Protocol Commc'ns, Inc.*, No. 01-3740 Section "A" (1), 2002 U.S. Dist. LEXIS 16876, at *5 (E.D. La. Sept. 10, 2002) (holding that *Shelton* did not apply to the deposition of a transactional lawyer who negotiated the agreement at issue); *Mass. Mut. Life Ins. Co. v. Cerf*, 177 F.R.D. 472, 479 (N.D. Cal. 1998) ("In this case, however, such concerns do not require the issuance of a protective order because Ms. Pfeiffer did not represent Cerf in this action."); *Rowe v. Liberty Mut. Grp., Inc.*, No. 11-cv-366-JL, 2013 U.S. Dist. LEXIS 99065, at *20–21 (D.N.H. July 16, 2013) ("Liberty Mutual also invokes the rule that '[t]aking depositions of opposing trial counsel is generally disfavored and discouraged.' That rule is irrelevant here. Neither of the deponents are 'trial counsel' in this action (Buckley is not an attorney at all) and, while some courts have treated 'supervising in-house counsel' for the litigation as 'trial counsel'

such circumstances, whether the attorney should be deposed and any limitations on the deposition are governed by the general rules regarding protective orders.³⁶

3. Lack of Knowledge

Often, prospective deponents will seek to quash a deposition notice or subpoena on the basis that the deponent lacks any relevant knowledge. If the deposition is not an “apex” one,³⁷ a claimed lack of knowledge generally is an insufficient basis for a protective order because “the general rule is that a claimed lack of knowledge does not provide sufficient grounds for a protective order; the other side is allowed to test this claim by deposing the witness.”³⁸ If, however, the deponent or non-noticing party

for purposes of this rule, Attorney Brown, so far as the court is aware, has no involvement in managing this litigation for Liberty Mutual.”)

³⁶See TEX. R. CIV. P. 192.6(b) (“To protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may—among other things—order that: (1) the requested discovery not be sought in whole or in part; (2) the extent or subject matter of discovery be limited; (3) the discovery not be undertaken at the time or place specified; [or] (4) the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court . . .”).

³⁷See *infra* Section I.A.4 (discussing apex depositions).

³⁸*Cf.* *Amherst Leasing Corp. v. Emhart Corp.*, 65 F.R.D. 121, 122 (D. Conn. 1974); *accord* *Libertarian Party of Ohio v. Husted*, 302 F.R.D. 472, 479 (S.D. Ohio 2014) (“[I]n ordinary circumstances, [it] does [not] matter that the proposed witness is a busy person or professes lack of knowledge of the matters at issue, as the party seeking the discovery is entitled to test the asserted lack of knowledge.”) (quoting *Naftchi v. N.Y. Univ. Med. Ctr.*, 172 F.R.D. 130, 132 (S.D.N.Y. 1997)); *Balfour Beatty Rail, Inc. v. Vaccarello*, No. 3:06-cv-551-J-20MCR, 2007 U.S. Dist. LEXIS 19525, at *8 (M.D. Fla. Mar. 20, 2007) (“The reason why alleged lack of knowledge is not a sufficient ground to prevent a deposition is obvious. The very purpose of the deposition discovery is to test the extent of the deponent’s knowledge and claims of ignorance.”). Because a deponent is not required to have personal knowledge of relevant facts, a claimed lack of personal knowledge is insufficient to prevent a deposition. See Tex. R. Civ. P. 192.3(c) (“A person has knowledge of relevant facts when the person has or may have knowledge of any discoverable matter. *The person need not have admissible information or personal knowledge of the facts.*” (emphasis added)); *In re Jinsun LLC*, No. 14-15-005680CV, 2015 Tex. App. LEXIS 9011, at *12 (Tex. App.—Houston [14th Dist.] Aug. 27, 2015, no pet.) (“Jinsun was not required to show that Dolcefino had ‘personal knowledge of any facts relevant to the disputed issues in this case.’ The trial court abused its discretion by quashing Dolcefino’s deposition on the ground of lack of personal knowledge.”); *In re Team Transp., Inc.*, 996 S.W.2d 256, 259 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (“A person with knowledge of relevant facts need not have personal knowledge of the facts.”).

believes that the noticing party is proceeding in bad faith, the proper response is to move for protection under Texas Rule 192.6.³⁹

In the same vein, the mere prospect that the witness may be asked questions that would be objectionable on privilege grounds is not a basis for failure to attend a deposition; instead, the deponent must appear and objections to specific questions should be made on the basis of privilege.⁴⁰ Of course, if the witness is a consulting expert whose mental impressions and opinions have *not* been reviewed by a testifying expert, the deposition is improper and a motion for a protective order or to quash the deposition notice is proper.⁴¹

³⁹ See TEX. R. CIV. P. 192.6(b)(1) (“To protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may—among other things—order that . . . the requested discovery not be sought in whole or in part . . .”).

⁴⁰ Cf. *In re Chevron Corp.*, 736 F. Supp. 2d 773, 783–84 (S.D.N.Y. 2010) (“The extraordinary nature of Berlinger’s claim that he and his associates cannot be subjected to deposition, even to test largely conclusory and certainly overbroad claims of privilege, is evident by comparing this position to that of one claiming attorney-client privilege, a privilege which, unlike the journalist privilege, is absolute in the sense that it is not overcome even by a compelling showing of need. Where a party seeks disclosure from a witness who may have relevant information concerning allegedly privileged attorney-client communications, the fact that the witness may be asked questions that call for information as to privileged communications does not protect a witness from being deposed or called to testify at a trial or before a grand jury. Rather, the witness must appear and give testimony. When a question seeking disclosure of allegedly privileged material is posed, however, the holder of the alleged privilege may object and delay disclosure until a court rules on the objection. When an objection is made, however, the party seeking disclosure nevertheless is entitled to discover the dates and places of and the identities of the participants in the communications, the identities of others who were present and to whom the communications were disclosed, and the general subject matter (but not the content) of the communications. This permits the party seeking disclosure and, if need be, the court to know which communications are at issue, something about their general nature, whether they in fact were confidential, and whether any privilege has been waived by disclosure of the contents of the communications to persons other than the attorney and client. Once such a record is developed, the court rules on the objection.”); *Elkins v. District of Columbia*, 250 F.R.D. 20, 27 (D.D.C. 2008) (“[T]he District cannot claim privilege pre-emptively, before any deposition question has been propounded.”); see *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1328 (M.D. Fla. 2011) (“Permitting the Commission in this instance to assert a blanket claim of privilege in response to a [Federal] Rule 30(b)(6) notice creates an unworkable circumstance in which a defendant loses a primary means of discovery without a meaningful review of his opponent’s claim of privilege.”).

⁴¹ TEX. R. CIV. P. 192.3(c) (defining discovery’s scope as to testifying and consulting experts).

4. Apex Depositions

In *Crown Central Petroleum Corp. v. Garcia*,⁴² the Texas Supreme Court established the “apex doctrine.” The doctrine applies, and potentially allows an organization’s high-level officials⁴³ to avoid being deposed, when the deposition is noticed solely because of the official’s position in the organization.⁴⁴ If, however, the official is named as a party because the official, for example, participated in or committed the underlying tort, is a party to the contract at issue, or is an owner of the condemned land or damaged property at issue, the doctrine is inapplicable.⁴⁵ Nor does it apply when the official “has unique or superior knowledge of discoverable information.”⁴⁶ This occurs when the official “is ‘the only person with personal knowledge of the information sought[,]’ ‘arguably possesses relevant knowledge greater in quality or quantity than other available sources,’”⁴⁷ or has first-hand knowledge of the facts (e.g., as an eyewitness

⁴²*Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 127 (Tex. 1995) (orig. proceeding).

⁴³*Id.* at 128 (holding that the apex doctrine potentially applies “[w]hen a party seeks to depose a corporate president or other high level corporate official”); *In re Alcatel USA, Inc.*, 11 S.W.3d 173, 175 (Tex. 2000) (orig. proceeding) (same); *In re TMX Fin. of Tex., Inc.*, 472 S.W.3d 864, 872 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (“An apex deposition is the deposition of a corporate officer at the apex of the corporate hierarchy.”) (quoting *AMR Corp. v. Enlow*, 926 S.W.2d 640, 642 (Tex. App.—Fort Worth 1996, no pet.)).

⁴⁴*In re Miscavige*, 436 S.W.3d 430, 437 (Tex. App.—Austin 2014, no pet.) (“The apex-deposition rule becomes a potential issue only when an executive’s corporate position bears some relationship to the underlying information the deposing party seeks.”); *In re Titus Cty.*, 412 S.W.3d 28, 35 (Tex. App.—Texarkana 2013, orig. proceeding) (“[T]he doctrine applies ‘only when the deponent has been noticed for deposition because of his corporate position.’”) (quoting *Simon v. Bridewell*, 950 S.W.2d 439, 442 (Tex. App.—Waco 1997, no pet.) (per curiam)). The doctrine is applicable to governmental organizations. *E.g.*, *Barnes v. Sulak*, No. 03-01-00159-CV, 2002 Tex. App. LEXIS 5727, at *13–15 (Tex. App.—Austin Aug. 8, 2002, pet. denied) (mem. op.) (applying the apex doctrine to a noticed deposition of a county judge).

⁴⁵*E.g.*, *In re Miscavige*, 436 S.W.3d at 438 (“If a high-level executive is named as a defendant based on some dispute that is unrelated to his status as an executive, then the plaintiff has a right to obtain the executive’s deposition just as he or she would any other party.”); *In re Titus*, 412 S.W.3d at 35 (concluding that the apex doctrine did not apply in a condemnation case because the official was the landowner).

⁴⁶*In re Alcatel*, 11 S.W.3d at 175–76; *accord Crown Cent.*, 904 S.W.2d at 128; *In re Taylor*, 401 S.W.3d 69, 73 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

⁴⁷*In re TMX Fin.*, 472 S.W.3d at 872 (quoting *In re Alcatel*, 11 S.W.3d at 170).

to the incident at issue or as one of the principal negotiators of the contract at issue).⁴⁸ As explained by the Austin Court of Appeals:

For example, if a party sought to depose the CEO of General Motors based on some alleged design flaw in a vehicle, then the deposition relates to her status as CEO, and the apex-deposition rule would be implicated. However, if a plaintiff sought to depose the same CEO because she witnessed a car accident, then her status as CEO would be irrelevant to the deposition, and the plaintiff would be entitled to take the CEO's deposition as if she were any other eyewitness.⁴⁹

It, however, is unclear whether the apex doctrine applies when the high-level official is named as a defendant solely because he is an official of the organization.⁵⁰

⁴⁸*In re TMX Fin.*, 472 S.W.3d at 879 (The apex doctrine “does not, for instance, protect corporate officials who have ‘first-hand knowledge of certain facts.’ Here, LoanStar presented evidence that Bielss was actively involved in TMX’s marketing efforts and operations in Texas, regularly holding conference calls concerning marketing and performance goals with regional and district managers and occasionally visiting individual stores in Texas to inquire about marketing practices. Bielss was the one who informed McDonald, Vice President of Operations for Texas, that LoanStar had made allegations of improper conduct against TMX. We conclude that LoanStar has shown that Bielss arguably has ‘unique or superior personal knowledge of discoverable information.’” (quoting *Boales v. Brighton Builders, Inc.*, 29 S.W.3d 159, 168 (Tex. App.—Houston [14th Dist.] 2000, pet. denied), and *Crown Cent.*, 904 S.W.2d at 128)); *Boales*, 29 S.W.3d at 168 (“First, we note that the ‘apex’ doctrine does not apply. Appellants do not seek to depose Krugh merely because of his corporate position. Rather they seek to depose him because they allege he has first-hand knowledge of certain facts, that is, the advice he gave to a Perry Homes vice president during contract negotiations between Perry Homes and Wimpey and to Perry Homes’ sales representatives during training sessions regarding buyer disclosure and the DTPA.”).

⁴⁹*In re Miscavige*, 436 S.W.3d at 437; accord *Simon v. Bridewell*, 950 S.W.2d 439, 442 (Tex. App.—Waco 1997, no pet.) (per curiam) (“A corporate officer is not exempt from deposition by the ‘apex’ doctrine merely because he is a corporate official. Rather, the doctrine may be invoked only when the deponent has been noticed for deposition because of his corporate position. For example, if the president of a Fortune 500 corporation personally witnesses a fatal car accident, he cannot avoid a deposition sought in connection with a resulting wrongful death action because of his ‘apex’ status.”).

⁵⁰*Compare In re Miscavige*, 436 S.W.3d at 438 (“If an executive is sued based on an alleged tort, contract dispute, or other theory of liability that does not arise from actions he took in his capacity as an executive, then the executive is subject to deposition just as any other individual would be. Conversely, we conclude that if an apex executive is named as a defendant based on his

To prevent an apex deposition, the organization or high-level official must file a motion for a protective order or to quash the deposition notice, accompanied by an affidavit from the official denying any unique or superior knowledge of relevant facts.⁵¹ The trial court then must “first determine whether the party seeking the deposition arguably has shown that the official has *any unique or superior personal knowledge of discoverable information.*”⁵² A mere showing that the official has some knowledge of discoverable information or that the official knows about the complained-of activity is insufficient to warrant the apex deposition. As explained by the Texas Supreme Court:

This evidence arguably shows that Kang may have discoverable information. But the first *Crown Central* guideline requires more; it requires that the person to be deposed arguably have “unique or superior personal knowledge of discoverable information.” This requirement is not satisfied by merely showing that a high-level executive has some knowledge of discoverable information. If “some knowledge” were enough, the apex deposition guidelines would be meaningless; they would be virtually indistinguishable from the scope of general discovery. Although *Crown Central* did not elaborate on what character of knowledge makes it unique or superior, there must be some showing beyond mere relevance, such as evidence that a high-level executive is the only person with personal knowledge of the information sought or that the executive arguably possesses relevant knowledge greater in quality or quantity than other available sources.⁵³

capacity as an executive, then the apex doctrine is implicated and the *Crown Central* standard should be applied to a request for his deposition.”), and *In re TMX Fin.*, 472 S.W.3d at 873–76 (following *Miscavige*), with *In re Titus*, 412 S.W.3d at 35 (holding that the apex doctrine does not apply when a high-level office is named as a defendant), and *Simon*, 950 S.W.2d at 443 (same).

⁵¹ *In re Alcatel*, 11 S.W.3d at 175–76; *Crown Cent. Petroleum*, 904 S.W.2d at 128; *In re TMX Fin.*, 472 S.W.3d at 872; *In re Taylor*, 401 S.W.3d at 74.

⁵² *Crown Cent.*, 904 S.W.2d at 128 (emphasis added); accord *In re Daisy Mfg. Co.*, 17 S.W.3d 654, 656 (Tex. 2000) (per curiam); *In re Alcatel*, 11 S.W.3d at 175–76.

⁵³ *In re Alcatel*, 11 S.W.3d at 179; accord *In re Miscavige*, 436 S.W.3d at 436 (“Although *Alcatel* was decided under the *Crown Central* standard, it extended the apex-deposition doctrine by establishing that allegations and evidence indicating that an apex executive must have known about the complained-of corporate activity is insufficient, in and of itself, to support taking an

If the party seeking the deposition establishes the official has unique or superior personal knowledge, the motion must be denied and the apex deposition allowed.⁵⁴ If, however, the party seeking the deposition does not make this showing, the trial court must “first require the party seeking that deposition to attempt to obtain the discovery through less intrusive methods.”⁵⁵ “Less intrusive methods” depend on “the circumstances of the case, but can include depositions of lower-level employees, the deposition of the corporation itself, and interrogatories and requests for production of documents directed to the corporation.”⁵⁶

“The discovering party may thereafter depose the apex official if, after making a ‘good faith effort to obtain the discovery through less intrusive methods,’ the party shows that (1) there is a reasonable indication that the official’s deposition is calculated to lead to the discovery of admissible evidence, and (2) the less-intrusive methods are unsatisfactory, insufficient or inadequate.”⁵⁷ However, “[m]erely completing some less-intrusive discovery does not trigger an automatic right to depose the apex official.”⁵⁸

apex deposition.”); *In re TMX Fin.*, 472 S.W.3d at 873–75 (holding that the mere fact that the official was the sole member, manager, and employee of one of three related defendant-limited liability companies was insufficient to warrant taking the official’s deposition); *In re Cont’l Airlines, Inc.*, 305 S.W.3d 849, 858 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (holding that the mere fact that an airline’s Chief Executive Officer and Chairman gave a statement and answered questions at a press conference following an accident and sent a letter to the passengers expressing his concern about it was insufficient because “the information he gave at the press conference was provided to him by other Continental employees [and] he did not discuss with the deadheading pilots what occurred before, during, and after the accident; he has not received information about the cause of the accident in the executive briefs”); *AMR Corp. v. Enlow*, 926 S.W.2d 640, 644 (Tex. App.—Fort Worth 1996, no pet.) (holding that testimony by the corporation’s president, CEO, and chairman that he had ultimate authority over any policy because he had “about all the authority he needs on most issues in business” amounted to “nothing more than the simple, obvious recognition that the highest-ranking corporate officer of any corporation has the ultimate responsibility for all corporate decisions and falls far short of the [*Crown Central*] standard”).

⁵⁴*In re Alcatel*, 11 S.W.3d at 176 (“Under *Crown Central*, if the party seeking the deposition has ‘arguably shown that the official has any unique or superior personal knowledge of discoverable information,’ the trial court should deny the motion for protection and the party seeking discovery should be entitled to take the apex depositions.”).

⁵⁵*In re Daisy Mfg.*, 17 S.W.3d at 656 (Tex. 2000) (quoting *Crown Cent.*, 904 S.W.2d at 128).

⁵⁶*In re TMX Fin.*, 472 S.W.3d at 873; accord *Crown Cent.*, 904 S.W.2d at 128.

⁵⁷*In re Daisy Mfg. Co.*, 17 S.W.3d at 657 (quoting *Crown Cent. Petroleum Corp.*, 904 S.W.2d at 128); accord *In re Alcatel*, 11 S.W.3d at 176; *In re TMX Fin.*, 472 S.W.3d at 873.

⁵⁸*In re Daisy Mfg.*, 17 S.W.3d at 657; accord *In re TMX Fin.*, 472 S.W.3d at 873; *In re Cont’l Airlines, Inc.*, 305 S.W.3d at 859.

Even if the showing is met, as with any deposition, the trial court retains discretion to restrict the apex deposition's duration, scope, and location under Texas Rule 192.6, which governs protective orders.⁵⁹

5. Depositions of Organizations (i.e., Representative Depositions)

Under Texas Rules 199.2, 200.1, and 202.1, a party—both during discovery in an action or in a presuit deposition to perpetuate testimony or investigate a claim or suit under Texas Rule 202—can depose an organization itself instead of merely its officers, directors, employees, or agents.⁶⁰ Texas Rule 199.2(b)(1) sets forth the procedure for doing so:

The [deposition] notice must state the name of the witness, which may be either an individual or a public or private corporation, partnership, association, governmental agency, or other organization. If an organization is named as the witness, the notice must describe with reasonable particularity the matters on which examination is requested. In response, the organization named in the notice must—a reasonable time before the deposition—designate one or more individuals to testify on its behalf and set forth, for each individual designated, the matters on which the individual will testify. Each individual designated must testify as to matters that are known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized by these rules.⁶¹

⁵⁹ *Crown Cent.*, 904 S.W.2d at 128 (“As with any deponent, the trial court retains discretion to restrict the duration, scope and location of the deposition.”); TEX. R. CIV. P. 192.6(b)(4) (allowing the trial court to issue a protective order that a deposition be taken only “upon such terms and conditions or at the time and place directed by the court”).

⁶⁰ *See id.* 199.2; *id.* 200.1; *id.* 202.1.

⁶¹ *Id.* 199.2(b)(1). Texas Rule 201.1, governing depositions upon written question, adopts the procedure of Texas Rule 199.2(b)(1): “The [deposition] notice must comply with [Texas] Rules 199.1(b)” So does Texas Rule 202, which governs presuit depositions. *See id.* 202.5 (noting that “depositions authorized by this rule are governed by the rules applicable to depositions of nonparties in a pending suit,” which in turn allow for representative depositions). Texas Rule 176.6(b), which relates to subpoenas, similarly provides: “If a subpoena commanding testimony is directed to a corporation, partnership, association, governmental agency, or other organization, and the matters on which examination is requested are described with reasonable particularity, the

Texas Rule 199.2(b)(1) is based on Federal Rule 30(b)(6),⁶² which was adopted to balance the needs of parties seeking discovery from an organization and the organization itself. Both Rules protect the party seeking discovery from the organization by preventing “bandying” by organizational witnesses, each of whom denies knowledge of relevant information or facts known by, or reasonably available to, the organization.⁶³ At the same time, the Rule protects the organization from

organization must designate one or more persons to testify on its behalf as to matters known or reasonably available to the organization.” *Id.* 176.6(b).

⁶² See *In re Fina Oil & Chem. Co.*, No. 13-98-640-CV, 1999 Tex. App. LEXIS 1751, at *14–15 (Tex. App.—Corpus Christi Mar. 11, 1999, writ den.) (not designated for publication) (noting that former Texas “Rule 201(4) is patterned after Federal Rule of Civil Procedure 30(b)(6)” and following federal cases interpreting the Federal Rule); *Hosp. Corp. of Am. v. Farrar*, 733 S.W.2d 393, 394–95 (Tex. App.—Fort Worth 1987, no pet.) (equating former Texas Rule 201(4) to Federal Rule 30(b)(6) and following federal cases interpreting the Federal Rule). Federal Rule 30(b)(6) provides:

In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

FED. R. CIV. P. 30.

There is one significant difference between Texas Rule 199.2(b)(1) and Federal Rule 30(b)(6): the Texas Rule requires the organization to designate the matters on which each representative will testify, *see* TEX. R. CIV. P. 199.2(b)(1) (providing that the organization “*must* . . . set forth, for each individual designated, the matters on which the individual will testify (emphasis added)), while the Federal Rule does not, *see* FED. R. CIV. P. 30(b)(6) (providing that the organization “*may* set out the matters on which each person designated will testify” (emphasis added)).

⁶³ FED. R. CIV. P. 30 advisory committee’s note to 1970 amendment. (“[Federal Rule 30(b)(6)] will curb the ‘bandying’ by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it.”); *see Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 432–33 (5th Cir. 2006) (“[Federal] Rule 30(b)(6) is designed ‘to avoid the possibility that several officers and managing agents might be deposed in turn, with each disclaiming personal knowledge of facts that are clearly known to persons within the organization and thus to the organization itself.’”) (quoting 8A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2103, at 33 (2d ed. 1994)); *Murphy v. Kmart Corp.*, 255 F.R.D. 497, 504 (D.S.D. 2009) (Federal Rule 30(b)(6) “curbs the ‘bandying’ by which various organizational officers or agents, while being

multiple depositions of its officers and employees by parties taking “shots in the dark” trying to identify the ones who have relevant information.⁶⁴ It also gives the organization control over the person to be deposed.⁶⁵

A representative deposition can be taken of both party and nonparty organizations.⁶⁶ If the organization designates more than one individual to testify on its behalf, each individual is considered a separate witness for purposes of the six-hour, per-deposition time limit of Texas Rule 199.5(c).⁶⁷

Unlike the typical deposition, a representative deposition is akin to answering interrogatories. In fact, the 1970 Advisory Committee Notes to the 1970 amendments to Federal Rule 30(b), in reference to the burden on an organization to prepare its witness, recognized this fact: “This burden is not essentially different from that of answering interrogatories under Federal Rule of Civil Procedure 33.”⁶⁸ Thus, as discussed below, as with interrogatories, the representative deposition notice must “describe with reasonable particularity the matters on which examination is requested.”⁶⁹ Based on this advanced notice, the organization’s designated witnesses are required to gather the information needed to fully answer questions about the matters on which they have been designated to testify, with the goal of

deposed, disclaim knowledge of facts clearly known by some other officer or agent of the organization.”); *FDIC v. Butcher*, 116 F.R.D. 196, 199 (E.D. Tenn. 1986), *aff’d*, 116 F.R.D. 203 (E.D. Tenn. 1987) (stating that Federal Rule 30(b)(6)’s purpose is to “curb any temptation a [litigant] might have to shunt a discovering party from ‘pillar to post’”).

⁶⁴*E.g.*, FED. R. CIV. P. 30, advisory committee’s note to 1970 amendment. (Federal Rule 30(b)(6) “should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge.”); see *Murphy*, 255 F.R.D. at 504 (Federal Rule 30(b) “protects the organization by eliminating unnecessary and unproductive depositions of employees who have no knowledge of the topics at issue”); *United States v. Taylor*, 166 F.R.D. 356, 360 (M.D.N.C. 1996), *aff’d*, 166 F.R.D. 367 (M.D.N.C. 1996) (Federal Rule 30(b)(6) “was added in 1970 . . . to assist corporations which found an unnecessarily large number of their officers and agents were being deposed.”).

⁶⁵*E.g.*, *QBE Ins. Corp. v. Jorda Enters.*, 277 F.R.D. 676, 687 (S.D. Fla. 2012) (“The rule gives the corporation being deposed more control by allowing it to designate and prepare a witness to testify on the corporation’s behalf.”); *Taylor*, 166 F.R.D. at 360 (same).

⁶⁶See TEX. R. CIV. P. 176.6(b); *id.* 199.1(a); *id.* 199.2(b); *id.* 200.1(a); *id.* 200.1(b); *id.* 202.5.

⁶⁷*Id.* 199 cmt. 2 (“For purposes of [Texas] Rule 199.5, each person designated by an organization under [Texas] Rule 199.2(b)(1) is a separate witness.”).

⁶⁸FED. R. CIV. P. 30, advisory committee’s note to 1970 amendment.

⁶⁹TEX. R. CIV. P. 199.2(b)(1); see also *id.* 176.6(a) (requiring the same for a subpoena for a nonparty organization’s deposition); *id.* 200.1(b) (incorporating Texas Rule 199.2(b)(1)’s requirement for depositions upon written questions). The particularity requirement for a representative deposition is discussed in Section I.A.5.a.ii.

setting forth the full breadth of the organization's knowledge about them.⁷⁰ This is similar to the process of answering interrogatories and generally, as is common with answering interrogatories, requires counsel's assistance to ensure accuracy and completeness and to avoid the inadvertent disclosure of privileged information.

a. The Representative Deposition Notice

Under Texas Rules 199.2 and 200.1, the party seeking an organization's deposition must serve a deposition notice naming the organization as the deponent.⁷¹ The notice alone is sufficient to trigger a duty to respond by the party organization, whereas a nonparty organization must be served with the notice and a subpoena.⁷² The representative deposition notice, unlike one for an individual's deposition, "must describe with reasonable particularity the matters on which examination is requested."⁷³

⁷⁰See *infra* notes 105–11 and accompanying text (discussing the organization's duty of reasonable inquiry in connection with a representative deposition).

⁷¹TEX. R. CIV. P. 199.2(b)(1) ("The notice must state the name of the witness, which may be either an individual or a public or private corporation, partnership, association, governmental agency, or other organization."); *id.* 200.1(b) ("The notice must comply with [Texas] Rule . . . 199.2(b) . . .").

⁷²*Id.* 199.3 ("A party may compel the witness to attend the oral deposition by serving the witness with a subpoena under [Texas] Rule 176. If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the notice of oral deposition upon the party's attorney has the same effect as a subpoena served on the witness."); *id.* 200.2 ("A party may compel the witness to attend the deposition on written questions by serving the witness with a subpoena under [Texas] Rule 176. If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the notice of oral deposition upon the party's attorney has the same effect as a subpoena served on the witness."); *id.* 205.1 ("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 [Texas] 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 [Texas] Rule 199.2(b)(5) or [Texas] Rule 200.1(b), served with a notice of deposition on oral examination or written questions; and (d) a request for production of documents and tangible things under this rule.").

⁷³*Id.* 199.2(b)(1); *accord id.* 176.6(b) ("If a subpoena commanding testimony is directed to a corporation, partnership, association, governmental agency, or other organization, and the matters on which examination is requested are described with reasonable particularity, the organization must designate one or more persons to testify on its behalf as to matters known or reasonably available to the organization."); *id.* 200.1(b) ("The notice must comply with [Texas] Rule . . . 199.2(b) . . ."); *cf.* *Alexander v. FBI*, 186 F.R.D. 137, 139 (D.D.C. 1998) ("[B]efore defendant EOP even needed to designate a witness under the notice of deposition, plaintiffs must have

The following questions arise regarding representative deposition notices. *First*, can the noticing party require the organization to designate specific officers, directors, or employees to testify on its behalf or, alternatively, require the organization to designate an individual with the most knowledge or with personal knowledge about the matters identified in the notice? *Second*, what constitutes “reasonable particularity?” *Third*, is the noticing party, during the deposition, limited to asking questions only about the subject matters in the deposition notice or those matters for which the representative has been designated to testify? *Fourth*, what is the proper way to object to a deposition notice that, for example, is not reasonably particular or purports to require the organization to produce a specific officer or employee to testify on its behalf? The answers to these questions are discussed below.

i. The Organization Is Not Required to Produce a Specific Individual as Its Representative or an Individual With the Most Knowledge About the Notice’s Subject Matters or Even One With Personal Knowledge About Them

Representative deposition notices often attempt to designate the specific officer, director, or employee that the noticing party wants to depose on the organization’s behalf. For example, the notice might state: “Pursuant to Texas Rule of Civil Procedure 199.2(b)(1), Plaintiff will depose John Smith, Defendant’s Chief Financial Officer, on the following subjects as Defendant X Corporation’s representative.” Other times, the notice will ask the organization to produce a representative with “the most knowledge” about its subject matters or one with “personal knowledge” about them. Such notices are improper.

As is clear from Texas Rule 199.2(b)(1)’s language, the organization has the sole right to designate the individual(s) who will testify on its behalf: “the *organization . . . must . . .* designate one or more individuals to testify on its behalf[.]”⁷⁴ For example, in *Cleveland v. Palmby*, a federal district court rejected a motion to compel the defendant corporation to produce a specific employee as its representative, reasoning that:

‘described with reasonable particularity the matters on which examination is requested.’”) (quoting FED. R. CIV. P. 30(b)(6)).

⁷⁴TEX. R. CIV. P. 199.2(b)(1).

[Federal Rule 30(b)(6)] provides that a party who is unable to name the specific employee or agent of an organization that he wishes to depose, can simply name the organization as the deponent and describe with reasonable particularity the matters on which examination is requested. It is then the duty of the organization to name one or more persons who consent to testify on its behalf and these persons must testify as to matters known or reasonably available to the organization. This Rule does not provide that a party can specifically name an employee of an organization and then require the organization to designate such employee as a witness to testify on behalf of the organization.⁷⁵

In the same vein, a deposition notice requiring the organization to designate an individual with personal knowledge of the notice's subject

⁷⁵Cleveland v. Palmby, 75 F.R.D. 654, 657 (W.D. Okla. 1977); accord Thornton v. UL Enters., LLC, No. Civ. 09-287E, 2011 U.S. Dist. LEXIS 41149, at *3-4 (W.D. Pa. Apr. 14, 2011) (holding defective, under Federal Rule 30(b)(6), an "Amended Notice of Deposition of Steve Larson" stating that "NOTICE is hereby given that the deposition upon oral examination of Steve Larson, has been rescheduled and will be taken, pursuant to Fed. R. Civ. P. 30" because "[t]he Notice does not designate whether Mr. Larson is to testify in his individual capacity and/or on behalf of STNA"); Wultz v. Bank of China Ltd., 298 F.R.D. 91, 99 (S.D.N.Y. 2014) ("Of course the court cannot compel Hapoalim to designate a *specific* person. But a court *can* compel Hapoalim to select a designee and educate her in accordance with its duty under [Federal] Rule 30(b)(6)."); Booker v. Mass. Dep't of Pub. Health, 246 F.R.D. 387, 389 (D. Mass. 2007) ("Plaintiff may not impose his belief on Defendants as to whom to designate as a 30(b)(6) witness."); Operative Plasterers' & Cement Masons' Int'l Ass'n v. Benjamin, 144 F.R.D. 87, 89-90 (N.D. Ind. 1992) (holding defective, under Federal Rule 30(b)(6), a deposition notice identifying the proposed deponents as "Mr. Beam," "Vince Panepinto," "Dominic Martell[,] and "Mr. Martinez" and stating that the depositions were being taken pursuant to "Federal Rules of Civil Procedure 26, 30(b)(6) and 32(a)(2)"); Fraser Yachts Fla., Inc. v. Milne, No. 05-21168-Civ-JORDAN/TORRES, 2007 U.S. Dist. LEXIS 27546, at *6 (S.D. Fla. Apr. 13, 2007) ("When a party notices a [Federal] Rule 30(b)(6) deposition, however, it leaves to the corporation's discretion who it chooses to be its representative."); Sears v. Am. Entm't Grp., No. 94 C 0165, 1995 U.S. Dist. LEXIS 1754, at *1 (N.D. Ill. Feb. 10, 1995) ("In their motion for protective order, defendants initially argue that the Notice of Deposition is defective. This argument is well taken. The Notice does not identify whether the deposition is being taken pursuant to Federal Rule of Civil Procedure 30(b)(1) or 30(b)(6). Since plaintiff has designated the deponents, the Notice cannot be made pursuant to [Federal] Rule 30(b)(6)."); GTE Prods. Corp. v. Gee, 115 F.R.D. 67, 68-69 (D. Mass. 1987) (holding defective, under Federal Rule 30(b)(6), deposition notices stating that the defendants "will take the deposition upon oral examination of [the plaintiff] GTE Products Corporation, by [a named person] on [a given date]").

matters is improper.⁷⁶ Because the organization does not have to designate a representative with personal knowledge, it follows that it also does not have to designate the “most knowledgeable” person. As recently explained by a federal court:

[Federal] Rule 30(b)(6) does not expressly or implicitly require the corporation or entity to produce the “person most knowledgeable” for the corporate deposition. Nevertheless, many lawyers issue notices and subpoenas which purport to require the producing party to provide “the most knowledgeable” witness. Not only does the rule not provide for this type of discovery demand, but the request is also fundamentally inconsistent with the purpose and dynamics of the rule. As noted, the witness/designee need not have *any* personal knowledge, so the “most knowledgeable” designation is illogical. Moreover, a corporation may have good grounds not to produce the “most knowledgeable” witness for a 30(b)(6) deposition. For example, that witness might be comparatively inarticulate, he might have a criminal conviction, she might be out of town for an extended trip, he might not be photogenic (for a videotaped deposition), she might prefer to avoid the entire process or the corporation might want to save the witness for trial. From a practical perspective, it might be difficult to determine which witness is the “most” knowledgeable on any given topic. And permitting a requesting party to insist on the production of the most

⁷⁶*Cf.* *PPM Fin., Inc. v. Norandal USA, Inc.*, 392 F.3d 889, 894–95 (7th Cir. 2004) (“[A]s Jackson correctly points out, Krupinski was designated as a witness under Fed. R. Civ. P. 30(b)(6), which authorized him to testify not only to matters within his personal knowledge but also to ‘matters known or reasonably available to the organization.’ Thus, Krupinski was free to testify to matters outside his personal knowledge as long as they were within the corporate rubric.”) (citation omitted); *Elan Microelectronics Corp. v. Pixcir Microelectronics Co.*, No. 2:10-cv-00014-GMN-PAL, 2013 U.S. Dist. LEXIS 114164, at *14 (D. Nev. Aug. 7, 2013) (“A [Federal] Rule 30(b)(6) designee is not required to have personal knowledge on the designated subject matter.”); *QBE Ins. Corp. v. Jorda Enters.*, 277 F.R.D. 676, 688 (S.D. Fla. 2012) (same); *Dodson Aviation, Inc. v. HLMP Aviation Corp.*, No. 08-4102-KGS, 2011 U.S. Dist. LEXIS 36063, at *38 (D. Kan. Mar. 31, 2011) (“[A Federal] Rule 30(b)(6) deponent is not required to have personal knowledge as to the facts to which he testifies because he testifies as to the corporation’s position on the matters set forth in the deposition notice, not his personal opinion.”); *PPM Fin., Inc. v. Norandal USA, Inc.*, 297 F. Supp. 2d 1072, 1085–86 (N.D. Ill. 2004) (same).

knowledgeable witness could lead to time-wasting disputes over the comparative level of the witness' knowledge. For example, if the rule authorized a demand for the most knowledgeable witness, then the requesting party could presumably obtain sanctions if the witness produced had the *second* most amount of knowledge. This result is impractical, inefficient and problematic, but it would be required by a procedure authorizing a demand for the "most" knowledgeable witness. But the rule says no such thing.⁷⁷

⁷⁷ *QBE Ins.*, 277 F.R.D. at 688–89; *accord In re Family Dollar Stores of Tex., LLC*, No. 04-14-00656-CV, 2015 Tex. App. LEXIS 4325, at *7 (Tex. App.—San Antonio Apr. 29, 2015, no pet.) (mem. op.) (“The corporation is entitled to present one or more witnesses to meet this obligation with respect to the topics specified in the corporate representative deposition notice. There is no obligation to present the ‘most knowledgeable’ person, or an individual with personal knowledge of the specified topics, but only a person reasonably prepared to address the subject matters designated in the notice.”) (internal citations omitted); *Eid v. KLM*, No. 14cv9066-PKC-FM, 2015 U.S. Dist. LEXIS 136409, at *5–6 (S.D.N.Y. Oct. 2, 2015) (“[I]t was not improper for the Defendants to fail to produce Abelmoneim. ‘[I]t is settled law that a party need not produce the organizational representative with the greatest knowledge about a subject; instead, it need only produce a person with knowledge whose testimony will be binding on the party.’ Here, the Defendants met that burden.”) (quoting *Rodriguez v. Pataki*, 293 F. Supp. 2d 305, 311 (S.D.N.Y. 2003)); *Aldridge v. Lake Cty. Sheriff’s Office*, No. 11 C 3041, 2012 U.S. Dist. LEXIS 102514, at *10 (N.D. Ill. July 24, 2012) (“While the ‘most knowledgeable person’ about the chain of custody may, ultimately, have been Ms. Robin’s colleague because he took the plastic coyote into evidence and released it, the most knowledgeable person is not required under [Federal] Rule 30(b)(6).”); *Towers Condo. Ass’n v. Pac. Ins. Co.*, No. 10-24310-CIV-GRAHAM/GOODMAN, 2011 U.S. Dist. LEXIS 138953, at *24–25 (S.D. Fla. Dec. 2, 2011) (“Pacific frames the issue as one of Kendall’s failure to provide the person with *the* most knowledge concerning the relevant issues, but this is not what [Federal] Rule 30(b)(6) requires. Under the Rule, the deponent selected to be the designee does not even need to have personal knowledge of the subject matter of the testimony so long as he can *become* knowledgeable of information that is generally known to the organization through reasonable preparation. Because [Federal] Rule 30(b)(6) imposes an obligation *on the organization* to select an individual to testify, the party seeking discovery is not entitled to insist on a specific person as the corporate representative and it likewise cannot demand the testimony of a designee the with the ‘most’ knowledge of a given matter.”). Because Texas Rule 199.2(b)(1) requires the organization to identify each of its representatives and the topics on which they will testify “a reasonable time before the deposition,” practitioners often respond to the designation by amending the deposition notice to state, for example, that “Defendant will take the deposition of John Doe, as the corporate representative of Plaintiff X Corporation, on the following topics.” Such an amended notice is objectionable because the organization can change its representative even after his or her designation as long as the organization gives reasonable notice of the change before the deposition date.

ii. Reasonable Particularity

“Reasonable particularity” with respect to the “matters” on which the organization is to be examined, like “reasonable particularity” with respect to a Texas Rule 196 production request, is not susceptible to a precise definition.⁷⁸ Rather, it depends on whether a reasonable person would understand about what matters the notice is requesting examination.⁷⁹ This, in turn, depends on the facts of the particular case.

Two common types of subject-matter designations, however, are never “reasonably particular.” The first is a subject matter that uses the word “including” or the phrase, “including, but not limited to.” As explained by the court in *Innomed Labs, LLC v. Alza Corp.*: “Innomed’s subpoena requests a person to be deposed about the documents ‘including but not limited to’ the areas specified. This language turns the subpoena into an overbroad notice, in contradiction to the ‘reasonable particularity’ required by [Federal] Rule 30(b)(6).”⁸⁰

⁷⁸No Texas cases, and only a few federal cases, discuss the “reasonable particularity” requirement for a representative deposition notice. Cases discussing the “reasonable-particularity” requirement for production requests, however, should be instructive. See Robert K. Wise, *Ending Evasive Responses to Written Discovery: A Guide for Properly Responding (and Objecting) to Interrogatories and Document Requests under the Texas Discovery Rules*, 65 BAYLOR L. REV. 510, 542 (2013) (discussing the particularity requirement for production requests).

⁷⁹*Cf.* Koninklijke Philips N.V. v. Zoll LifeCor Corp., No. 2:12-cv-1369, 2014 U.S. Dist. LEXIS 131078, at *12 (W.D. Pa. Aug. 22, 2014) (“[W]hen determining whether a [Federal] Rule 30(b)(6) deposition notice satisfies the ‘reasonable particularity’ standard, it is appropriate to bear in mind that a producing party potentially faces sanctions for failing to adequately prepare a corporate representative to testify on its behalf. Practically speaking, that means that the producing party must be able to reasonably identify the metes and bounds of the listed topics.”); see *Hager v. Graham*, 267 F.R.D. 486, 493 (N.D. W. Va. 2010) (discussing Federal Rule 34 and holding that “[t]he test for reasonable particularity is whether the request places the party upon ‘reasonable notice of what is called for and what is not.’ Therefore, the party requesting the production of documents must provide ‘sufficient information to enable [the party to whom the request is directed] to identify responsive documents.’ This test, however, is a matter of degree depending on the circumstances of the case.”) (quoting *Kidwiler v. Progressive Paloverde Ins. Co.*, 192 F.R.D. 193, 202 (N.D. W. Va. 2000)).

⁸⁰*Innomed Labs, LLC v. Alza Corp.*, 211 F.R.D. 237, 240 (S.D.N.Y. 2002); *accord* *Health Grades, Inc. v. MDx Med., Inc.*, No. 11-cv-00520-PAB-BNB, 2013 U.S. Dist. LEXIS 59271, at *11 (D. Colo. Apr. 25, 2013); *Fed. Ins. Co. v. Delta Mech. Contractors, LLC*, No. 11-048ML, 2013 U.S. Dist. LEXIS 47582, at *12–13 (D.R.I. Apr. 2, 2013); *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 125 (D.D.C. 2005); *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000).

The second is an omnibus subject matter calling for all information supporting all of the opposing parties' allegations, claims, or defenses. As explained by one federal court:

While the notice does call for the designation of a witness to testify as to any statement of fact set forth in the amended complaint to which defendant has denied, such a request does not provide with reasonable particularity the matters on which examination is requested. Plaintiff should have specifically listed all subject matters for which a 30(b)(6) designation is sought.⁸¹

iii. The Noticing Party Generally Can Question an Organization's Representative about Matters for Which the Representative was not Designated and About Matters Outside the Deposition Notice's Scope

A question arising from Texas Rule 199.2(b)(1)'s reasonable-particularity requirement for representative deposition notices is whether the organization's representative, at the deposition, can decline to answer questions about matters either for which he or she has not been designated or which are outside the deposition notice's scope? No Texas case has considered the question, and federal courts are divided on the issue.

One federal court, reasoning that Federal Rule 30(b)(6) implicitly restricts the scope of examination by requiring the noticing party to describe "with reasonable particularity the matters for examination," has held: "[I]f a party opts to employ the procedures of [Federal] Rule 30(b)(6) . . . to depose the representative of a corporation, that party must confine the examination to the matters stated 'with reasonable particularity' which are contained in the Notice of Deposition."⁸² Every other federal court that has considered the question, however, has held the opposite. As explained by the leading federal case on the issue:

[Federal] Rule 30(b)(6) should not be read to confer some special privilege on a corporate deponent responding to this

⁸¹ Skladzien v. St. Francis Reg'l Med. Ctr., No. 95-1518-MLB, 1996 U.S. Dist. LEXIS 20621, at *2 (D. Kan. Dec. 18, 1996).

⁸² Paperilli v. Prudential Life Ins. Co., 108 F.R.D. 727, 730 (D. Mass. 1985). The court in *Paperilli* also ruled that the organization's attorney must seek a protective order rather than simply instructing the witness not to answer matters outside the notice's scope. *Id.*

type of notice. Clearly, Plaintiff could simply re-notice a deponent under the regular notice provisions and ask him the same questions that were objected to. However, Plaintiff should not be forced to jump through that extra hoop absent some compelling reason. Rather, the Rule is best read as follows:

- 1) [Federal] Rule 30(b)(6) obligates the responding corporation to provide a witness who can answer questions regarding the subject matter listed in the notice.
- 2) If the designated deponent cannot answer those questions, then the corporation has failed to comply with its [Federal] Rule 30(b)(6) obligations and may be subject to sanctions, etc. The corporation has an affirmative duty to produce a representative who can answer questions that are both within the scope of the matters described in the notice and are “known or reasonably available” to the corporation. [Federal] Rule 30(b)(6) delineates this affirmative duty.
- 3) If the examining party asks questions outside the scope of the matters described in the notice, the general deposition rules govern (i.e. Fed. R. Civ. P. 26(b)(1)), so that relevant questions may be asked and no special protection is conferred on a deponent by virtue of the fact that the deposition was noticed under 30(b)(6).
- 4) However, if the deponent does not know the answer to questions outside the scope of the matters described in the notice, then that is the examining party’s problem.

This interpretation does not render the “describe with reasonable particularity” language “superfluous”; rather, it imposes an obligation on a corporation to provide someone who can indeed answer the particular questions presaged by the notice. [Federal] Rule 30(b)(6) does not limit what can be asked at deposition.

Since there is no specific limitation of what can be asked at deposition, the general deposition standards govern. The reason for adopting [Federal] Rule 30(b)(6) was not to provide greater notice or protections to corporate deponents, but rather to have the right person present at deposition. The Rule is not one of limitation but rather of specification within the broad parameters of the discovery rules. This is made clear by both the Advisory Committee's statement that 30(b)(6) "should be viewed as an added facility for discovery . . ." and the Rule's final sentence: "This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules." This Court sees no harm in allowing all relevant questions to be asked at a [Federal] Rule 30(b)(6) deposition or any incentive for an examining party to somehow abuse this process.

In sum, this Court concludes that [Federal] Rule 30(b)(6) cannot be used to limit what is asked of a designated witness at a deposition. Rather, the Rule simply defines a corporation's obligations regarding whom they are obligated to produce for such a deposition and what that witness is obligated to be able to answer.⁸³

The majority view is the better one. Accordingly, if the organization's representative is asked questions about subject matters on which the representative has not been designated or that are outside the scope of those in the deposition notice or subpoena, instead of instructing the representative not to answer such questions, the organization's counsel should object to the questions as beyond the representative's designation or

⁸³King v. Pratt & Whitney, 161 F.R.D. 475, 476 (S.D. Fla. 1995); accord *Alsabur v. Autozone, Inc.*, No. 13-cv-01689-KAW, 2014 U.S. Dist. LEXIS 84390, at *4-5 (N.D. Cal. June 18, 2014) ("However, the 'reasonable particularity' requirement of [Federal] Rule 30(b)(6) cannot be used to limit what is asked of the designated witness at a deposition.") (quoting *UniRAM Tech., Inc. v. Monolithic Sys. Tech., Inc.*, No. C 04-1268 VRW (MEJ), 2007 U.S. Dist. LEXIS 24869, at *6 (N.D. Cal. Mar. 23, 2007)); *First Fin. Bank, N.A. v. Bauknecht*, No. 12-cv-1509, 2014 U.S. Dist. LEXIS 31394, at *9-10 (C.D. Ill. Mar. 11, 2014) ("[A]ll district courts that have addressed the issue [since *King*] have followed suit, concluding that any relevant questions can be asked during a 30(b)(6) deposition, not just on matters listed in the notice of deposition."); *Am. Gen. Life Ins. Co. v. Billard*, No. C10-1012, 2010 U.S. Dist. LEXIS 114961, at *11-12 (N.D. Iowa Oct. 28, 2010) (collecting cases).

the notice's scope, noting that the witness is not testifying regarding such matters on the organization's behalf in answering them.⁸⁴ In fact, federal courts have held that answers to questions exceeding the scope of a representative deposition notice's subject matters do not "bind" the organization, but rather merely are the answers of the representative in the representative's individual capacity.⁸⁵ And, "[p]rior to trial, counsel may request from the trial judge jury instructions that such answers were merely the answers or opinions of individual fact witnesses, not admissions of the party."⁸⁶ Finally, as noted above, if the representative does not know the

⁸⁴ See Meyer Corp. U.S. v. Alfay Designs, Inc., No. CV 2010 3647(CBA)(MDG), 2012 U.S. Dist. LEXIS 113819, at *13–14 (E.D.N.Y. Aug. 12, 2012) (noting that a party "is permitted to object to a question as beyond the scope of the [Federal Rule 30(b)(6)] notice in order to preserve for the record that the deponent is answering such a question in an individual, not corporate[,] capacity"); cf. EEOC v. Caesars Entm't, Inc., 237 F.R.D. 428, 433 (D. Nev. 2006) ("[C]ounsel may note on the record that answers to questions beyond the scope of the [Federal] Rule 30(b)(6) designation are not intended as the answers of the designating party and do not bind the designating party.") (quoting *Detoy v. City & Cty. of S.F.*, 196 F.R.D. 362, 367 (N.D. Cal. 2000)); Texas Rule 199.5(f) allows "[a]n attorney [to] instruct a witness not to answer a question . . . if necessary to . . . protect a witness from abuse or one for which an answer would be misleading." Tex. R. Civ. P. 199.5(f). Although it can be argued that asking an organization's representative questions about matters beyond the scope of his or her designation or the deposition notice's subject matters is "misleading," Comment 4 to [Texas] Rule 199 suggests that an instruction not to answer is appropriate only when an objection is "inadequate." Clearly, an objection that a question is beyond the scope of the representative's designation or the deposition notice's subject matters is adequate, and the organization's attorney generally should not instruct the representative not to answer such questions. If, however, the questioning attorney is trying to create a misleading record or acting in bad faith by, for example, turning the deposition into the representative's personal deposition, the best solution is to terminate the deposition and move for a protective order under Texas Rule 192.6. Cf. *Peshlakai v. Ruiz*, No. CIV 13-0752 JB/ACT, 2014 U.S. Dist. LEXIS 14278, at *80–81 (D.N.M. Jan. 9, 2014) ("In the unusual case where the questioning party abuses the [Federal R]ule 30(b)(6) device—for example, where the questioning party notices the deposition as a [Federal R]ule 30(b)(6) deposition about a few discrete topics, but begins to conduct what is, in substance, a fact-witness deposition—the corporation is free to move to terminate or limit the deposition under [Federal R]ule 30(d)(3) 'on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party,' that is, the corporation or its designee.

⁸⁵ E.g., *EEOC v. Freeman*, 288 F.R.D. 92, 99 (D. Md. 2012) ("The deponent's answers to questions outside the scope of the notice will not bind the organization, and the organization cannot be penalized if the deponent does not know the answer."); *Falchenberg v. N.Y. State Dep't of Educ.*, 642 F. Supp. 2d 156, 164 (S.D.N.Y. 2008) ("Questions and answers exceeding the scope of the 30(b)(6) notice will not bind the corporation, but are merely treated as the answers of the individual deponent."), *aff'd on other grounds*, 338 Fed. Appx. 11 (2d Cir. 2009).

⁸⁶ *EEOC*, 237 F.R.D. at 433 (quoting *Detoy*, 196 F.R.D. at 367).

answer to questions outside the subject matters for which he or she has been designated or outside of the deposition notice's scope, that "is the examining party's problem."⁸⁷

iv. Objecting to a Representative Deposition Notice

Unlike Texas Rules 196.2(b), 197.2(b), 198.2(b), and 176.6(d), which respectively govern responses to production requests, interrogatories, requests for admission, and subpoenas requesting the production of documents and tangible things, there is no provision in Texas Rules 199.2(b)(1) or 176.6(b) allowing an organization to object to a representative deposition notice or subpoena. Accordingly, if the organization believes that the notice's or subpoena's subject matters are not reasonably particular or are otherwise objectionable (e.g., they are overbroad) or that the documents suffer from another malady, such as requiring the organization to designate a specific person as its representative or a representative with personal or the most knowledge about the notice's or subpoena's subject matters, the organization should either file a motion for protective order or move to quash the notice or subpoena before the deposition.⁸⁸ In other words, the organization "cannot simply 'decide on its

⁸⁷ *Alsabur*, 2014 U.S. Dist. LEXIS 84390, at *5 (quoting *Detoy*, 196 F.R.D. at 367); *accord Falchenberg*, 642 F. Supp. 2d at 164; *EEOC*, 237 F.R.D. at 433; *King*, 161 F.R.D. at 476 (S.D. Fla. 1995).

⁸⁸ *See* TEX. R. CIV. P. 192.6(a) ("A person from whom discovery is sought, and any other person affected by the discovery request, may move within the time permitted for response to the discovery request for an order protecting that person from the discovery sought."); *cf.* *Beach Mart, Inc. v. L&L Wings, Inc.*, 302 F.R.D. 396, 406 (E.D.N.C. 2014); *Fort Worth Emps. Ret. Fund v. J.P. Morgan Chase & Co.*, No. 09 Civ. 3701(JPO)(JCF), 2013 U.S. Dist. LEXIS 173006, at *7–8 (S.D.N.Y. Dec. 9, 2013) ("[T]here is no provision in the rules which provides for a party whose deposition is noticed to serve objections so as to be able to avoid providing the requested discovery until an order compelling discovery is issued . . ."); *id.* ("The weight of the authority holds that a party believing it has received a flawed 30(b)(6) notice may not merely rest upon its objections, but must move for a protective order. . . . This principle applies not only to objections that go to the notice in its entirety, but also to those that define the scope of the 30(b)(6) deposition."); *Robinson v. Quicken Loans, Inc.*, No. 3:12-cv-00981, 2013 U.S. Dist. LEXIS 59127, at *9 (S.D. W. Va. Apr. 25, 2013) ("When a corporation objects to a notice of [Federal] Rule 30(b)(6) deposition, the proper procedure is to file a motion for protective order."); *N. Eng. Carpenters Health Benefits Fund v. First DataBank, Inc.*, 242 F.R.D. 164, 166 (D. Mass. 2007) ("[T]here is no provision in the rules which provides for a party whose deposition is noticed to serve objections so as to be able to avoid providing the requested discovery until an order compelling discovery is issued Put simply and clearly, absent agreement, a party who for one

own to ignore the notice,' or 'file objections and then state that it will only produce general answers to the topics in accordance with its objections unless given more specific direction by the party seeking the deposition.'"⁸⁹ And, because the movant always has the burden to establish that a protective order should be granted, "[o]nce the deposition notice is served, 'the [organization] bears the burden of demonstrating *to the court* that the notice is objectionable or insufficient.'"⁹⁰

An interesting question is whether an organization may obtain protection from a representative notice that seeks the bases for the organization's contentions and claims or defenses on the ground that such subject matters invariably require inquiry into work product and, therefore, contention interrogatories are better used to obtain such information. No Texas cases have considered the matter, and federal courts are divided on it.⁹¹

As noted by one federal court, "[t]he issue usually comes down to whether contention interrogatories are a better discovery vehicle for that kind of information than a [Federal] Rule 30(b)(6) deposition."⁹² This, in turn, depends on the action's complexity, the scope and complexity of the deposition notice's subject matters, and the accessibility of the information sought through the deposition. For example, if the action relates to events that occurred long ago or actions by a predecessor organization that has not

reason or another does not wish to comply with a notice of deposition must seek a protective order.").

⁸⁹ *Robinson*, 2013 U.S. Dist. LEXIS 59127, at *10 (first quoting *N. Eng. Carpenters Health Benefits*, 242 F.R.D. 164, 166 (D. Mass. 2007); then quoting *Espy v. Mformation Techs., Inc.*, No. 08-2211-EFM-DWB, 2010 U.S. Dist. LEXIS 36594, at *7 (D. Kan. Apr. 13, 2010)).

⁹⁰ *Cf. Beach Mart, Inc.*, 302 F.R.D. at 406 (quoting *Robinson*, 2013 U.S. Dist. LEXIS 59127, at *10).

⁹¹ *E.g.*, *Milwaukee Elec. Tool Corp. v. Chevron N. Am., Inc.*, No. 14-CV-1289-JPS, 2015 U.S. Dist. LEXIS 92546, at *9–10 (E.D. Wis. July 16, 2015) ("Courts have split whether to allow parties to use 30(b)(6) depositions to explore facts underlying legal claims and theories."); *Clauss Constr. v. UChicago Argonne LLC*, No. 13-cv-05479, 2015 U.S. Dist. LEXIS 4131, at *14 (N.D. Ill. Jan. 13, 2015) ("There is a difference of opinion among courts as to whether a [Federal] Rule 30(b)(6) topic that asks an entity to designate a witness to testify about facts underlying legal claims or defenses is appropriate."); *Radian Asset Assur., Inc. v. Coll. of the Christian Bros.*, 273 F.R.D. 689, 691 (D.N.M. 2011) ("Courts have split whether to allow parties to use 30(b)(6) depositions to explore facts underlying legal claims and theories.").

⁹² *Clauss Constr.*, 2015 U.S. Dist. LEXIS 4131, at *14; *see Canal Barge Co. v. Commonwealth Edison Co.*, No 98 C 0589, 2001 U.S. Dist. LEXIS 10097, at *6 (N.D. Ill. July 18, 2001) ("Whether a [Federal] Rule 30(b)(6) deposition or a [former Federal] Rule 33(c) contention interrogatory is more appropriate will be a case by case factual determination.").

existed for a long period of time, interrogatories may be the better discovery vehicle.

Three facts, however, favor a representative deposition in the “ordinary” action under the Texas discovery rules. First, nothing in Texas Rule 199.2(b)(1) limits the scope of such depositions.⁹³ Second, the Texas discovery rules do not require parties to conduct discovery in a particular sequence, but rather expressly provide that “[t]he permissible forms of discovery may be . . . taken in any order.”⁹⁴ Finally, and perhaps most importantly, depositions are the discovery device that generally provides the most complete and comprehensive information.⁹⁵

b. The Organization’s Obligations

The organization, once noticed or subpoenaed, has a myriad of obligations. Initially, it *must* designate one or more individuals to testify on its behalf.⁹⁶ More than one individual *must* be designated if more than one

⁹³*Cf.* TEX. R. CIV. P. 194 cmt. 2 (“[Texas] Rule 194.2(c) and (d) permit a party further inquiry into another’s legal theories and factual claims than is often provided in notice pleadings. So-called ‘contention interrogatories’ are used for the same purpose. Such interrogatories are not properly used to require a party to marshal evidence or brief legal issues.”); *id.* 197.1 (“[Contention i]nterrogatories may not be used to require the responding party to marshal all of its available proof or the proof the party intends to offer at trial.”); *id.* 197 cmt. 1 (“[I]nterrogatories that ask a party to state all legal and factual assertions are improper. As with requests for disclosure, interrogatories may be used to ascertain basic legal and factual claims and defenses but may not be used to force a party to marshal evidence.”).

⁹⁴TEX. R. CIV. P. 192.2.

⁹⁵*Elan Microelectronics Corp. v. Pixcir Microelectronics Co.*, No. 2:10-cv-00014-GMN-PAL, 2013 U.S. Dist. LEXIS 114164, at *17 (D. Nev. Aug. 7, 2013) (“Because of its nature, the deposition process provides a means to obtain more complete information and is, therefore, favored.”) (quoting *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989)); *Buehrle v. City of O’Fallon*, No. 4:10CV00509, 2011 U.S. Dist. LEXIS 11972, at *7 (E.D. Mo. Feb. 8, 2011) (same); *Kleppinger v. Tex. Dep’t of Transp.*, 283 F.R.D. 330, 335 (S.D. Tex. 2012) (“While the Court recognizes that in many instances interrogatories and depositions can be utilized to obtain the same information in a lawsuit, these two methods of discovery are not necessarily equivalent. That is, the use of interrogatories may have disadvantages. For example, interrogatories do not provide subjective information, such as the demeanor of the responding party Further, interrogatories can be ineffective in obtaining complex or possibly confusing information Moreover, depositions have more flexibility than interrogatories because they permit an attorney to ask follow-up questions based on answers to previous questions or repeat questions if a deponent is being evasive.”) (citations omitted).

⁹⁶TEX. R. CIV. P. 199.2(b)(1).

is needed to testify fully about the notice's subject matters.⁹⁷ Texas Rule 199.2(b)(1), unlike Federal Rule 30(b)(6), requires the organization to designate, "a reasonable time before the deposition[,] both each individual who will testify on its behalf and "the matters on which the individual will testify."⁹⁸ This requirement helps the noticing party prepare for the deposition and also allows it to object to the designation if it believes the person designated by the organization is an inadequate representative.

The representative, however, need not be an officer or employee of the organization. Often an organization responding to a Texas Rule 199.2(b)(1) notice is hard-pressed to locate present officers or employees who have knowledge about distant events. If the organization is willing to designate a former employee as its deponent (and if the former employee accepts the role), the use of a former employee or any *other* person (e.g., a retained expert or the organization's attorney) as a designee is fully permissible under the Rule. This is made clear by Texas Rule 199.2(b)(1), which does not require the representative to have any present or past affiliation with the organization and which merely requires the organization to designate "one or more individuals to testify on its behalf[.]"⁹⁹

⁹⁷*In re Fina Oil & Chem. Co.*, No. 13-98-640-CV, 1999 Tex. App. LEXIS 1751, at *14–15 (Tex. App.—Corpus Christi Mar. 11, 1999, orig. proceeding) (not designated for publication) ("[Former Texas] Rule 201(4) is patterned after Federal Rule of Civil Procedure 30(b)(6), which has been consistently construed to require that a corporation 'must not only produce such number of persons as will satisfy the request, but more importantly, prepare them so that they may give complete, knowledgeable, and binding answers on behalf of the corporation.' At least one Texas court has implicitly adopted this construction of [former Texas] Rule 201(4) as well, by noting with disfavor the fact that a defendant had designated a witness who could not or would not provide responsive information despite 'exhaustive notice of the matters upon which' the witness would be questioned.") (first quoting *Marker*, 125 F.R.D. at 126 (M.D.N.C. 1989); then quoting *Allstate Tex. Lloyds v. Johnson*, 784 S.W.2d 100, 103 (Tex. App.—Waco 1989, orig. proceeding)); cf. *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1146 (10th Cir. 2007) ("The law is well-settled that corporations have an 'affirmative duty' to make available as many persons as necessary to give 'complete, knowledgeable, and binding answers' on the corporation's behalf.") (quoting *Reilly v. Natwest Mkts. Grp. Inc.*, 181 F.3d 253, 268 (2d Cir. 1999)); *SEC v. Goldstone*, 301 F.R.D. 593, 646-47 (D.N.M. 2014) (same); *Myrdal v. State*, 248 F.R.D. 315, 317 (D.D.C. 2008) ("[A] deponent is under a duty to designate more than one deponent if it is necessary to do so in order to respond to the relevant areas of inquiry that are specified with reasonable particularity by the plaintiff.") (quoting *Alexander v. F.B.I.*, 186 F.R.D. 137, 141 (D.D.C. 1998)); see TEX R. CIV. P. 199.2(b)(1) (providing that an "organization . . . must . . . designate *one or more* individuals to testify on its behalf") (emphasis added).

⁹⁸TEX. R. CIV. P. 199.2(b)(1).

⁹⁹See *supra* notes 74–77 and accompanying text.

The organization also can change its representatives, as well as the subject matters about which they have been designated to testify, after their designation as long as notice of the change is given a “reasonable time” before each affected deposition begins.¹⁰⁰ What constitutes a “reasonable time” will depend on the facts of the case, such as the number and complexity of the subject matters and the amount of time the notice was served before the deposition date.

As discussed above, there is no requirement that the representative have personal knowledge about the subject matters on which the representative has been designated to testify, much less the most knowledge about it.¹⁰¹ Thus, the representative need not have participated in the transaction or events about which inquiry will be made.

Implicit in Texas Rule 199.2(b)(1)’s requirement that the organization designate individuals to testify on its behalf about the deposition notice’s subject matters, is the obligation to prepare the representative to testify about each matter about which the representative has been designated to testify.¹⁰² This obligation extends not only to “matters known or reasonably

¹⁰⁰ See *supra* notes 74–77 and accompanying text.

¹⁰¹ See discussion *supra* notes 76–77 and accompanying text.

¹⁰² See *In re Fina Oil & Chem.*, 1999 Tex. App. LEXIS 1751, at *14–15 (“[Former Texas] Rule 201(4) is patterned after Federal Rule of Civil Procedure 30(b)(6), which has been consistently construed to require that a corporation ‘must not only produce such number of persons as will satisfy the request, but more importantly, prepare them so that they may give complete, knowledgeable, and binding answers on behalf of the corporation.’ At least one Texas court has implicitly adopted this construction of [former Texas] Rule 201(4) as well, by noting with disfavor the fact that a defendant had designated a witness who could not or would not provide responsive information despite ‘exhaustive notice of the matters upon which’ the witness would be questioned.”) (first quoting *Marker*, 125 F.R.D. at 126 (M.D.N.C. 1989); then quoting *Allstate Tex. Loyds*, 784 S.W.2d at 103.); cf. *Maronda Homes, Inc. v. Progressive Express Ins. Co.*, No. 6:14-cv-1287-Orl-31TBS, 2015 U.S. Dist. LEXIS 60603, at *6 (M.D. Fla. May 8, 2015) (“The corporation has an implicit duty to prepare its designees so that they are able to ‘testify about information known or reasonably available to the organization.’”) (quoting FED. R. CIV. P. 30(b)(6)); *Payless ShoeSource Worldwide, Inc. v. Target Corp.*, No. 05-0423-JAR, 2008 U.S. Dist. LEXIS 28878, at *31 (D. Kan. Apr. 8, 2008) (“Yet, ‘because [Federal] Rule 30(b)(6) explicitly requires a company to have persons testify on its behalf as to all matters reasonably available to it, this Court has held that the [Texas] Rule ‘implicitly requires persons to review all matters known or reasonably available to [the corporation] in preparation for the 30(b)(6) deposition.’”) (quoting *Raytheon Aircraft Co. v. United States*, No. 05-2328-JWL, 2007 U.S. Dist. LEXIS 66156, at *11 (D. Kan. Sept. 6, 2007)).

available to the organization[,]”¹⁰³ but also to the organization’s subject beliefs and opinions.¹⁰⁴

Because the organization is required to designate individuals to testify about “matters that are known or reasonably available to the organization,” the organization, in preparing its Texas Rule 199.2(b)(1) representatives, has an obligation of “reasonable inquiry” similar to its obligation of reasonable inquiry in answering disclosure requests, interrogatories, and requests for admission.¹⁰⁵ Thus, the two key factors are whether the information is “reasonably available” to the organization and whether it is in the organization’s control.¹⁰⁶ This generally requires the organization to

¹⁰³ TEX. R. CIV. P. 199.2(b)(1).

¹⁰⁴ *Lindsey v. O’Neill*, 689 S.W.2d 400, 402 (Tex. 1985) (holding that a trial court erred in striking twenty-one subject matters from the deposition notice for a defendant corporation because “[former Texas] Rule 200 makes no distinction between deposition notices directed toward corporations based upon whether the deposition is to pertain to purely factual matters or matters calling for expert opinion”); *cf. Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006) (“When a corporation produces an employee pursuant to a [Federal R]ule 30(b)(6) notice, it represents that the employee has the authority to speak on behalf of the corporation with respect to the areas within the notice of deposition. This extends not only to facts, but also to subjective beliefs and opinions.”); *Difiore v. CSL Behring, U.S., LLC*, No. 13-5027, 2015 U.S. Dist. LEXIS 121107, at *2–3 (E.D. Pa. Sept. 11, 2015) (“The organization represents that a 30(b)(6) deponent, unlike a lower level employee, is authorized to speak for it on the issue in terms of both facts *and* ‘subjective beliefs and opinions.’”) (quoting *Lapenna v. Upjohn Co.*, 110 F.R.D. 15, 20 (E.D. Pa. 1986)); *Johnson v. Samsung Elecs. Am.*, No. 10-1146; 10-1549 SECTION: “K” (4), 2011 U.S. Dist. LEXIS 77016, at *17–18 (E.D. La. July 14, 2011) (“Further, contrary to the Defendants’ assertions, corporations are capable of having an opinion. A [Federal] Rule 30(b)(6) designee does not give his personal opinions, but presents the corporation’s ‘position’ on the topic.”); *Cooley v. Lincoln Elec. Co.*, 693 F. Supp. 2d 767, 791 (N.D. Ohio 2010) (“[F]urther, a corporate designee may testify about not only a corporation’s knowledge but also its subjective beliefs.”).

¹⁰⁵ *Cf. Wilson v. Lakner*, 228 F.R.D. 524, 528–29 (D. Md. 2005) (equating the obligation to that in answering interrogatories); *Twentieth Century Fox Film Corp. v. Marvel Enters.*, No. 01 Civ. 3016 (AGS)(HBP), 2002 U.S. Dist. LEXIS 14682, at *13 (S.D.N.Y. Aug. 6, 2002) (“I conclude that the same principle that is applied to interrogatories and document requests should also be applied to determine the scope of a party’s obligation in responding to a [Federal] Rule 30(b)(6) notice of deposition. There is no logical reason why the sources researched by a party in responding to a discovery request should be dependent on the particular discovery vehicle used; in all cases, the responding party should be obligated to produce the information under its control.”); *Calzaturificio S.C.A.R.P.A., s.p.a. v. Fabiano Shoe Co.*, 201 F.R.D. 33, 38–39 (D. Mass. 2001) (equating the obligation to that in producing documents).

¹⁰⁶ *Cf. JZ Buckingham Invests., LLC v. United States*, 77 Fed. Cl. 37, 47 (Ct. Cl. 2007) (discussing responses to requests for admission and holding that initially, “a reasonable inquiry is limited to inquiry of documents and persons readily available and within the responding party’s control”); *Twentieth Century Fox*, 2002 U.S. Dist. LEXIS 14682, at *10 (“A corporation

(1) gather and review documents within its possession, custody, or control and documents within the possession of reasonably accessible nonparties under the organization's control; (2) interview (a) current directors, officers, employees, or agents who likely may have relevant information, (b) reasonably accessible nonparties within its control (e.g., directors, officers, employees, and agents of subsidiaries and affiliates under its control) or with an identity of interest, (c) reasonably accessible non-adverse parties with an identity of interest (e.g., a cooperating co-defendant or co-plaintiff), and (d) reasonably accessible and cooperative former directors, officers, and employees; (3) review written-discovery responses in the action; and (4) review relevant witness statements, interview summaries, and deposition transcripts and exhibits.¹⁰⁷ If the organization necessarily would

responding to interrogatories must provide not only the information contained in its own files and possessed by its own employees, it must also provide all information under its control. 'A party served with interrogatories is obliged to respond by furnishing such information *as is available to the party*. [Defendant] therefore is obliged to respond to the interrogatories not only by providing the information it has, but also the information within its control or otherwise obtainable by it.'" (quoting *In re Auction Houses Antitrust Litig.*, 196 F.R.D. 444, 445 (S.D.N.Y. 2000)); see also *Costa v. Kerzner Int'l Resorts, Inc.*, 277 F.R.D. 468, 471 (S.D. Fla. 2011) ("Furthermore, as with [Federal] Rule 34, a party must provide information in response to a [Federal] Rule 33 interrogatory if such information is under its control."); *Goodrich Corp. v. Emhart Indus.*, No. EDCV 04-00759-VAP (SSx), 2005 U.S. Dist. LEXIS 17190, at *8 (C.D. Cal. June 10, 2005) ("A corporation responding to interrogatories must provide not only the information contained in its own files and possessed by its own employees, but also all information under its control."); *T. Rowe Price Small-Cap Fund, Inc. v. Oppenheimer & Co.*, 174 F.R.D. 38, 43 (S.D.N.Y. 1997) ("Generally, a 'reasonable inquiry' is limited to review and inquiry of those persons and documents that are within the responding party's control."); *United States v. Taylor*, 166 F.R.D. 356, 363-64 (M.D.N.C. 1996) (holding that the "reasonable inquiry" requirement obligated the responding party to check its own files for documents sent by or to the responding party to determine their authenticity).

¹⁰⁷ *Cf. Brazos River Auth.*, 469 F.3d at 433 ("The deponent must prepare the designee to the extent matters are reasonably available, whether from documents, past employees, or other sources."); *Preferred Carolinas Realty, Inc. v. Am. Home Realty Network, Inc.*, No. 1:13CV181, 2014 U.S. Dist. LEXIS 41893, at *18-19 (M.D.N.C. Mar. 28, 2014) ("[Federal] Rule 30(b)(6) 'requires a good faith effort . . . to find out the relevant facts—to collect information, review documents, and interview employees with personal knowledge.'" (quoting *Dorsey v. TGT Consulting, LLC*, 888 F. Supp. 2d 670, 685 (D. Md. 2012)); *Aldridge v. Lake Cty. Sheriff's Office*, No. 11 C 3041, 2012 U.S. Dist. LEXIS 102514, at *5 (N.D. Ill. July 24, 2012) ("A corporation . . . has an obligation to prepare an individual by having him or her review available materials or talk to others with knowledge."); *QBE Ins. Corp. v. Jorda Enters.*, 277 F.R.D. 676, 689 (S.D. Fla. 2012) (holding that an organization "must prepare its designees by having them review available materials, such as fact witness deposition testimony, exhibits to depositions, documents produced in discovery, materials in former employees' files and, if necessary,

have to obtain the information to prepare for trial, it should obtain the information in connection with the deposition if the information is reasonably and readily available.¹⁰⁸

As should be obvious from the foregoing, the duty of reasonable inquiry even applies to information lost from the personal knowledge of the organization's current officers and employees due to time's passage. In such a case the organization either must locate a former officer or employee who is willing to testify about such information or prepare a current one (i.e., create a witness).¹⁰⁹ Texas Rule 199.2(b)(1)'s obligation, however,

interviews of former employees or others with knowledge"); *Great Am. Ins. Co. v. Vegas Constr. Co.*, 251 F.R.D. 534, 539 (D. Nev. 2008) (noting that the organization "must prepare deponents by having them review prior fact witness deposition testimony as well as documents and deposition exhibits") (quoting *Taylor*, 166 F.R.D. at 361); *Wilson*, 228 F.R.D. at 528–29 (D. Md. 2005) (holding that a corporation is required "to collect information [within its control], review documents [within its control], and interview employees with personal knowledge just as a corporate party is expected to do in answering interrogatories"); *Calzaturificio S.C.A.R.P.A., s.p.a.*, 201 F.R.D. at 39 ("I find that the Fabiano sons, in preparing to be deposed as 30(b)(6) representatives of the company, had the obligation to review all documents that were in their control, including the tax returns and related documents that were in the physical possession of Fabiano's accountant."). The question of whether an organization must provide information within the knowledge of its subsidiaries and affiliates is discussed *infra* in note 116 and its accompanying text.

¹⁰⁸ *Cf. Procaps S.A. v. Patheon Inc.*, No. 12-24356-CIV-GOODMAN, 2015 U.S. Dist. LEXIS 47104, at *6–7 (S.D. Fla. Apr. 10, 2015) ("Significantly, an 'interrogatory will not be held objectionable as calling for research if the interrogated party would gather the information in the preparation of its own case.'") (quoting 8A Wright et. al., *supra* note 63, at 33); *Dixie v. Virga*, No. 2:12-cv-2626-MCE-DAD, 2015 U.S. Dist. LEXIS 11429, at *27 (E.D. Cal. Jan. 29, 2015) ("[I]f the responding party would necessarily have to gather the requested information to prepare its own case, objections that it is too difficult to obtain the information for the requesting party are not honored.") (quoting *L.H. v. Schwarzenegger*, No. 2:06-cv-2042-LKK-GGH, 2007 U.S. Dist. LEXIS 73752, at *9–10 (E.D. Cal. Sept. 21, 2007)); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, Nos. 87 Civ. 5253 (MBM), 87 CIV 8982 (MBM), 1990 U.S. Dist. LEXIS 5009, at *8-9 (S.D.N.Y. May 2, 1990) ("[P]laintiffs will obviously be required to obtain this information as part of their trial preparation if they are to meet Gulf's assertion at trial that Cities misrepresented its oil reserves during the tender offer period. It necessarily follows that it would not be unreasonable to require plaintiffs to obtain such data at this stage in order to serve the purpose embodied in [Federal] Rule 36 of narrowing the scope of contested issues and proof at trial."); *Flour Mills, Inc. v. Pace*, 75 F.R.D. 676, 680 (D. Okla. 1977) ("An interrogatory will not be held objectionable as calling for research if it relates to details alleged in the pleading of the interrogated party, about which it presumably has information, or if the interrogated party would gather the information in the preparation of its own case.").

¹⁰⁹ *Cf. Coryn Grp. II, LLC v. O.C. Seacrets, Inc.*, 265 F.R.D. 235, 238 (D. Md. 2010) ("Indeed, the corporation 'is expected to create a witness or witnesses with responsive

neither is infinite nor requires perfection. It also does not require the organization to conduct discovery for the other side. Thus, the organization does not have to depose uncooperative former officers, directors, or employees or nonparties or subpoena their documents.¹¹⁰ In other words, if

knowledge,’ and in doing so must make a good faith effort to ‘find out the relevant facts—to collect information, review documents, and interview employees with personal knowledge.’” (quoting *Wilson*, 228 F.R.D. at 528).

¹¹⁰*Cf. QBE Ins. Corp.*, 277 F.R.D. at 691 (“A corporation cannot be faulted for not interviewing individuals who refuse to speak with it.”); *Costa v. Cty. of Burlington*, 254 F.R.D. 187, 191 (D.N.J. 2008) (“Some of plaintiffs’ complaints are illustrative of their unreasonable expectations. Certainly, defendant cannot be faulted for failing to interview former employees who are deployed in Iraq. Defendant also cannot be faulted for not interviewing officers who refused to speak with it.”) (citations omitted); *Wilson* 228 F.R.D. at 529 (“Wilson is not obliged to depose a string of hospital employees, none of whom is able to speak for the hospital as to how the incident or incidents in question occurred”); see also *United States ex. rel. Englund v. Los Angeles*, 235 F.R.D. 675, 685 (E.D. Cal. 2006) (“‘Reasonable inquiry’ is limited to persons and documents within the responding party’s control (e.g., its employees, partners, corporate affiliates, etc.). It does not require the responding party to interview or subpoena records from independent third parties in order to admit or deny a request for admission.”); *Haggie v. Coldwell Banker Real Estate Corp.*, No. 4:404CV111-M-A, 2007 U.S. Dist. LEXIS 35666, at *14–16 (N.D. Miss. May 15, 2007) (“Under [Federal] Rule 36, a defendant’s duty to make a ‘reasonable inquiry’ should not require the defendant to make judgments or put itself in the shoes of another unrelated defendant. In other words, a real estate company is not required to expend time, energy, and money to inquire as to the veracity of a request for admission regarding information that the bank, its employees, a mortgage lender, its employees, or an appraiser may have had or what those individuals may have thought or done in the course of closing a loan for the sale of a specific property. Instead, the court concludes that the defendant, Coldwell Banker, is responsible for responding only to requests for admission that relate directly to its corporate entity, its agents or employees and their acts, omissions, or impressions and not those of third parties or individuals or information outside its control. This does not mean that the defendant should not make every effort to respond to requests for admission completely and truthfully, but simply that the defendant is not under a duty to conclusively establish facts that it or its agents, partners, employees, corporate affiliates, etc., are without knowledge or evidence to determine.”); *T. Rowe Price Small-Cap Fund, Inc.*, 174 F.R.D. at 44 (“[I]t far exceeds the reasonable inquiry provision of [Federal] Rule 36 to require defendant to subpoena FDIC documents in Chicago, perhaps litigating the subpoena, travel to Chicago to review large volumes of documents and incur whatever additional expenses may be involved in their production. Thus, to the extent various admissions called for admissions as to matters at the Bank of which Oppenheimer had no knowledge, as to which there may have been relevant information in the FDIC documents, it was appropriate to respond that it has made reasonable inquiry and it was unable to admit or deny the requests.”); *Diederich v. Dep’t of Army*, 132 F.R.D. 614, 620 (S.D.N.Y. 1990) (“The requirement of reasonable inquiry does not generally extend to third persons”); *Morreale v. Willcox & Gibbs DN, Inc.*, No. 89 Civ. 5531 (MJL)(NRB), 1991 U.S. Dist. LEXIS 7741, at *1–2 (S.D.N.Y. June 6, 1991) (“Schwarz’[s] suggestion that defendants had a[n] obligation to take the additional action of interviewing former

the organization “genuinely cannot provide an appropriate designee because it does not have the information, cannot reasonably obtain it from other sources and still lacks sufficient knowledge after reviewing all available information,’ its obligations under the Rule cease.”¹¹¹

The organization’s obligations also must be measured by the scope and nature of the deposition notice’s subject matters.¹¹² If the matters are very broad, it is unrealistic to expect the representative(s) to be able to answer every conceivable question about them. As explained by one federal court:

Faced by such an overly broad list of topics, the entity may seek, but is not obliged to obtain, a protective order. Federal’s decision not to move for a protective order to narrow the scope of the list, but instead to produce a witness like Mr. Lopes, who knew a lot about many of the topics and something about virtually all of them, is certainly permissible. In effect, by choosing to list many broad topics, Delta, as the propounder of the notice, made a strategic decision to avoid the risk that a topic would come up outside the scope of the [Federal] Rule 30(b)(6) notice,

employees of Peat Marwick, a third party, is unprecedented, and indeed there is some authority to the contrary.”).

¹¹¹*Aldridge*, 2012 U.S. Dist. LEXIS 102514, at *5 (quoting *QBE Ins. Corp.*, 277 F.R.D. at 690.); *accord* *Suomen Colorize Oy v. Verizon Servs. Corp.*, No. 12-7154-CJB, 2013 U.S. Dist. LEXIS 150992, at *5–6 (D. Del. Oct. 15, 2013) (“Although a [Federal] Rule 30(b)(6) deponent must be properly prepared pursuant to the Rule’s dictates, he ‘need not have perfect responses to each question, nor a clairvoyant ability to predict every single question that may be posed[.]’ And where information is not reasonably available to the corporation, a [Federal] Rule 30(b)(6) witness need not answer the question.”) (citations omitted) (quoting *Estrada v. Wass*, No. 3:10-CV-1560, 2012 U.S. Dist. LEXIS 52817, at *7 (M.D. Pa. Apr. 16, 2012)); *In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486 CW (EDL), 2007 U.S. Dist. LEXIS 8523, at *12–13 (N.D. Cal. Jan. 29, 2007) (“While a corporation is not relieved from preparing its [Federal] Rule 30(b)(6) designee to the extent matters are reasonably available, even when it no longer employs individuals who remember earlier events, it need not make extreme efforts to obtain all information possibly relevant to the requests.”); *Calzaturificio S.C.A.R.P.A., s.p.a.*, 201 F.R.D. at 38 (“Certainly, the obligation imposed by [Federal] Rule 30(b)(6) is not infinite. If the Fabiano sons reviewed the available documentation and still would not have been able to give complete answers on behalf of Fabiano with respect to operating losses or other issues, and there were no other available witnesses who could do so, then Fabiano’s ‘obligations under [Federal] Rule 30(b)(6) cease, since the rule requires testimony only as to ‘matters known or reasonably available to the organization.’”) (first quoting *Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75 (D. Neb., 1995); then quoting FED. R. CIV. P. 30(b)(6)).

¹¹²*See generally infra* note 113 and accompanying text.

while accepting the risk that it is simply impractical to expect [Federal] Rule 30(b)(6) witnesses to know the intimate details of everything.”¹¹³

In the same vein, if it will be difficult to access information about the subject matters because, for example, they relate to events that occurred long ago or actions by a predecessor organization that has not existed for a long period of time, it is unrealistic to expect the organization to produce a witness that has in-depth knowledge about the subject matters.¹¹⁴

¹¹³Fed. Ins. Co. v. Delta Mech. Contrs., LLC, No. 11-048ML, 2013 U.S. Dist. LEXIS 47582, at *13–14 (D.R.I. Apr. 2, 2013) (citations omitted); see *Costa v. Cty. of Burlington*, 254 F.R.D. 187, 190 (D.N.J. 2008) (“Simply because defendant’s witness could not answer every question posed to him does not equate to the fact that defendant did not satisfy its obligation to prepare its 30(b)(6) witness.”); *Wilson*, 228 F.R.D. at 529 n.7 (“[A]bsolute perfection in preparation [is not required] . . . Obviously a rule of reason applies. There is no obligation to produce witnesses who know every single fact, only those that are relevant and material to the incident or incidents that underlie the suit.”).

¹¹⁴*Cf.* *Kimberly-Clark Worldwide, Inc. v. First Quality Baby Prods., LLC*, No. 09-c-0916, 2011 U.S. Dist. LEXIS 99027, at *6–8 (E.D. Wis. Aug. 31, 2011) (“Notably, [Federal] Rule 37 does not contemplate sanctions when a party no longer has information simply because of the passage of time and the fading of memories. The projects relevant here occurred approximately twenty years ago. Ms. Boudry’s deposition responses indicate she made a good faith effort to obtain answers but could not in the face of time and memory constraints. Despite First Quality’s claims, Ms. Boudry did not need to review every single document created by K-C twenty years ago in connection with these studies; it is enough that she reviewed several documents relating to each pertinent study, including research notes and written reports. In light of the time that has passed, First Quality’s demand that K-C contact every former employee listed on the distribution list for the projects in question is not supportable. As Ms. Boudry’s testimony suggests, the specific information First Quality is seeking simply seems to exist no longer. I am satisfied that Ms. Boudry’s inability to give more specific information in response to particular questions pertaining to the Libra and EZ-On projects is the result of the lengthy passage of time. Plaintiff is free to challenge the credibility of the witness at trial, but I find no violation of [Federal] Rule 30(b)(6)”) (citations omitted); *Walden v. City of Chicago*, No. 04 C 47, 2007 U.S. Dist. LEXIS 7400, at *8–9 (N.D. Ill. Feb. 1, 2007) (holding that “due to the passage of time and the fact that the pertinent records no longer exist . . . it is not appropriate or just to sanction the [defendant] pursuant to [Federal] Rule 37 for its inability to produce a [Federal] Rule 30(b)(6) witness”); *In re JDS Uniphase*, No. C-02-1486 CW (EDL), 2007 U.S. Dist. LEXIS 8523, at *15–16 (N.D. Cal. Jan. 29, 2007) (denying a motion to compel, noting that since seven years had passed since the events occurred, the Federal Rule 30(b)(6) designee testified on “matters [that] were reasonably available . . . and, not surprisingly, was unable to answer questions about matters which were not reasonably available”); *Barron v. Caterpillar, Inc.*, 168 F.R.D. 175, 177 (E.D. Pa. 1999) (noting that “parties should anticipate the unavailability of certain information” from events transpiring years ago).

An interesting question is whether information is considered “reasonably available” to an organization if it is in the possession of a related entity. Although the answer depends on the facts of each case, the general rule is that the organization must produce a representative to testify about such information if the other entity is within its “control,” as the term is used in connection with the production of documents under Texas Rule 196.¹¹⁵ As explained by one federal court:

[C]ourts have rejected an approach which limits the “reasonably available” requirement to only information possessed by entities over which the corporate deponent has direct legal control. Instead, courts have frequently used the “control” standard of [Federal] Rule 34(a) as a guideline to determine whether information of corporate affiliates is “reasonably available” to the deponent. The majority view appears to be that information is within a deponent’s “control” and thus “reasonably available” for purposes of [Federal] Rule 30(b)(6) when the deponent “either can secure [information] from the related entity to meet its business needs or acted with it in the transaction that gave rise to the suit.”¹¹⁶

¹¹⁵TEX. R. CIV. P. 196 cmt. 5; *id.* 192.3.

¹¹⁶*Int'l Bhd. of Teamsters, Airline Div. v. Frontier Airlines, Inc.*, No. 11-cv-02007-MSK-KLM, 2013 U.S. Dist. LEXIS 22986, at *16 (D. Colo. Feb. 19, 2013) (quoting *Sanofi-Aventis v. Sandoz, Inc.*, 272 F.R.D. 391, 394 (D.N.J. 2011)); *accord* *Sanofi-Aventis*, 272 F.R.D. at 395 (D.N.J. 2011) (“In short, knowledge from corporate affiliates can be ‘reasonably available’ to a 30(b)(6) deponent in certain instances. Direct, legal control over the related entity is not required. However, corporate form without more does not end the inquiry. The availability of information in the possession of a related company turns on the facts of each case, in particular as they relate to the ‘control’ standard of [Federal] Rule 34(a).”); *Twentieth Century Fox Film Corp. v. Marvel Enters.*, No. 01 Civ. 3016 (AGS)(HBP), 2002 U.S. Dist. LEXIS 14682, at *5–6 (S.D.N.Y. Aug. 6, 2002) (“[T]he scope of the entity’s obligation in responding to a 30(b)(6) notice is identical to its scope in responding to interrogatories served pursuant to [Federal] Rule 33 or a document request served pursuant to [Federal] Rule 34, namely, it must produce a witness prepared to testify with the knowledge of the subsidiaries and affiliates if the subsidiaries and affiliates are within its control.”); *see* *Citgo Petroleum Corp. v. Seachem*, No. H-07-2059, 2013 U.S. Dist. LEXIS 72898, at *39–40 (S.D. Tex. May 23, 2013) (“Corporations are not required to obtain information from an affiliate for a [Federal] Rule 30(b)(6) deposition about matters in which the corporation was not involved. However, if the corporation has control over the information requested in the notice, even if it is actually knowledge of an affiliate rather than that corporation, the corporation is obligated to provide that information.”) (citations omitted); *In re ClassicStar Mare Lease Litig.*,

Because an organization is required to produce a witness who can testify about the deposition notice's matters, it cannot properly designate a representative who will assert the Fifth Amendment privilege against self-incrimination.¹¹⁷

In preparing the representative for deposition, counsel must be aware of the fact that the organization may be compelled to produce or disclose the documents reviewed by the organization's representative in preparing for the deposition. That is, a trial court may reject an objection that counsel's selection of the documents constitutes attorney work product or that the documents are otherwise privileged.¹¹⁸

MDL No. 1877, 2009 U.S. Dist. LEXIS 41090, at *17–19 (E.D. Ky. May 12, 2009) (“Geostar cannot be excused from preparing a designee or designees as to matters related to its wholly owned and controlled subsidiaries to the extent that it has knowledge of those subsidiaries. Plaintiffs cite to the fact that GeoStar maintained the corporate books and records for several of its subsidiaries in its own offices during the entire period of its control and, in most instances, certain subsidiaries had no separate employees, and Geostar controlled and also performed all functions of certain subsidiaries. In such instances and in response to a [Federal] Rule 30(b)(6) notice, corporations have an obligation to inquire into materials in the possession of their subsidiaries and to use those materials to prepare a designee.”); *Murphy v. Kmart Corp.*, 255 F.R.D. 497, 508–09 (D.S.D. 2009) (holding that a parent corporation with sufficient access and control was charged with knowledge of its parent and sister corporations for purposes of a representative deposition); *S.C. Johnson & Son, Inc. v. Dial Corp.*, No. 08 C 4696, 2008 U.S. Dist. LEXIS 76320, at *4–6 (N.D. Ill. Sept. 10, 2008) (holding that a parent corporation had to produce witness to testify as to knowledge of its subsidiary when the parent, as a practical matter, controlled the subsidiary and the subsidiary's information was “reasonably available” to the parent).

¹¹⁷ *Cf. In re Anthracite Coal Antitrust Litig.*, 82 F.R.D.364, 369–70 (M.D. Pa. 1979) (imposing sanctions on the defendant corporations because the only persons with corporate knowledge to attend Federal Rule 30(b)(6) depositions invoked their individual Fifth Amendment privileges); *Chi. Title Ins. Co. v. Sinikovic*, No. 11 C 2504, 2015 U.S. Dist. LEXIS 114785, at *12–13 (N.D. Ill. Aug. 28, 2015) (“Typically, ‘[a] witness who asserts his Fifth Amendment rights cannot be compelled to serve as a [Federal] Rule 30(b)(6) deponent’ and the corporation can be compelled to answer the questions through an agent who will not invoke the privilege.’ But where, as here, the parties stipulated that the corporate deponent was one who invoked his Fifth Amendment privilege and M&M has not proffered another witness, a negative inference can be drawn against M&M despite the fact that it has no Fifth Amendment privilege of its own to assert.”) (quoting *Bank of Am., N.A. v. First Mut. Bancorp*, Nos. 09 C 5108, 09 C 5109, 2010 U.S. Dist. LEXIS 58519, at *13 (N.D. Ill. June 14, 2010)); *Worthington Pump Corp. v. Hoffert Mar., Inc.*, No. A 79-3531, 1982 U.S. Dist. LEXIS 17968, at *6–7 (D.N.J. Feb. 19, 1982) (“Normally when a corporate official acting as such invokes his fifth amendment privilege, the corporation is required to designate another agent who is capable of furnishing the information without incriminating himself.”).

¹¹⁸ Although many federal courts have held that an attorney's compilation or selection of relevant documents for use in discovery constitutes protected work product, *e.g.*, *Sporck v. Peil*,

c. Because the Representative's Testimony is not a Judicial Admission, It can be Corrected, Contradicted, Amended, or Supplemented

What happens when an organization later realizes that its representative's testimony on a matter was wrong or incomplete? Although courts agree that the testimony of an organization "binds" the organization in the sense that it is an admission by the organization,¹¹⁹ the testimony is not tantamount to a judicial admission that precludes contradiction, correction, amendment, or supplementation. Rather, the organization is "bound" by its representative's testimony only in the same sense as any other witness is bound. That is, the organization has committed to a position at a particular point in time, which may be contradicted, corrected, amended, or supplemented at trial or in later discovery responses. As explained by one federal court:

759 F.2d 312, 316–18 (3d Cir. 1985) (the leading case), many of them also have held that the documents used to prepare a witness for a Federal Rule 30(b)(6) deposition are discoverable under Federal Rule of Evidence 612, which gives a trial court discretion to order the production of documents used to refresh a witness's recollection before testifying at trial or a deposition, *e.g.*, *Coryn Grp. II, LLC v. O.C. Seacrets, Inc.*, 265 F.R.D. 235, 245 (D. Md. 2010) ("Where a 30(b)(6) deponent has no personal (or independent) knowledge of a topic, factual documents prepared for him to allow him to discharge his obligations under [Federal] Rule 30(b)(6) must necessarily be produced [under Federal Rule of Evidence 612]. How would it serve the pursuit of truth to shield such information, where the very same information would be available through other discovery devices? Denial of access would only cloud, rather than clarify, corporate knowledge."). *See infra* notes 314–26 and accompanying text (discussing the applicability of Texas Rule of Evidence 612 to depositions).

¹¹⁹*Cf.* *Difiore v. CSL Behring, U.S., LLC*, No. 13-5027, 2015 U.S. Dist. LEXIS 121107, at *2 (E.D. Pa. Sept. 11, 2015) ("A corporation is 'bound' by a 30(b)(6) deponent's testimony concerning factual matters."); *Elan Microelectronics Corp. v. Pixcir Microelectronics Co.*, No. 2:10-cv-00014-GMN-PAL, 2013 U.S. Dist. LEXIS 114164, at *14 (D. Nev. Aug. 7, 2013) ("A corporation has a duty under [Federal] Rule 30(b)(6) to provide a witness who is knowledgeable in order to provide 'binding answers on behalf of the corporation.'") (quoting *Starlight Int'l, Inc. v. Herlihy*, 186 F.R.D. 626, 638 (D. Kan. 1999)); *Marriott v. Cty. of Montgomery*, 426 F. Supp. 2d 1, 8 n.8 (N.D.N.Y. 2006) ("However, as a [Federal] Rule 30(b)(6) witness, Pecora's testimony is binding upon defendants."); *Twentieth Century Fox Film Corp.*, 2002 U.S. Dist. LEXIS 14682, at *6 ("A 30(b)(6) witness testifies as a representative of the entity, his answers bind the entity . . .") (quoting *Sabre v. First Dominion Capital, LLC*, No. 01 Civ. 2145 (BSJ)(HBP), 2001 U.S. Dist. LEXIS 20637, at *2 (S.D.N.Y. Dec. 12, 2001)); *Sanders v. Circle K Corp.*, 137 F.R.D. 292, 294 (D. Ariz. 1991) ("The purpose behind [Federal] Rule 30(b)(6) is to create testimony that will bind the corporation.").

Viskase argues that Grace is bound by its [Federal] Rule 30(b)(6) deposition testimony as a matter of law. On this basis, Viskase moves to preclude Grace from introducing any evidence that is contrary to statements made in its [Federal] Rule 30(b)(6) depositions.

Once again, Viskase misconstrues the law. It is true that a corporation is “bound” by its [Federal] Rule 30(b)(6) testimony, in the same sense that any individual deposed under [Federal] Rule 30(b)(1) would be “bound” by his or her testimony. All this means is that the witness has committed to a position at a particular point in time. It does not mean that the witness has made a judicial admission that formally and finally decides an issue. Deposition testimony is simply evidence, nothing more. Evidence may be explained or contradicted. Judicial admissions, on the other hand, may not be contradicted. Viskase ignores the differences between evidentiary testimony and judicial admissions.

If a Grace trial witness makes a statement that contradicts a position previously taken in a [Federal] Rule 30(b)(6) deposition, then Viskase may impeach that witness with the prior inconsistent statement.¹²⁰

Although some federal courts construing Federal Rule 30(b)(6) have held that, absent an evidentiary showing that the information was not reasonably available to the organization when its representative was deposed, the organization cannot introduce evidence contrary to the testimony of its representative,¹²¹ nothing in the language of Texas Rule

¹²⁰ *W. R. Grace & Co. v. Viskase Corp.*, No. 90-5383, 1991 U.S. Dist. LEXIS 14651, at *5–7 (N.D. Ill. Oct. 11, 1991); *accord S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 811 (8th Cir. 2013); *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001); *R&B Appliance Parts, Inc. v. Amana Co., L.P.*, 258 F.3d 783, 786–87 (3d Cir. 2001); *Difiore*, 2015 U.S. Dist. LEXIS 121107, at *2; *Otis Eng’g Corp. v. Trade & Dev. Corp.*, No. 92-1574, 1994 U.S. Dist. LEXIS 3132, at *1–3 (E.D. La. Mar. 16, 1994).

¹²¹ *E.g., Cont’l Cas. Co. v. First Fin. Emps. Leasing, Inc.*, 716 F. Supp. 2d 1176, 1190 (M.D. Fla. 2010) (“[S]ome courts have stated generally that when the [Federal] Rule 30(b)(6) representative claims ignorance of a subject during the deposition, the organization is precluded from later introducing evidence on that subject unless the evidence was previously unavailable.”); *Wilson v. Lakner*, 228 F.R.D. 524, 529–30 (D. Md. 2005) (“[D]epending on the nature and extent

199.2(b)(1) or any other Texas discovery rule,¹²² the Advisory Committee Notes to Federal Rule 30(b)(6) on which the Texas Rule is based,¹²³ or evidentiary principles supports this conclusion.¹²⁴ Rather, to effectively “bind” an organization, the noticing party should (1) file a motion to compel answers or a new deposition if the organization’s representative claimed ignorance about a matter, had limited knowledge about it, or was evasive, or (2) serve an interrogatory regarding the matter, the answers to which will preclude the organization from introducing contrary evidence at trial or in response to a summary judgment motion if not timely amended or supplemented.¹²⁵

d. Duplicative Depositions—Deposing an Organization’s Representative Individually After the Organization’s Deposition or Vice Versa and Taking More than One

of the obfuscation, the testimony given by the non-responsive deponent (e.g. ‘I don’t know’) may be deemed ‘binding on the corporation’ so as to prohibit it from offering contrary evidence at trial.”); *Rainey v. Am. Forest & Paper Ass’n*, 26 F. Supp. 2d 82, 94 (D.D.C. 1998) (“Unless it can prove that the information was not known or was inaccessible, a corporation cannot later proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition.”).

¹²² See TEX. R. CIV. P. 199.2(b)(1).

¹²³ For example, unlike written discovery, there is no obligation to supplement deposition testimony even if it is wrong or incomplete. *Id.* 193 cmt. 5 (Texas Rule 193.5 “imposes no duty to supplement or amend deposition testimony. The only duty to supplement deposition testimony is provided in [Texas] Rule 195.6[, relating to testifying experts.]”); see *Titus Cty. Hosp. Dist. v. Lucas*, 988 S.W.2d 740, 740 (Tex. 1998) (per curiam) (holding that, under former Texas Rule 166b(6), “[a] general duty to supplement deposition testimony (as opposed to a narrow duty for certain expert testimony, for example) would impose too great a burden on litigants. We therefore disapprove the court of appeals’ holding that deposition testimony must be supplemented.”) (citation omitted). The conclusion that Texas Rule 199.2(b) representative deposition testimony can be contradicted is supported by the “well-established rule that a deposition does not have controlling effect over an affidavit in determining whether a motion for summary judgment should be granted. Thus, if conflicting inferences may be drawn from a deposition and from an affidavit filed by the same party in opposition to a motion for summary judgment, a fact issue is presented.” *Randall v. Dallas Power & Light Co.*, 752 S.W.2d 4, 5 (Tex. 1988) (citation omitted).

¹²⁴ There is no evidence rule precluding a witness from testifying differently at trial than during his or her deposition.

¹²⁵ TEX. R. CIV. P. 193.6(a) (“A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, . . . unless the court finds that: (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.”).

Representative Deposition

In the context of representative depositions, several questions arise regarding the propriety of duplicative depositions. *First*, can an organization properly object to a Texas Rule 199.2(b)(1) deposition merely because the person who will be its representative has already been deposed in his or her individual capacity? *Second*, if an individual is deposed in a representative capacity, can he or she properly object to later being deposed in his or her individual capacity? *Third*, can a party take more than one representative deposition?

Relevant to the first two questions is the last sentence of Texas Rule 199.2(b)(1), which provides that “[t]his subdivision does not preclude taking deposition by any other procedure authorized by these rules.” Federal courts, based on the identical language of Federal Rule 30(b)(6), recognize that generally “there is no prohibition on deposing a witness as a corporate representative and then in an individual capacity”¹²⁶ and that “a second deposition is not improper in the converse factual situation in which a deposition was first taken of a witness in an individual capacity and then a second deposition was sought of a witness in a representative capacity.”¹²⁷ Nonetheless as cautioned by one federal court:

¹²⁶Sw. Bell Tel., L.P. v. UTEX Commc’ns. Corp., No. A-07-CV-435 RP, 2009 U.S. Dist. LEXIS 131706, at *6–7 (W.D. Tex. Sept. 30, 2009) (citing cases); *accord* Purdue Pharma L.P. v. Ranbaxy Inc., No. 3:12-MC-1 (CAR), 2012 U.S. Dist. LEXIS 55858, at *9, *8 n.2 (M.D. Ga. Apr. 20, 2012) (allowing a deposition of an organization’s representative in his individual capacity); *Ferguson v. Bell Helicopter Textron Inc.*, No. 1:09cv635-MHT (WO), 2011 U.S. Dist. LEXIS 99081, at *4 (M.D. Ala. Sept. 2, 2011) (same); *Williams v. Sprint/United Mgmt. Co.*, No. 03-2200-JWL-DJW, 2006 U.S. Dist. LEXIS 4937, at *4–5 (D. Kan. Feb. 8, 2006) (“Because Plaintiffs seek to depose Mr. St. Angelo in his individual capacity and he was previously deposed in his capacity as [Federal] Rule 30(b)(6) representative of Defendant corporation, the Court finds that the requirement that a party must obtain leave of court when the person to be examined has already been deposed, contained within [Federal] Rule 30(a)(2)(B), does not apply to Mr. St. Angelo.”); *Sabre v. First Dominion Cap., L.L.C.*, No. 01 Civ. 2145 (BSJ)(HBP), 2001 U.S. Dist. LEXIS 20637, at *4 (S.D.N.Y. Dec. 10, 2001) (“I conclude that the 30(b)(6) deposition of an [sic] witness is a separate deposition from the deposition of that same person as an individual witness and is presumptively subject to a separate, independent seven-hour time limit.”).

¹²⁷Sw. Bell Tel., L.P., 2009 U.S. Dist. LEXIS 131706, at *10 (citing cases); *accord* Difiore v. CSL Behring, U.S., LLC, No. No. 13-5027, 2015 U.S. Dist. LEXIS 121107, at *3–4 (E.D. Pa. Sept. 11, 2015) (rejecting a company’s objection to certain subject matters in a representative deposition notice because its employees had already testified about them because “[m]any other courts have not found the purported redundancy of deposing both individual fact witnesses and a corporate designee on similar topics to be an obstacle to a 30(b)(6) deposition”); *Matrix Grp., LLC v. Innerlight Holdings, Inc.*, No. 2:11-cv-00987, 2015 U.S. Dist. LEXIS 3304, at *3 (D. Utah

This is not to say, however, that the inquiring party has *carte blanche* to depose an individual for seven hours as an individual and seven hours as a 30(b)(6) witness. In the case of many closely-held corporations, the knowledge of an individual concerning a particular subject also constitutes the total knowledge of the entity. In such a situation, the witness could simply adopt the testimony he or she provided in a former capacity, thereby obviating the need for a second deposition. In addition, if the questioning at any deposition becomes repetitive or is otherwise being conducted in an oppressive manner, the aggrieved party can always make application for a protective order.¹²⁸

Jan. 12, 2015) (“While the court recognizes that the scope of Defendants’ prior depositions were broad, ‘courts have consistently held that the fact that a company’s employee was deposed under [Federal] Rule 30(b)(1) does not insulate the company from producing the same—or another—individual as a corporate representative to give a 30(b)(6) deposition.’”) (quoting *In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-MD-1840-KHV, 2009 U.S. Dist. LEXIS 118705, at *38–39 (D. Kan. Dec. 16, 2009)); *Centrix Fin. Liquidating Trust v. Nat’l Union Fire Ins. Co.*, No. 4:12-MC-624-JAR, 2013 U.S. Dist. LEXIS 88843, at *11–12 (E.D. Mo. June 25, 2013) (“Moreover, prior deposition testimony from individual fact witnesses does not relieve a corporation from designating a corporate spokesperson in response to a [Federal] Rule 30(b)(6) notice of deposition, even when the same witness will testify in an individual and a corporate capacity.”); *Landmark Screens, LLC v. Morgan, Lewis & Brokious LLP*, No. C08-02581 JF (HRL), 2010 U.S. Dist. LEXIS 91832, at *6 (N.D. Cal. Aug. 13, 2010) (“It is clear that the fact that a party has already taken depositions of individuals does not insulate a corporation from producing the same individuals as corporate representatives to give [Federal] Rule 30(b)(6) depositions on the same topics.”); *DHL Express (USA), Inc. v. Express Save Indus.*, No. 09-60276-CIV-COHN/SELTZER, 2009 U.S. Dist. LEXIS 102981, at *8–15 (S.D. Fla. Oct. 19, 2009) (allowing a deposition of an organization even though its designated representative had already been deposed individually); *Lendingtree, Inc. v. Lowermybills, Inc.*, No. 3:05CV153-C, 2006 U.S. Dist. LEXIS 59589, at *8–9 (W.D.N.C. Aug. 22, 2006) (same); *In re E. I. du Pont de Nemours & Co. C-8 Pers. Injury Litig.*, No. 2:13-MD-24332014 U.S. Dist. LEXIS 58041, at *16–17 (S.D. Ohio Apr. 24, 2014) (“In Discovery Order Number Three, the Court rejected DuPont’s reliance upon prior fact witness testimony to conclude that the topics noticed in the subject Notice of Deposition are improper on duplicity grounds[.]”); *Smith v. Gen. Mills*, No. C2 04-705, 2006 U.S. Dist. LEXIS 19093, at *15 (S.D. Ohio Apr. 13, 2006) (“Courts have soundly rejected [the] argument that prior deposition testimony from individual fact witnesses relieves a corporation from designating a corporate spokesperson in response to a [Federal] Rule 30(b)(6) notice of deposition.”).

¹²⁸*Sabre*, 2001 U.S. Dist. LEXIS 20637, at *3–4; *accord Difiore*, 2015 U.S. Dist. LEXIS 121107, at *3–4 (suggesting that an organization can avoid a representative deposition by adopting its employees’ deposition testimony and agreeing to be bound by it: “In one instance

Accordingly, when a representative deposition of closely-held corporation or other small organization and the individual deposition of the organization's representative likely would be substantially duplicative, a trial court, in the exercise of its discretion, can order that the deposition not be taken or limit its scope. For example, in *A.I.A. Holdings, S.A v. Lehman Brothers, Inc.*, the plaintiff corporation sought a protective order limiting the corporation's Federal Rule 30(b)(6) deposition to written interrogatories because all three of its principals had already been deposed in their individual capacities on the subjects set forth in the defendant's representative deposition notice.¹²⁹ After explaining the differences between an individual and a representative deposition, the court concluded:

Since a 30(b)(6) witness is obligated to provide the entity's knowledge, the mere fact that the principal of a corporation has been deposed is not an automatic substitute for a 30(b)(6) deposition. However, common sense teaches that in the case of relatively small, closely-held entities, like [the plaintiff corporation], there may be no difference

where a court did limit 30(b)(6) depositions on this ground, the corporation had explicitly agreed to be bound by the testimony of an employee previously deposed in his individual capacity. The reasoning of that case is persuasive, but it is easily distinguishable from the present case in which CSL frequently notes that the Plaintiff 'will likely argue' it is bound to its employees' testimony, without agreeing to be so bound. Therefore, I am persuaded that Defendant should still be required to prepare a 30(b)(6) deponent regarding these topics, as they have not agreed to accept their employees' prior testimony as their own." (citing *Novartis Pharms. Corp. v. Abbott Labs.*, 203 F.R.D. 159, 162-63 (D. Del. 2001)); see also *Sw. Bell Tel., L.P.*, 2009 U.S. Dist. LEXIS 131706, at *10-11 ("[T]he undersigned is mindful of the possibility raised by UTEX that a second deposition of Feldman could easily be used to cover topics fully addressed in his first deposition. Accordingly, counsel for AT&T is cautioned to restrict questioning of Feldman appropriately so as to minimize duplication and reduce the burden placed on Feldman as a deponent required to undergo a second deposition."); *Williams*, 2006 U.S. Dist. LEXIS 4937, at *4-5 ("This does not mean, however, that Plaintiffs can ask Mr. St. Angelo questions that they previously asked during his [Federal] Rule 30(b)(6) deposition in that such questions would be unreasonably duplicative and thus subject to the limitation of [Federal] Rule 26(b)(2).") *But see* *ICE Corp. v. Hamilton Sundstrand Corp.*, No. 05-4135, 2007 U.S. Dist. LEXIS 42965, at *13-14, (D. Kan. June 11, 2007) ("In contrast, the reverse has occurred in the instant case. Here, defendants first deposed plaintiff's witnesses in their individual capacities and now seek to depose plaintiff's 30(b)(6) witnesses. Thus, a caution against duplicative questioning is not warranted because such a caution would prevent defendants from effectively using 30(b)(6) depositions as they were designed, i.e. to prevent sandbagging.").

¹²⁹*A.I.A. Holdings, S.A v. Lehman Bros.*, No. 97 Civ. 4978, 2002 U.S. Dist. LEXIS 9218, at *13 (S.D.N.Y. May 20, 2002).

between the knowledge of the entity and the knowledge of its principals A 30(b)(6) deposition may not be justified where, assuming the witness is properly prepared, the entity establishes that the witness's testimony as a 30(b)(6) witness would be identical to his testimony as an individual and the 30(b)(6) is limited, or substantially limited, to topics covered in the deposition taken in the witness's individual capacity. In such a situation, there appears to be no obstacle to the entity's complying with its obligations under [Federal] Rule 30(b)(6) by adopting the witness's testimony in his individual capacity.¹³⁰

Regarding whether there is any limitation on the number of representative depositions, it often is inappropriate to insist that all subject matters be explored in a single representative deposition because different subject matters are suitable for discovery at different times in the action. For example, a party may need to obtain information about the organization's electronically stored information through a deposition before serving written discovery or taking depositions on the action's substantive issues.

e. Remedies for an Organization's Failure to Designate a Witness or to Properly Prepare its Representative

If the organization fails to designate a witness to testify on its behalf, if its witness is unprepared to testify, or if the witness fails to appear for deposition or fails to answer a question at the deposition, the noticing party "may move for an order compelling a designation, an appearance, an answer or answers . . . or apply to the court in which the action is pending for the imposition of any sanction authorized by [Texas] Rule 215.2(b) without the necessity of first having obtained a court order compelling such

¹³⁰*Id.* at *17–18. Nonetheless, the court in *A.I.A. Holdings* denied the plaintiff corporation's motion for a protective order because it could not determine from the record whether a representative deposition would be entirely, or even substantially, redundant of the depositions of the corporate principals taken in their individual capacities. It, however, gave the corporation an additional opportunity to show that a representative deposition "would be a waste of time and money." *Id.* at *19.

discovery.”¹³¹ In addition to such a discovery order, the noticing party, if it prevails on its motion to compel, is entitled to recover “the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.”¹³²

¹³¹TEX. R. CIV. P. 215.1(b). Many federal courts have held that presenting an unprepared representative is a failure to appear under Federal Rule 37(d). As explained by the United States Court of Appeals for the Third Circuit:

In reality if a [Federal] Rule 30(b)(6) witness is unable to give useful information he is no more present for the deposition than would be a deponent who physically appears for the deposition but sleeps through it. Indeed, we believe that the purpose behind [Federal] Rule 30(b)(6) undoubtedly is frustrated in the situation in which a corporate party produces a witness who is unable and/or unwilling to provide the necessary factual information on the entity’s behalf . . . Thus, we hold that when a witness is designated by a corporate party to speak on its behalf pursuant to [Federal] Rule 30(b)(6), “producing an unprepared witness is tantamount to a failure to appear” that is sanctionable under [Federal] Rule 37(d).”

Black Horse Lane Assoc., L.P. v. Dow Chem. Corp., 228 F.3d 275, 304 (3d Cir. 2000); *accord Maronda Homes, Inc. v. Progressive Express Ins. Co.*, No: 6:14-cv-1287-Orl-31TBS, 2015 U.S. Dist. LEXIS 60603, at *5–7 (M.D. Fla. May 8, 2015); *Cont’l Cas. Co. v. First Fin. Emp. Leasing, Inc.*, 716 F. Supp. 2d 1176, 1193 (M.D. Fla. 2010); *Pioneer Drive, LLC v. Nissan Diesel Am., Inc.*, 262 F.R.D. 552, 559–60 (D. Mont. 2009). Texas Rule 215.2(b) provides in relevant part:

[T]he court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

- (1) an order disallowing any further discovery of any kind or of a particular kind by the disobedient party;
- (2) an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;
- (3) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- (4) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
- (5) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party; . . .

TEX. R. CIV. P. 215.2(b).

¹³²TEX. R. CIV. P. 215.1(d).

Because merits-preclusive sanctions are generally disfavored in Texas absent flagrant and callous disregard for the discovery rules and prejudice to the noticing party,¹³³ an organization that initially fails to present a witness to testify on its behalf or presents an improperly prepared one should be ordered to produce such a witness and pay the noticing party's expenses, including attorneys' fees, incurred either in connection with the prior deposition or the new one.

B. *The Deposition's Scope*

A deposition's scope is governed by Texas Rule 192.3, the rule governing discovery's scope.¹³⁴ Under that Rule, depositions can be used to inquire about "any matter that is not privileged and that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party taking the deposition or the claim or defense of another party. It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."¹³⁵ Both the opposing party and the deponent, however, have the right to protection "from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights."¹³⁶ And a trial court, on its own

¹³³ *Petroleum Sols., Inc. v. Head*, 454 S.W.3d 482, 489 n.3 (Tex. 2014) ("Generally, we have stated that, consistent with due process considerations, discovery sanctions that 'are so severe as to preclude presentation of the merits of [a claim or defense] should not be assessed absent a party's flagrant bad faith or counsel's callous disregard for the responsibilities of discovery.") (quoting *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 918 (Tex. 1991)).

¹³⁴ TEX. R. CIV. P. 192.3.

¹³⁵ *Id.* 192.3(a); see *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 127 (Tex. 1995) (discussing depositions and noting that "[i]t is undisputed that a party is entitled to discovery that is relevant to the subject matter of the claim, and which appears reasonably calculated to lead to the discovery of admissible evidence") (quoting *Monsanto Co. v. May*, 889 S.W.2d 274, 276 (Tex. 1994) (Gonzalez, J., dissenting)); *In re West*, 346 S.W.3d 612, 615 (Tex. App.—El Paso 2009, orig. proceeding) (same).

¹³⁶ *Crown Cent. Petroleum Corp.*, 904 S.W.2d at 127; accord TEX. R. CIV. P. 192.4 ("The discovery methods permitted by these rules should be limited by the court if it determines, on motion or on its own initiative and on reasonable notice, that: (a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or (b) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."); *In re Titus Cty.*, 412 S.W.3d 28, 33 (Tex. App.—Texarkana 2013, orig. proceeding) (citing *Grass v. Golden*, 153 S.W.3d 659,

motion or in response to a motion to quash or for protection, can “make any order in the interest of justice and may—among other things—order that” the deposition not be taken, be limited in whole or in part, be taken at a certain time or place, or be taken by a specified method (e.g., in person, by telephone, or by video conference) and on specified terms and conditions, or that any deposition transcript or other recording be sealed or otherwise protected, subject to Texas Rule 76a.¹³⁷

Generally the discovery rules governing depositions can be modified by the parties’ agreement or by court order for good cause shown.¹³⁸ Thus, for example, the parties can agree to enlarge or shorten the time allowed for a deposition and to change the manner in which a deposition is conducted notwithstanding Texas Rule 199.5’s limitations.¹³⁹ Such an agreement “is

662–63 (Tex. App.—Tyler 2004, orig. proceeding); *Grass*, 153, S.W.3d at 662–663 (“A party commanded to appear at a deposition or any other person affected by the subpoena may move for a protective order under Texas Rule of Civil Procedure 192.6(b) To protect the movant, the court may make any order in the interest of justice, including an order that the discovery not be undertaken at the time or place specified.”); see *In re Baptist Hosps.*, 172 S.W.3d 136, 145–46 (Tex. App.—Beaumont 2005, orig. proceeding) (“Although the discovery rules provide access to material information, the rules also provide effective means of limiting discovery to preserve litigation as a viable dispute resolution mechanism. [Texas] Rule 192.4 authorizes the court to limit discovery methods permitted by the rules if the discovery is obtainable from some other source that is more convenient, less burdensome, or less expensive, or if the burden or expense of the proposed discovery outweighs its likely benefit.”).

¹³⁷TEX. R. CIV. P. 192.6(b); accord *In re Univar USA Inc.*, 311 S.W.3d 186, 189 (Tex. App.—Beaumont 2010, orig. proceeding) (holding that the trial court abused its discretion in not granting a protective order limiting the topics and production requests in the plaintiff’s representative deposition notice); *In re West*, 346 S.W.3d at 616–17 (“In light of the evidence presented, we find that it was reasonable for the trial judge to require that the deposition of CPA Henderson be tailored so as to protect Real Party’s privileged matters and to limit the deposition to matters relevant to the case. We also find that in light of Relator’s refusal to agree to a limited scope of discovery, it was reasonable for the judge to grant the Motion for Protective Order and to Quash the Notice of Deposition.”); *In re Boxer Prop. Mgmt. Corp.*, No. 14-00579-CV, 2009 Tex. App. LEXIS 7279, at *17–18 (Tex. App.—Houston [14th Dist.] Sept. 3, 2009, orig. proceeding) (mem. op.) (holding that the trial court abused its discretion in not quashing the deposition notice for the corporate defendant’s in-house attorney).

¹³⁸*In re Does*, 337 S.W.3d 862, 865 (Tex. 2011) (orig. proceeding) (per curiam) (“It is true that ‘[e]xcept where specifically prohibited, the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit by agreement of the parties’”) (quoting TEX. R. CIV. P. 191.1); *In re BP Prods. N. Am., Inc.*, 244 S.W.3d 840, 845 (Tex. 2008) (orig. proceeding) (“[Texas] Rule 191.1 provides that ‘except where specifically prohibited’ the parties may modify the ‘rules pertaining to discovery’ by agreement.”) (quoting Tex. R. Civ. P. 191.1).

¹³⁹TEX. R. CIV. P. 191 cmt. 1.

enforceable if it complies with [Texas] Rule 11 or, as it affects an oral deposition, if it is made a part of the record of the deposition.”¹⁴⁰ Under that Rule, an agreement is enforceable if it is “in writing, signed, and filed as part of the record, or if it is made in open court and entered in the record.”¹⁴¹ Although attorneys may choose to follow the deposition procedures set out in the discovery rules, agreements modifying them are commonplace and encouraged:

Wherever possible, a trial court should give effect to agreements between the parties. Discovery agreements serve an important role in efficient trial management, permitting the parties to settle their disputes without resort to judicial supervision. The Rules of Civil Procedure encourage parties to reach discovery agreements. When the parties conclude an agreement, the court should not lightly ignore their bargain.

A court should be particularly reluctant to set aside a [Texas] Rule 191.1 agreement after one party has acted in reliance on the agreed procedure and performed its obligations under the agreement.¹⁴²

II. ORAL DEPOSITIONS

A. *Oral Depositions in General*

Oral depositions are the most common type of depositions. They are preferred over other discovery methods because they allow the attorney to question the witness face-to-face, to judge the witness’s demeanor, and to gather information that has not been unduly filtered by opposing counsel.¹⁴³

¹⁴⁰*Id.* 191.1; accord *In re BP Prods. N. Am., Inc.*, 244 S.W.3d at 845–46 (“A [Texas Rule 191.1] agreement is enforceable when it complies with the terms of [Texas] Rule 11, or as it affects an oral deposition, if made a part of the record of the deposition.”).

¹⁴¹TEX. R. CIV. P. 11.

¹⁴²*In re BP Prods. N. Am., Inc.*, 244 S.W.3d at 846.

¹⁴³*Kleppinger v. Tex. Dep’t of Transp.*, 283 F.R.D. 330, 335 (S.D. Tex. 2012) (“While the Court recognizes that in many instances interrogatories and depositions can be utilized to obtain the same information in a lawsuit, these two methods of discovery are not necessarily equivalent. That is, the use of interrogatories may have disadvantages. For example, interrogatories do not provide subjective information, such as the demeanor of the responding party. Further, interrogatories can be ineffective in obtaining complex or possibly confusing information.

Moreover, because of the question-and-answer format, an attorney can readily follow up if the witness gives an unexpected or incomplete answer or if the attorney realizes that his or her question was inartful.

An oral deposition generally consists of questions by the attorney for one party, answers by the deponent, and objections and cross-examination by the other parties' attorneys, which "are recorded at the time they are given or made."¹⁴⁴ The deposition is recorded stenographically by a court reporter or by a mechanical recording device (e.g., a tape recorder or videotape) operated by a notary public, the party, its attorney, or its attorney's employee.¹⁴⁵

Texas Rule 199 governs oral depositions, allows a party to "take the testimony of any person or entity by oral examination,"¹⁴⁶ and sets forth the procedures for obtaining, conducting, and recording such depositions. To take an oral deposition, a party must serve a deposition notice on the witness and all other parties that complies with Texas Rule 199.2,¹⁴⁷ compel the witness to comply with the notice as provided in Texas Rule 199.3,¹⁴⁸ and make arrangements for taking and recording the deposition in compliance with Texas Rules 199.1(b) and (c).¹⁴⁹

B. *The Deposition Notice*

Texas Rule 199.2 sets forth the requirements for, and contents of, the oral deposition notice.¹⁵⁰

Moreover, depositions have more flexibility than interrogatories because they permit an attorney to ask follow-up questions based on answers to previous questions or repeat questions if a deponent is being evasive.") (citations omitted); *see* *Elan Microelectronics Corp. v. Pixcir Microelectronics Co.*, No. 2:10-cv-00014-GMN-PAL, 2013 U.S. Dist. LEXIS 114164, at *17 (D. Nev. Aug. 7, 2013) ("Because of its nature, the deposition process provides a means to obtain more complete information and is, therefore, favored.") (quoting *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989)); *Buehrle v. City of O'Fallon*, No. 4:10CV00509, 2011 U.S. Dist. LEXIS 11972, at *7 (E.D. Mo. Feb. 8, 2011) (same).

¹⁴⁴TEX. R. CIV. P. 199.1(a).

¹⁴⁵*See infra* Section II.F (discussing the recording of an oral deposition).

¹⁴⁶TEX. R. CIV. P. 199.1; *cf. In re Amezaga*, 195 B.R. 221, 227 (Bankr. D.P.R. 1996) (explaining that "a deposition is a 'question-and-answer conversation' between the witness and the attorneys used to gather facts about the case and the witness' actions and experiences").

¹⁴⁷*See infra* Section II.B (discussing deposition notices).

¹⁴⁸*See infra* Section II.C (discussing compelling attendance at the deposition).

¹⁴⁹*See infra* Section II.E (discussing the recording of the deposition).

¹⁵⁰TEX. R. CIV. P. 199.2.

1. Time for Serving the Deposition Notice

The oral deposition notice must be served a “reasonable time” before the deposition date.¹⁵¹ What constitutes a reasonable time depends on the circumstances,¹⁵² including the deposition’s location, the time needed to prepare for the deposition, the existence of exigent circumstances (e.g., a newly discovered witness shortly before discovery’s close or a witness located in a distant locale in which the parties are currently taking depositions), and whether the notice includes a production request as well as the production request’s scope.¹⁵³

Whereas courts generally hold that one or two days’ notice is unreasonable,¹⁵⁴ a week’s notice generally is found sufficient.¹⁵⁵ Scheduling

¹⁵¹ *Id.* 199.2(a); *accord* *Onwuteaka v. Comm’n for Lawyer Discipline*, No. 14-07-00595-CV, 2009 Tex. App. LEXIS 1694, at *26–27 (Tex. App.—Houston [14th Dist.] Mar. 12, 2009, pet. denied) (mem. op.) (“The discovery rules require that ‘a notice of intent to take an oral deposition . . . be served on the witness and all parties a *reasonable time* before the deposition is taken.’”) (quoting TEX. R. CIV. P. 199.2(a)).

¹⁵² *Hycarbex, Inc. v. Anglo-Suisse, Inc.*, 927 S.W.2d 103, 111 (Tex. App.—Houston [14th Dist.] 1996, no writ) (“[Former] Rule 200 of the Texas Rules of Civil Procedure requires a party to give reasonable notice of a deposition. Whether notice is reasonable depends on the circumstances of each case.”) (citation omitted); *Bloyed v. Gen. Motors Corp.*, 881 S.W.2d 422, 437 (Tex. App.—Texarkana 1994), *aff’d*, 916 S.W.2d 949 (Tex. 1996) (same); *cf.* *Peterson v. Union Pac. R.R.*, No. 06-CV-3084, 2007 U.S. Dist. LEXIS 62134, at *5–6 (C.D. Ill. Aug. 23, 2007) (“The analysis in determining the reasonableness of notice is necessarily case-specific and fact-intensive.”).

¹⁵³ *Cf. Peterson*, 2007 U.S. Dist. LEXIS 62134, at *6 (“A fact to be considered is the time between the notice and the deposition, with an eye toward preparation and travel.”); *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 320, 327 (N.D. Ill. 2005) (same).

¹⁵⁴ *See Onwuteaka*, 2009 Tex. App. LEXIS 1694, at *26–27 (holding that one day’s notice was unreasonable); *Bloyed*, 881 S.W.2d at 437 (same); *Hogan v. Beckel*, 783 S.W.2d 307, 307–08 (Tex. App.—San Antonio 1989, writ denied) (same); *cf.* *C&F Packing Co. v. Doskocil Cos.*, 126 F.R.D. 662, 679 (N.D. Ill. 1989) (same); *Bogan v. Kreski*, 546 So. 2d 1132, 1133 (Fla. Dist. Ct. App. 1989) (same). *But see* *Nat. Organics, Inc. v. Proteins Plus, Inc.*, 724 F. Supp. 50, 52 (E.D.N.Y. 1989) (“Although the defendant received only one-day’s notice, the parties were on an expedited discovery schedule, the need for her deposition was sudden and unexpected, and her deposition was brief and taken by phone. We find that the defendant received notice ‘reasonable under all the circumstances.’”) (quoting *Radio Corp. of Am. v. Rauland Corp.*, 21 F.R.D. 113, 115 (N.D. Ill. 1957)); *Radio Corp. of Am.* 21 F.R.D. at 113 (holding that one day’s notice was sufficient because “counsel were all in Oslo for the taking of the foreign depositions, and it was apparently understood that Zenith was to proceed with its depositions at the time”).

¹⁵⁵ *See Hycarbex, Inc.*, 927 S.W.2d at 111–12 (holding that four days’ notice was unreasonable); *Gutierrez v. Walsh*, 748 S.W.2d 27, 28 (Tex. App.—Corpus Christi 1988, no writ) (“The appellants concede that they received eight days notice for the first deposition and six days

numerous depositions on the same day in different cities or in a very short period of time often will be found to be unreasonable.¹⁵⁶

notice for the second deposition. The trial court could have found that such notice was reasonable.”); *cf.* *FAA v. Landy*, 705 F.2d 624, 635 (2d Cir. 1983) (“The court may take judicial notice of frequent flights from New York to Tampa, as well as availability of procedural remedies, in concluding that [four days’ notice of a deposition] was reasonable.”); *Guzman v. Bridgepoint Educ., Inc.*, No.11-0069-WQH(WVG), 2014 U.S. Dist. LEXIS 58806, at *4–5 (S.D. Cal. Apr. 28, 2014) (“Fed. R. Civ. P. 30(b)(1) requires that a party seeking a deposition give ‘reasonable notice’ of the deposition. Courts construe ‘reasonable notice’ to be five days, if the deposition notice does not require production of documents at the deposition. . . . Here, Plaintiff’s Deposition Notice was served on March 19, 2014 for a deposition to be taken on March 28, 2014. The time between March 19, 2014 and March 28, 2014 is nine days. Therefore, Plaintiff’s Deposition Notice, to the extent it did not request production of documents at the deposition, was timely and reasonable.”); *Millennium Labs., Inc. v. Allied World Assurance Co. (U.S.)*, No. 12cv2280-H(KSC), 2014 U.S. Dist. LEXIS 8158, at *5 n.1 (S.D. Cal. Jan. 15, 2014) (“[P]arties noticing depositions must give ‘reasonable written notice to every other party.’ Given the continuances granted to date and the January 31, 2014 fact discovery deadline, this Court construes reasonable notice to be 5 business days.” (quoting *FED. R. CIV. P. 30(b)(1)*)); *Charm Floral v. Wald Imps., Ltd.*, No. C10-1550-RSM, 2012 U.S. Dist. LEXIS 16007, at *5–7 (W.D. Wash. Feb. 9, 2012) (“[M]ore than one week’s notice generally is considered reasonable. Less than one week generally is not considered reasonable. Notice of a week or more is not, however, required in all circumstances.”) (citations omitted); *Zone Sports Ctr., LLC v. Nat’l Sur. Corp.*, No. 1:11-cv-00845-LJO-BAM, 2012 U.S. Dist. LEXIS 30208, at *3 (E.D. Cal. Mar. 7, 2012) (“Commonly, courts find that notice of at least five business days’ notice is required to constitute reasonable notice.”); *United States v. Philip Morris Inc.*, 312 F. Supp. 2d 27, 36–37 (D.D.C. 2004) (holding that three days’ notice was unreasonable); *Gamboa v. King Cty.*, No. C06-1034RSM, 2008 U.S. Dist. LEXIS 122279, at *2 (W.D. Wash. Feb. 22, 2008) (“Commonly, courts find that notice of at least five days is sufficient [notice] for a party’s deposition.”); *Davidson v. Dean*, 204 F.R.D. 251, 256 (S.D.N.Y. 2001) (holding eight days’ notice was “not unreasonable as a matter of law”); *In re Stratosphere Corp. Sec. Litig.*, 183 F.R.D. 684, 687 (D. Nev. 1999) (holding that five days’ notice was unreasonable); *Pearl v. Keystone Consol. Indus.*, 884 F.2d 1047, 1052 (7th Cir. 1989) (holding that six days’ notice was reasonable); *Peterson*, 2007 U.S. Dist. LEXIS 62134, at *5–6 (holding that four days’ notice was unreasonable); *Vardon Golf Co. v. Supreme Golf Sales, Inc.*, No. 89-C-2654, 1989 U.S. Dist. LEXIS 13183, at *3–4 (N.D. Ill., Nov. 2, 1989) (holding that four days’ notice was unreasonable); *Jones v. United States*, 720 F. Supp. 355, 366 (S.D.N.Y. 1989) (holding that eight days’ notice was reasonable); *Lloyd v. Cessna Aircraft Co.*, 430 F. Supp. 25, 26 (E.D. Tenn. 1976) (holding that two days’ notice was unreasonable); *Nielsen v. Nielsen*, 141 P.2d 415, 416 (Colo. 1943) (holding that three days’ notice was unreasonable). *But see* *Bohmfolk v. Linwood*, 742 S.W.2d 518, 520 (Tex. App.—Dallas 1987, no writ) (“Inasmuch as the deposition was being taken several weeks prior to trial, four days advance notice was, perhaps, somewhat scant. However, it was not unreasonable per se.”).

¹⁵⁶*Cf.* *Havadjias v. Vanguard Ins. Co.*, No. 93-56693, 1995 U.S. App. LEXIS 2694, at *7 (9th Cir. Feb. 1, 1995) (affirming the imposition of sanctions on pro se litigants who, among other things, sent notices scheduling forty depositions at the same time); *Mims v. Cent. Mfrs. Mut. Ins. Co.*, 178 F.2d 56, 59 (5th Cir. 1949) (“We are unwilling to give countenance to the propositions

2. The Notice's Content

Texas Rule 199.2(b) requires the oral deposition notice to state: (1) the deponent's name,¹⁵⁷ (2) the deposition's time and place,¹⁵⁸ (3) the method by which the testimony will be recorded,¹⁵⁹ (4) the names of any "additional attendees" (i.e., persons other than the witness, the parties, the parties' spouses, attorneys, and attorneys' employees, and the deposition officer—i.e., the person recording the deposition, usually a court reporter),¹⁶⁰ and (5) the documents to be produced at the deposition.¹⁶¹ Unless the witness is an organization, the notice need not describe the matters on which examination is requested.¹⁶² A non-noticing party that also intends to examine the witness is not required to serve its own deposition notice.¹⁶³

that the notices given as set forth above calling, as they did, for the taking of depositions of numerous witnesses on the same date, in scattered localities across the continent, were in any sense reasonable."); *Harry A. v. Duncan*, 223 F.R.D. 536, 538–39 (D. Mont. 2004) (holding that noticing eighty-five depositions during a two-week period was unreasonable); *Triple Crown Am. v. Biosynth AG*, No. 96-7476, 1998 U.S. Dist. LEXIS 6117, at *13 n.6 (E.D. Pa. Apr. 29, 1998) ("The scheduling of five depositions at the same hour on the same day, as plaintiff initially did, is unreasonable . . ."); *Imperial Chems. Indus., v. Barr Labs, Inc.*, 126 F.R.D. 467, 472–73 (S.D.N.Y. 1989) (imposing sanctions in a patent case against an attorney who served deposition notices calling for the deposition of six expert witnesses from around the world on a single day, in a single place).

¹⁵⁷TEX. R. CIV. P. 199.2(b)(1) (requiring a deposition notice to "state the name of the witness, which may be either an individual or a public or private corporation, partnership, association, governmental agency, or other organization"). If the deponent is a nonparty, the notice should also contain the nonparty's address so that the court reporter issuing the subpoena knows where to serve it.

¹⁵⁸*Id.* 199.2(b)(2) (requiring the deposition notice to "state a reasonable time and place for the oral deposition").

¹⁵⁹*Id.* 199.2(b)(3) (requiring the deposition notice to "state whether the deposition is to be taken by telephone or other remote electronic means and identify the means").

¹⁶⁰*Id.* 199.2(b)(4) (providing that the deposition notice "may include the notice concerning additional attendees required by [Texas] Rule 199.5(a)(3)").

¹⁶¹*Id.* 199.2(b)(5) (providing that the deposition notice "may include a request that the witness produce at the deposition documents or tangible things within the scope of discovery and within the witness's possession, custody, or control").

¹⁶²*Id.* 199.2(b); *cf.* *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 164 F.R.D. 245, 248 (D. Kan. 1995) ("[U]nder [Federal] Rule 30 there is no requirement that the notice to take depositions include an identification of the subject matters upon which the witness is to be deposed, as is required when the notice identifies a corporation as a deponent."). Representative depositions are discussed in Section I.A.5.

¹⁶³*Cf.* *FCC v. Mizuho Medy Co.*, 257 F.R.D. 679, 681–82 (S.D. Cal. 2009) ("There is no formal requirement for a party seeking to cross-examine a deponent to serve a notice. In a multi-

The deposition notice must be signed either by the party's attorney or a pro se party¹⁶⁴ and "must show the attorney's State Bar of Texas identification number, address, telephone number, and fax number, if any"¹⁶⁵ or the pro se party's "address, telephone number, and fax number, if any."¹⁶⁶ If the notice is not signed, it must be stricken unless signed promptly after the omission is called to the attention of the party serving the notice.¹⁶⁷ The deposition notice also must be served on the witness and the other parties and must contain a certificate of service stating it was properly served on them.¹⁶⁸ If it is not served on the other parties, the deposition cannot be used at trial or at a hearing if the other parties did not have a reasonable time to re-depose the witness.¹⁶⁹ The notice can be served "in person, [by] mail, by commercial delivery service, by fax, by email, or by such other manner as the court in its discretion may direct"¹⁷⁰ unless the notice is filed electronically (i.e., a notice for a nonparty's deposition), in which case it "must be served electronically through the electronic filing manager if the email address of the party or attorney to be served is on file

party lawsuit, one party may notice the deposition and other parties may attend and cross-examine the deponent without also having to notice the deposition.").

¹⁶⁴TEX. R. CIV. P. 191.3(a).

¹⁶⁵*Id.* 191.3(a)(1).

¹⁶⁶*Id.* 191.3(a)(2).

¹⁶⁷*Id.* 191.3(d) ("If a . . . notice . . . is not signed, it must be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, notice, response, or objection. A party is not required to take any action with respect to a . . . notice that is not signed.").

¹⁶⁸*Id.* 21(a), (d), 199.2(d); *see* *Onyung v. Onyung*, No. 01–10–00519–CV, 2013 Tex. App. LEXIS 9190, at *54 (Tex. App.—Houston [1st Dist.] July 25, 2013, pet. denied) ("The Rules of Civil Procedure provide that a 'notice of intent to take an oral deposition must be served on the witness and all parties a reasonable time before the deposition is taken.'" (quoting TEX. R. CIV. P. 199.2(a))).

¹⁶⁹In *Onyung*, the court of appeals held that the trial court did not abuse its discretion in allowing the plaintiff to use a deposition even though one of the defendants did not receive notice of it because the defendant had a reasonable time to redepose the witness before trial. *Onyung*, 2013 Tex. App. LEXIS 9190, at *56–58. In doing so, it analogized to Texas Rule 203.6(b), which provides that "[a] deposition is admissible against a party joined after the deposition was taken if . . . that party has had a reasonable opportunity to redepose the witness and has failed to do so." *Id.* (quoting TEX. R. CIV. P. 203.6(b)); *see also* *Shenandoah Assocs. v. J & K Props., Inc.*, 741 S.W.2d 470, 492 (Tex. App.—Dallas 1987, writ denied) ("When other parties are not given notice of the deposition, an 'ex parte' deposition is not admissible."); *In re Baum*, 606 F.2d 592, 593 n.1 (5th Cir. 1979) ("Depositions taken without proper notice may be found to be inadmissible.").

¹⁷⁰TEX. R. CIV. P. 21a(a)(2).

with the electronic filing manager.”¹⁷¹ The deposition notice should be filed with the trial court *only* if it is served on a nonparty.¹⁷² A notice that is served only on parties should not be filed,¹⁷³ but the noticing party must retain a copy of it during the action’s pendency and any related appellate proceedings begun within six months after judgment is signed, unless otherwise provided by the trial court.¹⁷⁴

a. The Deposition’s Time and Place

The time and place for an oral deposition must be “reasonable.”¹⁷⁵ Although there is no requirement under Texas Rule 199 that the parties confer about the oral deposition’s time and place, local court rules may require this, as does the Texas Lawyer’s Creed.¹⁷⁶ Whether the time for a deposition is reasonable depends on the circumstances.¹⁷⁷ Ordinarily the designation of any time during normal business hours is reasonable. At least one court has held that it is unreasonable to schedule a deposition on a Sunday.¹⁷⁸

Oral depositions, like written discovery, must be completed within the discovery period absent an agreement by the parties or leave of court.¹⁷⁹

¹⁷¹ *Id.* 21a(a)(1).

¹⁷² *Id.* 191.4(b)(1) (“The following discovery matters must be filed: . . . deposition notices[] and subpoenas required to be served on nonparties[.]”).

¹⁷³ *Id.* 191.4(a)(1) (“The following discovery matters must not be filed: . . . deposition notices[] and subpoenas required to be served only on parties[.]”).

¹⁷⁴ *Id.* 191.4(d) (“Any person required to serve discovery materials not required to be filed must retain the original or exact copy of the materials during the pendency of the case and any related appellate proceedings begun within six months after judgment is signed, unless otherwise provided by the trial court.”).

¹⁷⁵ *Id.* 199.2(b)(2); *accord* *Grass v. Golden*, 153 S.W.3d 659, 662 (Tex. App.—Tyler 2004, orig. proceeding) (“A notice for an oral deposition must state a reasonable time and place for the deposition.”).

¹⁷⁶ The Texas Lawyer’s Creed—A Mandate for Professionalism, Art. III.14, (1989) (“I will not arbitrarily schedule a deposition . . . until a good faith effort has been made to schedule it by agreement.”).

¹⁷⁷ *Cf.* *Union Cent. Life Ins. Co. v. Burger*, 27 F. Supp. 556, 557 (S.D.N.Y. 1939) (ordering that the deposition of a sixteen-year-old should be taken when he was not “busy at school”).

¹⁷⁸ *Cf.* *Shenker v. United States*, 25 F.R.D. 96, 97–98 (E.D.N.Y. 1960).

¹⁷⁹ TEX. R. CIV. P. 199.2(a) (“An oral deposition may be taken outside the discovery period only by agreement of the parties or with leave of court.”); *see id.* 190.2(c)(1), 190.3(b)(1) (providing that “all discovery” in Level 1 and 2 actions “must be completed during the discovery

Accordingly, if the parties agree and the trial court does not order otherwise, depositions can continue until the trial date. Any such agreement should either be stated on the deposition's record or in a Texas Rule 11 agreement.¹⁸⁰

Texas Rule 199.2(b)(2) specifies the following places where a deposition can be taken:

(A) the county of the witness's residence; (B) the county where the witness is employed or regularly transacts business in person; (C) the county of suit, if the witness is a party or a person designated by a party under [Texas] 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.¹⁸¹

Thus, even if one of the places in subdivisions (A)-(D) of Texas Rule 199.2(b)(2) applies, a trial court, under subdivision (E) of Texas Rule

period"), 190.4(b)(2) (requiring Level 3 discovery-control plans to include "a discovery period during which either all discovery must be conducted or all discovery requests must be sent").

¹⁸⁰ See *id.* 191.1.

¹⁸¹ *Id.* 199.2(b)(2); accord *In re Alamex*, NV, No. 01-12-00037-CV, 2012 Tex. App. LEXIS 3509, at *3-5 (Tex. App.—Houston [1st Dist.] May 3, 2012, orig. proceeding) (mem. op.) ("By rule, depositions may be set in the county of the witness's residence; the county where the witness is employed or regularly transacts business in person; the county of suit, if the witness is a party or a person designated by a party under rule 199.2(b)(1); 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, subject to the foregoing, at any other convenient place directed by the court in which the cause is pending."); *Grass v. Golden*, 153 S.W.3d 659, 662 (Tex. App.—Tyler 2004, orig. proceeding) ("A notice for an oral deposition must state a reasonable time and place for the deposition. The place may be in (1) the county of the witness's residence; (2) the county where the witness is employed or regularly transacts business in person; (3) the county of suit if the witness is a party or designated as a party representative under [Texas] Rule 199.2(b)(1); (4) 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 Texas resident or is a transient person; or (5) subject to the foregoing, at any other convenient place directed by the court in which the cause is pending.") (citation omitted); see *In re Family Dollar Stores of Tex., LLC*, No. 04-14-00656-CV, 2015 Tex. App. LEXIS 4325, at *6 (Tex. App.—San Antonio Apr. 29, 2015, orig. proceeding) (mem. op.) ("Generally, oral depositions may be requested in the county of the witness's residence or employment, the county where the witness is served with the subpoena, or another convenient place as directed by the court.").

199.2(b)(2), can order a witness to be deposed at any location that is convenient.¹⁸² “‘Convenience’ is determined from the perspective of the witness.”¹⁸³ Absent agreement, under Texas Rule 199.2(b)(2), most witnesses will be deposed in the county of the witness’s residence, the county where the witness is employed, or any convenient place determined by court where the action is pending provided that it is within subpoena range.¹⁸⁴ A witness who is party or a Texas Rule 199.2(b)(1) representative also can be deposed in the county of suit.¹⁸⁵ The deposition of a witness

¹⁸²See *In re Turner*, 243 S.W.3d 843, 846 (Tex. App.—Eastland 2008, orig. proceeding) (“When a deposition takes place outside one of the counties specifically identified by [Texas] Rule 199.2(b)(2), it must be at a convenient place.”); *In re Rogers*, 43 S.W.3d 20, 29 (Tex. App.—Amarillo 2001, orig. proceeding) (“Suit was filed and pending in Potter County. At the hearing of November 13th, it was represented to the trial judge that Ancona was no longer employed by King’s Manor, and that she had moved to Brownsville. Otherwise, no evidence was presented or representation made to the trial judge as to the residence or place of employment or place of business of the witnesses. Nor does the record support a conclusion that Dallas was a reasonable place or otherwise convenient for any of the witnesses. The record of the hearing, therefore, does not support the ordering of Rogers and witnesses Ancona, Vessel and Bunch to appear for deposing in Dallas, Texas.”); *Boone v. Fisher*, No. 13-96-001-CV, 1999 Tex. App. LEXIS 612, at *37–38 (Tex. App.—Corpus Christi Jan. 28, 1999, pet. denied) (not designated for publication) (“The record reveals the trial court gave no consideration to the reasonableness or the convenience of the place of the deposition of the witnesses. This constitutes an abuse of discretion on the part of the court contrary to [former Texas R]ule 201(5).”).

¹⁸³*Grass*, 153 S.W.3d at 662; accord *In re Alamex, NV*, 2012 Tex. App. LEXIS 3509, at *3; *In re W. Star Trucks US, Inc.*, 112 S.W.3d 756, 765 (Tex. App.—Eastland 2003, orig. proceeding).

¹⁸⁴TEX. R. CIV. P. 199.2(b)(2)(A), (B), (E); see *In re Prince*, No. 14-06-00895-CV, 2006 Tex. App. LEXIS 10558, at *11 (Tex. App.—Houston [14th Dist.] Dec. 12, 2006, orig. proceeding) (“[T]he Texas rules treat non-party witnesses differently from witnesses subject to a party’s control. [Texas] Rules 176.3 and 199.3 provide that only parties or witnesses who are ‘retained by, employed by, or otherwise subject to the control of a party’ may be compelled to attend a deposition at any of the reasonable locations provided in Rule 199.2(b)(2), specifically including ‘any . . . convenient place directed by the court.’ Other persons, by contrast, ‘may not be required by subpoena to appear or produce documents or other things in a county that is more than 150 miles from where the person resides or is served.’”) (citations omitted) (quoting TEX. R. CIV. P. 176.3(a)). Under Texas Rule 191.1, the parties and witness can agree to take the deposition anywhere. See TEX. R. CIV. P. 191.1.

¹⁸⁵TEX. R. CIV. P. 199.2(b)(2)(C); see *In re Family Dollar*, 2015 Tex. App. LEXIS 4325, at *6 (“When a party notices the deposition of a corporation, and the organization designates an individual to testify as a corporate representative on its behalf, the rule allows the deposition to be conducted in the county in which the suit is pending.”); *In re Bannum, Inc.*, No. 03-09-00512-CV, 2009 Tex. App. LEXIS 10088, at *1–2 (Tex. App.—Austin Oct. 30, 2009, orig. proceeding) (mem. op.) (“If the individual is a party or if the party is an organization and designates a person

who is neither a Texas resident nor a party's Texas Rule 199.2(b)(1) representative generally must be taken where the witness lives.¹⁸⁶

b. Alternative Methods of Conducting or Recording the Deposition

Under Texas Rule 199.1, a party can take an oral deposition by telephone or other remote electronic means (e.g., videoconference)¹⁸⁷ and can record the deposition nonstenographically (e.g., by tape recorder or videotape).¹⁸⁸ If the deposition is to be taken by telephone or other remote electronic means, the deposition notice must so state and identify the means by which the deposition will be taken.¹⁸⁹

If the deposition is to be recorded nonstenographically, a party, at least five days before the deposition date, must serve a written notice on the witness and all other parties: (1) stating the deposition will be recorded nonstenographically, (2) identifying the nonstenographic method that will

to act as its representative in a deposition, the rules allow the witness to be deposed in the county of suit.”); *Davis v. Ruffino*, 881 S.W.2d 186, 187 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding) (“When the deponent is a party to the suit, the deposition may be taken in the following counties: where the deponent resides, where the deponent is employed, where the deponent regularly conducts business in person, at such other convenient place as may be directed by the court, or in the county of suit.”).

¹⁸⁶ *Wal-Mart Stores Inc. v. Street*, 754 S.W.2d 153, 155 (Tex. 1988) (per curiam) (holding that the Chairman of the Board of the defendant corporation had to be deposed in Bentonville, Arkansas, where he lived and worked); *In re Wells Fargo Bank, N.A.*, No. 03-10-00469-CV, 2010 Tex. App. LEXIS 6817, at *3–6 (Tex. App.—Austin Aug. 16, 2010, orig. proceeding) (mem. op.) (holding that the defendant bank's employee, who lived and worked in De Moines, Iowa, had to be deposed there because “[i]t is not alleged that he received service within 150 miles of Travis County, Texas, or was a transient, or that Travis County, Texas was convenient for him. Grissom is not a party and he has not been designated as a corporate representative by Wells Fargo under [Texas R]ule 199.2(b)(1)”; *In re Bannum*, 2009 Tex. App. LEXIS 10088, at *1–5 (holding that the president of the defendant corporation, who was not the corporation's Texas Rule 199.2(b)(1) representative and who did not live or work in Texas, had to be deposed in Florida, where he lived); *Butan Valley, N.V. v. Smith*, 921 S.W.2d 822, 829 (Tex. App.—Houston [14th Dist.] 1996, no writ) (holding that a corporate director, who was not the corporation's Texas Rule 199.2(b)(1) representative, had to be deposed in Saudi Arabia, where he lived). The Austin Court of Appeals has held that a trial court has no authority to order a witness, who does not live or work in Texas, to appear for a deposition in Texas even as a sanction. *In re Bannum*, 2009 Tex. App. LEXIS 10088, at *4.

¹⁸⁷ TEX. R. CIV. P. 199.1(b).

¹⁸⁸ *Id.* 199.1(c).

¹⁸⁹ *Id.* 199.2(b)(3).

be used (e.g., tape recorder or videotape), and (3) stating whether the deposition also will be recorded stenographically.¹⁹⁰ This notice can be included in the original deposition notice or in a separate writing served on the witness and the other parties.¹⁹¹

After a party gives notice of its intent to record the deposition nonstenographically, any other party can serve a written notice designating that the deposition will be recorded stenographically or by another means *at its expense*.¹⁹² There, however, is no requirement that a nonstenographically recorded deposition also be recorded stenographically. Thus, for example, unless one party decides to pay for a court reporter or the trial court, under Texas Rule 203.6(a), orders the deposition be transcribed for trial,¹⁹³ a tape-recorded or videotaped deposition need not also be recorded stenographically.¹⁹⁴

c. *Additional Attendees*

Texas Rule 199.5 governs who may attend an oral deposition.¹⁹⁵ If a party “intends to have in attendance any persons other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the oral deposition,” the party must give “reasonable notice” to all parties of the other persons’ identities.¹⁹⁶ Thus, for example, a party is

¹⁹⁰ *Id.* 199.1(c) (“At least five days prior to the deposition, the party must serve on the witness and all parties a notice, either in the notice of deposition or separately, that the deposition will be recorded by other than stenographic means. This notice must state the method of nonstenographic recording to be used and whether the deposition will also be recorded stenographically.”).

¹⁹¹ *Id.* 199.2(b)(3) (“If the deposition is to be recorded by nonstenographic means, the notice may include the notice required by [Texas] Rule 199.1(c).”).

¹⁹² *Id.* 199.1(c).

¹⁹³ Texas Rule 203.6(a) provides, in relevant part:

A nonstenographic recording of an oral deposition, or a written transcription of all or part of such a recording, may be used to the same extent as a deposition taken by stenographic means. However, the court, for good cause shown, may require that the party seeking to use a nonstenographic recording or written transcription first obtain a complete transcript of the deposition recording from a certified court reporter.

TEX. R. CIV. P. 203.6(a).

¹⁹⁴ *Id.* 199.1(c).

¹⁹⁵ *Id.* 199.5.

¹⁹⁶ *Id.* 199.5(a)(3); *see* State Farm Lloyds v. Bold Roofing Co., No. 05-97-01908-CV, 2000 Tex. App. LEXIS 1602, at *7 (Tex. App.—Dallas Mar. 9, 2000, no pet.) (not designated for publication) (applying former Texas Rule 200(2)(a) and holding that “[t]he rules of civil

required to give notice that an expert witness will attend a deposition, unless the expert is the noticing party's attorney's employee rather than an independent contractor.¹⁹⁷ Once such notice is given, the other parties can challenge the notice's adequacy or the person's attendance by moving for a protective order.¹⁹⁸

The notice can be in the original deposition notice or a separate written document served on the witness and the other parties.¹⁹⁹ Any party can designate additional attendees.²⁰⁰ Texas Rule 199.5's purpose is to permit other parties to know in advance if an "additional attendee" will be at the deposition so they can seek a protective order if they have an objection to his or her attendance at the deposition. Once proper notice is given that an "additional attendee" will be present at the deposition, the "additional attendee" can attend the deposition unless the objecting party obtains a protective order preventing his or her attendance.²⁰¹

An interesting question and, one not directly addressed by either the Texas discovery rules or Texas courts, is the standard a trial court is to apply in determining whether an "additional attendee" should be allowed to attend the deposition. Under Texas Rule 192.6(b)(4), a court can dictate the terms and conditions of discovery:

[t]o protect the movant from . . . harassment, annoyance, or invasion of personal, constitutional, or property rights, . . . may make any order in the interest of justice and may—among other things—order that . . . the discovery be undertaken only . . . upon such terms and conditions . . . directed by the court[.]²⁰²

procedure mandate that a party give notice if someone other than a party, counsel, spouse, deposition officer, or spouse of a party is going to attend"); *Burrhus v. M&S Supply*, 933 S.W.2d 635, 640–41 (Tex. App.—San Antonio 1996, no writ) (same).

¹⁹⁷ *Burrhus*, 933 S.W.2d at 641 (construing former Texas Rule 200(2)(a)).

¹⁹⁸ *Id.*

¹⁹⁹ TEX. R. CIV. P. 199.5(a)(3); *see Burrhus*, 933 S.W.2d at 641 (construing former Texas Rule 200(2)(a)).

²⁰⁰ TEX. R. CIV. P. 199.5(a)(3).

²⁰¹ *Burrhus*, 933 S.W.2d at 641 (construing former Texas Rule 200(2)(a) and holding that "[t]he history of the rule makes clear . . . that the drafters of the rule intended that once proper notice was given, the non-exempted person named in the notice could attend the deposition unless the objecting party obtained a protective order precluding the non-exempted person's attendance").

²⁰² TEX. R. CIV. P. 192.6(b)(4).

Texas Rule 199.5(d) provides that “[t]he oral deposition must be conducted in the same manner as if the testimony were being obtained in court during trial.”²⁰³ Texas Rule 267 and Texas Rule of Evidence 614, in turn, govern the sequestration of witnesses at trial.²⁰⁴ Thus, the question becomes whether the propriety of an additional person’s attendance is governed by the protective-order rule, Texas Rule 192.6(b)(4), or the witness-sequestration rules, Texas Rule 267 and Texas Rule of Evidence 614.

Federal decisions are of limited help on this issue.²⁰⁵ Before 1993, Federal Rule 30(c), similar to Texas Rule 199.5(d), provided that “examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence.”²⁰⁶

²⁰³ *Id.* 199.5(d).

²⁰⁴ *Drilex Sys. v. Flores*, 1 S.W.3d 112, 116–17 (Tex. 1999) (“These rules provide that, at the request of any party, the witnesses on both sides shall be removed from the courtroom to some place where they cannot hear the testimony delivered by any other witness in the cause. Certain classes of prospective witnesses, however, are exempt from exclusion from the courtroom, including: (1) a party who is a natural person or his or her spouse; (2) an officer or employee of a party that is not a natural person and who is designated as its representative by its attorney; or (3) a person whose presence is shown by a party to be essential to the presentation of the cause.”); *accord* TEX. R. CIV. P. 267(b) (“This rule does not authorize exclusion of (1) a party who is a natural person or the spouse of such natural person, or (2) an officer or employee of a party that is not a natural person and who is designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the cause.”); TEX. R. EVID. 614 (“But this rule does not authorize excluding: (a) a party who is a natural person and, in civil cases, that person’s spouse; (b) after being designated as the party’s representative by its attorney . . . in a civil case, an officer or employee of a party that is not a natural person; . . . [or] (c) a person whose presence a party shows to be essential to presenting the party’s claim or defense . . .”).

²⁰⁵ One Texas case, in dictum, suggests that Texas Rule 199.5(d)’s requirement that an oral deposition be conducted in the same manner as if the testimony were being obtained in court during trial incorporates the witness-sequestration rule of Texas Rule 267 and Texas Rule of Evidence 614. *In re Bell Helicopter Textron, Inc.*, 87 S.W.3d 139, 150–51 (Tex. App.—Fort Worth 2002, orig. proceeding).

²⁰⁶ In 1993, Federal Rule 30(c) was amended to make clear that Federal Rule 26(c)(1) regarding protective orders governs the determination. Federal Rule 30(c)(1) presently provides, in relevant part, that “examination and cross-examination of witnesses [at oral depositions] may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence except Rules 103 and 615.” The Advisory Committee Note to the 1993 Amendment to Rule 30 explained the reason for the amendment as follows:

[T]he revision addresses a recurring problem as to whether other potential deponents can attend a deposition. Courts have disagreed, some holding that witnesses should be

Federal courts were split, however, regarding whether this language meant that the federal witness-sequestration rule, Federal Rule of Evidence 615,²⁰⁷ applied in determining who could attend a deposition or whether the determination was to be made under former Federal Rule 26(c)(5),²⁰⁸ the discovery rule regarding protective orders, which provided that “[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . designating the persons who may be present while the discovery is conducted[.]”²⁰⁹

excluded through invocation of [Federal] Rule 615 of the evidence rules, and others holding that witnesses may attend unless excluded by an order under [Federal] Rule 26(c)(5). The revision provides that other witnesses are not automatically excluded from a deposition simply by the request of a party. Exclusion, however, can be ordered under [Federal] Rule 26(c)(5) when appropriate; and, if exclusion is ordered, consideration should be given as to whether the excluded witnesses likewise should be precluded from reading, or being otherwise informed about, the testimony given in the earlier depositions.

FED. R. CIV. P. 30 advisory committee’s note to 1993 amend.

²⁰⁷ Federal Rule of Evidence 615 provides:

At a party’s request, the court must order witnesses excluded so that they cannot hear other witnesses’ testimony. Or the court may do so on its own. But this rule does not authorize excluding:

- (a) a party who is a natural person;
- (b) an officer or employee of a party that is not a natural person, after being designated as the party’s representative by its attorney;
- (c) a person whose presence a party shows to be essential to presenting the party’s claim or defense; or
- (d) a person authorized by statute to be present.

FED. R. EVID. 615.

²⁰⁸ Federal Rule 25(c)(5) is now Federal Rule 26(c)(1)(E).

²⁰⁹ Compare, e.g., *Adams v. Shell Oil Co.*, 136 F.R.D. 615, 617 & n.1 (E.D. La. 1991) (applying the witness-sequestration rule), *Lumpkin v. Bi-Lo, Inc.*, 117 F.R.D. 451, 453 (M.D. Ga. 1987) (same), *Naismith v. Prof’l Golfers Ass’n*, 85 F.R.D. 552, 568 (N.D. Ga. 1979) (same), *Williams v. Elec. Control Sys., Inc.*, 68 F.R.D. 703, 703–04 (E.D. Tenn. 1975) (same), and *Marks v. Powell (In re Marks)*, 135 B.R. 344, 345 (Bankr. E.D. Ark. 1991) (same), with, e.g., *In re Shell Oil Refinery*, 136 F.R.D. 615, 617 (E.D. La. 1991) (applying the good-cause requirement of former Federal Rule 26(c)(5)), and *BCI Comm’n Sys., Inc. v. Bell Atlanticom Sys., Inc.*, 112 F.R.D. 154, 157–59 (N.D. Ala. 1986) (same). State courts are similarly divided. Compare, e.g., *Stortz ex rel. Stortz v. Seier*, 835 S.W.2d 540, 542 (Mo. Ct. App. 1992) (applying the witness-

Because witness sequestration is a longstanding practice,²¹⁰ because the Texas Supreme Court opted not to adopt the 1993 amendments to Federal Rule 30(c) when making extensive amendments to the Texas discovery rules in 1999, and because there is no persuasive policy argument for limiting the witness-sequestration rule's application during discovery, the witness-sequestration rules—Texas Rule 267 and Texas Rule of Evidence 614—generally should inform the decision regarding whether an “additional attendee” should be allowed to attend a deposition. Thus, for example, an expert witness generally should be allowed to attend the depositions of the opposing party's experts,²¹¹ but a fact witness should not

sequestration rule), *with, e.g.*, *Hamon Contractors, Inc. v. Dist. Ct.*, 877 P.2d 884, 887 (Colo. 1994) (en banc) (holding that the witness-sequestration rule does not apply to depositions), and *Pettit v. Dolese Bros.*, 943 P.2d 161, 165 (Okla. Civ. App. 1997) (same).

²¹⁰The practice of separating witnesses to prevent collusive testimony can be traced to biblical times. *Braswell v. Wainwright*, 330 F. Supp. 281, 283 n.1 (S.D. Fla. 1971) (“The historical origin of ‘The Rule’ may not be clearly known. But Daniel’s effective use of the practice in the trial of Susanna suggests the genesis of this practice.” (citing *Daniel* 13:51–59 (New American))); *Bishop v. State*, 194 S.W. 389, 389 (Tex. Crim. App. 1917) (“The story of Susanna is familiar. Her accusers testified in the presence of each other to her guilt. She was about to be condemned when Daniel interposed, saying: ‘Put these two aside, one far from the other, and I will examine them.’ His examination disclosed such discrepancies in their testimony as resulted in the release of Susanna and the condemnation of her accusers.”). Witness sequestration was subsequently integrated into the English common law even before the emergence of jury trials, and the courts in most states embraced the practice when the common law was adopted as the prevailing legal system in this country. *See Drilex Sys., Inc. v. Flores*, 1 S.W.3d 112, 116 (Tex. 1999) (“English courts incorporated sequestration long ago, and the practice came to the United States as part of our inheritance of the common law.”).

²¹¹*See Drilex*, 1 S.W.3d at 118–19 (“*Drilex* is correct that this exception is often relied on to allow expert witnesses to be exempt from the [Texas] Rule. But nothing in [Texas Rule of Evidence] 614 or [Texas Rule] 267 suggests that *all* expert witnesses qualify for exemption. Although an expert witness may *typically* be found exempt under the essential presence exception, experts are not *automatically* exempt. Instead, [those Rules] vest in trial judges broad discretion to determine whether a witness is essential.”); *accord* *United States v. Seschillie*, 310 F.3d 1208, 1213 (9th Cir. 2002). Federal courts generally allow experts to attend depositions of the opposing party's experts. *Lisanti v. Lubetkin (In re Lisanti Foods, Inc.)*, 329 B.R. 491, 512 (Bankr. D.N.J. 2005) (“The Court sees no reason to bar one party's expert witness from the deposition of the other party's expert. It is common for experts to assist attorneys in connection with deposition testimony of opposing experts.”); *Lumpkin*, 117 F.R.D. at 453 n.1 (M.D. Ga. 1987) (“Because experts come within one of the exceptions to sequestration, this court is in complete agreement that experts can be excluded from depositions only upon a showing of good cause.”); *Skidmore v. Nw. Eng'g Co.*, 90 F.R.D. 75, 76–77 (S.D. Fla. 1981) (allowing the plaintiff's expert to attend the depositions of the defendants' employees); *Williams*, 68 F.R.D. 703, 703 (E.D. Tenn. 1975) (allowing an expert to attend the deposition of the opposing party's expert).

be allowed to attend the depositions of other fact witnesses unless the witness also is an organization's representative for the deposition.

Even though Texas Rule 267 and Texas Rule of Evidence 614 are applicable to oral depositions, a trial court nonetheless has discretion to exclude anyone—even a party or an organization's representative—from a deposition because Texas Rule 192.6(b)(4), which governs protective orders, provides that a trial court “to protect the movant from . . . harassment [or] annoyance” may make any order in the interest of justice and may—*among other things*—order that . . . the discovery be undertaken only . . . upon such terms and conditions ordered directed by the court[.]”²¹² A protective order excluding a party or an organization's representative from a deposition, however, should be granted only in exceptional circumstances. As explained by one federal court:

However, due to the heightened interests of parties in the proceedings, “factors that might justify exclusion of nonparties from a deposition might not be sufficient to exclude parties.” Hence, the principle has become well-established that a judge may exclude a party from a deposition only with a finding of “extraordinary circumstances.” In making this determination, the court must engage in a detailed analysis of the circumstances, parties and issues involved, and require a specific showing of good cause by the movant.²¹³

²¹²TEX. R. CIV. P. 192.6(b)(4) (emphasis added). Federal courts have excluded parties or their designated representatives from depositions under Federal Rule 26(c)(1)(E), which, unlike Texas Rule 192.6, specifically permits a court to enter a protective order “designating the persons who may be present while the discovery is conducted[.]” *E.g.*, *Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973); *Flores v. Wall*, No. CA 11-69 M, 2012 U.S. Dist. LEXIS 136676, at *13–14 (D.R.I. Sept. 6, 2012); *Nyazie v. Kennedy*, No. 97-0120, 1998 U.S. Dist. LEXIS 10050, at *9 (E.D. Pa. June 18, 1998); *Kerschbaumer v. Bell*, 112 F.R.D. 426, 426–27 (D.D.C. 1986).

²¹³*Nyazie*, 1998 U.S. Dist. LEXIS 10050, at *8 (quoting *Hines v. Wilkinson*, 163 F.R.D. 262, 266 (S.D. Ohio 1995), and 8 CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 2041, at 536 (1994)); *accord Galella*, 487 F.2d at 997 (holding that, although a trial court has the power to exclude a party from a deposition, “such an exclusion should be ordered rarely indeed”); *Flores*, 2012 U.S. Dist. LEXIS 136676, at *13–14 (“Absent a court order to the contrary, parties may attend depositions, and ‘due to the heightened interests of parties in the proceedings, factors that might justify exclusion of nonparties from a deposition might not be sufficient to exclude parties because of the parties’ more substantial interests in being present.’ For this reason, courts generally are loath to exclude parties from depositions in the absence of ‘compelling or exceptional circumstances.’”) (quoting *Dade v. Willis*, No. 95-6869, 1998 U.S.

Thus, for example, exclusion of a party or an organization's representative may be appropriate under the following circumstances: (1) when there is a significant and real risk that the party or representative will ridicule, harass, or intimidate the deponent;²¹⁴ (2) to protect privacy concerns or trade secrets;²¹⁵ and (3) very rarely, to prevent the possibility of a party's testimony being shaped or influenced by the deponent's testimony.²¹⁶

Dist. LEXIS 5941, at *4 (E.D. Pa. Apr. 20, 1998), and *BCI Commc'n*, 112 F.R.D. at 160; *Kerschbaumer*, 112 F.R.D. at 426 ("Most courts have granted protective orders to bar parties from attending depositions only in very limited circumstances."); *Hamon Contractors*, 877 P.2d at 888 (Colo. 1994) ("We conclude that a party who is a natural person or the representative of a party that is not a natural person may be excluded from a pre-trial deposition only under exceptional circumstances. This conclusion is supported not only by the foregoing authority but also by the fact that under C.R.E. 615, a party who is a natural person or representative of a party that is not a natural person may not be excluded from hearing the testimony of other witnesses at trial.").

²¹⁴ *Cf.*, e.g., *Galella*, 487 F.2d at 997 (holding that the trial court properly barred the plaintiff paparazzi photographer from the deposition of the defendant and former First Lady Jacqueline Kennedy Onassis in a suit for damages allegedly resulting from the plaintiff's manhandling by the defendant's security staff because of the plaintiff's history of harassing the defendant); *Monroe v. Sisters of St. Francis Health Servs., Inc.*, No. 2:09 cv 411, 2010 U.S. Dist. LEXIS 124488, at *8–9 (N.D. Ind. Nov. 23, 2010) (excluding the plaintiff's supervisors from attending the plaintiff's deposition because the plaintiff had a history of depression and the supervisors' presence could have an intimidating effect on his testimony and negatively impact his health); *Tolbert-Smith v. Bodman*, 253 F.R.D. 2, 5 (D.D.C. 2008) (excluding the plaintiff's former supervisors, who were designated as the defendant corporation's representatives, from the plaintiff's deposition in a discrimination action "[b]ecause plaintiff's doctor has expressed his concern that going forward with this deposition in the presence of plaintiff's former supervisors is very likely to result in severe and possibly catastrophic harm to the plaintiff . . ."); *Adams v. Shell Oil Co. (In re Shell Oil Refinery)*, 136 F.R.D. 615, 617 (E.D. La. 1991) (excluding corporate representatives from a deposition because of their intimidating influence on the deponent's testimony).

²¹⁵ *Cf.* *Gottlieb v. Cty. of Orange*, 151 F.R.D. 258, 260 (S.D.N.Y. 1993) (holding in a civil-rights action involving child abuse that "[o]nly counsel for the parties to this litigation, the witness, counsel for the witness, and a court reporter may be present" during the depositions of the nurses who cared for the child); *Monroe*, 2010 U.S. Dist. LEXIS 124488, at *4 ("Other instances of good cause have included separating witnesses . . . [and] protecting trade secrets . . .") (citing *Marshwood Co. v. Jamie Mills, Inc.*, 10 F.R.D. 386 (N.D. Ohio 1950)).

²¹⁶ *Compare*, e.g., *In re Terra Int'l, Inc.*, 134 F.3d 302, 306 (5th Cir. 1988) (holding that conclusory allegations that witnesses would be inclined to protect each other through senses of "camaraderie" was insufficient to establish good cause for exclusion), *Picard v. City of Woonsocket*, No. 09-318 S, 2011 U.S. Dist. LEXIS 94430, at *11–12 (D.R.I. Aug. 23, 2011) ("The weight of the authority holds that parties should not be excluded from depositions because of some inchoate fear that perjury would otherwise result. Simply put, credibility is an issue in every case, and without a specific, particularized reason for believing that these Defendants are

A different question may exist, however, when an organization selects a series of representatives, each of whom is a fact witness, to attend the depositions of other fact witnesses or wants two or more representatives present at a deposition. In such cases, a court properly can limit the organization to a single representative.²¹⁷ Nonetheless, because depositions,

any more likely than the average defendants to provide perjurious testimony, the Court is not free to exclude Defendants from proceedings in a suit they have been called upon to defend. Testimony of one defendant closely mirroring that of another is grist for the adversarial-system mill, which serves as the traditional and well-tested safeguard for perjury.” (citations omitted), *Nyazie*, 1998 U.S. Dist. LEXIS 10050, at *9–11 (“Repeatedly, courts have declined to order sequestration based on a broad and conclusory allegation that, should the witnesses be allowed to attend each other’s depositions, they will tailor their testimony to conform to one another Unlike the above cases, no such extraordinary factors exist in this matter What remains, then, is the exact argument rejected in numerous other cases—an inchoate fear of influence of one party’s deposition testimony on another’s. The simple fact that the plaintiffs are family members speaking on a matter in which they have a stake does not create good cause sufficient to override their interest in being present at every deposition. Consequently, the request for sequestration must be denied.”), *Baylis v. Pirelli Armstrong Tire Corp.*, No. 3:97 CV 729 (PCD), 1997 U.S. Dist. LEXIS 23136, at *4–5 (D. Conn. Oct. 31, 1997) (“Tactical considerations such as a desire to secure the independent recollection of witnesses or avoid the tailoring of testimony are per se not compelling and will not justify exclusion [of parties]. We will not restructure the adjudicative process to manufacture opportunities for counsel to ‘catch’ witnesses in inconsistent statements For such we must rely on the competence and skill of counsel in cross-examination.”) (quoting *Visor v. Sprint/United Mgmt. Co.*, No. 96-K-1730, 1997 U.S. Dist. LEXIS 14086, at *8 (D. Colo. Aug. 18, 1997), and *BCI Commc’n*, 112 F.R.D. at 155, 160 (N.D. Ala. 1986) (holding that the defendant’s allegations regarding the need to preclude the plaintiff’s witnesses, some of whom were its employees, “from hearing or being exposed to deponents’ testimony” did not constitute “anything more than ordinary garden variety or boilerplate ‘good cause’ facts which will exist in most civil litigation”), with, e.g., *Monroe*, 2010 U.S. Dist. LEXIS 124488, at *4 (“Other instances of good cause have included separating witnesses to prevent the possibility of one witness shaping the testimony of another”), *Dade*, 1998 U.S. Dist. LEXIS 5941, at *9 (excluding defendant police officers from each other’s depositions in a police brutality case because, “should the defendants be allowed to attend each other’s deposition, plaintiff’s ‘day in court’ will be deprived of its full effectiveness”), and *Clark v. Levine (In re Levine)*, 101 B.R. 260, 261–63 (Bankr. D. Colo. 1989) (ordering sequestration of certain defendants from the depositions of other defendants because “[w]hen allegations of fraud and conspiracy to commit fraud are joined, it can be persuasively argued that during discovery the need to test the observation, recollection and communication of each deponent independently should outweigh that party’s right to be present for deposition”).

²¹⁷ *Cf.*, e.g., *Adams*, 136 F.R.D. at 617 (E.D. La. 1991) (“Thus, by designating multiple corporate representatives who are also fact witnesses, Shell would in effect avoid the sequestration of witnesses rule. That would give Shell an unfair advantage over the plaintiffs.”); *Lumpkin v. Bi-Lo, Inc.*, 117 F.R.D. 451, 453–54 (M.D. Ga. 1987) (“Defendant further argues that even if [Federal Rule of Evidence] 615 applies to depositions, both Mr. Carithers and Mr. Barnes should

unlike the typical trial (which lasts at most a week or two), often take place over many months or years and in multiple locations, an organization generally need not designate the same representative for each deposition²¹⁸ and a deponent generally should not be precluded from discussing the action with other witnesses or reading transcripts of depositions already taken.²¹⁹

The final issue regarding “additional attendees” at depositions is the appropriate sanction for a violation of Texas Rule 199.5(a)(3)’s notice requirement. In *State Farm Lloyds v. Bold Roofing Co.*,²²⁰ the Dallas Court of Appeals explained:

be allowed to attend Plaintiff’s deposition under the second exception to [Federal Rule of Evidence] 615 which allows a corporate representative to be present at trial. The court recognizes that although the language of the exception is in the singular, it is not clear from the rule or its legislative history whether more than one representative may be designated. While a district judge may exercise wide discretion in allowing more than one corporate representative to be present, the court finds that the instant case is not one that would warrant the attendance of both Mr. Carithers and Mr. Barnes at Plaintiff’s deposition. Accordingly, counsel for Defendant may be accompanied by only one corporate representative at the deposition.” (citations omitted); *Lowy Dev. Corp. v. Super. Ct.*, 235 Cal. Rptr. 401, 404 (Cal. Ct. App. 1987) (allowing only one corporate representative to attend depositions).

²¹⁸*Cf. Breneman v. Kennecott Corp.*, 799 F.2d 470, 474 (9th Cir. 1986) (“Clearly, if a corporation may designate two representatives to remain in court during the trial, there is no violation of [Federal Rule of Evidence] 615 if, as here, a corporation designates a different single representative for the discovery and trial phases of a case.”).

²¹⁹*Cf. In re Terra Int’l*, 134 F.3d at 305–07 (5th Cir. 1998) (holding that the trial court abused its discretion in ordering “(1) when preparing witnesses for their depositions, attorneys may not refer ‘directly or indirectly by innuendo, to what other witnesses say about the facts;’ [or] (2) attorneys and officers of any party may not reveal prior deposition testimony to any witness prior to that witness’s deposition”); *Jones v. Circle K Stores, Inc.*, 185 F.R.D. 223, 223, 224–25 (M.D.N.C. 1999) (denying a protective order prohibiting the defendants from reading, discussing, or otherwise being informed about questions asked or testimony given in earlier depositions until their own deposition has been taken); *Solar Turbines, Inc. v. United States*, 14 Cl. Ct. 551, 552–53 (Cl. Ct. 1988) (denying a protective order precluding deponents from speaking to other witnesses or reviewing deposition transcripts); *Lumpkin*, 117 F.R.D. at 452–54 (denying a protective order precluding deponents from speaking to other witnesses or reviewing deposition transcripts); *BCI Commc’n*, 112 F.R.D. at 155, 160 (denying a protective order forbidding “disclosure by a plaintiff of deposition testimony to any person who is expected to be deposed in this case in the future or who is expected to testify at trial or both”). *But see* FED. R. CIV. P. 30 advisory committee’s note to 1993 amend. (noting that when exclusion is ordered under Federal Rule 26(c)(5) “consideration should be given as to whether the excluded witnesses likewise should be precluded from reading, or being otherwise informed about, the testimony given in the earlier depositions”).

²²⁰*State Farm Lloyds v. Bold Roofing Co.*, No. 05-97-01908-CV, 2000 Tex. App. LEXIS 1602, at *7–8 (Tex. App.—Dallas Mar. 9, 2000, no pet.) (not designated for publication). In *State*

Assuming there was a violation, neither [former Texas] Rule 200(2)(a) nor [Texas] Rule 215 specify a sanction or a range of sanctions available for a violation of the notice requirement. However, the overarching principle governing sanctions is that “[a] permissible sanction should . . . be no more severe than required to satisfy legitimate purposes.” These legitimate purposes “are threefold: (1) to secure compliance with discovery rules; (2) to deter other litigants from similar misconduct; and (3) to punish violators.” Sanctions that by their severity, prevent a decision on the merits of a case cannot be justified absent a party’s flagrant bad faith or counsel’s callous disregard for the responsibilities of discovery under the rules. Given these general rules, an appropriate sanction for a violation of [former Texas] Rule 200(2)(a)’s notice requirement can vary and may include excluding the testimony of the non-exempted and unnoticed witness in extreme cases evidencing bad faith or callous disregard. However, a court is not required to exclude the testimony as a sanction for the alleged violation of [former Texas] Rule 200(2)(a).²²¹

d. Document Requests

Under Texas Rule 199.2(b)(5), a deposition notice can “include a request that the witness produce at the deposition documents or tangible things within the scope of discovery and within the witness’s possession, custody, or control.”²²² If the witness is a party or subject to a party’s

Farm, an individual, one Hooper, attended a deposition as the plaintiff’s representative. The plaintiff later admitted that Hooper was not its employee and designated another person as its trial representative. As a sanction for violating former Texas Rule 200(2)(a), the trial court ordered the plaintiff to designate Hooper as its trial representative. On appeal, the Dallas Court of Appeals held that this was an “appropriate sanction.” *Id.* at *8; *see Burrhus v. M&S Supply, Inc.*, 933 S.W.2d 635 643 (Tex. App.—San Antonio 1996, writ ref’d n.r.e.) (holding that a trial court did not abuse its discretion in denying a motion to strike the testimony of an expert witness who attended other depositions without notice to the opposing party).

²²¹ *State Farm Lloyds*, 2000 Tex. App. LEXIS 1602, at *7–8 (citations omitted) (quoting *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992)) (applying former Texas Rule 200(2)(a)); *accord Burrhus*, 933 S.W.2d at 641 (construing former Texas Rule 200(2)(a)).

²²² *Accord City of Dallas v. City of Corsicana*, Nos. 10-14-00090-CV, 2015 Tex. App. LEXIS 8753, at *16 (Tex. App.—Waco Aug. 20, 2015, pet. filed) (mem. op.) (“[Texas] Rules 199 and 200 plainly allow for the production of documents with an oral deposition or a deposition on

control, the production request is governed by the rules governing production requests on parties, Texas Rules 193 and 196.²²³ Thus, the thirty-day time period for responding to production requests provided by Texas Rule 196.2(a) applies to production requests in a deposition notice to a party or a person subject to a party's control,²²⁴ and the party or person must respond to the request (as required by Texas Rule 196.2) without the need for a subpoena.²²⁵ If less than thirty-days' notice is provided, however, the party or person need not respond to the production request or produce the requested documents at or before the deposition, but rather must respond thereafter within the thirty-day period provided by Texas Rule 196.2.²²⁶ Absent objection to the time and place of production, however, the

written questions. Accordingly, the trial court's order is not an abuse of discretion to the extent that it allows Navarro to obtain documents in an oral deposition under [Texas R]ule 199 or a deposition on written questions under [Texas R]ule 200." (citations omitted). *See also supra* notes 72, 106 and *infra* notes 237–45 and accompanying text (discussing when a witness is subject to a party's "control").

²²³ *See also* Robert K. Wise, *Ending Evasive Responses to Written Discovery: A Guide for Properly Responding (and Objecting) to Interrogatories and Document Requests Under the Texas Discovery Rules*, 65 BAY. L. REV. 510, 543–45 (2013) (discussing responses to Texas Rule 196 production requests).

²²⁴ If the deposition is rescheduled by agreement, another thirty days' notice is required *only* if the noticing party serves an amended or supplemental deposition notice requesting *additional* documents.

²²⁵ *In re* Markowitz, No. 10-10-00116-CV, 2010 Tex. App. LEXIS 5327, at *8–9 (Tex. App.—Waco July 7, 2010, orig. proceeding) (holding that a production request in a deposition notice requires a party to produce the requested documents).

²²⁶ *Cf.* *Schultz v. Olympic Med. Ctr.*, No. C07-5377 FDB, 2008 U.S. Dist. LEXIS 80848, at *7 (W.D. Wash. Aug. 22, 2008) ("It is well settled that Fed. R. Civ. P. 30(b)(2) provides that any deposition notice which is served on a party deponent and which requests documents to be produced at the deposition must comply with the thirty-day notice requirement set forth in Fed. R. Civ. P. 34. Rule 30(b)(2) provides that a 'notice to a party deponent may be accompanied by a request under [Federal] Rule 34 to produce documents and tangible things at the deposition.' [Federal] Rule 34 grants respondents thirty days to file a written response after service of requests for production. A party may not unilaterally shorten that response period by noticing a deposition and requesting document production at that deposition. The deposition notice for Dr. Ferrell did not allow Defendants the requisite thirty days to respond to the request for production of documents. Such procedural infirmity, however, did not, in and of itself, defeat the discovery. Due to the infirmity, Defendants simply had no duty to produce documents at Dr. Ferrell's deposition. Defendants did, however, have the obligation to respond with the responsive documents and/or written objections by the end of the thirty-day period. Defendants served and filed its written objections to the requested production within that time frame, on August 18, 2008."); *RM Dean Farms v. Helena Chem. Co.*, No. 2:11CV00105 JLH, 2012 U.S. Dist. LEXIS 5830, at *3–4 (E.D. Ark. Jan. 19, 2012) ("Helena Chemical Company also objects to document requests included in

party or person should produce its documents at the time and place requested by the notice's production request, which usually will be at the deposition.²²⁷

If the witness is not a party or subject to a party's control, the production request and response are governed by Texas Rules 205 and 176, the rules respectively relating to discovery from nonparties and subpoenas.²²⁸ Under them, a witness who is not a party or subject to a party's control must be served with both a deposition notice and a subpoena.²²⁹ Because Texas Rules 176 and 205 neither have set a deadline for responses to production requests nor incorporate Texas Rule 196's deadline, Texas Rule 196.2(a)'s thirty-day deadline does *not* apply to production requests in a deposition notice for a witness who is not a party or under a party's control. Rather, such a production request must be served

the 30(b)(6) notice in part because those document requests seek production within less than 30 days. [Federal] Rule 30(b)(2) provides, in pertinent part, 'The notice to a party deponent may be accompanied by a request under [Federal] Rule 34 to produce documents and tangible things at the deposition.' [Federal] Rule 34, in turn, provides that the party to whom a document request is directed 'must respond in writing within 30 days after being served.' Thus, a party has 30 days within which to respond to a document request, even if the request is included in a notice of deposition, unless the time is shortened by stipulation or court order.'"); *see* *Niederquell v. Bank of Am. N.A.*, No. 11-cv-03185-MSK-MJW, 2013 U.S. Dist. LEXIS 18725, at *6-7 (D. Colo. Feb. 11, 2013) ("The court agrees with defendants. Rule 30(b)(2) states that a notice of deposition 'may be accompanied by a request under [Federal] Rule 34 to produce documents and tangible things at the deposition.' Accordingly, the plain language of [Federal] Rule 30 dictates that [Federal] Rule 34 governs the production of documents at depositions. It follows, therefore, that a [Federal] Rule 34 request accompanying a notice of deposition must be served prior to the [Federal] Rule 34 deadline set forth in the scheduling order. As defendants suggest, holding otherwise would largely render the [Federal] Rule 34 deadline meaningless. Accordingly, since the [Federal] Rule 34 deadline passed on August 3, 2012, the court finds that defendants' corporate representatives will not be required to produce any documents at their scheduled depositions.").

²²⁷ TEX. R. CIV. P. 196.3(a) ("Subject to any objections stated in the response, the responding party must produce the requested documents . . . at either the time and place requested or the time and place stated in the response, unless otherwise agreed by the parties or ordered by the court . . .").

²²⁸ *Id.* 176, 205.

²²⁹ *Id.* 176.2 ("A subpoena must command the person to whom it is directed to do either or both of the following: (a) attend and give testimony at a deposition . . . ; (b) produce and permit inspection and copying of documents or tangible things in the possession, custody, or control of that person."), 205.3(a) ("A party may compel production of documents and tangible things from a nonparty by serving—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 [Texas] Rule 205.2 and a subpoena compelling production or inspection of documents or tangible things.").

a “reasonable time” before the deposition,²³⁰ “but no later than 30 days before the end of [the] applicable discovery period”²³¹ absent the parties’ agreement or court order.²³² What is a “reasonable time” depends of the facts of each case.

The mere fact that documents are marked as exhibits during the deposition does not make them admissible. Rather, the party who wants to use them at a hearing, for summary judgment purposes, or at trial must establish their admissibility either at the deposition or otherwise (e.g., by requests for admission or interrogatories).²³³

C. Compelling Attendance at the Deposition

Under Texas Rule 199.3, “[i]f the witness is a party or is retained by, employed by, or otherwise subject to the control of a party,” the deposition notice’s proper service “has the same effect as a subpoena served on the witness.”²³⁴ All other deponents must also be served with a subpoena under Texas Rule 176.²³⁵

One obvious question is: when is a witness “otherwise subject to the control of a party” within Texas Rule 199.3’s meaning? Nothing in Texas

²³⁰ *Id.* 199.2(a). Of course, factors to be considered in determining what constitutes a “reasonable time” include the scope of any production request. *See also supra* Section II.B.1 (discussing the time for serving a deposition notice).

²³¹ TEX. R. CIV. P. 205.3(a).

²³² *See id.* 191.1.

²³³ *See James v. Hudgins*, 876 S.W.2d 418, 422 (Tex. App.—El Paso 1994, writ denied) (“At the deposition, the attorney for Appellees questioned Dr. Levin as to what he brought to the deposition in response to each of these twelve requests. All of the documents identified by Dr. Levin and brought to the deposition were marked as deposition exhibits and attached to the deposition transcript, but Dr. Levin was not questioned about the content or substance of any of the documents. The attorney for Appellant made no attempt during the deposition to establish the admissibility into evidence at trial of any of these documents.”).

²³⁴ TEX. R. CIV. P. 199.3. TEX. R. CIV. P. 205.1, which governs nonparty discovery, defines a nonparty as “a person who is not a party or subject to a party’s control[.]” *See In re Markowitz*, No. 10-10-00116-CV, 2010 Tex. App. LEXIS 5327, at *7 (Tex. App.—Waco July 7, 2010, orig. proceeding) (mem. op.) (“We first note that, because Markowitz is a party to the suit, Brazos was not required to serve him with a subpoena in order to compel his attendance at the deposition.”); *In re Reaud*, 286 S.W.3d 574, 578 (Tex. App.—Beaumont 2009, orig. proceeding) (per curiam) (“[U]nder the Texas Rules of Civil Procedure, a party may be compelled to present a nonparty witness who is subject to its control.”).

²³⁵ TEX. R. CIV. P. 199.3.

Rule 199 or any other Texas discovery rule defines “control,” and only one case has considered the issue: *In re Reaud*.²³⁶

In that case, the issue was whether a deposition notice was sufficient to compel an outside director for the plaintiff corporation, who also was a member of its board’s “Litigation Committee,” to appear for the deposition.²³⁷ The Beaumont Court of Appeals answered the question, as follows:

The term, “otherwise controlled,” is not defined by the procedural rules. In this instance we think the doctrine of *ejusdem generis* applies to restrict the potentially broad meaning of “otherwise controlled” as used in [Texas] Rules 199.3 and 205.1. *Ejusdem generis* means that “when words of a general nature are used in connection with the designation of particular objects or classes of persons or things, the meaning of the general words will be restricted to the particular designation.” In other words, *ejusdem generis* limits the undefined, general term “otherwise controlled” as used in [Texas] Rules 199.3 and 205.1 to include only control of the same kind, class, or nature as the types of control parties would have over employees or retained experts. A related rule of construction, *noscitur a sociis* (“a word is known by the company it keeps”), compels the same conclusion. While the current rules contain language that allow them to reach beyond retained experts and employees, it is now clear that these two rules do not extend to nonparties over whom the party does not have the type of control as it has over an employee or a retained expert.²³⁸

Applying this “test,” the court held that the corporation did not have control over the director because, unlike an employee or retained expert, who can be terminated, disciplined, or penalized by a party for failing to appear at a deposition, “there is no evidence that [the director] was subject

²³⁶ *Reaud*, 286 S.W.3d at 582. Former Texas Rule 201(3) provided that a deposition notice directed to “an agent or employee who is subject to the control of a party” was sufficient to compel the agent’s or employee’s attendance.

²³⁷ *Id.* at 577.

²³⁸ *Id.* at 580 (quoting *State v. Fid. & Deposit Co.*, 223 S.W.3d 309, 312 (Tex. 2007)) (citations omitted).

to termination, discipline, or a reduction in his fees as a director based upon his refusal to attend the deposition under the circumstances of a notice without an accompanying subpoena.²³⁹

Reaud is not a model of clarity regarding what constitutes “control” and seems too narrow. For example, under its reasoning, controlling shareholders of a corporation or members of a limited liability company arguably are not under the corporation’s or company’s control because the corporation or company technically has no ability to terminate, discipline,

²³⁹*Id.* at 581–82. The court in *Reaud* distinguished *Wal-Mart Stores Inc. v. Street*, 754 S.W.2d 153, 154–55 (Tex. 1988) (orig. proceeding) (per curiam), in which the Texas Supreme Court held that Wal-Mart had “control” over the Chairman of its Board of Directors, as follows:

In *Street*, Wal-Mart sought relief through a writ of mandamus from a trial court’s order that required Sam Walton, the chairman of Wal-Mart’s board of directors, to give a deposition. At that time, Rule 201(3) of the Rules of Civil Procedure provided that notice could be directed to “an agent or employee who is subject to the control of a party.” Without discussing the record pertinent to the issue of Wal-Mart’s control over Walton, the Texas Supreme Court stated that “[o]n the present record we find no clear abuse of discretion in Judge Street’s decisions that Walton is an agent of the corporation subject to its control. . . .”

Without knowing the state of the record before the *Street* Court concerning the proof surrounding Wal-Mart’s control over Walton, we cannot determine whether the case stands for the proposition asserted by the Bank that a director, by virtue of his position, is subject to the corporation’s control. For example, we do not know whether the record contained Wal-Mart’s corporate bylaws or articles of incorporation, Arkansas statutes relevant to the rules on corporate structure, or Arkansas statutes relevant to the duties of Arkansas directors, or whether the testimony of witnesses explained how the rules of corporate governance in Wal-Mart’s case made Walton subject to Wal-Mart’s control. In any event, we can glean from the sparse discussion about the record in *Street* that Walton had more of a connection to Wal-Mart than the connection shown to exist between Reaud and Huntsman. Unlike the record here, in *Street* the record showed that Walton was the president of Wal-Mart when the underlying accident occurred, but that he was not an employee when the notice was served, that Walton was Wal-Mart’s Board Chairman when the notice was issued, and that he was a major shareholder. Here, there is no evidence that Reaud was ever an officer of Huntsman or its board chairman, nor is there evidence that Reaud is a major shareholder in terms of the total shares issued by the corporation.

Most importantly, *Street* was decided under procedural rules that were repealed as of January 1, 1999, and the former rule considered in *Street* contained specific language requiring a party to produce an *agent* under its control.

Reaud, 286 S.W.3d at 582 (citations omitted) (quoting former Texas Rule 201(3)) and *Wal-Mart Stores Inc.*, 754 S.W.2d at 154–55).

or punish its controlling shareholders or members.²⁴⁰ Rather than applying the doctrine of *eiusdem generis*, the court should have applied the well-established statutory-construction rule that undefined terms in a statute or rule are given their ordinary or common meaning,²⁴¹ and then given “control” its common or ordinary meaning.²⁴²

Although the court in *Reaud* observed that Texas “Rules 199.3 and 205.1 do not expressly provide a procedure for resolving a dispute over control,” it curiously did not decide which party, the noticing or non-noticing one, bears the burden of establishing “control.”²⁴³ In an analogous context—determining whether documents are within the control of a party—courts have held the burden of establishing “control” is on the party

²⁴⁰ *Cf.* *Kia Motors Corp. v. Ruiz*, 348 S.W.3d 465, 485-87 (Tex. App.—Dallas 2011, pet. granted) (rejecting an automobile’s manufacturer’s argument that it did not have possession, custody, or control over the quality-control documents held by its supplier), *rev’d on other grounds*, 432 S.W.3d 865 (Tex. 2014); *Valley Forge Ins. Co. Relator v. Jones*, 733 S.W.2d 319, 321-322 (Tex. App.—Texarkana 1987, no writ) (ordering a controlling shareholder to produce documents of the corporations he owned because they were under his control).

²⁴¹ *E.g.*, *Sheffield Dev. Co. v. Carter & Burgess, Inc.*, No. 02-11-00204-CV, 2012 Tex. App. LEXIS 10599, at *16 (Tex. App.—Fort Worth Dec. 21, 2012, pet. dismissed) (mem. op.) (giving “marshal” as used in Texas Rule 197.1 regarding interrogatories its common meaning); *see Assignees of Best Buy v. Combs*, 395 S.W.3d 847, 864 (Tex. App.—Austin 2013, pet. denied) (“When construing rules of civil procedure, we apply the same rules of construction that we use when interpreting statutes. . . . If the rule’s language is unambiguous, we must interpret it according to its plain meaning, giving meaning to the language consistent with other provisions in the rule. We typically give undefined terms in a statute their ordinary meaning”) (citations omitted); *State v. Mercier*, 164 S.W.3d 799, 810–11 (Tex. App.—Corpus Christi 2005, pet. denied) (“To construe a rule of appellate procedure, we apply the rules of statutory construction. Under ordinary statutory construction, we apply the plain meaning of the words contained in the rule unless such application would lead to an absurd result.”) (citation omitted); TEX. GOV’T CODE ANN. § 311.011 (West 2013) (Ordinarily, “words and phrases shall be . . . construed according to . . . common usage[.]”); *BASF Fina Petrochemicals Ltd. v. H.B. Zachry Co.*, 168 S.W.3d 867, 871 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (pointing out that “[t]he Code Construction Act[, TEX. GOV’T CODE ANN. § 311.002(4),] also applies to the construction of the [Texas] Rules of Civil Procedure”).

²⁴² “Control” is defined as “[t]he direct or indirect power to govern the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee” *Control*, BLACK’S LAW DICTIONARY (9th ed. 2009); *see Henderson v. Zurn Indus.*, 131 F.R.D. 560, 567 (S.D. Ind. 1990) (giving “control” as used in Federal Rule 34 its ordinary meaning).

²⁴³ *See Reaud*, 286 S.W.3d at 578.

seeking the discovery.²⁴⁴ That should also be the case under Texas Rules 199.3 and 205.1. When “control” is in doubt, however, the best practice is to subpoena the witness to avoid a costly dispute regarding whether the witness is required to appear for deposition without a subpoena.

Once properly compelled, the deponent “must remain in attendance from day to day until the deposition is begun and completed.”²⁴⁵ This requirement does not supersede the six-hour time limitation per side on depositions under Texas Rule 199.5(c), but merely requires that the deponent attend the deposition until it is completed or each side exhausts its six hours.²⁴⁶

As discussed in Section II.B.2.d, if the deposition notice contains a production request, the notice is sufficient to compel the documents’ production if the witness is a party, or is employed by, retained by, or otherwise subject to the control of a party. Otherwise, the noticing party must serve a subpoena under Texas Rule 176.2(b) on the deponent to compel the documents’ production.

D. Taking, Attending, and Participating in Oral Depositions

There are three ways in which a party can participate in an oral deposition: (1) in person, (2) by telephone or other electronic means, or (3) by providing written questions to the deposition officer (i.e., the person recording the deposition, usually a court reporter). Each is discussed below.

1. In Person

Texas Rule 199.5(a)(2) provides that “[a] party may attend an oral deposition in person, even if the deposition is taken by telephone or other remote electronic means.”²⁴⁷ Thus, even if the noticing party does not attend

²⁴⁴*In re Summersett*, 438 S.W.3d 74, 81 (Tex. App.—Corpus Christ 2013, orig. proceeding) (mem. op.) (“The party seeking production has the burden of proving that the relator has constructive possession or the right to obtain possession of the requested documents.”); *In re U-Haul Int’l, Inc.*, 87 S.W.3d 653, 656 (Tex. App.—San Antonio 2002, orig. proceeding) (same); *cf.* *Norman v. Young*, 422 F.2d 470, 472–73 (10th Cir. 1970) (same).

²⁴⁵TEX. R. CIV. P. 199.5(a)(1); *accord* TEX. R. CIV. P. 176.6(a) (“A person commanded to appear and give testimony must remain at the place of deposition . . . from day to day until discharged by the court or by the party summoning the witness.”).

²⁴⁶*Id.* 199.5(a)(1), (c). Most practitioners include in their deposition notices a statement that the deposition will “continue day-to-day until completed.” This is unnecessary.

²⁴⁷*Id.* 199.5(a)(2).

a deposition taken by telephone or other remote means in person, the other parties can do so.

As discussed in Section II.B.2.c, pursuant to Texas Rule 193.6, a trial court, in the exercise of its discretion, can exclude any person from attending a deposition, even a party or an organization's representative. However, as also discussed in that Chapter, a party's or organization's representative should be excluded only in extraordinary circumstances.

2. By Telephone or Other Remote Electronic Means

Texas Rule 199.1 allows depositions to be taken by telephone and or other modern electronic communication technology (i.e., "other remote electronic means"), such as telephone or Internet video conferencing.²⁴⁸ To take a deposition by such means, the noticing party only needs to give "reasonable prior written notice."²⁴⁹ A deposition taken by telephone or other remote electronic means "is considered as having been taken in the district and at the place where the witness is located when answering the questions."²⁵⁰ The deposition officer, however, can be with the noticing party instead of the witness "if the witness is placed under oath by a person who is present with the witness and authorized to administer oaths in that jurisdiction" (e.g., a notary public).²⁵¹

If a deposition is noticed by telephone or other remote electronic means, the noticing party "must make arrangements for all persons to attend by the same means."²⁵² However, those other persons need *not* attend the deposition by that means. Rather, they can attend in person even if the

²⁴⁸ *Id.* 199.1(b), 199.5(a)(2).

²⁴⁹ *Id.* 199.1(b).

²⁵⁰ *Id.* 199.1(b). This is significant because a motion to compel or for protective order regarding the deposition of a nonparty must be filed in an appropriate court where the deposition was or is to be taken. TEX. R. CIV. P. 215.1(a) ("On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any district court in the district where the deposition is being taken. An application for an order to a deponent *who is not a party shall* be made to the court in the district where the deposition is being taken.") (emphasis added); *Latham v. Thornton*, 806 S.W.2d 347, 349 (Tex. App.—Fort Worth 1991, orig. proceeding) (same for a motion for protective order); *see In re Prince*, 2006 Tex. App. LEXIS 10558, at *7–8 ("If a non-party deponent fails to appear for or answer questions during a deposition, a party may apply for an order compelling discovery in the court of the district where the deposition is proceeding.").

²⁵¹ TEX. R. CIV. P. 199.1(b).

²⁵² *Id.* 199.5(a)(2).

noticing party is not physically present.²⁵³ In the same vein, non-noticing parties can attend a deposition to be taken in person, by telephone, or by other remote electronic means. The non-noticing parties do *not* have to give notice of their intent to attend by such means, but they are responsible for “mak[ing] the necessary arrangements with the deposition officer and the party noticing the deposition.”²⁵⁴

3. By Written Questions

Texas Rule 199.5(b) contains a seldom used practice—it allows a party to furnish written questions to be asked by the deposition officer (i.e., the person recording the deposition, usually a court reporter) at the oral deposition: “Any party, in lieu of participating in the examination, may serve written questions in a sealed envelope on the party noticing the oral deposition, who must deliver them to the deposition officer, who must open the envelope and propound them to the witness.”²⁵⁵

E. Recording the Deposition

Under Texas Rule 199.1(a), “[t]he testimony, objections, and any other statements during the deposition must be recorded at the time they are given or made.”²⁵⁶ This clause makes clear that anything said during the deposition, and not merely questions, answers, objections, and instructions not to answer, must be recorded. Of course, the parties can agree to go “off the record” at any time during the deposition.²⁵⁷

An oral deposition must be taken “before any officer authorized by law” to take one.²⁵⁸ Generally, the only such officer is a certified shorthand reporter. Section 154.101(f) of the Texas Government Code provides that, with limited exceptions, “all depositions conducted in this state must be recorded by a certified shorthand reporter.”²⁵⁹ When the statute requires the

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* 199.5(b).

²⁵⁶ *Id.* 191(a).

²⁵⁷ *See id.* 191.1.

²⁵⁸ *Id.* 199.1(a).

²⁵⁹ TEX. GOV'T CODE ANN. § 154.101(f) (West 2013).

use of such a reporter, the deposition must be by stenographic transcription.²⁶⁰

There are two exceptions to Section 154.101(f)'s requirement that an oral deposition be taken before, and recorded stenographically by, a certified shorthand reporter. First, other persons may record oral depositions stenographically when a certified shorthand reporter is unavailable and the parties comply with the procedures in Section 154.112 of the Texas Government Code.²⁶¹ Second, and more importantly, Section 154.101(f)'s requirements do not apply to (1) a party to the litigation involved, (2) the attorney of the party, or (3) a full-time employee of a party or a party's attorney.²⁶² Accordingly, such persons may record an oral deposition without the presence of certified shorthand reporter by a means other than stenographic recording, such as tape or video recording.²⁶³ In addition, any

²⁶⁰Tex. Att'y Gen. Op. No. 93-110 (1993) (suggesting that only tape recording an oral deposition violates former Section 52.021(f) of the Texas Government Code, which is now Section 154.101(f)); Tex. Att'y Gen. Op. No. JM-110 (1983) (stating that oral deposition generally must be recorded by a certified shorthand reporter).

²⁶¹TEX. GOV'T CODE ANN. §§ 154.101, 154.112. Section 154.101 references Section 154.112, which provides:

- (a) A noncertified shorthand reporter may be employed until a certified shorthand reporter is available.
- (b) A noncertified shorthand reporter may report an oral deposition only if:
 - (1) the noncertified shorthand reporter delivers an affidavit to the parties or to their counsel present at the deposition stating that a certified shorthand reporter is not available; or
 - (2) the parties or their counsel stipulate on the record at the beginning of the deposition that a certified shorthand reporter is not available.
- (c) This section does not apply to a deposition taken outside this state for use in this state.

Id.

²⁶²TEX. GOV'T CODE ANN. § 154.114; *see* Tex. Att'y Gen. Op. No. GA-0928 (2012) (analyzing former Texas Government Code Sections 52.021(f) and 52.033, which are now Sections 154.101(f) and 154.114 respectively, and concluding: "Construing [Texas] Rule . . . 199.1 in harmony with Government Code sections 52.021 and 52.033 . . . (1) a party to litigation, (2) the attorney of the party, or (3) a full-time employee of a party or a party's attorney . . . may record a deposition solely by non-stenographic means without violating Government Code section 52.021(f).").

²⁶³*See* *Burr v. Shannon*, 593 S.W.2d 677, 678 (Tex. 1980) (construing former TEX. REV. CIV. STAT. ART. 2324b, § 15, the predecessor of TEX. GOV'T CODE ANN. § 154.114).

person may record an oral deposition nonstenographically as long as a certified court reporter simultaneously records it stenographically.²⁶⁴

The procedure for recording oral depositions nonstenographically is set forth in Texas Rule 199.1(c) as follows:

Any party may cause a deposition upon oral examination to be recorded by other than stenographic means, including videotape recording. The party requesting the nonstenographic recording will be responsible for obtaining a person authorized by law to administer the oath [e.g., a notary public] and for assuring that the recording will be intelligible, accurate, and trustworthy.²⁶⁵

The written notice of nonstenographic recording can be included in the deposition notice required by Texas Rule 199.2(b) or in a separate notice (e.g., a letter).²⁶⁶ It must be given “[a]t least five days prior to the deposition” and “must state the method of nonstenographic recording to be used and whether the deposition will also be recorded stenographically.”²⁶⁷ After the notice is served, “[a]ny other party may then serve written notice designating another method of recording in addition to the method specified, at the expense of such other party unless the court orders otherwise.”²⁶⁸ Thus, if the noticing party designates stenographic recording of the deposition, any other party may arrange for and serve a notice designating a nonstenographic recording method.²⁶⁹

Under Texas Rule 203.6(a): “A nonstenographic recording of an oral deposition, or a written transcription of all or part of such a recording, may be used to the same extent as a deposition taken by stenographic means. However, the court, for good cause shown, may require that the party seeking to use a nonstenographic recording or written transcription first obtain a complete transcript of the deposition recording from a certified court reporter. . . .”²⁷⁰

F. Objections to the Time, Place, or Other Arrangements for a

²⁶⁴Tex. Att’y Gen. Op. No. DM-339 (1995).

²⁶⁵Tex. R. Civ. P. 199.1(c).

²⁶⁶*Id.*

²⁶⁷*Id.*

²⁶⁸*Id.*

²⁶⁹*Id.*

²⁷⁰*Id.* 203.6(a).

Deposition

Objections to the time or place of a deposition set forth in a deposition notice are governed by Texas Rule 199.4, which provides, in relevant part: “A party or witness may object to the time and place designated for an oral deposition by motion for protective order or by motion to quash the notice of deposition.”²⁷¹ Such a motion, if filed by the third business day after the notice’s service, *automatically* stays the deposition until the court rules on the motion.²⁷² If a non-noticing party or witness fails to so object, the deposition is not stayed unless the party or witness obtains a court order staying it before deposition date.²⁷³ Although Texas Rule 199.4 does not specifically require the movant to state a reasonable time and place for the deposition, Texas Rule 192.6(a) requires such a statement in a motion for protective order,²⁷⁴ but apparently not in a motion to quash.

Texas Rule 199.4 applies only to objections regarding the deposition’s time and place. Other objections to a deposition notice or subpoena besides objections to its production request (e.g., failure to give “reasonable notice” of the oral deposition, notice of an apex deposition, failure to designate subject matters in a representative deposition notice under Texas Rule

²⁷¹ *Id.* 199.4.

²⁷² *Id.* (“If the motion is filed by the third business day after service of the notice of deposition, an objection to the time and place of a deposition stays the oral deposition until the motion can be determined.”); see *Min Rong Zheng v. Bridgestone Firestone N. Am. Tire, L.L.C.*, 284 S.W.3d 890, 894 (Tex. App.—Eastland 2009, no pet.) (“On March 23, plaintiffs’ counsel filed a motion to quash, asserting that the date conflicted with his schedule. Because plaintiffs’ counsel failed to file the motion to quash within three business days after service of the notice of depositions, the depositions were not automatically stayed.”).

The federal discovery rules do not have a comparable provision. However, Federal Rule 32(a)(5)(A) provides that “[a] deposition must not be used against a party who, having received less than 14 days’ notice of the deposition, promptly moved for a protective order under [Federal] Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place—and this motion was still pending when the deposition was taken.” FED. R. CIV. P. 32(a)(5)(A).

²⁷³ *Min Rong Zheng*, 284 S.W.3d at 894 (“Because plaintiffs’ counsel failed to file the motion to quash within three business days after service of the notice of depositions, the depositions were not automatically stayed.”).

²⁷⁴ TEX. R. CIV. P. 192.6(a) provides, in relevant part: “If a person seeks protection regarding the time or place of discovery, the person must state a reasonable time and place for discovery with which the person will comply.” *Accord* *Grass v. Golden*, 153 S.W.3d 659, 662 (Tex. App.—Tyler 2004, orig. proceeding) (“A party commanded to appear at a deposition or any other person affected by the subpoena may move for a protective order under Texas Rule of Civil Procedure 192.6(b). A movant seeking protection regarding the time or place of discovery must state a reasonable time and place for discovery with which it will comply.”) (citation omitted).

199.2(b)(1) with particularity, an objection to “additional attendees”) also must be made by protective order or motion to quash before the deposition.²⁷⁵ Although it is clear that a *nonparty* who files a motion for protective order or to quash a subpoena under Texas Rule 176.6(e) need not comply with “the part of the subpoena from which protection is sought . . . unless ordered to do so by the court[.]”²⁷⁶ this does not appear to be true for a party or a person retained by, employed by, or subject to the control of a party. This is because nothing in the rule governing protective orders generally, Texas Rule 192.6, or the rule governing oral depositions, Texas Rule 199, contains language comparable to that in Texas Rule

²⁷⁵TEX. R. CIV. P. 192.6(a) (“A person from whom discovery is sought, and any other person affected by the discovery request, *may move within the time permitted for response to the discovery request* for an order protecting that person from the discovery sought.”) (emphasis added), 176.6(d) (“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.”); *see* *Siegel v. Smith*, 836 S.W.2d 193, 194 (Tex. App.—San Antonio 1992, writ denied) (“If the opposing party considers the notice inadequate or has a scheduling conflict, he has a duty to protest to opposing counsel and to the court as soon as possible.”); *Bohmfolk v. Linwood*, 742 S.W.2d 518, 520 (Tex. App.—Dallas 1987, no writ) (“Upon receipt of the notice, Holder, if he had a scheduling conflict or if he simply considered the notice inadequate, had a duty to protest both to opposing counsel and to the court as soon as possible. He had to make his protest before the deposition was ever taken; failing that, he was burdened to show that it was not feasible for him to do so. To allow the respondent to a deposition notice to save his objection until a later day would be most disruptive to the smooth functioning of the law.”).

An exception to this rule relates to production requests. If the deposition notice or subpoena contains one, the party or nonparty can file objections to it. TEX. R. CIV. P. 199.2(b)(5) (incorporating Texas Rule 196’s procedures with respect to production requests for deposition notices served on a party or a person subject to a party’s control), 200.1(b) (“The notice [for a deposition upon written questions] also may include a request for production of documents as permitted by [Texas] Rule 199.2(b)(5), the provisions of which will govern the request, service, and response), 176.6(d) (“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.”).

²⁷⁶*Id.* 176.6(e). If the nonparty moves for protection or to quash the subpoena, the party seeking deposition should secure a ruling on the motion as quickly as possible.

176.6(e).²⁷⁷ To the contrary, as discussed above, Texas Rule 199 suggests the opposite because *only* a motion for protective order or to quash regarding the time and place designated for an oral deposition filed by the third business day after the notice's or subpoena's service "automatically" stays the deposition until the motion is decided.²⁷⁸ Accordingly, if the witness is a party or a person retained by, controlled by, or subject to the control of a party and the protective order or motion to quash relates to something other than the deposition's time and place or relates to those matters but is not filed within three business days of the notice's service and there is insufficient time to secure a ruling on the motion before the deposition date, the witness should not simply fail to appear for the deposition.²⁷⁹ Rather, he or she should attempt to reach an agreement with

²⁷⁷ See *id.* 176.6(e), 192.6, 199.

²⁷⁸ *Id.* 199.4. TEX. R. CIV. P. 192.6(a) regarding protective orders generally provides that "[a] person must comply with a request to the extent protection is not sought unless it is unreasonable under the circumstances to do so before obtaining a ruling on the motion." Because the Rule uses the term "request," and not notice, it does *not* appear to apply to deposition notices.

²⁷⁹ Federal courts uniformly hold that a witness must comply with a deposition notice or subpoena unless a court order excuses compliance with it. *E.g.*, *Barnes v. Madison*, 79 Fed. App'x 691, 707 (5th Cir. 2003) ("[T]he mere act of filing a motion for a protective order does not relieve a party of the duty to appear; the party is obliged to appear until some order of the court excuses attendance."); *Pioche Mines Consol., Inc. v. Dolman*, 333 F.2d 257, 269 (9th Cir. 1964) ("[Federal] Rule 30(b) places the burden on the proposed deponent to get an order, not just to make a motion. And if there is not time to have his motion heard, the least that he can be expected to do is to get an order postponing the time of the deposition until his motion can be heard. He might also appear and seek to adjourn the deposition until an order can be obtained. But unless he has obtained a court order that postpones or dispenses with his duty to appear, that duty remains."); *Batt v. Kimberly-Clark Corp.*, 438 F. Supp. 2d 1315, 1318 (N.D. Okla. 2006) (holding that the mere filing motion for protective order is insufficient to stay a deposition and that "Defendant was required to take some action to stay the deposition until the parties, with or without the Court's assistance, could resolve the dispute. This could have been done even without a formal motion. Local Rule 37.2 provides a simple mechanism to invoke the Court's aid. Even only hours before the May 23 deposition, Defendant could have enlisted the Court's assistance by telephone, but did not do so. Thus, under the law, Defendant is in the wrong."); *Goodwin v. City of Boston*, 118 F.R.D. 297, 298 (D. Mass. 1988) ("The filing of a motion to quash or a motion for protective order does not automatically operate to stay a deposition or other discovery. When it appears that a Court is not going to be able to decide a motion to quash or a motion for protective order before the date set for a deposition, counsel for the movant should contact counsel for the party noticing the deposition and attempt to reach an agreement staying the deposition until after the Court acts on the motion to quash and/or the motion for a protective order. If agreement cannot be reached, it is incumbent on counsel for the movant to file a motion to stay the deposition until the Court acts on the motion to quash and/or for a protective order and to alert the clerk to the need for immediate action on the motion to stay.").

the noticing party postponing the deposition until the motion for protection or to quash is decided, file an emergency or accelerated motion to stay the deposition until the motion is decided, or, at least, appear at the deposition and immediately adjourn it until such motion is decided.²⁸⁰

G. *The Deposition's Conduct*

1. Time Limitations

Oral depositions are subject to two different time limits: one limiting the total number of hours for all such depositions and another limiting the time of each such deposition. The first limitation—the total number of hours for oral depositions—depends on the action's discovery Level.²⁸¹

In a Level 1 action,²⁸² each *party* has a total of six deposition hours “to examine and cross-examine all witnesses in oral depositions.”²⁸³

²⁸⁰ See cases cited *supra* note 279.

²⁸¹ TEX. R. CIV. P. 190.2–4.

²⁸² Level 1 applies to two types of actions: (1) an action “governed by the expedited actions process in [Texas] Rule 169[.]” and (2) unless the parties agree to a Level 2 discovery-control plan or the court orders a Level 3 one, “any suit for divorce not involving children in which a party pleads that the value of the marital estate is more than zero but not more than \$50,000[.]” *Id.* 190.2(a)(1), (2).

The “expedited actions process” of Texas Rule 169 “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.” *Id.* 169(a)(1) (emphasis added). Thus, the process does not apply to actions in which the plaintiffs seek injunctive or declaratory relief. Nor does it apply to an action “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.” *Id.* 169(a)(2). In addition, by statute, the expedited-actions process and Level 1 discovery-control plans are inapplicable to probate or guardianship proceedings. TEX. EST. & G'SHIP CODE ANN. §§ 53.107, 1053.105 (West 2014). Thus, in the foregoing types of actions (except for the divorce actions as described above), Level 1 is never proper, even if the amount in controversy is less than \$100,000. Rather, discovery will be governed by Level 2 or Level 3.

Texas Rule 47 requires that an “original pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim or third party claim” (except in actions under the Family Code and in probate and guardianship proceedings), TEX. R. CIV. P. 47(c); *see also* TEX. EST. & G'SHIP CODE ANN. §§ 53.107, 1053.105 (providing that Texas Rule 47(c) is inapplicable to probate and guardianship proceedings), include a statement that the party seeks:

In Level 2 actions²⁸⁴ deposition time is limited to 50 hours per “side.”²⁸⁵ This includes both the examination and cross-examination of the opposing

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- (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[.]

TEX. R. CIV. P. 47(c).

Texas Rule 47(c), in effect, requires plaintiffs to plead into, or out of, the expedited-actions process, as an action in which the original petition alleges that the plaintiff requests only monetary relief of \$100,000 or less is governed by that process. *Id.* cmt. to 2013 Change (“The further specificity in paragraphs (c)(2)–(5) [of Texas Rule 47] is to provide information regarding the nature of cases filed and does not affect a party’s substantive rights”). A party who fails to comply with Texas Rule 47(c) may not conduct discovery until its pleading is amended to comply with the Rule. *Id.* 47. The expedited-actions process is mandatory, and any suit that falls within the definition of an expedited action is subject to the process, *Id.* 169 cmt. 2, including the Level 1 discovery under Texas Rule 190.2, *Id.* 169(d)(1).

As Level 1 can be chosen by plaintiffs alone, a defendant cannot force an action that it believes to be a Level 1 case into Level 1. Nonetheless, a defendant who believes that the action is a Level 1 case can seek an agreement or order, including a Level 3 discovery-control plan, adopting Level 1 discovery limits.

Level 1 has the least discovery. Compare TEX. R. CIV. P. 190.2(b), with TEX. R. CIV. P. 190.3(b).

²⁸³TEX. R. CIV. P. 190.2(b)(2). (“The parties may agree to expand this limit up to 10 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.”).

²⁸⁴Level 2 is the “default” discovery-control plan, applying to actions not in Level 1 and not subject to a court-ordered Level 3 discovery-control plan. *Id.* 190.3(a) (“Unless a suit is governed by a discovery control plan under [Texas] Rules 190.2 or 190.4, discovery must be conducted in accordance with this subdivision.”). Due to Level 1’s restrictive pleading criteria, most actions fall within Level 2. If the plaintiff does not, or cannot, plead the action in compliance with Rule 190.2(a) so as to invoke Level 1, the action automatically is in Level 2 because an action cannot be in Level 3 until the court so orders on any party’s motion or its own initiative. *Id.* 190 cmt. 1 (“If a plaintiff does not or cannot plead the case in compliance with [Texas] Rule 190.2(a) so as to invoke the application of Level 1, the case is automatically in Level 2. A case remains in Level 1 or Level 2, as determined by the pleadings, unless and until it is moved to Level 3. To be in Level 3, the court must order a specific plan for the case, either on a party’s motion or on the court’s own initiative.”); see also *Shafer v. Shafer*, No. 09-12-00468-CV, 2014 Tex. App. LEXIS 11898,

sides' parties, experts, and other persons under their control.²⁸⁶ The 50-hour limit does not apply to depositions of nonparty fact witnesses who are not under a party's control.²⁸⁷ Moreover, if one side designates more than two experts, the opposing side has an additional six hours of deposition time for each additional expert designated that can be used to depose the expert(s) or any other witness.²⁸⁸

A Level 3 discovery-control plan²⁸⁹ is to be "tailored to the circumstances of the specific suit."²⁹⁰ A Level 3 discovery-control plan must include, among other things, "appropriate limits on the amount of discovery;"²⁹¹ Thus, it can set limits on the amount of discovery. The plan, however, need not do so because, before its entry, the action automatically is in Level 1 or 2, depending on the pleadings, and if the plan fails to modify any discovery limitation existing under the applicable level, that limitation will control.²⁹² Thus, for example, if the plaintiff initially pleaded

at *28 (Tex. App.—Beaumont Oct. 30, 2014, no pet.) (mem. op.) ("Because the trial court did not enter an order adopting a specific discovery control plan, the default deadlines and limitations of Level 2 controlled this case."); *Payne v. J. Baker Corp.*, No. 02-12-00181-CV, 2013 Tex. App. LEXIS 6106, at *16 (Tex. App.—Fort Worth May 16, 2013, no pet.) (mem. op.) ("Because the Homeowners did not affirmatively plead for the amount of monetary relief set out in [Texas R]ule 190.2, and the trial court has not ordered a discovery control plan, Level 2 discovery applied.") (footnote omitted).

²⁸⁵ TEX. R. CIV. P. 190.3(b)(2).

²⁸⁶ *Id.*

²⁸⁷ *Id.* As in Level 1, there is no limit on the number of depositions on written questions in a Level 2 action. *Id.* 190.2(b). Nonetheless, such depositions "cannot be used to circumvent the limits on interrogatories." *Id.* 190 cmt. 5.

²⁸⁸ *Id.*

²⁸⁹ Level 3 provides for a discovery-control plan similar to one entered under the Federal Rules of Civil Procedure. *See id.* 190.4(a); Nathan L. Hecht & Robert H. Pemberton, A Guide to the 1999 Texas Discovery Rules Revisions § C-3 (Nov. 11, 1998), <http://www.txcourts.gov/rules-forms/rules-standards.aspx>. It is designed for high-dollar or complex actions, although a party in any type of action (other than an expedited action) may move for a Level 3 discovery-control plan. *See* Nathan L. Hecht & Robert H. Pemberton, A Guide to the 1999 Texas Discovery Rules Revisions § C-3 (Nov. 11, 1998), <http://www.txcourts.gov/rules-forms/rules-standards.aspx>.

²⁹⁰ TEX. R. CIV. P. 190.4(a).

²⁹¹ *Id.* 190.4(b).

²⁹² *Id.* As explained by the Fort Worth Court of Appeals:

The rule addressing level 3 discovery-control plans states that "[t]he court must, on a party's motion, . . . order that discovery be conducted in accordance with a discovery control plan tailored to the circumstances of the specific suit." While the rule states that the court "must" enter a level 3 scheduling order on a party's motion, it does not require

the action into Level 1 and the court later enters a Level 3 discovery-control plan that does not address the number of deposition hours, Texas Rule 190.2(b)(2)'s limit will control.²⁹³ Similarly, if the action was a Level 2 one before the Level 3 discovery-control plan's entry, and the plan does not address the number of deposition hours, the 50-hour-deposition-time limit per side of Texas Rules 190.3(b)(2)–(3) will control.²⁹⁴

The second time limitation on depositions—the amount of time for each deposition—is set forth in Texas Rule 199.5(c), which provides that “[n]o *side* may examine or cross-examine an individual witness for more than six hours.”²⁹⁵

Texas Rule 199 and its comments, however, do not define “side.”²⁹⁶ The term is discussed extensively in Texas Rule 190, which addresses the total number of deposition hours, and its concept of “side” should apply to Texas Rule 199.5(c).²⁹⁷

that the order provide deadlines different from those under a level 2 case; even under a level 3 scheduling order, the level 2 deadlines continue to apply “unless specifically changed in the discovery control plan ordered by the court.” That decision is left to the trial court’s discretion: “The discovery control plan ordered by the court . . . may change any limitation on the time for . . . discovery set forth in these rules.”

Allen v. United of Omaha Life Ins. Co., 236 S.W.3d 315, 327 (Tex. App.—Fort Worth 2007, pet. denied) (quoting TEX. R. CIV. P. 190.4(a), (b); accord Brescia v. Slack & Davis, L.L.P., No. 03-08-00042-CV, 2010 Tex. App. LEXIS 9204, at *9–10 (Tex. App.—Austin Nov. 19, 2010, pet. denied) (mem. op.).

²⁹³TEX. R. CIV. P. 190.4(b) (“The discovery limitations of Rule 190.2, if applicable, or otherwise of Rule 190.3 apply unless specifically changed in the discovery control plan ordered by the court.”); Brescia, 2010 Tex. App. LEXIS 9204, at *10 (“[E]ven under a Level-3 scheduling order, Level-2 deadlines continue to apply ‘unless specifically changed in the discovery control plan ordered by the court.’” (quoting TEX. R. CIV. P. 190.4(b))).

Importantly, a Level 3 discovery-control plan can be used both to limit or expand the amount of, and time for, discovery. Thus, a party who believes that Level 2 allows more discovery than the action needs can move for a Level 3 plan limiting the amount of discovery, and a Level 3 plan may provide for *any* amount of discovery, even with Level 1’s discovery limitations. TEX. R. CIV. P. 190 cmt. 1.

²⁹⁴See *id.*

²⁹⁵*Id.* 199.5(c) (emphasis added).

²⁹⁶See *id.* 199.

²⁹⁷See *id.* 190(b).

Texas Rule 190.3(b)(2) defines “side” as “all the litigants with generally common interests in the litigation.”²⁹⁸ Comment 6 to Texas Rule 190 elaborates:

The concept of “side” in [Texas] Rule 190.3(b)(2) borrows from [Texas] Rule 233, which governs the allocation of peremptory strikes, and from Fed. R. Civ. P. 30(a)(2). In most cases there are only two sides—plaintiffs and defendants. In complex cases, however, there may be more than two sides, such as when defendants have sued third parties not named by plaintiffs, or when defendants have sued each other. As an example, if P1 and P2 sue D1, D2, and D3, and D1 sues D2 and D3, Ps would together be entitled to depose Ds and others permitted by the rule (*i.e.*, Ds’ experts and persons subject to Ds’ control) for 50 hours, and Ds would together be entitled to depose Ps and others for 50 hours. D1 would also be entitled to depose D2 and D3 and others for 50 hours on matters in controversy among them, and D2 and D3 would together be entitled to depose D1 and others for 50 hours.²⁹⁹

Texas Rule 190’s explanation of “side” should enable the parties and trial court to apply Texas Rule 199.5 in most cases because, as pointed out by Comment 6 to Texas Rule 199, most actions only involve two parties. Moreover, even in multiparty actions in which the concept of “side” becomes murky, the situation should be ameliorated by the fact that most complex actions should be governed by a Level 3 discovery-control plan, which should include deposition-time limits tailored to the action’s needs and facts.

Texas Rule 199.5(c)’s six-hour time limit applies to the questioning of an “individual witness” and does not include “breaks.”³⁰⁰ A “break” refers to any stoppage of the deposition, such as when the participants go “off the record” or when a party or the deponent leaves the deposition, whether by agreement or not.³⁰¹ The time credited to a side should include ordinary pauses by the questioner or the witness, but not off-the-record discussions

²⁹⁸ *Id.* 190.3(b)(2).

²⁹⁹ *Id.* 190 cmt. 6.

³⁰⁰ *Id.* 199.5(c) (“Breaks during depositions do not count against this limitation.”).

³⁰¹ *See id.* 199.5(d).

or protracted lapses, such as when a witness is reviewing a lengthy document.³⁰² For purposes of Texas Rule 199.5(c), “each person designated by an organization under [Texas] Rule 199.2(b)(1) is a separate witness.”³⁰³

The deposition officer (i.e., the person recording the deposition, usually a court reporter) is the timekeeper for purposes of keeping track of the amount of time used by each side.³⁰⁴ When the deposition officer certifies and delivers the deposition transcript or nonstenographic recording, the certificate must indicate the amount of time used by each party at the deposition.³⁰⁵

2. Attorneys’ and Witnesses’ Conduct

Texas Rules 199.5(d)–(h) govern the conduct of witnesses and attorneys during oral depositions.³⁰⁶

The deposition, according to Texas Rule 199.5(d), must be conducted “in the same manner as if the testimony were being obtained in court during trial.”³⁰⁷ This means that, after the witness is placed under oath,³⁰⁸ the parties examine and cross-examine the witness as if the witness were testifying in court at trial.³⁰⁹ An objection to a question and instructions not to answer must be made as permitted by Texas Rules 199.5(e) and (f).³¹⁰

³⁰² *See id.*

³⁰³ *Id.* 199 cmt. 2.

³⁰⁴ *See id.* 203.2(e).

³⁰⁵ *Id.* (“The deposition officer must file with the court, serve on all parties, and attach as part of the deposition transcript or nonstenographic recording of an oral deposition a certificate duly sworn by the officer stating . . . the amount of time used by each party at the deposition . . .”).

³⁰⁶ *Id.* 199.5(d)–(h).

³⁰⁷ *Id.* 199.5(d).

³⁰⁸ *Id.* 199.5(b) (“Every person whose deposition is taken by oral examination must first be placed under oath.”).

³⁰⁹ *See id.* (“The parties may examine and cross-examine the witness.”). Comment 3 to Texas Rule 199 provides that the requirement that the deposition be conducted in the same manner is “not on the scope of the interrogation permitted.”; *id.* 199 cmt. 3; Rather, the parties can inquire about any matter relevant to the action’s subject matter even though the information sought might not be admissible in evidence at trial as long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence. *Id.* 192.3(a).

³¹⁰ *See* Sections II.G.3 and II.G.4 (discussing objections and instructions not to answer, respectively). Several federal courts have held that, if the deponent is represented by an attorney, only the attorney can object to a question or decide which questions should not be answered. *Van Stelton v. Van Stelton*, No. C11-4045-MWB, 2013 U.S. Dist. LEXIS 145999, at *46–48 (N.D. Iowa Oct. 9, 2013) (“For reasons that should be obvious, a represented deponent may not

Because oral depositions must be conducted “in the same manner as if the testimony were being obtained in court during trial,” Texas Rule of Evidence 612 should apply to them. That Rule recognizes the right of an adverse party to obtain writings used to refresh the witness’s memory both *during* and *before* the deposition. It, however, “distinguishes between those writings used to refresh a witness’s testimony *while* testifying and those used to refresh *before* testifying. If a witness uses the writing while testifying, the adverse party must be given access to it, but if the writing is used before the witness testifies, the court has the discretion to order the writing disclosed to the adverse party.”³¹¹

interpose his or her own objections and decide which questions to answer.”) (footnote omitted); *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 191 (E.D. Pa. 2008) (same).

³¹¹*Goode v. Shoukfeh*, 943 S.W.2d 441, 449 (Tex. 1997) (*construing* former Texas Rule of Evidence 612); *accord In re H.L.B.*, No. 01-12-01082-CV, 2013 Tex. App. LEXIS 9004, at *23 (Tex. App.—Houston [1st Dist.] July 23, 2013, no pet.) (“If a witness uses a writing to refresh her memory, an adverse party ‘is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.’ In civil cases where the witness refreshes their memory before testifying, the trial court has discretion to allow an adverse party to review the writing if it is ‘necessary in the interests of justice.’” (quoting TEX. R. EVID. 612) (citation omitted)); *Denison v. Grisham*, 716 S.W.2d 121, 122–124 (Tex. App.—Dallas 1986, orig. proceeding) (holding, under former Texas Rule of Evidence 611, that the plaintiffs had to produce notes that they referenced during their deposition testimony).

Texas Rule of Evidence 612 provides, in relevant part:

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

- (1) while testifying;
- (2) before testifying, in civil cases, if the court decides that justice requires the party to have those options; or
- (3) before testifying, in criminal cases.

(b) Adverse Party’s Options; Deleting Unrelated Matter. An adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness’s testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

TEX. R. EVID. 612.

There, however, is scant Texas authority regarding the applicability of Texas Rule of Evidence 612 to depositions.³¹² Federal courts applying the almost identical federal procedural and evidence rules—Federal Rule 30(c) and Federal Rule of Evidence 612—generally hold that the evidence rule applies to depositions.³¹³ This should be the case in Texas.³¹⁴

Thus, if the deponent uses a document, even one within the work-product, attorney-client, or other privilege, while testifying *during* the deposition to refresh his or her recollection, the privilege is waived and the document *must* be produced to the adverse party.³¹⁵ If, however, the

³¹²Only four Texas cases even tangentially consider Texas Rule of Evidence 612's application to a deposition: *In re McIntyre*, No. 03-12-00134-CV, 2012 Tex. App. LEXIS 7524, at *13–14 (Tex. App.—Austin Aug. 31, 2012, orig. proceeding) (mem. op.), *In re Chevron Phillips Chem. Co. LP*, No. 09-06-470 CV, 2006 Tex. App. LEXIS 9186, at *1–3 (Tex. App.—Beaumont Oct. 25, 2006) (mem. op.), *In re Brown*, No. 03-97-00609-CV, 1998 Tex. App. LEXIS 2609, at *9–10 (Tex. App.—Austin Apr. 30, 1998, orig. proceeding) (not designated for publication), and *Denison*, 716 S.W.2d at 122–124. These cases are discussed *infra* in notes 321–324 and their accompanying text.

³¹³*Reed v. Advocate Health Care*, No. 06 C 3337, 2008 U.S. Dist. LEXIS 3561, at *6 (N.D. Ill. Jan. 17, 2008) (“The vast majority of cases that have considered the issue have concluded that [Federal Rule of Evidence] 612 is applicable to depositions by virtue of language contained in Federal Rule of Civil Procedure 30(c).” (quoting 28 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6183 (1st ed. 1993))); *Carfagno v. Jackson Nat’l Life Ins. Co.*, No. 5:99cv 118, 2001 U.S. Dist. LEXIS 1768, at *23 (W.D. Mich. Feb. 13, 2001) (“The vast majority of cases, however, conclude otherwise, holding that [Federal] Rule 612 is applicable to depositions by operation of [Federal] Rule 30(c) of the Federal Rules of Civil Procedure.”); *Hoglund v. Limbach Constructors*, No. 95-2847, 1998 U.S. Dist. LEXIS 8577, at *15–16 (S.D. Fla. Mar. 30, 1998) (“Most courts, however, have ordered the production of privileged material used to refresh a witness’ recollection before testifying.”).

³¹⁴*Tex. Dep’t of Pub. Safety v. Caruana*, 363 S.W.3d 558, 566 n.1 (Tex. 2012) (“When the federal and Texas rules of evidence are similar, we look to federal case law and the Federal Advisory Committee Notes when interpreting the Texas rules.”).

³¹⁵*Denison*, 716 S.W.2d at 122–124 (holding, that, under former Texas Rule of Evidence 611, the plaintiffs had to produce notes that they referenced during their deposition testimony); *cf. Heron Interact, Inc. v. Guidelines, Inc.*, 244 F.R.D. 75, 77 (D. Mass. 2007) (“Defendants also assert that Chacho specifically referred to at least two of the documents during the course of the deposition, *i.e.*, his annotated copies of the Covenant Not to Compete and the Asset Purchase Agreement. The court agrees. Those documents, accordingly, must be produced pursuant to [Federal Rule of Evidence] 612(1).”); *Sperling v. City of Kennesaw Police Dep’t*, 202 F.R.D. 325, 329 (N.D. Ga. 2001) (holding that the plaintiff’s use of a document during her deposition to refresh her memory waived work-product protection as to the document and entitled the defendant to its production under Federal Rule of Evidence 612); *see Goode*, 943 S.W.2d at 449 (Tex. 1997) (“We hold that an *Edmonson* movant has the right to examine the *voir dire* notes of the opponent’s

deponent reviews documents *before* the deposition to refresh his or her recollection, the documents are not *automatically* producible.³¹⁶ Rather, a trial court has discretion to order them produced.³¹⁷

attorney when the attorney relies upon these notes while giving sworn or unsworn testimony in the *Edmonson* hearing.”).

³¹⁶ See TEX. R. EVID. 612; *Goode*, 943 S.W.2d at 449 (construing former TEX. R. CIV. EVID. 612); cf. *Sporck v. Peil*, 759 F.2d 312, 317 (3d Cir. 1985); *In re Managed Care Litig.*, 415 F. Supp. 2d 1378, 1380 (S.D. Fla. 2006); *Nutramax Lab., Inc. v. Twin Lab., Inc.*, 183 F.R.D. 458, 468 (D. Md. 1998).

³¹⁷ See TEX. R. EVID. 612; *Goode*, 943 S.W.2d at 449 (construing former TEX. R. CIV. EVID. 612); cf. *Sporck*, 759 F.2d at 317; *In re Managed Care Litig.*, 415 F. Supp. 2d at 1380; *Nutramax Lab., Inc.*, 183 F.R.D. at 468.

Often a deposition notice will request that the witness bring to the deposition all the documents reviewed by the witness in preparation for it. Such a request is objectionable for two reasons. First, to obtain the documents, the adverse party must establish that the documents were used by the deponent to refresh the witness’s memory for the purpose of testifying at the deposition. See *Mata v. State*, No. 10-12-00249-CR, 2013 Tex. App. LEXIS 6939, at *12–13 (Tex. App.—Waco June 6, 2013, pet. ref’d) (“Appellant is only entitled to Wilson’s entire file if it was actually used by Wilson to refresh her memory. No one asked Wilson if or when she used the entire file in order to refresh her memory. Since there is no evidence from the record to establish that Wilson did in fact use the entire file to refresh her memory during or before her testimony, the trial court did not err in refusing to admit the file.”) (citation omitted); *Love v. State*, No. 01-08-00941-CR, 2009 Tex. App. LEXIS 8952, at *19 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (not designated for publication) (same); *Saldivar v. State*, 980 S.W.2d 475, 497 (Tex. App.—Houston [14th Dist.] 1998, pet. ref’d.) (same); cf. *Sporck*, 759 F.2d at 317 (“By its very language, [Federal Rule of Evidence] 612 requires that a party meet three conditions before it may obtain documents used by a witness prior to testifying: 1) the witness must use the writing to refresh his memory; 2) the witness must use the writing for the purpose of testifying; and 3) the court must determine that production is necessary in the interests of justice. The first requirement is consistent with the purposes of the rule, for if the witness is not using the document to refresh his memory, that document has no relevance to any attempt to test the credibility and memory of the witness.”) (citation omitted); *In re Managed Care Litig.*, 415 F. Supp. 2d at 1380 (same); *Nutramax Lab., Inc.*, 183 F.R.D. at 468 (same).

When the action involves thousands of documents, some federal courts have held that the comparable federal work-product doctrine exception applies to documents shown to witnesses in preparation for their depositions. *E.g.*, *In re Joint E. & S. Dist. Asbestos Litig.*, 119 F.R.D. 4, 6 (E. D. & S.D.N.Y. 1988) (“However, even without [Federal Rule of Evidence] 612, the portion of the product book sought should be disclosed to defendants on the basis of defendants’ demonstration of substantial need, as set out in [Federal] Rule 26(b)(3). Defendants have no other method of obtaining the identical material, i.e., the material that was shown to the plaintiff. Defendants cannot by other means learn whether the product book was used in a suggestive fashion so as to encourage plaintiff to recognize items he would not otherwise recognize.”).

The thorniest issue regarding the application of Texas Rule of Evidence Rule 612 to depositions relates to whether the use of work-product, attorney-client, or other privileged materials to refresh the deponent's recollection in preparation for the deposition waives the privilege. Four Texas cases appear to have divided on the issue.

Two cases, one in dictum, suggest, without any analysis, that Rule 612 applies to depositions and that privilege may be waived by using privileged documents to refresh a deponent's recollection before the deposition.³¹⁸ The other two cases, *In re Chevron Phillips Chemical Co. LP*³¹⁹ and *In re McIntyre*,³²⁰ appear to hold that the applicable privilege rule, rather than Rule 612, governs the waiver of privilege with respect to a document used to refresh a witness's recollection before deposition. Those cases are devoid of any analysis of Texas Rule 199.5(d) or Texas Rule of Evidence 612 and the policy behind Texas Rule of Evidence 612 and its interplay with the law of privilege.³²¹ Perhaps more importantly, both are at odds with the literal language of Texas Rule of Evidence 612, which does except privileged documents from its scope and which expressly applies to documents used to refresh a witness's recollection before he testifies.³²² They also are

³¹⁸*In re Brown*, No. 03-97-00609-CV, 1998 Tex. App. LEXIS 2609, at *9–11 (Tex. App.—Austin Apr. 30, 1998, orig. proceeding) (not designated for publication); *Denison*, 716 S.W.2d at 123 (after explaining that former Texas Rule of Evidence 611(1) “entitles an adverse party to inspect writings used by a witness to refresh his memory while he is testifying[.]” noting in dictum that former Texas “Rule [of Evidence] 611(2) allows opposing counsel to inspect documents examined by the witness before he testifies, but only if the court first determines this is necessary in the interest of justice”).

The court in *Brown* held that the trial court abused its discretion in ordering asbestos plaintiffs to produce a twenty-page “Memo” prepared by a legal assistant containing a question-and-answer section with descriptions of asbestos-laden products and blanks for plaintiffs to describe their exposure to those products and a section describing the deposition process and instructing the plaintiffs how to prepare, dress, and conduct themselves because there was no evidence that the “Memo” was used to refresh the plaintiffs' recollection. *In re Brown* 1998 Tex. App. LEXIS 2609, at *9–11.

³¹⁹*In re Chevron Phillips Chem. Co. LP*, No. 09-06-470 CV, 2006 Tex. App. LEXIS 9186, at *1–3 (Tex. App.—Beaumont Oct. 25, 2006, orig. proceeding) (mem. op.).

³²⁰*In re McIntyre*, No. 03-12-00134-CV, 2012 Tex. App. LEXIS 7524, at *13–14 (Tex. App.—Austin Aug. 31, 2012, orig. proceeding) (mem. op.).

³²¹See *In re McIntyre*, 2012 Tex. App. LEXIS 7524, at *13–16; *In re Chevron*, 2006 Tex. App. LEXIS 9186, at *4–5.

³²²See *In re McIntyre*, 2012 Tex. App. LEXIS 7524, at *13–16; *In re Chevron*, 2006 Tex. App. LEXIS 9186, at *4–5.

inconsistent with federal decisions, which uniformly hold that using privileged documents to prepare a deponent can waive their privileged status.³²³ Given the present state of uncertainty, practitioners should avoid using privileged materials to prepare witnesses for deposition.

During the deposition, “[c]ounsel should cooperate with and be courteous to each other and to the witness[, and t]he witness should not be evasive and should not unduly delay the examination.”³²⁴ Not only can a

³²³ Although a few federal decisions hold that privileged documents used to prepare a witness for deposition that refresh the witness’s recollection automatically are producible, the majority of more recent federal decisions balance the need for disclosure for effective cross-examination against the protection against disclosure afforded by relevant privilege. *E.g.*, *In re Managed Care Litig.*, 415 F. Supp. 2d 1378, 1381 (S.D. Fla. 2006) (“Although the Defendants point to a few old district court cases finding that use of a privileged document to refresh a witness’ recollection results in an automatic waiver of the privilege, this Court agrees with the more recent decisions holding that automatic waiver is inconsistent with both the plain language of [Federal Rule of Evidence] 612 and with the advisory committee notes.”); *United States ex rel. Barko v. Halliburton Co.*, No. 1:05-CV-1276, 2014 U.S. Dist. LEXIS 181353, at *39 (D.D.C. Nov. 20, 2014) (“Most courts balance the rights of adverse parties under [Federal Rule of Evidence] 612 against the interest in preserving work-product protection and attorney-client privilege, and analyze a series of factors in doing so.”). Unfortunately, the federal cases do not provide a uniform framework for analyzing these competing interests, but rather tailor it to the particular privilege asserted. *E.g.*, *In re Managed Care Litig.*, 415 F. Supp. 2d at 1380–1381; *Mfg. Admin. & Mgmt. Sys. v. ICT Grp., Inc.*, 212 F.R.D. 110, 118 (E.D.N.Y. 2002); *Suss v. MSX Int’l Eng’g Servs., Inc.*, 283 F. Supp. 2d 469 (S.D.N.Y. 2002); *EEOC v. Cont’l Airlines, Inc.*, 395 F. Supp. 2d 738, 744 (N.D. Ill. 2005).

Not only can documents reviewed by a witness in preparation for deposition possibly be obtained under Texas Rule of Evidence 612, but the opposing party may also be able to obtain them under the work-product rule, Texas Rule 192.5(b). As discussed above, see *supra* note 119, an attorney’s compilation or selection of relevant documents for use in discovery arguably is work product. If a party or witness claims that the documents reviewed by the witness in preparation for the deposition are protected work product, the question becomes whether the compilation is “core” work product. If it is not, the compilation may be discoverable “upon a showing that the party seeking discovery has a substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of material by other means.” TEX. R. CIV. P. 192.5(b)(2).

³²⁴ TEX. R. CIV. P. 199.5(d); *cf.* *State Farm Mut. Auto. Ins. Co. v. Lincow*, 715 F. Supp. 2d 617, 642 (E.D. Pa. 2010) (holding that it was proper to play the portion of a party’s expert’s videotaped deposition to the jury, where he became upset and unruly, noting that “Defendants had notice that the deposition was being videotaped and could be used at trial. Dr. Lincow had served as an expert witness at several trials and knew the purpose of a deposition. That Dr. Lincow may have come to regret his boorish behavior at the deposition is not grounds for excluding it. In the

witness who is a party, a party's officer, director, or managing agent, or an organization's representative be sanctioned for inappropriate deposition conduct, but so can the witness's attorney.³²⁵ For example, in *GMAC Bank v. HTFC*, a federal court sanctioned the witness, the defendant's CEO, as well as defense counsel.³²⁶ The witness was sanctioned because his deposition conduct was "outrageous"³²⁷—he was hostile, uncivil, and vulgar and refused to answer many questions or provided intentionally evasive answers.³²⁸ The attorney was sanctioned because his "complicity" was inexcusable—he willfully failed to intervene and control his client.³²⁹

final analysis, a deposition is a court proceeding and a witness and counsel are responsible for how they behave at depositions.").

³²⁵Under TEX. R. CIV. P. 215.1(b)(2)(B) and (c) and 215.2(b)(2), such a witness or the witness's attorney can be sanctioned (e.g., ordered to pay the expenses of discovery) if the witness fails to answer a question or answers one evasively. In addition, a *party* can be sanctioned under Texas Rule 215.3 for "abusing the discovery process in seeking, making or resisting discovery[.]" A number of Texas cases hold that the sanctions provided by Texas Rule 215.2(b) cannot be imposed against a nonparty. *E.g.*, *In re White*, 227 S.W.3d 234, 236–237 (Tex. App.—San Antonio 2007, orig. proceeding) (holding that the trial court abused its discretion in ordering a deponent to pay, as sanctions, the court reporter's fees to continue the deposition); *In re Prince*, 2006 Tex. App. LEXIS 10558, at *12 ("[A] a court's power to impose sanctions on non-parties is limited to its contempt power."); *see City of Houston v. Chambers*, 899 S.W.2d 306, 309 (Tex. App.—Houston [14th Dist.] 1995, orig. proceeding) (holding that the trial court abused its discretion in ordering a nonparty deponent, as sanctions, to pay the court reporter's fees to continue the deposition.). In so holding, the courts in *White* and *Prince* relied on the fact that Texas "Rule 215.2(b) only authorizes the trial court to impose sanctions for discovery abuses committed by 'a party or an officer, director, or managing agent of a party or a person designated . . . to testify on behalf of a party.'" *White*, 227 S.W.3d at 236; *accord Prince*, 2006 Tex. App. LEXIS 10558, at *12 (citing Texas Rules 215(b), (c)). TEX. R. CIV. P. 215.1(a), however, provides that if "a party[] or other deponent . . . fails to answer a question propounded or submitted upon oral examination or upon written questions . . . the discovering party may . . . apply to the court in which the action is pending for the imposition of any sanction authorized by Rule 215(b) without the necessity of first having obtained a court order compelling such discovery." (emphasis added). This language is inconsistent with Texas Rule 215.2(b). The courts in *White*, *Prince*, and *Chambers* did not mention this conflict. Thus, it is unclear whether, under Texas Rule 215.2(b)(2), sanctions can be imposed against a nonparty or the nonparty's attorney for failing to answer or evasively answering a deposition question.

³²⁶*GMAC Bank v. HTFC*, 248 F.R.D. 182, 198 (E.D. Pa. 2008).

³²⁷*Id.*

³²⁸*Id.* at 186; *accord Carroll v. Allstate Fire & Cas. Ins. Co.*, No. 12-cv-00007-WJM-KLM, 2014 U.S. Dist. LEXIS 28061, at *31–32, 37, 41 (D. Colo. Mar. 4, 2014) (imposing sanctions against the plaintiff's expert witness for inappropriate deposition behavior (i.e., repeated and unnecessary commentary regarding defense counsel's skills and methods and repeated verbal attacks against defense counsel)); *Van Stelton v. Van Stelton*, No. C11-4045-MWB, 2013 U.S.

In addition, “[a]n attorney must not ask a question at an oral deposition solely to harass or mislead the witness, for any other improper purpose, or without a good faith legal basis at the time.”³³⁰

Texas Rule 199.5(d) governs conferences, providing, in relevant part: “Private conferences between the witness and the witness’s attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during agreed recesses and adjournments.”³³¹

If an attorney *or* witness violates Texas Rule 199.5(d)’s requirements regarding courteousness, responsiveness, or conferences, “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.”³³²

Dist. LEXIS 145999, at *45–46, 54–56 (N.D. Iowa Oct. 9, 2013) (sanctioning both the defendant and his attorney because, to circumvent proper deposition procedure, they agreed that the defendant, instead of his attorney, would interpose improper objections and refuse to answer questions).

³²⁹ *GMAC Bank*, 248 F.R.D. at 186, 198 (E.D. Pa. 2008); *accord Van Stelton*, 2013 U.S. Dist. LEXIS 145999, at *45–46, 54–56 (sanctioning both the defendant and his attorney, because to circumvent proper deposition procedure, they agreed that the defendant, instead of his attorney, would interpose improper objections and refuse to answer questions).

³³⁰ TEX. R. CIV. P. 199.5(h).

³³¹ *Id.* 199.5(d).

³³² *Id.* Both the Texas Lawyer’s Creed and the Texas Disciplinary Rules of Professional Conduct also prohibit such questioning. For example, the Lawyer’s Creed instructs attorneys to treat adverse parties and witnesses with “fairness and due consideration” and to advise clients that they will not pursue conduct that is “intended to harass . . . an opposing party.” Tex. Law. Creed Art. II, § 6–7. The Disciplinary Rules similarly prohibit an attorney, in the representation of a client, from using “means that have no substantial purpose other than to embarrass, delay, or burden a third person[.]” Tex. Disciplinary Rules Prof’l Conduct 4.04(a), *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (West 2005), or “ask[ing] any questions intended to degrade a witness or other person except where the lawyer reasonably believes that the question will lead to admissible evidence[.]” Tex. Disciplinary Rules Prof’l Conduct R. 4.04(c)(4).

Both the Lawyer’s Creed and Disciplinary Rules also prohibit an attorney from making false statements and misrepresentations during a deposition. The Lawyer’s Creed provides that an attorney will not “knowingly misrepresent, mischaracterize, misquote, or miscite facts or authorities to gains an advantage.” Tex. Law. Creed Art. IV, § 6. Disciplinary Rule 4.01 prohibits an attorney from making a false statement or misrepresentation during a deposition. Tex. Disciplinary Rules Prof’l Conduct R. 4.01. Rule 8.4 further prohibits an attorney from engaging in dishonest, fraudulent, or deceptive conduct. Tex. Disciplinary Rules Prof’l Conduct R. 8.04.

3. Objections

Objections are made and recorded during the deposition by the deposition officer (i.e., the person recording the deposition, usually a court reporter) and reserved for ruling by the trial court, not the deposition officer.³³³ Texas Rule 199.5(e) sets forth the permissible types of objections, including the *exact* words that *must* be used: “Objections to questions during the oral deposition are limited to ‘Objection, leading’ and ‘Objection, form.’ Objections to testimony during the oral deposition are limited to ‘Objection, nonresponsive.’”³³⁴ These objections “are *waived* if not stated as phrased during the oral deposition.”³³⁵

An argumentative or suggestive objection waives the objection and may “be grounds for terminating the oral deposition or assessing costs or other sanctions.”³³⁶ An attorney, however, need not, and should not, make any

³³³TEX. R. CIV. P. 199.5(e) (“The officer taking the oral deposition will not rule on objections but must record them for ruling by the court. The officer taking the oral deposition must not fail to record testimony because an objection has been made.”).

³³⁴*Id.* Unlike Texas Rule 199.5(e), which specifically sets forth how a form objection should be made, Federal Rule 32(d)(3)(B)(i) merely provides that “[a]n objection to an error or irregularity at an oral examination is waived if . . . it relates to . . . the form of a question or answer[.]” Accordingly many federal courts require the objecting attorney to state the basis for the form objection in a few words (e.g., “objection, leading,” “objection, compound,” or “objection, narrative”). *E.g.*, *Sec. Nat’l Bank v. Abbott Labs.*, 299 F.R.D. 595, 602–03 (N.D. Iowa 2014) (citing cases), *rev’d on other grounds*, No. 14-3006, 2015 U.S. App. LEXIS 15122 (8th Cir. Aug. 27, 2015). But other federal courts, like Texas Rule 199.5(c), require the objecting attorney to state nothing more than an unspecified “form” objection during depositions. *Sec. Nat’l Bank*, 299 F.R.D. at 602–03 (citing cases).

³³⁵TEX. R. CIV. P. 199.5(e) (emphasis added).

³³⁶*Id.*; see *In re Harvest Cmty. of Houston, Inc.*, 88 S.W.3d 343, 346–348 (Tex. App.—San Antonio 2002, orig. proceeding) (“Mennellas’ counsel, who was taking the deposition, was repeatedly interrupted by long, argumentative objections by Hirsch, some of which lasted several pages. These objections were in violation of [Texas] Rule 199.5(e) which limits objections to questions during the oral deposition to ‘Objection, leading’ and ‘Objection, form.’ The purpose of the [Texas] Rule was to prevent the kind of obstructive behavior that was exhibited here and to save substantive complaints for a later hearing before the trial court . . .” (quoting TEX. R. CIV. P. 199.5(e)); *cf.* *Deville v. Givaudan Fragrances Corp.*, 419 Fed. App’x 201, 209 (3d Cir. 2011) (affirming a magistrate judge’s imposition of sanctions pursuant to Federal Rule 30(d)(2) because the sanctioned attorney “testified on behalf of her witness by way of suggestive speaking objections”); *Craig v. St. Anthony’s Med. Ctr.*, 384 Fed. App’x 531, 533 (8th Cir. 2010) (affirming a district judge’s award of sanctions pursuant to Federal Rule 30(d)(2) due to “a substantial number of argumentative objections together with suggestive objections and directions to the deponent to refrain from answering questions without asserting a valid justification”); *Howard v. Offshore Liftboats, LLC*, Nos. 13-4811; 13-4811, 13-6407, 2015 U.S. Dist. LEXIS

objections other than “form,” “leading,” or “nonresponsive” during the deposition to preserve those objections, and substantive objections (e.g., hearsay, relevance, materiality, the witness’s competency)³³⁷ can be raised later with the trial court in connection with a summary judgment motion, at the pretrial conference, or during trial.³³⁸

A leading question is “one that suggests the desired answer or puts words into the witness’s mouth to be echoed back.”³³⁹ Such questions “should not be used on direct examination except as necessary to develop the witness’s testimony.”³⁴⁰ Ordinarily, the court should allow leading questions (1) on cross-examination and (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.³⁴¹

“Form” objections for purposes of Texas Rule 199.5(e) include that the question (a) assumes facts in dispute or not in evidence, (b) is argumentative or abusive, (c) misquotes the witness, (d) calls for speculation, (e) is confusing, ambiguous, vague, or unintelligible, (f) is compound, (g) calls for a narrative, (h) has been asked and answered, (i) misstates the record, (j) calls for an opinion from an unqualified witness, (k) lacks a foundation, or (l) exceeds the scope of an organization’s representative’s designation or the subject matters in the deposition notice for an organization’s deposition under Texas Rule 199.2(b)(1).³⁴² Although

26629, at *28–30 (E.D. La. Mar. 4, 2015) (imposing monetary sanctions against an attorney and barring him from participating in further depositions in the action for, among other things, making improper speaking objections).

³³⁷A question exists regarding whether an attorney can instruct his client not to answer a question that seeks irrelevant information or information not calculated to lead the discovery of admissible evidence. See *infra* notes 362–365 and accompanying text.

³³⁸TEX. R. CIV. P. 199.5(e) (“All other objections need not be made or recorded during the oral deposition to be later raised with the court.”).

³³⁹*Sahualla v. Guseman Constr., LLC*, No. 09-14-00342-CV, 2015 Tex. App. LEXIS 4645, at *4 (Tex. App.—Beaumont May 7, 2015, no pet.); *accord* *Mega Child Care v. Texas Dep’t of Protective & Regulatory Servs.*, 29 S.W.3d 303, 307 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *GAB Bus. Servs. v. Moore*, 829 S.W.2d 345, 351 (Tex. App.—Texarkana 1992, no writ).

³⁴⁰TEX. R. EVID. 611(c).

³⁴¹*Id.*

³⁴²*Ordonez v. M.W. McCurdy & Co.*, 984 S.W.2d 264, 274 (Tex. App.—Houston [1st Dist.] 1998, no writ) (“Form” objections “usually involve the following objections: “(1) assumes facts in dispute or not in evidence; (2) is argumentative; (3) misquotes a deponent; (4) is leading; (5) calls for speculation; (6) is ambiguous or unintelligible; (7) is compound; (8) is too general; (9) calls for a narrative answer; or (10) has been asked and answered.”); *St. Luke’s Episcopal Hosp. v. Garcia*, 928 S.W.2d 307, 309 (Tex. App.—Houston [14th Dist.] 1996, no writ) (same); TEX. R. CIV. P. 199 cmt. 4 (“An objection to the form of a question includes objections that the question calls for

under Texas Rule 199.5(e), an attorney has the right and duty to object to protect his or her witness from improper questions, the attorney must do so as permitted by Texas Rule 199.5(d)–(h).³⁴³ For example, an attorney “properly cannot demand clarification of a question the *attorney* claims not to understand—the witness should be permitted to answer the question posed, or to ask for clarification if he or she does not understand the

speculation, calls for a narrative answer, is vague, is confusing, or is ambiguous.”); *cf.* Sec. Nat’l Bank v. Abbott Labs., 299 F.R.D. 595, 601 (N.D. Iowa 2014) (“‘[F]orm’ objections refer to a category of objections, which includes objections to ‘leading questions, lack of foundation, assuming facts not in evidence, mischaracterization or misleading question, non-responsive answer, lack of personal knowledge, testimony by counsel, speculation, asked and answered, argumentative question, and witness’ answers that were beyond the scope of the question.’” (quoting NGM Ins. Co. v. Walker Const. & Dev., LLC, No. 1:11-CV-146, 2012 U.S. Dist. LEXIS 177161, at *7 (E.D. Tenn. Dec. 13, 2012))), *rev’d on other grounds*, No. 14-3006, 2015 U.S. App. LEXIS 15122 (8th Cir. Aug. 27, 2015); Abu Dhabi Comm. Bank v. Morgan Stanley & Co., No. 08 Civ. 7508 (SAS), 2011 U.S. Dist. LEXIS 116840, at *26–27 (S.D.N.Y. Sept. 9, 2011) (“At least one secondary source has identified eleven grounds upon which a party or its counsel may state an objection to the form of a question posed at a deposition. Those grounds are: (1) compound; (2) asked and answered; (3) overbroad/calls for a narrative; (4) calls for speculation; (5) argumentative; (6) vague or unintelligible; (7) assumes facts not in evidence; (8) misstates the record; (9) calls for an opinion from an unqualified witness; (10) leading where not permitted; and (11) lack of foundation.”); *Boyd v. Univ. of Md. Med. Sys.*, 173 F.R.D. 143, 147 n.8 (D. Md. 1997) (“Fed. R. Civ. P. 32(d)(3)(B) requires attorneys to make seasonable objections to the form of questions which are asked, or else they are waived. The most frequent grounds for objecting to the form of a question are: (1) the question is too broad or calls for an excessive narrative answer, (2) the question is compound, (3) the question has been asked and responsively and completely answered, (4) the question calls for conjecture, speculation or judgment of veracity, (5) the question is ambiguous, imprecise, unintelligible or calls for a vague answer, (6) the question is argumentative, abusive or contains improper characterization, (7) the question assumes as true facts in dispute or not in evidence, (8) the question misquotes a witness’ earlier testimony, (9) the question calls for an opinion from a witness not qualified to give one, and (10) the question is leading under circumstances where leading questions would not be permitted by Fed. R. Evid. 611(c).” (citation omitted).

As noted in the foregoing authorities, although “leading” is a form objection, under Texas Rule 199.5(e), “leading” is treated as a distinct objection.

The last objection—the question exceeds the scope of an organization’s representative’s designation or the subject matters in a deposition notice for an organization’s deposition under Texas Rule 199.2(b)(1)—is discussed *supra* in note 84 and accompanying text.

³⁴³TEX. R. CIV. P. 199.5(e), 199.5(d)–(h).

question.”³⁴⁴ Moreover, attorneys “are strictly prohibited from making any comments . . . which might suggest or limit a witness’s answer to an unobjectionable question.”³⁴⁵ Likewise, attorneys “are not permitted to state

³⁴⁴ *Cf.* *Cnty. Ass’n Underwriters of Am. v. Queensboro Flooring Corp.*, No. 3:10-CV-1559, 2014 U.S. Dist. LEXIS 90939, at *22 (M.D. Pa. July 3, 2014); *accord Sec. Nat’l Bank*, 299 F.R.D. at 605–606, *rev’d on other grounds*, No. 14-3006, 2015 U.S. App. LEXIS 15122 (8th Cir. Aug. 27, 2015) (“These clarification-inducing objections are improper. Unless a question is truly so vague or ambiguous that the defending lawyer cannot possibly discern its subject matter, the defending lawyer may not suggest to the witness that the lawyer deems the question to be unclear. Lawyers may not object simply because they find a question to be vague, nor may they assume that the witness will not understand the question. The witness—not the lawyer—gets to decide whether he or she understands a particular question”); *Cincinnati Ins. Co. v. Serrano*, No. 11-2075-JAR, 2012 U.S. Dist. LEXIS 1363, at *13 (D. Kan. Jan. 5, 2012) (“Only the witness knows whether she understands a question, and the witness has a duty to request clarification if needed. This duty is traditionally explained to the witness by the questioner before the deposition. If defending counsel feels that an answer evidences a failure to understand a question, this may be remedied on cross-examination.”); *Meyer Corp. U.S. v. Alfay Designs, Inc.*, No. CV 2010 3647 (CBA)(MDG), 2012 U.S. Dist. LEXIS 113819, at *8–9 (E.D.N.Y. Aug. 13, 2012) (“Moreover, ‘it is not counsel’s place to interrupt if a question is perceived to be potentially unclear to the witness.’ Rather ‘[t]he Federal Rules of Civil Procedure provide two mechanisms to correct or clarify deposition testimony, namely cross-examination and through submission to the witness for review.’” (quoting *Phillips v. Mfrs. Hanover Trust Co.*, No. 92 Civ 8527 (KTD), 1994 U.S. Dist. LEXIS 3748, at *6 (S.D.N.Y. Mar. 29, 1994), and *Cameron Indus., v. Mothers Work, Inc.*, No. 06 2007 U.S. Dist. LEXIS 41482, at *12 (S.D.N.Y. June 6, 2007))); *Hall v. Clifton Precision*, 150 F.R.D. 525, 528–29 (E.D. Pa. 1993) (“If the witness does not understand the question, or needs some language further defined or some documents further explained, the witness can ask the deposing lawyer to clarify or further explain the question. After all, the lawyer who asked the question is in a better position to explain the question than is the witness’s own lawyer.” (footnote omitted)).

³⁴⁵ *Cf. Cnty. Ass’n Underwriters of Am.*, 2014 U.S. Dist. LEXIS 90939, at *23 (“[T]he law clearly prohibits a lawyer from coaching a witness during a deposition.” (quoting *Hall v. Clifton Precision*, 150 F.R.D. 525, 531 (E.D. Pa. 1993)); *Cincinnati Ins. Co.*, 2012 U.S. Dist. LEXIS 1363, at *12 (“Instructions to a witness that they may answer a question ‘if they know’ or ‘if they understand the question’ are raw, unmitigated coaching, and are never appropriate. This conduct, if it persists after the deposing attorney requests that it stop, is misconduct and sanctionable. Mr. Schmidt’s parenthetical after a question ‘If you know the difference between the two’ is in the same category.”); *Cordova v. United States*, No. CIV.05 563 JB/LFG, 2006 U.S. Dist. LEXIS 98226, at *9 (D.N.M. July 31, 2006) (imposing sanctions because “it became impossible to know if [a witness’s] answers emanated from her own line of reasoning or whether she adopted [the] lawyer’s reasoning from listening to his objections”); *Calzaturificio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 40 (D. Mass. 2001) (stating that an attorney may not “interpret” questions for a deponent, coach him or her as to how to answer, or engage in lengthy speaking objections and colloquies).

on the record their interpretations of questions, since those interpretations are irrelevant and often suggestive of a particularly desired answer.”³⁴⁶

To prevent the deposing attorney from being “sandbagged” by a form objection, Texas Rule 199.5(e) allows the deposing attorney to request the objecting attorney to explain the objection’s basis.³⁴⁷ When asked for a form objection’s basis, the objecting attorney “must give a clear and concise explanation of [the] objection[.]”³⁴⁸ An argumentative or suggestive explanation waives the objection and “may be grounds for terminating the oral deposition or assessing costs or other sanctions.”³⁴⁹

After a form objection is made and any requested explanation of it is given, the witness should answer the question.³⁵⁰ If the answer is offered at trial, the objecting party can then renew the objection and obtain a ruling from the trial court.³⁵¹ “An attorney must not object to a question at an oral deposition . . . unless there is a good faith factual and legal basis for doing so at the time.”³⁵²

³⁴⁶ *Cf. Cmty. Ass’n Underwriters of Am.*, 2014 U.S. Dist. LEXIS 90939, at *23 (quoting *Hall v. Clifton Precision, A Division of Litton Systems, Inc.*, 150 F.R.D. 525, 530 n.10 (E.D. Pa. 1993)); *accord Specht v. Google, Inc.*, 268 F.R.D. 596, 598 (N.D. Ill. 2010) (“Objections that are argumentative or that suggest an answer to a witness are called ‘speaking objections’ and are improper under [Federal] Rule 30(c)(2).”); *Damaj v. Farmers Ins. Co.*, 164 F.R.D. 559, 560 (N.D. Okla. 1995) (“[T]he purpose of a deposition is to find out what the witness saw, heard and knows, or what the witness thinks, through a question and answer conversation between the deposing lawyer and the witness. Frequent and suggestive objections by opposing counsel can, and oft times do, completely frustrate that objective. Additionally, suggestive objections by counsel can tend to obscure or alter the facts of the case and consequently frustrate the entire civil justice system’s attempt to find the truth.”) (footnote omitted); *see Deville v. Givaudan Fragrances Corp.*, 419 Fed. App’x 201, 209 (3d Cir. 2011) (affirming sanctions against an attorney who “testified on behalf of her witness by way of suggestive speaking objections”).

³⁴⁷ TEX. R. CIV. P. 199.5(e) (“The objecting party must give a clear and concise explanation of an objection if requested by the party taking the oral deposition, or the objection is waived.”).

³⁴⁸ *Id.*

³⁴⁹ *Id. In re Harvest Cmty. of Houston, Inc.*, 88 S.W.3d 343, 346–348 (Tex. App.—San Antonio 2002, orig. proceeding), the court upheld sanctions imposed under Texas Rule 215.3 against an attorney for discovery abuse involving long, argumentative objections and insulting comments directed at opposing counsel during a deposition.

³⁵⁰ TEX. R. CIV. P. 199 cmt. 4 (“Ordinarily, a witness must answer a question at a deposition subject to the objection.”).

³⁵¹ *Id.* 199.5(e).

³⁵² *Id.* 199.5(h).

4. Instructing a Witness Not to Answer and Suspending a Deposition

Texas Rule 199.5(f) sets forth four instances when an attorney may instruct a witness “not to answer a question during an oral deposition[.]”³⁵³ As with form objections, “[t]he 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.”³⁵⁴

The first instance in which an instruction not to answer a question is proper is “to preserve a privilege[.]”³⁵⁵ Of course, if privilege is asserted as a reason for instructing a witness not to answer, it must be a recognized one.³⁵⁶

The second instance in which an instruction not to answer a question is proper is to “comply with a court order or these rules[.]”³⁵⁷ If a court, for example, has ruled in connection with a motion to compel interrogatories or the production of documents that certain information is not discoverable or has granted summary judgment on a claim or defense, an attorney properly can instruct the witness not to answer questions seeking such information or about the claim or defense because such an instruction complies with a court order.³⁵⁸

It is unclear, however, whether a question asking about matters beyond discovery’s scope under Texas Rule 192.3 (i.e., information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence) would “comply with . . . these rules.” Arguably, an instruction not to answer a question seeking information that is neither relevant nor

³⁵³ *Id.* 199.5(f).

³⁵⁴ *Id.*

³⁵⁵ *Id.*; see *In re Lowe’s Cos.*, 134 S.W.3d 876, 878 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding) (holding that objections to deposition questions on the basis of the trade-secret privilege were proper).

³⁵⁶ *Cf.* *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Tr. No. 1B*, 230 F.R.D. 398, 421 (D. Md. 2005) (“Obviously, if privilege is asserted as a reason to not answer, it must be a recognized privilege.”); *Gober v. City of Leesburg*, 197 F.R.D. 519, 520–521 (M.D. Fla. 2000) (holding that the plaintiff’s attorney improperly instructed the plaintiff not to disclose his social security number on grounds of “financial privilege” because there is no such privilege).

³⁵⁷ TEX. R. CIV. P. 199.5(f).

³⁵⁸ *Id.*

reasonably calculated to lead to the discovery of admissible evidence is one that “compl[ies] with . . . these rules.” The only Texas case to consider the matter, *In re Lowe’s Companies*, however, held, without any analysis, that “relevance . . . is not a valid ground for instructing a witness not to answer a deposition question.”³⁵⁹

Even if *Lowe’s Companies’* holding is correct, it nonetheless is clear that “if counsel’s questions go so far beyond the realm of possible relevance [that] the deposition is being conducted in an abusive manner (i.e., in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party), then it would be permissive to instruct a deponent not to answer” and, if appropriate, to stop the deposition and move for a protective order under Texas Rule 192.6.³⁶⁰ This is because Texas Rule 199.5(f) specifically allows an instruction not to answer a question to protect a witness from abusive questions and Comment 4 to Texas Rule 199 points out that “questions that inquire into matters clearly beyond the scope of discovery” are abusive.³⁶¹ As one federal court explained:

Clearly, inquiry into irrelevant topics can constitute bad faith, or unreasonable annoyance, embarrassment or oppression, as described in [Federal] Rule 30(d)(3). For example, asking a deponent questions about personal or confidential matters, such as his or her medical history, sex life or financial condition, would quickly qualify if such matters had no possible relevance to the case.³⁶²

³⁵⁹134 S.W.3d at 878 (noting that “relevance is . . . not a valid ground for instructing a witness not to answer a deposition question”); *cf.* *Rangel v. Mascorro*, 274 F.R.D. 585, 591 (S.D. Tex. 2011) (“Because the plain language of [Federal] Rule 30 is rather clear on what types of objections counsel may make and when counsel may instruct a deponent not to answer a question, courts have generally concluded that it is improper to instruct a witness not to answer a question based on a relevancy objection.”).

³⁶⁰*Rangel*, 274 F.R.D. at 591 (S.D. Tex. 2011); *accord* *Coach, Inc. v. Hubert Keller, Inc.*, 911 F. Supp. 2d 1303, 1311 (S.D. Ga. 2012) (“The irrelevancy of a question is not grounds to instruct a witness not to answer the question, unless and until the nature of the questioning makes it obvious that it is necessary to stop the [deposition] and seek relief under [Federal] Rule 30(d)(3) for being conducted in a manner evidencing bad faith, or to embarrass, annoy, or oppress the deponent.”); *Quantachrome Corp. v. Micromeritics Instrument Corp.*, 189 F.R.D. 697, 700 (S.D. Fla. Oct. 30, 1999) (same).

³⁶¹TEX. R. CIV. P. 199.5(f); *id.* 199 cmt. 4.

³⁶²*Van Stelton v. Van Stelton*, No. C11-4045-MWB, 2013 U.S. Dist. LEXIS 145999, at *44 (N.D. Iowa Oct. 9, 2013). *See also* cases cited *supra* note 359.

As noted above, the third instance in which an instruction not to answer a question is proper is to “protect a witness from an abusive question or one for which any answer would be misleading.”³⁶³ Comment 4 to [Texas] Rule 199 provides the following explanation:

An objection may therefore be inadequate if a question incorporates such unfair assumptions or is worded so that any answer would necessarily be misleading. A witness should not be required to answer whether he has yet ceased conduct he denies ever doing, subject to an objection to form (i.e., that the question is confusing or assumes facts not in evidence) because any answer would necessarily be misleading on account of the way in which the question is put. The witness may be instructed not to answer. Abusive questions include questions that inquire into matters clearly beyond the scope of discovery or that are argumentative, repetitious, or harassing.³⁶⁴

The final instance in which an instruction not to answer is proper is when the attorney suspends the deposition to secure a ruling from the trial court.³⁶⁵ Texas Rule 199.5(g) allows a party to suspend a deposition “[i]f the time limitations for the deposition have expired or the deposition is being conducted or defended in violation of these rules[.]”³⁶⁶

“An attorney must not . . . 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.”³⁶⁷ When counsel instructs the witness not to answer based on an improper reason, the trial court can order the witness to be redeposed.³⁶⁸

³⁶³ TEX. R. CIV. P. 199.5(f).

³⁶⁴ *Id.* 199 cmt. 4.

³⁶⁵ *Id.* 199.5(f).

³⁶⁶ *Id.* 199.5(g); 215.1(b) similarly provides that, when a deponent fails to answer a question during the deposition, “the proponent of the question may complete or adjourn the examination before he applies for an order.”

³⁶⁷ *Id.* 199.5(h).

³⁶⁸ *Id.* 215.1(b)(2)(B), (c) (authorizing the trial court to order “a party or other deponent” to be redeposed to answer questions that the deponent refused to answer during the deposition); *cf.* *Pilates, Inc. v. Georgetown Bodyworks Deep Muscle Massage Ctrs., Inc.*, 201 F.R.D. 261, 262 (D.D.C. 2000) (ordering the witness to be redeposed because counsel improperly instructed him not to answer certain questions).

In sum, Texas Rules 199.5(d)–(g)’s purpose is to ensure that depositions are exactly what they are supposed to be—question-and-answer sessions between the attorney and the witness aimed at uncovering the facts in an action. When a deposition becomes something other than that because of strategic interruptions, instructions not to answer questions, coaching, and statements on the record, it not only becomes unnecessarily long, but it ceases to serve discovery’s purpose—to find the truth.³⁶⁹

5. Motions to Compel Answers to Deposition Questions

If a witness refuses to answer a question at his or her deposition, any party can file a motion to compel.³⁷⁰ The burden is on the witness to establish the propriety of the objection, privilege, or instruction not to answer by “either by testimony at the hearing or by affidavits served on opposing parties at least seven days before the hearing.”³⁷¹ The witness, however, need not obtain a ruling on the propriety of the objection, privilege assertion, or instruction because “the failure of a party to obtain a ruling prior to trial does not waive any objection or privilege.”³⁷²

³⁶⁹ As noted by the court in *Hall v. Clifton Precision*:

[T]he underlying purpose of a deposition is to find out what a witness saw, heard, or did—what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing attorney and the witness. There is no proper need for the witness’s own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness’s words to mold a legally convenient record. It is the witness—not the lawyer—who is the witness. As an advocate, the lawyer is free to frame those facts in a manner favorable to the client, and also to make favorable and creative arguments of law. But the lawyer is not entitled to be creative with the facts. Rather, a lawyer must accept the facts as they develop.

Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa 1993) (footnote omitted).

³⁷⁰ TEX. R. CIV. P. 199.6 (“Any party may, at any reasonable time, request a hearing on an objection or privilege asserted by an instruction not to answer or suspension of the deposition . . .”); *id.* 215.1(b)(2)(B) (“[I]f a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails . . . to answer a question propounded or submitted upon oral examination or upon written questions . . . the discovering party may move for an order compelling an answer. . .”).

³⁷¹ *Id.* (“The party seeking to avoid discovery must present any evidence necessary to support the objection or privilege either by testimony at the hearing or by affidavits served on opposing parties at least seven days before the hearing.”).

³⁷² *Id.*

H. Supplementing Oral Deposition Testimony

Unlike with respect to written discovery, there generally is no obligation to supplement deposition testimony even if it is wrong or incomplete. This is made clear by Comment 5 to Texas Rule 193, which provides: Texas Rule 193.5, the Rule regarding supplementation, “imposes no duty to supplement or amend deposition testimony. The only duty to supplement deposition testimony is provided in [Texas] Rule 195.6[, relating to testifying experts].”³⁷³

I. Depositions of a Witness Already Deposed

A witness faced with a second deposition should file a motion to quash or for a protective order.³⁷⁴ In ruling on the motion, the trial court should be guided by the factors set forth in Texas Rule 192.4, that is, whether the second deposition of the witness would be unnecessarily cumulative or duplicative, whether the information sought by the deposition is obtainable from some other source that is more convenient, less burdensome, or less expensive, and whether the burden of a second deposition outweighs its potential benefit.³⁷⁵ And, the court should grant the motion unless the party seeking the deposition shows a legitimate need or good reason for the second deposition.³⁷⁶ As noted by one federal court:

Typically, if, after a witness is deposed, new information comes to light relating to the subject of that deposition, new parties are added to the case, new allegations are made in pleadings, or new documents are produced, the witness may be re-deposed with respect to these new developments. A re-deposition may also be ordered if the examining party was inhibited from conducting a full examination as a result of obstructive conduct at the first deposition.

³⁷³ *Accord* Titus Cty. Hosp. Dist. v. Lucas, 988 S.W.2d 740, 740 (Tex. 1998) (per curiam) (holding that, under former Texas Rule 166b(6), “[a] general duty to supplement deposition testimony (as opposed to a narrow duty for certain expert testimony, for example) would impose too great a burden on litigants. We therefore disapprove the court of appeals’ holding that deposition testimony must be supplemented.” (citation omitted)); cf. *Pilates, Inc.*, 201 F.R.D. at 262 (recognizing that “[t]he Federal Rules of Civil Procedure impose no affirmative duty for deponents to supplement deposition testimony”).

³⁷⁴ TEX. R. CIV. PRO. 192.6.

³⁷⁵ *Id.* 192.4.

³⁷⁶ See cases cited *infra* note 377.

However, the Court may deny leave to conduct a second deposition of the witness even if relevant documents are produced subsequent to the deposition if the party taking the deposition either failed to request those documents in a timely fashion or chose to conduct the deposition prior to the completion of document discovery.³⁷⁷

When a second deposition is permitted, its scope generally should be limited to matters *not* covered in the first deposition.³⁷⁸

J. Expert Depositions

The Texas discovery rules distinguish between “testifying experts” (i.e., “an expert who may be called to testify as an expert witness at trial”)³⁷⁹ and “consulting experts” (i.e., “an expert who has been consulted, retained, or

³⁷⁷ *Fresenius Med. Care Holdings, Inc. v. Roxane Labs., Inc.*, No. 2:05-cv-0889, 2007 U.S. Dist. LEXIS 17834, at *5–6 (S.D. Ohio Mar. 9, 2007) (citations omitted); *accord* *Settles v. Livengood*, No. 4:13-CV-662 (CEJ), 2015 U.S. Dist. LEXIS 57833, at *3–4 (E.D. Mo. May 4, 2015) (“Typically, a party may conduct a second deposition of a witness if new information comes to light relating to the subject of that deposition, new parties are added to the case, new allegations are made in pleadings, or new documents are produced. Under these circumstances, the second deposition is limited to the new information. A second deposition may also be ordered if the examining party was inhibited from conducting a full examination as a result of obstructive conduct at the first deposition. None of these circumstances apply in this instance: plaintiff elected not to pose questions to Drs. Johnson and Chen during their depositions out of concern for their demeanor and appearance and may not now impose the expense of second depositions on defendants.” (citations omitted)).

³⁷⁸ *Yiping Luan v. Advanced Title Ins. Agency, L.C.*, No. 2:13-cv-00983, 2015 U.S. Dist. LEXIS 106201, at *6–9 (D. Utah Aug. 12, 2015) (limiting deposition to material produced after the first deposition); *Settles v. Livengood*, No. 4:13-CV-662 (CEJ), 2015 U.S. Dist. LEXIS 57833, at *3–4 (E.D. Mo. May 4, 2015) (noting that a second deposition generally is limited to “the new information”); *Dash v. Seagate Tech. (US) Holdings, Inc.*, No. CV 13-6329 (LDW) (AKT), 2015 U.S. Dist. LEXIS 91105, at *16–17 (E.D.N.Y. July 14, 2015) (“Where the deposition is reopened because of newly discovered information, the questioning of the witness is limited to those questions relating to the newly produced information.”); *Collins v. Int’l Dairy Queen*, 189 F.R.D. 496, 498 (M.D. Ga. 1999) (limiting second depositions to four hours each and limiting inquiry to subjects not previously inquired about as well as alleged facts and developments since the initial depositions); *Judicial Watch, Inc. v. Dep’t of Commerce*, 34 F. Supp. 2d 47, 54–55 (D.D.C. 1998) (limiting second depositions to information concerning documents’ unlawful destruction or removal); *Dixon v. Certainteed Corp.*, 164 F.R.D. 685, 692 (D. Kan. 1996) (limiting second deposition to inquiry about certain statements made by a witness about which the plaintiff was unaware at first deposition).

³⁷⁹ TEX. R. CIV. P. 192.7(c).

especially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert”).³⁸⁰ “Information concerning *purely* consulting experts, of course, is not discoverable.”³⁸¹ Conversely, with respect to testifying experts and consulting experts whose mental impressions or opinions have been reviewed by a testifying expert, the following information is discoverable under Texas Rule 192.3(e):

- (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;

³⁸⁰ *Id.* 192.7(d).

³⁸¹ *Id.* 195 cmt.1 (emphasis added); *accord id.* 192.3(e) (“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.”); *In re City of Georgetown*, 53 S.W.3d 328, 334 (Tex. 2001) (“The rules of civil procedure delineate a category for consulting experts whose mental impressions and opinions have not been reviewed by a testifying expert. The rules expressly provide that a party is not required to disclose the identity, mental impressions, and opinions of consulting experts.” (citation omitted)); *In re Alexander*, No. 09-12-00236-CV, 2013 Tex. App. LEXIS 6529, at *3–4, (Tex. App.—Beaumont May 30, 2013, pet. denied) (“Clayton was not designated or retained as a testifying expert for the State. ‘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.’ The trial court did not abuse its discretion in granting the State’s motion to quash.” (quoting TEX. R. CIV. P. 192.3(e))); *Rodriguez-Aguero v. Tex. Med. Bd.*, 2010 Tex. App. LEXIS 3220, at *19 (Tex. App.—Austin Apr. 30, 2010, no pet.) (mem. op.) (“Under [Texas Rule 192.3(e)], as a consulting-only expert, Dr. Arnold’s identity and his report, including his mental impressions and opinions are not discoverable. It necessarily follows that if Dr. Arnold’s identity and his report, including his mental impressions and opinions are not discoverable, then they are likewise not admissible.” (citation omitted)); *see Spectrum Healthcare Res., Inc. v. McDaniel*, 306 S.W.3d 249, 253–254 (Tex. 2010) (“Under the Texas Rules of Civil Procedure, a retained testifying expert’s report is always discoverable, but a retained consulting-only expert’s report generally is not.”).

(6) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony;

(7) the expert's current resume and bibliography.³⁸²

Depositions are one of the discovery methods that can be used with respect to testifying experts or consulting experts whose mental impressions or opinions have been reviewed by a testifying expert.³⁸³ Texas Rule 195.4 governs depositions of testifying experts that are "retained by, employed by, or otherwise within [a party's] control," and only permits oral depositions, not depositions on written questions, of such experts.³⁸⁴

Neither that Rule nor any other subdivision of Texas Rule 195 governs depositions of (1) consulting experts whose mental impressions or opinions have been reviewed by a testifying expert,³⁸⁵ or (2) testifying experts who are not retained by, employed by, or otherwise within a party's control.³⁸⁶ Because "[p]arties may obtain this discovery . . . through [Texas] Rules 176 and 205[,]" the discovery rules governing nonparty discovery, such experts can be deposed either orally or on written questions.³⁸⁷

³⁸²TEX. R. CIV. P. 192.3(e); see *In re McDaniel*, No. 14-13-00127-CV, 2013 Tex. App. LEXIS 4052, at *6 (Tex. App.—Houston [14th Dist.] Mar. 28, 2013, orig. proceeding) (mem. op.) ("A party is entitled to discovery of all documents, physical models, reports, compilations of data, or other material provided to, reviewed by, or prepared by or for a retained testifying expert. A party is entitled to obtain the same information about a consulting expert whose work was reviewed by a testifying expert." (citation omitted)).

³⁸³See TEX. R. CIV. P. 195.1 & cmt. 1.

³⁸⁴*Id.* 195.4 ("In addition to disclosure under [Texas] 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 . . . 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 . . ." (emphasis added)). See Section II.C. for a discussion of when a person is subject to a party's control.

³⁸⁵TEX. R. CIV. P. 195 cmt. 1 ("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.").

³⁸⁶*Id.* 195 cmt. 2 ("This rule and [Texas] 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 . . .").

³⁸⁷*Id.*

A testifying expert's deposition can cover the matters in Texas Rule 192.3(e).³⁸⁸ A production request can be served with the deposition notice as permitted by Texas Rule 199.2(b)(2), but must be limited to documents within the categories set forth in Texas Rule 192.3(e).³⁸⁹ If the expert is retained by, employed by, or otherwise in a party's control, the production request must be served at least thirty days before the deposition.³⁹⁰ Absent agreement or contrary court order, Texas Rule 199.5(b)'s six-hour time limit applies to expert depositions.³⁹¹

Texas Rule 195.3 sets out the scheduling sequence for testifying experts who are retained by, employed by, or otherwise in a party's control.³⁹² It

³⁸⁸ See *id.* 195.4. Rule 194 states that, in an oral deposition:

[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.

Id.

³⁸⁹ *Id.* Rule 199.2(b)(5), in turn, provides, that "[a deposition] notice may include a request that the witness produce at the deposition documents or tangible things within the scope of discovery and within the witness's possession, custody, or control." Finally, Rule 192.3(e) sets forth the information discoverable from experts.

³⁹⁰ *Id.* 199.2(b)(5) ("A [deposition] notice may include a request that the witness produce at the deposition documents or tangible things within the scope of discovery and within the witness's possession, custody, or control. . . . When the witness is a party or subject to the control of a party, document requests under this subdivision are governed by [Texas] Rules 193 and 196."). Rule 196.2(a), in turn, gives "[t]he responding party . . . 30 days after service of the request" to respond to it.

³⁹¹ *Id.* 199.5(c) ("No side may examine or cross-examine an individual witness for more than six hours."). See Section II.G.I for a discussion of deposition time limits.

³⁹² *Id.* 195.3. Rule 195.3 provides, in full:

(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

distinguishes between depositions of experts of a party seeking affirmative relief and those of other parties' experts.³⁹³ For a party seeking affirmative relief (e.g., a plaintiff, a counter-plaintiff, a cross-plaintiff, or a third-party plaintiff), Texas Rule 195.3 has different schedules depending on whether an expert report has been produced.³⁹⁴

The Rule generally requires that the expert of a party seeking affirmative relief, who has not produced an expert report, be produced for deposition "reasonably promptly after designation."³⁹⁵ "Designation" occurs when the information required by the expert disclosure rule, Texas Rule 194.2(f), is provided.³⁹⁶ If, however, the party provides an expert report,

experts, that deadline must be extended for other experts testifying on the same subject.

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

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

³⁹³ *Id.*

³⁹⁴ *Id.* A party can be both a "party seeking affirmative relief" and another party (e.g., a plaintiff and counter-defendant, a defendant and counter-plaintiff, a defendant and third-party plaintiff, or a defendant and cross-plaintiff).

³⁹⁵ *Id.*; *Duerr v. Brown*, 262 S.W.3d 63, 75 (Tex. App.—Houston [14th Dist.] 2008, no pet.) ("Because Lyon provided no report, Duerr was obligated to make Lyon available for deposition 'reasonably promptly' after designating him." (quoting TEX. R. CIV. P. 195.3); *Facundo v. Solis*, No. 03-05-00059-CV, 2006 Tex. App. LEXIS 318, at *6 (Tex. App.—Austin Jan. 12, 2006, no pet.) (mem. op.) ("[Texas] Rule 195.3(a)(2), titled 'Scheduling Depositions,' states that if a party seeking affirmative relief has retained and designated an expert who has not yet furnished a report, the expert must be made available for deposition reasonably promptly after he is designated."); *Vaughn v. Ford Motor Co.*, 91 S.W.3d 387, 389 (Tex. App.—Eastland 2002, pet. denied) ("[Texas] Rule 195.3 mandates that, where no expert report is furnished at the time of designation, a party seeking affirmative relief 'must make the expert available for deposition reasonably promptly after the expert is designated.' The comment to Rule 195 provides that 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.'" (quoting TEX. R. CIV. P. 199.3(a)(1) & cmt. 3)).

³⁹⁶ TEX. R. CIV. P. 195.2 ("Unless otherwise ordered by the court, a party must designate experts—that is, furnish information requested under Rule 194.2(f) . . .").

which must include the testifying expert's "factual observations, tests, supporting data, calculations, photographs, and opinions,"³⁹⁷ the expert need not be produced for deposition until reasonably promptly after all other experts have been designated.³⁹⁸ Thus, a party needs to balance an expert report's cost against the value of postponing the expert's deposition until after the other parties designate their experts.³⁹⁹

Texas Rule 195.3 arguably allows a party that produces an expert report to shield its expert from deposition by not serving a Texas Rule 194.2(f) expert-disclosure request on the other parties. Because a party does not have to produce its expert for deposition until *after* the other parties' expert designations (i.e., their Texas Rule 194.2(f) disclosure), a party can argue that its experts cannot be deposed because the other parties were not required to designate or disclose their experts. Such an argument should be given short shrift by a trial court, and it should order the party to produce its expert for deposition at an appropriate time. In fact, Comment 3 to Texas Rule 195 recognizes that Texas Rule 195.3's deposition-scheduling procedure can be modified for good cause under Texas Rule 191.1, and such gamesmanship establishes good cause for a modification.⁴⁰⁰

If the expert's deposition, "due to the actions of the tendering party" cannot "reasonably be concluded more than 15 days before the deadline for designating other experts, that deadline must be extended[, under Texas Rule 195.3(a)(1),] for other experts testifying on the same subject."⁴⁰¹

³⁹⁷ *Id.* 195.3(a)(1).

³⁹⁸ *Id.* (a)(2); *King v. Cirillo*, 233 S.W.3d 437, 441 (Tex. App.—Dallas 2007, pet. denied) ("Under [Texas R]ule 195, the parties have the option of providing at the time of the designation of the expert under [Texas R]ule 194 'a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions.' If no report is produced at the time of designation, the party must make the expert available for deposition 'reasonably promptly after the expert is designated.' If the report is produced at the time of designation, then the expert does not have to be made available for deposition 'until reasonably promptly after all other experts have been designated.'" (quoting TEX. R. CIV. P. 195.3(a)(1), (2))).

³⁹⁹ TEX. R. CIV. P. 195 cmt. 3 ("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.").

⁴⁰⁰ *Id.* ("[Texas] Rule 191.1 permits a trial court, for good cause, to modify the order or deadlines for designating and deposing experts . . .").

⁴⁰¹ *Id.* 195.3(a)(1); *see Vaughn v. Ford Motor Co.*, 91 S.W.3d 387, 391–92 (Tex. App.—Eastland 2002, pet. denied) (noting this remedy in holding that the trial court abused its discretion in striking experts under Texas Rule 215 because the plaintiff failed to make them available for deposition reasonably promptly after their designation).

Although not expressly required by the Rule, a party needing such an extension of time, as a matter of prudence, should move for one before the deadline that would otherwise have applied to its designations.

Under Texas Rule 195.3(b), a party *not* seeking affirmative relief need not make its experts available for deposition until “reasonably promptly” after (1) designating its experts, and (2) “the experts testifying on the same subject for the party seeking affirmative relief have been deposed.”⁴⁰² Literally applied, this limitation appears to allow a party to avoid producing its expert for deposition by failing to depose the experts of the party seeking affirmative relief.⁴⁰³ Any such argument for such a construction should be rejected as gamesmanship, and, under Texas Rule 191.1, the trial court should modify the limitation and order the expert’s deposition at an appropriate time.⁴⁰⁴

Generally, the party retaining the expert must pay “all reasonable fees charged by the expert for time spent in preparing for, giving, reviewing, and correcting the deposition[.]”⁴⁰⁵ For good cause, however, a trial court can modify this allocation of fees.⁴⁰⁶

1. Discovery of an Expert’s Bias

Although discovery of an expert’s bias is expressly permitted by Texas Rule 192.3(e)(5), the Texas Supreme Court in *In re Ford Motor Company* recently made clear that expansive discovery regarding an expert’s bias is improper because “allowing overly expansive discovery about testifying experts that can ‘permit witnesses to be subjected to harassment . . . might well discourage reputable experts’ from participating in the litigation process.”⁴⁰⁷ Accordingly, the court implied that production requests and other discovery (e.g., the expert’s personal financial information, the deposition of the expert’s employer or other third parties) purportedly related to the discovery of bias are overbroad and impermissible when evidence of bias is available from the expert’s deposition testimony about

⁴⁰²TEX. R. CIV. P. 195.3(b).

⁴⁰³*See id.*

⁴⁰⁴*Id.* 191.1.

⁴⁰⁵*Id.* 195.7.

⁴⁰⁶*Id.* 195 cmt. 3 (“[Texas] Rule 191.1 permits a trial court, for good cause, to modify . . . the allocation of fees and expenses.”).

⁴⁰⁷*In re Ford Motor Co.*, 427 S.W.3d 396, 397 (Tex. 2014) (per curiam) (quoting *Ex parte Shepperd*, 513 S.W.2d 813, 816 (Tex. 1974) (orig. proceeding)).

the expert's fees or the other cases on which expert has testified or been engaged.⁴⁰⁸ However, “[w]here there is other extrinsic evidence of bias discovered after the expert’s deposition that puts the expert’s credibility in doubt, discovery beyond the expert’s deposition might be permissible.”⁴⁰⁹

2. Supplementing or Amending Expert-Deposition Testimony

Unlike the deposition testimony generally, the deposition testimony of “an expert witness retained by, employed by, or otherwise under the control

⁴⁰⁸ In *Ford Motor*, the Texas Supreme Court held that the employers of defendants’ two experts did not have to appear for depositions to provide “detailed financial and business information for all cases the companies have handled for Ford or any other automobile manufacturer from 2000 to 2011,” *id.* at 397, because the experts’ bias was established by their deposition testimony:

Indeed, the most probative information regarding the bias of a testifying expert comes from the expert herself. In this case, for example, Harley testified that only 5% of the cases she handles are for plaintiffs and that she has never testified against an automobile manufacturer. Similarly, Mauldin testified that historically about 50% of Carr Engineering’s work is done for Ford. Moreover, Mauldin admitted that in park-to-reverse cases, he has never testified that a vehicle has a design defect. Mauldin’s deposition in this case also revealed that he worked at Ford for several years before becoming a consultant at Carr Engineering.

Id. at 398; *see also In re Siroosian*, 449 S.W.3d 920, 922–24 (Tex. App.—Fort Worth 2014, orig. proceeding) (following *Ford Motor* and holding that the plaintiff’s treating, non-retained, non-testifying chiropractor did not have to answer deposition questions about either the software used by, and the collections, revenues, and billings of his employer or about his personal political contributions); *In re Cent. N. Constr., LLC*, No. 05-14-00178-CV, 2014 Tex. App. LEXIS 4010, at *3–4, *7–8 (Tex. App.—Dallas Apr. 10, 2014, orig. proceeding) (mem. op.) (following *Ford Motor* and holding that the defendant’s expert’s employer did not have “to disclose . . . the dollar amount of gross revenues received by [it] from insurance companies, their policy holders, manufacturers and their attorneys, separately for the years 2009 through 2013 and . . . for the same time period the dollar amount of gross revenues received by [it] from each insurance company, policy holder or their counsel involved in this case” because “[g]enerally, although an expert witness may be questioned regarding payment received for his work as an expert witness, pre-trial discovery sought only to establish financial interest for impeachment purposes is not allowed”); *In re Weir*, 166 S.W.3d 861, 865 (Tex. App.—Beaumont 2005, orig. proceeding) (per curiam) (cited with approval in *Ford Motor* and holding expert witness did not have to testify about personal financial information because there was other evidence of bias); *Olinger v. Curry*, 926 S.W.2d 832, 834–35 (Tex. App.—Fort Worth 1996, orig. proceeding) (cited with approval in *Ford Motor* and holding the trial court abused its discretion in ordering the production of the expert’s tax returns because the expert witness had already admitted 90% of his services were provided to defendants in litigation).

⁴⁰⁹ *In re Cent. N. Constr.*, 2014 Tex. App. LEXIS 4010, at *8.

of a party,” under Texas Rule 195.6, must be amended or supplemented, “but only with regard to the expert’s mental impressions or opinions and the basis for them.”⁴¹⁰ The Rule does not explain how to supplement the testimony. Presumably, it can be done in any manner that communicates the new information, including a letter from counsel or a statement on the record during another deposition in the action.⁴¹¹

⁴¹⁰TEX. R. CIV. P. 195.6; The court in *Pilgrim’s Pride* stated:

In some instances, the change in an expert’s opinion does not require supplementation. For example, an expert may refine calculations or perfect a report through the time of trial. An expert may also change an opinion without supplementation if the opinion is an “expansion on an already disclosed subject.” However, a party may not present a material alteration of an expert’s opinion at trial that would constitute a surprise attack.

Pilgrim’s Pride Corp. v. Smoak, 134 S.W.3d 880, 902 (Tex. App.—Texarkana 2004, pet. denied) (citation omitted) (quoting *Navistar Int’l Transp. Corp. v. Crim Truck & Tractor Co.*, 883 S.W.2d 687, 691 (Tex. App.—Texarkana 1994, writ denied)); *see also Exxon Corp. v. W. Tex. Gathering Co.*, 868 S.W.2d 299, 304 (Tex. 1993) (“Our rules do not prevent experts from refining calculations and perfecting reports through the time of trial. The testimony of an expert should not be barred because a change in some minor detail of the person’s work has not been disclosed a month before trial.”); *JLG Trucking LLC v. Garza*, 461 S.W.3d 554, 559 (Tex. App.—San Antonio 2013), *rev’d on other grounds*, 466 S.W.3d 157 (Tex. 2015) (“Although Cortez recalculated Garza’s future earning capacity based on information that she was steadily working toward completing her accounting degree, his methodology and the formula he used to make his calculations did not change.”); *Norfolk S. Ry. Co. v. Bailey*, 92 S.W.3d 577, 581 (Tex. App.—Austin 2002, no pet.) (“In some instances, the change in an expert’s opinion does not require supplementation. For example, an expert may refine calculations or perfect a report up until the time of trial. An expert also may change an opinion without supplementation if the opinion is an ‘expansion of an already disclosed subject.’ However, a party may not present a material alteration of an expert’s opinion at trial that would constitute a surprise attack. The purpose of requiring timely disclosure of a material change in an expert’s opinion is to give the other party an opportunity to prepare a rebuttal. . . . [A]lthough we find no cases directly on point about admitting a change in testimony based on the progression of asbestosis, Dr. Darcey’s revised diagnosis falls somewhere between a refinement in calculations and an expansion of an already disclosed subject, both of which are admissible without the need for supplementation. We therefore conclude that the district court acted within the bounds of its discretion when it denied Norfolk Southern’s motion to strike Dr. Darcey’s testimony about his revised diagnosis.”) (citations omitted) (quoting *Navistar Int’l Transp. Corp.*, 883 S.W.2d at 691); *Koko Motel, Inc. v. Mayo*, 91 S.W.3d 41, 51 (Tex. App.—Amarillo 2002, pet. denied) (holding that the trial court did not abuse its discretion in allowing an expert to testify by applying different data into his old methodology or formulas to voice an alternate opinion).

⁴¹¹*See* TEX. R. CIV. P. 193.5(a)(2) (noting that there is no supplementation obligation if the information “has been made known to the other parties in writing [or] on the record at a deposition”).

III. DEPOSITIONS ON WRITTEN QUESTIONS—TEXAS RULE 200

A. *In General*

Depositions on written questions are an alternative to oral depositions.⁴¹² Although similar to interrogatories because the witness responds to written questions under oath, unlike interrogatories, depositions on written questions are not “written discovery” under Texas Rule 192.7(a).⁴¹³ Accordingly, Texas Rules 193 and 197, as well as other discovery rules regarding written discovery, including those relating to supplementation and asserting privilege, do not apply to depositions on written questions.⁴¹⁴ In addition, unlike interrogatories, there is no limit on the number of questions that can be asked in a deposition on written questions.⁴¹⁵ Comment 5 to Texas Rule 190, however, provides that “depositions on written questions cannot be used to circumvent the limits on interrogatories.”⁴¹⁶

Depositions on written questions are an affordable, alternative means of discovery for parties when they need to conduct discovery from a nonparty, but do not want to incur the high cost of an oral deposition. The fundamental difference between an oral deposition under Texas Rule 199 and one on written questions under Texas Rule 200 is that, under Texas Rule 200, the questions are prepared in advance and sent to the deposition officer (i.e., the person recording the deposition, usually a court reporter), who asks the questions at the deposition.

Depositions on written questions are used less frequently than oral depositions because there are no follow-up questions and because questions are provided in advance, enabling the witness’s attorney to craft answers to them.⁴¹⁷ Accordingly, the procedure is much more cumbersome than oral examination and unsuited for pursuing complicated inquiries or for

⁴¹² *Id.* 192.1(f).

⁴¹³ Rule 192.7(a) defines “written discovery” as “requests for disclosure, requests for production and inspection of documents and tangible things, requests for entry onto property, interrogatories, and requests for admission.”

⁴¹⁴ TEX. R. CIV. P. 192.7(a).

⁴¹⁵ *See id.* 200.

⁴¹⁶ *Id.* 190.6 cmt. 5.

⁴¹⁷ *Cf.* *Mill-Run Tours, Inc. v. Khashoggi*, 124 F.R.D. 547, 549 (S.D.N.Y. 1989) (explaining that “written questions provide an opportunity for counsel to assist the witness in providing answers so carefully tailored that they are likely to generate additional discovery disputes”).

interrogating a hostile or reluctant witness.⁴¹⁸ Rather, depositions on written question are best suited for securing testimony from a witness with limited relevant information, such as information from a business-records custodian.

As with oral depositions, “any person or entity” can be deposed on written questions.⁴¹⁹

B. Notice of a Deposition on Written Questions

To take a deposition on written questions, a party must serve “[a] notice of intent to take the deposition . . . on the witness and all parties at least 20 days before the deposition is taken.”⁴²⁰ Because a deposition on written questions, like an oral deposition, must be completed within the discovery period, the party noticing the deposition must complete the deposition within that period absent agreement of the parties or leave of court.⁴²¹ Twenty days’ notice, however, may be insufficient if the witness is a party or subject to a party’s control and the deposition notice contains a production request. In such a case, the noticing party must give at least thirty days’ notice because document requests served with such a notice are governed by Texas Rule 196.2(a)’s thirty-day response period.⁴²²

In addition to serving the deposition notice on the witness and all other parties, the noticing party “must also deliver to the deposition officer a copy of the notice and of all written questions to be asked during the

⁴¹⁸ See TEX. R. CIV. P. 200.

⁴¹⁹ *Id.* 200.1(a) (“A party may take the testimony of any person or entity by deposition on written questions . . .”).

⁴²⁰ *Id.*

⁴²¹ See *id.* (“A deposition on written questions may be taken outside the discovery period only by agreement of the parties or with leave of court.”).

⁴²² See *id.* (incorporating Texas Rule 199.2(b), which, in turn, incorporates Texas Rule 196’s procedures for responding to production requests). Under TEX. R. CIV. P. 4, the day the notice is served is not counted. Accord TEX. GOV’T CODE ANN. § 311.014(a) (West 2013). Under TEX. R. CIV. P. 21a(b), if the deposition notice is served by (1) mail, service is complete when the notice is mailed, but three days are added to the time to respond to the production request, and the witness has thirty-three days to respond to it, TEX. R. CIV. P. 4, 21a(b)–(c); (2) hand-delivery or email, service is complete on delivery or transmission, and the witness has thirty days to respond to the production request, TEX. R. CIV. P. 4, 21a(b); or (3) fax, service is complete on receipt, however, service completed after 5:00 p.m. local time of the witness is deemed served on the following day, and the witness will have either thirty or thirty-one days to respond to the production request depending when the fax was received, TEX. R. CIV. P. 4, 21a(b).

deposition.”⁴²³ The deposition officer can be a district court clerk, a county court judge or clerk, a certified shorthand reporter, or a notary public.⁴²⁴ The deposition’s officer’s duties in a deposition on written questions are virtually the same as those in an oral deposition—the officer must swear in the witness, “take the deposition . . . ; record the testimony of the witness under oath in response to the questions; and prepare, certify, and deliver the deposition transcript in accordance with [Texas] Rule 203. The deposition officer has authority when necessary to summon and swear an interpreter to facilitate the taking of the deposition.”⁴²⁵

Texas Rule 200.1(b) incorporates by reference three of Texas Rule 199’s provisions regarding the deposition notice’s content: (1) Texas Rule 199.1(b), which authorizes oral depositions by telephone or remote electronic means; (2) Texas Rule 199.2(b), which specifies the oral deposition notice’s content; and (3) Texas Rule 199.5(a)(3), which governs who may attend an oral deposition.⁴²⁶ Texas Rule 200.1(b) allows for the deposition of an organization and production requests, providing: “If the witness is an organization, the organization must comply with the requirements of [Texas Rule 199.2(b)(1)]. The notice also may include a request for production of documents as permitted by [Texas] Rule 199.2(b)(5), the provisions of which will govern the request, service, and response.”⁴²⁷ Accordingly, the notice for a deposition on written questions must: (1) state the name of the witness, which can be either an individual or an organization;⁴²⁸ (2) state a reasonable time and place for the deposition that, absent agreement by the parties or court order, must be within the discovery period and (a) at least twenty days after the notice’s service or (b) at least thirty days after the notice’s service, if the notice is for a deposition of a witness who is not party or subject to a party’s control and includes a

⁴²³ TEX. R. CIV. P. 200.1(a).

⁴²⁴ TEX. GOV’T CODE ANN. §154.101(f) (West Supp. 2015) (“Except as provided by Section 154.112 and by Section 20.001, Civil Practice and Remedies Code, all depositions in this state must be taken by a certified shorthand reporter.”); TEX. CIV. PRAC. & REM. CODE ANN. (West 2015) (“A deposition on written questions of a witness who is alleged to reside or to be in this state may be taken by: (1) a clerk of a district court; (2) a judge or clerk of a county court; or (3) a notary public of this state.”).

⁴²⁵ TEX. R. CIV. P. 200.4.

⁴²⁶ *Id.* 200.1(b).

⁴²⁷ *Id.*

⁴²⁸ *Id.* (incorporating by reference TEX. R. CIV. P. 199.2(b)(1)).

production request;⁴²⁹ (3) state whether the deposition is to be taken by telephone or other remote electronic means and identify the means;⁴³⁰ (4) identify any additional attendees (i.e., persons who will attend the deposition other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the oral deposition);⁴³¹ (5) identify any documents to be produced at the deposition;⁴³² (6) describe with reasonable particularity the matters on which examination is requested, if the witness is an organization;⁴³³ and (7) contain all of the written questions to be asked by the noticing party during the deposition.⁴³⁴

The deposition notice must be signed either by the party's attorney or a pro se party⁴³⁵ and "must show the attorney's State Bar of Texas identification number, address, telephone number, and fax number, if any,"⁴³⁶ or the pro se party's "address, telephone number, and fax number, if any."⁴³⁷ If the notice is not signed, it must be stricken unless signed promptly after the omission is called to the attention of the party serving the notice.⁴³⁸ The deposition notice also must be served on the witness and the other parties and must contain a certificate of service stating it was properly served on them.⁴³⁹ If it is not served on all parties, the deposition cannot be used at trial or at a hearing if the party on which it was not served did not have a reasonable time to redepose the witness.⁴⁴⁰ The notice can be served

⁴²⁹ *Id.* (incorporating by reference TEX. R. CIV. P. 199.2(b)(2)). See *supra* note 423 and accompanying text.

⁴³⁰ *Id.* (incorporating by reference TEX. R. CIV. P. 199.2(b)(3), 199.1(c) (this notice also can be given separately in another written notice or can be given by a non-noticing party.)).

⁴³¹ *Id.* (incorporating by reference TEX. R. CIV. P. 199.2(b)(4), 195.5(a)(3) (this notice also can be given separately in another written notice or can be given by a non-noticing party.)).

⁴³² *Id.* (incorporating by reference TEX. R. CIV. P. 199.2(b)(5)).

⁴³³ See *id.* (incorporating by reference TEX. R. CIV. P. 199.2(b)(1)).

⁴³⁴ *Id.* 200.3(a) ("The direct questions to be propounded to the witness must be attached to the notice.").

⁴³⁵ *Id.* 191.3(a).

⁴³⁶ *Id.* 191.3(a)(1).

⁴³⁷ *Id.* 191.3(a)(2).

⁴³⁸ *Id.* 191.3(d) ("If a request, notice, response, or objection is not signed, it must be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, notice, response, or objection. A party is not required to take any action with respect to a request or notice that is not signed.").

⁴³⁹ *Id.* 21(a), (d).

⁴⁴⁰ In *Onyung v. Onyung*, the court held that the trial court did not abuse its discretion in allowing the plaintiff to use a deposition even though one of the defendants did not receive notice

on the witness and other parties “in person, mail, by commercial delivery service, by fax, by email, or by such other manner as the court in its discretion may direct”⁴⁴¹ unless the notice is filed electronically (i.e., a notice for a nonparty’s deposition), in which case it “must be served electronically through the electronic filing manager if the email address of the party or attorney to be served is on file with the electronic filing manager.”⁴⁴² The deposition notice should be filed with the trial court *only* if it is served on a nonparty.⁴⁴³ A notice that is served only on parties should not be filed,⁴⁴⁴ but the party must retain a copy of it during the action’s pendency and any related appellate proceedings begun within six months after judgment is signed, unless otherwise provided by the trial court.⁴⁴⁵

The proper location for a deposition on written questions is governed by Texas Rule 199.2(b)(2), which governs an oral deposition’s proper location.⁴⁴⁶

C. *Compelling the Witness’s Attendance*

Texas Rule 200.2 relates to compelling the witness’s attendance at the deposition on written questions and is virtually identical to Texas Rule 199.3, which relates to compelling a witness’s attendance at an oral

of it because the defendant had a reasonable time to redepose the witness. No. 01-10-00519-CV, 2013 Tex. App. LEXIS 9190, at *56–58 (Tex. App.—Houston [1st Dist.] July 25, 2013, pet. denied). In doing so, it analogized to Texas Rule 203.6(b), which provides that “[a] deposition is admissible against a party joined after the deposition was taken if . . . that party has had a reasonable opportunity to redepose the witness and has failed to do so.” *Id.* at *56–58; *see* *Shenandoah Assocs. v. J & K Props., Inc.*, 741 S.W.2d 470, 492 (Tex. App.—Dallas 1987, writ denied) (“When other parties are not given notice of the deposition, an “ex parte” deposition is not admissible.”); *cf. In re Baum*, 606 F.2d 592, 593 n.1 (5th Cir. 1979) (“Depositions taken without proper notice may be found to be inadmissible.”).

⁴⁴¹ TEX. R. CIV. P. 21a(a)(2).

⁴⁴² *Id.* 21a(a)(1).

⁴⁴³ *Id.* 191.4(b)(1) (“The following discovery materials must be filed: . . . deposition notices[] and subpoenas required to be served on nonparties[.]”).

⁴⁴⁴ *Id.* 191.4(a)(1) (“The following discovery materials must not be filed: . . . deposition notices[] and subpoenas required to be served on parties[.]”).

⁴⁴⁵ *Id.* 191.4(d) (“Any person required to serve discovery materials not required to be filed must retain the original or exact copy of the materials during the pendency of the case and any related appellate proceeding begun within six months after judgment is signed, unless otherwise provided by the trial court.”).

⁴⁴⁶ *Id.* 200.1(b) (incorporating by reference TEX. R. CIV. P. 199.2(b)). *See also* Section II.B.2.a (discussing a deposition’s time and place).

deposition. “If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party . . . service of the deposition notice upon the party’s attorney has the same effect as a subpoena served on the witness.”⁴⁴⁷ If, however, the witness is neither a party nor subject to a party’s control, the witness must be served with a notice under Texas Rule 205.2 and a subpoena under Texas Rule 176.⁴⁴⁸

If a production request is contained in the deposition notice and the witness is a party or subject to a party’s control, the notice and request are sufficient to compel the production,⁴⁴⁹ the response to which will be governed by Texas Rule 196.2(a).⁴⁵⁰ Other witnesses must be served with the notice and subpoena under Texas Rules 205.2 and 176.2(a), respectively.

D. Questions and Objections

As noted above, the direct questions to be asked of the witness must be attached to, and served with, the deposition notice.⁴⁵¹ The procedure by which the parties can ask other questions and interpose objections to other parties’ questions is set forth in Texas Rule 200.3(b), as follows:

- Within ten days after the notice and the direct questions are served, “any party may object to the direct questions and serve cross-questions on all other parties.”⁴⁵²
- Within five days after the cross-questions are served, “any party may object to the cross-questions and serve redirect questions on all other parties.”⁴⁵³

⁴⁴⁷ *Id.* 200.2.

⁴⁴⁸ *Id.* (“A party may compel the witness to attend the deposition on written questions by serving the witness with a subpoena under [Texas] Rule 176.”); *see* TEX. R. CIV. P. 205.1(b) (“A party may compel discovery from a nonparty . . . by serving a subpoena compelling . . . a deposition on written questions . . .”), *and* 205.2 (“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. . .”).

⁴⁴⁹ *Id.* 200.1(b) (incorporating by reference TEX. R. CIV. P. 199.2(b)(5)).

⁴⁵⁰ *See id.* 200.1(a) (incorporating by reference TEX. R. CIV. P. 199.2(b), which, in turn, incorporates Texas Rule 196’s procedures for responding to production requests).

⁴⁵¹ *Id.* 200.3(a) (“The direct questions to be propounded to the witness must be attached to the notice.”); *see id.* 200.1(a) (“The party noticing the deposition must also deliver to the deposition officer a copy of the notice and of all written questions to be asked during the deposition.”).

⁴⁵² *Id.* 200.3(b).

⁴⁵³ *Id.*

- Within three days after the redirect questions are served, “any party may object to the redirect questions and serve recross questions on all other parties.”⁴⁵⁴
- Objections to recross questions must be served within five days after the earlier of when recross questions are served or the time of the deposition on written questions.⁴⁵⁵

The objections must be signed and served by the attorney or a pro se party in the same manner as the deposition notice.⁴⁵⁶ Although “[t]he party noticing the deposition must also deliver to the deposition officer a copy of the notice and of all written questions[,]”⁴⁵⁷ the party asking the questions or objecting to them also should send a copy of its questions or objections to the deposition officer as a matter of prudence.

Comment 1 to Texas Rule 200 makes clear that “[t]he procedures for asserting objections during oral depositions under [Texas] Rule 199.5(e) do not apply to depositions on written questions.”⁴⁵⁸ Texas Rule 200.3(c), however, provides that “[o]bjections to the form of a [written] question are waived unless asserted in accordance with this subdivision.”⁴⁵⁹ Thus, it appears that whereas a party can, but need not, interpose substantive objections to a written question,⁴⁶⁰ it should specify the applicable form objection (e.g., leading, compound, calls for a narrative, confusing, ambiguous, vague, unintelligible, argumentative, asked and answered) instead of merely stating “Objection, leading” or “Objection, form” as specified by Texas Rule 199.5(e).⁴⁶¹ Finally, unlike oral depositions for which there are limits on the total number of hours of the depositions in the action and on the number of hours for a witness’s examination, there are no

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.* 21a(a).

⁴⁵⁷ *Id.* 200.1(a).

⁴⁵⁸ *Id.* 200 cmt.1.

⁴⁵⁹ *Id.* 200.3(c).

⁴⁶⁰ *St. Luke’s Episcopal Hosp. v. Garcia*, 928 S.W.2d 307, 310 (Tex. App.—Houston [14th Dist.] 1996, no writ) (“Because relator has no objection to the form of TMC’s written questions, relator claims the provision in [former Texas] Rule 208 regarding timeliness of objections is inapplicable. We agree. In its objections to the deposition notice and subpoena duces tecum, relator’s primary objections are substantive objections relating to privilege. We hold that the ten-day limitation in [former Texas] Rule 208 is inapplicable to substantive objections. Therefore, the trial court abused its discretion to the extent the trial court’s July 26, 1996 order finds relator’s objections untimely pursuant to [former Texas] Rule 208.”).

⁴⁶¹ Form objections are discussed *supra* in note 354 and accompanying text.

such limitations on depositions on written questions.⁴⁶² A party who believes, however, that another party is abusing the discovery process by either asking too many written questions or taking too many depositions on written questions can move for a protective order under Texas Rule 192.6.

E. Supplementing Deposition Testimony Upon Written Questions

Unlike written discovery and like oral-deposition testimony, there is no obligation to supplement deposition-on-written-question testimony even if it is wrong or incomplete. This is made clear by Comment 5 to Texas Rule 193, which provides: Texas Rule 193.5, the Rule regarding supplementation, “imposes no duty to supplement or amend deposition testimony. The only duty to supplement deposition testimony is provided in [Texas] Rule 195.6[, relating to testifying experts].”⁴⁶³

IV. DEPOSITIONS IN FOREIGN JURISDICTIONS FOR USE IN TEXAS PROCEEDINGS AND DEPOSITIONS IN TEXAS FOR USE IN FOREIGN PROCEEDINGS—TEXAS RULE 201

A. In General

Texas Rule 201 governs the procedures for obtaining (1) an oral or written deposition in another state or foreign country for use in a Texas court proceeding,⁴⁶⁴ and (2) an oral or written deposition in Texas for use in a court proceeding in another state or foreign country.⁴⁶⁵

⁴⁶² See generally TEX. R. CIV. P. 200.

⁴⁶³ *Id.* 193 cmt. 5; accord *Titus Cty. Hosp. Dist. v. Lucas*, 988 S.W.2d 740, 740 (Tex. 1998) (per curiam) (holding that, under former Texas Rule 166b(6), “[a] general duty to supplement deposition testimony (as opposed to a narrow duty for certain expert testimony, for example) would impose too great a burden on litigants. We therefore disapprove the court of appeals’ holding that deposition testimony must be supplemented.” (citation omitted)); cf. *Pilates, Inc. v. Georgetown Bodyworks*, 201 F.R.D. 261, 262 (D.D.C. 2000) (recognizing that “[t]he Federal Rules of Civil Procedure impose no affirmative duty for deponents to supplement deposition testimony”).

⁴⁶⁴ TEX. R. CIV. P. 201.1.

⁴⁶⁵ *Id.* 201.2.

B. Depositions in Another State or Foreign Country for Use in a Texas Court Proceeding

Texas Rule 201.1, which governs the procedure for obtaining the deposition of a witness located outside of Texas for use in a Texas court proceeding, is needed because a Texas court cannot issue a subpoena compelling a witness located outside Texas to appear for a deposition in or outside Texas.⁴⁶⁶ Under the Rule, a deposition may be taken in another state or foreign country by one of four procedures: “(1) notice; (2) letter rogatory, letter of request, or other such device; (3) agreement of the parties; or (4) court order.”⁴⁶⁷ As pointed out in Comment 1 to Texas Rule 201, although “Rule 201.1 sets forth procedures for obtaining deposition testimony of a witness in another state or foreign jurisdiction for use in Texas court proceedings[, i]t does not . . . address whether any of the procedures listed are, in fact, permitted or recognized by the law of the state or foreign jurisdiction where the witness is located. A party must first determine what procedures are permitted by the jurisdiction where the witness is located before using this rule.”

Moreover, the discovery and evidentiary rules of the state or foreign country, and not the Texas discovery and evidentiary rules, generally will apply to the deposition even if they are inconsistent with Texas’s discovery⁴⁶⁸ or evidentiary rules.⁴⁶⁹

⁴⁶⁶*In re Bannum, Inc.*, No. 03-09-00512-CV, 2009 Tex. App. LEXIS 10088, at *2 (Tex. App.—Austin Oct. 30, 2009, pet. dism’d) (noting that “the rules covering oral depositions do not allow a court to order an out-of-state nonparty to appear”).

⁴⁶⁷TEX. R. CIV. P. 201.1(a).

⁴⁶⁸*See Owens-Corning Fiberglas Corp. v. Martin*, 942 S.W.2d 712, 721 (Tex. App.—Dallas 1997, no writ) (“Matters of remedy and procedure, however, are governed by the law of the forum where the suit is maintained.”); Restatement (Second) of Conflict Of Laws § 122 (1971) (“A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.”).

⁴⁶⁹*Cf. Samuelson v. Susen*, 576 F.2d 546, 549 (3d Cir. 1978) (noting that Federal Rule of Evidence 501 requires a district court exercising diversity jurisdiction “to apply the law of privilege which would be applied by the courts of the state in which it sits”); *Palmer v. Fisher*, 228 F.2d 603, 608–09 (7th Cir. 1955) (“Questions of evidence, including privilege, are generally decided by the law of the forum. Since the proceeding to suppress a deposition is an independent action, the law of the forum is the law of Illinois.”) (citation omitted); *Carter Prods., Inc. v. Eversharp, Inc.*, 360 F.2d 868 (7th Cir. 1966); *Wright v. Jeep Corp.*, 547 F. Supp. 871, 875 (E.D. Mich. 1982) (“Because the defendant seeks to depose the respondent in Michigan, the appropriate law regarding privilege is the law of Michigan.”).

C. Notice

If permitted by the state or country where the witness is located, a party can take the deposition by notice in the same manner as provided by Texas Rules 199 or 200, “except that the deposition officer may be a person authorized to administer oaths in the place where the deposition is taken.”⁴⁷⁰ Taking a deposition in another state or foreign country by notice is problematic for two reasons. First, the service of a notice does not give the noticing party the ability to compel the witness’s attendance.⁴⁷¹ Second, in some civil-law countries, the taking of testimony by private attorneys without the involvement of the local judiciary is forbidden.⁴⁷²

D. Letter Rogatory

If required or permitted by the law of the state or country where the witness is located, a party can file a motion for a letter rogatory in the Texas court where the action is pending.⁴⁷³ A letter rogatory is “[a] formal communication in writing, sent by a court in which an action is pending to a court or judge of a foreign country, requesting that the testimony of a witness resident within the jurisdiction of the latter court may be there formally taken under its direction and transmitted to the first court for use in the pending action.”⁴⁷⁴

The court “must issue a letter rogatory on terms that are just and appropriate, regardless of whether any other manner of obtaining the

⁴⁷⁰ TEX. R. CIV. P. 201.1(b).

⁴⁷¹ *Id.* 201.1 cmt. 1.

⁴⁷² Doak Bishop, *International Litigation in Texas: Obtaining Evidence in Foreign Countries*, 19 HOUS. L. REV. 361, 364–65 (1982).

⁴⁷³ TEX. R. CIV. P. 201.1(c).

⁴⁷⁴ *Ex parte Fierro*, 934 S.W.2d 370, 371 n.1 (Tex. Crim. App. 1996) (quoting Black’s Law Dictionary 471 (5th ed. 1983)); *accord* *Union Carbide Corp. v. Martin*, 349 S.W.3d 137, 140 n.2 (Tex. App.—Dallas 2011, no pet.) (“‘Letters rogatory’ indicates a formal communication from a court in which an action is pending to a foreign court requesting that the testimony of a witness residing in such foreign jurisdiction may be taken under the direction of the court addressed and transmitted to the court making the request.” (quoting 26B C.J.S. *Depositions* § 34 (2001)); *cf.* *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 n.1 (2004) (“[A] *letter rogatory* is the request by a domestic court to a foreign court to take evidence from a certain witness.” (quoting Harry Leroy Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 519 (1953))).

deposition is impractical or inconvenient.”⁴⁷⁵ In addition, the letter rogatory must:

- (1) be addressed to the appropriate authority in the jurisdiction in which the deposition is to be taken;
- (2) request and authorize that authority to summon the witness before the authority at a time and place stated in the letter for examination on oral or written questions; and
- (3) request and authorize that authority to cause the witness’s testimony to be reduced to writing and returned, together with any items marked as exhibits, to the party requesting the letter rogatory.⁴⁷⁶

E. Letter of Request or Other Such Device

“On motion by a party, the court in which an action is pending, or the clerk of that court, must issue a letter of request or other such device in accordance with an applicable treaty or international convention on terms that are just and appropriate.”⁴⁷⁷ The Hague Convention is such a treaty and “sets forth a number of provisions that must be included in a letter of request, including specific information about the lawsuit and the information sought.”⁴⁷⁸

The court or its clerk “must” issue the letter or other device “regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter or other device must: (1) be in the form prescribed by the treaty or convention under which it is issued, as presented by the movant to the court or clerk; and (2) must state the time, place, and manner of the examination of the witness.”⁴⁷⁹

⁴⁷⁵ TEX. R. CIV. P. 201.1(c).

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.* 201.1(d).

⁴⁷⁸ *In re Urethane Antitrust Litig.*, No. 04-MD-1616-JWL, 2010 U.S. Dist. LEXIS 129536, at *30 n.9 (D. Kan. Dec. 1, 2010).

⁴⁷⁹ TEX. R. CIV. P. 201.1(d).

F. Objections to the Form of the Letter Rogatory, the Letter of Request, or Other Such Device

Under Texas Rule 201.1(e), a court, before issuing a letter rogatory, letter of request, or other such device, “must set a time for objecting to the form of the device. A party must make any objection to the form of the device in writing and serve it on all other parties by the time set by the court, or the objection is waived.”⁴⁸⁰

G. The Deposition Officer

Section 20.001 of the Texas Civil Practice and Remedies Code provides a nonexclusive list of persons who are qualified to take depositions on oral examination or written questions in another state or foreign country. If the witness “is alleged to reside or to be outside [Texas], but inside the United States,” the deposition “may be taken in another state by: (1) a clerk of a court of record having a seal; (2) a commissioner of deeds appointed under the laws of this state; or (3) any notary public.”⁴⁸¹

If, however, the witness “is alleged to reside or to be outside the United States[,]” the deposition can be taken by: “(1) a minister, commissioner, or charge d’affaires of the United States who is a resident of and is accredited in the country where the deposition is taken; (2) a consul general, consul, vice-consul, commercial agent, vice-commercial agent, deputy consul, or consular agent of the United States who is a resident of the country where the deposition is taken; or (3) any notary public.”⁴⁸²

If the witness “is alleged to be a member of the United States Armed Forces or of a United States Armed Forces Auxiliary or . . . is alleged to be a civilian employed by or accompanying the armed forces or an auxiliary outside the United States[,]” the deposition “may be taken by a commissioned officer in the United States Armed Forces or United States Armed Forces Auxiliary or by a commissioned officer in the United States Armed Forces Reserve or an auxiliary of it.”⁴⁸³

⁴⁸⁰ *Id.* 201.1(e).

⁴⁸¹ TEX. CIV. PRAC. & REM. CODE ANN. § 20.001(b) (West 2015).

⁴⁸² *Id.* § 20.001(c); see *Kugle v. Daimler Chrysler Corp.*, 88 S.W.3d 355, 362 (Tex. App.—San Antonio 2002, pet. denied) (holding that a trial court properly admitted deposition testimony of Mexican police officers and an ambulance driver in a personal injury action in which witnesses were sworn in only by a Texas notary public).

⁴⁸³ TEX. CIV. PRAC. & REM. CODE ANN. § 20.001(d).

H. Method of Taking the Deposition

Under Texas Rule 201.1(g), “[a] deposition in another jurisdiction may be taken by telephone, videoconference, teleconference, or other electronic means under the provisions of [Texas] Rule 199.”⁴⁸⁴

I. The Testimony’s Admissibility

The “[e]vidence obtained in response to a letter rogatory, letter of request, or other such device is not inadmissible merely because it is not a verbatim transcript, or the testimony was not taken under oath, or for any similar departure from the requirements for depositions taken within [Texas] under [its discovery] rules.”⁴⁸⁵

J. Depositions in Texas for Use in Foreign Proceedings

Section 20.002 of the Texas Civil Practice & Remedies Code governs the manner in which parties to foreign proceedings can obtain a deposition on oral examination or written questions of a witness in Texas. Texas Rule 201.2 simply restates the statute⁴⁸⁶ and provides:

If a court of record of any other state or foreign jurisdiction issues a mandate, writ, or commission that requires a witness’s oral or written deposition testimony in this State, the witness may be compelled to appear and testify in the same manner and by the same process used for taking testimony in a proceeding pending in this State.⁴⁸⁷

Because the statute uses the word “may,” a Texas court need not compel the witness to appear.⁴⁸⁸

⁴⁸⁴TEX. R. CIV. P. 201.1(g).

⁴⁸⁵*Id.* 201.1(f).

⁴⁸⁶*Id.* 201 cmt. 3 (“[Texas] Rule 201.2 is based on Section 20.002 of the Civil Practice and Remedies Code.”).

⁴⁸⁷*Accord* TEX. CIV. PRAC. & REM. CODE ANN. § 20.002 (“If a court of record in any other state or foreign jurisdiction issues a mandate, writ, or commission that requires a witness’s testimony in this state, either to written questions or by oral deposition, the witness may be compelled to appear and testify in the same manner and by the same process used for taking testimony in a proceeding pending in this state.”).

⁴⁸⁸*In re Seavall*, No. 03-13-00205-CV, 2013 Tex. App. LEXIS 7020, at *3–4 (Tex. App.—Austin June 11, 2013, orig. proceeding) (mem. op.) (holding that the trial court abused its discretion in compelling a deposition in connection with an attempt to enforce a long-dormant

V. DEPOSITIONS BEFORE SUIT OR TO INVESTIGATE CLAIMS

A. *In General*

Texas Rule 202 allows “a person” to “petition the court for an order authorizing the taking of a deposition” on oral examination or on written questions to (1) perpetuate testimony for use in an anticipated suit, or (2) investigate a potential claim or suit.⁴⁸⁹ The testimony to be perpetuated may be that of the petitioner or “any other person.”⁴⁹⁰ With respect to anticipated suits or claims, a presuit deposition is available whether the petitioner would be a plaintiff or a defendant.⁴⁹¹

The “persons” who can file the petition or be deposed include any natural person, any entity irrespective of its nature (e.g., corporation, partnership, limited partnership, limited liability company, or association), and any governmental entity, subdivision, body, or agency.⁴⁹² A petitioner who lacks standing to bring the claim or suit being investigated, however,

judgment because Texas “[R]ule 201.2 ‘authorizes Texas courts to enforce foreign discovery orders,’ but note that it does not *mandate* that Texas courts do so” (quoting TEX. R. CIV. P. 201.2)).

⁴⁸⁹TEX. R. CIV. P. 202.1; *see* City of Dallas v. City of Corsicana, Nos. 10-14-00090-CV, 10-14-00171-CV, 2015 Tex. App. LEXIS 8753, at *12 (Tex. App.—Waco Aug. 20, 2015, pet. filed) (mem. op.) (“[Texas] Rule 202 allows depositions under two circumstances: (1) to perpetuate or obtain the person’s own testimony or that of any other person for use in an anticipated suit; and (2) to investigate a potential claim or suit.”); *In re East*, 476 S.W.3d 61, 65 (Tex. App.—Corpus Christi 2014, no pet.) (“Texas Rule of Civil Procedure 202 permits a person to petition the court for authorization to take a deposition before suit is filed in two circumstances: (1) to perpetuate or obtain the person’s own testimony or that of any other person for use in an anticipated suit; or (2) to investigate a potential claim or suit.”).

⁴⁹⁰TEX. R. CIV. P. 202.1(a).

⁴⁹¹*Id.* 202.2(d) (“The petition must . . . state . . . the petitioner seeks to investigate a potential claim *by or against* petitioner.”) (emphasis added); *In re Donna Indep. Sch. Dist.*, 299 S.W.3d 456, 460 (Tex. App.—Corpus Christi 2009, no pet.) (“[T]here is no requirement in [Texas] Rule 202 that the person sought to be deposed be a potentially liable defendant in the claim under investigation.”) (quoting *City of Houston v. U.S. Filter Wastewater Grp., Inc.*, 190 S.W.3d 242, 245 (Tex. App.—Houston [1st Dist.] 2006, no pet.)).

⁴⁹²This is because “person” as defined by Section 311.005 of the Texas Government Code “includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity” and because the “[t]he Code Construction Act applies to the Texas Rules of Civil Procedure[.]” TEX. GOV’T CODE ANN. § 311.005 (West 2013); *Simulis, L.L.C. v. G.E. Cap. Corp.*, 276 S.W.3d 109, 113 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (quoting *In re Walkup*, 122 S.W.3d 215, 217 (Tex. App.—Houston [1st Dist.] 2003, orig. proceeding)).

cannot properly seek a presuit deposition under Texas Rule 202.⁴⁹³ The person to be deposed need not be the potential plaintiff or defendant, but rather can be someone who has evidence relevant to the claim or suit.⁴⁹⁴

“Pre-suit discovery pursuant to [Texas R]ule 202 ‘is not an end in itself,’ but rather ‘is in aid of a suit which is anticipated’ and ‘ancillary to the anticipated suit.’”⁴⁹⁵ A petition for a presuit deposition involves no substantive claim or cause of action upon which relief can be granted. Rather, a successful petitioner merely acquires the right to obtain discovery—discovery that may or may not result in a lawsuit.⁴⁹⁶

Texas Rule 202 can be used only to obtain depositions, and not other forms of discovery.⁴⁹⁷ The Rule governs all presuit discovery governed by

⁴⁹³ *In re Does*, 337 S.W.3d 862, 865 (Tex. 2011) (per curiam) (holding that a trial court abused its discretion in allowing presuit depositions, in part, because the petition’s allegations “mostly concern possible causes of action by Klein, who is not a party to the proceeding”); *In re Wolfe*, 341 S.W.3d 932, 933 (Tex. 2011) (per curiam) (holding that, because individual citizens cannot maintain a suit to remove public officials without the joinder of an appropriate state official, they likewise cannot obtain presuit discovery about a potential removal action under Texas Rule 202); *In re Hochheim Prairie Farm Mut. Ins. Ass’n*, 115 S.W.3d 793, 795–96 (Tex. App.—Beaumont 2003, no pet.) (holding that a trial court abused its discretion in allowing an injured plaintiff to take a presuit deposition of the defendant’s insurance carrier regarding a *Stowers* claim because such a claim belongs to the insured, not to the injured party); see *In re Jorden*, 249 S.W.3d 416, 418 (Tex. 2008) (“Because [Section 74.351(s) of the Texas Civil Practice & Remedies Code regarding “healthcare-liability claims] prohibits ‘all discovery’ other than three exceptions—and [Texas] Rule 202 depositions are not listed among them—we hold the statute prohibits such depositions until after an expert report is served.”).

⁴⁹⁴ *In re Donna Indep. Sch. Dist.*, 299 S.W.3d at 460 (“[T]here is no requirement in [Texas] Rule 202 that the person sought to be deposed be a potentially liable defendant in the claim under investigation.” (quoting *City of Houston v. U.S. Filter Wastewater Grp., Inc.*, 190 S.W.3d 242, 245 (Tex. App.—Houston [1st Dist.] 2006, no pet.)).

⁴⁹⁵ *City of Dallas v. Dall. Black Fire Fighters Ass’n*, 353 S.W.3d 547, 553 (Tex. App.—Dallas 2011, no pet.) (quoting *In re Wolfe*, 341 S.W.3d at 933); see *Office Emps. Int’l Union Local 277, AFL-CIO v. Sw. Drug Corp.*, 391 S.W.2d 404, 406 (Tex. 1965) (construing former Texas Rule 187).

⁴⁹⁶ *Combs v. Tex. Civil Rights Project*, 410 S.W.3d 529, 534 (Tex. App.—Austin 2013, no pet.) (“[A] petition under [Texas R]ule 202 is ultimately a petition that asserts no substantive claim or cause of action upon which relief can be granted. A successful [Texas R]ule 202 petitioner simply acquires the right to obtain discovery—discovery that may or may not lead to a claim or cause of action.”).

⁴⁹⁷ *In re Akzo Nobel Chem., Inc.*, 24 S.W.3d 919, 921 (Tex. App.—Beaumont 2000, no pet.) (“The Relators also complain of the order requiring them to make the accident scene available for inspection because it is not authorized by [Texas] Rule 202. Neither by its language nor by implication can we construe [Texas] Rule 202 to authorize a trial court, before suit is filed, to

former Texas Rules 187 and 737, which respectively relate to depositions to perpetuate testimony and bills of discovery.⁴⁹⁸

B. *The Petition*

Before taking a presuit deposition, the person seeking it must file a petition that complies with Texas Rule 202.2's requirements⁴⁹⁹ and request an order authorizing the deposition.⁵⁰⁰

1. The Petition's Contents

The petition's contents are set forth in Texas Rule 202.2. They are different when the petitioner seeks a deposition to investigate a claim than when the petitioner anticipates the institution of a suit in which the petitioner may be a party. A petition to investigate a claim "must:"

(1) "be verified"⁵⁰¹—i.e., "be sworn to on personal knowledge,"⁵⁰²

order any form of discovery but deposition."). As discussed below, a production request can be included in a Texas Rule 202 deposition notice. *See infra* note 512 and accompanying text.

⁴⁹⁸TEX. R. CIV. P. 202 cmt. 1 ("This rule applies to all discovery before suit covered by former rules governing depositions to perpetuate testimony and bills of discovery.").

⁴⁹⁹*Id.* 202.1 ("A person may petition the court for an order . . ."); *see In re East*, 476 S.W.3d 61, 65 (Tex. App.—Corpus Christi 2014, no pet.) ("Texas Rule of Civil Procedure 202 permits a person to petition the court for authorization to take a deposition before suit is filed . . ."); *In re Contractor's Supplies, Inc.*, No. 12-09-00231-CV, 2009 Tex. App. LEXIS 6396, at *5 (Tex. App.—Tyler Aug. 17, 2009, no pet.) (mem. op.) ("The person seeking the deposition must file a verified petition . . .").

⁵⁰⁰TEX. R. CIV. P. 202.2(h) (providing that the petition must "request an order authorizing . . . the depositions"); *see id.* 202.4 (requiring an order to take a presuit deposition).

⁵⁰¹TEX. R. CIV. P. 202.2(a); *see In re East*, 476 S.W.3d at 63 n.3 ("Texas Rule of Civil Procedure 202.2 provides that a petition seeking presuit depositions must be verified."); *In re Contractor's Supplies Inc.*, 2009 Tex. App. LEXIS 6396, at *5 ("The person seeking the deposition must file a verified petition . . .").

⁵⁰²*In re East*, 476 S.W.3d at 63 n.3 (providing further that a petition based on the petitioner's "best knowledge and belief" is insufficient and noting, in dictum, that "language 'to the best of my knowledge' does not attest to the truthfulness of the facts alleged and is not legally effective as a verification"); *cf.* *Kerlin v. Arias*, 274 S.W.3d 666, 668 (Tex. 2008) ("[T]he only representation Castillo makes about the truth of her [summary-judgment] affidavit is that '[a]ll statements contained herein are true and correct to the best of my personal knowledge and belief.' To have probative value, an affiant 'must swear that the facts presented in the affidavit reflect his personal knowledge.' An affiant's *belief* about the facts is legally insufficient.") (citation omitted) (quoting *In re E.I. du Pont de Nemours & Co.*, 136 S.W.3d 218, 224 (Tex. 2004); *Lightfoot v. Weissgarber*,

(2)“be in the name of the petitioner;”⁵⁰³

(3)state that “the petitioner seeks to investigate a potential claim by or against petitioner;”⁵⁰⁴

(4)state “the subject matter of the anticipated action, if any, and the petitioner’s interest therein;”⁵⁰⁵

(5)“state the names, addresses, and telephone numbers of the persons to be deposed[;]”⁵⁰⁶

(6)state “the substance of the testimony that the petitioner expects to elicit from each” deponent;⁵⁰⁷

(7)state “the petitioner’s reasons for desiring to obtain the testimony of each” deponent;⁵⁰⁸

(8)identify the documents requested, if any;⁵⁰⁹ and

763 S.W.2d 624, 627 (Tex. App.—San Antonio 1989, writ denied) (“It is a long established rule in Texas that affidavits, in order to constitute summary judgment proof, must be sworn to on personal knowledge and that those sworn to on best knowledge and belief are insufficient.”).

⁵⁰³ TEX. R. CIV. P. 202.2(c).

⁵⁰⁴ *Id.* 202.2(d)(2).

⁵⁰⁵ *Id.* 202.2(e).

⁵⁰⁶ *Id.* 202.2(g); *accord* City of Dallas v. City of Corsicana, Nos. 10-14-00090-CV, 10-14-00171-CV, 2015 Tex. App. LEXIS 8753, at *17 (Tex. App.—Waco Aug. 20, 2015, pet. filed) (mem. op.). A trial court abuses its discretion if it authorizes the deposition of a person not *specifically* named in the petition. *E.g., id.* at *17 (holding that the trial court abused its discretion in ordering the “deposition of ‘a person or persons whose identities are revealed in the documents to be produced’ by the deponent”).

⁵⁰⁷ TEX. R. CIV. P. 202.2(g); *accord* City of Dallas, 2015 Tex. App. LEXIS 8753, at *17.

⁵⁰⁸ TEX. R. CIV. P. 202.2(g); *accord* City of Dallas, 2015 Tex. App. LEXIS 8753, at *17.

⁵⁰⁹ City of Dallas, 2015 Tex. App. LEXIS 8753, at *15–16 (“Under [Texas R]ule 202, documents can be requested in connection with a deposition. [Texas] Rule 202.4(b) provides that if ‘the order does not state the time and place at which a deposition will be taken, the petitioner must notice the deposition as required by [Texas] Rules 199 or 200,’ and [Texas R]ule 202.5 provides that ‘depositions authorized by this rule are governed by the rules applicable to depositions of nonparties in a pending suit.’ [Texas] Rules 199 and 200 plainly allow for the production of documents with an oral deposition or a deposition on written questions. Accordingly, the trial court’s order is not an abuse of discretion to the extent that it allows Navarro to obtain documents in an oral deposition under [Texas R]ule 199 or a deposition on written questions under [Texas R]ule 200.”) (citing TEX. R. CIV. P. 199.2(b)(5) (requiring the request for production of documents to comply with Texas Rule 205 if the witness is a nonparty), 200.1(b) (requiring the request for production of documents to comply with Texas Rule 199.2(b)(5), 205.1(a)-(c), and 205.2 (setting forth the requirements for the deposition of a

(9)“request an order authorizing the petitioner to take the depositions of the persons named in the petition.”⁵¹⁰

If, however, the petitioner anticipates the institution of a suit and seeks the deposition to perpetuate or obtain testimony for use in the lawsuit, all of the foregoing requirements apply to the petition except that: (1) instead of stating that “the petitioner seeks to investigate a potential claim by or against petitioner[.]” item 3 above, the petition must state “that the petitioner anticipates the institution of a suit in which the petitioner may be a party;” and (2) the petition must either “state the names of the persons petitioner expects to have interests adverse to the petitioner’s in the anticipated suit, and the addresses and telephone numbers for such persons; or . . . state that the names, addresses, and telephone numbers of persons petitioner expects to have interests adverse to petitioner’s in the anticipated suit cannot be ascertained through diligent inquiry, and describe those persons.”⁵¹¹

Although a petition to investigate a potential suit must state “the subject matter of the anticipated action[.]”⁵¹² it need not allege a specific cause of action. As explained by the Dallas Court of Appeals:

[Texas R]ule 202 does not require a petitioner to plead a specific cause of action; instead, it requires only that the petitioner “state the subject matter of the anticipated action, if any, and the petitioner’s interest therein[.]” Thus, the pleading requirements of [Texas R]ule 202, on their face,

nonparty with a production request)); see *In re Anand*, No. 01-12-01106-CV, 2013 Tex. App. LEXIS 4157, at *8–9 (Tex. App.—Houston [1st Dist.] Apr. 2, 2013, no pet.) (mem. op.) (“With respect to Relators’ first contention that the production of documents is not permitted by [Texas] Rule 202, there is nothing in the language of [Texas] Rule 202 that prohibits the petitioner from requesting that documents be produced along with the deposition. Furthermore, [Texas] Rule 202.5 expressly provides that ‘depositions authorized by this rule are governed by the rules applicable to depositions of nonparties in a pending suit.’ The rule further provides that ‘[t]he scope of discovery in depositions authorized by this rule is the same as if the anticipated suit or potential claim had been filed.’ [Texas] Rule 205, which governs discovery of nonparties, permits a party to compel discovery from a nonparty by serving a subpoena compelling ‘a request for production of documents or tangible things . . . served with a notice of deposition on oral examination or written questions.’ Therefore, the language of these rules when read together permits a petition seeking a pre-suit deposition under [Texas] Rule 202 to also request the production of documents.” (quoting TEX. R. CIV. P. 202.5, 205.1(c))).

⁵¹⁰TEX. R. CIV. P. 202.2(h).

⁵¹¹*Id.* 202.2(d), (f).

⁵¹²*Id.* 202.2(e).

are less stringent than those normally required to demonstrate a trial court's jurisdiction. More importantly, as a practical matter, a party filing a [Texas R]ule 202 petition will often not know enough facts or have enough information to allege facts that, if true, would establish the trial court's jurisdiction. If a party could sufficiently plead these factual allegations without violating [Texas R]ule 13, it is likely that the party could not demonstrate a need for the [Texas R]ule 202 deposition at all.⁵¹³

In fact, one court has held that "the defendants' merits-based defense to the potential lawsuit is not a valid objection to a petition seeking presuit depositions."⁵¹⁴

Texas Rule 202 cannot be used to investigate a claim or suit against a healthcare provider before an expert report is filed.⁵¹⁵ Nor can it be used to obtain otherwise impermissible discovery in an existing action.⁵¹⁶ It also is

⁵¹³Combs v. Tex. Civil Rights Project, 410 S.W.3d 529, 535–36 (Tex. App.—Austin 2013, pet. denied) (citations omitted) (quoting City of Houston v. U. S. Filter Wastewater Grp., Inc., 190 S.W.3d 242, 245 n.2 (Tex. App.—Houston [1st Dist.] 2006, no pet.); see also *In re* Emergency Consultants, Inc., 292 S.W.3d 78, 79 (Tex. App.—Houston [14th Dist.] 2007, no pet.) ("[Texas] Rule 202 does not require a potential litigant to expressly state a viable claim before being permitted to take a pre-suit deposition."); *City of Houston*, 190 S.W.3d at 245 n.2 ("In its reply brief, the City argues that U.S. Filter has not pleaded a civil conspiracy claim against Altivia. However, [Texas] Rule 202 does not require a petitioner to plead a specific cause of action; instead, it requires only that the petitioner 'state the subject matter of the anticipated action, if any, and the petitioner's interest therein[.]'" (quoting TEX. R. CIV. P. 202.2(e))).

⁵¹⁴*In re* East, 476 S.W.3d 61, 67 (Tex. App.—Corpus Christi 2014, no pet.); see *City of Dallas*, 2015 Tex. App. LEXIS 8753, at *11–12 ("We also disagree with Dallas's additional argument that we should address its merits-based arguments on why Navarro does not have a valid claim for tortious interference against Dallas. As we have noted, [Texas R]ule 202 'does not require a potential litigant to expressly state a viable claim before being permitted to take a pre-suit deposition.'" (quoting *In re* Denton, No. 10-08-00255-CV, 2009 Tex. App. LEXIS 1322, at *7 (Tex. App.—Waco Feb. 25, 2009, orig. proceeding) (mem. op.))).

⁵¹⁵*In re* Jordan, 249 S.W.3d 416, 418 (Tex. 2008) (Section 74.351(s) of the Texas Civil Practice & Remedies Code "limits discovery in health-care lawsuits until the plaintiff serves an expert report summarizing how each defendant violated standards of care and caused the plaintiff injury. The issue here is whether that statute applies to presuit depositions authorized by Rule 202 of the Texas Rules of Civil Procedure. Because the statute prohibits 'all discovery' other than three exceptions—and [Texas] Rule 202 depositions are not listed among them—we hold the statute prohibits such depositions until after an expert report is served.").

⁵¹⁶*In re* Hanover Ins. Co., No. 01-13-01066-CV, 2014 Tex. App. LEXIS 13930, at *9–11 (Tex. App.—Houston [1st Dist.] Dec. 30, 2014, no pet.) (mem. op.) (holding that Texas Rule 202

difficult, if not impossible, to obtain a presuit deposition in connection with a trade-secret misappropriation claim. As explained by the Austin Court of Appeals:

When the issue of discovery of trade secrets arises in the context of a [Texas R]ule 202 deposition request, it will be difficult—if not impossible—for a [Texas R]ule 202 petitioner relying on the investigatory purpose of [Texas R]ule 202 to meet his or her burden to establish the necessity of the information to adjudicate a claim or defense. This is because, by its very nature, a [Texas R]ule 202 proceeding to investigate claims does not involve the adjudication of any claim or defense. It involves only the investigation of potential claims. The standard for allowing discovery of trade secrets under *Bass*, *Bridgestone/Firestone*, and *Continental General Tire* requires a showing of necessity for the information to adjudicate existing claims or defenses. The trial court must weigh the degree of the requesting party’s need for the information against the potential harm to the resisting party from disclosure. Thus, the balance is between the need for confidentiality versus the need to adjudicate existing disputes. The standard is not based on a potential litigant’s desire to obtain confidential information merely to evaluate possible or suspected claims. If it were, business entities would have an extraordinary tool to obtain the trade secrets of their competitors whether or not they have a legitimate dispute with the competitor. We do not believe [Texas R]ule 202 was intended to be used this way.⁵¹⁷

cannot be “used as a mechanism for obtaining third-party discovery that a party was unable to obtain in pending litigation under [Texas] Rule 176”).

⁵¹⁷ *In re Hewlett Packard*, 212 S.W.3d 356, 363 (Tex. App.—Austin 2006, pet. denied.); *see In re Prairiesmarts LLC*, 421 S.W.3d 296, 308 n.11 (Tex. App.—Fort Worth 2014, no pet.) (holding that the trial court abused its discretion in allowing presuit discovery of trade secrets, but declining to hold that a Texas Rule 202 “petitioner can never obtain presuit discovery of trade secret information simply because a suit has not been filed” because Texas Rule 202.5 provides that “[t]he scope of discovery in depositions authorized by this rule is the same as if the anticipated suit or potential claim had been filed”); *In re Rockafellow*, No. 07-11-00066-CV, 2011 Tex. App. LEXIS 5495, at *13–14 (Tex. App.—Amarillo July 19, 2011, no pet.) (mem. op.) (holding that the trial court abused its discretion in allowing presuit discovery of trade secrets).

2. Where the Petition Must be Filed

Under Texas Rule 202.2(b), the petition must be filed “in a proper court of any county.”⁵¹⁸ If suit is anticipated, such court is one “where venue of the anticipated action may lie[.]”⁵¹⁹ Otherwise, it is one “where the witness resides[.]”⁵²⁰ In addition, the court must have subject-matter jurisdiction over the suit or claim.⁵²¹ For example, where the claim or suit would be barred by the doctrine of sovereign immunity or exclusive or primary jurisdiction, the Texas Rule 202 petition must be denied.⁵²² It is unclear,

⁵¹⁸TEX. R. CIV. P. 202.2(b).

⁵¹⁹*Id.* 202.2(b)(1); see *In re Doe*, 444 S.W.3d 603, 608 (Tex. 2014) (“[A] proper court must be one with venue over an anticipated action, though if none is anticipated, the court must be in the county where the witness resides.”); *In re Akzo Nobel Chem., Inc.*, 24 S.W.3d 919, 920 (Tex. App.—Beaumont 2000, no pet.) (“A petition under [Texas] Rule 202 must be filed where venue of the anticipated suit may lie, if suit is anticipated; or where the witness resides, if no suit is yet anticipated.”).

⁵²⁰TEX. R. CIV. P. 202.2(b)(2); *In re Doe*, 444 S.W.3d at 608 (“[A] proper court must be one with venue over an anticipated action, though if none is anticipated, the court must be in the county where the witness resides.”); *In re Akzo*, 24 S.W.3d at 920 (“A petition under [Texas] Rule 202 must be filed . . . where the witness resides, if no suit is yet anticipated.”).

⁵²¹*In re Doe*, 444 S.W.3d at 608 (“While [Texas] Rule 202 is silent on the subject, we think it implicit, as it has always been, that the court must have subject-matter jurisdiction over the anticipated action. The rule cannot be used, for example, to investigate a potential federal antitrust suit or patent suit, which can be brought only in federal court.”); *City of Dallas v. City of Corsicana*, Nos. 10-14-00090-CV, 10-14-00171-CV, 2015 Tex. App. LEXIS 8753, at *3 (Tex. App.—Waco Aug. 20, 2015, pet. filed) (mem. op.) (“A ‘proper court’ is a court with subject-matter jurisdiction over the underlying dispute, so we must look to the substantive law of the underlying dispute or the anticipated suit to determine jurisdiction.”).

⁵²²*In re Bailey-Newell*, No. 01-13-00783-CV, 2014 Tex. App. LEXIS 6663, at *1 (Tex. App.—Dallas June 19, 2014, no pet.) (mem. op.) (“Tang’s contemplated retaliation claim under the Texas Labor Code would be subject to exhaustion of administrative remedies, and Tang cannot circumvent the statutorily required administrative procedures through the use of [Texas] Rule 202.”); *In re Dall. Cty. Hosp. Dist.*, No. 05-14-00249-CV, 2014 Tex. App. LEXIS 3542, at *8–9 (Tex. App.—Dallas Apr. 1, 2014, no pet.) (mem. op.) (“The trial court abused its discretion in concluding that real party was entitled to discovery under [Texas] Rule 202 under the facts of this case because there was no evidence before the trial court that could provide a basis for concluding that real party’s potential claim would not be barred by sovereign immunity.”); *Combs v. Tex. Civil Rights Project*, 410 S.W.3d 529, 535 (Tex. App.—Austin 2013, pet. denied) (“[W]e conclude that [Texas] Rule 202 depositions may not be used solely to investigate potential claims that are otherwise barred by sovereign immunity.”).

however, whether a court has jurisdiction over a Texas Rule 202 proceeding if the dispute is one that is subject to an arbitration agreement.⁵²³

Finally, the court must have personal jurisdiction over the potential defendant (i.e., the potential defendant must have sufficient minimum contacts with Texas for the exercise of such jurisdiction).⁵²⁴ For that reason, the petition must contain “allegations showing personal jurisdiction over the defendant” even when “the potential defendant’s identity is unknown and may even be impossible to ascertain.”⁵²⁵

3. The Petitioner’s Notice and Service

Because Texas Rule 202 requires a court order to take a presuit deposition, there must be a hearing on the petition: “At least 15 days before the date of the hearing on the petition, the petitioner must serve the petition and a notice of the hearing—in accordance with [Texas] Rule 21a—on all persons petitioner seeks to depose[.]”⁵²⁶ In addition, “if suit is anticipated,”

⁵²³ Compare *Valerus Compression Servs., LP v. Woodcock (In re Valerus Compression Servs., LP)*, Nos. 14-14-00019-CV, 14-14-00042-CV, 2015 Tex. App. LEXIS 4647, at *8 (Tex. App.—Houston [14th Dist.] May 7, 2015, orig. proceeding) (“[A] trial court abuses its discretion when it defers a decision on a motion to compel arbitration until after a Texas Rule 202 deposition is conducted.”), *In re Bill Heard Chevrolet, Ltd.*, No. 14-05-00744-CV, 2005 Tex. App. LEXIS 8838, at *1 (Tex. App.—Houston [14th Dist.] Oct. 27, 2005, orig. proceeding) (mem. op.) (per curiam) (same), and *In re MHI P’ship., Ltd.*, 7 S.W.3d 918, 923 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding) (same), with *Patton Boggs LLP v. Moseley*, 394 S.W.3d 565, 572 (Tex. App.—Dallas 2011, orig. proceeding) (holding that the trial court has no jurisdiction to compel arbitration in connection with a petition for a presuit deposition).

⁵²⁴ *In re Doe*, 444 S.W.3d at 608 (holding that to be a “proper court,” the court must have personal jurisdiction over the potential defendant).

⁵²⁵ *Id.* at 610; accord *eBay Inc. v. Mary Kay Inc.*, No. 05-14-00782-CV, 2015 Tex. App. LEXIS 6563, at *8 (Tex. App.—Dallas June 25, 2015, pet. filed) (mem. op.) (“We reject Mary Kay’s contention that the allegations in its petition about the nature of its claims, as well as the fact that Mary Kay is based in Dallas County and eBay is available here, are sufficient to show the court had personal jurisdiction over the potential defendants. Mary Kay’s petition does not allege any jurisdictional facts to establish personal jurisdiction over the anonymous eBay sellers. Because Mary Kay did not meet its burden, albeit a heavy one, to plead jurisdictional facts sufficient to establish the trial court had personal jurisdiction over the potential defendants and thus was a proper court, the trial court abused its discretion in granting Mary Kay’s [Texas R]ule 202 petition.”).

⁵²⁶ TEX. R. CIV. P. 202.3(a). If the petition and notice are filed electronically and the email address of the person being served is on file with the electronic filing manager, then the petition and notice “must be served electronically through the electronic filing manager” under Texas Rule 21a(a)(1). In all other circumstances, Texas Rule 21a(a)(2) allows service “in person, by mail, by

the petition and notice of hearing must also be served on “all persons petitioner expects to have interests adverse to petitioner’s in the anticipated suit.”⁵²⁷ The petitioner can request a shorter notice period if “justice or necessity” so requires.⁵²⁸

If the petitioner does not know the names of the adverse persons, notice may be served by publication.⁵²⁹ “Any interested party may move, in the proceeding or by bill of review, to suppress any deposition, in whole or in part, taken on notice by publication, and may also attack or oppose the deposition by any other means available.”⁵³⁰

The Texas Rule of Civil Procedure 202.3 provides:

A petition to take a deposition in anticipation of an application for probate of a will, and notice of the hearing on the petition, may be served by posting as prescribed by Section 33(f)(2) of the Probate Code [now Sections 51.002 and .003 of the Texas Estates Code]. The notice and petition must be directed to all parties interested in the testator’s estate and must comply with the requirements of Section 33(c) of the Probate Code [now Section 51.053 of the Texas Estates Code] insofar as they may be applicable.⁵³¹

commercial delivery service, by fax, by email, or by such other manner as the court in its discretion may direct.”

⁵²⁷ *Id.*

⁵²⁸ *Id.* 202.3(d) (“As justice or necessity may require, the court may shorten or lengthen the notice periods under this rule and may extend the notice period to permit service on any expected adverse party.”).

⁵²⁹ TEX. R. CIV. P. 202.3(b)(1) governs service by publication and provides:

Unnamed persons described in the petition whom the petitioner expects to have interests adverse to petitioner’s in the anticipated suit, if any, may be served by publication with the petition and notice of the hearing. The notice must state the place for the hearing and the time it will be held, which must be more than 14 days after the first publication of the notice. The petition and notice must be published once each week for two consecutive weeks in the newspaper of broadest circulation in the county in which the petition is filed, or if no such newspaper exists, in the newspaper of broadest circulation in the nearest county where a newspaper is published.

TEX. R. CIV. P. 202.3(b)(1).

⁵³⁰ *Id.* 202.3(b)(2).

⁵³¹ *Id.* 202.3(c). Section 51.002 of the Texas Estates Code provides:

(a) A writ or other process other than a citation or notice must be directed “To any sheriff or constable within the State of Texas.”

(b) Notwithstanding Subsection (a), a writ or other process other than a citation or notice may not be held defective because the process is directed to the sheriff or a constable of a named county if the process is properly served within that county by the sheriff or constable.

TEX. EST. CODE ANN. § 51.002. Section 51.003 of the Texas Estates Code provides:

(a) A citation or notice must:

- (1) be directed to the person to be cited or notified;
- (2) be dated;
- (3) state the style and number of the proceeding;
- (4) state the court in which the proceeding is pending;
- (5) describe generally the nature of the proceeding or matter to which the citation or notice relates;
- (6) direct the person being cited or notified to appear by filing a written contest or answer or to perform another required action; and
- (7) state when and where the appearance or performance described by Subdivision (6) is required.

(b) A citation or notice issued by the county clerk must be styled “The State of Texas” and be signed by the clerk under the clerk’s seal.

(c) A notice required to be given by a personal representative must be in writing and be signed by the representative in the representative’s official capacity.

(d) A citation or notice is not required to contain a precept directed to an officer, but may not be held defective because the citation or notice contains a precept directed to an officer authorized to serve the citation or notice.

Id. § 51.003. Finally, Section 51.053 of the Texas Estates Code provides:

(a) The county clerk shall deliver the original and a copy of a citation or notice required to be posted to the sheriff or a constable of the county in which the proceeding is pending. The sheriff or constable shall post the copy at the door of the county courthouse or the location in or near the courthouse where public notices are customarily posted.

(b) Citation or notice under this section must be posted for at least 10 days before the return day of the service, excluding the date of posting, except as provided by Section 51.102(b). The date of service of citation or notice by posting is the date of posting.

Posting, however, is not a favored service method because the service can be attacked on due-process grounds. Accordingly, if the witnesses and potential adverse parties are known, they should be served as permitted by Texas Rule 21a.

Texas federal district courts have held that Texas Rule 202 petitions are not removable. A number of them have held that such petitions are not “civil actions” within the meaning of the removal statute, 28 U.S.C. § 1441.⁵³² And at least one federal district court has noted that, even if a Texas Rule 202 proceeding is a “civil action,” it is not removable because it is not one over “which [the] district courts of the United States have original jurisdiction[.]”⁵³³

C. Hearing and Standards for the Order

To authorize a presuit deposition, the trial court *must* make one of two specific findings,⁵³⁴ depending on whether the petition pertains to a

(c) A sheriff or constable who posts a citation or notice under this section shall return the original citation or notice to the county clerk and state the date and location of the posting in a written return on the citation or notice.

(d) The method of service prescribed by this section applies when a personal representative is required or permitted to post a notice. The notice must be:

- (1) issued in the name of the representative;
- (2) addressed and delivered to, and posted and returned by, the appropriate officer; and
- (3) filed with the county clerk.

Id. § 51.053.

⁵³²*See, e.g., In re Johnson*, No. 3:13-cv-00231, 2013 U.S. Dist. LEXIS 115908, at *4–7 (S.D. Tex. Aug. 15, 2013); *Sawyer v. E.I. du Pont de Nemours & Co.*, No. 06-1420, 2006 U.S. Dist. LEXIS 44026, at *6 (S.D. Tex. June 28, 2006); *Davidson v. S. Farm Bureau Cas. Ins. Co.*, No. H-05-03607, 2006 U.S. Dist. LEXIS 40654, at *6 (S.D. Tex. June 19, 2006); *McCrary v. Kan. City S. R.R.*, 121 F. Supp. 2d 566, 569 (E.D. Tex. 2000).

⁵³³*Mayfield-George v. Tex. Rehab. Comm’n*, 197 F.R.D. 280, 283 (N.D. Tex. 2000); *see In re Enable Comm., Inc.*, 256 F.R.D. 527, 531 (N.D. Tex. 2009) (doubting a federal court’s ability to manage a Texas Rule 202 petition after removal because the *Erie* doctrine mandates the application of federal procedural law and no federal rule is comparable to Texas Rule 202).

⁵³⁴TEX. R. CIV. P. 202.4(a) (“The court must order a deposition to be taken if, but only if, it finds that: (1) allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit; or (2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure.”).

deposition for an anticipated suit or a deposition to investigate a potential claim.

If the petitioner requests a deposition to obtain testimony for use in an anticipated suit, the trial court must find that allowing the petitioner to take the requested deposition may prevent a failure or delay of justice. If the petitioner requests a deposition to investigate a potential claim, however, the trial court must find that the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure.⁵³⁵

The requisite finding must be express, and cannot be implied from the record.⁵³⁶ Accordingly, the mere fact that the prospective deponent does not oppose the order is insufficient.⁵³⁷

⁵³⁵ *In re Dall. Cty. Hosp. Dist.*, No. 05-14-00249-CV, 2014 Tex. App. LEXIS 3542, at *4 (Tex. App.—Dallas Apr. 1, 2014, orig. proceeding) (mem. op.) (citation omitted); *accord In re Noriega*, No. 05-14-00307-CV, 2014 Tex. App. LEXIS 3462, at *4–5 (Tex. App.—Dallas Mar. 28, 2014, orig. proceeding) (mem. op.); *Patton Boggs LLP v. Moseley*, 394 S.W.3d 565, 570 (Tex. App.—Dallas 2011, orig. proceeding); *In re Denton*, No. 10-08-00255-CV, 2009 Tex. App. LEXIS 1322, at *6–7 (Tex. App.—Waco Feb. 25, 2009, orig. proceeding) (mem. op.); *In re Legate*, No. 04-10-00874-CV, 2011 Tex. App. LEXIS 8107, at *3–4 (Tex. App.—San Antonio Oct. 12, 2011, orig. proceeding) (mem. op.).

⁵³⁶ *In re Does*, 337 S.W.3d 862, 865 (Tex. 2011) (orig. proceeding) (per curiam) (“Nor can the required findings be implied in support of the trial court’s order compelling discovery.”); *In re Jorden*, 249 S.W.3d 416, 423 (Tex. 2008) (orig. proceeding) (“[P]resuit depositions are available under [Texas] Rule 202 only if a trial court makes one of the two findings [under Texas R]ule 202.4(a)”); *In re Cauley*, 437 S.W.3d 650, 657 (Tex. App.—Tyler 2014, no pet.) (“Presuit discovery under [Texas] Rule 202 expressly requires that discovery be ordered ‘only if’ the required findings are made. Thus, we are not permitted to deem the findings implied from support in the record. The trial court has no discretion to order presuit discovery without the required finding and abuses its discretion when it does so.” (quoting *In re Does*, 337 S.W.3d at 865)); *In re Dall. Cty. Hosp.*, 2014 Tex. App. LEXIS 3542, at *4 (“The trial court must expressly make the findings required under [Texas] Rule 202.4; [Texas] Rule 202.4 does not permit the required findings to be implied from the record. A trial court abuses its discretion in ordering a pre-suit deposition under [Texas] Rule 202 if it fails to make the required findings.”) (citation omitted); *Patton Boggs*, 394 S.W.3d at 571 (“The trial court’s August 15, 2011 order granting Moseley’s request to take depositions under [Texas R]ule 202 contains no finding that the likely benefit of allowing Moseley to take the requested depositions to investigate a potential claim outweighs the burden or expense of the procedure. The trial court had no discretion to order depositions under [Texas R]ule 202 without the required finding under [Texas R]ule 202.4(a)(2).”) (citation omitted).

⁵³⁷ *In re Does*, 337 S.W.3d at 865 (“PRK argues that compliance with [Texas] Rule 202 was excused because of its agreement with Google. It is true that ‘[e]xcept where specifically prohibited, the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit by agreement of the parties’ But PRK and Google were not the only

To make the requisite finding, a hearing on the petition is required at which “the petitioner must present evidence to meet its burden to establish the facts necessary to obtain the deposition.”⁵³⁸ In this regard, neither the verified petition nor the petitioner’s attorney’s arguments constitute evidence.⁵³⁹ An order granting a presuit deposition is reviewed for an abuse of discretion.⁵⁴⁰

In addition to containing the requisite finding, the order granting a presuit deposition “must state whether a deposition will be taken on oral

parties to the proceeding. [Texas] Rule 202.3(a) requires that ‘all persons petitioner expects to have interests adverse to petitioner’s in the anticipated suit’ be served with the petition and given notice of hearing. PRK asserted that relators would be defendants in the anticipated lawsuit, and by their motions to quash, relators made an appearance in the proceeding. PRK and Google could not modify the procedures prescribed by [Texas] Rule 202 by an agreement that did not include relators.”) (citations omitted) (quoting TEX. R. CIV. P. 191.1).

⁵³⁸*In re East*, 476 S.W.3d 61, 68 (Tex. App.—Corpus Christi 2014, no pet.); see *In re Hanover Ins. Co.*, No. 01-13-01066-CV, 2014 Tex. App. LEXIS 13930, at *4–5 (Tex. App.—Houston [1st Dist.] Dec. 30, 2014, no pet.) (mem. op.) (“A petitioner *must demonstrate* and the trial court must find that allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit. In general, this requires the petitioner to show that there is a reason that the deposition must occur before the anticipated lawsuit is filed, and not after.”) (emphasis added) (citation omitted); *In re Noriega*, No. 05-14-00307-CV, 2014 Tex. App. LEXIS 3462, at *6 (Tex. App.—Dallas Mar. 28, 2014, no pet.) (mem. op.) (“It is an abuse of discretion for a trial court to find that the likely benefit of a [Texas] Rule 202 deposition outweighs the burden of the deposition when the party seeking the deposition fails to provide any evidence on which the court could have based such a finding.”); *In re Campo*, No. 05-13-00477-CV, 2013 Tex. App. LEXIS 9312, at *3 (Tex. App.—Dallas July 26, 2013, no pet.) (mem. op.) (holding that the trial court abused its discretion in ordering a presuit deposition when no evidence was presented at the hearing on the motion).

⁵³⁹*In re Dall. Cty. Hosp. Dist.*, 2014 Tex. App. LEXIS 3542, at *5–6 (holding that neither verified pleadings nor the counsel’s argument generally is considered competent evidence to provide the basis for ordering a Texas Rule 202 presuit deposition); *In re Noriega*, 2014 Tex. App. LEXIS 3462, at *5 (same); *In re Contractor’s Supplies, Inc.*, No. 12-09-00231-CV, 2009 Tex. App. LEXIS 6396, at *15–16 (Tex. App.—Tyler Aug. 17, 2009, no pet.) (mem. op.) (same); *In re Rockafellow*, No. 07-11-00066-CV, 2011 Tex. App. LEXIS 5495, at *13 (Tex. App.—Amarillo July 19, 2011, orig. proceeding) (mem. op.) (same); cf. *Laidlaw Waste Sys. (Dall.), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995) (“Generally, pleadings are not competent [summary-judgment] evidence, even if sworn or verified.”); *Dall. Drain Co. v. Welsh*, No. 05-14-00831-CV, 2015 Tex. App. LEXIS 7042, at *13 (Tex. App.—Dallas July 8, 2015, no pet.) (same).

⁵⁴⁰*City of Dallas v. City of Corsicana*, Nos. 10-14-00090-CV, 10-14-00171-CV, 2015 Tex. App. LEXIS 8753, at *14 n.6 (Tex. App.—Waco Aug. 20, 2015, pet. filed) (mem. op.) (“A [Texas R]ule 202 order authorizing pre-suit depositions is reviewable for abuse of discretion.”); *Patton Boggs LLP*, 394 S.W.3d at 568–69 (same).

examination or written questions.”⁵⁴¹ It “may also state the time and place at which a deposition will be taken. If the order does not state the time and place at which a deposition will be taken, the petitioner must notice the deposition as required by [Texas] Rules 199 or 200.”⁵⁴² Because Texas Rule 202.4(b) incorporates the rules regarding oral depositions and depositions on written questions, the order can allow the deposition notice to include a production request.⁵⁴³

To protect against any unfairness or undue burden on the deponent, Texas Rule 202.4(b) requires the order to “contain any protections the court finds necessary or appropriate to protect the witness or any person who may be affected by the procedure.”⁵⁴⁴ Accordingly, the trial court has broad discretion to control the deposition’s conduct and scope,⁵⁴⁵ and defense counsel should attempt to have the order limit the deposition’s scope to the petition’s specific allegations.

D. The Deposition’s Taking and Use

Except as otherwise provided in Texas Rule 202, presuit depositions “are governed by the rules applicable to depositions of nonparties in a pending suit.”⁵⁴⁶ Thus, when the order granting the Texas Rule 202 petition does not specify the deposition’s time and place, the witness must be served

⁵⁴¹ TEX. R. CIV. P. 202.4(b).

⁵⁴² *Id.*

⁵⁴³ See *supra* note 512 and accompanying text.

⁵⁴⁴ TEX. R. CIV. P. 202.4(b); accord *Combs v. Tex. Civil Rights Project*, 410 S.W.3d 529, 531 (Tex. App.—Austin 2013, pet. denied) (“[T]he trial court’s order granting the request must contain any protections it finds necessary or appropriate to protect the witness or any person who may be affected by the procedure.”); *In re Fernandez*, No. 04-99-00841-CV, 1999 Tex. App. LEXIS 9553, at *5 (Tex. App.—San Antonio Dec. 30, 1999, pet. denied) (not designated for publication) (same); *Valley Baptist Med. Ctr. v. Gonzalez*, 18 S.W.3d 673, 678 (Tex. App.—Corpus Christi 1999, pet. granted) (same), *vacated as moot*, 33 S.W.3d 821 (Tex. 2000).

⁵⁴⁵ See *In re Fernandez*, 1999 Tex. App. LEXIS 9553, at *7–8 (holding that the trial court, in ordering a presuit deposition to perpetuate testimony under Texas Rule 202 in connection with an anticipated suit by a frail, ill nursing-home patient against a nursing home for injuries suffered when she was abused or assaulted by the nursing home’s staff, did not abuse its discretion in ordering the patient’s nursing home’s attorneys to consult with the patient’s treating physician regarding the conditions under which she could be deposed); *Valley Baptist Med. Ctr.*, 18 S.W.3d at 676 (suggesting that, because Texas Rule 202, “essentially is an equitable procedure,” a trial court could order a bond to protect the deponent from costs), *vacated as moot*, 33 S.W.3d 821 (Tex. 2000).

⁵⁴⁶ TEX. R. CIV. P. 202.5.

with both a deposition notice and a subpoena a reasonable time before the deposition is taken, specifying a place permitted by Texas Rule 199.2(b)(2).

To prevent an end-run around discovery limitations that would govern an actual lawsuit, Texas Rule 202.5 provides that the scope of discovery in presuit depositions is “the same as if the anticipated suit or potential claim had been filed.”⁵⁴⁷ In other words, Texas Rule 192.3 governs the scope of discovery in presuit depositions.

A presuit deposition “may be used in a subsequent suit as permitted by the rules of evidence[.]”⁵⁴⁸ Under Texas Rule of Evidence 801(e)(3), a deposition taken in the “same proceeding” is exempt from the hearsay rule irrespective of the witness’s availability.⁵⁴⁹ “‘Same proceeding’ includes a proceeding in a different court but involving the same subject matter and the same parties or their representatives or successors in interest.”⁵⁵⁰ In addition to the admissibility standards in Texas Rule of Evidence 801(e)(3), a party’s deposition is admissible against the party as a party admission⁵⁵¹ and a nonparty’s deposition from another proceeding is admissible if it meets the requirements of the hearsay rule’s former-testimony exception (i.e., (1) the deponent is unavailable as a witness,⁵⁵² and (2) the party

⁵⁴⁷ *Id.*; accord *In re Wolfe*, 341 S.W.3d 932, 933 (Tex. 2011).

⁵⁴⁸ TEX. R. CIV. P. 202 cmt. 2.

⁵⁴⁹ TEX. R. EVID. 801(e)(3) (“A statement is not hearsay if: . . . In a civil case, the statement was made in a deposition taken in the same proceeding. ‘Same proceeding’ is defined in [Texas] Rule of Civil Procedure 203.6(b). The deponent’s unavailability as a witness is not a requirement for admissibility.”).

⁵⁵⁰ TEX. R. CIV. P. 203.6(b).

⁵⁵¹ *Dillee v. Sisters of Charity of the Incarnate Word Health Care Sys.*, 912 S.W.2d 307, 310 n.6 (Tex. App.—Houston [14th Dist.] 1995, no writ) (holding that the deposition of a party from an earlier action was admissible under former Texas Rule of Evidence 801(e)(2) as an admission by a party opponent); accord TEX. R. EVID. 801(e)(2) (“A statement that meets the following conditions is not hearsay: . . . The statement is offered against an opposing party and: (A) was made by the party in an individual or representative capacity; (B) is one the party manifested that it adopted or believed to be true; (C) was made by a person whom the party authorized to make a statement on the subject; (D) was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed; or (E) was made by the party’s coconspirator during and in furtherance of the conspiracy.”).

⁵⁵² TEX. R. EVID. 804(a) provides that a declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted from testifying about the subject matter of the declarant’s statement because the court rules that a privilege applies;
- (2) refuses to testify about the subject matter despite a court order to do so;

against whom the deposition testimony is offered, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination).⁵⁵³

Accordingly, if a presuit deposition results in a lawsuit involving the same subject matter and parties to the Texas Rule 202 petition (i.e., the lawsuit is the “same proceeding”), the deposition likely can be used in the lawsuit under Texas Rule of Evidence 801(e)(3) irrespective of whether it is the deposition of a party or a nonparty. Conversely, if the lawsuit is not the “same proceeding” because it involves a different subject matter or parties, the presuit deposition can be used only if the requirements of the former-testimony exception to the hearsay rule are met, against a party as an admission, or to impeach a nonparty’s testimony.

Even if the deposition is otherwise admissible, the trial court has discretion “to restrict or prohibit” its use in a later lawsuit “to protect a person who was not served with notice of the deposition from any unfair prejudice or to prevent abuse of [Texas Rule 202].”⁵⁵⁴

E. Appellate Review

An order under Texas Rule 202 allowing or denying a presuit deposition from a third party against which suit is not contemplated is a final appealable order.⁵⁵⁵ Such an order, however, is not a final appealable order

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement’s proponent has not been able, by process or other reasonable means, to procure the declarant’s attendance or testimony.

But this subdivision (a) does not apply if the statement’s proponent procured or wrongfully caused the declarant’s unavailability as a witness in order to prevent the declarant from attending or testifying.

TEX. R. EVID. 804(a).

⁵⁵³ *Id.* 804(b)(1).

⁵⁵⁴ TEX. R. CIV. P. 202.5.

⁵⁵⁵ *E.g.*, *Sossamon v. Bardin*, No. 11-12-00164-CV, 2012 Tex. App. LEXIS 6818, at *2 (Tex. App.—Eastland Aug. 16, 2012, no pet.) (mem. op.) (per curiam) (“A ruling on a [Texas] Rule 202 petition constitutes a final, appealable order only if the petition seeks discovery from a third party against whom a suit is not contemplated, but a [Texas] Rule 202 ruling is interlocutory and does not constitute a final, appealable order if discovery is sought from a person against whom

by a party against whom suit is anticipated.⁵⁵⁶ Consequently, such a person should challenge the order by filing a mandamus petition, which will be reviewed for an abuse of discretion.⁵⁵⁷

VI. SIGNING, CERTIFICATION, AND USE OF ORAL DEPOSITIONS— TEXAS RULE 203

A. *Presentment, Signature, and Changes*

Texas Rule 203.1 requires the deposition officer (i.e., the person recording the deposition, such as court reporter) to provide the original transcript of an oral deposition to the witness for signature.⁵⁵⁸ If the witness was represented by any attorney at the deposition, the transcript must be provided to the attorney.⁵⁵⁹ The Rule does not apply (1) when the “witness and all parties waive the signature requirement,⁵⁶⁰ (2) to depositions on written questions,⁵⁶¹ or (3) to nonstenographic recordings.⁵⁶² If the oral deposition was recorded both stenographically and nonstenographically (e.g., videotaped), the witness (or the witness’s attorney) is presented only with the transcript for signature and change.

Once the oral deposition transcript is presented to the witness or the witness’s attorney, the witness can make changes to his answers as reflected in the transcript. The changes must be made on a separate sheet of paper

litigation is either pending or contemplated.”); *IFS Sec. Grp., Inc. v. Am. Equity Ins.*, 175 S.W.3d 560, 563 (Tex. App.—Dallas 2005, no pet.) (same); *Thomas v. Fitzgerald*, 166 S.W.3d 746, 747 (Tex. App.—Waco 2005, no pet.) (same).

⁵⁵⁶ *In re Hewlett Packard*, 212 S.W.3d 356, 360 (Tex. App.—Austin 2006, pet. denied) (“[A]n order pursuant to [Texas R]ule 202 allowing pre-suit discovery incident to a contemplated lawsuit against the party from whom the discovery is sought is not a final, appealable order.”); *IFS Sec. Grp., Inc.*, 175 S.W.3d at 563 (same); *Thomas*, 166 S.W.3d at 747 (same).

⁵⁵⁷ *In re Cauley*, 437 S.W.3d 650, 655 (Tex. App.—Tyler 2014, no pet.) (“An order allowing a presuit deposition pursuant to [Texas] Rule 202 is not a final, appealable order. Therefore, there is no adequate remedy by appeal, and mandamus is the proper avenue to challenge the trial court’s order granting Efficien’s petition for Cauley’s presuit deposition. Consequently, our focus in this proceeding is whether Cauley has shown an abuse of discretion by the trial court.”) (citations omitted); *In re Prairiesmarts LLC*, 421 S.W.3d 296, 304 (Tex. App.—Fort Worth 2014, no pet.) (same); *In re Hewlett Packard*, 212 S.W.3d at 360 (same).

⁵⁵⁸ TEX. R. CIV. P. 203.1(a).

⁵⁵⁹ *Id.*

⁵⁶⁰ *Id.* 203.1(c)(1).

⁵⁶¹ *Id.* 203.1(c)(2).

⁵⁶² *Id.* 203.1(c)(3).

(i.e., an “errata sheet”) because Texas Rule 203.1(b) prohibits “erasures or obliterations of any kind . . . to the original deposition transcript.” The witness must give a reason for *each* change.⁵⁶³ A court should strike any change for which no reason is given.⁵⁶⁴

There are three general types of deposition changes: (1) form ones that correct misspellings, typographical errors, and transcription errors; (2) “fill-in-the-blank” ones that provide additional information that the witness agreed to provide during the deposition; and (3) substantive ones that either wholly change an answer or contradict the original answer (e.g., changing a “no” to a “yes” or *vice versa*). Substantive changes are clearly permitted by Texas Rule 203. This is because nothing in Texas Rule 203.1(b) places any limitation on the type of change that can be made by the witness; rather, it

⁵⁶³ *Id.* 203.1(b); *cf.* *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 277 F.R.D. 286, 295 (E.D. Va. 2011) (“But, the mere statement of some reason does not alone satisfy the rule. That is because courts require that each proffered change be accompanied by a specific reason that explains the nature of, and the need to make, the change.”); *Holland v. Cedar Creek Min. Inc.*, 198 F.R.D. 651, 653 (S.D. W. Va. 2001) (“The witness is also plainly bound by the rule to state specific reasons for each change.”); *Duff v. Lobdell-Emery Mfg. Co.*, 926 F. Supp. 799, 804 (N.D. Ind. 1996) (“The rule is not onerous . . . but there must be a reason for every change.”); *Lutig v. Thomas*, 89 F.R.D. 639, 641 (N.D. Ill. 1981) (“[A]fter each change, the deponent must state the specific reason for that particular change.”).

⁵⁶⁴ *Cf.* *EBC, Inc. v. Clark Bldg. Sys.*, 618 F.3d 253, 266 (3d Cir. 2010) (“Courts have found that the failure to provide a statement of reasons alone suffices to strike a proposed change. We agree with these courts. If the party or deponent proffering changes in the form or substance of a deposition transcript fails to state the reasons for the changes, the reviewing court may appropriately strike the errata sheet.”) (citations omitted); *Kouassi v. W. Ill. Univ.*, No. 13-cv-1265, 2015 U.S. Dist. LEXIS 64926, at *8–9 (C.D. Ill. May 18, 2015) (“This Court, however, will not consider Dr. Kouassi’s corrections because he did not offer them in a manner that complies with [Federal] Rule 30(e). . . . [T]o change deposition testimony in form or substance, deponents must satisfy a number of procedural hurdles. Among them, and one that trips Dr. Kouassi, is the requirement that deponents provide a statement of reasons for necessary changes. General reasons will not suffice; courts require that deponents submit a reason for every change they would like made to a deposition transcript. Here, rather than providing specific reasons for each requested change to the deposition, Plaintiff has made a blanket assertion that the deposition transcript does not accurately reflect the answers that he provided. In certain places of the transcript, where Plaintiff has identified minor transcription errors that do not change the substance of his answers, the Court has little doubt that his requested changes are well-taken. Yet, in these places, Plaintiff fails to state a reason even though the rule requires that he provide one.”); *E.I. du Pont de Nemours & Co.*, 277 F.R.D. at 295 (“The first relevant procedural requirement at issue here is found in [Federal] Rule 30(e)(1)(B) which requires the deponent to ‘sign a statement listing the changes and reasons for making them.’ It is, of course, clear that, if the deponent does not provide any reasons for a change, then the rule is violated and that procedural defect alone renders the errata sheet improper.”).

simply provides that the “witness may change the responses as reflected in the deposition transcript by indicating the desired changes.” Nor does the Rule permit the trial court to examine the sufficiency, reasonableness, or legitimacy of the reasons for the changes—even if the given reasons are unconvincing.⁵⁶⁵ This means that the witness can change his or her deposition testimony *carte blanche*, and changes of any nature, no matter how considerable or fundamental, are permitted, even if the changes are wholly inconsistent with, or contradictory to, the original testimony.⁵⁶⁶

⁵⁶⁵ *Lugtig*, 89 F.R.D. at 641.

⁵⁶⁶ *Texaco, Inc. v. Pursley*, 527 S.W.2d 236, 242 (Tex. Civ. App.—Eastland 1975, writ ref’d n.r.e.) (holding that a deponent can make substantive changes to his deposition); see *Wohlstein v. Aliezer*, 321 S.W.3d 765, 771–72 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (“[E]ven were we to read that portion of the deposition as some sort of binding admission, Wohlstein clarified that testimony through an errata sheet that accompanied the signature page to his deposition. Noting he had misunderstood counsel’s questions, Wohlstein corrected that testimony to read, ‘It is my claim.’ Therefore, that equivocal testimony, later revised, cannot form the basis for summary judgment.”).

Federal Rule 30(e)(1) governs changes to oral deposition transcripts and provides, in relevant part:

On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which (A) to review the transcript or recording; and (B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

FED. R. CIV. P. 30(e)(1). The majority of federal courts allow the deponent to make any type of change to the deposition transcript. *E.g.*, *Aetna Inc. v. Express Scripts, Inc.*, 261 F.R.D. 72, 75 (E.D. Pa. 2009) (“[C]ourts are split over whether deponents may use their errata sheets to make substantive changes to testimony. However, the majority rule, as laid out in [8A Charles A. Wright, Arthur R. Miller & Richard L. Marcus], *Federal Practice and Procedure*, § 2118, and followed by District Courts in this Circuit, is that a deponent may ‘make changes that contradict the original answers given, even if those changes are not supported by convincing explanations, as long as the deponent complies with the instructions provided within the rule itself for making such changes.’” (quoting *Consulnet Computing, Inc. v. Moore*, 631 F. Supp. 2d 614, 627 (E.D. Pa. 2008))); *Walker v. George Koch Sons, Inc.*, No. 2:07cv274 KS-MTP, 2008 U.S. Dist. LEXIS 81919, at *7 (S.D. Miss. Sept. 18, 2008) (“[T]he majority view ‘accords a plain meaning approach or literal interpretation to [Federal] Rule 30 and, consequently, allows any change in form or substance regardless of whether convincing explanations support the change.’” (quoting *Betts v. Gen. Motors Corp.*, No. 3:04cv169-M-A, 2008 U.S. Dist. LEXIS 54350, at *4 (N.D. Miss. July 16, 2008))); *Reilly v. TXU Corp.*, 230 F.R.D. 486, 489 (N.D. Tex. 2005) (noting that the majority rule is that a deponent may “make changes that contradict the original answers given, even if those changes are not supported by convincing explanations, as long as the deponent complies with the instructions provided within the rule itself for making such changes”).

If, however, substantive changes make the deposition incomplete or useless without further testimony, the party who took the deposition should be allowed to reopen the deposition⁵⁶⁷ to ask questions that are “made necessary by the changed answers, questions about the reasons the changes were made, and questions about where the changes originated, whether with the deponent or with his attorney.”⁵⁶⁸ In addition, if the witness is a party, a court may be able to order the party to pay the costs, including reasonable attorneys’ fees, incurred in connection with the second deposition.⁵⁶⁹

⁵⁶⁷ Cf. *Tingley Sys., Inc. v. CSC Consulting, Inc.*, 152 F. Supp. 2d 95, 120 (D. Mass. 2001) (“The standard to reopen a deposition is whether the changes contained in the errata sheets ‘make the deposition incomplete or useless without further testimony.’” (quoting *Sanford v. CBS, Inc.*, 594 F. Supp. 713, 715 (N.D. Ill. 1984))); *Lugtig*, 89 F.R.D. at 642 (same).

⁵⁶⁸ Cf. *Lugtig*, 89 F.R.D. at 642; *accord Reilly*, 230 F.R.D. at 491 (“[I]n light of the number and significance of Plaintiffs’ changes, the Court finds that reopening the deposition is an appropriate remedy. Consistent with the case law on point, the reopening should be limited in scope. Defendants may inquire about the reasons for the changes and the source of the changes, such as whether they came from Plaintiff himself or his counsel. In addition, Defendants may also ask follow-up questions to the changed responses. Plaintiff, as the party making the 111 changes, will be responsible for costs and attorney’s fees.”); *Tingley Sys., Inc.*, 152 F. Supp. 2d at 121. (“Having reviewed the remaining changes, this court finds that the number and type of changes made to the depositions justify a reopening for the limited purpose of inquiring into the reasons for the changed answers and where the changes originated. No deposition shall extend beyond the subject matter of the reasons for the changes and the origination of the changes, i.e., whether such changes originate with the attorney or the deponent.”) (citation omitted).

⁵⁶⁹ Federal courts almost uniformly require this. *E.g.*, *Walker*, 2008 U.S. Dist. LEXIS 81919, at *8 (“These courts that interpret [Federal] Rule 30(e) broadly generally have adopted remedial measures to limit the potential for abuse. Such measures include reopening the deposition for limited purposes, requiring the deponent to pay the costs of reopening his deposition, and ordering that the original and changed answers, as well as the reasons for the changes, remain in the record and may be used during summary judgment and/or at trial.”); *Reilly*, 230 F.R.D. at 491 (“Plaintiff, as the party making the 111 changes, will be responsible for costs and attorney’s fees.”); *Sanford v. CBS, Inc.*, 594 F. Supp. 713, 715 (N.D. Ill. 1984) (“In this case, Jackson has made numerous changes in his deposition, many of them differing significantly from his original testimony Should plaintiff choose to reopen the deposition, defendants will bear the related costs and attorney’s fees.”); *Lugtig*, 89 F.R.D. at 642 (“Furthermore, if changes made in the deposition pursuant to [Federal] Rule 30(e) make the deposition incomplete or useless without further testimony, the party who took the deposition can reopen the examination Since it is defendant’s actions which necessitate reopening the examination of defendant, the costs and attorneys fees connected with the continued deposition will be borne by defendant.”). Neither Texas Rule 215, which governs sanctions and discovery abuse, nor any other Texas discovery rule specifically allows a trial court to order a witness, whose substantive changes to a deposition require his or her re-deposition, to pay the cost of the second deposition. Texas Rule 215.3, however, allows a trial to sanction a party “abusing the discovery process in seeking, making or

Finally, the original answers to the deposition questions remain part of the record and either can be used to impeach the witness at trial or can be read into evidence.⁵⁷⁰ This is because nothing in Texas Rule 203.1(b)'s language requires or implies that the original answers are to be stricken when changes are made and because under Texas Rule of Evidence 804, such testimony is an admissible admission by a party-opponent.⁵⁷¹

The witness must sign the transcript, as well as the errata sheet, and return them to the deposition officer within twenty days after the transcript was provided to the witness or the witness's attorney.⁵⁷² Because Texas Rule 203.1(b) provides that a failure to return the transcript within the twenty-day period "may be deemed" a waiver of "the right to make the changes," the trial court has discretion to allow changes to be made after the twenty-day period if the late changes do not prejudice any party to the

resisting discovery" to "charge[] all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party[.]" TEX. R. CIV. P. 215.2(b)(2), 215.3; see *In re Prince*, No. 14-06-00895-CV, 2006 Tex. App. LEXIS 10558, at *12 (Tex. App.—Houston [14th Dist.] Dec. 12, 2006, no pet.) ("[A] court's power to impose sanctions on non-parties is limited to its contempt power."). If a party's substantive changes to his or her deposition transcript require a second deposition, there certainly has been a sufficient abuse of the discovery process to allow a trial court to order the party to pay the expenses incurred by the opposing party in connection with the second deposition.

⁵⁷⁰ *Foutz v. Town of Vinton*, 211 F.R.D. 293, 295 (W.D. Va. 2002).

⁵⁷¹ Cf. *Podell v. Citicorp Diners Club*, 112 F.3d 98, 103 (2d Cir. N.Y. 1997) ("At the same time, when a party amends his testimony under [Federal] Rule 30(e), 'the original answer to the deposition questions will remain part of the record and can be read at the trial. Nothing in the language of [Federal] Rule 30(e) requires or implies that the original answers are to be stricken when changes are made.' This Court has recognized that because 'any out-of-court statement by a party is an admission,' a deponent's 'original answer should [be] admitted [into evidence]' even when he amends his deposition testimony—with the deponent 'of course . . . free to introduce the amended answer and explain the reasons for the change.'" (quoting *Lugtig*, 89 F.R.D. at 641, and *Usiak v. N.Y. Tank Barge Co.*, 299 F.2d 810 (2d Cir. 1962)); *Maharaj v. Geico Cas. Co.*, 996 F. Supp. 2d 1303, 1312 (S.D. Fla. 2014) (same); *Foutz*, 211 F.R.D. at 295 (same). One Texas case has held that a trial court has discretion to exclude the original testimony under Texas Rule of Evidence 403 if such testimony's probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. *Ramsey v. Cravey*, No. 04-03-00342-CV, 2004 Tex. App. LEXIS 5724, at *3-5 (Tex. App.—San Antonio June 30, 2004, pet. denied) (mem. op.). Such exclusion should be the exception rather than the rule.

⁵⁷² TEX. R. CIV. P. 203.1(b).

action.⁵⁷³ It appears that the party objecting to the change's admissibility has the burden to establish that it was prejudiced by the untimely change.⁵⁷⁴

The witness's failure to sign the transcript, however, has no consequence. Under Texas Rule 203.1(b), an unsigned transcript may be certified and used to the same extent as a signed one.⁵⁷⁵

⁵⁷³ *Dickerson v. State Farm Lloyd's Inc.*, No. 10-11-00071-CV, 2011 Tex. App. LEXIS 6061, at *39–41 (Tex. App.—Waco Aug. 3, 2011, pet. denied) (mem. op.) (“[E]ven though it is undisputed that appellees did not return the revised deposition transcript to the deposition officer within the twenty-day deadline, it was within the discretion of the trial court to accept the changes or conclude that appellees waived the right to make the tendered changes Should it believe that a party’s changes would inflict harm or prejudice on opposing parties, the trial court has the discretion to conclude that such changes were waived.”). Unlike Texas Rule 203.1(b), Federal Rule 30(e) gives a federal trial court no discretion to allow late changes to a deposition transcript. *E.g.*, *In re Kugel Mesh Hernia Repair Patch Litig.*, No. 07-1842ML, 2010 U.S. Dist. LEXIS 16538, at *13–14 (D.R.I. Feb. 23, 2010) (“Rule 30(e), Fed. R. Civ. P., allows a deponent to make changes ‘in form or substance’ to deposition testimony upon request. A deponent who utilizes this ‘privilege’ must, however, comply with the procedural mechanics of the rule. The mechanics ‘could not be more straightforward: a deponent has thirty days after notification by the court reporter to review the deposition transcript and to sign a statement setting forth any changes and the reasons for those changes.’” (quoting *Welsh v. R.W. Bradford Trans.*, 231 F.R.D. 297, 298–99 (N.D. Ill. 2005))); *Griswold v. Fresenius USA*, 978 F. Supp. 718, 722 (N.D. Ohio 1997) (Federal “Rule 30(e) permits a deponent to amend his deposition only within thirty days after receiving notice that the transcript is available; that date has passed with respect to the deposition at issue. Therefore, Plaintiff’s corrections to his October 15, 1996 deposition must be stricken.”).

⁵⁷⁴ *Dickerson*, 2011 Tex. App. LEXIS 6061, at *42 (“Based on our reading of Texas R]ule 203.1, we cannot agree with appellants’ insistence that Laura and Miguel were duty-bound to provide an excuse to explain the delay. To endorse appellants’ argument would be to add language to [Texas R]ule 203.1(b) which does not exist. We decline to do so.”) (citation omitted).

⁵⁷⁵ *See also* TEX. R. CIV. P. 203.2(b); *Marty’s Food & Wine, Inc. v. Starbucks Corp.*, No. 05-01-0008-CV, 2002 Tex. App. LEXIS 7672, at *11 (Tex. App. Dallas—Oct. 28, 2002, no pet.) (“Marty’s objected that Shapiro had not signed the deposition and that the excerpts should not be allowed because twenty days had not elapsed since the deposition was taken to allow for any corrections by the witness. ‘Mere lack of signature will not justify suppression of a deposition, even when timely motion is made, unless the reasons for not signing impugn the verity or reliability of the deposition.’ No allegation was made that the deposition was unreliable. Therefore, the trial court did not err in overruling Marty’s objection to the use of Shapiro’s deposition.”) (citation omitted) (quoting *Hill v. Rich*, 522 S.W.2d 597, 600 (Tex. Civ. App.—Austin 1975, writ ref’d n.r.e.)); *Klorer v. Block*, 717 S.W.2d 754, 757 (Tex. App.—San Antonio 1986, writ ref’d n.r.e.) (“It is settled law that the absence of the signature alone is not grounds for suppressing a deposition. ‘It is not the mere lack of signature which justifies suppression, but reasons which may impugn the verity or reliability of the deposition.’” (quoting *Bell v. Linehan*, 500 S.W.2d 228, 230 (Tex. Civ. App.—Texarkana 1973, writ ref’d n.r.e.))).

B. Certification

For all types of depositions, the deposition officer “must file with the court, serve on all parties, and attach as part of the deposition transcript or nonstenographic recording of an oral deposition a certificate duly sworn by the officer,”⁵⁷⁶ which states:

- (a) that the witness was duly sworn by the officer and that the transcript or nonstenographic recording of the oral deposition is a true record of the testimony given by the witness;
- (b) that the deposition transcript, if any, was submitted to the witness or to the attorney for the witness for examination and signature, the date on which the transcript was submitted, whether the witness returned the transcript, and if so, the date on which it was returned[;]
- (c) that changes, if any, made by the witness are attached to the deposition transcript;
- (d) that the deposition officer delivered the deposition transcript or nonstenographic recording of an oral deposition in accordance with [Texas] Rule 203.3;
- (e) the amount of time used by each party at the deposition;
- (f) the amount of the deposition officer’s charges for preparing the original deposition transcript, which the clerk of the court must tax as costs; and
- (g) that a copy of the certificate was served on all parties and the date of service.⁵⁷⁷

Although Texas Rule 203.2 refers to “deposition officer” in the singular, there may be two deposition officers if the deposition was recorded both stenographically and nonstenographically.⁵⁷⁸ In such a case, the court reporter and the person recording the deposition nonstenographically (e.g., the videographer) must each certify the recording for which he or she is responsible. But the parties can agree to designate one of them as the

⁵⁷⁶ TEX. R. CIV. P. 203.2.

⁵⁷⁷ *Id.*

⁵⁷⁸ *Id.* 199.1(c).

deposition officer taking the deposition's official record, relieving the other one of the certification requirement.⁵⁷⁹

As noted above, Texas Rule 203.2(f) requires the deposition officer's certificate to state the cost for "preparing the original deposition transcript," which the clerk of the court must tax as costs. Because the Rule does not mention the cost of a deposition's nonstenographic recording, a question exists regarding whether such costs are taxable ones if the deposition is noticed for nonstenographic recording only as permitted by Texas Rule 199.1(c). If a deposition is noticed only for nonstenographic recording, Texas Rule 199.1(c) permits any other party to notice it for another method of recording (e.g., stenographic recording) at that *party's expense* unless otherwise ordered by the court.⁵⁸⁰ Because the Rule does not require the original noticing party to pay the cost of the deposition's nonstenographic recording, arguably its cost is a taxable one.⁵⁸¹

Whether this is actually the case is unclear because Section 31.007(b) of the Texas Civil Practice and Remedies Code, which defines taxable recoverable costs, does not specifically provide for the recovery of costs for nonstenographic deposition recordings.⁵⁸² The majority of the Texas courts of appeals to have considered the issue have held that the costs of nonstenographic deposition recordings (i.e., videotapes) are not recoverable under the statute.⁵⁸³

⁵⁷⁹ *Id.* 191.1.

⁵⁸⁰ *Id.* 199.1(c).

⁵⁸¹ *Id.*

⁵⁸² "[F]ees of the court reporter for the original of stenographic transcripts necessarily obtained for use in the suit" and "such other costs and fees as may be permitted by these rules and state statutes" are recoverable. TEX. CIV. PRAC. & REM. CODE ANN. § 31.007(b)(2), (4) (West 2015).

⁵⁸³ *Compare* Waste Mgmt. of Tex. v. Tex. Disposal Sys. Landfill, No. 03-10-00826-CV, 2014 Tex. App. LEXIS 12391, at *12 (Tex. App.—Austin Nov. 14, 2014, no pet.) ("The costs for video depositions or copies of depositions or transcripts, however, are not recoverable as court costs."), *Gumpert v. ABF Freight Sys., Inc.*, 312 S.W.3d 237, 242 (Tex. App.—Dallas 2010, no pet.) (holding that "because no statute or rule authorizes the recovery of the costs to videotape a deposition or obtain a copy of a deposition transcript," those items are not recoverable costs), *and* *Shaikh v. Aerovias De Mex.*, 127 S.W.3d 76, 82 (Tex. App.—Houston [1st Dist.] 2003, no pet.) ("[T]he rule providing for the taxing the costs for depositions does not include taxing the cost of copies of depositions The copies of deposition transcripts, videotapes, and litigation documents listed in Aeromexico's Bill of Costs are not required by law and are part of the expenses of litigation."), *with* *Crescendo Invs. v. Brice*, 61 S.W.3d 465, 480–81 (Tex. App.—San Antonio 2001, pet. denied) (holding that certified copies of depositions can be taxed as costs).

C. Delivery

“The deposition officer must endorse the title of the action and ‘Deposition of (name of witness)’ on the original deposition transcript (or a copy, if the original was not returned) or the original nonstenographic recording of an oral deposition”⁵⁸⁴ The officer must return the oral deposition transcript to the party “who asked the first question appearing in the transcript.”⁵⁸⁵ If the deposition was recorded nonstenographically, the officer must return the nonstenographic recording (e.g., the videotape) to the party who requested it.⁵⁸⁶ The officer also must serve notice of the delivery on all other parties.⁵⁸⁷ The transcript or recording is not filed with the court by the deposition officer.

“The party receiving the original deposition transcript or nonstenographic recording *must* make it available on reasonable request for inspection and copying by any other party.”⁵⁸⁸ Accordingly, it is not necessary for the parties to pay the court reporter for more than the original deposition transcript, and the parties can agree to split that cost and the cost of making copies of the original. Of course, “[a]ny party or the witness is entitled to obtain a copy of the deposition transcript or nonstenographic recording from the deposition officer on payment of a reasonable fee.”⁵⁸⁹

⁵⁸⁴ TEX. R. CIV. P. 203.3(a).

⁵⁸⁵ *Id.* 203.3(a)(1). Charges for a deposition are governed by Section 52.059 of the Texas Government Code. The attorney who takes the deposition, as well as the attorney’s law firm, are “jointly and severally liable for a shorthand reporter’s charges for: (1) the shorthand reporting of the deposition; (2) transcribing the deposition; and (3) each copy of the deposition transcript requested by the attorney.” TEX. GOV’T CODE ANN. § 52.059(a) (West 2013). An attorney “takes” a deposition if the attorney: (A) obtains the deponent’s appearance through an informal request; (B) obtains the deponent’s appearance through formal means, including a notice of deposition or subpoena; or (C) asks the first question in the deposition.” *Id.* § 52.059(d)(2); see TEX. R. CIV. P. 203.3(a) (providing that the original deposition transcript is delivered to the attorney “who asked the first question”). An attorney who asks for a copy of the deposition transcript, as well as the attorney’s law firm, are “jointly and severally” liable for the reporter’s charges for “each copy of the deposition transcript requested by the attorney.” TEX. GOV’T CODE ANN. § 52.059(b). If an attorney does not want to be bound by the requirements of Section 52.059, the attorney must so state on the record before the deposition begins and “a determination of the person who will pay for the deposition costs will be made on the record[.]” *Id.* § 52.059(c).

⁵⁸⁶ TEX. R. CIV. P. 203.3(a)(2).

⁵⁸⁷ *Id.* 203.3(b).

⁵⁸⁸ *Id.* 203.3(c) (emphasis added).

⁵⁸⁹ *Id.*

D. Exhibits

Texas Rule 203.4 governs deposition exhibits. It requires the deposition officer, “at the request of a party” during the deposition, to mark and annex to the deposition transcript or nonstenographic recording any documents and things produced for inspection during the deposition.⁵⁹⁰

The producing witness, under Texas Rule 203.4, can produce copies instead of original documents provided the witness gives “all other parties fair opportunity at the deposition to compare the copies with the originals.” If, however, the witness offers originals rather than copies:

[T]he deposition officer must, after the conclusion of the deposition, make copies to be attached to the original deposition transcript or nonstenographic recording, and then return the originals to the person who produced them. The person who produced the originals must preserve them for hearing or trial and make them available for inspection or copying by any other party on seven days’ notice. Copies annexed to the original deposition transcript or nonstenographic recording may be used for all purposes.⁵⁹¹

Texas Rule 203.4’s requirement that the witness bring the original documents to the deposition is inconsistent with Texas Rules 196.3(b) and 199.2(b)(5)’s requirements for parties and persons subject to a party’s control. The former Rule provides that “[t]he responding party may produce copies in lieu of originals unless a question is raised as to the authenticity of the original or in the circumstances it would be unfair to produce copies in lieu of originals.”⁵⁹² Texas Rule 199.2(b)(5), in turn, provides that production requests in a deposition notice for the deposition of a party or a person subject to a party’s control are governed by Texas Rule 196. Thus, it is unclear whether Texas Rule 203.4’s requirement regarding the production of original documents trumps Texas Rule 196.2(b)(5)’s requirement that original documents need not be produced by parties or persons subject to their control.

If the witness is not a party or subject to a party’s control, Texas Rule 204’s provisions regarding the production of originals would apply because Texas Rule 199.2(b)(5) incorporates the provisions of Texas Rules 176 and

⁵⁹⁰ *Id.* 203.4.

⁵⁹¹ *Id.*

⁵⁹² *Id.* 196.3(b).

205 with respect to the witness's responses to subpoenas⁵⁹³ and neither Rule provides that only copies need be produced.

E. Motions to Suppress

To object to errors or irregularities in how a deposition was prepared, transcribed, signed, certified, sealed, endorsed, or delivered, a party must file a written motion to suppress the deposition and serve it on the other parties.⁵⁹⁴ If the deposition was transcribed stenographically and, if it was properly delivered at least one day before trial, the motion must be filed *before* trial.⁵⁹⁵ However, if the deposition was recorded nonstenographically, the motion need be filed before trial *only* if the nonstenographic recording was properly delivered at least thirty days before trial. Otherwise, the motion can be filed during the trial.⁵⁹⁶

F. Using Depositions

The admissibility of deposition testimony is governed by a combination of Texas Rule 203.6(b) and the hearsay rules in the Texas Rules of Evidence.

⁵⁹³ *Id.* 199.2(b)(5) (“A notice may include a request that the witness produce at the deposition documents or tangible things within the scope of discovery and within the witness’s possession, custody, or control. If the witness is a nonparty, the request must comply with [Texas] Rule 205 and the designation of materials required to be identified in the subpoena must be attached to, or included in, the notice. The nonparty’s response to the request is governed by [Texas] Rules 176 and 205.”).

⁵⁹⁴ TEX. R. CIV. P. 203.5. (“A party may object to any errors and irregularities in the manner in which the testimony is transcribed, signed, delivered, or otherwise dealt with by the deposition officer by filing a motion to suppress all or part of the deposition.”).

⁵⁹⁵ *Id.*; *Garza v. Guerrero*, 993 S.W.2d 137, 140 (Tex. App.—San Antonio 1999, no pet.) (construing former Texas Rule 207(3) and explaining: “If a deposition transcript has been on file with the trial court for one day or more before trial, any error in the manner in which the deposition transcript is signed is waived unless a written motion to suppress is filed and delivered before the trial commences. Only if the deposition has not been on file for one day prior to trial may the motion to suppress be made orally at the time the deposition is offered into evidence. The deposition in this case was taken on September 5, 1997, and trial commenced September 15, 1997. There is no evidence in the record with regard to the date the deposition was filed with the trial court. The Garzas’ attorney states in his objection, however, that the deposition was not on file for more than one day before trial; therefore, we conclude that the Garzas did not waive their objection by failing to file a written motion to suppress. The Garzas’ oral motion to suppress was sufficient to preserve error.”).

⁵⁹⁶ TEX. R. CIV. P. 203.5.

1. Depositions Taken in the Same Proceeding

Texas Rule 203.6(b) provides that “[a]ll or part of a deposition may be used for any purpose in the same proceeding in which it was taken.” “Same proceeding” includes both the action in which the deposition was taken and “a proceeding in a different court but involving the same subject matter and the same parties or their representatives or successors in interest.”⁵⁹⁷

Under Texas Rule of Evidence 801(e)(3), a deposition taken in the same proceeding is exempt from the hearsay rule irrespective of the witness’s availability.⁵⁹⁸ Thus, such deposition testimony can be used instead of, or in addition to, the witness’s live testimony irrespective of whether the witness is available to testify.

Under Texas Rule 191.4, deposition transcripts are not automatically filed by the deposition officer but may be filed for use in court proceedings. Thus, if the custodial attorney files the original deposition transcript or a noncustodial attorney files a certified copy of it, the transcript may be used at trial by any party for any purpose.⁵⁹⁹

Under Texas Rule 203.6(b), “[a] deposition is admissible against a party joined after the deposition was taken if: (1) the deposition is admissible pursuant to Rule 804(b)(1) of the Texas Rules of Evidence, [the former-testimony exception to the hearsay rule,] or (2) that party has had a reasonable opportunity to redepose the witness and has failed to do so.” The former-testimony exception to the hearsay rule allows a deposition to be used if (1) the declarant is unavailable as a witness, and (2) the party against whom the deposition testimony is offered, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.⁶⁰⁰

If a party fails to attend a deposition for which the party received proper notice, the deposition can be used against the party for all purposes in the action. Even if the party did not receive proper notice of the deposition, it

⁵⁹⁷ *Id.* 203.6(b).

⁵⁹⁸ TEX. R. EVID. 801(e)(3) (“A statement that meets the following conditions is not hearsay: . . . In a civil case, the statement was made in a deposition taken in the same proceeding. ‘Same proceeding’ is defined in [Texas] Rule of Civil Procedure 203.6(b). The deponent’s unavailability as a witness is not a requirement for admissibility.”).

⁵⁹⁹ TEX. R. CIV. P. 203.6(b).

⁶⁰⁰ TEX. R. EVID. 804(b)(1).

appears that it can be used against the party if the party had a reasonable time to redepose the witness and failed to do so.⁶⁰¹

2. Depositions Taken in Another Proceeding

A deposition from another proceeding can be used in an action only if it is admissible under the Texas Rules of Evidence.⁶⁰² If the deposition is one of a party to the action, it is admissible as a party admission.⁶⁰³

A nonparty's deposition from another proceeding is admissible only if it meets the requirements of the hearsay rule's former-testimony exception, Texas Rule of Evidence 804(b)(1), which requires that the (1) the declarant (i.e., the deponent) is unavailable as a witness,⁶⁰⁴ and (2) the party against

⁶⁰¹ *Onyung v. Onyung*, No. 01-10-00519-CV, 2013 Tex. App. LEXIS 9190, at *56–57 (Tex. App.—Houston [1st Dist.] July 25, 2013, pet. denied) (applying Texas Rule 203.6(b) by analogy to a situation in which a party did not receive notice of a deposition, but had ample opportunity to redepose the witness, noting that “[a]lthough [Texas] Rule 203.6(b) does not directly apply to this situation because the Yuen law firms were not parties ‘joined’ after the deposition was taken, the principle undergirding the rule applies nevertheless”).

⁶⁰² TEX. R. CIV. P. 203.6(c) (“Depositions taken in different proceedings may be used as permitted by the Rules of Evidence.”).

⁶⁰³ *Dillee v. Sisters of Charity of the Incarnate Word Health Care Sys.*, 912 S.W.2d 307, 310 n.6 (Tex. App.—Houston [14th Dist.] 1995, no writ) (holding that the deposition of a party from an earlier action was admissible under former Texas Rule of Civil Evidence 801(e)(2) as an admission by a party opponent); accord TEX. R. EVID. 801(e)(2) (“A statement that meets the following conditions is not hearsay: . . . The statement is offered against an opposing party and: (A) was made by the party in an individual or representative capacity; (B) is one the party manifested that it adopted or believed to be true; (C) was made by a person whom the party authorized to make a statement on the subject; (D) was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed; or (E) was made by the party’s coconspirator during and in furtherance of the conspiracy.”).

⁶⁰⁴ TEX. R. EVID. 804(a) provides that a declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted from testifying about the subject matter of the declarant’s statement because the court rules that a privilege applies;
- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

whom the deposition testimony is offered, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.⁶⁰⁵

3. Procedure for Using Deposition Testimony

At trial, the party offering deposition testimony either must read the relevant portions of the deposition transcript or play the relevant portion of the videotaped deposition into the record.⁶⁰⁶ When using a deposition transcript, generally one attorney, sitting at counsel table, reads the questions, and another, sitting in the witness stand, reads the answers. Unless the parties agreed otherwise, leading, form, and nonresponsiveness objections made during the deposition can be urged during the trial along with any non-form, substantive objections (e.g., relevance, hearsay, materiality, the witness's competence).⁶⁰⁷

Deposition testimony also can be used in support of or opposition to a summary judgment motion.⁶⁰⁸ Deposition excerpts submitted as summary judgment evidence need not be authenticated by an affidavit certifying the truthfulness and correctness of the copied excerpts.⁶⁰⁹

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the declarant's attendance or testimony.

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

TEX. R. EVID. 804(a).

⁶⁰⁵ *Id.* 804(b)(1).

⁶⁰⁶ *See* TEX. R. CIV. P. 203.6(b).

⁶⁰⁷ *See id.* 199.5(e). Deposition objections are discussed in Sections II.G.3 and III.D.

⁶⁰⁸ TEX. R. CIV. P. 166a(d) ("Discovery products not on file with the clerk may be used as summary judgment evidence . . ."); *accord* *McConathy v. McConathy*, 869 S.W.2d 341, 342 (Tex. 1994).

⁶⁰⁹ *McConathy*, 869 S.W.2d at 342 ("All parties have ready access to depositions taken in a cause, and thus deposition excerpts submitted with a motion for summary judgment may be easily verified as to their accuracy. Authentication is not necessary and is not required under the present rules.").

4. Use of Nonstenographic Recordings

“A nonstenographic recording of an oral deposition, or a written transcription of all or part of such a recording, may be used to the same extent as a deposition taken by stenographic means.”⁶¹⁰ The trial court, for good cause shown, such as when there is a dispute regarding the nonstenographic recording’s or the written transcript’s contents, can order the party seeking to use the nonstenographic deposition or written transcription of it to first obtain a complete stenographic recording prepared by a certified shorthand reporter.⁶¹¹

If a certified shorthand court reporter is asked to prepare a transcript of the nonstenographic deposition recording, “[t]he court reporter must, to the extent applicable, comply with the provisions of [Texas Rule 203], except that the court reporter must deliver the original transcript to the attorney requesting the transcript, and the court reporter’s certificate must include a statement that the transcript is a true record of the nonstenographic recording.”⁶¹²

As is the case with the original deposition, “[t]he party to whom the court reporter delivers the original transcript must make the transcript available, upon reasonable request, for inspection and copying by the witness or any party.”⁶¹³

VII. CONCLUSION

Depositions serve a variety of purposes. They can be used to discover facts and the opposing party’s legal and factual contentions and positions, to perpetuate the testimony of a witness who might not be available at the time of the trial, or to investigate a claim or suit. Depositions can force witnesses to adopt under oath a version of the facts that can be used for impeachment if the witness later changes his or her testimony. They also allow a party to evaluate the opposition’s witnesses and attorney and observe his or her own client and witnesses under cross-examination. Because depositions are central to civil litigation and perhaps the single

⁶¹⁰TEX. R. CIV. P. 203.6(a).

⁶¹¹*Id.* 203.6(a).

⁶¹²*Id.* Because such a transcript is not “the original deposition transcript,” Texas Rule 203.1’s signature requirements do not apply. *See id.* 203.1(c)(3).

⁶¹³*Id.* 203.6(a).

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most important discovery device, it is imperative that Texas practitioners understand and follow the discovery rules governing them.