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Discovery Update for Appellate Lawyers

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Haynes and Boone, LLP, Partner, Appellate Practice Group, Fort Worth, Texas.
Adjunct Professor, Legal Research and Writing, Texas A & M University School of Law, 1998-2001.

PROFESSIONAL ASSOCIATIONS:
Admitted—Texas state courts; Supreme Court of the United States; United States Courts of Appeals, Second, Fifth Sixth, and Ninth Circuits; United States District Court, Northern District of Texas.

Member—State Bar of Texas, Appellate Section; ABA, Section of Litigation/Appellate Practice Committee, Council of Appellate Lawyers; Bar Association of the Fifth Federal Circuit; Tarrant County Bar Association, Appellate Section; College of the State Bar of Texas; American, Texas and Tarrant County Bar Foundations.

BOARDS AND COMMITTEES:
American Bar Association—Co-Chair Appellate Practice Committee, Section of Litigation (2009-12), Co-Chair, Rules and Statutes Subcommittee (2006-09).

State Bar of Texas—Council, Appellate Section (2008-11), Committee Chair (2008-14); Member, Board of Editors, Texas Bar Journal (2009-15); Member, Pattern Jury Charge Committee, Oil and Gas (2013-16); Chair, Pattern Jury Charge Committee, Business, Consumer, and Employment (2006-09), Vice Chair (2003-06), Member (2001-09); Member, Annual Meeting Committee (2009-10); Member, Pattern Jury Charge, Oversight Committee (2003-05).

Tarrant County—Director (2007-08); National Delegate, Fort Worth Chapter, Federal Bar Association (2013-15); Bar Association: Chair, Business Litigation Section (2012-13); Chair/Vice-Chair/Secretary, Appellate Section (2004-07); Chair, Bylaws Committee (2009-10), Brown Bag Seminar Committee (2004-07, Member 2001-11); Member, Judicial Evaluation Committee (2000-11); Eldon B. Mahon Inn of Court (Associate, Barrister).

Community Activities—Board, Fort Worth Chamber of Commerce (2011-14); Board, Fort Worth Public Library Foundation (2010-15); Board, Big Brothers, Big Sisters, Western Region (2010-12).

Contributing Author—The Class Action Fairness Act: Law and Strategy (ABA 2013); A Practitioner's Guide to Appellate Advocacy (ABA, Anne Marie Lofaso ed., 2010).

HONORS AND RECOGNITIONS:
Member, American Law Institute (2007-Present).
Ranked in the *Chambers USA Guide*, Litigation: Appellate Practice (2012-14).
Best Lawyers in America, published by Woodward/White (2005-15).
Texas Super Lawyer, *Texas Monthly* (2003-14), Top 50 Texas Female Lawyers (2004, 2005, 2008-14), Top 100 Dallas/Fort Worth Region (2010, 2012, 2014).
Tarrant County Top Appellate Attorneys, *Fort Worth, Texas, Magazine* (2002-14, annually).
Power Attorney, *Fort Worth Business Press* (2013).
Outstanding Subcommittee Chair, Appellate Practice Committee, ABA Section of Litigation (2009).
Best Series of Articles in Local Bar Publication Award, State Bar of Texas (2007).

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Southern Methodist University, J.D., with honors, May 1991.
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Vanderbilt University Law School, J.D., 2014.
Baylor University, Master of Taxation, 2011.
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I. Introduction

Discovery is the frequent subject of both interlocutory mandamus review and ordinary appeals. This paper provides a summary of cases concerning discovery under the Texas Rules of Civil Procedure decided over the last several years, and a discussion of mandamus procedures that highlights categories of discovery issues that have been the subject of recent review by petition for writ of mandamus. Where applicable, cases may appear (with full cite) in both sections.

II. Update: Recent Discovery Decisions

This section provides the text of the rules that have been the subject of recent opinions, followed by the citations of the recent cases in bold with a descriptive parenthetical.

A. Rules 190-193—Scope

> **190.1 Discovery Control Plan Required**.
> Every case must be governed by a discovery control plan as provided in this Rule. A plaintiff must allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under Level 1, 2, or 3 of this Rule."

TEX. R. CIV. P. 190.1; *see* ***Border States Elec. Supply of Tex., Inc. v. Coast to Coast Elec., LLC***, No. 13-13-00118-CV, 2014 WL 3953961, at *12 (Tex. App.—Corpus Christi May 29, 2014, pet. denied) (holding that the trial court did not abuse its discretion under Rule 190.4 in failing to issue a Level 3 scheduling order because there was ample time for discovery during the four years that the case was pending).

> **190.3 Discovery Control Plan - By Rule (Level 2)**
> …
> (b) **Limitations**. Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations:
> (1) **Discovery period**. All discovery must be conducted during the discovery period, which begins when suit is filed and continues until:
> (A) 30 days before the date set for trial, in cases under the Family Code; or
> (B) in other cases, the earlier of
> (i) 30 days before the date set for trial, or
> (ii) nine months after the earlier of the date of the first oral deposition or the due date of the first response to written discovery.

TEX. R. CIV. P. 190.3(b).

> **190.4 Discovery Control Plan - By Order (Level 3)**
> (a) **Application**. The court must, on a party's motion, and may, on its own initiative, order that discovery be conducted in accordance with a discovery control plan tailored to the circumstances of the specific suit. The parties may submit an agreed order to the court for its consideration. The court should act on a party's motion or agreed order under this subdivision as promptly as reasonably possible.

TEX. R. CIV. P. 190.4(a); *see* ***Payne v. J. Baker Corp.***, No. 02-12-00181-CV, 2013WL 2091774, at *4 (Tex. App.—Fort Worth May 16, 2013, no pet.) (holding in absence of requested Rule 190.4 requested scheduling order, Rule 190.3 Level 2 provisions controlled, and holding that court abused its discretion in denying continuance of summary judgment hearing when discovery sought material to defeating the motion prior to deadline and shortly after filing of case and motion); ***Sloan v. Hill***, No. 01-12-000-45-CV, 2013 WL 816414, at *4-5 (Tex. App.—Houston [1st Dist.] March 5, 2013, pet. denied) (without discovery order, Rule 190.3 controlled, and discovery period had passed, second continuance not requested, and no request to alter discovery deadlines; trial court did not abuse its discretion in deciding adequate time for discovery had passed before granting Rule 166a(i) no-evidence motion for summary judgment).

> **190.5 Modification of Discovery Control Plan**
> The court may modify a discovery control plan at any time and must do so when the interest of justice requires. Unless a suit is governed by the expedited actions process in Rule 169, the court must allow additional discovery:
> (a) related to new, amended or supplemental pleadings, or new information disclosed in a discovery response or in an amended or supplemental response, if:
> (1) the pleadings or responses were made after the deadline for completion of discovery or so nearly before that deadline that an adverse party does not have an adequate opportunity to conduct discovery related to the new matters, and

(2) the adverse party would be unfairly prejudiced without such additional discovery;

(b) regarding matters that have changed materially after the discovery cutoff if trial is set or postponed so that the trial date is more than three months after the discovery period ends.

TEX. R. CIV. P. 190.5; *see* ***In re Estate of Hernandez***, No. 04-14-00046-CV, 2014 WL 7439713, at *3 (Tex. App.—San Antonio Dec. 31, 2014, no pet.) (holding that the trial court did not abuse its discretion in denying either the motion for continuance or the motion for new trial because the record did not reflect that the litigant used due diligence in pursuing his right to conduct discovery).[1]

192.3 Scope of Discovery.

(a) **Generally**. In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other 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."

(b) **Documents and tangible things**. A party may obtain discovery of the existence, description, nature, custody, condition, location, and contents of documents and tangible things (including papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, data, and data compilations) that constitute or contain matters relevant to the subject matter of the action. A person is required to produce a document or tangible thing that is within the person's possession, custody, or control.

…

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

(1) the expert's name, address, and telephone number;

(2) the subject matter on which a testifying expert will testify;

(3) the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was acquired;

(4) the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them;

(5) any bias of the witness;

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

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

…

(g) **Settlement agreements**. A party may obtain discovery of the existence and contents of any relevant portions of a settlement agreement. Information concerning a settlement agreement is not by reason of disclosure admissible in evidence at trial.

TEX. R. CIV. P. 192.3(a), (b), (e), (g); *see* ***In re Nat'l Lloyds Ins. Co.***, 449 S.W.3d 486, 488 (Tex. 2014, orig. proceeding) (granting mandamus relief because the discovery sought in relation to the insurance company's dealings with unrelated third parties was not probative of its conduct with the plaintiff and was therefore not reasonably calculated to lead to admissible evidence); ***In re Siroosian***, 449 S.W.3d 920, 924-27 (Tex. App.—Fort Worth 2014, orig. proceeding) (granting mandamus to limit the breadth of expert discovery because the information sought was not relevant, was not calculated to expose bias,

[1] Many opinions addressing petitions for writs of mandamus and simple discovery issues are memorandum opinions and/or not designated for publication. Based on the number of unpublished memorandum opinions cited in this paper, the "mem. op." and "not designated for publication" parentheticals are not included in the citations to conserve space and de-clutter the many string cites. The "[mand. denied]" insert is also omitted because the parenthetical generally includes the disposition