

# **SOME STILL DON'T GET IT: EXPERTS UNDER THE "NEW RULES"**

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## TABLE OF CONTENTS

<b>I. <u>INTRODUCTION</u></b> .....	1
<b>II. <u>DESIGNATING EXPERTS</u></b> .....	1
A. <u>TYPES OF EXPERTS</u> .....	1
B. <u>DESIGNATION PROCEDURES</u> .....	2
1. <u>Testifying Experts</u> .....	2
2. <u>Discoverable Consulting Experts</u> .....	2
C. <u>GENERAL CONSIDERATIONS</u> .....	2
<b>III. <u>DISCOVERY CONCERNING EXPERTS</u></b> .....	4
A. <u>PERMISSIBLE SCOPE OF DISCOVERY</u> .....	4
1. <u>(Purely) Consulting Experts</u> .....	4
2. <u>Testifying and Discoverable Consulting Experts</u> .....	4
B. <u>DISCOVERY MECHANISMS</u> .....	5
1. <u>Requests for Disclosure</u> .....	5
2. <u>Discovery of Discoverable Consulting Experts</u> .....	6
3. <u>Depositions</u> .....	6
a. <u>Deposition Schedule</u> .....	6
b. <u>Subpoena/Notice Duces Tecum</u> .....	7
c. <u>Cost of Expert</u> .....	7
d. <u>Always Necessary?</u> .....	7
4. <u>Non-Retained Experts</u> .....	8
5. <u>Expert Reports</u> .....	8
6. <u>Amendment and Supplementation</u> .....	8
<b>IV. <u>CONCLUSION</u></b> .....	9

Appendix A: Proposed Scheduling Order

Appendix B: Proposed Request for Documents for Deposition Notice

Appendix C: Hypotheticals Under the “New Rules”

# EXPERTS UNDER THE “NEW RULES”

## I. INTRODUCTION

Most cases today involve the use of at least one expert witness for each side in litigation. It is important for the practitioner to know and understand how the 1999 changes to the discovery rules affect the manner in which to designate experts and the discovery of information concerning experts. Even though over four years have passed since the implementation of the “new rules,” many practitioners have failed to recognize many of the pitfalls and benefits associated with them. This article will address the process and considerations in designating experts under the new rules and the discovery mechanisms available to discover the identity of and information concerning expert witnesses.

## II. DESIGNATING EXPERTS

A. TYPES OF EXPERTS. In general, experts can be divided into three general categories: (i) testifying experts; (ii) non-discoverable consulting experts; and (iii) discoverable consulting experts. The classification of an expert governs the discovery method(s) available, as well as what information is discoverable.

A **testifying expert** is an expert who may be called to testify as an expert witness at trial. TEX. R. CIV. P. 192.7(c). Full discovery is allowed concerning information regarding a party’s testifying experts. TEX. R. CIV. P. 192.3(e), 194.2(f). Discovery concerning testifying experts is governed by TEX. R. CIV. P. 195.

A **non-discoverable consulting expert** is an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert and his/her work product, opinions and mental impressions have not been reviewed by a testifying expert and he/she has no discoverable, personal factual knowledge or information about the case. TEX. R. CIV. P. 192.7(d), 192.3(e). The identity, mental impressions, and work product of such a purely consulting expert is not discoverable. TEX. R. CIV. P. 192.3(e); TEX. R. CIV. P. 195 Comment 1. Accordingly, this privilege remains unchanged by the new discovery rules.

A **discoverable consulting expert** is a consulting expert who has lost the protection of a purely consulting expert and becomes discoverable because (i) his or her work product, mental impressions or opinions have been reviewed by a testifying expert or (ii) he or she has personal knowledge of factual information about the case. TEX. R. CIV. P. 192.3(e) and 192.3(c). An example of a discoverable consulting expert is an accountant whose work product has been reviewed by a testifying economist or a doctor who was consulted and her records were reviewed by a testifying expert. An example of a dual capacity witness may be an employee of a corporate client who worked in the same department that is the subject of litigation and has first-hand knowledge of facts and whom counsel also uses as a “consulting expert” on the business or areas of the business’ practices. The identity of such a dual capacity witness is still discoverable even though he has been acting as a consulting expert.

## B. DESIGNATION PROCEDURES.

1. Testifying Experts. TEX. R. CIV. P. 195 provides that the permissible discovery tools for the designation (and disclosure of information) of testifying experts are (i) Requests for Disclosure under TEX. R. CIV. P. 194, (ii) depositions, and (iii) expert reports as ordered by the court. TEX. R. CIV. P. 195.1. Accordingly, a party will designate testifying experts in response to Requests for Disclosure under TEX. R. CIV. P. 194. An interrogatory requesting that a party “identify the name, address and telephone number of each expert who may be called to testify at the trial of the matter” or to state the subject matter on which an expert is expected to testify is **objectionable** and is not the appropriate mechanism for discovering information about testifying experts. TEX. R. CIV. P. 195.1. Specific information outlining the information obtainable and a timetable for disclosure under Rule 194 is set forth below in Section III(B)(1).

It should be noted that there may be a situation in which one may want to designate testifying experts in response to an interrogatory as a matter of caution. TEX. R. CIV. P. 192.3(d) provides that a party may obtain discovery of the name, address and telephone number of any person who is expected to be called to testify at trial. The inquiry into the identification of trial witnesses is through an interrogatory. A response to a request for disclosure regarding testifying experts complies with TEX. R. CIV. P. 192.3(d). However, as a matter of caution, an attorney may consider either including testifying experts in the answer to the “trial witness” interrogatory or at least including a statement referring counsel to the responses to requests for disclosure for designation of testifying experts.

2. Discoverable Consulting Experts. An interrogatory remains the appropriate mechanism to discover the identity and information concerning a discoverable consulting expert. Comment 1 to TEX. R. CIV. P. 195 states that the rule does not limit the permissible methods of discovery concerning consulting experts whose mental impressions or opinions have been reviewed by a testifying expert. Furthermore, a dual-capacity expert’s identity would be discoverable through an interrogatory asking for those with factual knowledge or possibly an interrogatory inquiring about the facts of which said dual-capacity expert had personal knowledge. Furthermore, the dual-capacity expert would also be discoverable through a Rule 194 request for disclosure of persons having knowledge of relevant facts.

C. GENERAL CONSIDERATIONS. As was the situation prior to the 1999 revisions, careful consideration must be given to who and when one designates a testifying expert. The considerations as to who remain essentially unchanged. However, TEX. R. CIV. P. 195 now governs the schedule for when counsel must designate experts.

TEX. R. CIV. P. 195.2 sets forth a schedule for designating experts. Rule 195.2 governs such a schedule “unless otherwise ordered by the court.” Rule 195.2 provides that a party must designate experts, i.e., furnish the information requested under Rule 194.2(8), by the *later* of:

- (1) 30 days after the Rule 194 request is served, or
- (2)
  - (i) 90 days before the end of the discovery period if the expert is testifying for the party seeking affirmative relief; and
  - (ii) 60 days before the end of the discovery period for all other experts.

The rule contemplates (i) there will always be a request for disclosure and (ii) there will be a set date on which the discovery period ends. If one's opposing counsel does not send requests for disclosure prior to ninety (90) days before discovery ends and you are a plaintiff, counter-plaintiff or cross-plaintiff, or within sixty (60) days if you are a defendant, until case law is available, counsel must weigh the options of (i) not designating experts and arguing that opposing counsel did not serve requests for disclosure so there was no obligation to designate or (ii) designating experts as one would have had a Rule 194.2(f) request for disclosure been served. TEX. R. CIV. P. 195.2 can be read to impose a duty to disclose even without the service of requests for disclosure. It can also be read to support the argument that there is no obligation to disclose unless a request for disclosure is served.

As mentioned above, TEX. R. CIV. P. 195.2 also contemplates that there will be a set date on which the discovery period ends. For cases filed after January 1, 1999, there will be a set date for the end of the discovery period based upon the discovery control plan under TEX. R. CIV. P. 190. Likewise, for older cases in which there is a scheduling order, there will most likely be an ending date for discovery. However, for older cases in which there is no court order establishing a discovery period, Rule 195.2 requires some creative interpretation, at least until case law is developed. One alternative would be to use the date of trial as the "end of the discovery period" date.

The discovery control plans established under TEX. R. CIV. P. 190, especially TEX. R. CIV. P. 190.3 establishing a Level 2 plan, provides an additional consideration in designating experts. Under a Level 2 control plan, if one side designates more than two (2) experts, the opposing side may have an additional six (6) hours of total deposition time for each additional expert designated. Therefore, unless the additional hours of deposition time are not a strategic or economic concern for counsel and the client, counsel should give careful consideration to the number of experts designated. Perhaps the easiest example of this would be to avoid following the prior common practice of naming three (3) or more attorneys as experts on attorney's fees. If counsel designates three (3) attorneys as experts on attorney's fees, a damage expert and another expert on customs and practices in the relevant industry, under a Level 2 discovery control plan, the opposing side will have eighteen (18) additional hours of deposition time to be used for any deposition(s) counsel chooses. Accordingly, counsel should be mindful in designating experts of the impact it may have under the relevant Rule 190 discovery control plan.

### **III. DISCOVERY CONCERNING EXPERTS**

As previously mentioned, the new discovery rules change the mechanisms used to discover information regarding experts, especially testifying experts. While the mechanisms have been altered, the scope of discovery has not materially changed. This section will briefly review the scope of discovery and the mechanisms available for discovery regarding experts.

#### **A. PERMISSIBLE SCOPE OF DISCOVERY.**

1. (Purely) Consulting Experts. A consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert (and who has no independent, first-hand knowledge of the facts) is not discoverable. TEX. R. CIV. P. 192.3(e).

2. Testifying and Discoverable Consulting Experts. The following is discoverable from a testifying expert or a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert:

(a) The expert's name, address, and telephone number;

(b) The subject matter on which a testifying expert will testify;

(c) 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;

(d) 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;

(e) Any bias of the witness;

(f) 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;

(g) The expert's current resume and bibliography.

TEX. R. CIV. P. 192.3(e).

There are two primary changes in the scope of permissible discovery regarding experts under the new rules. TEX. R. CIV. P. 192.3(e)(5) states that a party may discover "any bias of the witness" referring to testifying experts (or consulting experts whose mental impressions or opinions have been reviewed by a testifying expert). This may have the effect of overruling case law which held that a party could not discover financial information and records of experts to

prove that the expert was a "plaintiff" or "defense" expert. *See Russell v. Young*, 452 S.W.2d 434 (Tex. 1970). Additionally, TEX. R. CIV. P. 192.3(e)(7) provides that a party may discover the expert's current resume and bibliography. This is also provided as a part of the standard request for disclosure under TEX. R. CIV. P. 194.2(f)(4)(B) for testifying experts retained by, employed by, or otherwise subject to the control of the party responding to the request.

B. DISCOVERY MECHANISMS. Under the new rules, there are only three (3) permissible mechanisms of discovery regarding testifying experts: (i) requests for disclosure; (ii) depositions; and (iii) court ordered reports. The new rules also provide a schedule for expert depositions. This section will address the three mechanisms for discovery regarding testifying experts, discovery of discoverable consulting experts, and the new rule regarding supplementation and amendment of expert discovery.

1. Requests for Disclosure. TEX. R. CIV. P. 194 provides for a "new" discovery mechanism known as a request for disclosure. A request for disclosure is one of the three (3) means to discover information concerning testifying experts. A request for disclosure must be served within thirty (30) days before the end of the applicable discovery period. TEX. R. CIV. P. 194.1 By duly serving a request for disclosure, a party may request the following regarding a *testifying* expert

- \* the expert's name, address and telephone number;
- \* the subject matter on which the expert will testify;
- \* the general substance of the expert's mental impressions and opinions and brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;

*if the expert is retained by, employed by or otherwise subject to the control of the responding party, the following is also discoverable through a request for disclosure:*

- \* 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 the expert's testimony; and
- \* the expert's current resume and bibliography.

TEX. R. CIV. P. 194.2(f). The party upon whom a request for disclosure is served must serve a written response within thirty (30) days after service except that a defendant served with a request before the answer date does not have to respond until fifty (50) days after service. Furthermore, a response under Rule 194.2(f) regarding testifying experts is governed by Rule 195. TEX. R. CIV. P. 194.3(b) Accordingly, a designation of experts pursuant to TEX. R. CIV. P. 194.2(f) must be made by the later of thirty (30) days after service or (i) 90 days before the end

of the discovery period for experts testifying for a party seeking affirmative relief; or (ii) 60 days before the end of the discovery period for all other experts. TEX. R. CIV. P. 195.2.

2. Discovery of Discoverable Consulting Experts. As stated above, interrogatories (and requests for production) which inquire about *testifying* experts are not proper and are objectionable pursuant to TEX. R. CIV. P. 195.1. However, according to Comment 1 to TEX. R. CIV. P. 195, the rule does not limit the permissible methods of discovery concerning consulting experts whose mental impressions or opinions have been reviewed by a testifying expert. Accordingly, an interrogatory which requests a party to name and provide discoverable information regarding a consulting expert whose mental impressions, opinions or work product has been reviewed by a testifying expert is proper.

3. Depositions. The second mechanism for discovering information regarding testifying experts is through depositions. TEX. R. CIV. P. 195.4 provides that a party may obtain discovery through a deposition 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 response to a request for disclosure).

a. Deposition Schedule. TEX. R. CIV. P. 195.3 establishes a plan for the scheduling of depositions of experts. Comment 3 to TEX. R. CIV. P. 195 states that in providing the plan, the rule attempts to minimize unfair surprise and undue expense. The basic plan set forth in TEX. R. CIV. P. 195.3 is as follows:

(1) 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:

\* If an expert report is not furnished when the expert is designated:

> party must make the expert available *reasonably promptly* after the expert is designated; and

> if the deposition of the expert cannot be concluded (due to fault of tendering party) more than fifteen (15) days before the deadline for designating other experts, the deadline *must* be extended for other experts testifying on the same subject. TEX. R. CIV. P. 195.3(a)(1).

\* If an expert report is furnished when the expert is designated:

> party must make the expert available *reasonably promptly* after all other experts have been designated. TEX. R. CIV. P. 195.3(a)(2).

(2) Party not seeking affirmative relief:

\* party must make the expert available *reasonably promptly* after the expert is designated and the experts testifying on the same subject for the party seeking affirmative relief have been deposed. TEX. R. CIV. P. 195.3(b).

It should be noted that the court may, for good cause, modify the order or deadlines for designating and deposing experts pursuant to TEX. R. CIV. P. 191.1.

b. Subpoena/Notice Duces Tecum. A notice or subpoena duces tecum is still an available tool for obtaining discoverable documents from a testifying expert, e.g. the expert's work file. However, it should be noted that to take the deposition of an expert within a party's control that *requests the production of documents*, the witness must be given at least thirty (30) days notice, so that the witness has thirty (30) days to serve a response. See TEX. R. CIV. P. 199.2(a), (b)(2), (b)(5). TEX. R. CIV. P. 199.2(b)(5) incorporates the procedures and limitations applicable to the requests for production under Tex. R. Civ. P. 196, including the thirty (30) day deadline for responses. TEX. R. CIV. P. 199 comment 1. Accordingly, the deposition should be set 35-45 days after the date of the notice to allow for the expiration of the thirty (30) days and provide time to reschedule if the witness refuses to produce the documents requested.

c. Cost of Expert. TEX. R. CIV. P. 195.7 provides that the party who retained the expert must pay all reasonable charges of the expert for time spent in preparing for, giving, reviewing and correcting the deposition.

d. Always Necessary? There are a few circumstances where taking an expert's deposition may not be in your client's best interest. Such examples may include:

- i. If you have a materially incomplete disclosure, then you might consider not taking the deposition and objecting at trial to exclude the expert's testimony.
- ii. When you receive disclosures that are quite complete, you may have all the information you need. The expert could actually gain more from the deposition than you will. You will probably only signal areas of weakness for the opposing expert.

- iii. As touched upon above, the cost of the deposition may be a prohibitive factor. Unless there is some material gain, you might consider not taking it.

4. Non-Retained Experts. The provisions of TEX. R. CIV. P. 195.3 regarding scheduling depositions and the provisions of TEX. R. CIV. P. 194.2(f)(4)(A) and (B) (regarding production of documents reviewed by or prepared by an expert) do not apply to experts who are not retained by, employed by or otherwise in the control of a party. The production of documents and the depositions of such non-retained experts are governed by TEX. R. CIV. P. 176 and 205. TEX. R. CIV. P. 205 governs discovery from non-parties and allows for the issuance of a subpoena on a non-party to compel (i) an oral deposition; (ii) a deposition on written questions; (iii) a request for production served with notice of oral deposition or deposition on written questions or (iv) a request for production. In order to depose a non-retained expert with a subpoena duces tecum, a party must give the witness reasonable notice (not necessarily the thirty (30) days required for retained experts). TEX. R. CIV. P. 176.

5. Expert Reports. TEX. R. CIV. P. 195.5 provides that the trial court may order that an expert's discoverable factual observations, tests, supporting data, calculations, photographs, or opinions be reduced to tangible form. TEX. R. CIV. P. 195.5. A request for production which asks that an expert's opinions be reduced to a report and produced is not sufficient to compel the production of a report. TEX. R. CIV. P. 195.5 specifically states "court-ordered" report. It should be noted that if opposing counsel seeks a court ordered report of an expert who has already been deposed or will be deposed, counsel may use the arguments in TEX. R. CIV. P. 192.4 (for limiting discovery) to oppose the motion. Counsel may argue that (i) a report would be cumulative or duplicative of the expert's deposition testimony; (ii) opposing counsel had or will have ample opportunity to discover the information in the expert's deposition; or (iii) the expense of producing a report is outweighed by the likely benefit if one takes into account the client's resources or the amount in controversy or the needs of the case.

6. Amendment and Supplementation. TEX. R. CIV. P. 195.6 addresses the amendment and supplementation of discovery concerning experts. A party's duty to amend or supplement written discovery concerning a testifying expert, e.g. request for disclosure, is governed by TEX. R. CIV. P. 193.5. A party must supplement the discovery response if (i) the party obtains information that reveals its response to discovery was incomplete or incorrect when made or (ii) the party discovers that its response to discovery, though complete and correct when made is no longer true and complete. TEX. R. CIV. P. 193.5(a). A party must supplement written discovery reasonably promptly after learning the necessity for the supplementation and at least thirty (30) days prior to trial (unless the parties agree to a later date or the court grants leave). TEX. R. CIV. P. 193.5(b) Supplementation or amendment of written discovery must be in the same form as the initial response. In other words, supplementation of a request for disclosure should be in the format of a response to a request for disclosure. For an expert retained by, employed by, or otherwise subject to the control of a party, the party must also

supplement the expert's deposition testimony and written report, but only with regard to the expert's mental impressions or opinions and basis for them.

#### **IV. CONCLUSION**

The changes and new approaches contained in the 1999 revisions were motivated by the desire to simplify and address issues that the old rules left open. However, there is still some confusion caused by the new rules. Fortunately, cooperation among litigants and a full understanding of the pitfalls and benefits of the new rules can result in smoothly securing discovery of experts.

**APPENDIX A**

CAUSE NO. 2003-CI-00000

JOHN DOE	§	IN THE DISTRICT COURT
	§	
v.	§	777TH JUDICIAL DISTRICT
	§	
JOHN DEER	§	ANY COUNTY, TEXAS

**SCHEDULING ORDER**

On this \_\_\_ day of \_\_\_\_\_, 2003, the Court hereby orders the following deadlines pursuant to Rules 166 and 195 of the Texas Rules of Civil Procedure:

1. This is a Level III case.
2. All discovery must be conducted by May 9, 2003. **[31 days before trial]**
3. All experts testifying for a party seeking affirmative relief must be designated and a report furnished from said experts must be provided by March 11, 2003. **[90 days before trial]** All experts testifying for a party seeking affirmative relief shall be made available for deposition prior to March 26, 2003. **[75 days before trial]** If a particular expert’s deposition cannot be secured because of scheduling conflicts, the deadline for parties not seeking affirmative relief to designate a testifying expert that will testify regarding the same issue shall be extended accordingly.
4. All experts testifying for a party not seeking affirmative relief must be designated and a report furnished from said experts must be produced by April 12, 2003. **[58 days before trial]**. Said experts shall be made available for deposition by April 30, 2002 **[40 days before trial]**.

5. The reports required by paragraphs 3 and 4 shall be prepared pursuant to T.R.C.P. 195.5 and include all matters identified in Rule 195.5.
6. Plaintiffs shall provide a list of trial witnesses by April 10, 2003 via facsimile. **[60 days before trial]**
7. Defendant shall provide a list of trial witnesses by April 13, 2003 via facsimile. **[57 days before trial]**
8. Plaintiffs shall have until May 9, 2003 to amend their pleadings. **[31 days before trial]**
9. Defendant shall have until May 17, 2003 to amend his pleadings. **[23 days before trial]**
10. Plaintiffs and Defendant shall mark and exchange all exhibits that they may use at trial by June 2, 2003. **[7 days before trial]** Written objections to the opposing party's exhibits shall be filed by June 5, 2003. **[4 days before trial]** The exhibits shall be considered authentic and admissible unless objections are filed challenging the authenticity or admissibility.
11. Plaintiffs shall serve designations of deposition testimony, via facsimile, by 5:00 p.m. on May 16, 2003. **[24 days before trial]**
12. Defendant shall serve designations of deposition testimony, via facsimile, by 5:00 p.m. on May 22, 2003. **[18 days before trial]**
13. All parties shall file objections, to form and substance, regarding deposition testimony by May 29, 2003. **[11 days before trial]**
14. The discovery limits shall be those found in Rule 190.3(b) of the Texas Rules of Civil Procedure.

15. Jury Selection is set for June 9, 2003.
16. The parties shall mediate this matter by April 25, 2003. **[45 days before trial]**
17. Pursuant to Rule 191.1 of the Texas Rules of Civil Procedure, the deadlines outlined in this Scheduling Order may be modified by the agreement of the parties or by court order for good cause. Any agreements between the parties are enforceable if they comply with Rule 11 or, as it affects an oral deposition, if the agreement is made a part of the record of the deposition.

Signed this the \_\_\_\_ day of \_\_\_\_\_, 2003.

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JUDGE PRESIDING

**Appendix B**

CAUSE NO. 2003-CI-00000

JOHN DOE	§	IN THE DISTRICT COURT
	§	
VS.	§	777th JUDICIAL DISTRICT
	§	
JOHN DEER	§	ANY COUNTY, TEXAS

**DEFENDANT, JOHN DEER'S NOTICE OF INTENTION TO TAKE ORAL DEPOSITION OF DR. KNOW IT ALL AND REQUEST FOR DOCUMENTS**

TO: JOHN DOE  
c/o Thomas A. Ham  
HAM & BACON, LLP  
205 Hatten Street, Suite 200  
Anywhere, Texas 78666  
ATTORNEY FOR PLAINTIFF

Notice is hereby given that after service hereof, and in accordance with Rule 199, Texas Rules of Civil Procedure, and this Notice of Intention To Take Oral Deposition of **DR. KNOW IT ALL** and Request for Documents, that the deposition of **DR. KNOW IT ALL** will be secured on **August 30, 2002 at 1:00 p.m. in the offices of JOE AND BLOW, 1199 Banana Street, San Antonio, Texas 78250 before Happy Court Reporters, 123 Pear Street, San Antonio, Texas.** Said witness, **DR. KNOW IT ALL**, is hereby directed to produce all documents and tangible things in the custody or subject to her control which are identified in Exhibit "A" attached hereto and incorporated herein for all purposes. Exhibit "A" is a request for documents pursuant to Rule 199.2(b)(5) of the Texas Rules of Civil Procedure.

The deposition will be taken by oral examination and may be videotaped, and the answers will be used as testimony at the trial of the above-styled and numbered cause.

### **DEFINITIONS AND INSTRUCTIONS**

The following definitions and instructions are to be considered applicable to all matters and demands in this Notice:

"Document" means writings of every kind including all correspondence, notes, memoranda, tabulations, charts, graphs, engineering drawings, architectural plans, records, reports, report forms, minutes, minute books, papers, letters, bulletins, books, schedules, lists, worksheets, records of any communications or conversations (including telephone bills), instructions, telegrams, teletypes, radiograms, cables, appointment books, calendar and diary entries, tapes and tape recordings or any other form of mechanical recordings of all statements not reduced to writing, microfilm, and other forms of preserving information of every kind and description in the actual or constructive possession, custody or control of the recipient of this Notice or any of its officers, directors, agents, employees or representatives wherever located. Each request for documents seeks production of the document in its entirety, without abbreviation or expurgation, including all attachments or other matters affixed thereto. The term document also includes copies of writings when originals are not in the possession, custody or control of the recipient of this Notice, as well as copies bearing notations or containing information in addition to that contained on the originals.

"Person" includes any individual, firm, person, corporation, partnership, unincorporated association, trust, bank, banking association of any type, lending institution or any other legal business organization or governmental entity.

"Communications or correspondence between" any two persons means any and all documents, without limitations, transmitted or received by either or both of the persons, and/or any and all documents which reflect oral communications and/or any and all documents prepared jointly by or as a result of the joint efforts of such persons.

If any document requested herein was formerly in the possession, custody or control of the recipient of this Notice, and has been lost or destroyed, or otherwise disposed of, the recipient of this Notice, is requested at the time of the deposition to (1) describe in detail the nature of the document and its contents; (2) identify the person who prepared or authored the document and the date on which the document was prepared; and (3) specify the date on which the document was lost or destroyed.

If any document requested herein is withheld on the basis of any claim of privilege or work product, the recipient of this Notice is requested to (1) identify the person who prepared or authored the document and, if applicable, the person to whom the document was sent or shown; (2) specify the date on which the document was prepared or transmitted; (3) identify the subject matter of the document; (4) describe the nature of the document; and (5) state briefly why the document is claimed to be privileged, or to constitute work product.

Respectfully submitted,

ADAMS, HILL & JOHNSON, INC.  
100 Apple Tree, Suite 200  
Anywhere, Texas 78777  
Telephone No. : (503) 222-2222  
Telecopier No. : (503) 222-2221

By: \_\_\_\_\_  
WILLIAM JAMES ADAMS  
State Bar No. 00555555

ATTORNEYS FOR DEFENDANT

*EXHIBIT "A"*

**DOCUMENTS TO BE PRODUCED**

**DR. KNOW IT ALL** ("WITNESS") is to produce any and all documents and tangible things in the WITNESS'S possession or subject to THE WITNESS'S control (which shall include items under the control of plaintiff's counsel and agents) described as follows:

1. Reports prepared by you on behalf of Thomas A. Ham, HAM & BACON, LLP, and other lawyers and/or paralegals of Thomas A. Ham, HAM & BACON, LLP, and/or clients of Thomas A. Ham and/or HAM & BACON, LLP.
2. All files reflecting work you have done on behalf of Thomas A. Ham, HAM & BACON, LLP, and other lawyers and/or paralegals of Thomas A. Ham, HAM & BACON, LLP, and/or clients of Thomas A. Ham and/or HAM & BACON, LLP.
3. Copies of all depositions you have given as an expert.
4. Your fee agreement in this matter.
5. Your fee agreements in other matters over the past five years.
6. Copies of all reports you have prepared as an expert in the past ten years.
7. Your current resume and bibliography.
8. All documents, tangible things, reports, models, and/or data compilations that have been provided to, reviewed by and/or prepared by or for you.
9. All 1099s you have received in the past ten years reflecting your serving as an expert witness.
10. A copy of any and all agreements between you and TASA.
11. A list of all cases for which you have provided testimony in the past, whether it be via deposition or trial or hearing testimony.
12. All drafts of your work in this matter.
13. All textbooks and other literature upon which you are relying in giving your opinions in this matter.

14. All information which is inconsistent or contrary to your opinions in this matter.
15. Your file in this matter.
16. A copy of any and all newspaper articles, magazine articles or other forms of press which discuss your work.
17. All advertisements you have sponsored, issued, or authorized to be used which discuss your services as an expert.
18. All licenses you currently possess.
19. All reports given in matters where your testimony was limited by the trial court and/or appellate court, in whole or in part.

## APPENDIX C

HYPOTHETICAL A: Opposing counsel serves interrogatories on your client, interrogatory number 4 requests that you identify all experts who may testify at the trial of the case and consulting experts whose opinions, mental impressions or work product have been reviewed by a testifying expert. What should your response to interrogatory number 4 be?

ANSWER: Object to interrogatory number 4 to the extent that it seeks information concerning testifying experts as being improper pursuant to TEX. R. CIV. P. 195.1 and an improper means of discovery concerning testifying experts pursuant to TEX. R. CIV. P. 195.1. Answer by identifying any consulting experts whose mental impressions, opinions or work product have been reviewed by a testifying expert.

HYPOTHETICAL B: You represent the defendant in a breach of contract case. Your client has no claims for affirmative relief. The trial of the matter is set in 6 months and the discovery period ends in 120 days. Opposing counsel serves upon you requests for disclosures under Rule 194, including a request under Rule 194.2(f) to identify and provide information about your testifying experts. You have not yet made your final decisions regarding designations. How do you respond?

ANSWER: As to the Rule 194.2(f) request for disclosure, respond (within thirty days of service of the request) that you will supplement your response to the request concerning testifying experts. Mark your calendar and supplement the response, in the same format as the original response, within sixty days prior to the end of the discovery period with a designation of experts and providing the information set forth in TEX. R. CIV. P. 194.2(f).

HYPOTHETICAL C: Opposing counsel has served a notice duces tecum for the deposition of your testifying medical expert. The notice duces tecum requests the expert's financial records for the past three (3) years for any income received as an expert (consulting or testifying) in court cases or disputes. You are outraged and object to that provision of the notice duces tecum as being unreasonable, an attempt to harass the witness and as seeking information which is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. When counsel calls to confer, you inform her that you will not remove your objection or have your doctor produce the information requested. She sets a motion to compel. Will she prevail?

ANSWER: Most likely, yes. TEX. R. CIV. P. 192.4 provides that evidence of an expert's bias is discoverable. The doctor's income records will help to indicate if a majority of any such income is derived from testifying primarily for one side of the bar or the other, therefore indicating a possible bias.

HYPOTHETICAL D: You represent a defendant in a Texas DTPA case in which the plaintiff alleges that the merchandise sold to her was not as represented by the sales person. The amount in controversy is less than \$10,000.00. You have retained an expert who has inspected the merchandise and has opined that the merchandise is as the plaintiff claims was represented to her. You have produced all of the information provided for in Rule 194 regarding your expert and your expert has testified for over five (5) hours in a deposition outlining everything

regarding his opinion. Opposing counsel files a motion to compel your expert to write and produce a report regarding his opinion. Your client is a small business and the report would cost at least \$1,500 to prepare. Your client has already spent \$2,000 in producing the expert for his deposition. What can you include in your response to the motion to help persuade the court to deny the motion for a court-ordered report?

ANSWER: Your response should set out the economics of the situation, i.e. the amount in controversy, your client's size (and lack of wealth), the estimated cost of the report and the cost already incurred in deposition. Counsel should then direct the court to TEX. R. CIV. P. 192.4 concerning limiting discovery and argue: (i) the report would be cumulative of the expert's deposition testimony; (ii) opposing counsel had ample opportunity to explore everything about the expert's opinion in the deposition; and (iii) the likely benefit of the report is greatly outweighed by the cost of such a report given the amount in controversy and your client's finances.

HYPOTHETICAL E: You represent a corporate plaintiff in a large case which has been on file (and discovery has been continuing) for almost two years. It will finally go to trial in a few months. You produced expert reports and produced your experts for depositions almost a year ago. As you review information from your damages expert in preparation for trial, you learn that due to some changes in the industry, the expert has performed some re-calculations on damages and his testimony at trial regarding the actual calculation will be materially different than what was discussed in his deposition and his report. But, your opposing counsel has not asked for any supplemental reports or depositions. What do you do with this new information?

ANSWER: Under TEX. R. CIV. P. 195.6 you must supplement (or amend) the expert's deposition testimony, supplement his report and supplement any requests for disclosure responses which have also now changed due to this new information. You must provide this supplementation reasonably promptly after learning this information (and in no event later than thirty days prior to trial).

HYPOTHETICAL F: Suppose your client is sued for negligence, and you serve some requests for disclosure. Your opponent responds timely, but the response does not contain a complete response to Rule 194.2(f) regarding testifying experts. What should you do?

ANSWER: One option is to object at trial at the point the expert attempts to testify on the particular area omitted from the disclosure (i.e. proximate cause). Explain to the court that the information was not provided. Under TEX. R. CIV. P. 193.6, the evidence will be excluded unless the other side can show there was "good cause" or the failure to amend or supplement will not result in unfair surprise or prejudice. Of course, whether you decide to take this particular approach depends upon the circumstances. If all you are lacking is a telephone number, then that's not going to amount to unfair prejudice. In instances where you are uncertain, you may want to pursue further discovery.

HYPOTHETICAL G: You serve requests for disclosure and your opponent designates Dr. X as a testifying expert. After you receive this information, you take Dr. X's deposition. At the conclusion of the deposition, you reach the conclusion that the opponent's expert, Dr. X, is

actually more helpful to you. You then decide that if your opponent doesn't call Dr. X, you will. May you call Dr. X at trial?

ANSWER: You must designate your own experts. Parties are entitled to know who is going to be called so that those witnesses can be rebutted if necessary. Therefore, you should designate Dr. X if you want to offer his testimony. Of course, you must be very careful. If you determine that Dr. X is a quack, you may have problems excluding him under *Robinson*.

HYPOTHETICAL H: Suppose P sues D1 and D2. D1 serves some requests for disclosure to P. D2 does not serve request for disclosures. Prior to trial, P and D1 settle. P calls Dr. X to testify even though P had not designated Dr. X. D2 moves to exclude Dr. X. Should that be granted?

ANSWER: Probably yes. A party is entitled to rely on the answers of the parties in the same suit to avoid unnecessary duplication. You may rely upon another party's discovery request in lieu of making your own, but you may not rely on someone else when you are required to respond.

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<sup>1</sup>Since the initial publication of this paper, Ms. Nancy Meyers-Harvey and her family have moved to Kansas as a result of her husband's transfer. Her husband is a pilot in the United States Air Force.