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Discoverectomy II:  
The End of "Gotcha" Litigation

Dan Downey*  
Lori Massey**

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I. Introduction

Discovery was intended to be a domesticated bird dog to help flush out evidence. It has become, instead, a voracious wolf roaming the countryside, eating everything in sight.¹

** Briefing Attorney, Texas Supreme Court. B.A. 1990, University of Texas; J.D. 1993, South Texas College of Law.
¹ Edward F. Sherman, The Judge's Role in Discovery, 3 REV. LITIG. 89, 196-97
In 1939, the new procedural process known simply as "discovery" was heralded as marking "the highest point so far reached in the English speaking world in the elimination of secrecy in the preparation for trial." Some foresaw that discovery would "stamp the entire federal judicial process with a character of frankness and fairness that [would] go far in aiding our legal system to overcome the effects of its rather crude heredity." Others might say that such predictions were nothing more than the wishful thinking of naive idealists. No one, though, could have foreseen the manipulation of the discovery process that so transformed the system as to make the original intent seem laughable.

In a previous article, written in the midst of a barrage of petty discovery disputes, I proposed a virtual end to this madness we call discovery. The proposal met with the overwhelming approval of those lawyers who actually try cases rather than climb under the rug of discovery to avoid the courtroom. Their response makes me believe that discovery can again be a tool of preparation rather than a tool of obstruction.

One lawyer, after reading Discoverectomy (I), was so impressed with the novel concept that a litigator's practice should primarily involve preparation for trial that he inquired about the steps necessary to make Discoverectomy a reality. Having no respect for those who simply criticize without suggesting meaningful solutions,
we felt it imperative that an effort be made to rewrite the rules of procedure and outline a plan of action.

This endeavor was further motivated by a more personal interest. As a judge, I have gained more respect for good lawyering than I had when I was a practicing attorney myself. Despite what some think, professional advocates whose work product is characterized by honesty and integrity are the engines that drive not only our system of jurisprudence, but our entire system of governance. Sadly, their very existence is threatened by the current state of affairs.

Our preoccupation with "gotcha" discovery rules demeans the practice of law and all who participate in it. Even worse, it has driven some of our best trial lawyers out of the business or into the grave. The swelling ranks of full-time attorney-mediators who have given up the toil of litigation in frustration are a testimony to this unfortunate phenomenon.

Discovery was meant not only to inform the parties of the facts necessary to foster settlement, but to lead to a more efficient trial. However, some attorneys are creating entire practices out of discovery by specializing in interrogatories and depositions. It has become the center of litigation rather than the facilitator of a later trial. "[O]ne comes to the conclusion that discovery has simply become an extended field of play in an on-going game of blindman's bluff."8

In devising this plan, we recognized early that it would be impossible to compile a set of rules addressing every conceivable problem that might arise in the course of litigation. We were also mindful of the perils of "overlegislating," which was precisely the problem we were seeking to correct. In recognition of these limitations, we adopted the "eighty percent rule." That is, these rules are designed to handle the realities of eighty percent of the cases tried. To deal with the other twenty percent, we have returned to that age-old jurisprudential concept of reposing in the judiciary the

7. See WALTER JORDAN, MODERN DISCOVERY PRACTICE § 1.01 (1974) ("Before 1941, there were neither rules of civil procedure nor statutes specifically designed to provide litigants with the means of discovering pertinent information in the possession of their adversary or third parties.").

freedom and discretion to craft rules where necessary to fit the needs of particular cases.\textsuperscript{9}

The thrust of this Article concerns only those rules that we feel are the principal causes of the discovery maze in which lawyers today are expected to ply their trade, principally Texas Rules of Civil Procedure 166, 166b, 167, and 187. It is acknowledged that the adoption of the rules proposed herein will necessarily require amendment and adjustment of other rules of procedure. We have left that task to others.

II. The Plan in Practice

The first and foremost objective of our plan is to transform rights of discovery into real transfers of information. Currently, our system involves "compelled discovery." It is one in which a party will receive the information to which it is "entitled" only after first serving a request and then countering objections with a motion to compel.\textsuperscript{10} As a first step, our plan establishes not only the right to know, but also the duty to disclose.

Through a structured timeline, much like that established in appellate procedure, attorneys wind their way along a preset path of discovery and disclosure, rather than spend months quibbling over what information shall be disclosed. The affirmative duties of disclosure in our plan somewhat mirror those proposed in the federal arena.\textsuperscript{11} However, they do not go so far as to force one attorney to educate the other.\textsuperscript{12} A lawyer may not lazily rely on the other

\textsuperscript{9}. See infra Appendix I, Proposed Rule 166c.

\textsuperscript{10}. Rule 166b merely outlines information to which each party is "entitled," and gives no absolute right to such information. Even the United States Supreme Court has commented on the problem, stating that the Federal Rules merely give litigants the right to compel opponents to disclose certain information prior to trial. Hickman v. Taylor, 329 U.S. 495, 507 (1947).

\textsuperscript{11}. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE (Proposed Draft 1991), reprinted in 137 F.R.D. 53 (1991) [hereinafter COMMITTEE ON FEDERAL RULES]. The idea of affirmative duties of disclosure is not merely a recently proposed cure. It is, in fact, consistent with the intention of the drafters of the discovery rules, who envisioned discovery as a process in which attorneys would lay their cards on the table. See Sunderland, supra note 2, at 738.

\textsuperscript{12}. The Federal Rules do impose such an affirmative duty to disclose. See infra
party to make his case; he must affirmatively meet his own duties at each step of the timeline.

The second step in reaching the objective of our plan is to dispose of needless and inefficient practices.\textsuperscript{13} Currently, parties play the game of "Gotcha!" with the tools of discovery. Instead of seeking relevant information, they seek to harass, avoid, or both. For this reason, our plan eliminates requests for admission\textsuperscript{14} and interrogatories.\textsuperscript{15}

Requests for admission were intended to forge common ground and to narrow the issues for trial. Instead, they are used to catch the opponent off guard. If the opponent fails to admit or deny within the time required, the requests are deemed admitted.\textsuperscript{16} Thus, the request is often not a method of acquiring useful information, but a "get rich quick" method of litigation.\textsuperscript{17} Instead, our plan calls for the joint filing of written stipulations prior to the pretrial conference.\textsuperscript{18}

Interrogatories, although often yielding pertinent information, more often yield a severe headache. The questions are too often verbose, overbroad, or harassing, served by attorneys with no direction in their case. The objections are too often frivolous and serve merely as an avoidance tactic. As a result, interrogatories "spawn a greater percentage of objections and motions than any other discovery device."\textsuperscript{19}

Dealing with this endless foray of requests, objections, and motions has transformed the judge from an adjudicator to a babysitter.\textsuperscript{20} Our plan eliminates the need for such supervision by

\begin{itemize}
\item text accompanying notes 51-53.
\item \textsuperscript{13} See Wolfson, supra note 8, at 18 (recognizing that pretrial discovery was initially an attempt to make trials more efficient).
\item \textsuperscript{14} TEX. R. CIV. P. 169.
\item \textsuperscript{15} TEX. R. CIV. P. 168.
\item \textsuperscript{16} TEX. R. CIV. P. 215(4)(a).
\item \textsuperscript{17} See, e.g., Hoffman v. Texas Commerce Bank Nat'l Ass'n, 846 S.W.2d 336, 339-40 (Tex. App.—Houston [14th Dist.] 1992, no writ) (affirming trial court's grant of summary judgment after deeming requests admitted).
\item \textsuperscript{18} See infra Appendix I, Proposed Rule 169.
\item \textsuperscript{20} Ironically, the response to the maddening abuses pervading our system has been to involve the court even more heavily in guiding the litigants through the discovery maze. See, e.g., Fed. R. CIV. P. 16(b) (requiring that the court hold a
disposing of these “discovery” devices and, to the extent feasible, removing the judge from the discovery arena. By doing so, our plan frees the docket of wasteful discovery hearings and allows cases to move through the system at a more efficient pace. If properly executed, the result of our plan is a drastically shortened discovery schedule, one that allows a case to be tried within one year of the service of pleadings. Thus, our plan promises a “just, speedy, and inexpensive determination of every action” and mandates that discovery finally take a backseat to the judicial system’s foremost objective—the adjudication of rights.

A. Discovery of Fact Witnesses

Currently, a party may not simply request the identification of fact witnesses whom the other party plans to call at trial. Instead, detailed and often verbose interrogatories are propounded, requesting, among other things, the identification of those persons with knowledge of relevant facts. Only after months of discovery and numerous, costly depositions may a party be compelled to identify who will actually testify at trial, and then only if a pretrial order is entered pursuant to Rule 166. Regardless of whether the party is required to give notice of direct fact witnesses, no witness may be called who has not been previously identified as a person with knowledge of relevant facts. However, this seemingly automatic

scheduling conference); TEX. R. CIV. P. 166 (suggesting that the court hold a pretrial conference and encourage settlement).

21. See infra Appendix II, Timeline. When devising the plan, our intention was to create rules that would serve well in most situations. We did not forget, though, that special circumstances may arise. The court is given discretion to take such circumstances into account and to alter or extend the timeline when necessary. See infra Appendix I, Proposed Rule 166c.

22. FED. R. CIV. P. 1; see also TEX. R. CIV. P. 1 (stating that the objective of the rules is a “just, fair, equitable and impartial adjudication . . . attained with as great expedition . . . as may be practicable”).


24. See TEX. R. CIV. P. 166b(2)(d) (entitling party to information concerning persons with knowledge of relevant facts).

25. TEX. R. CIV. P. 166 (suggesting, but not requiring, that a pretrial conference be held).

exclusion is easily avoided by showing good cause, a standard muddied by recent case law.

This system of discovering fact witnesses seems workable enough on paper. In actual practice, however, it proves to foster nothing but aggravation. As an alternative, our plan calls for a two-part disclosure, which in the end yields the same information and provides the same protection as the current system.

1. Initial Disclosures.—First, each party, no later than ninety days after service of the complaint or answer, shall disclose to all other parties the identification and location of any and all parties, potential parties, and other persons with knowledge of relevant facts. Along with the identification of each person with knowledge of relevant facts, there shall be a statement of the subject matter and scope of his knowledge. For the attorney faced with an overwhelming list of persons with knowledge of relevant facts, these statements will serve as effective aids to trial preparation by

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27. TEX. R. CIV. P. 166b(6), 215(5).
28. The present standard more closely resembles the lesser hurdle of surprise than good cause. See, e.g., Henry S. Miller Co. v. Bynum, 836 S.W.2d 160, 162 (Tex. 1992); Rogers v. Stell, 835 S.W.2d 100, 100 (Tex. 1992); Smith v. Southwest Feed Yards, 835 S.W.2d 89, 91 (Tex. 1992) (each allowing the testimony of a witness clearly identified through some form of discovery as having knowledge of relevant facts); see also Texas Dep't of Human Servs. v. Green, 855 S.W.2d 136, 148 (Tex. App.—Austin 1993, no writ) ("The common thread running through these cases is that an opponent objecting to the unidentified party's testimony had reason to anticipate that the party would be a witness based on the party's other discovery responses or deposition testimony.").
29. The timeline for the initial disclosure begins for the plaintiff as soon as the complaint is served upon the defendant. However, the defendant may start the clock ticking either by filing an answer or otherwise making a general appearance, one not allowed as a special appearance under Rule 120a.
30. "Identification and location" includes the person's most recent known name, address, and telephone number. TEX. R. CIV. P. 166b(2)(d).
31. Because this rule explicitly states that this disclosure includes "all parties," there is no reason to treat with special care the failure of a party to name himself as a person with knowledge of relevant facts, as the court did in Southwest Feed Yards.
32. Appendix I, Proposed Rule 166b(1), infra. The definition of "persons with knowledge of relevant facts" remains the same as under current Rule 166b(2)(d).
33. Appendix I, Proposed Rule 166b(1), infra. Currently, it is common for an interrogatory to request such information. Furthermore, Rule 166(h) allows the court to order the parties to disclose the subject matter of each witness's testimony.
forcing the opposing party to identify those persons who are named merely for authentication purposes, as opposed to those who have truly relevant, material knowledge.

The ninety-day deadline is reasonable and lenient in comparison to the current system. With interrogatories, a plaintiff may be required to divulge this information as early as thirty days after the commencement of the action.\textsuperscript{34} A defendant, even if served interrogatories with the complaint, only has fifty days to respond.\textsuperscript{35} Even the proposed changes to the Federal Rules require this disclosure within thirty days of the filed answer.\textsuperscript{36}

2. \textit{Depositions}.—Only after the initial disclosure is made by both parties may they engage in a very limited form of discovery.\textsuperscript{37} Under the current system, the postanswer period is packed with costly depositions, ostensibly designed to discern the knowledge of those persons identified. Problems arise, however, because parties tend to camouflage those persons who truly have knowledge of relevant facts among those who do not. The quest to separate the wheat from the chaff entails exorbitant costs and wasted effort because, out of a long list of persons identified as having knowledge of relevant facts, a party ends up calling only a few to testify.

To avoid undue expense and wasted time, our plan virtually eliminates "discovery depositions" as we know them.\textsuperscript{38} Depositions of fact witnesses may be allowed only if a verified motion is filed with the court.\textsuperscript{39} The motion shall state that the deponent’s testimony is material and necessary to the presentation of the movant’s case-in-chief and either (1) the deponent is unavailable for trial due to illness or other “unusual circumstances” or (2) the

\begin{flushleft}
\textsuperscript{34} TEX. R. CIV. P. 168(4).
\textsuperscript{35} Id.
\textsuperscript{36} COMMITTEE ON FEDERAL RULES, supra note 11, at 88 (providing text of Proposed Federal Rule 26).
\textsuperscript{37} For example, it may be appropriate to seek an independent medical examination, conduct depositions to perpetuate testimony, contact persons with knowledge of relevant facts, or request documents.
\textsuperscript{38} Depositions on written questions would remain available, but only for authentication purposes. \textit{See infra} Appendix I, Proposed Rule 208(a).
\textsuperscript{39} \textit{See infra} Appendix I, Proposed Rule 187a(1)(a).
\textsuperscript{40} An adverse party may be deposed if material to the party’s case-in-chief and not merely a rebuttal witness. \textit{See infra} Appendix I, Proposed Rule 187a cmt.
\textsuperscript{41} Whether “unusual circumstances” exist is left to the discretion of the court,
\end{flushleft}
deponent is beyond the subpoena power of the court.\textsuperscript{42} Once the deposition is taken, the deponent may not appear live at trial.\textsuperscript{43} As a result, the deposition is no longer utilized as a discovery tool per se. Instead, it is merely a substitute for the live testimony of the witness.

In light of the above restrictions, different rules are required regarding the assertion of privilege during the deposition.\textsuperscript{44} When a privilege is asserted, the court reporter will certify the question and the witness will be required to answer outside the presence of all parties and attorneys. If the court later determines that the answer did not involve a privilege, it will be released. If the court finds that a second deposition of the witness is necessary to fairly and adequately develop the testimony of the witness, the court can order further limited examination. If the court finds that the assertion of the privilege was made without substantial justification, the court can charge the costs of any additional deposition, including attorney’s fees, to the party asserting the privilege.

Admittedly, the procedure we have proposed involves the court in each attempt to take a trial deposition. However, because of the stringent requirements that must be met in order to take the deposition, the circumstances in which such means would be used are minimized. In the end, the plan frees the parties of the expense of hours, if not days, of unnecessary depositions.

\textsuperscript{42} Appendix I, Proposed Rule 187a(1)(a)(i), infra. The court could also consider whether another party should bear any responsibility for the circumstances causing the witness to be unavailable.

\textsuperscript{43} Appendix I, Proposed Rule 187a(1)(a)(ii), infra.

\textsuperscript{44} Appendix I, Proposed Rule 187a(1)(b), infra; see JORDAN, supra note 7, §1.01 (stating that the original purpose of depositions was merely to perpetuate testimony). If a party seeks the testimony of an adverse party’s witness and can satisfy the necessary requirements, the deposition will not preclude the adverse party from bringing that witness live in his own case-in-chief.

A penalty for choosing not to use the deposition transcript at trial was considered, such as ordering the reimbursement of other party’s expenses associated with the deposition. However, we rejected the penalty, deciding that the rule is stringent enough to prevent most abuse.

\textsuperscript{44} See infra Appendix I, Proposed Rule 187a(4).
3. Fact Statements.—A final tool for the discovery of fact witnesses is necessary to bridge the information gap created by the curtailment of depositions. At least sixty days prior to trial,\textsuperscript{45} each party is required to "disclose to all other parties the identification and location of all direct fact witnesses expected to be called at trial."\textsuperscript{46} More importantly, the identification of each fact witness shall be accompanied by a witness statement.\textsuperscript{47} This statement shall be specific and detail the relevant facts known by the witness about which the witness will testify. No witness may testify at variance with the statement or in addition to the facts detailed in or reasonably inferred from the statement.

At first glance, the requirement of a witness statement flies in the face of Rule 166b(3), which exempts from discovery witness statements made in anticipation of litigation. The same argument, however, was once posed to protect expert reports from disclosure.\textsuperscript{48} The argument was rejected in that context, making expert reports undeniably discoverable.\textsuperscript{49} These statements, like expert reports, are prepared for the very purpose of disclosure. Furthermore, they are not work product because they detail facts to be raised at trial, not the thoughts, impressions, or opinions of counsel.\textsuperscript{50}

Even though our plan prohibits discovery by way of interrogatory and severely limits the use of depositions, it does allow an

\textsuperscript{45} "[D]ate of trial' refers to the date the case is set for trial and not the date the trial actually begins." Carr v. Houston Business Forms, Inc., 794 S.W.2d 849, 851 (Tex. App.—Houston [14th Dist.] 1990, no writ).

\textsuperscript{46} Appendix I, Proposed Rule 166b(4)(a), infra. In accordance with current Rule 166(h), our proposed rule provides an exception to this disclosure for "those rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated prior to trial." See Aluminum Co. of Am. v. Bullock, No. D-3404, 1994 WL 6716 (Tex. Jan. 12, 1994).

\textsuperscript{47} Appendix I, Proposed Rule 166b(4)(a), infra.

\textsuperscript{48} See State v. Ashworth, 484 S.W.2d 565, 567 (Tex. 1972). In Ashworth, the court recognized the necessity of discovering such reports but found that the rules of procedure specifically exempted them.

\textsuperscript{49} The rule was amended after the decision in Ashworth to make such reports discoverable. See Tex. R. Civ. P. 166b(2)(e); Ex parte Shepperd, 513 S.W.2d 813, 815 (Tex. 1974).

\textsuperscript{50} Cf. Houdaille Indus. v. Cunningham, 502 S.W.2d 544, 548 (Tex. 1973) (stating that work product does not protect expert reports prepared by or for the expert in anticipation of his testimony).
attorney to acquire the information necessary to prepare for trial. More importantly, our plan reaches this goal through less costly and more efficient methods. Thus, while eliminating the more familiar means, our plan arrives at the same end.

B. Discovery of Documents

The second well of information most necessary to a litigator’s preparation for trial is the documentation kept by the opposing party. Often, this area of discovery is also inundated with frivolous objections and unnecessary court hearings. However, the cure may be worse than the disease.

The proposed changes to the Federal Rules of Civil Procedure call for an affirmative duty to disclose “all relevant documents” within thirty days of the date the action is commenced.\(^ {51} \) Our plan, however, does not incorporate that duty because, unlike the duty to disclose persons with knowledge of relevant facts, it would involve crossing the line between requiring cooperation and requiring one party to make the other’s case. Furthermore, it would force attorneys to guess what is relevant to an often sparse complaint. The likely result would be that attorneys would simply designate “Warehouse A” because of the fear of being accused of hiding a document. This would achieve no benefit for either side.

Finally, such a duty would subject the defendant to great expense and effort even before the plaintiff is required to show that he has a valid claim. This is particularly dangerous in Texas because once documents are discovered, they become public record.\(^ {52} \) Such a rule would invite persons to use the courthouse as a clearinghouse to make private documents public. For all these reasons, our plan leaves the procedure for requesting documents much the same as under the current system.\(^ {53} \)

There is one change, though, as stated above: our plan does not allow parties to serve interrogatories. Currently, a party will serve interrogatories to find out what documents are in the other party’s possession, custody, or control. After answers are given or, more

\(^{51}\) Committee on Federal Rules, supra note 11 (describing Proposed Federal Rule 26).

\(^{52}\) See Tex. R. Civ. P. 76(a).

likely, compelled by order of the court, the serving party then requests those same documents through requests for production. It seems obvious that the initial interrogatory can be easily side-stepped. Instead, a party can simply request documents in the form as follows:

Please produce the following documents. If you do not have these documents in your possession, custody, or control, please identify the source from which the documents may be obtained.\textsuperscript{54}

If the documents do not exist, the other party may simply respond to that effect.

Finally, thirty days before trial, parties will disclose a list of all documents or tangible things to be used as exhibits at trial.\textsuperscript{55} At the same time, the parties will make known all demonstrative aids intended to be used at trial and provide a date, time, and place where other parties may view the aids.\textsuperscript{56} Because all exhibits and demonstrative aids are disclosed a month before trial, the parties should be prepared either to stipulate as to their admissibility\textsuperscript{57} or to make written objections at the pretrial conference.\textsuperscript{58}

\textbf{C. Discovery of Experts}

Many attorneys feel that the use of experts at trial is crucial to the presentation of a claim or defense. This theory is at best questionable. Undeniable, though, is the fact that the use of experts and the discovery associated with their use require the expenditure of more money and time than any other facet of litigation. Although nothing can be done about the amount of expert fees themselves, steps can be taken to avoid much of the cost incurred during discovery.

\textsuperscript{54} The definition of “possession, custody, or control” is carried over from the current rule. “As long as the person has a superior right to compel the production from a third party, the person has possession, custody, or control.” TEX. R. CIV. P. 166b(2)(b).

\textsuperscript{55} Appendix I, Proposed Rule 166b(4)(b), \textit{infra}. Currently, Rule 166 requires the parties to disclose during the pretrial conference all exhibits intended to be used at trial.

\textsuperscript{56} Appendix I, Proposed Rule 166b(4)(b), \textit{infra}.

\textsuperscript{57} Appendix I, Proposed Rule 169, \textit{infra}.

\textsuperscript{58} Appendix I, Proposed Rule 166(b)(3), \textit{infra}.
Discovery of experts has become an unnecessarily complicated journey. First, interrogatories are served requesting the identification of experts, as well as any documents or tangible things used by the expert to form his opinions. Once the interrogatories are finally answered, a motion to produce is filed requesting the documents or other tangible things identified in the interrogatory answers. Then, a deadline is set, and expert reports are exchanged outlining the experts’ opinions and backgrounds.

As if the relevant information had not already been divulged, the attorneys then begin down another trail. They send out a notice of deposition that not only requires the expert’s presence for hours, if not days, during which the meter is running for both expert and attorney’s fees, but also requires the expert to produce the very documents previously disclosed in response to the request for production. In the deposition itself, the parties inquire as to the facts known by the expert, the subject matter of his testimony, his mental impressions and opinions, and his qualifications, all of which were previously disclosed in the expert report.

Needless to say, the current process is inefficient. The expense of the discovery methods in conjunction with the expert fees to review evidence, prepare data, testify at the deposition, prepare the report, and testify at trial is phenomenal. Our plan cuts the cost by making the discovery of experts and their opinions more straightforward by providing a simple two-step process.

1. **Initial Disclosure.**—First, at least 120 days before the first trial setting, each party discloses to all other parties the identification and location of all experts expected to testify at trial, either live or by deposition. For each identified expert, the party shall disclose detailed information as to his qualifications and experience. The information must include the expert’s name, address, and telephone number. In addition, the expert’s curriculum vitae shall be disclosed

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59. See TEX. R. CIV. P. 166b(2)(e)(1). Rule 166b(2)(e)(1) allows the discovery of those experts who will testify at trial and consulting experts whose work product, mental impressions, and opinions have been reviewed by a testifying expert.

60. *Id.*

61. Appendix I, Proposed Rule 166b(6)(a), *infra.* As in current Rule 166b(2)(e)(1), parties must also disclose information regarding the identity of consulting experts whose work product, mental impressions, or opinions have been or will be reviewed by a testifying expert.
outlining his formal training, education, experience, and any publications or research conducted by the expert in his particular field of expertise. Information regarding previous cases in which the expert has testified is required, including the number of cases, the subject matter of each, and the side for which he testified, plaintiff or defendant. Finally, the expert’s expected compensation shall be disclosed.

2. Expert Reports.—One final disclosure is made that details the expert’s opinions and expected testimony. Thirty days before trial, each expert is required to produce all documents and tangible things, including all reports, physical models, compilations of data, and other materials prepared by or for him or reviewed in anticipation of his testimony. Along with the production of tangible evidence, each expert shall produce a detailed report of his opinions, including any facts known to the expert that relate to or form the basis of his mental impressions and opinions. The expert will be limited to the substance of this report when testifying on direct examination and may not testify at variance with or in addition to the report. However, an expert may criticize another testifying expert’s qualifications, opinions, or mental impressions without including that criticism in his report.

3. Depositions.—Because of the detailed disclosures and the required report outlining the expert’s testimony, depositions need not be relied on to the extent they are under the current system. Our plan allows the party for whom the expert is testifying to decide

62. The federal changes require that this disclosure be made 90 days before trial. COMMITTEE ON FEDERAL RULES, supra note 11 (describing Proposed Federal Rule 26). However, our 30-day deadline allows the experts time to review all information disclosed during discovery before having to submit a report. See also infra Appendix I, Proposed Rule 166b(4)(a) (requiring witness statements 60 days before trial).

63. Appendix I, Proposed Rule 166b(6)(b)(i), infra; see also TEX. R. CIV. P. 166b(2)(e) (making such evidence discoverable).

64. Appendix I, Proposed Rule 166b(6)(b)(i), infra. If the expert is to be depoosed, this report must be produced at least 10 days prior to the scheduled deposition. Appendix I, Proposed Rule 187a(2)(a), infra.

65. Appendix I, Proposed Rule 166b(6)(b)(i), infra.

66. See COMMITTEE ON FEDERAL RULES, supra note 11 (describing Proposed Federal Rule 26 and recommending that the Federal Rules preclude admission of facts and opinions not contained in the report).
whether the expert will testify live or by deposition.\textsuperscript{67} As is the case with fact witnesses, the deposition is used in lieu of, not in the preparation of, the expert's live testimony.

Providing the party with this choice is admittedly more lenient than the rule for fact witnesses.\textsuperscript{68} However, because experts often have busy schedules, are from different areas of the country, and, more importantly, are being paid to testify, it is sometimes more feasible for parties to pay experts to be deposed than to have them testify live at trial. As protection from abuse, a party who deposes but later chooses not to introduce the deposition testimony at trial must reimburse all other parties for their expenses in preparing for and attending the deposition.\textsuperscript{69}

To limit the cost to other parties, the expert must be deposed in the county in which the case is to be tried.\textsuperscript{70} This is required so that a party may not save expenses by deposing the expert in a foreign location, while forcing all other parties to travel around the country, and sometimes around the globe, to cross-examine the witness. Furthermore, bringing the expert to the deposition is practical, whereas it may not be for the ordinary fact witness. Unlike a fact witness who is beyond the subpoena power of the court, an expert who is being paid by the party has every reason to appear, especially if it is made a condition of his employment.

Thus, through two simple exchanges of information, the parties gain the same information obtained by the current system. More importantly, they do so at a fraction of the cost and frustration.

\textbf{D. Duty to Supplement}

Like the current rule, our plan prohibits a party from calling a witness, lay or expert, who was not identified prior to trial or introducing an exhibit that was not identified prior to trial.\textsuperscript{71}

\textsuperscript{67} Appendix I, Proposed Rule 187a(2), \textit{infra}. This alone will reduce the number of depositions because by deposing the expert, the party precludes his live testimony.

\textsuperscript{68} \textit{See supra} section II.A.2.

\textsuperscript{69} Appendix I, Proposed Rule 187(2)(d), \textit{infra}. Reimbursement, however, would not be necessary in the event that the trial court limited the use of the deposition.

\textsuperscript{70} Appendix I, Proposed Rule 187a(2)(b), \textit{infra}.

\textsuperscript{71} TEX. R. CIV. P. 166b(2), 215(5); \textit{see also} Sharp v. Nat'l Bank, 784 S.W.2d
Witnesses must have been previously identified as persons with knowledge of relevant facts, and documents, if requested, must have been produced. Although these initial duties to disclose are relatively clear-cut, the duty to supplement is in need of an overhaul to make the pretrial plan complete and to avoid the pitfalls so characteristic of the current system.

Under the current system, a party may wait until the last possible day to supplement and then bury the opponent in new information a month before trial. Even if the party misses the deadline, the witness can testify or the document can be introduced merely on a showing of good cause, which under recent court decisions more closely resembles the standard of surprise.

669, 671 (Tex. 1990) ("A party is entitled to prepare for trial assured that a witness will not be called because opposing counsel has not identified him or her in response to a proper interrogatory.").

72. See, e.g., Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 916-17 (Tex. 1992) (excluding testimony of witness not previously identified as person with knowledge of relevant facts).

73. See TEX. R. CIV. P. 166b(6).


75. Current Rule 166b(6) merely prescribes a deadline to supplement and imposes no continuing obligation to update except for expert witnesses.

Our plan calls for a continuing obligation to seasonably supplement all disclosures to include any information later acquired or not yet disclosed. Therefore, rather than waiting until the last day to supplement—or, more accurately, surprise—a party shall supplement the disclosure within a reasonable time of learning of the information. Unlike the current rule, the fact that the disclosure was correct when made is not good enough.

Although the duty to supplement is continuing, the ability of the party to supplement depends on when he attempts to do so. If the party wishes to supplement either a disclosure or response before sixty days prior to the first trial setting, the party may do so unless an objecting party is able to show that either

(i) the supplementing party had actual knowledge of the information at an earlier date and failed to supplement within a reasonable time; or

(ii) the supplementing party, through reasonable diligence, should have known of the information at an earlier date and the late supplementation will now prejudice the objecting party.

The objecting party’s burden before the deadline is admittedly hard to sustain and should be so. In this way, parties are effectively discouraged from objecting to predeadline supplementation unless it is clear that the spirit and purpose of the continuing obligation to supplement has been ignored.

After the deadline, the burden shifts from the objecting party to the supplementing party. Instead of presuming that the supplementation is proper, the court will presume that it is improper. Therefore, it is the burden of the supplementing party to show that both

(i) the exclusion of the information will by itself work a manifest injustice; and

(ii) the supplementing party did not know and, through reasonable diligence, should not have known of the information at an earlier date.

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77. Appendix I, Proposed Rule 166b(5), infra.
78. Current Rule 166b(6) requires supplementation only when (1) the party “knows that the response was incorrect or incomplete when made,” or (2) the party “knows that the response though correct and complete when made is no longer true and complete and the circumstances are such that failure to amend the answer is in substance misleading.”
79. Appendix I, Proposed Rule 166b(5)(a), infra.
80. Appendix I, Proposed Rule 166b(5)(b), infra.
This burden is much like the burden a party must meet before being granted a new trial based on newly discovered evidence. Such a heavy burden is necessary in order to force the parties to meet their duty of disclosure. This furthers the objective of effective preparation for trial and encourages attorneys to do their homework up front.

E. Pretrial Conference

With the necessary information regarding persons, documents, and experts timely disclosed, the court may, in its discretion, schedule a pretrial conference any time within the month before trial. This conference, established by current Rule 166, allows the court to use its authority under Texas Rule of Evidence 611(a) to assist in the smooth disposition of the case. The court may require the attorneys and the parties or their duly authorized agents to appear together or separately on the record. At the pretrial conference, the court and the parties will discuss

1. all pending pleas, motions, and exceptions;
2. for a jury trial, proposed jury questions, instructions, and definitions, and for a nonjury trial, proposed findings of fact and conclusions of law;
3. stipulations of authenticity and admissibility of exhibits or written objections to such authenticity and admissibility;
4. limits on the number of fact witnesses and experts allowed to testify;

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81. See Jackson v. Van Winkle, 660 S.W.2d 807, 809 (Tex. 1983) (describing elements for a motion for new trial based on newly discovered evidence: (1) the evidence surfaced after trial; (2) the party used due diligence before trial to discover the evidence but was unable to do so; (3) the evidence is not cumulative; and (4) the evidence is sufficiently material so as to make a different result in a new trial probable).

82. Appendix I, Proposed Rule 166, infra.

83. Texas Rule of Evidence 611(a) grants the trial court the authority to “exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.”

84. Instead of requests for admission, our plan makes use of written stipulations to narrow the issues for trial and ensure a smooth and efficient trial. These stipulations must be filed with the court at least 30 days before trial. Appendix I, Proposed Rule 169, infra.
(5) settlement, and in the aid thereof, the court may encourage settlement;
and

(6) any other matters that may aid the disposition of the case.85

Any rulings made during the pretrial conference shall be made on
the record and will preserve error. The rulings shall control the
subsequent action unless modified to prevent manifest injustice.86

To finalize the case for trial, any amendment of pleadings must
be done at least thirty days before trial.87 This deadline comes
after the deadline to supplement so that any new claims or defenses
arising from supplemented information may be included. When
presented with an amendment, the court has discretion to extend the
timeline or grant a continuance.

Requiring the parties to take these last steps to prepare the case
for trial truly transforms the "pretrial conference" into a meeting of
last-minute preparation. By making discovery a self-sufficient
system, our plan effectively removes the court from the initial
discovery process and involves the court only after the parties have
done their homework. Therefore, the court's involvement is limited
to familiarizing itself with the issues about to be tried and to solving
last-minute problems. More importantly, by forcing the parties to
paint a final picture of what they will face at trial, our plan encour-
gages a closer examination of the possibilities of settlement.

III. Conclusion

So, what have we accomplished? A lot with a little.

While keeping Rule 215 virtually unchanged, we have effect-
ively limited the circumstances under which the parties will be
entitled to resort to its application. In short, we have pulled the rug
out from under the obstructionist. Interrogatories and requests for
admissions are gone. In their place is the obligation to identify

85. Appendix I, Proposed Rule 166(b), infra.
86. This standard is borrowed from current Rule 166.
87. Appendix I, Proposed Rule 63. infra. The current rule allows for
amendments up to seven days before trial. TEX. R. CIV. P. 63. Under our plan,
however, parties are privy to all information at least 60 days prior to trial. Thus,
there is no reason to allow a party to sit on its heels, amend, and possibly change the
character of the entire suit, one week before the scheduled trial.
persons with knowledge of relevant facts and later to identify those actually intended to be called at trial. Also eliminated is the intolerable and ever-changing case law surrounding the duty to supplement an answer to discovery and the elusive quarry known as "good cause." In its place is a more reasonable standard for supplementation that, when coupled with the obligation to identify trial witnesses, retains the benefits of the old procedure.

Our plan also eliminates the opportunity for attorneys to designate and depose more experts than they could possibly intend to call to testify. The parties can still choose their own experts, and may either call them live or depose them, but not both. Further, if the proponent chooses to depose, the deposition must occur in the county where the suit is pending. If the proponent decides (without court intervention) not to use the deposition, he must pay everyone else for their trouble in attending and preparing for it.

Finally, the rules concerning production of documents have been left untouched, except with respect to the obligation to disclose trial exhibits and the application of the new standard for supplementation.

Those concerned that these changes might have an adverse effect on settlements need not be concerned. First, discovery is rarely the catalyst that settles cases. To the contrary, extensive abuse of discovery renders cases too expensive to settle. It is only when the parties and lawyers are faced with the fear and uncertainty of an imminent trial setting that they realistically evaluate their chances of success in the courtroom. Also, none of these changes will affect alternative dispute resolution techniques, which have been extremely effective in settling cases. In fact, the greater the number of cases that reach settlement, the more quickly others will be able to reach trial, which in turn will result in more settlements.
APPENDIX I

Rule 63—Amendment of Pleadings
Parties may amend their pleadings at any time so as not to operate as a surprise to an opposing party, provided that any pleadings offered for filing within thirty (30) days of the date of trial shall be filed only after leave of court is obtained, which leave shall be granted unless there is a showing that such filing will operate as a surprise to an opposing party.

Comment
The deadline for amendments is changed from seven (7) to thirty (30) days before the date of trial. The requirement for leave of court after that deadline, however, remains the same.

Rule 166—Pretrial Conference
(a) The court, in its discretion, to assist the disposition of the case without undue expense or burden to the parties, may require the attorneys and the parties or their duly authorized agents to appear together or separately on the record for a pretrial conference.

(b) The following matters are to be discussed in the pretrial conference:
   (1) all pending pleas, motions, and exceptions;
   (2) for a jury trial, proposed jury questions, instructions, and definitions, and for a nonjury trial, proposed findings of fact and conclusions of law;
   (3) stipulations of authenticity and admissibility of exhibits or written objections to such authenticity or admissibility;
   (4) limitations on the number of fact witnesses and experts allowed to testify;
   (5) settlement, and in aid thereof, the court may encourage settlement; and
   (6) any other matters that may aid the disposition of the case.

(c) The rulings made in the conference are to be made on the record and preserve error. Such rulings shall control the subsequent action unless modified to prevent manifest injustice.
Comment
Many items listed in current Rule 166 to be discussed at the pretrial conference are deleted, because under our new plan they are dealt with by the parties without court supervision. Because all documents must be disclosed thirty (30) days before trial at the latest, each party should have written objections ready to be presented and discussed at the conference. The standard for amending a ruling of the court made during the conference remains the same as under the current rule. Subsection (c) makes it clear that any rulings made during such conferences preserve error for purposes of appeal.

Rule 166b—Duties and Scope of Discovery, Supplementation, and Responses

(1) Initial Disclosures
Except when otherwise ordered, each party, within ninety (90) days of service of its complaint or answer, shall voluntarily, and without waiting for a discovery request, disclose to all other parties the identification and location (including the most recent known name, address, and telephone number) of any party or potential party, and of all other persons with knowledge of relevant facts. For each identified person, a statement of the subject matter and scope of his knowledge shall be included. A person has knowledge of relevant facts when he has or may have knowledge of any discoverable matter. The information need not be admissible in order to satisfy the requirements of this subsection and personal knowledge is not required.

Comment
This section mirrors the language in current Rule 166b(2)(b) making such information discoverable. The new rule simply makes it possible for a party who is “entitled” to this information to receive it without jumping through the hoops so prevalent in the current system. The requirement that statements accompany the disclosure is lifted from current Rule 166(h), which allows the court to require parties to exchange “the subject of the testimony of each . . . witness” identified by the party. It is also common for such statements to be requested through interrogatories. The definition of “person with knowledge of relevant facts” is the same as under the current rule.
(2) Discovery of Additional Matter
Once the initial disclosures have been made pursuant to section (1) of this rule, parties may obtain discovery by one or more of the following methods: oral or written depositions per Rules 187, 187a, and 208; requests and motions for production, examination, and copying of documents or other tangible things per Rule 167; requests and motions for entry upon land and examination of real property per Rule 167; and motions for a mental or physical examination of a party or person under the legal control of a party per Rule 167a.

Comment
Like proposed Federal Rule 26(d), this section requires that the parties wait for the initial disclosures before utilizing further discovery methods. This allows a party to focus on full disclosure and prevents wasteful requests served before the information is forthcoming pursuant to section (1) of this rule. The proper forms of discovery, listed in current Rule 166b(1), have been limited. Specifically, interrogatories and requests for admissions have been excised from the system. Both discovery methods have proven to be unnecessary and, more often than not, disserve the purpose of discovery. In addition, oral depositions are limited by Rule 187a and written depositions are to be used for authentication purposes only pursuant to Rule 208. The other forms of discovery are carried over from the current system.

(3) Scope of Discovery
Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter in 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 ground for objection that the information sought will be inadmissible at the trial, provided that the request for the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Comment
Language regarding the scope of discovery is lifted directly from current Rule 166b(2)(a). As with that rule, the scope is limited by the exemptions and privileges stated later in the rule. However, the language of the current rule relating to interrogatories and requests
for admissions that call for opinion or application of law are deleted because neither is a proper form of discovery under our plan. The remainder of current Rule 166b(2), entitling a party to request production of various documents, is transferred to Rule 167, which outlines the rules for such requests.

(4) Trial Disclosures

(a) At least sixty (60) days before trial, each party shall disclose to all other parties the identification and location of all direct fact witnesses expected to be called at trial, except for those rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated prior to trial. For each witness expected to testify live at trial, the party shall disclose a statement detailing the relevant facts known by the witness. No witness shall be allowed to testify who was not previously identified pursuant to section (1) of this rule, unless the court finds that the duty to supplement, as set forth in section (5), has been satisfied.

(b) At least thirty (30) days before trial, each party shall disclose to all other parties a list of all documents or other tangible things to be introduced as exhibits or demonstrative aids at trial. If an exhibit was not previously requested, the party shall disclose the document or tangible thing at this time. If an exhibit was not previously disclosed pursuant to an appropriate request, the party must satisfy the duty to supplement, as set forth in section (5). The party shall also make any demonstrative aid available to the other parties for their viewing.

Comment

Section (4)(a) of this rule requires the disclosure of information currently exchanged pursuant to current Rule 166(h). The disclosure of this information would be required under proposed Federal Rule 26(a)(3)(A). The deadline for this disclosure is set at sixty (60) days before trial so that experts may have this information prior to submitting their reports. The requirement of the actual witness statement, however, is more stringent than the requirement in current Rule 166(h) that the “subject of the testimony of each such witness” be disclosed. This statement is necessary to bridge the information gap created by the curtailment of depositions. The exemption
regarding witness statements in current Rule 166b(3)(c) is thus deleted.

Section (4)(b) requires the disclosure of information currently exchanged pursuant to present Rule 166(l). The disclosure of this information would be required under proposed Federal Rule 26(a)(3)(C). The difference in the deadline between sections (4)(a) and (4)(b) is due to the fact that experts are already privy to the information contained in the documents produced in response to earlier requests. Section (4)(b) merely narrows the field of documents that may be introduced at trial, whereas the witness statements in section (4)(a) may disclose new facts that must be taken into account by experts before they are required to file a report.

(5) Duty to Supplement
A party has a continuing obligation to seasonably supplement or correct discovery disclosures or responses to include information thereafter acquired.

(a) A party may supplement a disclosure or response any time prior to sixty (60) days before trial, unless the objecting party shows:
   (i) the supplementing party had actual knowledge of the information at an earlier date and failed to supplement within a reasonable time; or
   (ii) the supplementing party, through reasonable diligence, should have known of the information at an earlier date and the late supplementation will now prejudice the objecting party.

(b) A party may not supplement a disclosure or response later than sixty (60) days before trial, unless the supplementing party shows:
   (i) the exclusion of the information will by itself work a manifest injustice; and
   (ii) the supplementing party did not know and, through reasonable diligence, should not have known of the information at an earlier date.
Comment
Unlike the current duty to supplement, this plan calls for a continuing obligation, much like the one in proposed Federal Rule 26(e)(1)(2). An objection should not be made to supplementation before the deadline unless the spirit of this continuing obligation has been ignored. Acquisition of any new information triggers this duty to supplement, regardless of whether the original disclosure was correct and complete when made. To supplement after the deadline, a party must overcome a burden which mirrors that required before a new trial may be granted based on newly discovered evidence. This is appropriate because the party has had months to supplement and only that information which was not discoverable earlier should be thrust upon a hapless opponent on the eve of trial.

(6) Disclosure of Experts

(a) At least 120 days before trial, each party shall disclose to all other parties the identification of all experts expected to testify at trial, either live or by deposition. The following information shall be included regarding each expert:

(i) name, address, and telephone number;
(ii) curriculum vitae, including:
(A) formal training;
(B) education;
(C) experience; and
(D) publications, research, etc.;
(iii) expected compensation; and
(iv) previous cases in which the expert testified, including:
(A) number of cases;
(B) subject matter of each action; and
(C) side for which expert testified.

This information is also required of consulting experts if their work product, mental impressions, or opinions have been or will be reviewed by a testifying expert.

(b) At least thirty (30) days before trial, each party shall disclose to all other parties the following:

(i) For each expert, a detailed report of his opinions, including any facts known to the expert that relate to or form a basis of the mental impressions or opinions held by the expert. The expert
will be limited to the substance of this report and may not testify at variance with or in addition to the report on direct examination. This limitation does not apply to the expert’s criticisms of other testifying experts’ qualifications, work product, mental impressions, or opinions.

(ii) All documents and tangible things, including all reports, physical models, compilations of data, and other materials reviewed or prepared by or for an expert in anticipation of the expert’s testimony. The discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert must be reduced to tangible form and produced in compliance with this rule. If the tangible thing is a model or demonstrative aid, it must be made available for viewing within the same time frame.

Comment
This section requires disclosure of the information discoverable under current Rule 166b(2)(e). However, the new rule goes further and requires more detailed information, much like that in the proposed changes to Federal Rules 26(a)(2)(A)-(B) and 26(b)(4)(A). If an expert is being deposed rather than testifying live at trial, a report required under section (2) shall be submitted to all other parties at least ten days prior to the date of the scheduled deposition under Proposed Rule 187a(2)(a). By limiting the expert’s testimony to that information disclosed in his report, the rule ensures that the report will be accurate and detailed.

(7) Exemptions

This section remains unchanged from current Rule 166b(3) except that 166b(3)(c), which exempts witness statements from discovery, is deleted. Such statements are discoverable under this plan.

(8) Presentation of Objections

This section remains unchanged from current Rule 166b(4) except for the following addition:

The party withholding information from disclosure or discovery on an express claim that it is privileged shall support the claim with a
description of the documents, testimony, or things not produced or disclosed that is sufficient to enable other parties to contest the claim. If an assertion is claimed to prevent voluntary disclosure as required by section (1) or (4), and the court finds that the information is well outside any privilege, the court may, in its discretion, order an appropriate sanction if the assertion violated or abused the spirit of discovery.

Comment
The requirement that a privilege be expressly asserted and supported is derived from the proposed changes to Federal Rule 26(b)(5).

(9) Protective Orders

This section remains unchanged from current Rule 166b(5).

(10) Discovery Motions

This section remains unchanged from current Rule 166b(7).

(11) Signing of Disclosures

Every disclosure made pursuant to this rule shall be signed by the party and at least one attorney of record. A party who is not represented by counsel shall sign the disclosure. The signature of the attorney or party constitutes a certification that, to the best of the signers knowledge, information, and belief formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

Comment
This section is similar to that proposed for Federal Rule 26(g). The purpose of having the party, as well as his attorney, sign the disclosure is to prevent a party from eluding disclosure by simply not telling his attorney about the information. By signing the disclosure, the party and his attorney certify that it is complete.
Rule 166c—Court Discretion
When the circumstances of a case so require, the court, in the interests of justice, may alter or extend the timeline for a particular disclosure, or allow further or more expanded discovery.

Comment
This rule allows the court to take into account the particular complexities of a case and decide if the discovery plan needs to be expanded. The court should keep in mind that the goal of discovery is to facilitate the cooperative exchange of information and the preparation for trial.

Rule 167—Production of Documents and Things for Inspection, Copying or Photographing
(1) Procedure. Any party may serve on any other party a REQUEST:

(a) to produce and permit the party making the REQUEST, or someone acting on his behalf, to inspect, sample, test, photograph and/or copy, documents or tangible things which contain information within the scope of Rule 166b which are in the possession, custody or control of the party upon whom the request is served, including but not limited to:

(i) Indemnity, Insuring and Settlement Agreements. A party may obtain discovery of the following:

(A) The existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(B) The existence and contents of any settlement agreement. Information concerning the settlement agreement is not by reason of disclosure admissible in evidence at trial.

(ii) Statements. Any person, whether or not a party, shall be entitled to obtain, upon written request, his own statement
previously made concerning the subject matter of a lawsuit, which is in the possession, custody, or control of any party. For the purpose of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, and (B) a stenographic, mechanical, electrical or other type of recording, or any transcription thereof which is a substantially verbatim recital of a statement made by the person and contemporaneously recorded.

(iii) Medical Records; Medical Authorization. Any party alleging physical or mental injury and damages arising from the occurrence which is the subject of the case shall be required, upon written request, to produce, or furnish an authorization permitting the full disclosure of, medical records not theretofore furnished to the requesting party which are reasonably related to the injury or damages asserted. Copies of all medical records, reports, x-rays or other documentation obtained by virtue of an authorization furnished in response, shall be furnished by the requesting party, without charge, to the party who furnished the authorization in response to the request and copies of all medical records, reports, x-rays or other documentation obtained by virtue of the written request or by virtue of the authorization shall be made available by the requesting party for inspection and photographing and/or copying to all parties to the action under reasonable terms and conditions. If such information, so obtained, is to be used or offered in evidence upon trial, it shall be furnished by the requesting party to the party who furnished the authorization and made available for inspection by all parties not less than thirty (30) days prior to trial.

Comment
The above additions to Rule 167 are transported from Rule 166b(f), (g), and (h). The remainder of the rule remains unchanged.

Rule 169—Stipulations
At least thirty (30) days before trial, the parties shall have conferred and filed written stipulations of agreed upon and contested issues of fact and law.
Comment
This rule replaces the current rule regarding requests for admissions. In the current system, such requests are no longer used to discover information, but rather to catch the other party off guard. Rather than reward such tactics, discovery tools should be tailored to foster cooperation. Therefore, the parties must now confer among themselves to produce stipulations of fact and law. If none can be agreed upon, they should file a statement outlining the contested issues so that the court can at least get acquainted with the case and the relevant issues.

Rule 187—Depositions to Perpetuate Testimony

This rule remains unchanged. Although there is some room for abuse because of the language allowing a person to depose "any other party," sufficient safeguards exist to limit any such threat. Judges rarely grant such depositions since they take place before any litigation and therefore not all parties are yet known. Under Rule 207, the deposition would not be admissible against any party not named and not appearing at the deposition.

Rule 187a—Trial Depositions

(1) No deposition of any fact witness may be taken unless:

(a) a verified motion is filed with the court stating that the person to be deposed is a person whose testimony is material and necessary to the presentation of the movant's case-in-chief; and either:

(i) is unavailable for trial due to illness or other unusual circumstances; or

(ii) is beyond the subpoena power of the court; and

(b) an order is entered by the court authorizing the deposition and setting the time and place.

If a deposition is taken pursuant to this rule, the witness may not later testify live at trial, even if available. The determination of "unusual circumstances" is within the court's discretion. "Unusual circumstances" does not include scheduling conflicts of counsel or expenses associated with appearance.
Comment

This rule limits depositions to unusual circumstances to ensure that depositions are not used for one party's fishing expedition while every other party is forced to incur exorbitant attorney's fees. Subsection (a)(i) is intended to limit the deposition to those persons the movant plans to bring as direct fact witnesses. Even if a witness is adverse to the movant, he may still be material to the presentation of the movant's case-in-chief. The rule somewhat limits the court's discretion by stating what may not constitute "unusual circumstances." These limitations, however, are reasonable. For example, where a witness is unable to pay the expenses associated with his testimony, it is more reasonable to require the party who intends to use his testimony to pay the expenses to get the witness to trial than to force all other parties to expend the time and resources associated with preparing for, traveling to, and attending a deposition. When determining whether "unusual circumstances" exist, the court should consider whether other parties in any way caused the witness to be unavailable. The rule barring live testimony once a deposition is taken is designed to ensure that the party seeks to depose only those persons who are likely to be unavailable at trial. It will also prevent depositions from being taken merely to prepare the witness for trial.

(2) In lieu of presenting an expert witness live at trial, a party may take the trial deposition of its own expert under the following conditions:

(a) a report and accompanying data must be served in compliance with Rule 166b(6)(b) upon counsel for all other parties at least ten (10) days before the date of the scheduled deposition;
(b) the deposition of the expert must be taken in the county where the suit is pending;
(c) the witness may not testify live at trial; and
(d) absent a court-imposed limitation on expert testimony, if the party noticing the deposition decides not to use it at trial, such party shall pay the costs associated with attending the deposition incurred by all other parties, including reasonable attorney's fees. The parties may waive this requirement per Rule 11.

Comment
In some cases, deposing an expert may be more feasible than having him testify live. If so, the deposition may be taken as long as the other parties are not disfavored thereby. The above conditions prevent shifting the inconvenience to the other parties. The parties are entitled to a report detailing the expert’s opinions and the accompanying data prepared for or by the expert in anticipation of his testimony, just as if the expert were testifying live. This allows the parties to prepare for their cross-examination as they would have for trial. The deposed expert is barred from testifying live at trial.

(3) At least ten (10) days before the deposition takes place pursuant to section (1) or (2) above, the party, or his attorney, shall serve written notice on all other parties of the time and place designated therefor. The notice shall state the name of the deponent, the time and place of the deposition, and the identity of all persons who will attend the deposition other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the deposition.

Comment
This rule is derived from current Rule 200(2). The only changes are that a deadline of ten (10) days is added to clarify the meaning of “reasonable notice.” Also, the provisions regarding notice of requested documents are deleted because they are handled by a Rule 167 request.

(4) When a witness asserts a privilege during a trial deposition and is instructed by counsel not to answer the question:
   (a) the question shall be answered on the record outside the presence of any other party or counsel;
   (b) the answer shall be kept under seal by the court reporter and not disclosed without court order;
   (c) the court, upon motion by a party seeking to compel the answer to such sealed questions, may order that such answers be disclosed; and
   (d) if additional questions reasonably related to the sealed answers are required to ensure full and fair cross-examination, the party asserting the privilege shall reconvene the deposition upon ten (10) days notice. The costs associated with the reconvened
deposition incurred by all other parties, including reasonable attorney's fees, shall be borne by the party asserting the privilege.

Comment
This rule ensures that a privilege is not asserted merely to hide the ball. Because counsel's instructions that the witness not answer are given at his peril, he will likely do so only if he truly believes the answer is protected.

Rule 188—Depositions in Foreign Jurisdiction

This rule remains unchanged except that the deposition must be one in compliance with Rule 187a.

Rule 200—Depositions upon Oral Examination

This rule is deleted. Oral depositions may only be taken in compliance with Rule 187a.

Rule 201—Compelling Appearance; Production of Documents and Things; Deposition of Organization

This rule remains unchanged with the exception of the following deletion. As to the request of documents through subpoena duces tecum, parties have ample opportunity to compel production of such documents either at or before the deposition in accordance with Rule 167. Thus, section (2) of Rule 201 is deleted.

Rule 203—Failure of Party or Witness to Attend; Expenses

This rule remains unchanged.

Rule 204—Examination; Cross-Examination; Objections

This rule is deleted. The deposition must be taken as a trial deposition to ensure its admissibility.

Rule 205—Submission to Witness; Changes; Signing

This rule remains unchanged.
Rule 206—Certification by Officer; Exhibits; Copies; Notice of Delivery

This rule remains unchanged.

Rule 207—Use of Deposition Transcripts in Court Proceedings

This rule remains unchanged.

Rule 208—Depositions upon Written Questions

This rule remains unchanged from current Rule 208 except for the following, which replaces the first paragraph of Rule 208(1):

1) Serving Questions; Notice.

(a) After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. All questions shall be limited to developing the authenticity or admissibility of documentary evidence. Leave of court, granted with or without notice, must be obtained only if a party seeks to take a deposition prior to the appearance day of any defendant.

(b) Attendance of witnesses may be compelled by a subpoena issued in accordance with Rule 201.

Comment

This form of discovery is the last remaining vestige of attorney-controlled depositions. It can only be used, however, to ask questions pertaining to the authenticity or admissibility of documentary evidence. This is a necessary tool because although documentary evidence is the main objective of discovery, its use requires that it be in admissible form.
APPENDIX II
Timeline to Trial

PERIOD OF LIMITED DISCOVERY

90 Days After Complaint

120 Days Before Trial
- Disclosure of Identity of Persons with Relevant Knowledge

60 Days Before Trial
- Disclosure of Identity of Experts and Basic Information
- Supplementation Deadline
- Statements of Fact Witnesses Due

30 Days Before Trial
- Deadline to Amend Pleadings
- Disclosure of Exhibits and Demonstrative Aids
- Disclosure of Expert Reports

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