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DAY 1

7.5 hours including 1 ethics

8:55 **Welcoming Remarks**
Course Director
Jason P. Fulton, *Dallas*
Diamond McCarthy

Co-Course Director
Hon. Robin Malone Darr, *Midland*
Senior Judge, 385th District Court

9:00 **U.S. Supreme Court Update** *1 hr*
Dean Erwin Chemerinsky, *Berkeley, CA*
University of California,
Berkeley School of Law

10:00 **Personal Injury Topic Update** *.5 hr*
Cade W. Browning, *Abilene*
Browning Law Firm

10:30 **Break**

10:45 **Legislative Update and Practices After COVID-19** *.75 hr (.25 ethics)*
David E. Chamberlain, *Austin*
Chamberlain Mchaney

Guy Choate, *San Angelo*
Webb Stokes & Sparks

11:30 **Attorneys' Fees, After *Roohrmoos Venture*** *.5 hr (.25 ethics)*
Robert Ford, *Houston*
Bradley Arant Boult Cummings LLP

12:00 **Break**

12:15 **Luncheon Presentation: Texas Supreme Court and Fifth Circuit Update** *1.0 hr*
Hon. Craig T. Enoch, *Austin*
Justice (Ret.), Enoch Kever

Hon. Thomas R. Phillips, *Austin*
Chief Justice (Ret.), Baker Botts

1:15 **Break**

1:30 **Business Torts Update** *.5 hr*
Joe Escobedo, *Edinburg*
Escobedo & Cardenas

2:00 **Oil and Gas Litigation Update** *.75 hr*
Timothy S. McConn, *Houston*
Yetter Coleman

Reece Rondon, *Houston*
Judge (Ret.), Hall Maines Lugrin

2:45 **Malpractice and Ethics Update** *.75 hr (.5 ethics)*
Randy Johnston, *Dallas*
Johnston Tobey Baruch

3:30 **Break**

3:45 **Simplifying the Complex for Trial Preparation and Presentation** *.5 hr*
Chip Brooker, *Dallas*
Brooker Law

4:15 **Family Law Litigation Update in Light of COVID-19** *.5 hr*
Sally Pretorius, *Plano*
KoonsFuller

4:45 **The Impact of COVID-19 on Employment Law: What Litigators Need to Know** *.75 hr*
Amy Gibson, *Dallas*
Gibson Wiley

Christie A. Newkirk, *Dallas*
Carrington Coleman Sloman & Blumenthal

5:30 **Adjourn**

DAY 2

6.5 hours including 1.75 ethics

8:55 **Announcements**

9:00 **Judges' Panel: COVID-19 Discovery and Trial Procedure Disputes** *1 hr*
Moderator
Michael Murphy, *Houston*
Winston & Strawn

Panelists
Hon. Barbara M.G. Lynn, *Dallas*
Chief Judge, Northern District Court of Texas

Hon. Beau A. Miller, *Houston*
Judge, 190th Civil Court

Hon. Emily Miskel, *McKinney*
Judge, 470th District Court

David Slayton, *Austin*
Office of Court Administration and Texas Judicial Council

10:00 **Avoiding the Traps: Key Differences Between State and Federal Civil Procedure** *.75 hr (.25 ethics)*
R. Layne Rouse, *Odessa*
Shafer Davis O'Leary & Stoker

10:45 **Break**

11:00 **2021 Discovery Update: Full Disclosure and Other Changes in a Post-COVID Texas** *.75 hr (.5 ethics)*
Monica W. Latin, *Dallas*
Carrington Coleman Sloman & Blumenthal

11:45 **Preservation of Error** *.5 hr*
Mary M. Steinle, *Austin*
Baker Botts

Macey Reasoner Stokes, *Houston*
Baker Botts

12:15 **Break**

12:30 **Luncheon Presentation: Be Your Own Director - 10 Practical Tips and Tricks Appearing via Zoom** *1.0 hr*
Hon. Chari L. Kelly, *Austin*
Justice, Third Court of Appeals

Prof. Tracy W. McCormack, *Austin*
University of Texas School of Law

Amy M. Stewart, *Dallas*
Stewart Law Group

1:30 **Break**

1:45 **Bankruptcy Update for the General Litigator** *.5 hr*
Paul D. Moak, *Houston*
Gray Reed

2:15 **Negligence and Premises Liability Update** *.5 hr*
Christine L. Stetson, *Beaumont*
The Bernsen Law Firm

2:45 **Preparation of Jury Charge and Objections** *.5 hr*
Marie Jamison, *Houston*
Wright Close & Barger

3:15 **Tools to Better Yourself and Your Practice: TLAP and Other State Bar Member Benefits** *.5 hr ethics*
Derek Cook, *Midland*
Lynch Chappell & Alsup

3:45 **Ethics of Technology in Law Practice: Practical Considerations for Lawyers in the COVID-19 Era** *.5 hr ethics*
Nathaniel (Nate) St. Clair, II, *Dallas*
Jackson Walker

4:15 **Adjourn**

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Hon. Robin Malone Darr ..... Midland

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BLOOD, GUTS, AND SORE BACKS: PERSONAL INJURY UPDATE 2020

CADE BROWNING, *Abilene*
Browning Law Firm, PLLC

State Bar of Texas
37TH ANNUAL
LITIGATION UPDATE INSTITUTE
January 21-22, 2021

CHAPTER 2

BIOGRAPHY

Cade Browning's practice is devoted to litigation. He is board certified by the Texas Board of Legal Specialization in personal injury trial law and is licensed in both Texas and Oklahoma.

Cade was born in Lucas, Texas where he grew up raising, training, selling, and showing cutting horses. He continues that tradition today at his ranch in Coronado's Camp (near Buffalo Gap) where he lives with his wife, Katie, and their two boys, Barrett and Bede.

Cade graduated from Texas A&M University and Baylor University School of Law, where he was twice elected President of the Student Bar Association and received the 'High A' in Baylor's esteemed Practice Court course from Professor Muldrow.

Professionally, Cade has served as president of the Abilene Bar Association, president of the Abilene Young Lawyers Association, and was named Abilene's Outstanding Young Lawyer.

Cade currently serves as President of the West Texas Chapter of ABOTA and on the Executive Committee for the Litigation Council of the Litigation Section of the State Bar of Texas where he has served for the last ten years. He was also elected to serve on the Texas Young Lawyers Association's Board of Directors for four years representing his thirty-four-county area in West Texas. Cade has served on multiple State Bar Committees, including the Grievance Committee where he was Panel Chair, and the Local Bar Services Committee. He has been named a Texas Super Lawyer seven times and is a Sustaining Life Fellow of the Texas Bar Foundation and the ABOTA Foundation

Locally, Cade has been very involved in Abilene and West Texas. Cade currently serves on the board of trustees and executive committees for the Grace Museum, Taylor County Expo Center, and Western Heritage Classic. Cade was previously on the board of directors for the Abilene Preservation League, Abilene Community Foundation- Future Fund, St. John's Episcopal School, Big Country Health Education Center, Texas Frontier Heritage and Cultural Center Advisory Board, and Abilene A&M Club. Cade was honored to serve as the president of the board for the Abilene Preservation League, the chairperson of the board for the Abilene Community Foundation – Future Fund, and the Chair for the Board of Trustees for the Grace Museum.

In 2014, Cade was honored to be asked to run for Justice on the Eleventh Court of Appeals in Eastland, a twenty-eighty county district, stretching from Stephenville to New Mexico. Although he won Taylor, Jones, Fisher, Shackelford, Stonewall, and Ector Counties, the bid was unsuccessful, allowing him to happily return to private practice.

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BLOOD, GUTS, AND SORE BACKS: PERSONAL INJURY UPDATE

I. INTRODUCTION

Rather than attempting a comprehensive survey of changes in all areas of personal injury law, this paper focuses on recent changes in four areas of personal injury law. The four areas are:

1. Changes to the TRCPs
2. Changes to TCPRC § 18.001 Practice
3. Vicarious Liability in the wake of *Painter*
4. UIM Cases

II. THE RULES ARE A CHANGIN'

AMENDMENTS TO THE TEXAS RULES OF CIVIL PROCEDURE

The Texas Supreme Court recently announced amendments to the Texas Rules of Civil Procedure, which will affect the practice of most litigants. Although still available for comment from December 1, 2020, the Court indicated it would be amending the Rules, drastically changing the requirements of Rule 194 Request for Disclosures, and expanding what constitutes an Expedited Action, effective January 1, 2021.

A. 194 Required Disclosures f/k/a ~~Requests for Disclosure~~

Effective January 1, 2021, Rule 194 will now more parallel Federal Rule 26(a). The disclosures outlined in the Rule will be mandatory and are not contingent upon a request. The comments to this proposed change indicate it is in response to the adoption of Texas Government Code Section 22.004(h-1) which calls for rules "to promote the prompt, efficient, and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed $250,000" that "balance the need for lowering discovery costs in these actions against the complexity of and discovery needs in these actions." However, the Rule 194 changes will apply to all cases, not just those pending in county court at laws or amounts in controversy under $250,000. Further, "[a] party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures."

Unless otherwise agreed to by the parties or ordered by the court, a party cannot serve discovery until after the initial disclosures are due. Tex. R. Civ. P. 192.2. Thus, serving interrogatories and request for production with the petition are no longer allowed.

So, what are the proposed changes?

1. 194.1 Duty to Disclose; Production f/k/a ~~Request~~

A party must make the initial disclosures at or within 30 days after the filing of the first answer unless a different time is set by the parties' agreement or court order. A party that is first served or otherwise joined after the filing of the first answer must make the initial disclosures within 30 days after being served or joined, unless a different time is set by the parties' agreement or court order. Tex. R. Civ. 194.2(a).

The content of the disclosure remains unchanged except for:

- **194.2(b)(4) f/k/a 194.2(d) ~~The Amount and any Method of Calculating Economic Damages~~**

194.2(d) is being stricken in its entirety and replaced with the following required disclosure:

> **a computation of each category of damages claimed by the responding party—who must also make available for inspection and copying the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered;**

Tracking the federal rule, the change is potentially significant in the striking of the term "economic damages." The proposed language could be interpreted to include both non-economic and economic damages. Further, replacing the "method of calculating" language with "a computation of each category of damages," is another issue the Courts will have to wrestle with. Finally, the party must also make "available for inspection and copying the documents or other evidentiary material on which each computation is based." This includes materials bearing on the nature and extent of injuries suffered. A party may still withhold such documents and materials under the attorney-client privilege but now the disclosure is required at the beginning of a case.

Disclosures under Rule 194.2(b)(3)(legal theories and factual bases of a responding party's claims or defenses) and 194.2(b)(4) (computation of damages), that are amended or supplemented, will not be admissible and may not be used for impeachment. Tex R. Civ. P. 194.6.

- **194.2(b)(6) Copies of Non-impeachment Documents**

Similar to requiring the production of documents used in computing damages and, again, tracking the federal rule, the proposed Required Disclosure Rule also adds a new subpart to Request for Disclosures, Subpart 6,

which provides a litigant "must provide to the other parties: (6) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the responding party has in its possession, custody, or control, and may use to support its claims or defenses, unless the use would be solely for impeachment."

- **194.3 f/k/a 194.2(f) Testifying Expert Disclosures**

194.2(f) would be stricken and a new 194.3 added, which indicates

> In addition to the disclosures required by Rule 194.2, a party must disclose to the other parties testifying expert information as provided by Rule 195.

Rule 195 is to be amended to require disclosure of testifying expert information without awaiting a discovery request. Further, the disclosure is to be expanded to include the following three new disclosures, based on FRCP 26(a)(2)(B):

> (C) the expert's qualifications, including a list of all publications authored in the previous 10 years;
> (D) a list of all other cases in which, during the previous four years, the expert testified as an expert at trial or by deposition; and
> (E) a statement of the compensation to be paid for the expert's study and testimony in the case.

The time requirement for testifying expert disclosures is unchanged.

- **194.4 Pretrial Disclosures**

The changes would also add Rule 194.4, wherein a party must provide **and file** its witness list (separating probable from potential witnesses) and exhibits list (including summaries and separating probable from potential exhibits) at least 30 days before trial, unless ordered otherwise by the Court. Tex. R. Civ. P. 194.4. The proposed Rule tracks the federal rule, but does not include a deposition excerpt requirement.

The proposed Rule 194.4 reads:

> (a) In General. In addition to the disclosures required by Rule 194.2 and 194.3, a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:
>
> (1) the name and, if not previously provided, the address, and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;
> (2) an identification of each document or other exhibits, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

B. Rule 169 - Expedited Actions

In the last Session, the Legislature passed Texas Government Code Section 22.004(h-1) which states "[i]n addition to the rules adopted under Subsection (h), the supreme court shall adopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed $250,000." However, the Legislature left in place Section 22.004(h) which requires rules to expedite district court actions where the claim of relief is under $100,000.

In response, the Supreme Court is changing Rule 47 to mandate a statement in an original pleading if a party seeks monetary relief above or below $250,000.00 or above $1,000,000.

If that party pleads for monetary relief below $250,000, the case will be governed by Rule 169 as an Expedited Action. Despite Section 22.004(h-1) reference to county courts at law, the Court's proposed Rule 169 would apply to all cases, whether in a district court or a county court at law.

Importantly, the $250,000 expedited trial threshold, though, no longer is inclusive of all damages, but specifically excludes "interest, statutory or punitive damages and penalties, and attorney's fees and costs." Tex. R. Civ. P. 47(c)(1); 169(a).

Rule 190 Level 1 Discovery Control Plans would also be expanded to apply to all cases involving $250,000 or less. Ostensibly, in response to the larger cases being handed by Level 1 Discovery Control Plans, the amount of time for oral deposition would increase to 20 hours from 6. Tex. R. Civ. P. 190.2(b)(1).

C. Paper Due Before Speech

The Supreme Court has reserved the right to change these proposed rules before January 1, 2021, in response to public comments. The Court has requested that comments be sent by **December 1, 2020**, which is after this paper due date, but before this speech. So, I reserve the right to change everything.

III. "WHAT IN THE 18 DOUBLE 01 IS GOING ON HERE?"

TEXAS CIVIL PRACTICE AND REMEDIES CODE § 18.001

Dr. Doe, if you will please raise your right hand……..

Q. Doctor, tell me, how much do you charge for a rotator cuff surgery?

A. You know, I have no idea. You will need to ask my billing manager, Martha.

Q. Well, do think that $175,000 is a reasonable and customary charge for a surgery facility in Abilene?

A. I really do not know.

Q. Well, is $100 a visit a normal charge for post-surgery physical therapy.

A. Again, quit pestering me. I have no idea.

Q. Doctor, how do you even run a business?

A. I don't. I run a profession. I hire others to run the business.

How many times have you asked a doctor during a deposition about medical expenses, only to get befuddled by the absolute total inability to have any idea of his own billing practices, much less those of other medical professionals and subject areas?

A. History

In order to recover medical expenses as a plaintiff, the plaintiff must not only establish the amount of the medical expense, but that the amount is reasonable, necessary, and was proximately caused by the injury-causing event.

Proof of amounts charged or paid is not proof of reasonableness, and recovery of such expenses should be denied in the absence of evidence showing the charges were reasonable and necessary. *Dallas Railway & Terminal Company v. Gossett,* 156 Tex. 252, 259, 294 S.W.2d 377, 382-83 (1956). Medical expenses must be comparable to the usual and customary charges for such services at the time and place the service was rendered in order to be "reasonable." *Fort Worth v. Barlow*, 313 S.W.2d 906 (Tex. Civ. App.—Fort Worth 1958, writ ref'd n.r.e.). Moreover, courts have interpreted the term "necessary" to mean treatment was required as a result of the injury. *Gossett*, 294 S.W.2d at 382.

Without evidence supporting the reasonableness and necessity of the medical bills, such bills are not admitted to the jury. *Six Flags Over Texas, Inc. v. Parker*, 759 S.W.2d 758 (Tex. App.—Fort Worth 1988, no writ).

Historically, this meant a medical professional should testify to not only causation, but that the amount charged was reasonable and necessary for that geographic area. However, as our deposition vignette above demonstrates, that was often easier said than done.

In an effort to reduce the length of trials, provide an inexpensive means to prove expenses without the burden to call experts live, and perhaps to ease the burden on certain individuals who would otherwise have to testify, the legislature enacted article Texas Revised Civil Statute 3737h in 1979, which allowed the parties, by way of affidavit from a records custodian, to prove the amount and reasonableness of charges for services rendered by other persons and institutions.

The 1979 House Committee on the Judiciary reported the following in its bill analysis:

> Background Information
> Under existing Texas law, proof of the amount of expenses incurred or contracted for is not sufficient proof to support a finding that such expenses were either reasonable or necessary. As a result of this rule, an injured party in a civil action must offer testimony that any expenses incurred have been reasonable and necessary, *even if the opposing party offers no testimony to the contrary*. Because of this requirement, parties incur additional expense by calling expert witnesses to prove the necessity and reasonableness of charges made, *particularly in the field of medicine*. This also makes law suits more expensive.

In 1985 the legislature repealed 3737h and codified it as Section 18.001 of the Texas Civil Practice and Remedies Code ("18.001"). The statue had been amended in various years to account for paid/incurred and in various changed as to notice and filing requirements.

"Section 18.001 is an evidentiary statute that accomplishes three things:

(1) it allows for the admissibility, by affidavit, of evidence of the reasonableness and necessity of charges that would otherwise be inadmissible hearsay;
(2) it permits the use of otherwise inadmissible hearsay to support findings of fact by the trier of fact; and
(3) it provides for exclusion of evidence to the contrary, upon proper objection, in the absence of a properly-filed controverting affidavit."

Hong v. Bennett, 209 S.W.3d 795, 800 (Tex. App.—Fort Worth 2006, no pet.).

Unless a controverting affidavit is served as provided by section 18.001, the initial affidavit is sufficient evidence to support a jury's finding that past medical expenses were reasonable and necessary. *Liang v. Edwards*, No. 05-15-01038-CV, 2016 Tex. App. LEXIS 12554, 2016 WL 7163841, at *2 (Tex. App.—Dallas Nov. 23, 2016, no pet.) (mem. op.) ("The jury is not required to award a plaintiff the amount of damages established in the affidavit, but if it chooses to do so, the affidavit is sufficient evidence to support the jury's finding that past medical expenses were reasonable and necessary.").

By filing a counteraffidavit compliant with section 18.001, the defendant can preclude the plaintiff's affidavit from being used as evidence of the reasonableness and necessity of medical expenses, and instead require the plaintiff to prove reasonableness and necessity by expert testimony at trial. *Liang*, 2016 Tex. App. LEXIS 12554, 2016 WL 7163841, at *2; *see also Rountree v. Cavazos*, No. 05-16-00512-CV, 2017 Tex. App. LEXIS 5888, 2017 WL 2730422, at *1 (Tex. App.—Dallas June 26, 2017, no pet.) (mem. op.) (medical provider's section 18.001 affidavit saves plaintiff expense of hiring expert to testify medical expenses were reasonable and necessary).

In practice, though, 18.001 led to various issues for trial attorneys, particularly defense lawyers. Some plaintiff lawyers would serve and file the cost affidavits immediately when filing the case, catching the defense lawyer flat-footed and not able to get a grasp and hire an expert to give a counter-affidavit in time. Other plaintiff attorneys could wait until 30 days before trial, limiting the time a defense lawyer could get counter-affidavits together to 14 days before trial.

Further, how did 18.001 counteract with Texas Civil Practice and Remedies Code Section 41.0105 (paid/incurred) and Chapter 146 (timely billing of health insurance)?

In the 2019 Session, the Texas Civil Justice League pushed and Representative John Smithee (R-Amarillo) filed House Bill 1693 which was filed as an overhaul of 18.001 "to ensure fair treatment for all parties." HB 1693, *House Committee Report, Bill Analysis* (2019).

B. The 2019 Amendments

As originally filed, Rep. Smithee's bill would have changed the deadlines to 90 days before trial and 60 days to controvert.

However, through compromise, the enacted bill created a litany of different possible deadlines, which had led to much confusion and concern of litigants. Be aware, though, the 2019 amendment only applies to cases filed on or after September 1, 2019. A copy of the new statute is attached as Appendix 1.

The 2019 Amendment effects the ability of any party to use an affidavit or counteraffidavit as evidence of causation, tightens deadlines for the submission of affidavits and counteraffidavits, allows for supplementation of affidavits and counteraffidavits according to additional medical procedures and costs, requires parties serving an affidavit to file notice of service with the court clerk, requires parties serving counteraffidavits to provide written notice of the service to the court clerk, and eliminates the requirement of parties to file their affidavit.

C. Deadlines

The deadlines are harsh. "[I]f a party fails to comply with Section 18.001(d) by timely serving the affidavit on the parties, a trial court does not abuse its discretion in sanctioning a party by excluding the affidavits. *Singleton v. Bowman* 557 S.W. 711 (Tex. App.—Texarkana 2018, pet. filed). This is because "[t]he Legislature set out the deadline for service of cost affidavits in mandatory language." *Nye v. Buntin*, No. 03-05-00214-CV, 2006 Tex. App. LEXIS 7067, 2006 WL 2309051, at *3 (Tex. App.—Austin Aug. 11, 2006, pet. denied) (mem. op.) ("While exclusion is not expressly the only potential consequence of noncompliance, it is a reasonable sanction.").

There are three different type of timelines to consider in the new 18.001:

1. Past Medical - 18.001(d)

a. Proponent

The party offering the initial affidavit must serve a copy on the other parties **by the earlier of**:

1) 90 days after the date the defendant files and answer;
2) the date the offering party must designate any expert witness under a court order (Scheduling Order under Level 3); or
3) the date the offering party must designate expert witness as required by the Texas Rules of Civil Procedure (Levels 1 and 2)

TEX. CIV. PRAC. & REM. C. §18.001(d)(1-3).

b. Controverter

Any party intending to controvert a claim reflected by plaintiff's affidavit must serve a proper counteraffidavit on each other party by the earlier of:

1) 120 days after the date the defendant files its answer;
2) the date the party offering the counteraffidavit must designate an expert witness under a court order (Scheduling Order under Level 3); or
3) the date the party offering the counteraffidavit must designate an expert witness pursuant to

the Texas Rules of Civil Procedure (Levels 1 and 2)

Id. at (e)(1-3).

2. New Treatment after Answer- 18.001(d-1)

a. Proponent

If the plaintiff received services for the first-time by a provider after the date the defendant files an answer, the party offering the initial affidavit must serve a copy on the other parties **by the earlier of**:

1) the date the offering party must designate any expert witness under a court order (Scheduling Order under Level 3);
2) the date the offering party must designate expert witness as required by the Texas Rules of Civil Procedure (Levels 1 and 2)

Id. at (d-1)(1-2).

b. Controverter

Any party intending to controvert a claim for these providers must serve a proper counteraffidavit on each other party **by the later of**:

1) 30 days after service of the affidavit on the party offering the counteraffidavit in evidence;
2) the date the party offering the counteraffidavit must designate an expert witness under a court order (Scheduling Order under Level 3); or
3) the date the party offering the counteraffidavit must designate an expert witness pursuant to the Texas Rules of Civil Procedure (Levels 1 and 2)

Id. at (e-1)(1-3).

3. Continuing Treatment - 18.001(h)

a. Proponent

If the plaintiff continues to receive treatment after a deadline, the party may supplement the affidavit by serving a copy on the other parties on or before:

1) the 60th day before the date the trial commences,

Id. at (h)(1).

b. Controverter

Any party intending to controvert a claim for these continued care providers must supplement the counteraffidavit on or before

1) the 30th day before the date the trial commences.

Id. at (h(2).

4. Suggested Common Sense Approach to Deadlines

Do not despair. The most important and anxiety-saving language of the new statute is found in subpart (i) which provides:

> Notwithstanding Subsections (d), (d-1), (d-2), (e), (e-1), (g), and (h), a deadline under this section may be altered by all parties to an action by agreement or with leave of the court.

Id. at (i).

Thus, in order to prevent frantic calendaring and calculating, this author humbly suggests that the parties enter into a Rule 11 Agreement or a Level 3 Discovery Control Plan when an answer is filed which dictate the deadlines that best fits your particular case.

A common-sense approach would seem to be that affidavits be filed at the same time as the testifying experts are designated, with an exception for continued or new care. Attached as Appendix 2 is proposed DCO language.

D. 'Reasonable and Necessary' and Causation

Under the 18.001 process, a plaintiff does not need to have an expert to testify that the amount charged was "reasonable and necessary." Unless controverted, a properly served affidavit with properly filed notice establishes that the amount "was reasonable at the time and place that the service was provided and that the service was necessary." TEX. CIV. PRAC. & REM. C. §18.001(b).

As an evidentiary statute, 18.001 is basically an exception to the hearsay rule and expert requirement and:

(1) allows for the admissibility, by affidavit, of evidence of the reasonableness and necessity of charges that would otherwise be inadmissible hearsay that can support findings of fact by the trier of fact; and *Castillo v. American Garment Finishers Corp*., 965 S.W.2d 646, 654 (Tex. App.-El Paso 1998, no pet.); and
(2) allows a records custodian to give expert opinions that a charge is reasonable and necessary. TEX. CIV. PRAC. & REM. C. §18.001(b).

Unless controverted, a 18.001 affidavit will support findings of fact and bar conflicting evidence. *Hong v. Bennett,* 209 S.W.3d 795, 800 (Tex. App.—Fort Worth

2006, no pet.); *Beauchamp v. Hambrick*, 901 S.W.2d 747, 749 (Tex.App.—Eastland 1995, no writ).

But, an affidavit submitted under §18.001 does not conclusively establish the amount of damages as a matter of law. *Barrajas v. VIA Metro. Transit Auth.*, 945 S.W.2d 207, 209 (Tex. App.—San Antonio 1997, no writ); *Beauchamp*, 901 S.W.2d at 749. *But see Allright, Inc. v. Strawder*, 679 S.W.2d 81, 83 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (in bailment suit applying predecessor statute to §18.001, trial court rendered damages as a matter of law based on affidavit).

Even though the initial affidavit does not establish damages as a matter of law, the fact-finder cannot ignore the undisputed facts and award an arbitrary amount of damages. *Hill v. Clayton*, 827 S.W.2d 570, 574 (Tex.App.—Corpus Christi 1992, no writ) (case reversed and remanded for new trial because jury awarded less than one-third of medical damages set out in uncontroverted affidavits). *But see, Hilland v. Arnold*, 856 S.W.2d 240, 242-43 (Tex.App.—Texarkana 1993, no writ) (jury could award damages lower than amount proved by affidavit because causal link was put in doubt when doctor testified accident may not have caused bulging disc or spinal deterioration).

Further, the affidavit was never sufficient to prove causation. *Guevara v. Ferrer*, 247 S.W.3d 662, 668 (Tex. 2007). The 2019 amendment clarified, for anyone in doubt, by adding the language:

> The affidavit is not evidence of and does not support a finding of the causation element of the cause of action that is the basis for the civil action.

TEX. CIV. PRAC. & REM. C. §18.001(b).

Nonetheless, if a plaintiff does not use the 18.001 process, she would, arguably, need to have expert testimony to prove that the charges sought are both "Reasonable and Necessary" in addition that the injury was caused by the event.

Establishing causation in a personal injury case requires a plaintiff to "prove that the conduct of the defendant caused an event and that this event caused the plaintiff to suffer compensable injuries." *JLG Trucking, LLC v. Garza*, 466 S.W.3d 157, 162 (Tex. 2015)

Thus, "when an accident victim seeks to recover medical expenses, she must show both 'what all the conditions were' that generated the expenses and 'that all the conditions were caused by the accident.'" *Id.* (quoting *Guevara v. Ferrer*, 247 S.W.3d 662, 669 (Tex. 2007)).

Expert testimony is generally necessary to establish causation of medical conditions that are "outside the common knowledge and experience of jurors." *Guevara* 247 S.W.3d at 665. In limited cases, however, lay testimony may support a causation finding that links an event with a person's physical condition. *Id.* at 666. "This exception applies only in those cases in which general experience and common sense enable a layperson to determine the causal relationship with reasonable probability." *Kelley v. Aldine Indep. Sch. Dist.*, No. 14-15-00899-CV, 2017 Tex. App. LEXIS 829, 2017 WL 421980, at *2 (Tex. App.—Houston [14th Dist.] Jan. 31, 2017, pet. denied).

In such cases, "lay testimony establishing a sequence of events which provides a strong, logically traceable connection between the event and the condition is sufficient proof of causation." *Id.* (quoting *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 733 (Tex. 1984)).

The Houston Court of Appeals recently overturned a verdict for medical expenses when causation was based on lay testimony in *Hills v. Donis*, NO. 14-18-00566-CV, 2020 Tex. App. LEXIS 303 2020 WL 206187 (Tex. App.—Houston [14th Dist.] January 14, 2020, no. pet. history). In *Donis*, the plaintiffs argued that their lay testimony regarding the pain they experienced due to the accident was sufficient to support a causation finding that linked the automobile accident on July 6, 2014 with their diagnosed conditions. The Court held that the plaintiffs' injuries did does not fall within the kinds of "basic" injuries identified in *Guevara* in which expert testimony regarding the causal connection between an occurrence and a physical condition is unnecessary. *Id.* 247 S.W.3d at 667. The plaintiffs "were not pulled from a damaged vehicle with "overt injuries" such as broken bones or lacerations, nor did they experience objective physical symptoms, such as crumbling teeth, shortly after the accident. Rather, the types of injuries for which the Donis Parties sought compensation—i.e., cervical radiculitis, lumbar radiculitis, thoracalgia, cervical IVD displacement, lumbar IVD Displacement, thoracic IVD displacement, cervical discogenic pain, lumbar discogenic pain, disc herniation, cervical disc disorder, lumbar disc disorder, thoracic disc disorder, and lumbalgia—are neither common nor basic." *Id* (Citing *Guevara*, 247 S.W.3d at 669-70 and *City of Laredo v. Garza*, 293 S.W.3d 625, 632-33 (Tex. App.—San Antonio 2009, no pet.) (determining that lay testimony alone was not sufficient to prove medical causation of disc herniations and radiculopathy). *Id. at *8.*

Thus, the Court held that the plaintiffs' injuries were not the type which general experience and common sense would enable a layperson to determine the causal relationship with reasonable probability. The plaintiffs needed expert testimony to establish a causal connection between the accident and their claimed injuries. *Id.*

E. Who Can Sign the Affidavit?

An 18.001 affidavit **must** be made by:

(A) the person who provided the service; or
(B) the person in charge of records showing the service provided and charge made.

Id. at (c)(2)(A-B) (emphasis added).

In June 2018, the Texas Supreme Court affirmed Fourteenth Court of Appeals' decision in *Gunn v. McCoy* wherein Plaintiff was allowed to submit 18.001 affidavits sworn to by subrogation agents for insurance carriers that had paid the plaintiff's medical expenses. 554 S.W.3d 645, 672.

In *Gunn*, a medical malpractice case, the plaintiff initially served fourteen (14) 18.001 affidavits from his medical providers' records custodians. However, after the *Escabedo v. Haygood* case held that only the incurred amount was admissible, the plaintiff withdrew the provider affidavits and filed affidavits from subrogation agents for health insurance carriers that had paid the medical expenses, reflecting instead the amounts actually paid under Section 41.0105. After verdict, the defense appealed, in pertinent part, claiming 18.001 limits the proper affiants to medical providers or record custodians for those medical providers.

The Texas Supreme Court took on this issue and held the subrogation agent's affidavits were sufficient. *Id.* The Court concluded that Section 18.001 was designed "to streamline proof of the reasonableness and necessity of medical expenses" and noted that "the plain language of section 18.001(c)(2)(B) does not require that affidavits be made by a records custodian *for a medical provide*r." *Id*. at 672.

The Court further explained that "insurance companies keep records and databases of both the list prices and the actual prices of specific treatments and procedures." Id. at 673. As a result, "with national and regional bases on which to compare prices actually paid, insurance agents are generally well-suited to determine the reasonableness of medical expenses." *Id*. at 673.

F. Affidavits vs. Declarations

TEXAS CIVIL PRACTICE AND REMEDIES CODE Section 132.001 was adopted in 1987 to allow inmates to use an unsown declaration in lieu of an affidavit.

The statute was amended in 2011 to open up the possibility of unsworn declarations in lieu of affidavits in many new situations. Acts 2011, 82nd Leg., ch. 847 (H.B. 3674), § 1.

Specifically, the statue provides that "an unsworn declaration may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or required by a rule, order, or requirement adopted as provided by law", except "as to liens required to be filed with a county clerk, an instrument concerning real or personal property required to be filed with a county clerk, or an oath of office or an oath required to be taken before a specified official other than a notary public." TEX. CIV. PRAC. & REM. C. § 132.001(a-b).

The statute allows an unsworn declaration if the declaration is in writing and is "subscribed by the person making the declaration as true under penalty of perjury." *Id*. at (c). A form Declaration as suggested by the statute is included in Appendix 3.

Many times, especially in rural Texas, the medical provider will not have a notary available. So, could a plaintiff have the records custodian for the medical provider simply do a written declaration in lieu of an affidavit under 18.001?

The language of Section 132.001 certainly seems to say so and 18.001 is not excluded under 132.001(b). But the language of 18.001 specifically states that "[t]he affidavit must be taken before an officer with authority to administer oaths." TEX. CIV. PRAC. & REM. C. § 18.001(c)(1).

G. To Serve, File, or What?

As referenced above, Section 18.001 has gone through various iterations mandating that they be filed or just served. So, what is status of this for cases filed after September 1, 2019?

A copy of 18.001 affidavits must be served "on each party to the case" by the deadlines discussed above.

Also, "[t]he party offering the affidavit in evidence or the party's attorney must file notice with the clerk of the court when serving the affidavit that the party or the attorney served a copy of the affidavit in accordance with this section. Except as provided by the Texas Rules of Evidence, the affidavit is not required to be filed with the clerk of the court before the trial commences." TEX. CIV. PRAC. & REM. C. § 18.001(d-2).

Thus, you must serve the affidavits with the attached itemizations on all parties and file with the Clerk a Notice of filing, without the attached records at the same time. A suggested form Notice is attached as Appendix 4.

H. Defense Options

If a defendant receives a properly served and timely affidavit under 18.001, what are the options? If she does nothing, and the affidavit is admitted (*But See* Justice Schenck's Dissent in *In re Parks*, No. 05-19-00375-CV, 2020 Tex. App. LEXIS 1329, at *40 (Tex. App.—Dallas Feb. 18, 2020), the opposing party:

1) is not prevented from making arguments contesting the affidavits during opening statements and closing arguments,
2) may cross-examine the offering parties about their injuries and prior medical conditions, and

3) may introduce corresponding medical records.

In re Flores, No. 01-19-00484-CV, 2020 LEXIS 742, at *3, 2020 WL 425297 (Tex. App.—Houston [1st Dist.] Jan. 28, 2020).

However, a purpose of the statute is to spare the expense of hiring an expert witness to testify at trial if the issue of the reasonableness and necessity of medical expenses. The author believes that if an 18.001 affidavit is not controverted, an expert that wants to controvert the necessity of the treatment, may be excluded. For example, in *Wal-Mart Stores Tex., LLC v. Bishop*, 553 S.W.3d 648 (Tex. App.—Dallas 2018, pet. granted, aff'd as modified w.r.m.), the Dallas Court affirmed the exclusion of a defense expert's ability to testify as to reasonableness and necessity of treatment when the expert was designated past the 18.001 deadlines.

Nonetheless, the defendant may choose to controvert the affidavit by filing a counter-affidavit. "The counteraffidavit must give reasonable notice of the basis on which the party serving it intends at trial to controvert the claim reflected by the initial affidavit and must be taken before a person authorized to administer oaths." TEX. CIV. PRAC. & REM. C. §18.001(f).

Like the 18.001 affidavits, the controverting affidavits must be served within the deadlines discussed above and the controverter must "file written notice with the clerk of the court when serving the counteraffidavit that the party or attorney served a copy of the counteraffidavit in accordance with this section." *Id*. at (g).

Again, in restating the obvious, the statute also sets out that "[t]he counteraffidavit may not be used to controvert the causation element of the cause of action that is the basis for the civil action." *Id*. at (f).

I. Controverting Affidavits

So, you want to controvert the Plaintiff's 18.001 affidavit? Who do you get to controvert?

First, let's go back. A plaintiff can present evidence concerning the reasonableness and necessity of past medical expenses through (1) expert testimony, or (2) an affidavit from the plaintiff's medical provider made pursuant to Section 18.001. *Whitaker v. Rose*, 218 S.W.3d 216, 223 (Tex. App.—Houston [14th Dist.] 2007, no pet.); see also TEX. CIV. PRAC. & REM. CODE Ann. § 18.001

In other words, a medical provider's Section 18.001 affidavit can save the plaintiffs the expense of having to hire an expert to testify that their medical expenses were reasonable and necessary. *Turner v. Peril*, 50 S.W.3d 742, 747 (Tex. App.—Dallas 2001, pet. denied).

"[S]ection 18.001(b) provides a limited exception to the general rule that expert testimony is required to prove reasonableness and necessity of medical expenses." *Hong v. Bennett*, 209 S.W.3d 795, 801 (Tex. App.—Fort Worth 2006, no pet.).

The affiant need only be the provider or the provider's records custodian (not an expert, but just an expert's custodian). But, what about counteraffidavits? Need they be experts? The answer is – Yes.

There are two main requirements for a counteraffidavit: (1) it must give reasonable notice of which claims the opponent intends to controvert and why, and (2) it must be made by a person who is qualified to testify about all or part of any of the matters contained in the initial affidavit. TEX. CIV. PRAC. & REM. CODE § 18.001(f).

So, for counteraffidavits, Section 18.001(f) requires that it be made by a person qualified to testify in contravention about matters contained in the initial affidavit. *Id*. § 18.001(f).

Section 18.002 sets out a form for an affidavit regarding cost and necessity of services but provides no form for a counteraffidavit. *Id*. § 18.002. It has been held that the statute places a greater burden of proof on counteraffidavits to discourage their misuse in a manner that frustrates the intended savings. *Turner*, 50 S.W.3d at 747.

18.001 affidavits though address two things: (1) reasonableness and (2) necessity. Thus, a counter-affiant must be qualified to testify about one or the other or, potentially, both, if they are so qualified.

Thus, a counteraffidavit may need two different experts. For reasonableness, the affiant must be qualified to give an opinion as to the reasonableness of the medical services. General experience in a specialized field does not qualify a witness as an expert. *Gen. Motors Corp. v. Burry*, 203 S.W.3d 514, 526 (Tex. App.—Fort Worth, 2006, pet. denied); *Pack v. Crossroads, Inc*., 53 S.W.3d 492, 506 (Tex. App.—Fort Worth 2001, pet. denied). "What is required is that the offering party establish that the expert has 'knowledge, skill, experience, training, or education' regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject." *Broders v. Heise*, 924 S.W.2d 148, 153-54 (Tex.1996). If "a party can show that a subject is substantially developed in more than one field, testimony can come from a qualified expert in any of those fields." *Id*. at 154.

For instance, in *Gunn* the Supreme Court held that insurance subrogation agents are qualified to use their databases to create affidavits regarding the reasonableness of a plaintiff's medical expenses. *Gunn*, 554 S.W.3d at 674-75. As a result, "with national and regional bases on which to compare prices actually paid, insurance agents are generally well-suited to determine the reasonableness of medical expenses." *Id*.

The expert signing the counteraffidavit should be knowledgeable of the reasonable and customary charge for the particular medical procedure in question. For example, a chiropractor cannot testify to the reasonable

and customary charges for a surgeon. *Hong*, 209 S.W.3d at 803.

The Tyler Court of Appeals recently addressed this issue in granting a writ of mandamus in *In re: Larry Brown and JBS Carriers*, No. 12-18-00295-CV, 2019 WL 1032458 2019 Tex. App. LEXIS 1666 (Tex. App.—Tyler, Mar. 5, 2019, orig. proceeding). In *In re Brown*, the plaintiff timely filed 18.001 affidavits and the defendants subsequently filed a controverting affidavit from Registered Nurse, Jana Schieber. The plaintiff filed a motion to strike the controverting affidavit on several grounds, alleging Schieber's opinions lacked reliability or factual basis; Schieber was unqualified as an expert and relied on a database for her opinions rather than her own training, expertise or experience; Schieber had been struck in other matters; and that Schieber offered no facts, treaties, or medical studies to show the reliability or acceptance by the medical community of the database she relied upon. *Id. at *1-2.*

The defendants responded with a declaration from Schieber which included attachments from the database she relied, however the trial court granted Plaintiff's motion to strike. The trial court found that Schieber was unqualified to provide expert testimony and that the opinions in the controverting affidavit were not reliable. *Id.*

The defendants filed a petition for a writ of mandamus alleging that the trial court abused its discretion by striking Schieber.

The Tyler Court of Appeals noted that Section 18.001 permits the reasonableness and necessity of charges be proved by a nonexpert custodian—however the controverting affidavit must be made by a person qualified to testify in contravention of the matters contained in the initial affidavit. *Id*. at 7.

Citing *Gunn*, the Tyler Court noted that insurance companies keep records and databases of both the list and actual prices for specific medical treatments and procedures—thereby agents are well-suited to determine the reasonableness of medical expense. *Id. at *7-8.*

Based on this reasoning, the Tyler Court held that Schieber was qualified and her opinion reliable despite the facts she was not a practicing nurse and that she relied upon a database. *Id*.

The second category to examine is if the treatment is 'necessary.' This would seem to mandate a more medical-related expert opinion. For example, the plaintiff received a back surgery, but was that back surgery necessary? That is a different analysis than the issue of was the injury caused by the event in question.

1. Procedure after Counteraffidavit

So what happens when a counteraffidavit is timely served and notice filed? Does the jury consider both affidavits? Does the trial court make a decision?

The answer catches many plaintiff lawyers by surprise. By filing a controverting affidavit under section 18.001(f), a nonoffering party prevents the use of an offering party's affidavit as evidence. *Hong* 209 S.W.3d at 801 (Tex. App.—Fort Worth 2006, no pet.). Neither the affidavit nor the counteraffidavit are admissible in trial.

Defendants argue that once a counteraffidavit is filed, the expert exception allowed in 18.001 is voided and the plaintiff must present expert testimony as to reasonableness and necessity of the charges. *Id*. at 804. The 18.001 affidavit is no longer admissible. *Id.* Thus, without the 18.001 affidavit averring that medical expenses are reasonable and necessary, a plaintiff must prove the reasonableness and necessity of such expenses by expert testimony. *Turner v. Peril*, 50 S.W.3d 742, 746-47 (Tex. App.--Dallas 2001, pet. denied) *But see City of El Paso v. Pub. Util. Comm'n of Tex*., 916 S.W.2d 515, 524 (Tex. App.--Austin 1995, writ dism'd by agr.) (holding that "[s]ection 18.001 does not address the admissibility of an affidavit concerning cost and necessity of services but only the sufficiency of the affidavit to support a finding of fact that a charge was reasonable or a service was necessary"); *Ozlat v. Priddy*, No. 11-96-00240-CV, 1997 WL 33798173, at *2-4 (Tex. App.--Eastland May 29, 1997, pet. denied) (not designated for publication) (holding that trial court did not abuse its discretion by admitting both section 18.001(b) affidavits and controverting affidavit as evidence at trial and that "[s]ection 18.001 provides a procedure allowing parties to prove and controvert by affidavit the costs and necessity of services without calling a witness at trial").

J. Striking the Controverting Affidavit

If timely served with counteraffidavits, the best step is often that the plaintiff's attorney will closely examine the affidavit and will move to strike the counteraffidavit.

There are two basic reasons to strike the counteraffidavit. First, if it does not give "reasonable notice of the basis on which the party serving it intends at trial to controvert…" TEX. CIV. PRAC. & REM. CODE § 18.001(f).

In *Turner v. Peril*, 50 S.W.3d 742 (Tex. App. – Dallas 2001, pet. denied), the Dallas Court of Appeals held that a physician's counteraffidavits in an auto wreck case were insufficient to controvert the plaintiff's 18.001 affidavits because the counteraffidavits failed to provide reasonable notice of the basis on which the defendant intended to controvert the plaintiff's claims.

The trial court judge in the *Turner* case had excluded the plaintiff's affidavits due to the filing of counteraffidavits by Dr. George Sibley. Dr. Sibley's affidavit countering an affidavit filed by the plaintiff to prove the reasonableness and necessity of two drug prescriptions that cost $20.00 stating:

> My name is Dr. George W. Sibley. I am a licensed physician in the County of Dallas, State of Texas. I am above the age of 18 years, of sound mind, and make this Affidavit upon my best information and belief. I am a board-certified orthopedic surgeon, a member of the American Academy of Orthopedic Surgery and have practiced orthopedic surgery in Dallas for 35 years. I am fully competent to testify thereto. This Counter Affidavit is made in response to the affidavit of Derek A. Schenk, custodian of records for Sack-N-Save Pharmacy No. 218 pursuant to Section 18.001 of the Texas Civil Practices [sic] and Remedies Code. Such affidavit states a purported fact that the services outlined on attachments hereto were necessary and the charges reasonable. In my opinion, the health care treatment, numerous procedures and charges were not reasonable or necessary or justified by the condition as described in the medical reports filed by such medical service provider in connection with the alleged incident. In addition, this Counter-Affidavit is made on the basis of the following: (1) my education, training and experience, and (2) a review of the medical records of Charles C. Turner regarding a rear end collision on 2/18/94 fail [sic] to show any objective finding of a significant injury. All treatment after 2/18/94 was not reasonable and necessary as a result of the 2/18/94 accident.

Dr. Sibley filed multiple counteraffidavits which were identical to this example except for the designation of the affiant and service provider named in the initial affidavit filed by the plaintiff.

In striking Dr. Sibley's counteraffidavits (in addition to the fact that he was testifying outside his range of expertise as an orthopedic surgeon), the Court found his conclusory statement that the plaintiff's medical records failed to show any objective finding of a significant injury did not give reasonable notice of the basis for his conclusion that none of the medical services were necessary. *Id.* at 747-48.

Although the court conceded that Sibley's stated basis for controverting the plaintiff's affidavits – that there was no objective finding of a significant injury – might give reasonable notice "under some circumstances," it did not in the case facing the court because none of Sibley's counteraffidavits "specifically addressed the claims made in the corresponding initial affidavit." *Id.* at 748. Instead, Sibley merely referred to "numerous procedures," even though some of the initial affidavits involved only medication, and stated that his opinion was based upon unidentified "medical reports filed by such medical service provider." *Id.* Further, Sibley rejected all treatment because of the absence of an "objective finding" of significant injury, even though some of the initial affidavits addressed only the treatment and medication of pain. *Id*. The Court felt that Sibley's counteraffidavits "either obscured his basis for controverting the affidavits filed by [the plaintiff] or concealed the absence of any basis." *Id*.

Second, and what is mostly litigated, is if the affiant is "qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit." *Id*.

The *Turner* Court, in striking Dr. Sibley's counteraffidavits, found that his credentials as an orthopedic surgeon and his blanket statement that the counteraffidavits were made on the basis of his "education, training, and experience" did not show that he was qualified to contravene all of the matters contained in each of the plaintiff's affidavits because none of the medical expenses documented by the initial affidavits involved examination or treatment by an orthopedic surgeon. *Id*.

Instead, the initial affidavits related to services provided by a hospital, pharmacies, a chiropractor, a diagnostic center, a nurse anesthetist, and doctors who were not orthopedic surgeons. *Id*. Dr. Sibley's status as a medical doctor did not automatically qualify him to contravene all or some of the plaintiff's affidavits. *Id*.

18.001 places a "greater burden of proof on counteraffidavits to discourage their misuse in a manner that frustrates" the purpose of the statute, and that an expert's status as a licensed physician does not qualify that expert on every medical question. *Id* at 747.

However, as mentioned above, the Tyler Court in *In re Brown*, relying on *Gunn*, has now said a medical billing individual who relies on a database of charges is qualified to determine what is reasonable. *In re Brown*, 2019 Tex. App. LEXIS 1666 at *8.

> Question:
>
> Would the coding individual in *In re Brown*, be allowed to express expert opinions from the witness stand under Texas Rule of Evidence 702? Is so, how can she testify about database and insurance charges? What about the collateral source rule?
>
> If not, why would a counter-affiant be held to a different standard than an expert at trial? Section 18.001(f) states the counter-affiant must be made by a person who is "*qualified*, by knowledge, skill, experience, training, education, or other expertise, to *testify*…" To be qualified to testify they should have to pass the gatekeeper function of the trial court. Tex. R. Evid. 702.

Since *In re Brown*, multiple cases are in the various court of appeals and we may get an answer soon.

K. Mandamus Available

In *In re Brown*, the defendants filed a writ of mandamus concerning the trial court's striking of the counteraffidavit. The Tyler Court granted the mandamus and found that the remedy of appeal is inadequate because the error deprived the defendant of any ability to defend against medical charges, which was a substantial right holding:

> "[t]he limited avenues available to a party who has a counter-affidavit struck are a far cry from the rights and protections afforded a party who has filed a proper counter-affidavit.

In re Brown, 2019 WL 10322458 at *5.

However, since *In re Brown*, multiple other Courts of Appeals have held the issue is not ripe for mandamus and that there is an adequate remedy at appeal. The other courts of appeals have noted that the defendants still have to right to open, close, present evidence and cross examine the plaintiff.

- *In re Flores*, No. 01-19-004840-CV (Tex. App.— Houston [1st Dist.] Jan. 27, 2020) (orig. proceeding).
- *In re Allstate Indemnity Co*., No. 13-19-00346-CV, 2019 WL 5866592 (Tex. App.— Corpus Christi-Edinburg Nov. 8, 2019) (orig. proceeding).
- *In re Chapa*, No. 13-19-00435-CV,2019 Tex. App. LEXIS 8303, 2019 WL 4315028 (Tex. App.— Corpus Christi—Edinburg Sept. 12, 2019, orig. proceeding [mand. denied]) (mem. op.);
- *In re Parks*, No. 05-19-00375-CV, 2020 Tex. App. LEXIS 1329 (TEx. App.—Dallas February 18, 2020, orig. proceeding).

IV. RESPONDEAT SUPERIOR

COURSE AND SCOPE ANALYSIS UNDER *PAINTER V. AMERIMEX DRILLING I, LTD.*, 561 S.W.3D 125 (TEX. 2018).

> vicarious liability
>
> n. The imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons. Indirect or imputed legal responsibility for acts of another; for example, the liability of an employer for the acts of an employee, or, a principal for torts and contracts of an agent.

Black's Law Dictionary. HENRY CAMPBELL BLACK, M.A., 1990.

A. Respondeat Superior and Control

One of the first Latin phrases many Texas lawyers ever learned was *Respondeat Superior*:

> Let the Master Answer for His Servant.

However, much ink has been inked and trees killed on summary judgments determining exactly when an employee is in the course and scope of his employment and when he is not.

Respondeat Superior, is "a deliberate allocation of risk" in line with "the general common law notion that one who is in a position to exercise some general control over the situation must exercise it or bear the loss." *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 540 (Tex. 2002) (quoting Keeton et al., *Prosser and Keeton on the Law of Torts* § 69, at 499-501 (5th ed. 1984)).

Respondeat Superior thus constitutes an exception to the general rule that a person has no duty to control another's conduct. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 757 (Tex. 2007) (citing *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983)).

Historically, to prove an employer's vicarious liability for a worker's negligence, the plaintiff had to establish that, at the time of the negligent conduct, the worker (1) was an employee and (2) was acting in the course and scope of his employment. *Id.*; *see also Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 311 (Tex. 2002).

However, throughout the years various court of appeals applied these elements differently. Many courts applied a right to control test on the actions of the agent. *London v. Texas Power & Light Co*., 620 S.W.2d 718, 720 (Tex. Civ. App.—Dallas 1981, no writ). "It is settled that the test of one's liability for the act or omission of his alleged servant is his right and power to direct and control his imputed agent in the performance of the causal act or omission at the very instant of the act or neglect." *Parmlee v. Tex. & New Orleans R.R. Co*., 381 S.W.2d 90, 93-96 (Tex. Civ. App.—Tyler 1964, writ ref'd n.r.e). "[A] master is liable for acts of his agent under the doctrine of respondeat superior only where the relationship of master and servant exists at the time and in respect to the very thing causing the injury and from which it arises." *Id*. "[O]nce the control ends – as when the employee leaves the workplace – the master's potential for vicarious liability also ends in all but the most extraordinary situations." *Painter v. Amerimex Drilling I, Ltd*., 511 S.W.3d 700, 706 (Tex. App.—El Paso 2015, rev'd).

Some courts were insisting that the employer must be in control of the very task for which the employee was engaged in at the time of the tort. As the Corpus

Christi Court noted in *Stapp Drilling Co. v. Roberts*, 471 S.W.2d 131, 135 (Tex.Civ.App.—Corpus Christi 1971, writ ref'd n.r.e.):

> It is settled that the test of one's liability for the act or omission of his alleged servant is his right and power to direct and control his imputed agent ***in the performance of the causal act or omission at the very instant of the act or neglect***. Putting the matter in a different way, it may be said that a master is liable for acts of his agent under the doctrine of respondeat superior only where the relationship of master and servant exists at the time ***and in respect to the very thing causing the injury and from which it arises***.

Id. at 134-35 (emphasis added).

However, in 2018, the Texas Supreme Court attempted to provide some clarity and harmonize various conflicting court of appeals decisions in *Painter v. Amerimex Drilling I, Ltd*., 561 S.W.3d 125 (Tex. 2018).

In *Painter*, Sandridge Energy Inc. ("Sandridge") hired Amerimex Drilling I, Ltd. ("Amerimex") to drill oil wells on the Longfellow Ranch in Pecos County, near Fort Stockton. Normally, Amerimex would provide bunkhouses for its crews. But Longfellow Ranch did not allow the bunkhouses to be located on the ranch. Thus, the bunkhouses were set up near Fort Stockton, some 30 miles from the ranch.

The contract between Sandridge and Amerimex provided that Amerimex would invoice Sandridge for and pay each driller $50/day to drive a crew out to the well location. Amerimex did not require its crew to stay in the bunkhouse or ride with the driller. Amerimex placed no restrictions on what route they took between the bunkhouse and the drilling site or where they stopped along the way.

One such driller was J.C. Burchett. Burchett was paid the daily bonus to drive his crew between the bunkhouse and the ranch in his own truck. On February 28, 2007, Burchett and his crew members— Steven Painter, Earl Wright, and Albert Carrillo, were returning to Fort Stockton after their shift ended when Burkett fell asleep and rolled his truck, killing Wright and Carrillo and injuring Painter. Painter filed suit against Burchett and Amerimex, alleging negligence and that Sandridge and Amerimex were vicariously liable for Burchett's negligence.

The Texas Supreme Court addressed the conflicting court of appeals decisions and held that there is now a two-step process for proving an employer's vicarious liability for a worker's negligence:

At the time of the negligent conduct, was the worker:

(1) an employee; and
(2) acting in the course and scope of his employment?

The Court made it clear that the right-to-control issue is only needed to satisfy the first element: that the wrongdoer was an employee at the time of the negligent conduct.

The employment-status inquiry involved in step one depends on whether the employer has the *overall* right to control the progress, details, and methods of operations of the work, whether or not it chooses to exercise that right as to any particular task. If the employee relationship is undisputed, "the employer essentially concedes the existence of the right to control that is necessary to give rise to the relationship." *Id*. at 131.

Once established, "this right to control extends to all the employee's acts within the course and scope of his employment, i.e., actions "within the scope of the employee's general authority in furtherance of the employer's business and for the accomplishment of the object for which the employee was hired." *Id*.

In other words, the Court overruled a task-by-task analysis of control for an employee, holding the task-by-task analysis "conceivably could result in an individual shifting between employee and independent contractor status countless times in a given work day." *Id* at 132. The right-to-control is established by the nature of the employment relationship, if it was exercised during the actual tortious activity or not. *Id* at 135.

Once it is proven that the agent was an employee of the employer, the courts should move onto the second element: Was the employee acting in the course and scope of his employment?

This step involves an objective analysis, hinging on whether the employee was performing the tasks generally assigned to him in furtherance of the employer's business. That is, the employee must be acting with the employer's authority and for the employer's benefit. *Id* at 138. Vicarious liability arises only if (a) the tortious act falls within the scope of the employee's general authority in furtherance of the employer's business and (b) for the accomplishment of the object for which the employee was hired. *Id.*

The Supreme Court reversed the trial court's summary judgment for Amerimex finding there was a fact issue as to whether Burchett was acting in the course and scope of his employment when the accident occurred. The Court focused on the fact that Burchett was paid to drive the crew to the worksite. The Court dispelled the notion that the contract only provided that Burchett was to drive the crew to the worksite, and that because the accident occurred driving the crew away from the worksite, there should be no liability. The Court held that common sense says that the crew shouldn't be stranded at the end of the work day and that

Burchett had a duty as a "driller—and one for which he was paid additional money over his regular salary—to provide the crew transportation to and from the drilling site. This benefited Amerimex by ensuring that the full crew showed up for each shift and was not left stranded on site at the end of the workday, and that the drillers were not hired away by other companies." *Id*. at 135.

B. Coming-And-Going / Commuting Exception

In *Painter*, though, the Supreme Court also confirmed that the "coming-and-going" exception, under which an employee is generally not acting within the scope of his employment when travelling to and from work, is still alive. *Id*. at 138. "This rule is based on the premise that an injury occurring while traveling to and from work is caused by risks and hazards incident to driving on public streets, which has nothing to do with the risks and hazards emanating from a person's employment." *Molina v. City of Pasadena*, No. 14-17-00524-CV, 2018 Tex. App. LEXIS 6579, at *8, 2018 WL 3977945 (Tex. App.—Houston [14th Dist.] Aug. 21, 2018, no pet.).

The *Painter* Court did, however, recognize the 'special mission' exception for when such travel involves the performance of regular or specifically assigned duties for the benefit of the employer. The Court held Burchett's driving of workers to a workplace is such a duty, even in his personal truck. *Id*.

In a different context, if an employee is driving a company vehicle when an accident occurs, a presumption arises that the employee was acting within the scope of his employment. *Robertson Tank Lines, Inc. v. Van Cleave*, 468 S.W.2d 354, 357 (Tex. 1971) ("It is recognized in Texas that when it is proved that the truck was owned by the defendant and that the driver was in the employment of defendant, a presumption arises that the driver was acting within the scope of his employment when the accident occurred.").

If there is evidence that the driver was on a personal errand, simply commuting, or otherwise not in the furtherance of his employer's business, the presumption can be rebutted. *Id.*; *Williams v. Great Western Distrib. Co*., No. 12-16-00095-CV, 2016 Tex. App. LEXIS 13410, 2016 WL 7322802, at *3 (Tex. App.—Tyler Dec. 16, 2016, no pet.) (mem. op.).

In *Meija-Rosa*, the Houston Court of Appeals recently affirmed the granting of a summary judgment when the employee hit a pedestrian as he entered the parking lot of his apartment complex at the end of his work day. Although the employee was driving a company van, his employer rebutted the company-owned car presumption with testimony that the employee was not furthering the affairs of the employer at the time of wreck. *Mejia-Rosa v. John Moore Servs*., No. 01-17-00955-CV, 2019 Tex. App. LEXIS 6405, at *16 (Tex. App.—Houston [1st Dist.] July 25, 2019).

The *Mejia-Rosa* Court rejected the plaintiff's arguments that he had used a company phone while driving home and was "on-call." The Court stated "the phone records do not show that [the employee] was on a phone call at the time of the accident. Instead, they indicate that the last call placed or received on his company cell phone ended a half-hour before the accident and that there were two brief calls beginning about a half-hour after the accident…[and]… there is no evidence in the record revealing the substance of these calls, i.e., whether they were work-related." "Even if the record contained evidence that the phone calls were work-related, such evidence would be insufficient to present a fact issue here because the purpose of [the employee's] drive was simply to go home, not to further any business of [the employer]." *Id* at *19.

The Court also held that being subject to call, without more, is insufficient to place an employee within the course and scope of his employment for vicarious liability purposes. *Id* at *21 (citing *Atlantic Indus., Inc. v. Blair, 457 S.W.3d 511, 516 (Tex. App.—El Paso 2014), reversed on other grounds, 482 S.W.3d 57 (Tex. 2016)* (evidence that employee was on call and driving truck with company logo insufficient to support determination that he was within course and scope of his employment at time of accident); *Mayes*, 236 S.W.3d at 757 (summary-judgment evidence that employee on personal errand was driving company truck loaded with company products for delivery, was available via pager 24 hours a day, and was not restricted from using truck for personal business, insufficient to raise genuine issue of fact regarding course and scope); *J & C Drilling Co. v. Salaiz, 866 S.W.2d 632, 637-38 (Tex. App.—San Antonio 1993, no writ)* (fact that employee involved in accident while driving company car was required to be on 24-hour call "not sufficient to raise an issue of course and scope").

C. Personal Deviation Exception

The Supreme Court in *Painter* also left room for the personal deviation exception in the vicarious liability context. The Court said that if Burchett had stopped for a meal, run a personal errand, or traveled somewhere not furthering the affairs of his employer. the course and scope analysis would be affected. "[A]n employer is not responsible for what occurs when an employee deviates from the performance of his duties for his own purposes." *Id.* (citing *Mayes*, 236 S.W.3d at 757). This is the case even if the deviation occurs with the employer's express or implied permission. *Mayes*, 236 S.W.3d at 757 (holding that an employee was not within the scope of employment while using his employer's vehicle to run a personal errand, even though he was not restricted from using the truck for personal business).

In another recent decision from a Houston Court of Appeals, a City of Pasadena employee was driving a

city-owned vehicle. *Molina v. City of Pasadena*, No. 14-17-00524-CV, 2018 Tex. App. LEXIS 6579, at *1, 2018 WL 3977945 (Tex. App.—Houston [14th Dist.] Aug. 21, 2018, no pet.) (mem. op.). The employee, an inspector for the City, would pick up his city-owned vehicle at the City dispatch in the morning and would drive to up to seven construction sites per day. He was allowed to drive the vehicle to lunch and back, but would leave it at the dispatch at the end of the day. *Id.*

On the day of the accident, after eating lunch at a fast-food restaurant, as he was proceeding to the next construction site, he failed to yield the right-of-way to a pedestrian and knocked the pedestrian down. The Court affirmed the granting of a plea to the jurisdiction holding that *Painter* did not change older case law that "an employee returning to work from a personal errand is not acting within the course and scope of his employment. An accident that occurs while an employee is 'returning to the zone of his employment' does not fix liability against the employer." *Id.*

V. WHAT IS THIS WEIRD CRITTER?

UM / UIM ISSUES PERCOLATING IN TEXAS

How to file a UM/UIM case? How to try a UM/UIM case? These are currently unanswered questions in Texas and the subject of much angst and gnashing of teeth amongst litigators. Traditionally, UM/UIM cases were filed and tried as breach of contract claims. But tradition began to show some cracks in 2000 with the Texas Supreme Court case of *Henson v. Southern Farm Bureau Casualty Insurance Company* when the Court held that an insured is not "legally entitled to recover" under the UIM contract until the jury establishes the liability of the other motorist and damages. *Henson v. Southern Farm Bureau Casualty Insurance Company*, 17 S.W.3d 652, 654 (Tex. 2000). The *Henson* Court held that the insurer lacked any obligation to pay prior to the juries' findings. In *Henson*, the insurer paid promptly post-verdict and, thus, the Court held there was no breach of a contractual duty and the plaintiff was not entitled to prejudgment interest.

However, the earth truly began to shake in UM/UIM litigation in 2006 with a trilogy of cases from the Texas Supreme Court headlined by *Brainard v. Trinity Universal Insurance Company*. *Brainard v. Trinity Universal Insurance Company*, 216 S.W.3d 809 (Tex. 2006); *State Farm Mut. Ins. Co. v. Norris*, 216 S.W.3d 819 (Tex. 2006); and *State Farm Mut. Ins. Co. v. Nickerson*, 216 S.W.3d 823 (Tex. 2006).

A. It is a *Brainard* World

In 1999, Mr. Brainard was killed when his vehicle had a head-on collision with a rig owned by Premier Well Service, Inc. His surviving family filed suit against Premier and sought his $1,000,000 in UIM benefits from his insurer, Trinity Universal Insurance Company. After settling for Premier's policy limit of $1,000,000, Brainard's family demanded that Trinity tender its limits. Trinity refused and offered $50,000. The trial court severed Brainard's extra-contractual claims and the parties proceeded to trial as a breach of contract claim under the UIM contract. The jury awarded Brainard's family $1,010,000 in wrongful death damages and $100,000 in attorney's fees. After applying a credit for the settlement with Premier and for $5,000 in PIP benefits previously paid by Trinity, the trial court signed a judgment against Trinity for $5,000 and $100,000 in attorney's fees. On appeal, Trinity challenged the attorney's fees award, and Brainard, by cross appeal, alleged the trial court erred in refusing to award prejudgment interest on the $ 1,010,000 in actual damages. *Brainard*, 216 S.W.3d at 811-812.

Although *Brainard* discussed what amount of prejudgment interest would be covered by the UIM contract, the crux of the case had to do with attorney's fees. Brainard argued that, under Texas Civil Practice and Remedies Code Chapter 38, they were entitled to attorney's fees because the UIM contract was no different than a regular insurance contract. Thus, the failure of Trinity to pay the policy benefits when the claim was submitted constituted a breach of the contract. Trinity argued a UIM policy is different and unique because the insurer's duty to pay does not arise until the underinsured motorist's liability and the insured's damages are legally determined by the jury. *Id.* at 817-818.

The Court agreed with Trinity and held that, "the UIM insurer is obligated to pay damages which the insured is 'legally entitled to recover' from the underinsured motorist" citing Texas Insurance Code 5.06-1(15)[1] which states:

> The underinsured motorist coverage shall provide for payment to the insured of all sums which he shall be **legally entitled to recover** as damages from owners or operators of underinsured motor vehicles because of bodily injury or property damage in an amount up to the limit specified in the policy, reduced by the amount recovered or recoverable from the insurer of the underinsured motor vehicle

Id. at 818

The Court continued, "we have determined that this language means the UIM insurer is under no contractual duty to pay benefits until the insured obtains a judgment establishing the liability and underinsured status of the other motorist. Neither requesting UIM benefits nor filing suit against the insurer triggers a contractual duty

[1] TEX. INS. C. 5.06-1(15) (now TEX. INS. C. §1952.106)

to pay. Where there is no contractual duty to pay, there is no just amount owed. Thus, under Chapter 38, a claim for UIM benefits is not presented until the trial court signs a judgment establishing the negligence and underinsured status of the other motorist." *Id*.

BAM. Thus, forever after a UM/UIM contract is unlike any other first-party insurance contract because, according to its terms, benefits are conditioned upon the insured's legal entitlement to receive damages from a third party. In other words, you have to try it before they have to pay a dime under the policy. If the verdict is paid within thirty (30) days, there is no breach and attorney's fees are not recoverable.

Although some defense lawyers claim *Brainard* just further clarified *Henson*, we can all agree that with the release of *Brainard*, the number of UM/UIM cases being litigated exploded.

Brainard, for all intents and purposes, applies a damage cap to the amount of damages an insurer might have to pay under the policy, thus destroying a plaintiff's leverage on an insurer to resolve these cases. As Stephanie Baenisch argues in her excellent paper, *Brainard* imposes a "ligation surcharge" on UM/UIM policies. "[W]ith an uninsured/underinsured motorist, the insured will likely find the road to recovery of a fair sum under the UM/UIM policy very difficult, time consuming, and expensive. From the onset, the insured loses 33-40% because the insured is practically forced to hire an attorney and is frequently forced to engage in litigation in order to prove that the insured is "legally entitled to recover" benefits under the UM/UIM contract." Stephanie Baenisch, *The Litigation Surcharge: Brainard's Impact on UM/UIM Coverage*, 30th Annual State Bar of Texas Advanced Personal Injury Law Course, 2014.

Nonetheless, the logical conclusion is that if there is no contractual duty to pay benefits until after a verdict, how has an insurer breached a contract beforehand? If the insurer has not breached a contract, how to I seek judicial review of a denied claim? What is my cause of action to sue my UM/UIM insurer when they deny my claim? Wasn't one of the first things I learned in law school that I have to have a cause of action to have a lawsuit? If it is not a breach of contract, what is it? What do I plead? How do I get into court? What is this critter?

Well, the answer is not clear. The courts are all over the place as are various defense and plaintiff lawyers. Many courts, defense and plaintiff lawyers continue as if *Brainard* didn't really mean what it said, and are still filing and trying these cases as breach of contact cases, albeit without attorney's fees. Some plaintiff lawyers have started filing them as a declaratory judgment action to determine the rights of the parties and some courts have agreed. Some defense lawyers seem to argue that *Brainard* created a new common law cause action I will call a "Claim for UM/UIM Benefits." Below, we will address each of the causes of action and the courts that have agreed or ignored the distinctions.

B. Declaratory Judgment Actions and Attorney's Fees

If it is not a breach of contract, what else is there? Can an agreed judgment between the tortfeasor and the insured get you there? Nope. *State Farm Fire and Cas. Co. v. Gandy*, 925 S.W.2d 696, 714 (Tex. 1996) (in a case involving an agreed judgment and assignment of claim against the defendant's insurance company, the court opined that the underlying judgment would not be binding without a fully adversarial trial).

What about trying the tortfeasor? Could the insurer be obligated by the trial result? Nope. *U.S. Fire Ins. Co. v. Millard*, 847 S.W.2d 668 (Tex. App.-Houston [1st Dist.] 1993, no pet.) (absent a consent to be bound, an insurer is not bound by the suit against the underlying driver).

What about a settlement or even an admission of liability by the underlying driver? Again, nope. *Brainard*, 216 S.W.3d at 818 (neither a settlement nor an admission of liability from the tortfeasor establishes UIM coverage, because a jury could find that the other motorist was not at fault or award damages that do not exceed the tortfeasor's liability insurance).

Plaintiff's lawyers are arguing that the only choice left is a declaratory judgment under Chapter 37 of the Texas Civil Practices and Remedies Code as a vehicle into Court, which provides:

> A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

TEX. CIV. PRAC. & REM. C. §37.004(a).

The purpose of the Uniform Declaratory Judgments Act "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered." TEX. CIV. PRAC. & REM. C. § 37.002(b).

The Act provides that "[t]he declaration . . . has the force and effect of a final judgment or decree." TEX. CIV. PRAC. & REM. C. §37.003(b). It provides that "[a] person interested under a . . . contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of the rights, status, or other legal relations thereunder."

TEX. CIV. PRAC. & REM. C. §37.004(a) "A contract may be construed either before or after there has been a breach." TEX. CIV. PRAC. & REM. C. §37.004(b).

The argument is that a UM/UIM claim simply involves a dispute as to whether there is a covered loss. Although UM/UIM insurance law uses principles of tort law to determine a contractual responsibility, the plaintiff's claim against his carrier do not lie in tort because the negligence allegations are against the underinsured tortfeasor, not the carrier. But, under *Brainard*, a breach of contract is not ripe until post-judgment. Therefore, the plaintiff must seek a declaration that: (1) the plaintiff is entitled to UM/UIM coverage under the policy; (2) the underlying driver is an uninsured or underinsured driver; (3) the underlying driver was the proximate cause of the wreck; (4) the amount of damages that the plaintiff incurred as a result of the wreck, and (5) the amount of damages (following any offsets or credits) that the insurer is obligated to pay under the contract. Brooks Schuelke, *Uninsured/Underinsured Motorist Claims After Brainard*, 9th Annual State Bar of Texas Advanced Insurance Law Course, 2012.

Interestingly, the Act also provides that a court may award costs and reasonable and necessary attorney's fees as are equitable and just. TEX. CIV. PRAC. & REM. C. §37.009. Although *Brainard* disapproved the award of attorney's fees if the insurer paid the judgment within thirty (30) days of judgment, Brainard was limited to the request for attorney's fees under Chapter 38, leaving open the possibility of attorney's fees under Chapter 37. Brainard, 216 S.W.3d at 811.

However, that sword can cut both ways. TEX. CIV. PRAC. & REM. C. §37.009.

The Texarkana Court of tackled this issue and allowed a declaratory judgment action as a UIM vehicle, but disallowed attorney's fees as a recovery. *Allstate Ins. Co. v. Jordan*, 503 S.W.3d 450, 455 (Tex. App.—Texarkana 2016, no pet.). There, Margaret Jordan sued Allstate, her UIM insurer, seeking to recover damages she suffered in excess of the tortfeasor's policy limits. *Id*. at 452. She asserted claims for breach of contract and declaratory relief. *Id*. at 454. The trial court signed a declaratory judgment awarding Jordan damages and attorney's fees. *Id*. Allstate appealed, arguing that the trial court abused its discretion in declaring Jordan was entitled to damages because her UIM claim did not raise "a question of construction or validity" under the UDJA. *Id*. The Texarkana Court rejected Allstate's argument and held Jordan could use the UDJA to establish the amount of damages she was legally entitled to recover under her policy. *Id*. at 455.

However, the Court disallowed the recovery of attorney's fees quoting *Brainard* for the holding that "an insurer has no duty to pay UIM benefits until the plaintiff has established that she is legally entitled to an amount of damages that exceeds the limits of the UIM's policy. Therefore, the insurer has the right to make the plaintiff meet the liability and damages prerequisites to UIM recovery, through litigation or otherwise. Consequently, requiring an insurer to pay attorney fees for exercising its right to require the plaintiff to establish its entitlement to recovery of UIM benefits under the policy would be inequitable and unjust under the UDJA." *Id*. at 457.

Under Chapter 38 the Court also held that "until payment has been refused and more than thirty days have expired after presentment, and if presentment under Chapter 38 in a UIM case does not occur "until after the liability of the other motorist and the amount of damages suffered by the insured are determined, then allowing recovery of attorney fees in UIM cases under the UDJA would create a special category of contract cases where attorney fees would be recoverable prior to presentment." The Court concluded that the UDJA claim cannot be used "as a vehicle to obtain otherwise impermissible attorney's fees." *Id.*

The Corpus Christi Court of Appeals and the San Antonio Court of Appeals have likewise allowed declaratory judgments to be the UIM vehicle, but have disagreed with the Texarkana Court of Appeals and have allowed recovery of attorney's fees under Chapter 37. *Allstate Fire & Cas. Ins. Co. v. Inclan*, No. 13-19-00026-CV, 2020 Tex. App. LEXIS 568, at *8 2020 WL 373061 (Tex. App.—Corpus Christi Jan. 23, 2020, pet. filed); *Allstate Ins. Co. v. Irwin*, No. 04-18 00293-CV, 2019 Tex. App. Lexis 7368, 2019 WL 3937281 (Tex. App.—San Antonio, August 21, 2019, pet. filed).

In *Irwin*, the San Antonio Court of Appeals upheld a trial court judgment awarding attorney's fees in a UIM case as part of the claim for relief under the Uniform Declaratory Judgments Act ("UDJA"). Irwin sued Allstate after a car wreck with an underinsured motorist, seeking a declaration that he was entitled to recover damages under his UIM policy. The sole issue presented to the jury at the trial court was whether Irwin was legally entitled to recover his excess damages. The parties stipulated to coverage under the UIM policy and the offset from a prior settlement with the tortfeasor. The jury returned a verdict in Irwin's favor, awarding him $498,968.36 in damages. The trial court signed a judgment awarding Irwin the policy limit of $50,000 plus court costs. The trial court also awarded Irwin $45,540 in attorney's fees. Allstate appealed. On appeal, Allstate argued that because an insured must first establish the amount he is legally entitled to recover before pursuing a breach of contract claim to recover UIM benefits, an insured cannot file a claim for declaratory relief to obtain the judgment required by the Brainard v. Trinity Universal Insurance Co. decision. Irwin argued that a declaratory judgment action is proper for pursuing a UIM claim and that nothing in the *Brainard* decision precludes its use.

The court began its analysis by noting that was a

case of first impression for it and the Texarkana Court of Appeals has been the only Texas appellate court to address the issue. The court agreed with the Texarkana court and held that an insured may use the UDJA to establish the prerequisites to recovery in an UM/UIM claim. The court further held that because the UDJA is to be "liberally construed and administered" there is nothing preventing the award of reasonable attorney's fees. The court specifically distinguished the *Brainard* decision because it was based on a breach of contract claim and not a claim for declaratory judgment. The court affirmed the trial court's judgment as to the declaratory judgment and the award of attorney's fees. *Id*.

Thus, we have conflicting court of appeals decisions. But we may not have to wait for long to determine the answer to this question, though.

The Texas Supreme Court has accepted the petition for review and set oral argument for January 7, 2021 in *Allstate Ins. Co. v. Irwin*. http://search.txcourts.gov/Case.aspx?cn=20-0153&coa=cossup

C. Extracontractual Claims and Insurance Code Violations

Texas historically recognized a bad faith cause of action in a UIM context. *Arnold v. National County Mutual Fire Insurance*, 725 S.W.2d 165, 166–67 (Tex. 1987). However, how does a carrier violated the common law duty of good faith and fair dealing, much less the various insurance code violations when Brainard says they owe no duty to pay a claim until post-verdict? In other words, can a carrier have any liability ore responsibility until a jury verdict under *Brainard*?

Well, there are a number of recent vases percolating in the Courts which will hopefully clarify these issues.

On November 19, 2020, Justice Bridwell issued an 87-page opinion for the Fort Worth Court of Appeals, dissecting with detail the conundrums and history of how we got to where we are on UIM litigation. *In re State Farm Mut. Auto. Ins. Co.*, No. 02-20-00144-CV, 2020 Tex. App. LEXIS 8978, 2020 WL 6788961 (Tex. App.—Fort Worth Nov. 19, 2020). In this Mandamus case, State Farm asked the court of appeals to reverse the trial court's order allowing claims process discovery. The insured tried its UIM case against State Farm, receiving a verdict over the policy limits. Subsequently, she then filed a second lawsuit against State Farm asserting causes of action for breach of the common law duty of good faith and fair dealing, breach of contract, violations of Chapters 541 and 542 of the Texas Insurance Code, and violations of the Deceptive Trade Practices Act. She also asked for various claims process-related discovery, to which, State Farm objected, arguing that by paying the judgment post-verdict, "State Farm has satisfied its obligations to Mentzer, her breach of contract and extra-contractual causes of action will not accrue or become ripe, and having to respond to the written discovery requests or conduct any additional discovery will have been a waste of time and resources."

Justice Bridwell denied the mandamus after distinguishing that *Brainard* did not overrule the stare decisis accrual holdings of *Arnold* and *Murray v. San Jacinto Agency*, 800 S.W.2d 826, 828–29 (Tex. 1990), which held that an insurer's common law cause of action for an insurer's breach of its duty of good faith and fair dealing accrues on the date the insurer denies the UM/UIM claim, not the date of the final resolution of the underlying direct action. In so holding, the Court found that an "insurer breaches its duty of good faith and fair dealing by denying or delaying payment of a UM/UIM claim until after the rendition of a binding judgment of liability and damages when its liability was ***reasonably clear*** before the filing of the insured's direct action." *Id*. at 104.

So, what does ***reasonably clear*** mean? Hold tight as I am sure there will be more cases to find out.

Further, the Texas Supreme Court heard oral arguments on two other original proceedings involving extracontractual UIM cases on December 2, 2020. *In re State Farm Mut. Auto. Ins.*, No. 19-0791 (Tex.)

(http://www.search.txcourts.gov/Case.aspx?cn=19-0791&coa=cossup),

and No. 19-0792 (Tex.)

(http://www.search.txcourts.gov/Case.aspx?cn=19-0792&coa=cossup)

According to its briefs on the merits in those proceedings, State Farm seeks mandamus to the trial courts to abate discovery and trial of the extracontractual cases until after a verdict establishing the amount of the insured's damages under *Brainard*. The only causes of action pleaded by the insureds are statutory extracontractual liability causes of action. Interestingly, the plaintffs never prosecuted a direct action against State Farm to a binding judgment of liability and damages attributable to the allegedly underinsured motorists. In both proceedings, the Dallas Court of Appeals denied mandamus relief peremptorily. *In re State Farm Mut. Auto. Ins.*, 606 S.W.3d 780, 780 (Tex. App.—Dallas 2019, orig. proceeding [mand. pending]) (mem. op.); *In re State Farm Mut. Auto. Ins.*, No. 05-19-00920-CV, 2019 Tex. App. LEXIS 7606, 2019 WL 3955762, at *1 (Tex. App.—Dallas Aug. 22, 2019, orig. proceeding [mand. pending]) (mem. op.). *In re State Farm*, 2020 Tex. App. LEXIS 8978, FN. 7.

Tex. Civ. Prac. & Rem. Code § 18.001

This document is current through the 2019 Regular Session, 86th Legislature, and 2019 election results.

Texas Statutes & Codes Annotated by LexisNexis® > Civil Practice and Remedies Code > Title 2 Trial, Judgment, and Appeal (Subts. A — D) > Subtitle B Trial Matters (Chs. 15 — 30) > Chapter 18 Evidence (Subchs. A — D) > Subchapter A Documentary Evidence (§§ 18.001 — 18.030)

Sec. 18.001. Affidavit Concerning Cost and Necessity of Services.

(a) This section applies to civil actions only, but not to an action on a sworn account.

(b) Unless a controverting affidavit is served as provided by this section, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary. The affidavit is not evidence of and does not support a finding of the causation element of the cause of action that is the basis for the civil action.

(c) The affidavit must:

(1) be taken before an officer with authority to administer oaths;

(2) be made by:

(A) the person who provided the service; or

(B) the person in charge of records showing the service provided and charge made; and

(3) include an itemized statement of the service and charge.

(d) The party offering the affidavit in evidence or the party's attorney must serve a copy of the affidavit on each other party to the case by the earlier of:

(1) 90 days after the date the defendant files an answer;

(2) the date the offering party must designate any expert witness under a court order; or

(3) the date the offering party must designate any expert witness as required by the Texas Rules of Civil Procedure.

(d-1) Notwithstanding Subsection (d), if services are provided for the first time by a provider after the date the defendant files an answer, the party offering the affidavit in evidence or the party's attorney must serve a copy of the affidavit for services provided by that provider on each other party to the case by the earlier of:

(1) the date the offering party must designate any expert witness under a court order; or

(2) the date the offering party must designate any expert witness as required by the Texas Rules of Civil Procedure.

(d-2) The party offering the affidavit in evidence or the party's attorney must file notice with the clerk of the court when serving the affidavit that the party or the attorney served a copy of the affidavit in

accordance with this section. Except as provided by the Texas Rules of Evidence, the affidavit is not required to be filed with the clerk of the court before the trial commences.

(e) A party intending to controvert a claim reflected by the affidavit must serve a copy of the counteraffidavit on each other party or the party's attorney of record by the earlier of:

(1) 120 days after the date the defendant files its answer;

(2) the date the party offering the counteraffidavit must designate expert witnesses under a court order; or

(3) the date the party offering the counteraffidavit must designate any expert witness as required by the Texas Rules of Civil Procedure.

(e-1) Notwithstanding Subsection (e), if the party offering the affidavit in evidence serves a copy of the affidavit under Subsection (d-1), the party offering the counteraffidavit in evidence or the party's attorney must serve a copy of the counteraffidavit on each other party to the case by the later of:

(1) 30 days after service of the affidavit on the party offering the counteraffidavit in evidence;

(2) the date the party offering the counteraffidavit must designate any expert witness under a court order; or

(3) the date the party offering the counteraffidavit in evidence must designate any expert witness as required by the Texas Rules of Civil Procedure.

(f) The counteraffidavit must give reasonable notice of the basis on which the party serving it intends at trial to controvert the claim reflected by the initial affidavit and must be taken before a person authorized to administer oaths. The counteraffidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit. The counteraffidavit may not be used to controvert the causation element of the cause of action that is the basis for the civil action.

(g) The party offering the counteraffidavit in evidence or the party's attorney must file written notice with the clerk of the court when serving the counteraffidavit that the party or attorney served a copy of the counteraffidavit in accordance with this section.

(h) If continuing services are provided after a relevant deadline under this section:

(1) a party may supplement an affidavit served by the party under Subsection (d) or (d-1) on or before the 60th day before the date the trial commences; and

(2) a party that served a counteraffidavit under Subsection (e) or (e-1) may supplement the counteraffidavit on or before the 30th day before the date the trial commences.

(i) Notwithstanding Subsections (d), (d-1), (d-2), (e), (e-1), (g), and (h), a deadline under this section may be altered by all parties to an action by agreement or with leave of the court.

History

Enacted by Acts 1985, 69th Leg., ch. 959 (S.B. 797), § 1, effective September 1, 1985; am. Acts 1987, 70th Leg., ch. 167 (S.B. 892), § 3.04(a), effective September 1, 1987; am. Acts 2007, 80th Leg., ch. 978

(S.B. 763), § 1, effective September 1, 2007; am. Acts 2013, 83rd Leg., ch. 560 (S.B. 679), § 1, effective September 1, 2013; am. Acts 2019, 86th Leg., ch. 779 (H.B. 1693), § 1, effective September 1, 2019.

End of Document

Cause No. _____

********	**§**	**IN THE ****DISTRICT COURT**
	§	
v.	**§**	**IN AND FOR**
	§	
********	**§**	****** COUNTY, TEXAS**

DOCKET CONTROL PLAN

It is ORDERED pursuant to Rule 190.4 that discovery in this case be conducted in accordance with this Plan and that the parties shall meet and adhere to the following deadlines:

1. Deadlines to designate testifying expert witnesses:

   a. Plaintiff shall designate testifying expert witnesses no later than _____, pursuant to Texas Rule of Civil Procedure 194.2(f).

   b. Defendant(s) shall designate testifying expert witnesses no later than _____, pursuant to Texas Rule of Civil Procedure 194.2(f).

   c. Plaintiff shall designate any testifying rebuttal expert witness no later than _____, pursuant to Texas Rule of Civil Procedure 194.2(f).

   d. Any party designating a testifying expert witness is ORDERED to provide, no later than the dates set forth above for designation, the information set forth in Rule 194.2(f) and a written report prepared by any retained expert setting forth the substance of the expert's opinion.

   e. Pursuant to Texas Civil Practice and Remedies Code Section 18.001(i), the parties agree that Plaintiff shall serve affidavits under Section 18.001(d), if any, by the same date Plaintiff shall be required to designate testifying experts. Likewise, Defendant(s) shall serve counteraffidavits under Section 18.001(e), if any, by the same date Defendant shall be required to designate testifying experts.

   f. If services are provided for the first time by a provider after Plaintiff's designation date or there is continued treatment after the designation date, Plaintiff shall serve or supplement affidavits under Section 18.001, if any, on or before the 60th day before the date the trial commences. Likewise, Defendant(s) shall serve or supplement counteraffidavits to these affidavits, if any, on or before the 30th day before the date the trial commences.

2. Discovery period ends _____, which may be extended by agreement by the parties.

3. Deadline to amend or supplement pleadings: _____.

4. The parties are ordered to exchange with each other by _____ the following items:

   a. Proposed jury instructions and questions (jury trial).

   b. Motions in Limine.

   c. Exhibit lists.

   d. Labeled and numbered exhibits. The parties are ordered per Rule 192.5 (c)(2) to exchange prior to the pretrial conference all exhibits they intend to introduce at trial and to make good faith efforts to reach agreement on the admissibility of all exhibits. The parties should be prepared to discuss at the pretrial conference objection to exhibits which the parties do not agree are admissible.

   e. Witness list stating each witness' name, address, and phone number and stating whether the witness is a party, a fact witness or an expert witness. The parties should be prepared to discuss at the pretrial conference any scheduling problems relating to witnesses and any objections to improperly designated experts or fact witnesses.

6. Pre-trial Hearing to be set if requested.

7. Trial

   Trial is set for _____at 9:00 a.m.

SIGNED on _____, 2020.

_____
JUDGE PRESIDING

Agreed to by Counsel:

BROWNING LAW FIRM, PLLC
P. O. Box 1600
Abilene, TX 79604
(325) 437-3737
(325) 437-1799 (fax)

By: _____
Cade W. Browning
State Bar No. 24028748
cade@browningfirm.com

ATTORNEYS FOR PLAINTIFF

TALL BUILDING DEFENSE FIRM, PLLC
Really Tall Building
Dallas, Texas 75002
(214) 555-5555
(214) 555-5555(fax)

By: _____
John Doe
State Bar No. 55555555
defenselawyer@defensefirm.com

ATTORNEYS FOR DEFENDANT

DECLARATION OF COST OF SERVICE BY CUSTODIAN

"My name is _____. I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated. My date of birth is _____ and my address is _____, _____, Texas _____.

"Attached hereto are billing records that provide an itemized statement of the service and the charge for the services that _____provided to_____. The attached billing records are incorporated as a part of this declaration.

"The attached records are kept by me in the regular course of business, and it was the regular course of business of _____for an employee or representative with knowledge of diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original."

"The total amount paid for the services was $_____ and the amount currently unpaid but which _____has a right to be paid after any adjustments or credits is $_____."

"I declare under penalty of perjury that the foregoing is true and correct."

Executed in _____ County, State of _____, on the _____ day of _____, 2020.

_____
Declarant

AFFIDAVIT OF COST OF SERVICE BY CUSTODIAN

STATE OF TEXAS

COUNTY OF _____

BEFORE ME, the undersigned authority, on this day personally appeared _____, who swore on oath that the following facts are true:

"My name is _____. I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated.

"I am the custodian of the records of_____. Attached hereto are billing records that provide an itemized statement of the service and the charge for the services that _____ _____provided to _____on_____. The attached billing records are incorporated as a part of this affidavit.

"The attached records are kept by me in the regular course of business, and it was the regular course of business of _____for an employee or representative with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original."

"The total amount paid for the services was $_____ and the amount currently unpaid but which _____has a right to be paid after any adjustments or credits is $_____."

"The service provided was necessary and the amount charged for the service was reasonable at the time and place the service was provided.

_____
Affiant

Sworn to and subscribed before me on the _____ day of _____, 2020.

_____
Notary Public, State of _____

_____
Notary's Printed Name

Cause No. _____

********	**§**	**IN THE ****DISTRICT COURT**
	§	
v.	**§**	**IN AND FOR**
	§	
********	**§**	****** COUNTY, TEXAS**

PLAINTIFF'S NOTICE OF AFFIDAVIT SERVICE IN ACCORDANCE WITH TEXAS CIVIL PRACTICE AND REMEDIES CODE § 18.001

TO: Defendant Big Bad Insurance Company, by and through its attorneys of record, Mr. John Doe, TALL BUILDING DEFENSE FIRM, PLLC, Really Tall Building, Dallas, Texas 75002 .

Now comes **** ("Plaintiff") by and through the undersigned counsel, and confirms the following medical billing record affidavits and medical records affidavits have been produced to all counsel associated with this case in accordance with TEX. CIV. PRAC. & REM. C. §18.001:

1. Declaration of _____regarding the billing records from _____ _____regarding Plaintiff's treatment from January 1, 2020 – March 5, 2020 produced as PLF 9-26;

2. Affidavit of _____regarding the billing records from _____ _____regarding Plaintiff's treatment from January 1, 2020 – March 5, 2020 produced as PLF 27-32; and

3. Declaration of _____regarding the billing records from _____ _____regarding Plaintiff's treatment from January 1, 2020 – March 5, 2020 produced as PLF 32-86.

Respectfully submitted,

BROWNING LAW FIRM, PLLC
P. O. Box 1600
Abilene, TX 79604
(325) 437-3737
(325) 437-1799 (fax)

By: _____
Cade W. Browning
State Bar No. 24028748
cade@browningfirm.com

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that on this 20th day of March, 2020, a true and correct copy of the above and foregoing document has been forwarded to opposing counsel as follows:

SENT VIA HAND DELIVERY
Mr. John Doe
TALL BUILDING DEFENSE FIRM, PLLC
Really Tall Building
Dallas, Texas 75002

_____
Cade W. Browning

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 20-9101

ORDER AMENDING TEXAS RULES OF CIVIL PROCEDURE 47, 169, 190, 192, 193, 194, AND 195

ORDERED that:

1. In accordance with the Act of May 27, 2019, 86th Leg., R.S., ch. 696 (SB 2342), the Supreme Court approves the following amendments to Rules 47, 169, 190, 192, 193, 194, and 195 of the Texas Rules of Civil Procedure.

2. The amendments take effect January 1, 2021, and apply to cases filed on or after January 1, 2021, except for those filed in justice court.

3. The amendments may be changed before January 1, 2021, in response to public comments. Written comments should be sent to rulescomments@txcourts.gov. The Court requests that comments be sent by December 1, 2020.

4. Because the Court previously approved amendments to Rule 47, effective September 1, 2020 (Misc. Dkt. No. 20-9070), the amendments to Rule 47 approved in this Order are shown in redline against the version of Rule 47 that takes effect September 1, 2020.

5. The Clerk is directed to:

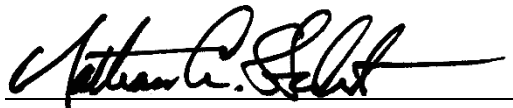
   a. file a copy of this Order with the Secretary of State;

   b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

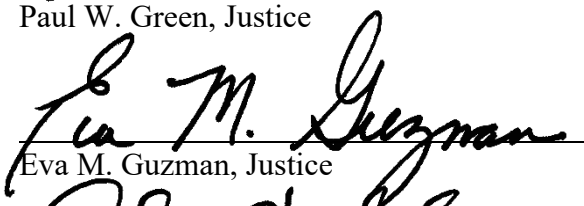
   c. send a copy of this Order to each elected member of the Legislature; and

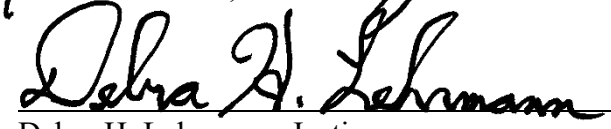
   d. submit a copy of the Order for publication in the *Texas Register*.

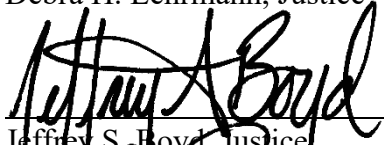
Dated: August 21, 2020

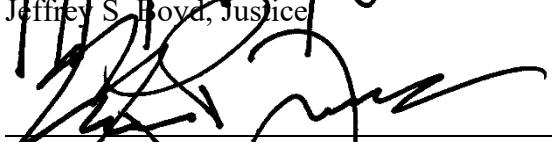

Nathan L. Hecht, Chief Justice

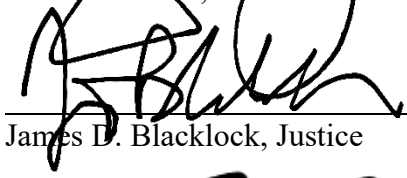

Paul W. Green, Justice

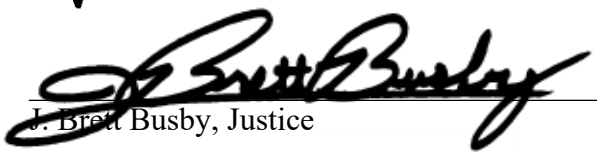

Eva M. Guzman, Justice

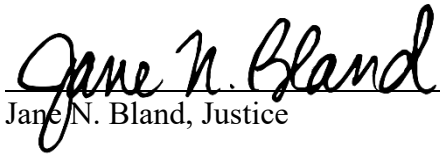

Debra H. Lehrmann, Justice


Jeffrey S. Boyd, Justice


John P. Devine, Justice


James D. Blacklock, Justice


J. Brett Busby, Justice


Jane N. Bland, Justice

RULE 47. CLAIMS FOR RELIEF

An original pleading which sets for a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim, shall contain:

(a) a short statement of the cause of action sufficient to give fair notice of the claim involved;

(b) a statement that the damages sought are within the jurisdictional limits of the court;

(c) except in suits governed by the Family Code, a statement that the party seeks:

(1) only monetary relief of $~~100,000~~250,000 or less, ~~including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees~~excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs; ~~or~~

(2) monetary relief of $~~100,000~~250,000 or less and non-monetary relief; ~~or~~

~~(3) monetary relief over $100,000 but not more than $250,000; or~~

(~~4~~3) monetary relief over $250,000 but not more than $1,000,000; or

(~~5~~4) monetary relief over $1,000,000; and

(d) a demand for judgment for all the other relief to which the party deems himself entitled.

Relief in the alternative or of several different types may be demanded; provided, further, that upon special exception the court shall require the pleader to amend so as to specify the maximum amount claimed. A party that fails to comply with (c) may not conduct discovery until the party's pleading is amended to comply.

Comment to 2021 change: Rule 47 is amended to implement section 22.004(h-1) of the Texas Government Code. A suit in which the original petition contains the statement in paragraph (c)(1) is governed by the expedited actions process in Rule 169.

RULE 169. EXPEDITED ACTIONS

(a) *Application.*

~~(1)~~ The expedited actions process in this rule applies to suit in which all claimants, other than counter-claimants, affirmatively plead that they seek only monetary relief aggregating $~~100,000~~250,000 or less, ~~including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees~~excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs.

~~(2) The expedited actions process does not apply to a suit in which a party has filed a claim governed by the Family Code, the Property Code, the Tax Code, or Chapter 74 of the Civil Practice & Remedies Code.~~

(b) *Recovery.* In no event may a party who prosecutes a suit under this rule recover a judgment in excess of $~~100,000~~250,000, excluding ~~post judgment~~ interest, statutory or punitive damages and penalties, and attorney's fees and costs.

(c) *Removal from Process.*

(1) A court must remove a suit from the expedited actions process:

(A) on motion and a showing of good cause by any party; or

(B) if any claimant, other than a counter-claimant, files a pleading or an amended or supplemental pleading that seeks any relief other than the monetary relief allowed by (a)~~(1)~~.

(2) A pleading, amended pleading, or supplemental pleading that removes a suit from the expedited actions process may not be filed without leave of court unless it is filed before the earlier of 30 days after the discovery period is closed or 30 days before the date set for trial. Leave to amend may be granted only if good cause for filing the pleading outweighs any prejudice to an opposing party.

(3) If a suit is removed from the expedited actions process, the court must reopen discovery under Rule 190.2(c).

(d) *Expedited Actions Process.*

(1) Discovery. Discovery is governed by Rule 190.2.

(2) Trial Setting; Continuances. On any party's request, the court must set the case for a trial date that is within 90 days after the discovery period in Rule 190.2(b)(1) ends. The court may continue the case twice, not to exceed a total of 60 days.

(3) Time Limits for Trial. Each side is allowed no more than eight hours to complete jury selection, opening statements, presentation of evidence, examination and cross-examination of witnesses, and closing arguments. On motion and a showing of good cause by any party, the court may extend the time limit to no more than twelve hours per side.

(A) The term "side" has the same definition set out in Rule 233.

(B) Time spent on objections, bench conferences, bills of exception, and challenges for cause to a juror under Rule 228 are not included in the time limit.

(4) Alternative Dispute Resolution.

(A) Unless the parties have agreed not to engage in alternative dispute resolution, the court may refer the case to an alternative dispute resolution procedure once, and the procedure must:

(i) not exceed a half-day in duration, excluding scheduling time;

(ii) not exceed a total cost of twice the amount of applicable civil filing fees; and

(iii) be completed no later than 60 days before the initial trial setting.

(B) The court must consider objections to the referral unless prohibited by statute.

(C) The parties may agree to engage in alternative dispute resolution other than that provided for in (A).

(5) Expert Testimony. Unless requested by the party sponsoring the expert, a party may only challenge the admissibility of expert testimony as an objection to summary judgment evidence under Rule 166a or during the trial on the merits. This paragraph does not apply to a motion to strike for late designation.

Comment to 2021 change: Rule 169 is amended to implement section 22.004(h-1) of the Texas Government Code—which calls for rules to promote the prompt, efficient, and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed $250,000—and changes to section 22.004(h) of the Texas Government Code. Certain actions are exempt from Rule 169's application by statute. *See e.g.,* TEX. ESTATES CODE §§ 53.107, 1053.105.

RULE 190. DISCOVERY LIMITATIONS

190.1 Discovery Control Plan Required.

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

190.2 Discovery Control Plan - Expedited Actions and Divorces Involving $~~50,000~~250,000 or Less (Level 1)

(a) **Application.** This subdivision applies to:

(1) any suit that is governed by the expedited actions process in Rule 169; and

(2) unless the parties agree that rule 190.3 should apply or the court orders a discovery control plan under Rule 190.4, any suit for divorce not involving children in which a party pleads that the value of the marital estate is more than zero but not more than $~~50,000~~250,000.

(b) **Limitations.** Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations:

(1) **Discovery period.** All discovery must be conducted during the discovery period, which begins when ~~the suit is filed~~initial disclosures are due and continues until 180 days after the date the ~~first request for discovery of any kind is served on a party~~initial disclosures are due.

(2) **Total time for oral depositions.** Each party may have no more than ~~six~~20 hours in total to examine and cross-examine all witnesses in oral depositions. ~~The parties may agree to expand this limit up to ten hours in total, but not more except by court order.~~ The court may modify the deposition hours so that no party is given unfair advantage.

(3) **Interrogatories.** Any party may serve on any other party no more than 15 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory.

(4) **Requests for Production.** Any party may serve on any other party no more than 15 written requests for production. Each discrete subpart of a request for production is considered a separate request for production.

(5) **Requests for Admissions.** Any party may serve on any other party no more than 15 written requests for admissions. Each discrete subpart of a request for admission is considered a separate request for admission.

~~(6) **Requests for Disclosure**. In addition to the content subject to disclosure under Rule 194.2, a party may request disclosure of all documents, electronic information, and tangible items that the disclosing party has in its possession, custody or control and may use to support its claims or defenses. A request for disclosure made pursuant to this paragraph is not considered a request for production.~~

(c) **Reopening Discovery.** If a suit is removed from the expedited actions process in Rule 169 or, in a divorce, the filing of a pleading renders this subdivision no longer applicable, the discovery period reopens, and discovery must be completed within the limitations provided in Rules 190.3 or 190.4, whichever is applicable. Any person previously deposed may be redeposed. On motion of any party, the court should continue the trial date if necessary to permit completion of discovery.

190.3 Discovery Control Plan - By Rule (Level 2)

(a) **Application.** Unless a suit is governed by a discovery control plan under Rules 190.2 or 190.4, discovery must be conducted in accordance with this subdivision.

(b) **Limitations.** Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations:

(1) **Discovery period.** All discovery must be conducted during the discovery period, which begins when ~~suit is filed~~initial disclosures are due and continues until:

(A) 30 days before the date set for trial, in cases under the Family Code; or

(B) in other cases, the earlier of

(i) 30 days before the date set for trial, or

(ii) nine months after the ~~earlier of the date of the first oral deposition or the due date of the first response to written discovery~~initial disclosures are due.

(2) **Total time for oral depositions.** Each side may have no more than 50 hours in oral depositions to examine and cross-examine parties on the opposing side, experts designated by those parties, and persons who are subject to those parties' control. "Side" refers to all the litigants with generally common interests in the litigation. If one side designates more than two experts, the opposing side may have an additional six hours of total deposition time for each additional expert designated. The court may modify the deposition hours and must do so when a side or party would be given unfair advantage.

(3) **Interrogatories.** Any party may serve on any other party no more than 25 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory.

* * *

Comment to 2021 change: Rule 190.2 is amended to implement section 22.004(h-1) of the Texas Government Code, which calls for rules "to promote the prompt, efficient, and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed $250,000" that "balance the need for lowering discovery costs in these actions against the complexity of and discovery needs in these actions." Under amended Rule 190.2, Level 1 discovery limitations now apply to a broader subset of civil actions: expedited actions under Rule 169, which is also amended to implement section 22.004(h-1) of the Texas Government Code, and divorces not involving children in which the value of the marital estate is not more than $250,000. Level 1 limitations are revised to impose a twenty-hour limit on oral deposition. Disclosure requests under Rule 190.2(b)(6) and Rule 194 are now replaced by required disclosures under Rule

194, as amended. The discovery periods under Rules 190.2(b)(1) and 190.3(b)(1) are revised to reference the required disclosures.

RULE 192. PERMISSIBLE DISCOVERY: FORMS AND SCOPE; WORK PRODUCT; PROTECTIVE ORDERS; DEFINITIONS

192.1 Forms of Discovery.

Permissible forms of discovery are:

(a) ~~requests for~~required disclosures;

(b) requests for production and inspection of documents and tangible things;

(c) requests and motions for entry upon and examination of real property;

(d) interrogatories to a party;

(e) requests for admission;

(f) oral or written depositions; and

(g) motions for mental or physical examinations.

192.2 Timing and Sequence of Discovery.

(a) **Timing.** Unless otherwise agreed to by the parties or ordered by the court, a party cannot serve discovery until after the initial disclosures are due.

(b) **Sequence.** The permissible forms of discovery may be combined in the same document and may be taken in any order or sequence.

* * *

192.7 Definitions.

As used in these rules

(a) *Written discovery* means ~~requests for~~required disclosures, requests for production and inspection of documents and tangible things, requests for entry onto property, interrogatories, and requests for admission.

(b) *Possession, custody, or control* of an item means that the person either has physical possession of the item or has a right to possession of the item that is equal or superior to the person who has physical possession of the item.

(c) A *testifying expert* is an expert who may be called to testify as an expert witness at trial.

(d) A *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.

RULE 193. WRITTEN DISCOVERY: RESPONSE; OBJECTION; ASSERTION OF PRIVILEGE; SUPPLEMENTATION AND AMENDMENT; FAILURE TO TIMELY RESPOND; PRESUMPTION OF AUTHENTICITY

193.1 Responding to Written Discovery; Duty to Make Complete Response.

A party must respond to written discovery in writing within the time provided by court order or these rules. When responding to written discovery, a party must make a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made. The responding party's answers, objections, and other responses must be preceded by the request or required disclosure to which they apply.

* * *

193.3 Asserting a Privilege

A party may preserve a privilege from written discovery in accordance with this subdivision.

(a) **Withholding privileged material or information.** A party who claims that material or information responsive to written discovery is privileged may withhold the privileged material or information from the response. The party must state—in the response (or an amended or supplemental response) or in a separate document—that:

(1) information or material responsive to the request or required disclosure has been withheld,

(2) the request or required disclosure to which the information or material relates, and

(3) the privilege or privileges asserted.

(b) **Description of withheld material or information.** After receiving a response indicating that material or information has been withheld from production, ~~the~~a party seeking discovery may serve a written request that the withholding party identify the information and material withheld. Within 15 days of service of that request, the withholding party must serve a response that:

(1) describes the information or materials withheld that, without revealing the privileged information itself or otherwise waiving the privilege, enables other parties to assess the applicability of the privilege, and

(2) asserts a specific privilege for each item or group of items withheld.

(c) **Exemption.** Without complying with paragraphs (a) and (b), a party may withhold a privileged communication to or from a lawyer or lawyer's representative or a privileged document of a lawyer or lawyer's representative

(1) created or made from the point at which a party consults a lawyer with a view to obtaining professional legal services from the lawyer in the prosecution or defense of a specific claim in the litigation in which discovery is requested or required, and

(2) concerning the litigation in which the discovery is requested or required.

(d) **Privilege not waived by production.** A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if—within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made—the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, ~~the requesting~~any party who has obtained the specific material or information must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

193.4 Hearing and Ruling on Objections and Assertions of Privilege.

(a) **Hearing.** Any party may at any reasonable time request a hearing on an objection or claim of privilege asserted under this rule. The party making the objection or asserting the privilege must present any evidence necessary to support the objection or privilege. The evidence may be testimony presented at the hearing or affidavits served at least seven days before the hearing or at such other reasonable time as the court permits. If the court determines that an *in camera* review of some or all of the requested discovery or required disclosure is necessary, that material or information must be segregated and produced to the court in a sealed wrapper within a reasonable time following the hearing.

(b) **Ruling.** To the extent the court sustains the objection or claim of privilege, the responding party has no further duty to respond to that request or required disclosure. To the extent the court overrules the objection or claim of privilege, the responding party must produce the requested or required material or information within 30 days after the court's ruling or at such time as the court orders. A party need not request a ruling on that party's own objection or assertion of privilege to preserve the objection or privilege.

(c) **Use of material or information withheld under claim of privilege.** A party may not use—at any hearing or trial—material or information withheld from discovery under a claim of privilege, including a claim sustained by the court, without timely amending or supplementing the party's response to that discovery.

* * *

RULE 194. ~~REQUESTS FOR~~REQUIRED DISCLOSURES

194.1 ~~Request~~Duty to Disclose; Production.

~~A party may obtain disclosure from another party of the information or material listed in Rule 194.2 by serving the other party no later than 30 days before the end of any applicable discovery period the following request: "Pursuant to Rule 194, you are requested to disclose, within 30 days of service of this request, the information or material described in Rule [state rule, *e.g.*, 194.2, or 194.2(a), (c), and (f), or 194.2(d) (g)]."~~

(a) **Duty to Disclose.** Except as exempted by Rule 194.2(d) or as otherwise agreed by the parties or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties the information or material described in Rule 194.2, 194.3, and 194.4.

(b) **Production.** Copies of documents and other tangible items ordinarily must be served with the response. But if the responsive documents are voluminous, the response must state a reasonable time and place for the production of documents. The responding party must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them.

194.2 ~~Content~~Initial Disclosures.

(a) **Time for Initial Disclosures.** A party must make the initial disclosures at or within 30 days after the filing of the first answer unless a different time is set by the parties' agreement or court order. A party that is first served or otherwise joined after the filing of the first answer must make the initial disclosures within 30 days after being served or joined, unless a different time is set by the parties' agreement or court order.

(b) **Content.** Without awaiting a discovery request, ~~A~~a party ~~may request disclosure of any or all of the following~~must provide to the other parties:

(~~a~~1) the correct names of the parties to the lawsuit;

(~~b~~2) the name, address, and telephone number of any potential parties;

(~~c~~3) the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial);

(~~d~~4) ~~the amount and any method of calculating economic damages~~a computation of each category of damages claimed by the responding party—who must also make available for inspection and copying the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered;

(~~e~~5) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case;

(6) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the responding party has in its possession, custody, or control, and may use to support its claims or defenses, unless the use would be solely for impeachment;

~~(f) for any testifying expert:~~

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

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

~~(3) the general substance of the expert's mental impressions and opinions and a 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.~~

~~(4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:~~

~~(A) 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~~

~~(B) the expert's current resume and bibliography;~~

(~~g~~7) any indemnity and insuring agreements described in Rule 192.3(f);

(~~h~~8) any settlement agreements described in Rule 192.3(g);

(~~i~~9) any witness statements described in Rule 192.3(h);

(~~j~~10) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;

(~~k~~11) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party; and

(~~l~~12) the name, address, and telephone number of any person who may be designated as a responsible third party.

(c) **Content in Certain Suits Under the Family Code.**

(1) In a suit for divorce or annulment, a party must, without awaiting a discovery request, provide to the other party a copy of:

(A) all documents pertaining to real estate;

(B) all documents pertaining to any pension, retirement, profit-sharing, or other employee benefit plan, including the most recent account statement for any plan;

(C) all documents pertaining to any life, casualty, liability, and health insurance; and

(D) the most recent statement pertaining to any account at a financial institution, including banks, savings and loans institutions, credit unions, and brokerage firms.

(2) In a suit in which child or spousal support is at issue, a party must, without awaiting a discovery request, provide to the other party a copy of:

(A) all policies, statements, and the summary description of benefits for any medical and health insurance coverage that is or would be available for the child or the spouse;

(B) the party's income tax returns for the previous two years or, if no return has been filed, the party's Form W-2, Form 1099, and Schedule K-1 for such years; and

(C) the party's two most recent payroll check stubs.

(d) **Proceedings Exempt from Initial Disclosure.** The following proceedings are exempt from initial disclosure, but a court may order the parties to make particular disclosures and set the time for disclosure:

(1) an action for review on an administrative record;

(2) a forfeiture action arising from a state statute; and

(3) a petition for habeas corpus.

~~**194.3 Response.**~~

~~The responding party must serve a written response on the requesting party within 30 days after service of the request, except that:~~

~~(a) a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request, and~~

~~(b) a response to a request under Rule 194.2(f) is governed by Rule 195.~~

194.3 Testifying Expert Disclosures.

In addition to the disclosures required by Rule 194.2, a party must disclose to the other parties testifying expert information as provided by Rule 195.

~~**194.4 Production.**~~

~~Copies of documents and other tangible items ordinarily must be served with the response. But if the responsive documents are voluminous, the response must state a reasonable time and place for the production of documents. The responding party must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them.~~

194.4 Pretrial Disclosures.

(a) **In General.** In addition to the disclosures required by Rule 194.2 and 194.3, a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(1) the name and, if not previously provided, the address, and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(2) an identification of each document or other exhibits, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(b) **Time for Pretrial Disclosures.** Unless the court orders otherwise, these disclosures must be made at least 30 days before trial.

194.5 No Objection or Assertion of Work Product.

No objection or assertion of work product is permitted to a ~~request~~disclosure under this rule.

194.6 Certain Responses Not Admissible.

A ~~response to requests~~disclosure under Rule 194.2(~~c~~b)(3) and (~~d~~4) that has been changed by an amended or supplemental response is not admissible and may not be used for impeachment.

Comment to 2021 change: Rule 194 is amended to implement section 22.004(h-1) of the Texas Government Code, which calls for rules "to promote the prompt, efficient, and cost-effective

resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed $250,000" that "balance the need for lowering discovery costs in these actions against the complexity of and discovery needs in these actions." Rule 194 is amended based on Federal Rule of Civil Procedure 26(a) to require disclosure of basic discovery automatically, without awaiting a discovery request. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures. As with other written discovery responses, required disclosures must be signed under Rule 191.3, complete under Rule 193.2, served under Rule 191.5, and timely amended or supplemented under Rule 193.5.

RULE 195. DISCOVERY REGARDING TESTIFYING EXPERT WITNESSES

195.1 Permissible Discovery Tools.

A party may ~~request another party to designate and disclose~~obtain information concerning testifying expert witnesses only through ~~a request for~~ disclosure under Rule 194 and this rule and through depositions and reports as permitted by this rule.

195.2 Schedule for Designating Experts.

Unless otherwise ordered by the court, a party must designate experts—that is, furnish information ~~requested under~~described in Rule ~~194.2(f)~~195.5(a)—by the ~~later of the~~ following ~~two~~ dates: ~~30 days after the request is served, or~~

(a) with regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery period;

(b) with regard to all other experts, 60 days before the end of the discovery period.

* * *

195.4 Oral Deposition.

In addition to the information disclos~~ure~~ed under Rule 1945.5(a), a party may obtain discovery concerning the subject matter on which the expert is expected to testify, the expert's mental impressions and opinions, the facts known to the expert (regardless of when the factual information was acquired) that relate to or form the basis of the testifying expert's mental impressions and opinions, and other discoverable matters, including documents not produced in disclosure, only by oral deposition of the expert and by a report prepared by the expert under this rule.

195.5 ~~Court Ordered~~Expert Disclosures and Reports.

(a) **Disclosures**. Without awaiting a discovery request, a party must provide the following for any testifying expert:

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

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

(3) the general substance of the expert's mental impressions and opinions and a 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;

(4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:

(A) 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;

(B) the expert's current resume and bibliography;

(C) the expert's qualifications, including a list of all publications authored in the previous 10 years;

(D) a list of all other cases in which, during the previous four years, the expert testified as an expert at trial or by deposition; and

(E) a statement of the compensation to be paid for the expert's study and testimony in the case.

(b) **Expert Reports.** If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert have not been recorded and reduced to tangible form, the court may order these matters reduced to tangible form and produced in addition to the deposition.

* * *

Comment to 2021 change: Rule 195 is amended to reflect changes to Rule 194. Amended Rule 195.5(a) lists the disclosures for any testifying expert, which are now required without awaiting a discovery request, that were formerly listed in Rule 194(f). Amended Rule 195.5(a) also includes three new disclosures based on Federal Rule of Civil Procedure 26(a)(2)(B).