



## The Rules They are A-Changin' by Cade W. Browning

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. Speak now or Forever....**

The Supreme Court has reserved the right to change these proposed rules before January 1, 2021, in response to public comments. Written comments should be sent to [rulescomments@txcourts.gov](mailto:rulescomments@txcourts.gov). The Court has requested that comments be sent by **December 1, 2020**. 