

# **RUNNING AND GUNNING FOR JUSTICE:**

## **STRATEGIES FOR FORMULATING AND IMPLEMENTING SCHEDULING ORDERS IN MEDICAL MALPRACTICE CLAIMS**

**\*LESSONS LEARNED  
FROM THE HURRY UP OFFENSE**

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## **1.00 OVERVIEW:**

The Texas Supreme Court, effective January 1, 1999, implemented new rules of discovery. One of the keystones of the “new rules,” is Rule 190, which has been described as a “differential case management model.”<sup>1</sup> Under this new model, there are three discovery levels. Level 1, which will only receive passing mention in this paper, deals with cases involving damages of \$50,000 or less. Level 3 provides the court and parties discretion to devise a discovery control plan tailored to the particular suit, so long as the discovery control plan approved by the court contains certain required elements such as a trial date, discovery period, deadline for joining parties and deadline for designating experts. Level 2, is the default level. If a party does not specifically plead into and request that a case be in Level 1 and if the court does not enter a Level 3 order, the case is automatically governed by Level 2. See, Rule 190.3(a) and 190.4(a). Furthermore, if the court enters a Level 3 order, any aspects of the pretrial that are not

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<sup>1</sup>Albright, et al, *Handbook on Texas Discovery Practice*, at 58 (West Pub. 1999)

specifically addressed by the court's order, are automatically governed by the limitations of Level 2 regarding such aspect. See, Rule 190.4(b). For instance, if the court enters a Level 3 order and does not specifically address the number of interrogatories that may be served by each party, the limitation of Level 2 (25 interrogatories per party) presumptively will govern.

Of equal importance to Rule 190.5, which makes allows the trial courts to modify a control plan at any time, and requires them to modify such plans in the interest of fair administration of justice, when good cause warrants. This can be particularly important if the case is not reached on the first setting and is not reset within three months and that significant developments or changes in circumstances which require additional discovery. See, 190.5(b). Further, Rule 191.1 allows the parties to modify the "procedures and limitations" in any suit by agreement.

There are I believe some inherent problems with the Discovery Levels rule as presently written. First and foremost, the structure creates ambiguity with regard to deadlines, that serves to frustrate both the bench and bar. Second, there is not much incentive for the parties to agree upon a plan tailored to the case, and third, there is not much incentive for the bench to take the time to tailor a plan for the particular case. Until such time as the Texas Supreme Court revises the rule to address these problems, the proposals set out in this paper are offered as a practical approach for accomplishing this goal.

One of the primary goals of this presentation is to show by practical examples how to implement the above rules to formulate and effectuate a strategic plan for rapidly progressing through the pre-trial stage, and expediting a rapid and efficient resolution, of a medical malpractice case. Toward this end, I have drawn examples from medical malpractice cases I have recently prosecuted. These examples will appear in the Appendix of this paper.

## 2.00 THE PLEADING

Rule 190 requires that the plaintiff plead in the first paragraph of the original petition the Level the plaintiff wishes to apply. It is important to realize that this, however, is merely a notice requirement. ***Pleading that a case should be a Level 3 case, does not make it so.*** Not until the trial court issues a Level 3 order, can a case be considered in Level 3. Until the court issues a Level 3 order, the case remains in Level 2, unless the plaintiff has specifically pleaded into Level 1.

I believe the plaintiff should in most cases plead for a Level 3 control plan. There are a couple of practical reasons for this. First, I believe the plaintiff starts out with the initiative in the case and that this initiative should never be relinquished. In this regard, it should be the plaintiff that dictates if or when the case moves into Level 3, and not the defendant. From a tactical perspective, the plaintiff does not want to begin conducting the case in Level 2, only to have the defendant later in the case move for a Level 3 order which broadens the limitations on

the discovery it may obtain. Second, the motion for Level 3 forces the issue of a discovery conference early in the case, which was a goal sought by virtually all the groups participating in the formulation of the new rules. The earlier the parties can confer and agree upon the scope and timing of discovery in the particular case, the more likely they can influence the type of order that will be issued by the court.

Most trial courts in the larger counties, prior to the new rules, were issuing form scheduling orders. The new rules grant the court discretion to continue using these forms. This means that in counties such as Harris and Dallas, the trial courts are going to be issuing form scheduling orders that effectively constitute Level 3 orders. So long as these orders contain the elements required by the Supreme Court, they are acceptable.<sup>2</sup> Once the court issues a form scheduling order, the parties may still modify it by agreement and approval of the court; however, it is probably going to be harder to get the court to modify the order after it is issued than before. This reinforces the reason for trying to obtain a conference and agreement among the parties about a discovery control plan as early as possible.

While Rule 190.4 states that a court must, on a party's motion order that discovery be conducted in accordance with a discovery control plan tailored to the circumstances of the specific suit, it would be illusory for the plaintiff attorney to think that all he or she has to do is file a motion and the that the court must tailor the plan to conform with the plaintiff's attorney's vision about how the case should be developed. First, the rule does not say that the court has to tailor the plan to the circumstances of the specific case, based solely on the perceptions of the parties. Indeed, the trial court, if requested to enter a Level 3 control plan, would be within its discretion to oblige by merely entering a Level 2 plan, so long as the order contains a trial date, a discovery period, limits on discovery, and deadlines for joining additional parties, amending or supplementing pleadings, and designating experts. See, 190.4 (b). Second, a request for a Level 3 conference is considered a matter relevant to discovery, hence Rule 191.2 is activated. Rule 191.2 requires that all discovery motions or requests for hearings "relating to discovery" must contain a certificate by the party filing the motion or request that a reasonable effort has been made to resolve the dispute without the necessity of court intervention and the effort failed.

**Appendix 1** is an example of how I have attempted in my original petition to both put the defendant on notice that I am seeking a Level 3 discovery control plan and to set the groundwork for a Level 3 hearing in conformance with the requirements of Rule 191.2. A motion for Level 3, which is attached to the petition (**See Appendix 2**) and I also attach to the motion a proposed format for a scheduling order, to facilitate the parties reaching an agreement expeditiously. **See, Appendix 3.**

We will discuss in more detail how to effectively following through with this strategy, in the section below, entitled, "Conference," but first, it is probably beneficial to discuss the advantages of serving discovery with the original petition.

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<sup>2</sup>Some problems to watch out for in this regard will be discussed in the section on Orders.

### 3.00 THE ATTORNEY SCHEDULING CONFERENCE:

A meaningful scheduling conference among the attorneys at the beginning of the case is an ideal that should be pursued diligently. In federal court, this is required and accomplished under Fed. R. Civ. P. 26(f).<sup>3</sup> The federal judge typically set the case for a scheduling conference, and the parties are required to confer in advance of such conference. The Texas Supreme Court rejected the proposal that in every case the trial judge should conduct a scheduling conference at the beginning of the case, recognizing that the Texas trial bench lacks the resources available to their federal counterpart.<sup>4</sup> Nonetheless, regardless of whether there is in place a requirement for the trial judge to conduct a scheduling conference,<sup>5</sup> there is no reason why in every case the attorneys should not get together to discuss the same issues as they would be required to do in a Fed. R. Civ. P. 26(f) conference:

Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), **meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for disclosures required by subdivision (a)(1), and to develop a proposed discovery plan.** The plan shall indicate the parties' views and proposals concerning:

- (1) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a) or local rule, including a statement as to when disclosures under subdivision (a)(1) were made or will be made;
- (2) the subjects on which discovery may be needed, when discovery should be completed, and **whether discovery should be conducted in phases or be limited to or focused upon particular issues;**
- (3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

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<sup>3</sup>See Appendix \_\_\_\_\_, for an example of such a report I prepared in a non-medical malpractice case in federal court. [LLEWELLYN]

<sup>4</sup>See, Pemberton:

<sup>5</sup>Under the new rules, this is essentially accomplished by a request for a Level 3 Discovery Control Plan. See, Tex. R. Civ. P. 190.4(a).

- (4) any other orders that should be entered by the court under subdivision (c) or under Rule 16(b) and (c).

I have highlighted the following phrase in paragraph 2, above, because I believe it is particularly pertinent to the management of medical malpractice cases: “ and **whether discovery should be conducted in phases or be limited to or focused upon particular issues.**” All too often in medical malpractice cases, we start off by focusing on issues that may very well not be in dispute. It may be that the parties don’t exactly concede, but accept that causation and not standard of care is the pivotal point in the case, or *vice versa*. In some instances, it might be pragmatic and efficient to conduct the discovery in phases so that the pivotal issue is addressed, with the anticipation that the case might be more expeditiously and efficiently resolved by doing so. Then if this is not accomplished within a particular time period, the parties would move the trial preparation phase of discovery. While this may not work in every case, it is a concept that is definitely worth considering in the appropriate case.

It’s probably fair to say, most attorneys practicing in state courts are philosophically and/or genetically opposed to anything that is done in the federal courts. Nonetheless, the concepts embedded in Rule 26(f) are directionally correct. Attorney’s, regardless of whether they are in state or federal court, should voluntarily engage in the discussion required by Fed. R. Civ. P. 26(f) and then if there are particular problems or issues that should be addressed by the court, these should be submitted to the court in a report, so that there is a agenda or outline for the court to work from during any subsequent hearing on the issues.

One of the problems and frustrations with the Level 3 conference as presently written and structured, is that if the parties don’t agree, they simply file a motion with the court seeking a Level 3 conference and/or order. Under the rule, there is no requirement that the parties provide the court any reporting regarding what they have conferred about, what they disagree upon and what relief specifically they seek from the court. Although I have no empirical data to support my theory, I strongly suspect that most trial judges are resistant to scheduling Level 3 conferences because of these deficiencies. The judge does not want to spend an inordinate amount of time, listening to an unstructured debate about why a discovery schedule should be “tailored” to the needs of this particular case, when he or she has been provided no advance outline or report about the nature of the case, the parties’ claims and defenses and what discovery is really needed to get the case to the point where it can be evaluated for settlement.

I strongly advocate that as soon as practicable the plaintiff’s attorney take the initiative of arranging a conference to agree upon a discovery control plan format, dates for deadlines, and discovery timetables for responses to written discovery and for scheduling depositions. I seize this initiative in the original petition, by requesting that the defendants promptly contact me to discuss the above topics. See Appendix \_\_\_\_\_ par. \_\_\_\_\_.

The day the defendant serves its original answer, I serve the defense attorney with a letter re-urging my proposal for a conference and directing the defense attorney to the motion and proposed discovery control plan attached to the original petition. See Appendix \_\_\_\_\_. If I

do not get a prompt, affirmative response. Then I prepare a certificate of conference, pursuant to Tex. R. Civ.P. 191.2, attach it to my Motion for Level 3 Discovery Control Plan and file the motion, requesting a hearing.

Any plaintiff's attorney who has been handling cases under the new rules that went into effect January 1, 1999, is probably saying, "*okay, what he is saying makes sense in a theoretical way, but how do I get what I want and need in the way of a discovery control plan, either by arranging an attorneys' conference or seeking a hearing and ruling from the court?*" To borrow from Jock Ewing, "*son, no one gives you power; you've got to take it.*"

All trial attorneys and judges no doubt agree that ideally the best thing the attorneys can do in a case is to get together out the outset, discuss in a candid way the nature of the claim and the basic issues and attempt to formulate an orderly discovery schedule that will result in the parties being able to prepare for mediation, settlement and/or trial in a cost/effective manner. Unfortunately, in state practice, this rarely happens and when it does happen is not particularly productive.

In all but a few instances in my experience, defense attorneys at the beginning of the case perceive pre-trial procedure as a one way street: first the plaintiff should have to disgorge all her theories, facts and experts' opinions so the defense attorney, his client and the insurance adjuster know what the claim is about and then the defendant will file a general denial.

It is a fairly frustrating exercise and one sure to engender deep seated cynicism with regard to such conferences. It is rather naive to expect that insurance adjusters and defense attorneys (who have to make a living in the post tort reform error pleasing first and foremost the insurance carrier paying their bills) are going to strive to come up with a discovery control plan that is fair, since they believe strongly that providing any information to the plaintiff is inherently unfair. Consequently, when the plaintiff attorney goes into such a conference, he should do so from a position of strength. If the plaintiff attorney goes in on an equal footing or at a disadvantage, the chances of "agreeing" on a fair discovery control plan in most instances are going to be slim or none.

The power, the strength, the leverage the plaintiff's attorney needs to assure that a fair discovery control plan is formulated and implemented derives from taking the initiative in the case and holding onto the momentum. This means investigating your case before you file it, preparing in advance for the questions that the defense attorney mindlessly is going to send to you, and serving a tailored set of discovery with the petition. The defense attorney will respond one of two ways. He will either provide responses to the discovery, which predictably will be evasive and dilatory, which will result in the defense attorney then having to construct responses to motions to compel. Or, the defense attorney will become pragmatic and attempt to work out a meaningful and mutually acceptable discovery control plan that treats all the parties fairly and seeks to achieve the goal advocated by the Texas Supreme Court that the case be expeditiously and efficiently prepared for settlement or trial.

#### **4.00 SERVING DISCOVERY WITH THE ORIGINAL PETITION**

I have been a longtime advocate of serving discovery with the original petition. The new rules, like their predecessors, continue to authorize this approach.<sup>6</sup>

The most important reason for serving discovery with the original petition is because it helps take the initiative and seize the momentum, which I believe is fundamental to achieving the goal of an expeditious and efficient resolution of the case. There are also some other noteworthy reasons for doing so. First, there really is no good reason not to. If you are prepared to file the lawsuit, you should be prepared to prosecute it. There is nothing that says that the initial sets of discovery have to be exhaustive. In fact, there is merit to tailoring the initial discovery to what you initially need to get the case moving, and then building on these requests as the case develops. However, in other instances, if you have a fairly clear understanding of the case and the theory(ies) you wish to pursue, there is nothing that prevents you from serving more thorough requests. At the very least, you should always serve with the petition a Request for Disclosure; it is simple, non-objectionable, and it will at least provide you with the basic information you need to start taking depositions and evaluating strategy. Through this efficient discovery device, you can at least hope to obtain-- or start creating leverage to obtain reasonably promptly-- proper parties, individuals with knowledge of relevant facts, statements, insurance agreements and timely designation of the other side's testifying experts.

Another important reason for serving the discovery with the petition is that it puts the ball in play. Filing a lawsuit does not equate with prosecuting the lawsuit. Prosecuting the lawsuit is what gets it to the point of resolution. Under the new rules, the discovery period, absent an agreement or order addressing this point, will begun to run at the time the first response to written discovery is due (fifty days after service, if the requests are served with the petition) or when the first deposition is taken. While there are things that you can do to control your fate in this regard, in a medical malpractice case, you also have to be cognizant of the Art. 4590i § 13 report requirements. Unless an agreement is reached altering the deadlines, the plaintiff may have to file a report 90 days after the suit is filed (or post a bond) and most certainly will have to file reports 180 days after the suit is filed.

An important benefit of filing discovery with the petition is that affords you negotiating leverage. For instance, in return for extending the defendant time to respond to written discovery requests, the plaintiff may also obtain a reciprocal extension. There might be

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<sup>6</sup>See, Rule 194.3(b) tacitly acknowledging that Requests for Disclosure may be served with the petition, and that in such an instance, the defendant will have 50 days from date of service within which to respond. In this same regard, see Rule 196.2(a) regarding responses to Requests for Production served with the petition. Rule 197.2(a) imposes the procedure with regard to Interrogatories served with the original petition. Rule 198.2 (a) follows the same procedure with regard to Requests for Admissions, and Rule 199 imposing no limitation on when a notice of oral deposition may be served, except that it must be served a "reasonable time before the deposition is taken." Note also, that Rule 192.1 allows all forms of written discovery may be combined into one document. When you serve discovery with the petition, you need to make sure that copy of every discovery request is served on every party. See, Rule 191.5

negotiation about extending the plaintiff's deadline for filing Art. 4590i reports, and/or even extinguishing the 90 day bond requirement. See **Appendix 4**, for an example of such negotiations.

Recently, I have begun experimenting with the tactic of noticing the deposition of my own client and of my own testifying experts. While the rationale for this approach is beyond the scope of this presentation, there are definite advantages from taking the lead in directing questions to your own client and your own testifying experts. From a tactical perspective with regard to scheduling discovery, it takes a tremendous amount of wind out of the defendant's sails when a notice of deposition for the plaintiff's deposition is served with the original petition. For an example of such a notice, see **Appendix 5**. While I am not recommending that this be done as a matter of routine-- it should be considered instead on a case by case basis-- virtually every time I have taken this initiative, the defendant has demanded that the deposition be delayed. See, **Appendix 6**. This is a very peculiar position for the defendant to take, particularly if it must argue a motion to quash the deposition before the court.<sup>7</sup> What the defendant is forced to do is

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<sup>7</sup>Keep in mind that it will probably be very difficult for a defendant to find the wherewithal to file a motion to quash within three (3) days of being served with the notice, if it is served with the original petition. Therefore, to quash the deposition, the defendant will have to file a motion and obtain a ruling from the court. See, Rule 199.4.

argue that the whole case should be put on hold. No doubt, the defense attorney will argue that in fairness the plaintiff's deposition should be taken before the defendant's deposition, but that even though the plaintiff's attorney has noticed the plaintiff's deposition the defense attorney is not ready to take the deposition. When such an argument is advanced, it places the plaintiff in a particularly good light with the court, because at worst the plaintiff is merely trying to move the case, which is what the court wants. I find it hard to believe that most courts are going to quash the plaintiff's deposition of her own deposition to afford the defendant time to learn what the case is about, when one of the main purposes for taking the plaintiff's deposition is to find out what the case is about.<sup>8</sup> Like I said above, it is a very precarious situation for the defendant.

When discovery requests are filed with the original petition, it is predictable that the defendant will respond in several ways. First, there is the response that comes on the eve of the response deadline that the defense attorney never received the discovery. That is why I do not leave it to chance that the discovery will be attached to the citation. In my original petition, I clearly entitle the petition, "Original Petition with Discovery." I indicate in a footnote on the first page that the discovery documents are attached and delineated in the second to last paragraph of the petition, and further request that if any of the sets of discovery are not served with the petition that the defendant and/or the defendant's attorney immediately contact me so that a replacement copy may be promptly provided. **See, Appendix 1.**

Older defense attorneys usually respond with the "good ol' boys" analysis that "it isn't fair, and the plaintiff should have to produce discovery before the defendant produces discovery because. . . well, the defendant is defending!" This response, once again, is specious, or to borrow from the "good ol' boys" themselves, "bull." There is nothing in the new rules, the old rules going back to the Code of Hammurabi that states that the plaintiff has to wait until the defendant conducts discovery before the plaintiff can proceed with obtaining discovery from the defendant.

Another typical defense attorney response is that he or she just received the file and that he or she knows nothing about the case; and that they need a bunch of discovery from the plaintiff before they can serve any meaningful responses. **See, Appendix 7.** Of course this plea is bogus. While it may be true that the defense attorney does not know much about the case, what the defense attorney avoids discussing is what the insurance carrier knows. The Texas Medical Association and its allies spent a great deal of time and money in the Texas Legislature over the years assuring that before a plaintiff can file and prosecute a lawsuit, the plaintiff must provide notice to the defendant and either pertinent medical records or a medical authorization. There is supposed to be a sixty (60) day grace period to enable the defendant to evaluate the

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<sup>8</sup>Don't forget that Rule 192.6 requires that if a "person seeks protection regarding the time and place of discovery (note: not limited to "written discovery") the person **must** state a reasonable time and place for discovery with which the person will comply."

claim. The fact is, the insurance companies are either not investigating the claims or they are not providing the benefit of their investigation to the defense attorneys they hire. The defense argument that the plaintiff has had months to prepare the case and the defendant is at a disadvantage is simply a non-argument. If the argument had any merit, then the Texas Supreme Court would have built into the rules a provision that anytime the plaintiff filed a lawsuit, the defendant could abate for as long as it needed to investigate and evaluate its exposure. Such a concept would be anathema to the philosophy underlying the new rules, which is to prosecute the case quickly and efficiently because the longer the parties have to develop the case, the more expensive the litigation becomes. So, when the defense attorney says, I am not ready, the implicit response should be, "ready or not, here I come". Of course, just because you seize the initiative, does not mean that you cannot be cooperative. Indeed, once having obtained the initiative, you are now in a position of strength to negotiate a meaningful and productive discovery schedule.

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## **5.00 FORMULATING AND IMPLEMENTING THE DISCOVERY CONTROL PLAN**

The following format is presently my standard introductory proposal for a discovery control plan that I serve with the original petition. I will use it to discuss operationally the various concepts that should be considered in formulating and implementing a strategic discovery control plan.

Keep in mind that regardless of whether the parties agree to a discovery control plan or the court enters a control plan, the Texas Supreme Court has admonished that the plan contain the following elements: a trial date, a discovery period, a deadline for joining parties and a deadline for designating experts. It is therefore recommended that these elements be addressed in all discovery control plans.

The key consideration throughout this analysis is getting the case prepared expeditiously for settlement, and barring settlement, having the case ready for trial on the first setting.

### **PROPOSED DISCOVERY CONTROL PLAN**

Pursuant to Rule 191.1 Tex. R. Civ. P., the undersigned have agreed upon the following proposed format and dates for [Level 2 or Level 3] discovery control plan:

#### **(1) JOINDER OF NEW PARTIES.**

\_\_\_\_\_ Any amendment joining a party in this lawsuit, or asserting a cross or counterclaim against a new or existing party must be filed with the District Clerk and

service requested no later than this date. A copy of this agreed order is to be served on each new party, with the summons and petition.

2. EXPERT WITNESS DESIGNATION:

\_\_\_\_\_ PLAINTIFFS' DESIGNATION

Plaintiffs and all other parties seeking affirmative relief shall designate their testifying experts no later than this date (with regard to defendants who are also seeking affirmative relief, designation at this time shall apply only to testifying experts with regard to claims for affirmative relief). This includes all retained, non-retained and specially employed experts, including experts otherwise under the control of designating party.

\_\_\_\_\_ DEFENDANTS' DESIGNATION

All parties not seeking affirmative relief, including defendants and cross defendants shall designate their testifying experts no later than this date. This includes all retained, non-retained and specially employed experts, including testifying experts otherwise under the control of the parties.

TERMS OF DESIGNATION.

Designations shall include producing at the time of designation the following for each *retained testifying expert and testifying expert otherwise under the control of the designating party*, that the respective parties intend to offer or produce at trial: a complete and current curriculum vitae; a complete and current bibliography; and for all opinions, the bases for same that have not previously been reduced to writing and produced by the expert or offered by the expert in deposition testimony in the instant litigation, a report that complies with the requirements of Rule 195.5. Additionally, it is intended in this regard that the parties will produce substantive reports, signed by the respective experts, that outline the expert's opinions to be offered at trial, the factual bases and/or methodology underlying same. The testimony of

retained testifying experts not designated by the above deadlines, absent a showing of good cause, will not be allowed at trial in any form.

Reports are not required from parties, non retained experts or experts not otherwise under the control of the designating party; however, in lieu of reports the parties agree to provide full disclosure with regard to the identity of each such expert, the witness' credentials and/or a copy of the witness' curriculum vitae, the subject matter(s) upon which the witness is expected to offer expert testimony, the expert's opinions, and a summary of the factual basis for such opinions. Further, the designating party is to produce or specifically identify each document reflecting the opinions of these type testifying experts, that they expect to offer or elicit at trial.

At the time of plaintiffs designation all parties agree to confer and attempt to set aside dates for depositions of all testifying experts following the defendants designation deadline.

The plaintiffs need not make their experts available for deposition until reasonably promptly after all the defendants have designated all their respective testifying experts in conformance with the above terms.

Experts not designated in compliance with this section will not be permitted to testify absent a showing of good cause.

This agreement contemplates that all parties reserve the right to add additional testifying experts by agreement, or to seek leave from the court for leave to designate additional or rebuttal testifying experts, upon a showing a good cause.

### 3. TRIAL FACT WITNESSES.

\_\_\_\_\_ The plaintiffs shall designate their intended trial fact witnesses in accordance with Rule 192(3)(d) no later than this date. The testimony of trial witnesses not designated by this date, absent a showing of good cause and/or surprise, will not be

allowed at trial in any form.

\_\_\_\_\_ The defendants each shall designate their respective intended trial fact witnesses in accordance with Rule 192(3)(d) no later than this date. The testimony of trial witnesses not designated by this date, absent a showing of good cause and/or surprise, will not be allowed at trial in any form.

4. DISCOVERY DEADLINE.

\_\_\_\_\_ The cutoff date for all discovery shall be on the stated date. All written discovery must be due before the cutoff date and no oral depositions will be taken beyond the cutoff date, absent and agreement of all parties or an order of the court.

5. AMENDMENTS TO PLEADINGS.

\_\_\_\_\_ All pleadings and answers must be amended by this date.

\_\_\_\_\_ Each party shall have until this date to file responsive or supplemental pleadings to points raised for the first time in the amended pleadings or answers.

No amendments to pleadings or answers beyond these dates shall be allowed absent an order of the court or agreement of the parties.

6. MOTIONS FOR SUMMARY JUDGMENT AND TO LIMIT OR STRIKE EXPERT TESTIMONY.

\_\_\_\_\_ Motions for summary judgment and/or to limit or strike expert testimony must be filed, and requests made for hearings on the first available docket, no later than this date.

7. ALTERNATIVE DISPUTE RESOLUTION.

\_\_\_\_\_ Alternative dispute resolution shall take place no later than this date.

\_\_\_\_\_ Alternative dispute resolution shall be concluded by this

date.

8. PRETRIAL CONFERENCE.

\_\_\_\_\_ The parties are to serve on each other or exchange the following things no later than this date:

- A. Exhibit lists (and make exhibits available for inspection);
- B. Witness lists;
- C. Deposition excerpts (written and/or videotape);
- D. Motions in Limine;

The parties are to serve objections to the above referenced items no later than 7 days before trial.

9. PRETRIAL HEARING.

\_\_\_\_\_ A pretrial hearing will be at this date and time to address motions and/or objections that have been raised and served in compliance with the preceding paragraph.

10. JURY TRIAL SETTING.

\_\_\_\_\_ The parties, through their attorneys, agree to a jury trial setting on this date for a one week docket.

11. DEFAULT PROVISION

Those matters not specifically agreed upon shall be controlled by Rule 190.3 Tex. R. Civ. P. This agreement is not intended to supercede the affect of Rules 190.5, 193.5 or 193.6.

The court approves and shall enter the above order, which shall apply to all future parties, and which shall continue to remain in effect absent ([Level 2: absent an agreement of all parties or an order of the court]; [Level 3: absent an order of the court]) an order of the court.

Dated:

PRESIDING JUDGE

## **DISCUSSION**

### **5.01 JOINDER OF PARTIES**

A deadline for joining parties is one of the elements the Texas Supreme Court has mandated must be in a discovery control plan. An important practical considerations underlying this requirement is that if the plan is going to be fair and achieve the goal of expediting the conclusion of discovery, all necessary parties must be before the court and afforded due process. Fairness to all parties is always going to be an important consideration by the trial judge.

The plaintiff's primary objective is going to be to set a deadline that affords her sufficient time identify and join all necessary parties without having to adjust the other deadlines, particularly the mediation and trial dates, to accommodate the newly added defendants. It is often very difficult to reconcile this objection with the newly joined party's interest in seeing that the deadlines in the existing discovery control plan afford them sufficient time to learn the nature of the case and to formulate a defense. If the deadline for adding parties is too short, the plaintiff may have to request an extension, which could force an adjustment of all deadlines, including the trial date. If the deadline is set too far out in the discovery process the newly joined party arguably will have a basis for arguing that the discovery control plan should be revised to afford the new party due process.

Although fit is beyond the scope of this paper, not to mention, my mathematical skills, it is worth considering the impact of §33.04 Tex. Pract. Rem. Code, pertaining to Joinder of Responsible Third Parties. If the defendant seeks to join a responsible third party for the purpose of allocating responsibility, it must do so before the expiration of limitations on the plaintiff's claim for damages against the defendant. This provision does not apply to claims for contribution or indemnity, nor to cross-claims or counterclaims. See, §33.004(b). An exception to this rule is if the defendant's third party claim is filed on or before 30 days after the date the defendant's answer is required to be filed. See, §33.004(d).

In view of the above considerations, it is probably prudent, if practicable, to set the joinder of parties deadline at no more than sixty (60) days after the original named defendants' answer date or about 180 days before the plaintiffs' deadline for designating experts. Given these timing issues, the plaintiff should not only serve with the petition a request for disclosure of potential parties, but should also be persistent in requiring the defendant to provide a meaningful and timely response.

### **5.02 TESTIFYING EXPERT DESIGNATION**

#### **A. ANALYSIS OF LEVEL REQUIREMENTS**

### **1. LEVEL 1 (RULE 190.2)**

There is no discussion of expert witness in Rule 190.2. While it is not explicitly stated either in the rule or in the comments to the rule, it is clear that use of expert witnesses in a level 1 case is not contemplated. Indeed, given the dollar limitation to be in Level 1 (\$50,000) and the time allowed for deposing all witnesses (6 hours per party), it is unlikely an expert witness could be squeezed into these constraints, even if a party were inclined to do so.

### **2.. LEVEL 2 (RULE 190.3)**

The only place expert witnesses are discussed in Rule 190.3 is with regard to Total time for Oral Depositions. Rule 190.3 (b)(2):

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 for each additional expert designated. The court may modify the deposition hours and must do so when a side or party would be give an unfair advantage.

### **3. LEVEL 3 (RULE 190.4)**

The only place in Rule 190.4 that expert witnesses are discussed expressly is in Rule 190.4 (b)(4), which states that any plan under this rule must include deadlines for designating expert witnesses. In this regard, as discussed elsewhere in this paper, parties should consider and address the following in either a level 2 or 3 discovery control plan: The parties should determine whether the deadlines in the Rule provide adequate time for completing discovery of experts. If not, consideration should be given to moving up the deadlines and/or scheduling specific dates or blocks of days for expert depositions; Consideration should be given to scheduling the depositions of non-retained experts, particularly with regard to whether subpoenas will be required and who will bear the cost, if any, assessed by the non-retained expert. Agreements should be made with regard to the report requirement of the parties not seeking affirmative relief. Agreements should be made about how and when the documents generated by, provided to and/or reviewed by the experts will be produced.<sup>9</sup>

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<sup>9</sup>I have observed that the requirements of Rule 194.4 notwithstanding, parties are not producing the materials generated or provided to the testifying experts, until the time of the expert's deposition. This is fine, so long as it is done by agreement.

Lastly, absent a Scheduling Order requiring the parties to clearly state what expert witnesses they actually expect to call at trial, there should be an agreement that this type of designation will be provided a reasonable time before trial, so that parties are not preparing examinations of expert witnesses who the other side never intends to call at trial. See Rule 192.3 (d).<sup>10</sup>

## B. DESIGNATION DEADLINES

Aside from the deadline for the discovery period, the most important deadline in the discovery control plan pertains to designation of testifying experts. Indeed, the two deadlines interface with each other in that the designation deadline for testifying experts, absent an alternative agreement, under Rule 195, is tied to the end of the discovery period. “Designation,” influenced by three rules: Rule 190, 194, and 195.

An important thing to clarify if the court issues its own scheduling order, is how it describes designation. Many courts continue to use old terminology in their scheduling orders old terminology regarding designation of experts. Under Rule 195, “designation” is now a term of art, which is specifically defined to mean “furnish information requested under Rule 194.2(f).” If the court’s scheduling order merely requires the parties to designate testifying experts by identifying the expert and the subject matter on which he or she is to give testimony, then arguably the Rule 194 requirements for designation would also continue to remain in effect, provided the plaintiff timely served on the defendants a request for disclosure of testifying experts. Until the standardized orders are conformed to the new rules, it would be prudent for the attorneys to obtain clarification at the outset of the case as to whether compliance with one designation deadline constitutes compliance with both and whether designation under the court’s order means merely to state the identity of the expert, or whether it means compliance with Rule 195. At present the situation can arise where the parties have two designation dates: one under the court’s scheduling order, which might only require the identification of expert witnesses, and the other 90 or 60 days before the end of the discovery period, requiring disclosure pursuant to Rule 194.2(f). Further attorneys should carefully read each scheduling order to confirm that the order does not unintentionally or inadvertently shorten the time for designation under Rule 195.2.

Under Rule 194.2 a party may request disclosure of any or all the following for any testifying expert.

- a. the experts name, address and telephone number;
- b. the subject matter on which the expert will testify;
- c. the general substance of the expert’s mental impressions and opinions and a brief summary of the basis for them, or

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<sup>10</sup>This writer continues to believe that it was an oversight on the part of the Texas Supreme Court that designation of trial witnesses was not included in Rule 194.4, as something that should be disclosed, if requested, a reasonable time before the trial date.

if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;

- d. if the expert is retained by, employed by, or otherwise subject to control of the responding party:
  - 1) 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
  - 2) the expert's current resume and bibliography.

While a party may propound a request for disclosure at anytime after the commencement of the lawsuit, including serving a request for disclosure with the original petition,<sup>11</sup> the responding party is not required to “designate experts” until the time periods stated in Rule 195.2. There must be a request for disclosure to activate this provision.. Recall that under Rule 195.2, “designated” is defined to mean “furnish information *requested*” under Rule 194.2(f). Also recall that Rule 194 is not self-activating. Rule 194.1 states that a party may obtain disclosure by serving a request. Therefore, for Rule 195.2 to be activated, a party seeking, disclosure and/or depositions of an opponent's expert must timely serve a request for disclosure.

Rule 195.2 provides that unless otherwise ordered by the Court, a party must designate experts – that is, furnish information requested under Rule 194.2(f) – by the *later* of the following dates: 30 days after the request is served, or

- 1) with regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery period;
- 2) with regard to all others experts, 60 days before the end of the discovery period.

Rule 195.2 states that “designation” shall take place by the *later* of the two dates. Theoretically, if a party waited until 90 days before the end of the discovery period to send a request for disclosure, 30 days thereafter would be *later* than 90 days before the end of the discovery period. However, in most instances, prudent trial attorneys are going to exchange requests for disclosure early in the case, meaning the designation deadlines will arise much later than 30 days after the request is served.

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<sup>11</sup>Tex. R. Civ. P. 194.3(a)

Another thing to be diligent about is making sure the scheduling order with regard to designation of testifying experts uses the terminology “parties seeking affirmative relief,” rather than the terms, “plaintiffs” and “defendants,” because defendants who file cross-actions arguably may be seeking affirmative relief. With respect to experts designated on cross-action claims seeking affirmative relief, the cross-claimant should be required to designate, first, along with the plaintiffs, or other parties seeking affirmative relief.

Remember that at the onset parties can agree to alter these deadlines under Rule 191.1. Further, if these deadlines are incorporated into a discovery control plan, the court may modify the deadlines at any time and must do so in the interest of justice. Tex. R. Civ. P. 190.5.

### C. EXPERT REPORTS

There is no requirement that parties automatically produce expert reports. Rule 195.3 offers an inducement to the party seeking affirmative relief to timely produce reports, and Rule 195.5 provides a method of obtaining court-ordered reports, upon motion. Rule 195.3 deals with scheduling depositions; however, it is also an important rule with regard to the production of expert reports, since scheduling of expert depositions is keyed to whether a party seeking affirmative relief furnishes a report.

#### 1. THE EFFECT OF NOT PRODUCING A REPORT

Rule 195.3 (a) (1) provides that if a report of the expert’s factual observations, tests, supporting data, calculations, photographs, and opinions *is not produced* when the expert is designated,<sup>12</sup> then the party must make the expert available for deposition reasonably promptly after the expert is designated. If the deposition cannot—due to the actions of the tendering party—reasonably be concluded more than 15 days before the deadline for designating other experts, that deadline must be extended for other experts testifying on the same subject. This subsection only applies to the party seeking affirmative relief. As will be discussed below, until this rule is further modified by the Texas Supreme Court to impose a reciprocal duty on the defending parties, it would be prudent at the outset of the litigation to either obtain an agreement or seek a protective order, requiring the defending parties to produce like/kind reports at the time of their respective designations.

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<sup>12</sup>As defined in Rule 195.2.

I believe the plaintiff attorney should be vigilant with regard to the wording of the discovery control plan regarding how designation is to take place in that the order should be worded to allow the plaintiff either to produce a report and/or provide the information that is required to be produced under Rule 194.2 (f). There is no reason for the plaintiff to be locked into producing a report under the discovery control plan, when the rules allow greater flexibility.<sup>13</sup> Additionally, the plaintiff should seek to have included in the discovery control plan an agreement that if the plaintiff produces a report for an expert on a particular subject, the defendant is required to produce a like-kind report for the experts it designates on the same subject. I also believe it is a good practice to set out in the order what the intention of the parties is with regard to the format of the reports. That way, if a party produces a deficient report the matter may be taken up directly with the court as a violation of a Rule 11 agreement or a court order. Otherwise, the party must first specially except to the deficient report. Rule 195.3 (a)(1) indirectly circumscribes the criteria that must be met by a report for it to be acceptable. The report must contain the following: i) The expert's factual observations; ii) Tests; iii) Supporting data; iv) Calculations; v) Photographs, and vi) Opinions.

If for whatever reasons, the party seeking affirmative relief decides not to produce a report, then he must make the expert available for deposition reasonably promptly after the designation. The responding party's designation deadline can only be extended if the tendering party through its actions prevents the deposition from being *completed* more than 15 days before the deadline for designating other experts. If the delay is not caused by the actions of the tendering party, the rule does not afford any extension of the deadline for designating other experts. This rule is not entirely clear. For instance, if the deadline for the party seeking affirmative relief is October 15 and he tenders his expert for deposition on October 16, 17, 28, 29, and 30, but the other parties want to depose the witness on October 18, a date that the tendering party's attorney does not have available and the next mutually agreeable date is November 2 (less than 15 days before the deadline for designating the other experts, has the tendering party prevented the deposition from being completed 15 days before the deadline for designating other experts? Arguably, absent a demonstration of gamesmanship, the party's good faith tendering of the expert should prevent an extension of the deadline for designating the other experts.

If the party seeking affirmative relief produces a report for its one liability expert, but does not produce a report for its one damages expert, and this party's actions

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<sup>13</sup> Rule 195.3 could be a potential area for tactical maneuvering, or gamesmanship, depending upon your perspective. The party seeking affirmative relief might calculate that there would be cost and tactical benefits by not producing a report, and immediately notice his own expert's deposition following the designation date. This conceivably would save the expense of a report, and put the opposing party at the disadvantage of having to depose the expert without the benefit of a road map. The problem with this tactic is that ignores the requirement that even if a report is not produced, the party seeking affirmative relief must fully disclose in response to Rule 194.2(f), and such a disclosure is at least as extensive as a report from the expert. Further, if the court perceived such a tactic as discovery abuse (and some judges have already identified this tactic as such) it could modify the requirement under Rule 191.1, or if the requirement were part of a discovery control plan, under Rule 190.5.

also prevent the deposition of the damages expert's deposition from being concluded more than 15 days before the deadline for designating other experts, the deadline is only extended for other experts testifying *on the same subject* as the expert who did not produce a report and whose deposition was not timely concluded. In this instance, only the deadline for designating other experts on damages would be extended. The deadline for designating other experts on liability would not be extended because the party seeking affirmative relief had timely produced a report on that subject. The rule does not state a prescribed length of extension, which means this will probably be left to the discretion of the trial judge. Presumably this will be decided on a case by case basis, with the extension bearing some reasonable relationship to the delay caused by the tendering party, and in the normal run of things, being no longer than 15 days. Also, the extension probably will not be self-activating, but instead will have to be sought by motion, timely filed.

## 2. THE EFFECT OF PRODUCING A REPORT

In most instances, it is going to behoove the party seeking affirmative relief to produce a report from his expert so that discovery may proceed in an orderly fashion. If for no other reason, the tendering party will want to avoid the potential land mines that have to be navigated if a report is not produced, which can result in an extension of the deadlines for other experts. Further, it is in this party's interest to know the opinions of the defendants' experts before offering his experts for deposition, so that the experts may respond to the defense experts' opinions.

As this rule was originally drafted, the party seeking affirmative relief had no discretion but to offer his experts for deposition before the other side had to designate its experts. This draft of the rule was modified shortly before the effective date of the rules because it was recognized that this approach was counterproductive to the goal of increased efficiency in the discovery process. Efficiency is better achieved by affording the experts for the party seeking affirmative relief to have the opportunity to know the opinions of the other side's experts before they themselves are deposed. If the experts for the party seeking affirmative relief do not know the opinions of the other side's experts then the other side cannot learn all their opinions. Theoretically, this could result in piecemeal depositions that would be both burdensome and incredibly cost prohibitive. Alternatively, if the other side propounds hypothetical questions to the plaintiff's experts regarding potential defenses, without the experts first having an opportunity to consider the other side's experts' opinions and the bases for them, then this arguably would be just as abusive as the party seeking affirmative relief noticing his own experts without first producing a report.

Tex. R. Civ. P. 195.3. *If Report Furnished.* If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is produced when the expert is designated, then the party need not make the expert available for deposition until reasonably promptly after all other experts have been designated.

As stated above, an apparent flaw in Rule 195 is that it does not

impose a report requirement on the side or parties not seeking affirmative relief. Granted, it would be inequitable to require the other side to have to produce a report if the party seeking affirmative relief does not produce a report; however, there should be some provision that if the party seeking affirmative relief produces an expert report on a subject, the other side or parties must produce a like/kind report for each expert they present on the same subject. I strongly recommend that at the outset of the case, as part of the discovery control plan, the parties agree that “designation” shall include, for each testifying expert under the control of the respective parties, producing a report of the expert’s factual observations, tests, supporting data, calculations, photographs, and opinions. This agreement can be limited to retained experts, or in special circumstances, the parties might want to agree that the requirement pertain to all testifying experts except non-retained experts over whom the parties do not exercise control.

If no agreement can be reached regarding the production of expert reports by the parties not seeking affirmative relief, then a protective order should be sought. The motion should state that in the event the party seeking affirmative relief at the time of designation produces a report in compliance with Rule 195.3, then the opposing side, at the time of its designation, must produce a report in compliance with Rule 195.3 for each expert it designates on the same subject. The plaintiff’s attorney might also seek an order from the court requiring that reports from the defendants’ experts be created and produced, under Rule 195.5.

#### D. SCHEDULING DEPOSITIONS OF TESTIFYING EXPERTS

As discussed above, Rule 195.3 deals with scheduling depositions in terms of whether a party seeking affirmative relief produce reports for his or her testifying experts. The discovery control plan should make clear that if the party seeking affirmative relief produces reports the defendant cannot depose the expert until “all other experts have been designated.”

There is nothing in the rules that states expressly in what order expert witnesses are to be deposed. Customarily, the plaintiff produces her experts for deposition and the defendants produce theirs. The process can become even more refined, with the plaintiff producing an expert on a particular subject and the defendants then producing their experts on the same subject, before experts are produced on other topics or subjects.

Rule 195.3 states that a party not seeking affirmative relief *must* make its retained experts and those otherwise under its control available for deposition “reasonably promptly after the expert is designated and experts testifying on the same subject for the party seeking affirmative relief have been deposed. I have had at least one defense attorney argue that this rule requires the plaintiff to produce its experts for deposition before the defendants’ experts are produced for deposition. I do not read this rule so restrictively. It does not say anything about restricting the right of the plaintiff to notice the defendants’ experts for deposition first. It merely states that the defendant must produce its experts for deposition reasonably promptly after the plaintiffs’ experts’ depositions, assuming the plaintiffs’ experts are noticed for deposition first.

Although, I believe it is mutually beneficial to all interested parties

to incorporate into the discovery control plan blocks of dates for taking the depositions of expert witnesses; however, this proposal seems always to be met with great objection by defense attorneys, and I am very seldom successful in getting this accomplished.

### **5.03 TAKING DEPOSITIONS**

Unless agreed upon or an order is issued by the court modifying the number of hours that can be spent taking the depositions of party witnesses, each side is limited to 50 hours under Rule 190.3(2). This is definitely one of those elements that will have to be addressed on a case by case basis, as the great majority of cases will rarely bump up against these limitations. Further, the rule itself state that the court may modify the deposition hours and **must** do so when a side or party would be given unfair advantage.

### **5.04 TRIAL WITNESSES**

While the identify of trial witnesses is now included in the scope of discovery, this information inexplicably is not part of the required disclosures under Rule 194; therefor, it is useful to build into the discovery control plan a trial witness requirement and designation deadline.

### **5.05 DISPOSITIVE MOTIONS**

To avoid being blindsided by motions for summary judgment or *Daubert/Robinson* motions, it is recommended that the discovery control plan contained time periods for filing such motions. With regard to motions for summary judgment, the plan should set out that such motions will not be filed before a certain date nor after a certain date. Serious thought should be given about whether to require *Daubert/Robinson* motions be filed and/or heard prior to the trial date.

### **5.06 AMENDED PLEADINGS**

The control plan contain deadlines for amending pleadings. Ideally, the amendment deadline should be sufficiently in advance of the discovery deadline so that if a new theory or defense is added, discovery can be conducted without having to seek court intervention. See, Rule 190.5 (discussed in the next section, “Discovery Beyond the Discovery Control Plan”). If feasible, the deadline should be after the deadline for dispositive motions so that the plaintiff is not precluded from amending herself out from beneath a motion for summary judgment.

### **5.07 DISCOVERY PERIOD**

The discovery control plan must contain a date by which the discovery

period comes to an end. I personally prefer that the discovery period come to an end thirty (30) days prior to trial so that I am not having to respond to discovery requests while I am trying to complete preparations for trial. Most defense attorneys ,for tactical reasons, would prefer to keep the plaintiff's attorney working all the way up until the eve of trial. I recommend that the discovery period be bifurcated into written discovery and oral depositions. The deadline for written discovery should be thirty days before trial, such that no response is due later than thirty (30) days before trial. This means that the final written discovery requests would need to be served about 65 days before the trial date. With regard to depositions, I recommend that a separate deadline be specified, so that it is clear that no depositions (written or oral) will be taken—regardless of when the notice is served— after a certain date, unless by agreement or order of the court.

As repeated throughout this paper, the parties and the court may modify the discovery period set out in Level 2 to accommodate the needs of the particular case. If it appears to the parties that the time limitations of Level 2 are simply impractical for the needs of the case, they should address this matter with the court so that an appropriate modification may be made. While it would be ideal to be prescient and address these needs at the outset of the case, this is often not feasible. The rules also allow the parties at any time to request modification of the discovery control plan, and the court must make the modifications in the interest of justice.

## **6.00 DISCOVERY BEYOND THE DISCOVERY CONTROL PLAN**

Under Texas practice prior to the new rules, a scheduling order was tied to a trial date. If the case were continued, new deadlines would go into effect. That practice no longer exists. Under Rule 190.4, the discovery period controls regardless of when the case is tried, subject to the modification provisions of Rule 190.5.

First, a trial court may modify a discovery control plan at any time and *must* do so when the interest of just requires. See, Rule 190.5.

Second, trial court must allow additional discovery related to new, amend or supplemental pleadings, or new information disclosed in a discovery response or in an amended or supplemental response if the pleadings or response were made after the deadline for completing discovery or so nearly before the deadline that an adverse party does not have an adequate opportunity to conduct discovery related to the new matters, and the adverse party would be unfairly prejudiced without such additional discovery. See, Rule 190.5(a).

Third, regarding matters that have changed materially after the discovery cutoff if trial is set or postponed so that the trial date is more than three months after the discovery period ends. Presumably, if the court keeps resetting the case every two months, the discovery period would remain unchanged absent circumstances that would activate subsection (a).

## **7.00 CONCLUSION**

One of the basic principles underlying the new discovery rules is that discovery takes too long and that the longer the parties have to conduct discovery the more discovery they will conduct and the more expense they will incur. Litigation had become far too costly. The new rules are designed to reduce the cost of litigation and the rules regarding discovery control plans are the main engines for accomplishing this goal. The discovery control plan can be particularly useful to the plaintiff in setting out a timetable that will allow the plaintiff to expeditiously prepare the case for settlement or trial, at a minimum of expense. The formulation of a strategic discovery control plan should be a prime consideration at the beginning of the case and attention should be given throughout the case to implementing it diligently. The likely benefit of doing so will be a cost/effective and expeditious recovery for the plaintiff.