

Texas Civil Procedure: Pretrial Litigation, 2022-2023 Edition

2024 SUPPLEMENT

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2024 Supplement

Chapter 1

Page 40

1.05

Add as last paragraph of § 1.05:

A homeowner seeking damages or other relief under the Residential Construction Liability Act from a contractor in connection with a residential construction defect dispute must give written notice to the contractor before the 60th day preceding the date the claimant files an action. The notice must be sent by certified mail, return receipt requested, to the contractor’s last known address, and must specify in reasonable detail the construction defects that are the subject of the complaint. In addition, the claimant must provide to the contractor any evidence that depicts the nature and cause of the defect and the nature and extent of repairs necessary to remedy the defect, including any expert reports, photographs, and video or audio recordings, if that evidence would be discoverable under Rule 192, Texas Rules of Civil Procedure. The contractor may seek an abatement of the action if that notice is not given. Within 35 days of receiving notice, the contractor may inspect the property to determine the nature and cause of the defect and the nature and extent of repairs necessary to remedy the defect. The contractor may make an offer of settlement within 60 days of receipt of the homeowner’s notice, that if determined to be reasonable, may limit the recovery of the homeowner’s damages. Tex. Prop. Code § 27.004(a).

Chapter 2

Page 69

§ 2.01

Add after *Charter Medical Corp. v. Miller* opinion:

NOTE

What are the factors the trial court should consider in setting the bond when granting a t.r.o. or temporary injunction? Justice Young, dissenting from the denial of the petition for review seeking guidance on the amount of the bond, observed, “[t]his Court, one would thus reasonably expect, surely has issued many opinions to guide Texas trial courts in exercising their discretion regarding injunction bonds. Yet one would be wrong to so presume. Our lower courts have long acknowledged the paucity of guidance from this Court.” *Van Huis v. Marine Ventures, Ltd*, 672 S.W.3d 22, 23 (Tex. 2023). Two learned justices described the exercise of judicial discretion on the calculation of the amount of the bond as “a shot in the dark—a guess

for which the law provides little guidance” Jeffrey V. Brown & Andrew M. Edison, *Liability for a Wrongfully Obtained Injunction: The Cause of Action Few Lawyers Understand*, 32 *The Advocate* (Tex.) 83, 83 (2005). The case law does inform that abuse of discretion is the appellate standard of review and that the purpose of the bond is to pay for any damage caused by the injunction, if wrongful.

Chapter 3

Page 109

§ 3.02

**Change [G] Summary to:
[H] Summary**

**Add as new [G]:
[G] Specialty Courts**

The Legislature, in exercising its constitutional authority to establish such additional courts as it may deem necessary, is authorized to prescribe their jurisdiction and to conform the jurisdiction of the district and other inferior courts to that of the legislatively established courts. Tex. Const. art. V, § 1. The jurisdiction of these legislative courts is generally set forth in the Government Code. These courts are established in some counties and not in others, and the jurisdictions of the particular types of courts may themselves differ from county to county. The legislature has created district courts, county courts at law, probate courts, a special three-judge court, and, more recently, business courts. Tex. Gov't Code Ann. §§ 25a.001 to 25a.020.

Chapter 4

Page 205

Add at the end of:

§ 4.02 [E] Consent

The United States Supreme Court upheld, under a due process challenge, the exercise of general jurisdiction under a Pennsylvania statute requiring a nonresident corporation to consent to personal jurisdiction in order to do business in that state and maintain an agent for service of process in that state. *Mallory v. Norfolk Southern Railway Co.*, 143 S. Ct. 2028, 2039 (2023) Is the corporation “essentially at home”?

No, but consent is an alternate valid basis to uphold the exercise of personal jurisdiction.

Add at the end of the chapter (but before past bar questions):

Appendix A

Electronic Filing & Service Requirements & Notice of Remote Court Proceedings

a. Filing & Service of Pleadings and Motions

Tex. R. Civ. P. 21 governs general filing and service requirements. Lawyers generally must electronically file pleadings and motions to the court with limited exceptions. Unless required by local rule, a paper copy of an electronically filed document need not be filed. Tex. R. Civ. P. 21(f)(9). An email address of an attorney or unrepresented party must be included in documents filed with the court.

Service of documents filed with the court (other than the citation) are likewise required to be accomplished electronically, save for a few limited exceptions. Tex. R. Civ. P. 21a. The submission format required as well as approved electronic filing service providers are limited by rule 21(f). A document not filed electronically may be served in person, by mail, by commercial delivery service, by fax, by email, or by other manner as the court may direct. Tex. R. Civ. P. 21a (a)(2).

A document filed electronically must be served electronically through the electronic filing manager if the email address of the party or attorney to be served is on file with the electronic filing manager. There are a few exceptions to mandatory electronically filing documents by counsel including documents filed under seal or otherwise restricted by law or court orders, wills, and courts where electronic filing is available and not mandated. For good cause, a court may permit a party to file documents in paper form. Tex. R. Civ. P. 21(f).

b. Court Notices, Orders, and Judgments Electronically Transmitted

Similarly, the trial court clerk and the trial court are required to send court orders, notices, and documents not filed under seal to the parties electronically. Tex. Govt. Code § 80.002(b); Tex. R. App. P. 21(f)(10). However, this requirement does not apply when the documents are sealed or where otherwise restricted by law or court order or when an unrepresented party has not provided an email address.

c. Remote Court Proceedings Not in Person

Technical advances have resulted in the manner in which court proceedings, such as a hearing or trial, may be conducted. Tex. R. Civ. P. 21d. Unless the notice of a court proceeding states otherwise, a person participating in a court proceeding is to do so by physical presence in the courtroom. A participant includes any party, attorney, witness, court reporter, or juror. However, upon appropriate notice by a party or the court, a court may allow or require a participant to appear by videoconference, teleconference, or other available electronic means. This does not apply to jury trials. Tex. R. Civ. P. 21d(b)(2)(B). In other court proceedings in

which oral testimony would be heard, the court must not require a party or lawyer to appear electronically for a court proceeding unless on agreement of the parties or for good cause. Tex. R. Civ. P. 21d(b)(2)(A).

An application to the court for an order and notice of any court proceeding, not presented during a court proceeding, must be served upon all other parties not less than three days before the time specified for the court proceeding, unless otherwise provided by a rule of procedure or shortened by the court. Tex. R. Civ. P. 21(b). Notice of any court proceeding must contain the information needed for participants to participate in the proceeding, including the location of the proceeding or instructions for joining the proceeding electronically, the court's designated contact information, and instructions for submitting evidence. Tex. R. Civ. P. 21d. A court must publish the information needed for participants to participate in its proceedings. A party may object, for good cause stated and within a reasonable time after receiving notice, to any method of appearance. The court has discretion to determine if it will conduct a hearing on the objection. However, before proceeding by the objected-to method of appearance, the court must rule on the objection and timely communicate the ruling to the parties in a written order or on the record. Tex. R. Civ. P. 21d.

Factors the court should consider when assessing good cause include: 1) the case type; 2) the type of court proceeding; 3) the number of parties and witnesses; 4) the complexity of the legal and factual issues; 5) the type of evidence to be submitted, if any; 6) any technological restrictions such as lack of access to or proficiency in necessary technology; 7) travel restrictions such as lack of transportation, distance, or inability to take off work; 8) whether a method of appearance is best suited to provide necessary language access services for a person with limited English proficiency or accommodations for a person with a disability; and, 9) any previous abuse of a method of appearance. Tex. R. Civ. P. 21d.

A trial judge may appear at a court proceeding by videoconference, teleconference, or other available electronic means. However, even if appearing electronically, a judge must conduct the court proceeding from a location required by law. Tex. R. Civ. P. 21d. When a court conducts a court proceeding in which all participants appear electronically, the court must provide reasonable notice to the public of how to observe the court proceeding as well as provide the public the opportunity to observe the court proceeding, unless the court has determined that it must close the court proceeding to protect an overriding interest, considered all less-restrictive alternatives to closure, and make findings on the record adequate to support closure. Tex. R. Civ. P. 21d. Similar rule provisions provide for remote proceedings in justice court proceedings. Tex. R. Civ. P. 500.2, 500.10, 501.4 (b).

Chapter 5

Page 277

Scope.

Insert as second sentence:

This chapter focuses on the main venue statute for civil cases brought in County and District Court. There are more particularized venue provisions that are subject specific that are not addressed in detail. Neither are venue provisions that govern actions in Justice Courts or Specialty Courts, like the Business Courts.

Chapter 6: No changes

Chapter 7: No changes

Chapter 8: No changes

Chapter 9

Page 572

§ 9.01

[D][1] Level One Plans

Replace last paragraph on the page with:

All discovery must be conducted during the “discovery period.” For suits not governed by the Family Code, the discovery period begins when the first initial required disclosures are due and continues for 180 days. In a suit governed by the Family Code, the discovery period begins when the suit is filed and continues until 180 days after the date the first request for discovery of any kind is served on a party. Tex. R. Civ. P. 190.2(b). Thus, counsel must be cautious in using discovery devices that permit 30 days for a response (such as requests for production of documents, and interrogatories) so as to allow sufficient time for responses. See Tex. R. Civ. P. 196.1, 197.1, 198.1.

Page 574

§ 9.01

[D][1] Level Two Plans

Replace third paragraph with:

Discovery in Level 2 must be conducted during the “discovery period.” The discovery period is different for suits governed by the Family Code and those that are not. The discovery period for a Level 2 case other than a suit governed by the Family Code, begins when initial disclosures are due and continues until the earlier of 30 days before the date set for trial, or nine months after the date the initial disclosures are due. The discovery period for Level 2 suits governed by the Family Code begins when the suit is filed and continues until 30 days before the date set for trial. Tex. R. Civ. P. 190.3. As with Level 1, discovery devices that allow a 30-day response time must be served at least 30 days before the end of the discovery period. The “discovery period” may come to a close considerably before trial in some metropolitan areas.

Page 588

§ 9.03

[A][1]The Discovery Relevance Standard

Notes and Questions

(2) Similar Products:

Add to end of second paragraph:

Applying similar reasoning, the Texas Supreme Court held that the negotiated rates a medical provider charged to patients' private insurers were relevant and discoverable on the issue of the reasonableness of the rates the provider charged to an uninsured patient for the same services. *In re N. Cypress Med. Ctr. Operating Co.*, 559 S.W.3d 128, 129 (Tex. 2018). See, *In re K & L Auto Crushers, LLC*. 627 S.W.3d 239, 248 (Tex. 2021).

Page 588

§ 9.03

[A][1] The Discovery Relevance Standard

Notes and Questions

Add at the end of Note (4) The Proportionality Rule:

The proportionality factors include (1) the likely benefit of the requested discovery; (2) the needs of the case; (3) the amount in controversy; (4) the parties' resources; (5) the importance of the issue at stake in the litigation' (6) the importance of the proposed discovery in resolving the litigation; and, (8) any other articulable factor bearing on proportionality. *In re State Farm Lloyds*, 520 S.W.3d 595, 607-612 (Tex. 2017).

Page 589

§ 9.03

[A][2]Special Relevance Issues

[a]

Replace Read with:

Read Tex. R. Civ. P. 192, 194.2(b), and 194a.2.

Replace the second sentence in first paragraph with:

Some of these areas are directly addressed in the rules regarding relevance and disclosures.

Page 590

§ 9.03

[A][2][b] Insurance Policies and Settlement Agreements

Replace Read with:

Read Tex. R. Civ. P. 192.3(f), (g), 194.2(b) and 194a.2.

Page 610

§ 9.03

[B][1][c] Expert Witness

Replace Read with:

Read Tex. R. Civ. P. 192.3(e), 192.7(c)–(d), 192.5(c)(1), 194.2(f), 195, 195a.

Page 617

§ 9.03][1][c] Expert Witness

Notes and Questions

Note 2

Replace last paragraph of Note 2 with:

In suits governed by the Family Code, discovery regarding testifying experts is accomplished through a request for disclosures, depositions, and reports as permitted by Rules 194a.2(f) and 195a.4. Pursuant to a proper request, for disclosure 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:
 - 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;
 - the expert's current resume and biography.

In addition to disclosures, in suits governed by the Family Code and those not governed by the Family Code, a party may obtain discovery by oral deposition and a report concerning the subject matter on which a testifying expert is expected to testify; the expert's mental impressions and opinions; the facts known to the expert, regardless of when the factual information is acquired, that relate to or form the basis of the expert's mental impressions and opinions; and, other discoverable items, including documents not produced in response to a disclosure request. Tex. R. Civ. P. 195 and 195a.

Page 618-619

Section 9.03 [B][1][c] Expert Witnesses

Note (3)

Add new paragraph at the end of Note 3:

In suits governed by the Family Code, Rule 195a governs the time to designate and take expert witnesses. The timing is essentially the same as for cases not governed by the Family Code. Tex. R. Civ. P. 195, 195a.

Page 621

Section 9.03 [B][1][c] Expert Witnesses

Notes and Questions

Add as Note (6):

(6) *Expert Disclosure*. Are any communications between a party's attorney and a testifying expert protected from disclosure? TEX. R. CIV. P. 195.5.

Page 632

§ 9.03 [B][2] Other Discovery Privileges

Note 2

Add at the end of Note 2:

See, Tex. Occ. Code § 160.007.

Page 639

§ 9.04 [A] Preservation of Privileges; Written Discovery

Add new paragraph at the end of (9) Raising and Litigation Trade Secret Claims:

The Texas Uniform Trade Secrets Act requires a trial court to take reasonable measures to protect trade secrets and creates a presumption in favor of granting protective orders to preserve the secrecy of trade secrets. *In re M-I L.L.C.*, 505 S.W.3d 569, 579 (Tex. 2016). *See* TEX. CIV. PRAC. & REM. CODE § 134A.006(a).

Chapter 10

Page 655

§ 10.01 [A] The Discovery Devices Provided by the Rules

Replace 1. Required Disclosures with:

1. *Required and Requests for Disclosures*. In a suit not governed by the Family Code, required disclosures (without the necessity of a request) are used. There are three types of

required disclosures: initial required disclosures, expert disclosures, and pretrial disclosures pertaining to witnesses and evidence expected to be presented at trial. Civil Procedure Rules 194 and 195. However, in cases governed by the Family Code, requests for disclosure may be used. Civil Procedure Rule 194a.2.

In all cases, the discovery rules provide for disclosure of basic information described in Civil Procedure Rules 194.2, 194a.2, 195 and 195a. including identity of parties and potential parties, legal theories, damage calculations, persons with knowledge of relevant facts, information about testifying experts, witness statements, lay witnesses, trial exhibits, and insurance and settlement agreements.

Page 657

§ 10.01 [B] Discovery Timing

Add before first paragraph on Page 657:

In a suit not governed by the Family Code, unless otherwise agreed to by the parties or ordered by the court, initial required disclosures are to be made before other discovery devices are utilized Civil Procedure Rule 192.2. However, in suits governed by the Family Code, requests for disclosure are used and parties can serve discovery any time with or after the initial pleading and in any sequence. Civil Procedure Rule 192.2.

Page 657

§ 10.01 [B] Discovery Timing

Replace last paragraph on Page 657 with:

In suits not governed by the Family Code, a party must make pretrial disclosures about witnesses a party expects to testify and about exhibits it expects to offer at trial at least thirty days before trial, a party must make pretrial disclosures about witnesses. There is no discrete provision for pretrial disclosures for suits governed by the Family Code.

Page 661

§ 10.02 [A] Discovery Devices

[A] Written Discovery

Change Title of [1] Requests for Disclosure to:

[1] Disclosures

Page 661

§ 10.02 Discovery Devices

Written Discovery

[1] Disclosures

Add after last paragraph on Page 657:

As noted earlier, in suits governed by the Family Code required disclosures without the necessity of a request are not used. However, in these cases a party may request another party to disclose substantially the same information as listed above for required disclosures. A major difference is there is no separate request for disclosure that would require production of all documents, electronically stored information and tangible things in support of the parties claims or defenses. Civil Procedure Rule 194a.2. A party may not assert a work product privilege as to information covered by disclosure rules.

Page 662

§ 10.02 Discovery Devices

[A] Written Discovery

[2] Interrogatories to Parties

Add new paragraph before last paragraph on Page 662:

In suits governed by the Family Code, discovery devices may be used in any sequence and may be served anytime after the initial pleading is served, the rules provide for a party in those cases to respond to interrogatories within 30 days of service. However, if interrogatories (or any other written discovery request) are served before the other party's answer is due, the response is not due until 50 days after service.

Page 663

§ 10.02 Discovery Devices

[A] Written Discovery

[2] Interrogatories to Parties

Notes and Questions.

Add New Note (3):

(3) *Filing Discovery with the Court.* Should discovery requests, disclosures, and responses be filed with the court? TEX. R. CIV. P. 191.4.

Page 664

§ 10.02 Discovery Devices

[A] Written Discovery

[3] Production and Inspection of Document and Tangible Things

Replace first sentence in first full paragraph on Page 664 with:

The responding party must serve a written response within 30 days after service of the request. However, in suits governed by the Family Code if the Request for Production is served before the other party's answer is due, the response is not due until 50 days after service.

Page 664

§ 10.02 Discovery Devices

[A] Written Discovery

[3] Production and Inspection of Document and Tangible Things

Insert in third line before first full sentence on the page:

There is no request for disclosure that would require production of all documents, electronically stored information, and tangible things in support of the parties' claims or defenses in suits governed by the Family Code. However, a request for production is an available tool.

Page 684

§ 10.02 [Discovery Devices

[A] Written Discovery

[5] Requests for Admissions

Add at the end of the first paragraph:

The responding party must serve a written response within 30 days after service of the request. However, in suits governed by the Family Code, if the Requests for Admissions is served before the other party's answer is due, the response is not due until 50 days after service.

Page 700

§ 10.02 Discovery Devices

[B] Oral and Other Non-Written Discovery

Note 11. Delete current last paragraph in Note 11 and replace with:

A party may take an oral deposition by telephone or other remote electronic means if the party gives reasonable prior written notice of intent to do so. An oral deposition taken by telephone or other remote electronic means is considered as having been taken in the district and at the place where the witness is located when answering the questions. Tex. R. Civ. P. 199.1.

Page 710

**[B] Oral and Other Non-Written Discovery
[5] Motions for Physical or Mental Examination**

Note (1)

Add at the end of existing Note 1:

Recent Texas Supreme Court decisions upholding court ordered examinations appear to be more focused on the abuse of discretion standard and less on the “good cause” requirement. *In re Auburn Creek L.P.*, 655 S.W.3d 837, 842-843 (Tex. 2022, orig. proceeding); *In re Sherwin-Williams Co.*, 658 S.W.3d 368, (Tex. 2023, orig. proceeding)

Page 718

§ 10.03 Amendment and Supplementation of Discovery Responses

[B] Oral and Other Non-Written Discovery

Note (7). Add at the end of note 7:

Tex. R. Civ. P. 195a.

Chapter 11

Page 767

§ 11.02 [b] [Procedure and Evidence]

Notes and Questions

Add at the end of Note (1):

See, Judge David Hittner, Lynne Liberato, Kent Rutter & Jerry Dunbar, *Summary Judgments in Texas and Federal Practice*: 62 S. Tex. L. Rev. 99 (2023).

Page 772

§ 11.02 [b] [Procedure and Evidence]

Notes and Questions

Add New Note (12):

(12) *Rulings on Objections to Summary Judgment Evidence*. A trial court’s oral ruling sustaining an objection to specific summary judgment evidence is sufficient to preserve error. Thus, the excluded document was not part of the summary judgment evidence. *FieldTurf USA, Inc. v. Pleasant Grove Indep. Sch. Dist.* 642 S.W.3d 829, 838 (Tex. 2022) The best practice for a party objecting to summary judgment evidence is to secure a written order on the objection from the trial court.

Is a trial court ruling on the merits of a summary judgment an implicit ruling on objections that were made to summary judgment evidence? The Texas Supreme Court recently answered in the negative. *Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 164 (Tex. 2018). *In re*

Z.L.T., 124 S.W.3d 163, 165 (Tex. 2003) (The Court recognized that Civil Appellate Rule 33 recognizes an implicit ruling could preserve error, but only if the implication is clear.).

Chapter 12

Page 816

§ 12.02 [C] Arbitration

Compelling Arbitration

Add at the end of the second paragraph:

Recent statutory adoptions provide that a party may not assert a claim in an arbitration proceeding if the party cannot bring suit for the claim in court due to the expiration of the applicable limitations period. Tex. Civ. Prac. & Rem. Code §16.073. However, if the claim was brought in court before the expiration of the applicable limitations period and the parties to the claim agreed to arbitrate the claim or a court ordered the parties to arbitrate the claim, a party may assert its claim in an arbitration proceeding after expiration of the applicable limitations period. Tex. Civ. Prac. & Rem. Code §16.073. Thus, it appears the trial court should determine this issue, if raised, before ruling on a motion to compel arbitration.

Page 818

Waiver of Arbitration

Add at the end of the first sentence on page 818:

However, the United States Supreme Court recently held that waiver of the right to arbitrate does not require a showing of prejudice under the Federal Arbitration Act. *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022). The Texas Supreme Court has not yet determined what effect, if any, that decision will have on state waiver law.