

# Recent Changes to Texas Discovery Practice

Collin County Bar Association

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## Texas Expands the Expedited Action Process



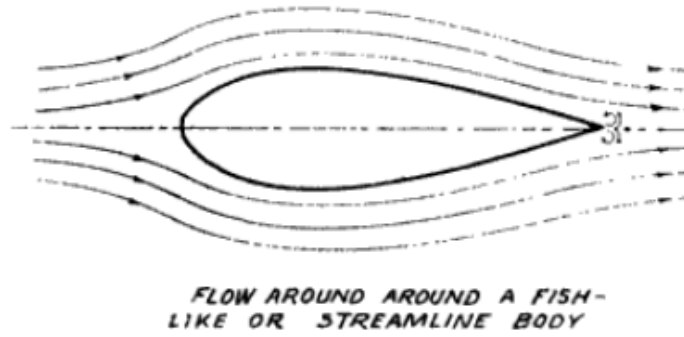
## What is the Expedited Action Process?



2011 Legislature added Government Code Section 22.004(h), which calls for rules to promote the prompt, efficient, and cost-effective resolution of civil cases for cases where the amount of controversy does not exceed \$100,000. Tex. R. Civ. P. 169 cmt. 1.

The Supreme Court of Texas promulgated Rule 169 to create the expedited action process.

## Streamlined discovery



The parties have 180 days to complete discovery. Tex. R. Civ. P. 190.1(b)(1).

The parties have a limited number of hours to depose witnesses. Tex. R. Civ. P. 190.1(b)(2).

The rules limit the number of Interrogatories, Requests for Production, and Requests for Admissions. Tex. R. Civ. P. 190.1(b)(3)-(5).

A party can request disclosure of all documents, electronic information, and tangible items the disclosing party has in its possession, custody, or control and may use to support its claims or defenses. Tex. R. Civ. P. 190.1(b)(6).

Get cases to trial quickly



On any party's request, the Court must set a case for a trial date that is within 90 days after the end of the discovery period. Tex. R. Civ. P. 169(d)(2).

The Court may continue the case twice, not to exceed sixty days. Tex. R. Civ. P. 169(d)(2).

Each side gets eight hours to try their case. Upon a party's motion and a showing of good cause, the Court can extend the time limit to up to twelve hours per side. Tex. R. Civ. P. 169(d)(3).

## ADR and experts



A court may refer the case to an ADR procedure once. The procedure must be a half-day or less and cost not more than twice the amount of applicable civil filing fees. Tex. R. Civ. P. 169(d)(4).

If a Court refers a case to ADR, the parties must complete ADR 60 days before the initial trial setting. Tex. R. Civ. P. 169(d)(4)(A)(iii).

The parties can agree on a different form of ADR. Tex. R. Civ. P. 169(d)(4)(iii).

A party may only challenge the admissibility of expert testimony as an objection to summary judgment evidence or during trial on the merits. Tex. R. Civ. P. 169(d)(5). This limitation does not apply to a motion to strike for late designation. *Id.*

The Texas Legislature and the Texas Supreme Court expand the expedited action process.



The 2019 Legislature enacted Government Code Section 22.004(h-1).

On August 21, 2020, the Supreme Court of Texas adopted rules implementing Government Code Section Section 22.004(h-1) amending the expedited action process. Tex. R. Civ. P. 169 cmt (2020).

## Goals



S.B. 2342 Bill Analysis: “Every Texan, no matter their background or economic status, has the right to access a court to peacefully resolve a legitimate civil dispute. The ever-increasing cost of civil litigation, however, limits the ability of many Texans to access the civil justice system, creating frustration with the system and, in some instances, causing unacceptable delays in resolution of disputes or leaving disputes unresolved altogether.”

Groups who supported the bill included Justices of the Peace and Constables Association of Texas, Texas for Lawsuit Reform, CNA Insurance, Independent Insurance Agents of Texas, TADC, Texas Civil Justice League, U.S. Chamber Institute for Legal Reform



## Concerns



Opponents indicated the expansion could limit discovery and trial time for more complex cases. As the amounts in controversy of cases increase, so do their complexity and need for significant discovery. Requiring these cases to adhere to expedited rules could lead to inefficient outcomes.

Opponents included members of TTLA.



The expedited action process applies to cases where the claimants affirmatively plead only monetary relief aggregating \$250,000 or less, **not including** statutory damages, punitive damages, attorney's fees and costs, or interest. Tex. R. Civ. P. 169(a).

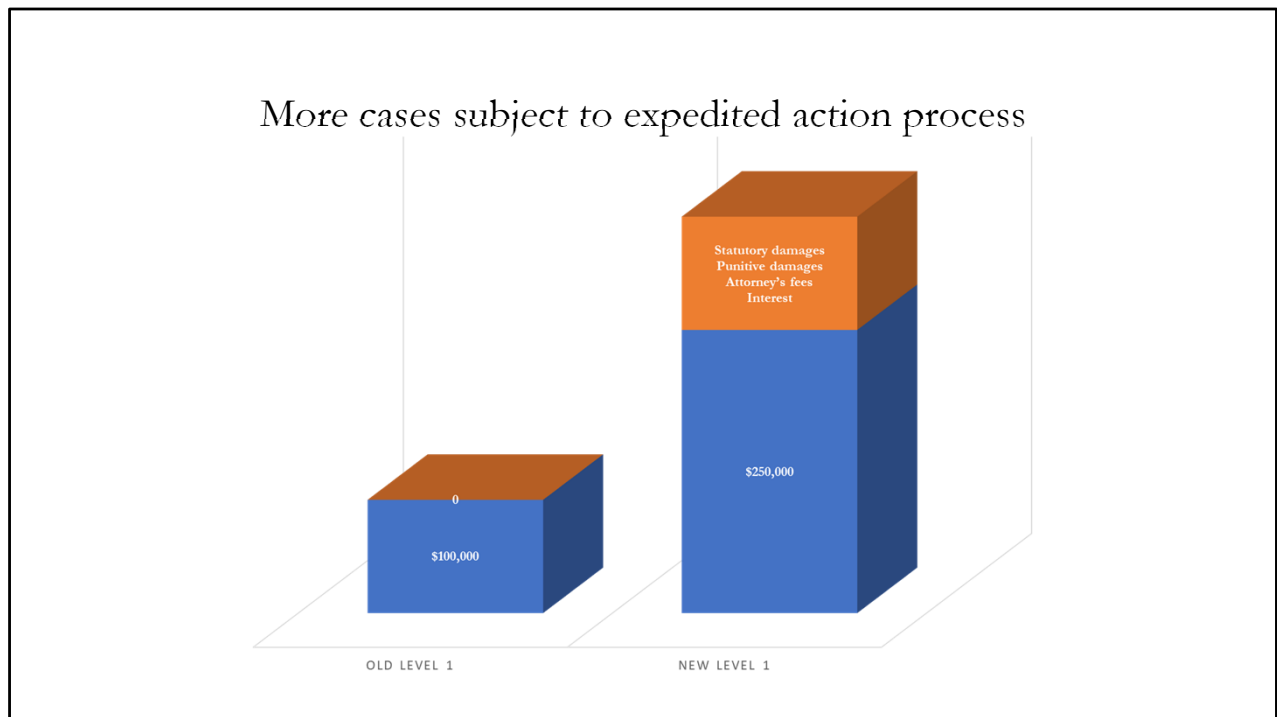
The old rule capped the amount at \$100,000, **including** damages of any kind, penalties, costs, and attorney's fees.

The old rule excluded cases brought under the Family Code, the Property Code, the Tax Code, or CPRC Chapter 74. The new rule repealed the exclusion.

Level 1 also applies to divorce suits not involving children in which a party pleads the value of the marital estate is more than zero but less than \$250,000. Tex. Civ. P. 190.2(a)(2).

## Practical effects





The new Rule 169 increased the monetary cap by 150%.

Other damages, such as statutory (DTPA) or punitive damages, do not count against the Level 1 cap.

Attorney's fees do not count against the cap. More contract cases may fall within the expedited action process.

## County Court at Law cases



Generally, statutory county courts that exercise civil jurisdiction concurrent with the constitutional county court also have concurrent civil jurisdiction with the district courts in: 1) civil cases in which the matter in controversy exceeds \$500 but does not exceed \$250,000, and 2) appeals of final rulings and decisions of the Texas Workers' Compensation Commission. Tex. Gov't Code §25.003.

Denton County Court at Law No. 2 has a jurisdictional cap of \$250,000.

Other counties: Collin, Grayson, Harris, Johnson Tarrant, Wise

Where do you want to be?

**IN OR OUT?**

A party must affirmatively plead into Level 1 and the expedited action process. Tex. R. Civ. P. 47, 169.

A court must remove a suit from the expedited action process upon a motion and showing of good cause. Tex. R. Civ. P. 169(c)(1)(A).

A court must remove a suit from the expedited action process if a claimant files a pleading seeking relief other than the monetary relief allowed. Tex. R. Civ. P. 169(c)(1)(B).

A party must have leave of court to file a pleading that removes a suit from the expedited actions process unless it is filed before the earlier of 30 days after the discovery period is closed or 30 days before the date set for trial. Tex. R. Civ. P. 169(c)(3).

If a suit is removed from the expedited actions process, the court must reopen discovery. Any person previously deposed may be redeposed. Tex. R. Civ. P. 190.2(b).

Will Courts actually follow the Level 1 limits re: trial date ?

## Texas Changes the Disclosure Process



The Court amended the disclosure process to implement Government Code Section 22.004(h-1). Tex. R. Civ. P. 194 cmt. (2021).

The Court amended the disclosure rules to balance the need for lowering discovery costs in actions against the complexity of and discovery needs in these actions. Tex. R. Civ. P. 194 cmt. (2021).

The Court expressly modeled the disclosure rule after Federal Rule of Civil Procedure 26. Tex. R. Civ. P. 194 cmt. (2021).

## The Federal Way: Rule 26



Texas expressly modeled the new disclosure requirements after Federal Rule of Civil Procedure 26.

“Rule 194 is amended based on Federal Rule of Civil Procedure 26(a) to require disclosure of basic discovery automatically, without awaiting a discovery request.” Tex. R. Civ. P. 194 cmt. (2020).



## The Federal Way: Initial Disclosures



Rule 26 obligates a party to provide to the other parties within 14 days after the parties' Rule 26(f) conference (unless otherwise agreed or ordered):

- (1) The name, address, and phone number of each individual likely to have discoverable information, along with the subjects of that information, that the disclosing party may use to support its claims or defenses;
- (2) A copy, or description by category and location, of all documents, ESI, and tangible things that the disclosing 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;
- (3) A computation of each category of damages claimed by the disclosing party, who must also make available for inspection and copying as under Rule 34 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; and
- (4) Any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment.

Fed. R. Civ. P. 26(a)(1)(A).

## The Federal Way: Expert Disclosures



A party must disclose the following for experts who prepare a report:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

## The Federal Way: Pre-Trial Disclosures



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:

- (i) 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;
- (ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and
- (iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

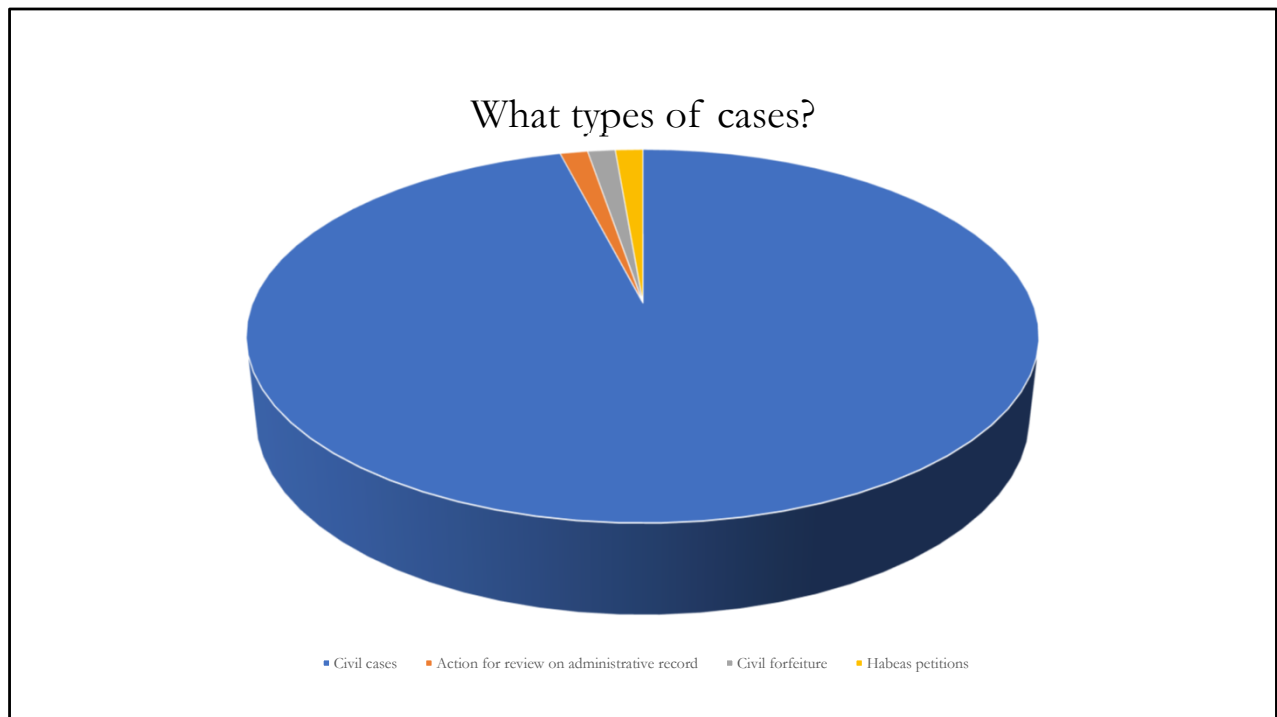
Unless the court orders otherwise, these disclosures must be made at least 30 days before trial.

Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together

with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

## Applicability





The disclosure requirements apply generally, regardless of discovery level. The rules exempt only certain cases.

## Some exemptions



Rule 194.2 exempts certain procedures from the initial disclosures requirement. These include:

- (1) An action for review on an administrative record;
- (2) A forfeiture action arising from a state statute; and
- (3) A petition for habeas corpus.
- (4) An action under the Family Code filed by or against the Title IV-D agency in a Title IV-D case.
- (5) A child protection action under Subtitle E, Title 5 of the Family Code.
- (6) A protective order action under Title 4 of the Texas Family Code.
- (7) Other actions involving domestic violence; and
- (8) An action on appeal from a justice Court.

Tex. R. Civ. P. 194.2(d). The Court added subparts (4) through (8) in response to public comments.

A court may order the parties to make particular disclosure and set the time for disclosure.

These exemptions largely mirror those in Federal Rule of Civil Procedure 26. See Fed. R. Civ. P. 26(a)(1)(B).



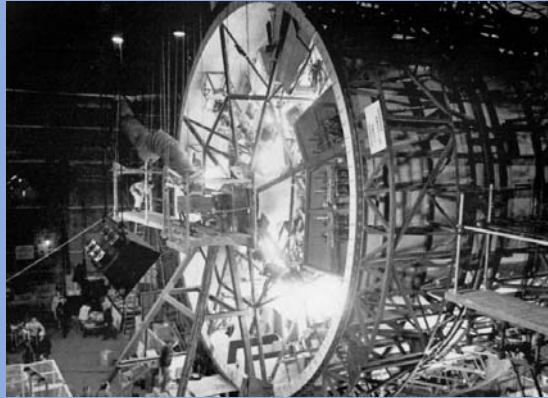
When does it begin?



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

The Supreme Court of Texas initially proposed the amendments on August 21, 2020. The Court modified some of the proposed amendments on December 23, 2020 in response to public comments.

Practical effects on other discovery



Stays other discovery



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(a). **This is new.**

Compare with Federal Rule of Civil Procedure 26(d)—a party may not seek discovery from any source before the parties have conducted a Rule 26(f) conference.

Amends Level 2 discovery period



Under Level 2, the discovery period begins when initial disclosures are due. Discovery continues until the earlier of 30 days before trial or nine months after initial disclosures are due. Tex. R. Civ. P. 190.3(b)(1).

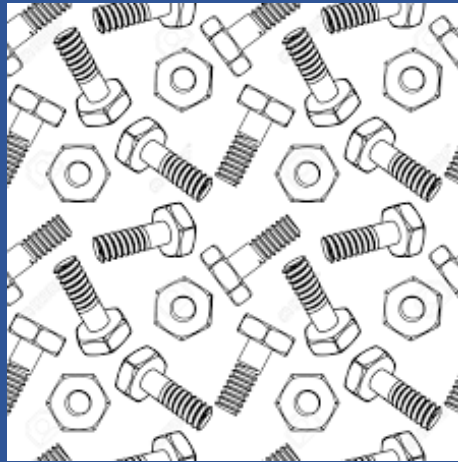
## Consequences for non-compliance



Rule 193.6 mandates exclusion unless the Court finds (1) good cause and (2) the failure to timely disclose will not unfairly surprise or prejudice other parties. Tex. R. Civ. P. 193.6.

Also see Rule 215 for potential discovery sanctions.

## Nuts and bolts



# ABCDEF

## Initial Disclosures



## Documents and ESI



A party must provide “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;” Tex. R. Civ. P. 194.2(b)(6).

Compare with Fed. R. Civ. P. 26(a)(1)(A)(2).

If a party does not produce copies of all responsive documents, electronically stored information, and tangible things with the response, the response must state a reasonable time and place for the production of these items. The responding party must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them. Tex. R. Civ. P. 194.1(b) (was formerly Rule 194.4).



## Divorce or annulment



In a suit for divorce or annulment, a party must produce

- (A) all documents pertaining to real estate;
- (B) all documents pertaining to any pension, retirement, profit-sharing, or other employee benefit plan, including the most recent account statement for any plan;
- (C) all documents pertaining to any life, casualty, liability, and health insurance; and
- (D) the most recent statement pertaining to any account at a financial institution, including banks, savings and loans institutions, credit unions, and brokerage firms.

Tex. R. Civ. P. 194.2(c)(1).

## Child or spousal support



In a suit in which child or spousal support is at issue, a party must produce:

- (A) all policies, statements, and the summary description of benefits for any medical and health insurance coverage that is or would be available for the child or the spouse;
- (B) the party's income tax returns for the previous two years or, if no return has been filed, the party's Form W-2, Form 1099, and Schedule K-1 for such years; and
- (C) the party's two most recent payroll check stubs.

Tex. R. Civ. P. 194.2(c)(2).

## Timing



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. Tex. R. Civ. P. 194.2(a).

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. P. 194.2(a).

A party must make disclosures without awaiting a discovery request. Tex. R. Civ. P. 194.2(b). Compare with Fed. R. Civ. P. 26(a)(1)(A).

A party isn't excused from making its disclosures because:

- (a) It hasn't fully investigated the case;
- (b) It challenges the sufficiency of another party's disclosures; or
- (c) Because another party has not made its disclosures.

Tex. R. Civ. P. 194 cmt.

## Expert Disclosures



## Additional background information



For retained experts, a party must now disclose:

- the expert's qualifications, including a list of all publications authored in the previous 10 years;
- 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
- a statement of the compensation to be paid for the expert's study and testimony in the case.

Tex. R. Civ. P. 195.5(a).

The Court carved out those experts who are "the responding party's attorney and is testifying to attorney fees" from the requirement to list all cases in which the expert testified in the previous four years. Tex. R. Civ. P. 195.5(a)(4)(D).

The Court based these three new disclosures on Federal Rule of Civil Procedure 26(a)(2)(B). Tex. R. Civ. P. 195 cmt.

## New Protections for Expert Communications



The Court significantly expanded the protections for a party's communications with experts. Now, communications between a party and its retained expert are protected from discovery except if the communications relate to (1) the expert's communications relate to compensation; (2) identify facts or data that the party's attorney provided and the expert considered in forming opinions; or (3) identify assumptions provided by the party's attorney and relied upon by the expert. Tex. R. Civ. P. 195.5(c).

The Court also protected an expert's draft reports and disclosures from discovery. Tex. R. Civ. P. 195.5(d).

The Court based these discovery protections on Federal Rule of Civil Procedure 26(b)(4)(B) and (C).

No change to substance



The Court did not change a party's obligation to disclose:

- the subject matter on which the expert will testify;
- 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; and,
- 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.

Tex. R. Civ. P. 195.5(a).

## Timing



Unless otherwise ordered, a party must designate experts:

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

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

Tex. R. Civ. P. 195.2.

A party must make expert disclosures without awaiting a discovery request. Tex. R. Civ. P. 195.5(a).

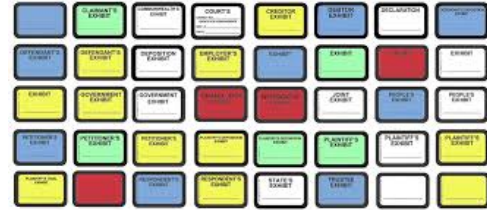
A party has an ongoing duty to amend or supplement. Tex. R. Civ. P. 193.5.



## Pre-Trial Disclosures



## A photograph of a modern office interior. The room features wood-paneled walls and large, arched windows that provide a view of the city. A long wooden conference table is positioned in the center of the room, surrounded by chairs. In the foreground, a black leather office chair is visible. The overall atmosphere is professional and contemporary.



(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; and

Tex. R. Civ. P. 194.4(a).

Rule 194.4 does not include a deadline to object to pretrial disclosures.

## “Will” call vs. “May” call



What is the practical significance of designating a witness as “will call” versus “may call?”

Some courts consider “will call” witnesses to be a representation on which the Court and every other party may rely that the witness listed will be present and available to testify during trial.

*See, e.g.,* Trial Preparation Conference Order, *Tootle v. Wyatt-Edison Charter Sch.*, C.A. No. 10-CV-02421-REB-KMT (D. Colo. Feb. 24, 2011).

## Timing



Unless the court orders otherwise, these disclosures must be made at least 30 days before trial.

Tex. R. Civ. P. 194.4(b).

Thank You!



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