

# Memorandum



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**To:** SCAC

**From:** Discovery Subcommittee

**Date:** June 14, 2023

**Re:** H.B. 2850 referral

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Our subcommittee was asked to see what changes needed to be made to the discovery rules in light of H.B. 2850. We asked Richard Orsinger to join us on the committee.

This memo discusses the import of each section of the bill that impacts the rules. The impact of this bill is far from clear. Does it replace only certain sections of the Rules of Civil Procedure or only a select few? The bill analysis indicates it was only to effect Rules 194 and 195 but the language of the bill is not clear.

## **Section 301.002 Conflicts with the Rules of Procedure**

Recommendation: Further study and discussion. This provision provides that “this chapter may not be modified or repealed by the supreme court.” Many sections of the discovery rules provide that the trial court or the parties by agreement can modify the rules. Can we keep these potential “modifications” in the rules for cases brought under the Family Code?

## **Section 301.003 Draft Expert Reports and Disclosures Protected**

Recommendation: no changes needed. We have reviewed the rules and believe these provisions are current law.

## **Section 301.051—301.056 Requests For Disclosures**

Recommendation: Although not explicit, it appears that this section is meant to eliminate “required disclosures” under the rule. The Supreme Court has two choices: either comment

under current rules (192.1, 192.2, and 194 and maybe others) that these rules do not apply in proceedings brought under the Family Code or import these rules into the Texas Rules of Civil Procedures. Our committee recommends putting the new provisions in the rules. We have made changes and created a new rule 194A.

### **Section 301.101-301.108 Discovery Regarding Testifying Expert Witnesses**

Recommendation: this section appears to explicitly allow discovery of testifying experts **only** through this section. Therefore, it replaces TRCP 195 and perhaps other sections might be impacted such as 194.3. Again, there are two choices: a comment to the rules referring to the Family Code provisions or the incorporation of the new section into the rules. Our committee recommends putting the new provisions in our rules. We have made changes and created a new rule 195A.

### **Other General Problems**

1. We will need to redefine the discovery period since there are no initial disclosures. We recommend returning to the prior definition of the discovery period for Family cases.
2. The new statute only refers to testifying witnesses and does not cover discovery regarding a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert. It is unclear as to the effect of this issue. We recommend further study and discussion.