

**DISCOVERY:
A VIEW FROM BOTH SIDES OF THE BENCH**

Presented by:

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CHAPTER 7



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Professional Affiliations, Honors and Awards

- Judge – 394th Judicial District Court (2013-Present)
- Member – Texas Judicial Council Civil Justice Committee’s Advisory Council (2018)
- Liaison Member – Judicial Committee on Information Technology (2016-Present)
- Director – Judicial Section, State Bar of Texas (2015-Present)
- Judge Pro Tem – 8th District Court of Appeals, by assignment (2015-2016)
- Special Service Commendation – State Bar of Texas GPSOLO Section (2014)
- Lawyer of the Year – State Bar of Texas GPSOLO Section (2012)
- Member – District 17 Grievance Committee, State Bar of Texas (2011-2012)
- Life Sustaining Fellow – Texas Bar Foundation
- Member – College of the State Bar of Texas
- General Practice Solo and Small Firm Section, State Bar of Texas
 - Councilmember (2003-2016)
 - Officer (2006-2014, including Chair (2009-2010))
- Participant – Veterans Legal Clinic (2010)
- Juvenile Court Referee – Presidio County, Texas, December (2001-2003)
- Justice of the Peace Pro Tem – Presidio County, Texas (December, 1999-July, 2000)
- Licensed to practice before the United States Supreme Court
- Member – State Bar of Texas (1995-Present)

Education and Related Honors

- Juris Doctorate of Law, St. Mary’s University, San Antonio, Texas (1994)
- Bachelor of Science in Civil Engineering, University of Texas at Arlington (1992)
- American Jurisprudence Award recipient in administrative law
- Member, Chi Epsilon, honorary fraternity for civil engineering students
- Member, Kappa Kappa Psi, honorary fraternity for college bandsmembers
- Member, Phi Alpha Delta, honorary fraternity for law students

Public Speaking and Articles

- 2018, Ector County Bar Association CLE, Presenter, “Simple Things that Everyone Does Wrong.”
- 2017, NM Defense Lawyers Association and West Texas TADC Joint Seminar, Presenter, “A View from the Bench – Ethical and Effective Advocacy: What Works and What Doesn’t.”

Public Speaking and Articles (continued)

- 2017, Texas A&M University School of Law, “Ethical and Effective Representation of Rural Communities.”
- 2017, Presiding Judge, “State of Texas v. Luke Skywalker – Mock Jury Selection.”
- 2016, Adv. Family Law Conference, Presenter, “Parental Alienation: What It Is and What It Isn’t.”
- 2016, State Bar of Texas Annual Meeting, Presenter, “Effective and Ethical Advocacy from the Judge’s Perspective.”
- 2016, Presiding Judge, State of Texas v. Harry Potter – Mock Jury Selection.”
- 2015, Adv. Family Law Conference, Presenter, “Judges’ Tech Tips.”
- 2015, Val Verde County Bar Association Annual CLE, Presenter, “Effective Use of Courtroom Technology in Family Law.”
- 2015, State Bar of Texas Annual Meeting, Presenter, “Effective Advocacy – What Does and Doesn’t Work in the Courtroom from a Judge’s Perspective.”
- 2015, American Legion District Convention, Keynote Presenter, “And Justice for All.”
- 2014, State Bar of Texas CLE, Presenter/Panelist, “What Judges Think Is (and Isn’t) Persuasive With the Use of Technology in the Courtroom.”
- 2014, State of Texas Juvenile Probation Chief’s Conference, Presenter, “Sex, Violence and Video Games.”
- 2014, Region 18 Meeting of School Administrators, Presenter, “Sex, Violence and Video Games.”
- 2014, State Bar of Texas Annual Meeting, Presenter, “Practical and Ethical Impacts of *In re Stephanie Lee*, or: Who Will Speak for the Children?”
- 2013, West of the Pecos Republican Women’s Association, Presenter, “Freedom of Speech is Under Attack!”
- 2012, American Legion Regional Meeting, Presenter, “Defending Freedom of Speech.”
- 2012, State Bar of Texas Annual Meeting, Presenter, “Legal Ethics vs. Moral Compass.”
- 2011, Texas Bar Journal, January Edition, “Referendum 2011 – How Would You Advise a Lawyer to Vote?”
- 2011, State Bar of Texas Annual Meeting, Presenter, “Ethics and the Small Law Firm – That’s an Impact Tremor, That’s What THAT is!”
- 2010, State Bar of Texas Annual Meeting, Moderator and Presenter, “Recent Ethical Issues for the Solo and Small Firm Practitioner.”
- 2010, General Practice Institute, Waco Texas, Moderator
- 2010, Baylor Law School Student Outreach Program, Presenter and Moderator
- 2010, St. Mary’s School of Law Student Outreach Program, Presenter and Moderator
- 2009, State Bar of Texas Annual Meeting, Presenter, “Hot Topics in Legal Ethics.”
- 2008, State Bar of Texas CLE, Presenter, “Ethics and the Small Law Firm.” (webcast)
- 2008, State Bar of Texas CLE, Presenter and Moderator, “Ethics and the Small Firm: Use of Technology in the Development of a Successful and Profitable Practice.”
- 2008, State Bar of Texas Annual Meeting, Presenter, “Ethics and the Small Law Firm – Ten Hot Tips on Avoiding Grievances.”
- 2007, State Bar of Texas Annual Meeting, Presenter, “Ethics and the Small Law Firm – Avoiding Grievances Through Early Detection.”
- 2006, Article, “Ethical Pitfalls for the Community Lawyer – an Outline for Discussion Among General Practitioners.”
- 2006, State Bar of Texas Annual Meeting, Presenter/Moderator, “Panel Discussion on Legal Ethics.”

About the 394th Judicial District

The 394th Judicial District is comprised of Brewster, Culberson, Hudspeth, Jeff Davis, and Presidio Counties. The District encompasses approx. 20,000 sq. miles (larger than nine states), and includes roughly 1/3rd of the Texas-Mexico border and 1/5th of the United States–Mexico border.

About the Texas Judicial Council Civil Justice Committee’s Advisory Council

The committee is charged with studying the landscape of Texas civil justice and recommending necessary reforms to improve access to justice to the Texas courts. Judge Ferguson is one of three Texas district judges to join the council.

About the Judicial Committee on Information Technology

A part of the Texas Supreme Court’s Texas Commission on Judicial Efficiency, the mission of the Judicial Committee on Information Technology is to establish standards and guidelines for the systematic implementation and integration of technology in Texas' trial and appellate courts.

About the Texas Bar Foundation

Founded in 1965, the Texas Bar Foundation has maintained and pursued its mission to assist the public, improve the profession of law, and build a strong justice system for all Texans. Fellows of the Foundation are selected for their outstanding professional achievements and their demonstrated commitment to the improvement of the justice system throughout the state of Texas. Each year, only one-third of one percent of State Bar of Texas members are invited to become Fellows.

About the Texas Bar College

The Texas Bar College is an honorary society of lawyers who are among the best trained attorneys in Texas. Members are qualified attorneys who are interested in both high ethical standards and improved training for all Texas attorneys. The College recognizes and encourages lawyers, paralegals and judges who maintain and enhance their professional skills and the quality of their service to the public by significant voluntary participation in legal education.

About the 394th District Court Mock Jury Selection Program

When Judge Ferguson took the bench on January 1, 2013, public response to jury summonses across the 394th Judicial District was incredibly low, in some counties below 15%. Judge Ferguson implemented a multi-faceted plan to increase and improve jury turnout, without fining or jailing community members in one of the poorest parts of Texas. A key facet of that plan is public education and awareness of the jury system. During Juror Appreciation Week in Texas each year, every high school senior in the District is summoned to appear before Judge Ferguson as a potential juror. Students are placed under oath, qualified, and questioned in a realistic jury selection for a fictional case. In 2016, Harry Potter was tried for the murder of Voldemort. In 2017, Luke Skywalker stood charged with over one million counts of murder for blowing up the Death Star. (Charges against Mr. Potter were dismissed after the jury was empaneled and sworn, and the trial of Mr. Skywalker ended in a mistrial when the defendant leapt from his seat at counsel table and attacked the first witness for the prosecution – Darth Vader.)

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Texas Tech University School of Law, J.D., May 2009
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Underwood Law Firm, P.C., Associate, October 2015 to Present
Law Office of Titiana D. Frausto, P.C., Amarillo, Texas, April 2013 to September 2015
Abbott Law Office, P.C., Associate, Amarillo, Texas, 2010 to 2013

PROFESSIONAL MEMBERSHIPS & ACTIVITIES:

State Bar of Texas Family Law Section, Member
State Bar of Texas Family Collaborative Law Section, Member
Amarillo Area Bar Association, Member
Amarillo Area Young Lawyers Association, Member
Panhandle Family Lawyers Association, Secretary
Collaborative Divorce Texas, Member
State Bar of Texas District 13 Grievance Committee, Member, 2013 to present
Amarillo Art Institute, President

AWARDS/RECOGNITION:

Outstanding Lawyer of the Year, Amarillo Young Lawyers Association, 2016
Top 20 Under 40, Amarillo Chamber of Commerce, 2017

WRITINGS AND SPEAKING ENGAGEMENTS

Maintenance and Alimony – They are Not the Same Thing, Speaker, Family Law Essentials – Giving Back to Your Community, Amarillo, Texas 2018

Protecting Your Client from Their Own Technology, Speaker, Family Law Essentials – Giving Back to Your Community, Plainview, Texas 2017

Predicates, Speaker, Family Law Essentials – Giving Back to Your Community, Longview, Texas 2016

Assertion of the Fifth Amendment in Civil Proceedings, Author, Sex, Drugs & Surveillance, Houston, Texas, 2014

Discovery (Getting it in and Keeping it Out), Facebook and Social Networking, Speaker, Family Law Essentials – Giving Back to Your Community, Amarillo, Texas, 2013

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DISCOVERY: A VIEW FROM BOTH SIDES OF THE BENCH

I. INTRODUCTION

Discovery can be a cost-effective way of gathering information. The Texas Rules of Civil Procedure allow discovery of any matter that is not privileged and is relevant to the subject matter of the case. *In re Mason & Co. Property Mgmt.*, 172 S.W.3d 308 (Tex. App.—Corpus Christi 2005, orig. proceeding). The requested information should be reasonably calculated to lead to the discovery of admissible evidence. *Id.* Discovery can be a tedious and often dreaded part of any family law case. However, when done correctly, it can be a major difference maker in the outcome. This paper will give practice tips to help you effectively apply the rules of discovery, as well as advice from the bench when seeking to compel production or exclude evidence.

II. SCOPE

The scope of discovery is broad. A party may “obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action.” Tex. R. Civ. P. 192.3(a). Though what is “relevant” is broadly construed, requests must not be overbroad. *In re Nat’l Lloyds Ins. Co.*, 449 S.W.3d 486, 488 (Tex. 2014). A request that is “reasonably tailored to include only matters relevant to the case” is not overbroad. *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995). A party may not use discovery to “fish” for evidence. *K Mart Corp. v. Sanderson*, 937 S.W.2d 429, 431 (Tex. 1996). A trial court has the power to limit the scope of discovery if it determines that the discovery is duplicative or cumulative, can be obtained from a more convenient source, or that the benefit is outweighed by the burden or expense of responding. Tex. R. Civ. P. 192.4; *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941-42 (Tex. 1998).

III. COMMON FORMS OF DISCOVERY

A. Written Discovery

Under Texas Rules of Civil Procedure Rule 192, written discovery pertains to: 1) requests for disclosure, 2) requests for production and inspection of documents and tangible things, 3) requests for entry onto property, 4) interrogatories to a party, and 5) requests for admission. Tex. R. Civ. P. 192.7. When requesting discovery, it is important to ask for what you really need.

1. Requests for Disclosure

The requests for disclosure is very general, and is issued pursuant to Texas Rules of Civil Procedure Rule 194. A party is allowed to obtain information regarding the case, including: the correct names of the parties to the suit; the name, address, and telephone number of any

potential parties; the legal theories and, in general, the factual bases of the responding party’s claims or defenses; the amount and any method of calculating economic damages; the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person’s connection with the case; any testifying expert’s name, address, and telephone number, the subject matter on which the expert will testify, and the general substance of the expert’s mental impressions and opinions and a brief summary of the basis for them, the expert’s resume, the documents the expert reviewed; the name, address, and telephone number of any person who may be designated as a responsible third party. Tex. R. Civ. P. 194.2. Disclosures are not subject to objection. *In re Morse*, 153 S.W.3d 578, 581 (Tex. App.—Amarillo 2004, no pet.).

PRACTICE TIP: Send early. Many practitioners send requests for disclosure inside their initial pleadings.

PRACTICE TIP: Fully respond to the disclosure and supplement when needed. Failure to do so could result in the information, i.e. testimony regarding theory of case or expert testimony, being excluded during trial.

PRACTICE TIP: Designate yourself as an expert, and produce your resume and billing invoices. Failure to do so could prevent you from testifying regarding attorney’s fees.

If you find yourself in a situation where you have failed to respond to a request for disclosure, or have failed to supplement your response, don’t settle for your evidence being excluded. Instead, argue that there was good cause for the untimely response, amendment, or supplement, or that the failure to do so will not unfairly surprise or unfairly prejudice the opposing party. Tex. R. Civ. P. 193.6(a).

2. Interrogatories

A party may serve on another party written interrogatories to inquire about any matter within the scope of discovery except matters covered by Rule 195. Tex. R. Civ. P. 197.1. Interrogatories are written questions served by one party to another to get information regarding that parties legal and factual contentions about the case, with the exception of information regarding testifying experts. Tex. R. Civ. P. 197.1. Interrogatories may not be used to “require the responding party to marshal all of its available proof or

the proof the party intends to offer at trial.” *Id.* What constitutes “marshalling” is unclear from the rule.

Cases conducted under Level 1 Control Plan, are limited to fifteen written interrogatories, and cases conducted under Level 2 Control Plan are limited to twenty-five written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Tex. R. Civ. P. 190.2(b)(3) and 190.3(b)(3). “Discrete subparts” of interrogatories are counted as single interrogatories, but not every separate factual inquiry is a discrete subpart. Tex. R. Civ. P. 190 cmt. 3 (citing to Fed. R. Civ. P. 33(a)). While not susceptible of precise definition, a “discrete subpart” is, in general, one that calls for information that is not logically or factually related to the primary interrogatory. Tex. R. Civ. P. 190 cmt. 3. Thus, if the subpart cannot be fairly and reasonably characterized as closely related to the first part of the interrogatory, it is discrete and separate. Because of these limitations, it is important to carefully draft interrogatories to the specific facts of your case.

Answers to interrogatories can be helpful in identifying and determining the characterization of assets, identifying liabilities, and gathering evidence to prove or defend against a claim. Interrogatories may also be helpful with establishing a line of questioning for depositions.

PRACTICE TIP: If information has been, or can be, requested through another form of discovery, don’t waste an interrogatory on that information.

Weed through your interrogatories to eliminate those that are duplicative of other discovery requests. Next, eliminate interrogatories that will not lead to the discovery of information relevant to your case. The interrogatories that you submit should be those that aid your case and your theory of it.

- If you contend the primary residence of the child should [not] be restricted to [geographic area], state in general the legal theories and factual bases that support your contention.
- State each day you exercised possession of or access to the child since [date] and the amount of time you spent with the child on each such day.
- If you contend that your spouse has tried to alienate you from the child since [date], state each fact that supports your contention.
- If you contend that it is in the child’s best interest to be home schooled, state in general the legal theories and factual bases that support your contention.

- If the court orders you to pay child support, state the monthly amount of support the court should order you to pay and the calculations, including numbers, you used to determine that number.
- If you contend that you are entitled to spousal maintenance, state with specificity the elements contained in section 8.051 of the Texas Family Code on which you rely to support your contention.
- State each of your minimum reasonable needs and the monthly amount in US dollars of each of those minimum reasonable needs.

3. Request for Production and Inspection

A request for production and inspection may seek to inspect, sample, test, photograph, or copy documents or tangible things within the scope of discovery. Tex. R. Civ. P. 196.1(a). However, “the request must specify the items to be produced or inspected, either by individual item or by category, and describe with reasonable particularity each item and category.” Tex. R. Civ. P. 196.1(b). “Reasonable particularity” depends on whether a reasonable person would know what documents or things are called for by the request. *See* Robert K. Wise, *Ending Evasive Responses to Written Discovery: A Guide for Properly Responding (and Objecting) to Interrogatories and Document Requests Under the Texas Discovery Rules*, 65 BAYLOR L. REV. 510, 517 (Spring 2013).

How specific a request needs to be depends on the requesting party’s knowledge about the documents or things sought. *Id.* For example, requests for electronic or magnetic data must specify the form in which the requesting party wants the information produced. Tex. R. Civ. P. 196.4. The request must also specify a reasonable time and place for production. Tex. R. Civ. P. 196.1(b).

Documents and tangible things that are relevant to the subject matter of the suit or action are subject to discovery from a party if that party has possession, custody, or control of the document or tangible thing. Tex. R. Civ. P. 192.3(b). A responding party is only required to produce items that are within the person’s possession, custody, or control, not information that the person must “seek out and obtain.” *In re Buggs*, 166 S.W.3rd 506 (Tex. App.—Texarkana 2005, orig. proceeding). Possession, custody, or control means “that the person either has physical possession of the item or has a right to possession or the item that is equal or superior to the person who has physical possession of the item.” Tex. R. Civ. P. 192.7(b).

PRACTICE TIP: When possible, avoid using terms like “any,” “all,” “every,” “any and all,” or “each and every” when sending requests. These requests will almost always draw an objection as overly broad, or unduly burdensome. Even if not objected to, you will likely receive numerous documents that overshadow information that is relevant and useful to your case.

PRACTICE TIP: Judges are willing to further narrow an already narrow request that has been objected to. However, it is unlikely that a judge will narrow a broad generic request to a more specific request.

4. Request for Admissions

A party may serve on another party written requests that the other party admit the truth of any matter within the scope of discovery, including statements of opinion or of fact or the application of law to fact, or the genuineness of any documents served with the request or otherwise made available for inspection and copying. Tex. R. Civ. P. 198.1.

Unless the responding party states an objection or asserts a privilege, the responding party must specifically admit or deny the request or explain in detail the reasons that the responding party cannot admit or deny the request. A response must fairly meet the substance of the request. The responding party may qualify an answer, or deny a request in part, only when good faith requires. Lack of information or knowledge is not a proper response unless the responding party states that a reasonable inquiry was made but that the information known or easily obtainable is insufficient to enable the responding party to admit or deny. An assertion that the request presents an issue for trial is not a proper response. Tex. R. Civ. P. 198.2(b).

Requests for admissions can be an effective and efficient way to establish facts and limit the amount of unresolved issues before trial. Usually, any matter or fact that is admitted is deemed conclusively established. Thus, that issue will not be debated at trial unless the court permits withdrawal or amendment of the admission. Admissions can also be an effective tool for summary judgment relief.

There is no limit to the number of requests of admissions you can send. *See* Tex. R. Civ. P. 190, 198. As such, use them to your advantage. For example, if there is a request for spousal maintenance, use the requests for admissions to eliminate the undisputed

elements and to determine the areas that are in controversy. Requests for admissions can also be used to settle minor issues, or issues that are not hotly contested. A good example is that the parties be named joint managing conservators.

Other examples where requests for admissions could be useful to settle issues are:

- That the residence of the child will be restricted to a certain geographic area;
- What party will provide health insurance for the child;
- How health expenses of the child not covered by insurance will be split;
- Whether the alternative beginning and ending possession times under TFC section 153.317 apply.

PRACTICE TIP: Word RFA narrowly and specifically to avoid giving the responding party any wiggle room to give an ambiguous response.

PRACTICE TIP: Do not compound questions, i.e., “admit or deny that you charged a hotel room on the VISA credit card while on vacation with your mistress.” A denial to this question could be regarding whether the responding party charged a hotel room, what card was used, if it was while the responding party was on vacation, or whether the responding party was accompanied by his mistress.

a. Deemed Admissions

Admissions are deemed admitted as a matter of law when no response is served. Tex. R. Civ. P. 198.2(c). No hearing or motion to compel is necessary. *Id.* However, the court may permit the party to withdraw or amend the admission if 1) the party shows good cause for the withdrawal or amendment; and 2) if the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be served by permitting the party to amend or withdraw the admissions. Tex. R. Civ. P. 198.3. Good cause is established by showing that the failure was not intentional or the result of conscious indifference. *Wheeler v. Green*, 157 S.W.3d 439, 443 (Tex. 2005). Whether a party will be unduly prejudiced depends on whether withdrawing an admission or filing a late response will delay trial or significantly hamper the opposing party’s ability to prepare for trial. *Id.*

PRACTICE TIP: If you have missed the deadline to respond, respond as soon as possible. Under most circumstances, Judges will undeem the admissions.

B. Oral Depositions

After the written discovery has been completed, attorneys should then consider whether it will be useful to depose the other party and/or any nonparty witnesses. Oral depositions allow for questioning of a party under oath before being called as a witness at trial. This can be very helpful in preparing the case.

A party may take the testimony of any person or entity by deposition on oral examination before any officer authorized by law to take depositions. Tex. R. Civ. P. 199.1(a). Depositions must be recorded at the time they are given or made. *Id.* Depositions may also be taken by telephone, other remote electronic means, and non-stenographic recording, including video recording. *See* Tex. R. Civ. P. 199.1(b)-(c).

A notice of intent to take an oral deposition must be served on the witness and all parties in a reasonable amount of time before the deposition is to be taken. Tex. R. Civ. P. 199.2(a). The notice must include:

- a) the name of the witness;
- b) a reasonable time and place for the deposition;
- c) the means by which the deposition will be recorded; and
- d) the identity of any nonparties who might be attending the deposition. Tex. R. Civ. P. 199.2(b)(1)-(4).

The request may also include a request for production of documents or tangible things within the scope of discovery, and within the witness' possession, custody, or control. Tex. R. Civ. P. 199.2(b)(5). The deposition may be taken in:

- a) the county of the witness's residence;
- b) the county where the witness is employed or regularly transacts business in person;
- c) the county of suit, if the witness is a party or a person designated by a party under Rule 199.2(b)(1);
- d) the county where the witness was served with the subpoena, or within 150 miles of the place of service, if the witness is not a resident of Texas or is a transient person; or
- e) subject to the foregoing, at any other convenient place directed by the court in which the cause is pending. Tex. R. Civ. P. 199.2(b)(2).

A witness must remain in attendance until the deposition is completed, even if the questioning exceeds one day. Tex. R. Civ. P. 199.5(a)(1). An attorney must not ask a question at an oral deposition solely to harass or mislead the witness, for any other improper purpose, or without a good faith legal basis at the time. Tex. R. Civ. P. 199.5(h). Further, an attorney must not object to a question at an oral deposition, instruct the witness not to answer a question, or suspend the deposition unless there is a good faith factual and legal basis for doing so at the time. *Id.*

PRACTICE TIPS: Ask open-ended questions when trying to get information, and ask leading questions when trying to pin a witness down. Keep questions short.

IV. DRAFTING REQUESTS

When drafting discovery, keep in mind that specific requests are good, and broad requests are bad. A request asking a party to state or produce "all...", "every...", "any and all...", or "each and every..." may be improper. These types of requests are commonly referred to "kitchen sink" requests. These are often the types of requests that are found in formbooks or ProDoc. Such requests are a good starting point when drafting discovery, but are not tailored to the facts of your specific case. Don't be afraid to get creative and draft requests that are specific to your needs. Remember, requests must be made with enough specificity that the responding party knows how to comply. *Loftin v. Martin*, 776 S.W.2d 145, 148 (Tex. 1989).

PRACTICE TIP: If there is an item that you are seeking, don't rely on a global request to cover the production of that item. Instead, specify the item in the request to make sure that it survives a possible objection to overly broad.

PRACTICE TIP: Use discovery like a scalpel (carefully carving out the information that you need), and not like a hand grenade.

V. RESPONDING, OBJECTING, AND ASSERTING PRIVILEGE

A party may respond to a discovery request by answering, objecting, or asserting a privilege. A party must respond in writing within the time provided by court order or the rules. Tex. R. Civ. P. 193.1. Responses to discovery requests are generally due within 30 days from the date of service; however, requests that are sent by mail are due within 33 days, and requests sent by fax (after 5:00 p.m.) are due within 31 days. Tex. R. Civ. P.

21a(b)(2), (c). Responses to requests that are served on a party before the Answer deadline are due within 50 days following service. Tex. R. Civ. P. 194.3(a), 196.2(a), 197.1(a), 198.2(a). The deadline to respond can be extended either by agreement between the parties, or by court order.

PRACTICE TIP: A request for extension of time to respond should be made *before* the response deadline has passed.

A. Responding

A party may not answer written discovery requests orally. The party must provide written responses to discovery requests that are preceded by the corresponding request. Tex. R. Civ. P. 193.1. The responding party's answers, objections, and other responses must be preceded by the corresponding request. *Id.* Responses to written discovery must be signed by the attorney, or pro se party. Answers to interrogatories must be verified.

Responses should be complete, and based on all information reasonably available at the time the response is made. Tex. R. Civ. P. 193.1. It is a violation of the rules to only produce information that is favorable to your theory of the case, and withhold information that could be detrimental. An objection does not excuse the requirement to respond to the request.

1. Amending or Supplementing Responses

A party must amend or supplement a response once it is discovered that the response is incomplete or incorrect:

- (1) to the extent that the written discovery sought the identification of persons with knowledge of relevant facts, trial witnesses, or expert witnesses, and
- (2) to the extent that the written discovery sought other information, unless the additional or corrective information has been made known to the other parties in writing, on the record at a deposition, or through other discovery responses. Tex. R. Civ. P. 193.5(a).

Amended and supplemental responses should be in the same form as the original response. Tex. R. Civ. P. 193.5(b). The requesting party is under no duty to request supplementation of discovery responses. After a party discovers the necessity for a response or amendment, they must do so *reasonably promptly*. *Id.* It is presumed that an amended or supplemental response made less than 30 days before trial was not made reasonably promptly. *Id.*

B. Making an Objection

A party must make any objection to written discovery in writing - either in the response or in a separate document - within the time for response. Tex. R. Civ. P. 193.2(a). The party must state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request. *Id.* If a party is only objecting to part of a request, the party must comply with as much of the request to which the party has made no objection unless it is unreasonable under the circumstances to do so before obtaining a ruling on the objection. Tex. R. Civ. P. 193.2(b). An objection that is not made within the time required is waived unless the court excuses the waiver for good cause shown. Tex. R. Civ. P. 193.2(e).

PRACTICE TIP: Using form objections, as well as using the same objection to all requests is inappropriate.

Some commonly used objections include:

- Petitioner/Respondent objects to this request on the grounds that it is overly broad and constitutes a fishing expedition of the type prohibited under *Loftin v. Martin*, 776 S.W.2d 145,148 (Tex. 1989); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813 (Tex. 1995). Specifically, this request is not properly limited in time or scope.
- Petitioner/Respondent objects to this request on the grounds that it is overly broad and unduly burdensome.
- Petitioner/Respondent objects to this Request for Production because it fails to identify the documents sought with sufficient particularity.
- Petitioner/Respondent objects to this Request for Production because it is not reasonably limited in time, nature, or scope.
- Petitioner/Respondent objects to this request to the extent it seeks information that is not relevant to the issues of this case and is not reasonably calculated to lead to the discovery of admissible evidence. Tex. R. Civ. P. 192.3(a). The proposed discovery goes beyond the subject matters of the case and reasonable expectations of obtaining information that will aid resolution of the dispute. Tex. R. Civ. P. 192 cmt.1.
- Petitioner/Respondent objects to this request to the extent it seeks information that is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive. Tex. R. Civ. P. 192.4(a)
- Petitioner/Respondent objects to this request to the extent it subjects Petitioner/Respondent to undue

burden, unnecessary expense, harassment, or annoyance. Tex. R. Civ. P. 192.6(b). Further, the requested documents are equally accessible to Petitioner/Respondent.

PRACTICE TIP: The term “equally accessible” means that your client does not have the documents, but has the ability to get them. Under these circumstances, the parties can agree to share the cost associated with obtaining the documents.

PRACTICE TIP: A party may request a hearing regarding the objections. However, the party should also move to compel because a motion to compel allows for a request for sanctions and attorney’s fees.

C. Asserting Privilege

A party who claims that material or information responsive to written discovery is privileged may withhold the privileged material or information from the response. Tex. R. Civ. P. 193.3. The party must serve a withholding statement (either in the discovery response or in a separate document) on the requesting party which

- 1) states the information or material responsive to the request has been withheld,
- 2) identifies the request to which the information or material relates, and
- 3) identifies the privilege(s) asserted.

If you represent the requesting party and you are served with a withholding statement, request a privilege log. To do so, you need to request in writing that the withholding party identify the information or material withheld. Tex. R. Civ. P. 193.3(b). The responding party will then have 15 days to respond, and the response must 1) describe the information or materials withheld that, without revealing the privileged information itself or otherwise waiving the privilege, enables other parties to assess the applicability of the privilege, and 2) asserts a specific privilege for each item or group of items withheld. *Id.*

Either party may request a hearing to have the court decide whether the withheld information is protected by privilege. At the hearing, Party who seeks to limit discovery by asserting privilege has burden of proof. *In re E. I. DuPont de Nemours & Co.*, 136 S.W.3d at 223. Once prima facie case of privilege is established the burden then shifts to party seeking to compel discovery to refute proof, show that privilege was waived, or prove exception to privilege. *In re Monsanto Co.*, 998 S.W.2d 917, 933-34 (Tex. App.—Waco 1999, org. proceeding).

PRACTICE TIP: Make your privilege log persuasive. Include not only privileges claimed, but basis for privilege, using language from rule(s), i.e., “confidential communications for purpose of facilitating rendition of professional legal services.”

VI. MOTION TO COMPEL

Motions to compel are frequently used to settle discovery disputes, especially when a responding party refuses or fails to turn over requested information or documentation. Motions to compel may also be filed when a party receives responses that are inadequate, numerous objections that are inappropriate, or claims of privilege that are believed to be unfounded. A motion to compel must be specific and supported by facts and authority.

When one party objects to discovery as improper, any party may request a hearing. Tex. R. Civ. P. 193.4(a). However, before doing so, the parties and their attorneys are expected to cooperate and make agreements “reasonably necessary for the efficient disposition of the case.” Tex. R. Civ. P. 191.2. The motion to compel must contain a certificate of conference stating that the parties have made a reasonable effort to resolve the issue without court intervention, but have been unable to do so. *Id.* Once in court, the objecting party has the burden of proof to show why the discovery request is improper. *Id.*

If the court sustains the objection or assertion of privilege, the responding party has no further duty to respond that the request. Tex. R. Civ. P. 193.4(b). If the Court overrules the objection or assertion of privilege, the responding party must produce the requested documentation or information within 30 days following the court’s ruling, or at a time that the court orders. *Id.* The court may also impose sanctions upon the responding party for abusing the discovery process. Tex. R. Civ. P. 215.2(b).

PRACTICE TIP: Judge’s prefer not to be involved in discovery disputes. When possible, it is wise to work out discovery issues between the parties and their attorneys.

PRACTICE TIP: A motion to compel isn’t a motion for summary judgment, and the judge doesn’t need to know the minute details of the case to decide the motion. Know your case, and be concise.

PRACTICE TIP: Filing a motion to compel regarding generic discovery requests that are not narrowly tailored may result in your motion be overruled. Likewise, using generic objections may result in the motion to compel being sustained.

VII. CONCLUSION

Knowing the discovery rules will help you to efficiently develop your case and prepare for trial. Remember to ask for what you want, and do so with particularity. This will ultimately save you time and your client money.

