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MEDIATION OF TRUST, ESTATE, AND FIDUCIARY DISPUTES

SCOTT D. WEBER, *Dallas*
Husch Blackwell

State Bar of Texas
BECOMING A FIDUCIARY LITIGATOR
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Fort Worth

CHAPTER 8

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OVERVIEW

Scott brings 30+ years of trust and estate litigation experience to clients' cases.

Scott has practiced in the private wealth arena since 1989, when he worked for a small firm that did a significant amount of estate planning, as well as trust and estate litigation. He quickly discovered a passion for helping clients with matters of such great importance to them and to their families' futures, but he also knew he was at his best as an attorney when developing litigation strategies and implementing them in the courtroom. Scott went on to build a decades-long career with a focus on trust and estate litigation, later becoming managing partner of a boutique probate litigation firm in Dallas.

In 2023, Scott and his colleagues joined Husch Blackwell with a goal of offering clients greater legal resources through the firm's national platform. He continues to represent clients in both trust and estate matters, handling cases involving contested wills, allegations of undue influence or incompetency, and other related controversies. He also assists in situations involving highly complex estates, such as those funding large numbers of trusts or with ambiguities requiring family negotiations and agreements. While traditional trust and estate litigation forms the majority of his practice, Scott has experience with guardianship matters as well.

Scott's superb knowledge of the law and the rules of court, along with his continued persistence, won my case.

— Client Feedback

Industry

Financial Services & Capital Markets

Services

Private Wealth

Trust, Estate, & Fiduciary Litigation

In addition to serving as an advocate for clients, Scott is also an accomplished mediator. He is frequently appointed by the courts or recommended by the lawyers to help other parties settle their trust and estate disputes. He has mediated more than 450 cases.

A sophisticated legal strategist and trial lawyer, Scott is devoted to advocating for clients, whether through negotiation or at trial, and he understands how significant these cases are to clients – whether they are individuals or institutions. However, he is perhaps best known for his gift for client communication: clients appreciate how well he explains their legal rights and the likely outcomes of their cases, as well as his dedication to keeping them informed and aware as he navigates complex processes on their behalf.

Scott is a frequent speaker, author, and contributor to key trust and estate legal and educational organizations, including as an elected American College of Trust and Estate Counsel Fellow.

Experience

- Represented trustee in complex trust lawsuit involving trusts with combined assets valued at more than \$100 million in stock of a billion dollar plus privately held company. Matter was successfully settled through mediation.
- Obtained summary judgments in multiple will contests.
- Obtained a favorable settlement for beneficiaries of \$40 million estate that would have otherwise gone to the assistant executive director of the retirement community where the decedent resided.
- Obtained a favorable settlement on behalf of beneficiary, executor, trustee, managing member, and general partner of complex estates holding assets valued more than \$25 million.
- Obtained a guardianship to protect elderly widow and her estate valued at approximately \$100 million.
- Obtained a judicial partition of a 300-acre development site.
- Obtained a judicial discharge for co-trustees of \$6m trust with disgruntled beneficiaries.

Recognition

- Thomson Reuters' *Texas Super Lawyer*, 2006-present
- *D Magazine*, Best Lawyers in Dallas, Probate: Trust & Estates, 2021-present
- BL Rankings' *The Best Lawyers in America*®, 2008-2026
 - Litigation – Trusts and Estates, 2011-2026
 - Best Lawyers® Litigation – Trusts and Estates "Lawyer of the Year," Dallas, 2015, 2022

Education

- J.D., Southern Methodist University Dedman School of Law
- B.A., Columbia University

Admissions

- Texas
- U.S. District Court, Northern District of Texas
- U.S. District Court, Southern District of Texas
- U.S. District Court, Eastern District of Texas
- U.S. District Court, Western District of Texas
- U.S. Court of Appeals, Fifth Circuit
- U.S. Supreme Court
- U.S. Tax Court

Community Leadership

Scott has previously been on the board of the Southwestern Diabetic Foundation and participates in Dallas Bar Association activities.



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Mediation of Trust, Estate, and Fiduciary Disputes

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Introduction

CNN recently reported: “[O]ver the next twenty years, Millennials are poised to inherit some \$90 trillion of assets and become the richest generation in history.” Anna Bahney, [*Millennials Stand to Become the Richest Generation in History, After \\$90 Trillion Wealth Transfer*](#), CNN (Mar. 1, 2024, 8:00 AM). This will undoubtedly result in increased litigation involving estates, trusts, and guardianships, leading to more mediation. Additionally, during the COVID-19 pandemic, there was an increase in overall mediation numbers due to the difficulty in accessing the courts to resolve disputes. Furthermore, anticipated, and actual legislation impacting estate taxes, grantor trusts, and other estate planning vehicles has led to a flurry of estate planning that will likely be ripe for litigation soon, thus increasing mediation.

Mediation of trust, estate, and fiduciary disputes is markedly different from almost any other type of litigation. Whether it be a will contest, a lawsuit against a trustee for breaching fiduciary duties, claims against a longstanding CPA who served as executor, or a business divorce between partners, these cases are emotionally charged. These examples of trust, estate, and fiduciary litigation all involve disputes arising out of longstanding relationships between individuals who, at some point, liked, trusted, and even loved one another. Due to the emotional aspect of this kind of litigation, it is more important than ever to prepare your client, yourself, and your mediator to have the best chance of resolving the dispute.

While every lawsuit is unique, there are common themes in every trust, estate, and fiduciary case. For instance, most families that end up in litigation had a strong patriarch or matriarch who grew or at least was a steward of the family fortune and held the family together. When this individual is gone, there is a vacuum that the children and others try to fill by exercising power and control. Overlaid on top of this dynamic is the animosity and bitterness that typically exists in dysfunctional family systems. This same dysfunction can also manifest itself in closely held business divorces where changing circumstances and pressure are exerted on the principals, resulting in trips to the courthouse.

Another common element is the existence of blended families. Siblings in a nuclear family are more likely to get along with each other after the death of their parents, but a blended family sometimes lacks the trust and strong relationships within the next generation that might otherwise exist.

Prepare Your Clients

Imagine all the extensive ways you prepare your client for trial, yet 90-95% of all cases settle before trial. Why not put that same emphasis on preparing for mediation? After all, this may be your client’s only—or at least most important—lawsuit.

Explain to your client that I am not the judge or the arbitrator. I will not decide anything. Explain how the process works, especially what to expect during the private caucuses. Ensure your client understands the protections afforded to and the confidentiality of mediation. Your client will also need to understand that my role is to settle the case. I will be trying to create and keep momentum moving towards that goal. To do that, I will need to change people’s perspectives about the case, cast doubts, determine what people really believe about their case, and discover where the real bottom line is. I will also be exploring the various dynamics at work and finding out who is the most pliable. Whoever that is will get the most pressure.

Your clients will need to keep an open mind and be flexible with their approach and analysis. As I tell my clients before mediation: “Don’t draw lines in the sand.” They will need to avoid emotional reactions,

make smart business decisions, and try to understand the perspective of their opponent. They do not have to agree with the other side's perspective, but they need to at least try to understand it. Because if they do not settle, how the jury perceives the facts will determine the outcome.

Your clients also need to understand that mediation is a process. As tempting as it may be, you cannot just come in with your best offer and expect the other side to take it. Nobody ever capitulates. The parties need to adjust their expectations by being told "no."

Finally, you and your client must know what the various outcomes will look like if you try the case. What is your best-case scenario or your home run? What does it look like if you strike out? What is the current makeup of the estate? What is the most realistic value of the business? Who are the potential buyers in that market? What is it going to cost to go to trial, file an appeal, defend against an appeal, etc.? What is your damage model?

Remember the adage: "The perfect settlement is one where everyone goes away mad."

The Mediation Paper and Other Pre-Mediation Communication with Me

Do not just send pleadings to me. It is lazy. Think of the irrelevant things in your pleadings. Most mediators do not want to have to read all of that, and I certainly do not. Instead, provide a clear, concise, and informative overview of the case. Introduce your clients and explain how they are related to the other parties. Describe how the business started and who did what. Provide some backstory and explain what the issues are. Tell me how much is at issue and what the assets consist of. Are they liquid or comprised of stock in a closely held business? Show me the operative language in the will, trust, partnership agreement, or other key documents.

If you prepare me as your mediator, I will be much more prepared when I talk with the other side during the first substantive meeting. They will know I am prepared because of what you have given me. They know what they gave me, but if I am not following their "script," they will know you are prepared, and you, in turn, prepared me.

People often give me a PowerPoint or a presentation with deposition clips, exhibits, and other snippets about the case and then ask if they should give them to the opponent. Most of the time, I tell them to send it to the opposing party. It shows you are organized, prepared, and ready to proceed. You want the other side to see what their testimony looks like, what the documents look like, and what other circumstances might look like. While you cannot guarantee opposing counsel will share with their client what you send, they certainly cannot share what you do not send.

Do not think you will show up at mediation, surprise your opponent with some key fact or piece of evidence, and have them capitulate on the spot. Surprises at mediation never go over well and typically delay the resolution. You will ultimately have to produce whatever evidence you have that you think is so good, so why not get it to the other side in advance of the mediation so they have time to evaluate it?

Even if you do not have time to prepare a paper for me, at least call me and let us talk about the case. If we have never worked together, it gives us a chance to get to know each other and develop some rapport. You can also give me the backstory, tell me about your client, and let me know if there are any issues I need to be aware of that might help or hinder the process.

Let me know about all other prior settlement negotiations. Tell me who offered what, when, and what the response was. It is imperative I know in whose court the ball is so I do not spend extra time sorting out whose turn it is to make the next offer. There is nothing worse than spending several hours arguing over who should make the first move.

Consider preparing a mediation statement or position paper for me and the other side as well. Much like the PowerPoint presentation I mentioned above, a well-crafted position paper that you also send to your opponent conveys the message you have analyzed the case thoroughly, you take the process seriously, and you will be prepared for trial if not successful at mediation. While the communication is protected by [TEX. R. EVID. 408](#), and you do not have to worry about your words being used against you, a certain amount of discretion is still required if you do this.

Put Down the Sword

Do not get your client fired up about winning when we are there to try to resolve the dispute peacefully. Do not come in and tell me what a great case you have, how you are going to crush the other side, and how the court will grant you every item you are seeking in damages. Unless you have guaranteed, in writing, that your client will prevail, it is of little value to posture.

No lawyer in their right mind can predict what a judge or jury will do. We have all lost cases we thought we would win, and we have all won cases we thought we would lose. If you start talking about how you will win, I will politely point out your inability to accurately predict the future, and you will lose face in front of your client. Remember, mediation is a time for peace, and there will be a time for battle if you fail at mediation.

Let Your Client Talk

Let your client talk directly to me, let them tell me how they got to this point, what they think caused it, and what they think is going to motivate the other side. I need to be able to develop a rapport with them, and I cannot do it when you do all the talking. On the other hand, if I ask you a softball question, like what your fees will be if you go to trial, tell me.

Let Your Client Vent

Because litigation is so emotional, clients often get wound up, animated, and frankly angry. Lawyers often intervene and try to get their clients to calm down, want them to take a break, or in some way encourage clients to bottle up their emotions. That is not necessarily a good thing. Your client has been talking with you for quite some time before you get to mediation. Your client needs a new face to talk to. They need a new audience to vent their frustrations to. Let them do it with me. Oftentimes, this venting is cathartic, and clients will calm down and focus on resolving the dispute in a more rational manner. If they cannot seem to stop venting, then I will step in when appropriate and help slow them down.

When You Do Talk, Be Honest

This should go without saying. However, I know a mediator whose checklist to prepare for mediation reminds him: “Take with a grain of salt what counsel says.” However, it is imperative you be candid with me—and your client—about the weaknesses of your case, just like you will be strident about the strengths of it. Mediation is all about controlling cost and risk. If you cannot adequately analyze the risk, how will you control it? And, if I am asking about risks—and you know I will—when you have not adequately prepared your client for that discussion, it is not going to look good.

Do Not Routinely Kick Me Out of the Room

Almost every time I convey an offer, we will chat about it for a little while, and the lawyer will say, “Give us a minute,” and politely kick me out of the room. Why do that? The more you share with me, the better able I am to guide the parties to a resolution. Consider letting me stay and observe the process you and your client undergo to formulate the response. I can join in the discussion or be the proverbial fly on

the wall if that makes you and your client feel more comfortable. As I will be the only person in all the breakout rooms, I can add a unique perspective to the process of formulating the proposal. Why not take advantage of that?

Do Not Allow Your Clients to Post Anything About the Case on Social Media During Mediation

This is rather obvious and should go without saying, but I can assure you people do it. I mediated a case where the children tagged their stepmother with the Kanye West song, Gold Digger, on Facebook during mediation. It did not help. Do not let your clients do it.

Do Not Resist a General Session

When I talk about a general session, I am referring to one where everyone gathers in one room—or on one computer screen—so I can explain the process, make commitments to the parties, and get their commitments back. I am not talking about the old general session where the lawyers would give a closing argument and annoy everyone so much it would take the mediator three hours to get everyone back on track. It is not that I have anything particularly brilliant to say, but rather, having everyone hear what I have to say at the same time is extremely helpful. It allows me to develop rapport with everyone at the same time and, hopefully, to begin to build trust with your clients. It is also helpful for the parties to see each other and to understand the process is real. Sometimes, mediation seems abstract and having the adversaries in the same room at the beginning grounds them in reality. It also helps from a psychological standpoint to have the parties hear the other side make the same commitments to me that I ask of them. And when I say I do not want the lawyers to make speeches, I am serious. There may be an occasional case—but they are few and far between—where it is appropriate, and some mediators will tell you it always is. I do not think it is a good idea.

When I tell people my plan for a general session, they inevitably say, “I am not going to sit in the same room with [fill in the blank].” My response is that you can certainly sit in the room with them for ten minutes to settle this case. Otherwise, you are going to be sitting in conference rooms and in a courtroom with them for a lot longer. Usually, they agree. Occasionally, the plaintiff or the will contestant will tell me they will get too upset or anxious if they must see the other side. Pointing out the obvious fact that plaintiffs are the ones who started the fight, and they should not have done it if they are not willing to look someone in the eye usually gets them over the hurdle.

Do not tell your client they will not have to see the other side during mediation—especially without talking to me first. And when I suggest the general session, do not resist unless there is a good reason. If you have a good reason for not wanting to, you should have brought it to my attention well beforehand.

Know Where You Are Going to Start

Know what your opening move is going to be. Whether it is the initial opening of the negotiations or your response to your opponent’s opening move, you know you are going to be making an offer or demand at some point in the day. You can generally anticipate what the other side is going to do, even if it is to demand their best day in court. Be prepared, generally, to make your offer. This involves meeting with your clients ahead of time, reminding them of prior settlement discussions, setting goals and expectations, going over your damage model, sharing the possible outcomes, and mapping out a game plan to get into an acceptable settlement range. One of the primary reasons for delay in mediation is the lawyer who says, “Give me a minute to see what my client wants to do.” This is code for: “I have not talked with my client yet, and we need to decide what our offer/demand is going to be.” Sort that out before you walk into my office.

Bring Lots of Lists

The mediation of most trust, estate, and fiduciary cases involves dividing up the estate, trust, or assets of the business. To divide it, everyone must know how big it is and what the assets are. Plan and prepare various spreadsheets that will allow you to evaluate the proposed allocation of assets and their values. Use an Excel spreadsheet. It does not have to be fancy. It can be as complex as you wish, or it can be as simple as the following table created for a hypothetical estate. You can easily move assets into one column or the other, depending on who gets what and/or how it will be divided, so you can evaluate the settlement positions.

Asset	Value	Us	Them
Homestead	\$1,250,000		
Lakehouse	\$750,000		
Minerals	\$5,000,000		
Acme Company	\$12,700,000		
Ranch	\$4,000,000		
Antique Cars	\$1,000,000		
Total	\$24,700,000		

While this kind of spreadsheet is essential to understanding and processing the big picture, there are often other assets that are more voluminous and/or sentimental in nature. These assets can include firearms, artwork, antiques, pots and pans, furniture, and other collectibles. These are generally addressed after the big-ticket items and usually later in the evening or even the early morning. You absolutely must have lists of those ready to discuss. Having a list ready before makes it so much easier to address at mediation. If you have one with photos included or even an appraisal, it makes the process go much more smoothly. We have even divided “pots and pans” by attaching a list and putting initials next to each item to memorialize who gets it. If you have that list of items ready to go, it makes the process that much faster.

Know Your Fees and Expenses

There are various ways to recover attorneys’ fees in trust, estate, and fiduciary litigation, and they are always a factor. You must come into mediation knowing what your total fees are thus far, how much your client has paid, what is outstanding, and what you estimate your fees and expenses will be going forward—through trial and even on appeal. I will have that fee talk with you and your client at some point during the mediation, and the better prepared you are for it, the more effective the conversation will be.

Zoom and Remote Mediation

With COVID, the use of Zoom or Microsoft Teams for mediation became commonplace. If you are one of the few who has not done one yet, try it. You will be pleasantly surprised. The mediator will have created breakout rooms, which are simply virtual conference rooms that work just as if you were at the mediator’s office sitting in a conference room there. You and your client will be able to communicate freely and privately in the breakout room. And just like in a “real” mediation, the mediator will pop in and out and talk with you and your client. You can use the Share Screen feature to show the mediator whatever information you might want to use, and the parties can even edit the settlement agreement on the screen. Your client can execute the settlement agreement using DocuSign. They can also print the signature page, sign it, and return it as a PDF or even as a photograph from their phone. In short, remote

mediation has proven to be an effective way to resolve disputes. And, with parties scattered about the state, country, and even the world, being able to “attend” mediation without traveling is here to stay.

By now, everyone should be well-versed in how to use Zoom and Teams. If you are not, play with it. You can get a free account that is good for limited periods of time or an unlimited account for a nominal price. Use it to meet virtually with your family and friends and familiarize yourself with it. Obviously, you will need a quiet place, good quality, reliable internet, and a webcam. Most of the cameras on laptops are certainly good enough for mediation, but you can buy a quality camera that plugs into your computer for less than \$100. Make sure you have good lighting from the front. Experiment and make sure you like the way the platform works.

Conclusion

If you take the process seriously and prepare yourself and your client for it like you would a trial, you automatically increase the odds you will reach a settlement. The most important thing you can do is communicate with me. Whether that is in writing, over the phone, or over a cup of coffee or lunch a few days before, it does not matter. I would much rather know what we are dealing with ahead of time than you simply show up at my office, tell me this is a will contest or partnership dispute, and explain that I can figure it out as we go. The second most important thing you can do is prepare your client for the process and have a realistic idea of where you want to end up. I look forward to helping you resolve your next trust, estate, or fiduciary dispute.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 518

October 15, 2025

A Lawyer's Duties to Avoid Misleading Communications When Acting as a Third-Party Neutral Mediator

Rule 2.4 of the ABA Model Rules of Professional Conduct addresses a lawyer's duties when acting as a third-party neutral and defines third-party neutral as a lawyer who assists two or more persons – who are not clients of the lawyer – to reach a resolution of a dispute.

Under Rule 2.4(b), a lawyer acting as a third-party neutral must inform unrepresented parties that the lawyer-mediator does not represent them. Paragraph (b) also requires the lawyer-mediator to explain the difference between the lawyer-mediator's role as a third-party neutral and the role of a lawyer representing a client in a mediation when the lawyer knows or reasonably should know that the parties do not understand the mediation process. Therefore, in most instances, unless the parties are sophisticated consumers of mediation services, the lawyer-mediator should ensure that all persons involved in the mediation understand the role of the lawyer-mediator.

Although a lawyer is not subject to many of the Model Rules when acting as a third-party neutral mediator, a lawyer-mediator is subject to Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. A lawyer-mediator may not give credence to statements the lawyer-mediator knows to be false or personally make statements that the mediator knows to be false.

I. The Lawyer-Mediator's Duties under Model Rule 2.4 When Serving as Third-Party Neutral

The Preamble to the ABA Model Rules of Professional Conduct explains that lawyers play various roles in the legal system. Their usual role is to represent clients, but one alternative is to “serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter.”¹ Rule 2.4, titled “Lawyer Serving as Third-Party Neutral,” defines a third-party neutral as a lawyer who assists two or more persons “who are not clients of the lawyer” to reach a resolution of a dispute. This differs from the lawyer's role in circumstances in which the lawyer represents one or more clients.

Most provisions of the Model Rules address a lawyer's role in representing one or more clients. Some of these govern the client-lawyer relationship. *See, e.g.*, Rules 1.1 through 1.10, 1.13, 1.14, 1.16, 2.1, and 2.3. Other Model Rules address lawyers' interactions with the tribunal, other counsel, or third parties, but all in the context of representing a client. *See, e.g.*, Rules 3.1-3.9, 4.1-4.3. None of these Model Rules applies to a lawyer-mediator. Instead, Rules 1.12 and 2.4 specifically address lawyers serving as third-party neutrals. In addition, other Model Rules apply to lawyer-mediators

¹ ABA MODEL RULES OF PROF'L CONDUCT, Preamble [3].

simply because those Model Rules govern lawyers' conduct regardless of whether the lawyer is serving in a representational role. *See, e.g.*, Model Rules 8.1-8.4.

Paragraph (b) of Rule 2.4 imposes two duties on the lawyer-mediator: to “inform unrepresented parties that the lawyer is not representing them,” and “[w]hen the lawyer knows or reasonably should know that a party does not understand the lawyer’s role in the matter, the lawyer shall explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.” Particularly when a party to a mediation is unrepresented, fulfilling these duties ensures that each party to the mediation understands that the lawyer-mediator is not representing the party, is not seeking to protect the party’s best interests, as would a lawyer in a legal representation, and is not assuming the duties that a lawyer would ordinarily have to a client under the Model Rules.²

Comment [3] to Rule 2.4 explains that lawyers serving as neutrals “may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer’s service as a client representative.” It notes that “[f]or some parties, particularly parties who frequently use dispute-resolution processes, this information [that the lawyer does not represent anyone in the matter] will be sufficient. For others, particularly those who are using the process for the first time, more information will be required.” The Comment further advises:

Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer’s role as third-party neutral and a lawyer’s role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.³

Unless the parties are sophisticated consumers of mediation services, it is prudent for the lawyer-mediator not only to inform all parties that the lawyer-mediator does not represent them but also to afford them an opportunity to discuss what this means.

² Mediation, like all alternative dispute resolution processes, is generally conducted subject to other rules and policies that may include state statutes, court rules, or procedures promulgated by the organization conducting the mediation. These other mediation rules will also inform the lawyer-mediator’s obligations. *See, e.g.*, AMERICAN ARBITRATION ASSOCIATION, AMERICAN BAR ASSOCIATION & ASSOCIATION FOR CONFLICT RESOLUTION, MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Sept. 2005), https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standard_s_conduct_april2007.pdf. For example, Standard III provides: “A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator’s impartiality.”

³ The requirement that a lawyer inform persons who are not clients about the lawyer’s role in a matter is not unique to Rule 2.4(b). In other contexts, lawyers have similar obligations to avoid confusion about their role. For example, Rules 4.3, 5.7(a)(2), and 1.13(f) also address a lawyer’s obligation to disclose to some persons with whom the lawyer is dealing that the lawyer will not owe that person the duties imposed by the Model Rules applicable to a lawyer who is representing a client.

II. The Lawyer-Mediator's Duty to Avoid Statements that Imply that the Lawyer-Mediator is not Neutral but is Seeking to Achieve a Party's Best Interest

Under the Model Rules, a lawyer must act in the client's interest. Various provisions of the Model Rules give expression to that responsibility, however, that is not the role of a lawyer-mediator. The lawyer-mediator's role is to assist the parties in resolving their dispute, regardless of where the interest of a party may lie.

Once a lawyer-mediator explains the role of a neutral, as distinct from the role of a lawyer for one or more clients, the lawyer-mediator must not depart from that role. Specifically, the lawyer-mediator should be vigilant in conducting the mediation to avoid creating the impression that the lawyer-mediator will be providing the protections of the client-lawyer relationship. For example, if the lawyer-mediator explains that a mediator's confidentiality obligation under the applicable mediation rules,⁴ the lawyer-mediator should ensure that the parties understand that the source of the obligation is not a client-lawyer relationship, and that the attorney-client privilege does not apply.

The obligation to avoid misleading the parties about the lawyer-mediator's role also means that, in conducting the mediation, the lawyer should not state that the lawyer-mediator is acting to achieve a party's best interest or that a proposed settlement is in a party's best interest. Otherwise, the party may rely on the lawyer-mediator's assurance, mistakenly believing that the lawyer-mediator is acting in the party's best interest as the party's lawyer.⁵ The lawyer-mediator may, of course, provide truthful information that helps the parties to conclude for themselves, or even makes it obvious to them, whether a proposed resolution is in their best interest, given their objectives.

Likewise, if the give-and-take in a mediation includes a discussion of how the law applies to the parties' dispute, the lawyer-mediator should avoid communicating in a manner that might be taken as rendering legal advice, or otherwise suggesting to a mediation party that the lawyer-mediator's role is to protect or advance a party's legal interests or to help the party to attain a particular desired result. It is not misleading, however, to provide legal information or to discuss the parties' respective views of how a tribunal would resolve a legal or factual question.⁶ A mediator may offer an opinion as to how a tribunal is likely to rule on an issue, but the lawyer-

⁴ See, e.g., MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 2. For a helpful discussion of the interaction of the Model Rules with other rules applicable to mediation (which other rules are beyond the scope of this opinion), see John M. Barkett, *Ethics in ADR – A Sampling of Issues*, 9 AM. J. MEDIATION 9 (2016).

⁵ Similarly, the Committee recently discussed the responsibility of an organization's lawyer, when interacting with the organization's individual constituents, to avoid misunderstandings about the lawyer's role. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 514 (2025).

⁶ For a discussion of the distinction between legal information and legal advice (and the advisability of accompanying legal information with a statement that the legal information is general in nature and not intended as a substitute for personal legal advice), see ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 10-457 (2010).

mediator should not state or imply that a settlement is in the party's best interest *because* a tribunal is likely to decide adversely to the party.⁷

If a party, particularly an unrepresented party, requests that the mediator provide legal advice, the mediator should again explain the mediator's role and advise the party to seek legal advice from counsel of their choice.

III. The Lawyer-Mediator's Duty to Avoid Dishonesty, Fraud, Deceit, and Misrepresentation When Communicating with the Parties

The role of the mediator, like any third-party neutral, turns on being credibly neutral. To resolve disputes, the lawyer-mediator will be conveying information to the parties. The lawyer-mediator will often provide mediation-appropriate insights when conveying this information to help the parties evaluate whether to settle and, if so, on what terms.

At the same time, there are limits on what a lawyer-mediator may say to the parties to assist them in making this determination. Rule 8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. This Model Rule applies not only when a lawyer represents a client but also to the lawyer's personal and professional conduct outside of the practice of law. Thus, notwithstanding the fact that they are not representing clients in the mediation, lawyer-mediators have an ethical duty under Rule 8.4(c) to avoid engaging in conduct that is dishonest, fraudulent, deceptive, or misleading.

This raises the question of whether a lawyer-mediator may engage in exaggeration or concealment of various kinds in an effort at persuasion. For lawyers representing parties in negotiations, untrue statements are not entirely forbidden. Rule 4.1 forbids a lawyer "[i]n the course of representing a client" from "making a false statement of material fact or law to a third person." However, Comment [2] to this rule recognizes that "[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact." Among the examples are statements regarding "a party's intentions as to an acceptable settlement of a claim." ABA Formal Ethics Opinion 06-439,⁸ which addresses a lawyer's obligation when representing a client in a mediation (but explicitly does not address the ethical duties of a lawyer-mediator, who does not represent any party), provides further examples as follows:

[S]tatements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's "bottom line" position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatements of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the

⁷ If a mediator were to provide legal advice to a party in the mediation, the mediator would risk forming a client-lawyer relationship with that party (*see, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §14 (2001)). Doing so is incompatible with the mediator's role as a neutral.

⁸ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-439 (2006).

negotiation. Such statements generally are not considered material facts subject to Rule 4.1.

Lawyers representing negotiating parties have the same leeway to make immaterial false statements under Rule 8.4(c) as they have under Rule 4.1. (This is not to suggest that this Committee encourages doing so, but simply that the Model Rules do not forbid it.)

A lawyer-mediator does not have the same leeway as a lawyer negotiating for a client, however, because a lawyer-mediator does not represent a client in the mediation but serves as a third-party neutral under Rule 2.4. Therefore, neither Rule 4.1 nor the above-noted Comment to this rule applies to the lawyer-mediator.⁹

A mediator's statement may violate Rule 8.4(c) even if a similar statement by a lawyer representing a party in a negotiation or mediation would not, because the lawyer-mediator's statement may be taken as true and influence a party's decision. Rule 8.4(c) applies differently to lawyer-neutrals than to lawyer-advocates because their different roles create different expectations. False statements that would not be regarded as statements of "material fact" under Rule 4.1, or violate Rule 8.4(c), coming from a party's lawyer are likely to be taken at face value coming from a lawyer-mediator precisely because of the lawyer-mediator's role as a neutral.

Given the lawyer-mediator's neutrality, parties are likely to trust the lawyer-mediator to play it straight, and to not exaggerate or make false statements designed to lead the parties to an agreement. Framed differently, parties dealing with the opposing party or the opposing party's lawyer are expected to know that negotiating parties engage in "puffery" or exaggeration about certain matters, and to discount their assertions about such matters. But parties to a mediation, having been advised about the lawyer-mediator's neutral role, would have no similar reason to be on their guard when receiving communications from that individual.

Therefore, it follows that a lawyer-mediator must be both thoughtful and cautious in communicating information from one party to the other and in answering questions that may be asked about the information communicated or about the lawyer-mediator's views of the information. For example, a lawyer-mediator may not make a statement that the lawyer-mediator knows to be false that "this is the best offer the opposing party will make." The lawyer-mediator must be careful not to make misleading statements about the strength or weakness of a party's case. While a mediator may accurately convey statements from one party to another that may

⁹ ABA Formal Ethics Opinion 06-439 opined that lawyers who represent clients in a negotiation or caucused mediation may make "statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation 'puffing'" without violating Model Rule 8.4's proscription on making false or misleading statements. Formal Opinion 06-439 at footnote 19 states, "This opinion is limited to lawyers representing clients involved in caucused mediation, and does not attempt to explore issues that may be presented when a lawyer serves as a mediator and, in carrying out that role, makes a false or misleading statement of fact. A lawyer serving as a mediator is not representing a client, and is thus not subject to Rule 4.1, but may well be subject to Rule 8.4(c)." The footnote goes on to state "in our view, Rule 8.4(c) should not impose a more demanding standard of truthfulness for a lawyer when acting as a mediator than when representing a client." The lawyer-mediator may communicate statements made by the parties or their counsel as long as the lawyer-mediator makes clear the origin of such statements and that the statements do not represent an opinion of the lawyer-mediator.

include falsehoods that are not regarded as false statements of “material fact” under Rule 4.1, the lawyer-mediator may not give credence to those statements if the mediator knows them to be false by suggesting that the lawyer-mediator credits them or by implying that the opposing party should do so. Similarly, the lawyer-mediator must be precise and avoid any inappropriate gloss in describing to one party the position that the other party is taking. For example, as noted, it is improper, if untrue, to state that “this is the best offer the opposing party will make.”

IV. Conclusion

A lawyer-mediator does not represent any party to a mediation. Under Rule 2.4, lawyer-mediators must explain their role to mediation parties who are not represented or who do not appear to understand the mediator’s function and, where necessary, inform all parties of the difference between the role of a mediator and that of a lawyer representing a party. Based on the guidance in Comment [3], unless the parties are sophisticated consumers of mediation services, it is prudent for the lawyer-mediator not only to inform all parties that the lawyer-mediator does not represent them but also to afford them an opportunity to discuss what this means. In addition to other rules governing the duties of a mediator, the Model Rules require the lawyer-mediator to avoid communications that are dishonest, fraudulent, deceitful, or misrepresentative in violation of Rule 8.4(c).

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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CENTER FOR PROFESSIONAL RESPONSIBILITY

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MOTHER MAY I?

STATUTORY REQUIREMENTS AND PRACTICAL REALITIES OF DEPENDENT ADMINISTRATIONS

2026 North Texas Probate Bench Bar Conference

April 30, 2026

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DEPENDENT ADMINISTRATIONS

- WHY a Dependent Administration?
 - Minor Heirs in an Intestate Estate
 - All Heirs do not consent to an Independent Administration
 - Will Contests or no Executor under Will who can or will serve (and no consent among beneficiaries to an Independent Administration)
 - The Will does not contain proper language for an independent administration
 - An Administration needs to be created sooner than an heirship can be completed
 - Unsecured Debts that can potentially be barred

THE BOND AND THE OATH

- Prequalify the proposed Dependent Administrator with the bonding company
- Discuss Statutory Disqualification
- Amount of Bond—Value of Personal Property and estimated Income
- File Bond within 20 days of the Order (§305.004)
- File Oath within 20 days of the Order (§305.003)
- After filing of Oath and approval of Bond by the Court, Administrator can obtain Letters of Administration

IMMEDIATE ACTIONS

- Forward the Decedent's mail
- Obtain original Death Certificate
- Obtain an EIN for the Estate through the IRS website
- Close bank accounts and transfer/consolidate money into an Estate Bank Account
 - Consider an interest-bearing money market account and FDIC limits
- Secure real property
- Insure property
- Take possession of any valuable jewelry or other personal property.
- Safety deposit box? Inventory with witnesses

PRACTICE TIPS

- Become aware of Estate assets prior to qualification
- Become aware of status of property insurance and be ready to immediately take out an appropriate policy
 - What if there is only Real Property in the Estate?
- Qualify as soon as possible, but do not qualify until you have information to know what you need to do immediately

INSURANCE

- Evaluate the type of insurance needed for the real property(s)
 - Owner Occupied Insurance
 - Renters Insurance
 - Require renter to carry renter's insurance on their personal property
 - Vacant Property Insurance

AUTHORITY WITHOUT COURT ORDER

- §351.052
- Pay Insurance Premiums—Real Property Insurance, Personal Property Insurance, and Liability Insurance
- Pay Taxes
- Pay Bond Premiums
- Pay Court Costs
- Release a Lien Upon Maturity of the Debt
- Vote Stocks by Proxy
- Pay Calls and Assessments

AUTHORITY WITH COURT ORDER

- §351.051
- Ask for permission for everything else
 - Monthly Allowance for Care and Maintenance of Property
 - Hiring Professionals
 - Selling Property
 - Abandonment of Property
 - Prosecuting and Defending Lawsuits
- File Applications for Authority with Invoices as Exhibits

PROHIBITED TRANSACTIONS

- Generally cannot purchase any estate property that you are selling on behalf of the Estate
- Exception for an executory contract signed by Decedent (§356.653)
- May purchase estate property if court determines that the sale is in the estate's best interest (§356.654)
 - Notice by qualified delivery method to distributees and creditors

INVESTIGATE ASSETS

- Forward the mail
- Pull IRS transcripts to identify property
- Pull Credit Reports
- Non-Probate Assets
 - Review signature cards for accounts to ensure that accounts are non-probate assets

THE INVENTORY

- §309.051/§309.052
- 90 days to file with the Court
- Identify all real property located in Texas
- Identify all personal property
- Value as of date of death
- Indicate whether separate or community property
- “Claims Due or Owing to Estate” does NOT mean claims *against* the Estate
- Sworn

FEDERAL INCOME TAXES

- File Form 56—Notice Concerning Fiduciary Relationship
 - Updates mailing address with IRS
- File Form 1310—Refund for a Deceased Taxpayer
- File Form 2848 – Power of Attorney and Declaration of Representative
 - Allows the CPA to obtain transcripts for the Decedent/Estate

FEDERAL INCOME TAXES

- Transcripts—Form 4506-T
 - Record of Account Transcript—Current and 3 Prior Tax Years
 - Shows line items from 1040s and schedules
 - Helps you identify what tax returns may need to be filed for prior years
 - Wage and Income Transcript
 - Shows W-2, 1098, 1099 and other items reported to IRS
 - Helps you to identify property of the Estate

FEDERAL INCOME TAXES

- Request copies of tax returns that have been filed by the Decedent
 - Form 4506—Request for Copy of Tax Return

FEDERAL INCOME TAXES

- Final Form 1040 for the Decedent for year of death
 - Pull Wage and Income Transcript to see income reported to IRS
- Itemized Deductions are limited on a Form 1040
 - Review bank and financial records for the Decedent to locate deductions
 - If the person was residing in a facility or had in home care, these substantial expenses may be deductible as medical expenses (subject to being deductible only to the extent they exceed 7.5% of AGI)

FEDERAL INCOME TAXES

- Form 1041
 - Consult a CPA each year, but generally file each year the Estate has income over \$600 and the tax year when Estate property is sold
 - Attorneys Fees and Fiduciary Fees are generally deductible

PRACTICE TIPS

- Think about timing of payments for deductions
 - Property taxes? Pay in December or January?
 - Timing of payment of Attorneys Fees/ Fiduciary Fee
- Is a partial distribution advisable to carry out income to lower tax bracket beneficiaries?
- Close interest bearing accounts near end of administration so no additional tax returns have to be filed?

NOTICE TO CREDITORS

- Notice to Creditors (§308.051)
 - Within 1 month of receipt of letters, must provide notice to anyone who has a claim against the Estate to present it within the period prescribed by law
 - Published in a newspaper of general circulation in the county where Letters are issued

NOTICE TO COMPTROLLER

- Notice to Texas Comptroller (§308.051)
- Within 1 month of letters, provide notice to Comptroller if the Decedent remitted or should have remitted taxes administered by Comptroller
 - Same content as Notice to Creditors
 - Applies when Decedent owned or operated a business at time of death

PERMISSIVE NOTICES TO UNSECURED CREDITORS

- Notice to Unsecured Creditors (§308.054)
 - **MAY** give notice by a qualified delivery method, to any unsecured creditor who has a “claim for money” against the Estate
 - Creditor must present claim before 121st day after date of receipt of notice or claim is barred, unless already barred by general statutes of limitation (§355.060)
 - Credit card companies, collection agencies, etc.

UNSECURED CLAIMS

- Present to the Administrator (§355.001)
- Deposit with Clerk of Court (§355.002)
 - Clerk is required to notify Administrator
 - What if you don't get notice?

UNSECURED CLAIMS

- §355.004
 - Claim must be supported by an affidavit that states that the claim is just and that all legal offsets, payments, and credits known to the affiant have been allowed
 - If claim not founded on a written instrument or account, must state the facts upon which the claim is founded
 - Blanket statement of amount owed not good enough

UNSECURED CLAIMS

- §355.059
 - Personal representative specifically prohibited from approving a claim for money against an Estate unless the claim is supported by an affidavit that meets the requirements of §355.004(a) and §355.005

UNSECURED CLAIMS

- Must allow or reject claims within 30 days after date presented (§355.051)
- Presumed rejected if no action in 30 days
 - If later established by suit, costs shall be taxed against Administrator, individually (§ 355.052)
 - Can be removed on the written complaint of any person interested in the claim
 - Very important to timely approve or reject!

SUIT ON REJECTED CLAIM

- When claim is rejected or deemed rejected, claimant must file suit no later than 90 days after rejection, or the claim is barred (§355.064)

AMENDED CLAIMS

- Nothing in Estates Code that allows a creditor to amend a claim or discusses how to handle them
- After rejection, creditor likely must file suit within 90 days, and cannot amend rejected claim
- Still good practice to reject amended claims

PRACTICE TIPS

- Creditors usually do not comply with statutory requirements.
- § 308.054 and § 355.060 may be effective way to bar claims
- Do not waste time talking to unsecured creditors on the phone—
They will call endlessly!
- Try to negotiate with creditors
- Use Inventory to show unsecured creditors who are last in line
that nothing is left for them

REQUIRED NOTICES TO SECURED CREDITORS

- Notice to Secured Creditors (§308.053)
 - Within 2 months of receiving letters, must give notice to anyone who may have a claim against the Estate which is secured by Estate property
 - Common Examples include real estate which is secured by a mortgage / vehicles with outstanding loans

SECURED CLAIMS

- §355.151 and §355.152
- 6 months after letters are granted or 4 months after required notice is received, whichever is later, a secured creditor must elect if he chooses a “matured secured claim” to be paid in the due course of administration
- If no election is made, claim shall be a “preferred debt and lien”

SECURED CLAIMS

- Preferred debt and lien status means that a creditor can only take his collateral, and cannot take a deficiency from the Estate (§355.154)
- Matured secured claim status means that the claim is paid in the due course of administration of the Estate as a Class 3 claim (§355.153)

PRIORITY OF CLAIMS

- §355.102
- Class 1—Funeral expenses and expenses of last illness not to exceed \$15,000 for each
- Class 2—Expenses of Administration / Unpaid Expenses of Guardianship
 - Includes attorneys' fees and expenses incurred by PR in connection with the administration of the Estate and in connection with defending a contested will

PRIORITY OF CLAIMS

- Class 3—Matured Secured Claims for Money, including tax liens, to the extent it can be paid out of the proceeds of the property subject to the lien
- Class 4—Child Support
- Class 5—Taxes, Penalties and Interest related to franchise taxes, coin operated machines, sales and use taxes

PRIORITY OF CLAIMS

- Class 6—Claims for Cost of Confinement
- Class 7—Claims for Repayment of Medical Assistance Payments by the State (MERP)
- Class 8—All other claims (unsecured creditor claims)

PRIORITY OF CLAIMS

- § 355.103
- Class 1 claims are limited to \$15,000 (Funeral expenses and expenses of last illness)
- Allowances made to the surviving spouse and children are paid after Class 1 claims
- Expenses of Administration are paid right after Allowances

PRIORITY OF CLAIMS

- US Government Claims
 - Not discussed in Texas Estates Code
 - Claims of US Government must be paid before all other debts of a Decedent (31 U.S.C.A §3713(a))
 - Administrator is personally liable for failure to give priority to these claims

PRIORITY OF CLAIMS

- US Government Claims
 - Government claims do not take priority over funeral expenses and expenses of administration as these are not “debts” of the Decedent
 - *United States v. Weisburn*, 48 F. Supp. 393 (E.D. Pa. 1943)
 - Family Allowance takes priority over Government claims
 - *Schwartz v. Commissioner*, 560 F.2d 311 (8th Cir. 1977)

SALE OF REAL PROPERTY

- §356.251
- Must ask for Court approval
- Sale permitted if necessary or advisable to:
 - Pay expenses of administration, funeral expenses, expenses of Decedent's last illness, allowances, and claims against the Estate (§356.251)
 - Dispose of an interest in estate real property if selling is in the Estate's best interest (§356.251)

SALE OF REAL PROPERTY

- §356.252
- Contains specific contents of the Application for Sale of Real Property
 - Must be accompanied by Affidavit showing the condition of the Estate, claims, and Estate property available to pay claims
 - Ask the Court to approve hiring of a real estate agent and terms of the contract with such agent
 - Attach the proposed Listing Agreement to the Application

SALE OF REAL PROPERTY

- §356.253
- Citation must be issued to all persons interest in the Estate and must be served by posting
 - Citation indicates that the Court can act as soon as the first Monday after 10 days from date of posting
 - Keep interested persons informed of the sale and proposed list price prior to filing for sale

SALE OF REAL PROPERTY

- §356.254
- If an Opposition is filed, the Court is required to hold a hearing
- If no Opposition is filed, the Court can sign the Order allowing the sale without a hearing

PRACTICE TIPS

- Make sure that Administrator enters into sales contract only in their capacity as Administrator of the Estate, and not individually
- Not required to make normal seller's disclosure (Tex. Property Code §5.008 (e)(5)); make sure buyer willing to accept property as is
- Special Provisions Addendum
 - Confirm that contract not being made in your individual capacity
 - Indicates that sale subject to Court approval and that Court's failure to approve will not be a default by seller
 - No representation that all work to obtain Court confirmation of sale will be completed by closing date in the contract
 - Claim exemption from need to provide Seller's disclosure and confirm that buyer accepting property "AS IS"

SALE OF REAL PROPERTY

- After the property is under contract, file a Report of Sale in accordance with §356.551
 - Attach Settlement Statement and Contract to Report of Sale
- Court must wait five days after filing of Report of Sale before it can act (§356.552)
 - Contact Court to schedule hearing on Report of Sale as soon as possible after filing
 - Don't make closing date too quick!

PRACTICE TIPS

- If the bond has to be increased, it must be approved before or at the same time as the hearing on confirmation of sale
- If there are any concerns, have your broker at hearing to testify about fairness of sales price
- For the Report of Sale hearing, you also need to file an Independent Broker Letter confirming the range of the fair market value of the property based on its condition and other comparable sales

SALE OF PERSONAL PROPERTY

- §356.051 - After inventory approved, administrator shall apply for a court order to sell estate property that is “liable to perish, waste, or deteriorate in value, or that will be an expense to disadvantage to the estate if kept”
 - Certain property cannot be sold under this section (property exempt from forced sale, property subject of specific legacy, property needed to carry on a business)

SALE OF PERSONAL PROPERTY

- §356.101
- The Court may order sale of personal property if the court finds that the sale of such property is in the estate's best interest to pay expenses of administration, funeral expenses, expenses of last illness, allowances or claims against the Estate
 - Exempt property or property that is the subject of a specific legacy cannot be sold

PRACTICE TIPS

- Ask court to approve terms of agreement with estate sale company, including fee to be paid to such company
- Always also request the authority to donate or abandon any personal property that is unable to be sold (§351.051(a)(6))
- Provide beneficiaries with written notice of time and date of estate sale so they can purchase any items

ANNUAL ACCOUNTS

- § 359.001
 - Requirements of what must be contained in an Annual Account
 - No citation required, just a 10 day period before the Court can approve it.
- §359.003
 - Supporting vouchers required
- 359.101
 - Court can remove an Administrator on its on motion for failure to file an Annual Account

PRACTICE TIPS

- To prepare the Annual Account, make sure your client is aware you will require them to give you copies of all statements/cancelled checks for all bank/brokerage accounts of the Estate.
- DO NOT prepare the Annual Account based on second hand information from the client, but obtain all statements from them

SUCCESSOR ADMINISTRATOR

- §361.155
 - Inventory must be filed within 90 days
 - List and value property as of date of qualification
- If removal is the reason for the appointment of a Successor Dependent Administration, you need to potentially file the Final Account for the former Administrator and consider whether to try to collect on the bond

FINAL ACCOUNT

- §362.004
 - Requirements of what must be included in a Final Account
- §362.005
 - Citation by posting
 - Citation by qualified delivery method to interested persons
 - Affidavit or Certificate confirming citation and notice

CLOSE ESTATE AND DISCHARGE BOND

- Upon approval of Final Account, pay final expenses awarded
- Make distributions to interested persons
 - If interested person cannot be located, consider other options (Comptroller?—Chapter 551)
- Obtain Receipt or other proof of delivery of Estate property
- File a sworn Report of Compliance
- Submit and Order Closing Estate that also specifically releases and discharges the surety on the bond

THE MAGIC BULLET

- Motion for Instructions

**Better Requests, Better Responses:
Drafting Targeted Requests for
Production and Defensible Objections**

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**North Texas Probate Bench Bar
2026**



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Mark R. Caldwell routinely represents executors, guardians, and beneficiaries in complex estate, trust, and guardianship litigation. He has also represented fiduciaries in all phases of estate, trust, and guardianship administration. Mark is passionate about holding those who exploit others accountable and defending those who have been wrongfully accused of doing so. Mark enjoys the investigatory aspects of estate and trust litigation, including reviewing and analyzing medical, financial, and suspicious property records and transactions. Mark is committed to developing and maintaining strong, personal relationships with his clients. He endeavors to offer smart, pragmatic and cost-effective legal advice. Mark believes that the strongest winning position is one that is simple, direct, and understandable. While he strives to advocate strong, aggressive positions for clients, Mark also strives to resolve disputes in an ethical, reasonable, and cost-effective manner.

Biography

Mark was born on June 29, 1979 at Beaufort Naval Hospital in Beaufort, South Carolina where his father flew F-4 Phantoms at the nearby Marine Corps air station (although his mother had the more difficult job of raising three children). After having lived in South Carolina, North Carolina, Hawaii, and California, he returned to North Texas and attended Eastfield Community College before transferring to Southern Methodist University, where he earned a full academic scholarship. One year later, he attended the London School of Economics as a General Course Student. Mark earned his law degree from New England School of Law Boston, in Boston, Massachusetts in 2005. Mark is married and has three children. He enjoys spending time with his family, living an active lifestyle, and traveling.

Representative Experience

- Obtained favorable ruling after a bench trial invalidating attempts to redirect over three-million dollars in non-probate assets on the basis of lack of contractual capacity and lack of valid signature cards; successfully defended against surviving spouse's claims for reimbursement.
- Obtained favorable jury verdict and award of nearly \$3 million for breach of

contract and breach of fiduciary duties in hotly contested family dispute involving sale of oil and gas interests.

- Obtained favorable jury verdict for lack of testamentary capacity and undue influence in hotly contested will contest and favorable jury verdict for lack of contractual capacity and breach of fiduciary duty in same lawsuit regarding certain non-probate beneficiary designations.
- Recovered significant settlement in case involving fraud on the community and breach of fiduciary duty through the use of a power of attorney.
- Obtained favorable jury verdict in a guardianship case involving an elderly ward.
- Successfully defeated claim that will was executed without testamentary capacity on summary judgment.
- Obtained temporary injunction and temporary guardianship to halt rogue agent from abusing their powers of attorney.
- Obtained partial summary judgment against Trustee for breach of fiduciary duty involving the failure to account.
- Represents guardians, executors, and administrators in all phases of guardianship and estate administration.
- Routinely serves as attorney ad litem and guardian ad litem in guardianship cases.
- Routinely serves as temporary guardian in contested guardianship cases and as temporary administrator and administrator in decedents' estates.
- Successfully obtained ancillary estate administration in California to collect and administer assets and claims due and owing to Texas estate.
- Successfully transferred guardianships to and from California.

Public Speaking & Publications

- Co-Author: Understanding the Psychology of Inheritance: Successfully Theming an Inheritance Fight — 20th Annual Fiduciary Litigation Course (December 2025).
- Panelist: Taking Possession of Estate Assets — Probate Section, Dallas Bar Association (Spring 2025).
- Co-Author/Panelist: Incapacity Issues in Estate Planning, Guardianships, and Contested Matters — 30th Annual Advanced Estate Planning Strategies (Spring 2024).
- Co-Author/Speaker: Drafting for Multiple Executors, Trustees, and Agents — 33rd Annual Estate Planning & Probate Drafting (2022).
- Co-Author/Panelist: Getting Back on Track – What to do When Best-Laid Estate Plans Get Derailed – 28th Annual Advanced Estate Planning Strategies Course (2022).
- Author/Speaker: Disclosure and the Fiduciary: How Much, How Far and to Whom? – 15th Annual Fiduciary Litigation Seminar (2020).
- Author/Speaker: North Texas Probate Bench Bar: A Trustee's Duty to Disclose: A Dangerous Trap or a Useful Tool? (2020).
- Co-Author: "You Settled it Right? Family Settlement Agreements in Probate, Trust and Guardianship Disputes" – Texas Tech Estate Planning and Community Property

- Law Journal, 11 Est. Plan. & Community Prop. L.J. 213 (Spring 2019).
- Co-Author/Speaker: State Bar of Texas: Changing IRA Beneficiary Designations After Death by Court Order or Agreement – Intermediate Estate Planning and Probate (2019)
 - Co-Author/Speaker: National College of Probate Judges: “A Road Increasingly Traveled: Multistate Probate Issues” – (2019).
 - Co-Author: “You Settled It, Right? Family Settlement Agreements in Probate, Trust and Guardianship Disputes” – North Texas Probate Bench Bar (2019).
 - Co-Author/Speaker: “Choosing Your Own Adventure and Navigating Self-Dealing Transactions Under the New Power of Attorney Act” – 29th Annual Estate Planning & Probate Drafting (2018).
 - Co-Author/Speaker: “A Road Increasingly Traveled: Multistate Probate Issues” – The Estate Planning, Trust and Probate Law Section of the San Diego County Bar Association (2017).
 - Co-Author: “Ensure Powers of Attorney Fulfill Intended Purposes” – Estate Planning, Thompson Reuters Checkpoint, (January 2018).
 - Co-Author: National College of Probate Judges: “Constitutional Considerations When Restricting Access to the Proposed Ward in Contested Guardianship Proceedings” – Spring Journal (2017).
 - Co-Author/Speaker: State Bar of Texas: State Bar of Texas: “Litigation Involving Powers of Attorney & Bank Accounts” – Advanced Estate Planning & Probate (2017).
 - Co-Author/Speaker: State Bar of Texas: “What’s New in Guardianship” – Advanced Guardianship Law Course (2017).
 - Co-Author/Speaker: State Bar of Texas: “The Shortest Route to Victory: Summary Judgment Practice in Probate and Trust Litigation” – 40th Annual Advanced Estate Planning and Probate Course (2016).
 - Co-Author/Speaker: Dallas County Bar Association, Probate, Trust and Estates Section: “Trends in Litigating and Administering Guardianships” (2016).
 - Author/Speaker: State Bar of Texas: “Injunctive Relief–The Lethal Preemptive Strike in Probate, Trust and Guardianship Litigation” – 39th Annual Advanced Estate Planning and Probate Course (2015).
 - Co-Author/Speaker: State Bar of Texas: “Elder Exploitation” – Advanced Guardianship Law (2015).
 - Co-Author/Speaker: Travis County Bar Association: “Winning the Battle & the War: A Remedies–Centered Approach to Litigation Involving Durable Powers of Attorney” (2015).
 - Co-Author: “Properly Performing Annual Accounts in Guardianships and Management Trusts Where One or Both Spouses are Incompetent” – Real Estate, Probate, & Trust Law Reporter, Volume 52, No. 4 (2014).
 - Served as Moderator for the Guardianship and Ad litem Attorney Certification Course, sponsored by the Dallas Bar Association Probate, Trusts & Estate Section, Dallas County Probate Courts and the Dallas Volunteer Attorney Program to train lawyers in the representation of guardians of indigent wards, and the role and

- responsibilities of the Attorney ad litem (2014).
- Co-Author: "Winning the Battle and the War; A Remedies—Centered Approach to Litigation Involving Durable Powers of Attorney" – 64 Bay. L. Rev. 435 (Spring 2012).
- Author/Speaker: "An Introduction to Guardianships" – Texas Department of Assistive & Rehabilitative Services (DARS), Dallas, Texas (Fall 2010; Spring 2011).
- Co-Author/Speaker: "Proof of Facts and Common Evidentiary Problems Encountered in Contested Probate Proceedings," at the Seventh Probate Litigation Seminar, sponsored by the Tarrant County Probate Bar Association (September 2010).
- Author, A Good Deed Repaid: "Awarding Attorney's Fees in Contested Guardianship Proceedings" – 51 S. Tex. L. Rev. 439 (Winter 2009).

Community and Bar Association Involvement

- Course Director; 20th Annual Fiduciary Litigation Course, State Bar of Texas (December 2025).
- Benchner and Executive Committee Member, Dallas Probate American Inn of Court (2022-2023)
- State Bar of Texas; Real Estate, Probate and Trust Law Section, Guardianship Committee; Member (2015-2018)
- Dallas Bar Association; Probate and Trust Section Member; Trial Skills Section Member
- Dallas Bar Association; Probate and Trust Section; Council Member (2015-2016)
- Dallas Association of Young Lawyers; Elder Law Section Member
- Member, St. Thomas More Society
- Dallas Bar Mentor Program; Participated as Mentee; Mentor, Edward V. Smith III
- Board of Directors and Vice President, City of Sachse Economic Development Corporation (2010-2014)
- Member, Charter Review Commission, City of Sachse, Texas (2012-2013)

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I. INTRODUCTION¹

Discovery disputes are often blamed on obstructionist responses, but the quality of the requests themselves frequently determines whether discovery will be useful, expensive, or needlessly contentious. Practically speaking, discovery is the process through which parties obtain the information necessary to understand the factual landscape of a dispute, test the merits of competing claims and defenses, and realistically evaluate the case. Whether a case is resolved by dispositive motion, settlement, or trial, discovery largely determines what the parties—and ultimately the court—know when those decisions are made.

Yet discovery is also one of the most frequent sources of cost, delay, and conflict in litigation. Courts routinely confront disputes fueled by boilerplate objections, evasive responses, and gamesmanship that obscure rather than illuminate the facts. These practices rightly draw criticism.² But focusing solely on deficient responses tells only half the story. Discovery costs are not driven by objections and responses alone. They are equally shaped—often decisively—by the quality of the discovery requests that prompt them. Unreasonable, untargeted requests for documents invite objections, generate unnecessary motion practice, and inflate litigation expenses without advancing the resolution of the dispute. When discovery is drafted without careful attention to the claims, defenses, and proportional needs of the case, inefficiency is not an accident; it is the predictable result.

This paper argues that a meaningful change in requests for production practice must begin with how discovery is drafted, not merely how it is answered. By emphasizing tailored, purposeful discovery requests alongside the obligation to provide good-faith responses, litigants and courts can better align discovery with its core purpose: efficiently obtaining the information necessary to resolve disputes efficiently, fairly, and on the merits.

II. OVERVIEW

This paper proceeds in four main parts. **First**, it summarizes the governing limits of discovery under Texas law. **Second**, it explains how to draft requests for production that are specific, relevant, and proportional.

Third, it addresses how to respond to requests through diligent collection, targeted objections, and clear production statements. **Fourth**, it outlines practical considerations when moving to compel production.

III. A GROWTH MINDSET

Discovery practice is exactly that—a practice. It is not static, mechanical, or perfected once and for all. What works well in one case may be too broad, too narrow, too early, or too expensive in another. Experience teaches that effective discovery requires constant reassessment: what information is actually needed, what language is most likely to survive objection, what requests are most likely to generate useful documents, and what sequencing will best position the case for settlement, motion practice, or trial.

This author's own methods and approaches are continually evolving. The examples and suggestions in this paper are not intended as rigid templates or final answers, but as practical illustrations. As cases, courts, clients, and opposing counsel vary, so too should the tools we use. Better discovery practice comes from remaining curious, self-critical, and willing to revise one's assumptions in light of experience. In that sense, improving your discovery practice is not a sign that earlier approaches were necessarily wrong; it is a sign that you are paying attention. The goal is not perfection, but improvement — becoming more precise, more efficient, more persuasive, and more effective in using discovery to uncover the facts that matter.

IV. THE GOVERNING FRAMEWORK

A. The Purpose of Discovery Is to Promote the Fullest Knowledge of the Facts and Issues Before Trial

The discovery process rests on the fundamental principle that parties are entitled to obtain the information necessary to prosecute and defend their claims, ensuring that trial is a fair contest rather than trial by ambush. This broad mandate to develop the facts is tempered by the limits of relevance, privilege, and proportionality. Texas courts have reaffirmed these principles in a variety of ways:

- The purpose of discovery is to allow the parties to obtain the fullest knowledge of issues and facts prior to trial.³

¹ This article and any related presentation are for educational purposes only and are not intended to establish an attorney-client relationship or provide legal advice. While some areas of the law are settled, other remain unsettled. In certain areas, the authors have endeavored to identify differing positions or arguments which may be taken or made with respect to specific patterns and/or unsettled legal issues.

² See e.g. 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, 568–69 (2013); Matthew J. Hill, *The Art of Appropriate Discovery Objections Balancing Advocacy and Professionalism in Texas Civil Litigation*, 88 Tex. B.J. 197 (2025).

³ *West v. Solito*, 563 S.W.2d 240, 243 (Tex. 1978).

- The primary objective of discovery is to ensure that lawsuits are “decided by what the facts reveal, not by what facts are concealed.”⁴
- Discovery’s primary goals are to “provide[] notice of the evidence that the opposing party intends to offer at trial” and to “prevent trial by ambush.”⁵
- Parties are “entitled to full, fair discovery” and to have their cases decided on the merits.⁶

Modern discovery and pretrial procedures serve the useful purpose of “[making] a trial less a game of blindman’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.”⁷ As one Texas court recently explained, “Discovery in civil cases is founded on the principle that justice is best served when litigants may obtain information not in their possession to prosecute and defend claims.”⁸ Yet the same features that make discovery valuable also make it expensive, intrusive, and susceptible to abuse.

B. Discovery’s Benefits Must Be Balanced Against Its Burdens and Costs

Discovery does not simply uncover relevant facts. It can also generate burden, delay, and expense not proportional to its likely benefit. “Notwithstanding its laudable purpose and goals, discovery is ‘the bane of modern litigation.’”⁹ As one federal court candidly observed, “[Discovery] is intrusive, unpleasant, time-consuming and costly . . . [and] is, like life itself, ‘nasty [and] brutish.... Unfortunately, it is not generally ‘short.’”¹⁰

“In practice . . . discovery is not only ‘a tool for uncovering facts essential to accurate adjudication,’ but also ‘a weapon capable of imposing large and unjustifiable costs on one’s adversary.’”¹¹ “Discovery is often the most significant cost of litigation.”¹² Indeed, “[d]iscovery provides access to that information, but at

a price . . . discovery may be misused to deny justice to parties by driving up the costs of litigation until it is unaffordable and stalling resolution of cases.”¹³ In other words, “the rules of procedure must provide both adequate access to information and effective means of curbing discovery when appropriate to preserve litigation as a viable, affordable, and expeditious dispute resolution mechanism.”¹⁴ This point is perhaps best illustrated by Judge Dietz’s observation:

Not all discovery material discloses the truth. So much of the information discovered becomes just a clutter of noise and chatter in the quest for essential facts; nor is there any cost benefit analysis to this unbridled quest for “truth.” In every case there are some essential “dynamite” facts. These are very worthwhile. Then there are lesser facts of consequence and so on until there are facts about a case that are of no consequence. There has to be a cost benefit consideration to acquiring every fact about a case because, at the end of the day, a judgment is about money. If, in general, civil litigation is about money, then costs and outcomes have to be considered.¹⁵

The tension between discovery’s benefits and burdens is resolved through the court’s obligation to impose reasonable limits.

C. Courts Must Impose Reasonable Discovery Limits

The Texas Supreme Court of Texas has significantly reshaped discovery practice over the past quarter century, emphasizing that while discovery remains broad in scope, “the simple fact that requested information is discoverable ... does not mean that discovery must be had.”¹⁶ Texas’ proportionality

⁴ *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 (Tex. 1999) (citing *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex.1984)).

⁵ *Best Indus. Unif. Supply Co., Inc. v. Gulf Coast Alloy Welding, Inc.*, 41 S.W.3d 145, 147 (Tex. App.—Amarillo 2000, pet. denied).

⁶ *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 663 (Tex. 2009) (internal citations omitted).

⁷ *Id.* (citing *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958)).

⁸ *In re Gautreaux*, No. 05-25-00380-CV, 2025 WL 2076482, at *11 (Tex. App.—Dallas July 23, 2025, no pet.) (citing the Explanatory Statement Accompanying the 1999 Amendments to the Rules of Civil Procedure Governing Discovery, Order of Approval of the Revisions to the Texas Rules of Civil Procedure, Misc. Docket No. 98–9196, (Tex. Nov. 9, 1998)).

⁹ Di Troia, Francesca A., *Protective Orders & Confidentiality Issues*, 37th Annual Advanced Evidence and Discovery, 1 (2024) (citing *Rossetto v. Pabst Brewing Co., Inc.*, 217 F.3d 539, 542 (7th Cir. 2000)).

¹⁰ *Flentye v. Kathrein*, No. 06 C 3492, 2007 WL 2903128, at *2 (N.D. Ill. Oct. 2, 2007) (quoting Hobbes, Leviathan, Chapter XIII).

¹¹ *In re Alford Chevrolet-Geo*, 997 S.W.2d at 180 (internal citations omitted).

¹² *Id.*

¹³ *Id.*

¹⁴ *In re Gautreaux*, No. 05-25-00380-CV, 2025 WL 2076482, at *11.

¹⁵ John K. Dietz, *Discovery Practice Tips*, State Bar College 13th Annual Summer School, State Bar of Texas, 1 (2011).

¹⁶ Matthew J. Hill, *The Art of Appropriate Discovery Objections Balancing Advocacy and Professionalism in*

doctrine had its origins in the 1999 adoption of Rule 192.4, and the developed through early mandamus cases limiting overbroad and unduly burdensome discovery.¹⁷ The doctrine reached its modern articulation in the seminal Texas Supreme Court case *In re State Farm Lloyds*, 520 S.W.3d 595 (Tex. 2017), which explained that “[m]odern discovery practice requires courts to undertake a careful proportionality analysis weighing the needs of the case, amount in controversy, parties’ resources, importance of the issues, and burden of production.”¹⁸ Proportionality has therefore become the “cornerstone of modern discovery practice.”¹⁹ Thus, while the trial court has broad discretion over the scope of discovery, the court “must make an effort to impose reasonable discovery limits.”²⁰

V. SCOPE OF DISCOVERY

Tex. R. Civ. P. 192 defines the scope of discovery. As a general rule, “a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party.”²¹ This includes information that “will be inadmissible at trial if the information sought appears

reasonably calculated to lead to the discovery of admissible evidence.”²²

A. Relevant

For information to be discoverable, it must be relevant to the pending action.²³ The party seeking discovery has the burden to demonstrate that the requested documents are relevant and therefore discoverable.²⁴

While the phrase “relevant to the subject matter” is not defined in the rules,²⁵ the “relevant to the subject matter” and “reasonably calculated to lead to admissible evidence” tests are liberally construed to allow litigants to obtain the fullest knowledge of the facts and issues prior to trial.²⁶ Thus, the scope of discovery is broad, but it is not unlimited.²⁷ A party’s discovery requests must show a reasonable expectation of obtaining information that will aid in the resolution of the dispute.²⁸ “Thus, discovery requests must be ‘reasonably tailored’ to include only relevant matters.”²⁹ For example, discovery “may not exceed the bounds of the claims at issue.”³⁰

Importantly, relevance for purposes of discovery is broader than relevance under the Texas Rules of Evidence.³¹ Under Tex. R. Evid. 401, relevance involves two separate requirements:

Texas Civil Litigation, 88 Tex. B.J. 197 (2025)(quoting *In re State Farm Lloyds*, 520 S.W.3d 595, 605 (Tex. 2017)).

¹⁷ *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 (Tex. 1999); *In re CSX Corp.*, 124 S.W.3d 149, 153 (Tex. 2003)

¹⁸ Hill, 88 Tex. B.J. at 197 (citing *In re State Farm Lloyds*, 520 S.W.3d at 607-612)); *see also In re K & L Auto Crushers, LLC*, 627 S.W.3d 239, 252-54 (Tex. 2021).

¹⁹ *Id.*

²⁰ *Id.* at 604.

²¹ Tex. R. Civ. P. 192.3(a).

²² *Id.*

²³ *Id.*

²⁴ *In re Kuraray Am., Inc.*, 656 S.W.3d 137, 142 (Tex. 2022); *In re TIG Ins. Co.*, 172 S.W.3d 160, 167 (Tex. App.—Beaumont 2005, orig. proceeding) (per curiam)(“[i]t is the discovery proponent’s burden to demonstrate that the requested documents fall within the scope-of-discovery of Rule 192.3”).

²⁵ 3 MCDONALD & CARLSON TEX. CIV. PRAC. § 12:12 (2d. ed.).

²⁶ *Axelson v. McIlhany*, 798 S.W.2d 550, 553 (Tex.1990); *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 664 (Tex. 2009); *see also Tex. R. Civ. P. 1* (“The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.”).

²⁷ *Khyber Holdings, LLC v. U.S. Bank Nat’l Ass’n as Tr. to Bank of Am., Nat’l Ass’n*, No. 01-23-00357-CV, 2024 WL

5160511, at *8 (Tex. App.—Houston [1st Dist.] Dec. 19, 2024, pet. denied) (“Litigants are not entitled to conduct discovery on matters unrelated to the subject matter of the dispute.”).

²⁸ *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003); Tex. R. Civ. P. 192.7, cmt. 1 (“While the scope of discovery is quite broad, it is nevertheless confined by the subject matter of the case and reasonable expectations of obtaining information that will aid resolution of the dispute. The rule must be read and applied in that context”).

²⁹ *Id.*; *In re Am. Optical Corp.*, 988 S.W.2d 711, 713, (Tex. 1998) (orig. proceeding) (“Requests must be reasonably tailored to include only matters relevant to the case.”); *In re Padilla*, 2018 WL 4087733 (Tex. App.—Austin 2018, orig. proceeding) (mem. op.) (finding abuse of discretion in ordering discovery of cell phone records when cell-phone usage was not pleaded as having anything to do with the automobile accident at issue).

³⁰ *In re State Farm Mut. Auto. Ins. Co.*, 712 S.W.3d 53, 67 (Tex. 2025) (citing *In re USAA Gen. Indem. Co.*, 624 S.W.3d 782, 791 (Tex. 2021)).m

³¹ *In re Plains Pipeline, L.P.*, 618 S.W.3d 780, 789-90 (Tex. App.—El Paso 2020, no pet.); *In re E.C.*, 444 S.W.3d 760, 765 (Tex. App.—Fort Worth 2014, no pet.) (“ . . .there is a fundamental difference between the discoverability of evidence and the admissibility of evidence at trial or some proceeding”); *see also In re Pilgrim’s Pride Corp.*, 204 S.W.3d 831, 835 n. 8 (Tex. App.—Texarkana 2006, orig. proceeding [mand. dismiss’d]) (“Relevance should not be confused with admissibility. Admissibility is not required for information to be discoverable.”); *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984), *disapproved of by Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992) (“To increase the

- the information must be *probative* (i.e. it must have a logical tendency to make a particular proposition more or less likely); and
- the information must be *material* (i.e. it supports a proposition that is a fact of consequence in determining the action).³²

In the discovery context, Texas courts combine these two above referenced requirements for relevance by explaining that information is relevant if it tends to make the existence of a fact of consequence to the determination of the action more or less probable than it would be without the information.³³

1. Pleadings.

Determining which facts are “of consequence” to the action necessarily begins with a review of the pleadings and the specific claims and defenses made therein.³⁴

- ***Facts that may be of consequence to issues not raised by pleadings are not permissible areas of discovery.***³⁵
- Discovery is ***limited to the causes of action identified in the pleadings and cannot be used to develop new ones.***³⁶

likelihood that all relevant evidence will be disclosed and brought before the trier of fact, the law circumscribes a significantly larger class of discoverable evidence to include anything reasonably calculated to lead to the discovery of material evidence.”).

³² *S. Plains Lamesa R.R., Ltd. v. Heinrich*, 280 S.W.3d 357, 363 (Tex. App.—Amarillo 2008, no pet.) (stating that “for evidence to be relevant, it must logically tend to make a particular proposition more or less likely . . . Additionally, the proposition to be proved must be of consequence to some issue in the trial)(internal citations omitted).

³³ *In re Allstate Fire & Cas. Ins. Co.*, 617 S.W.3d 635, 643 (Tex. App.—Houston [14th Dist.] 2021, no pet.) (citing Tex. R. Evid. 401).

³⁴ *Id.*; *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 n.1 (Tex. 1999) (stating that review of relevancy generally done by “close examination of the pleadings and specific claims and defenses made”); *In re Methodist Primary Care Group*, No. 14-17-00299-CV, 2017 WL 3480292, at *2 (Tex. App.—Houston [14th Dist.] Aug. 14, 2017, no pet.) (“Courts measure the scope of discovery by the live pleadings regarding the pending claims”); Tex. R. Civ. P. 192.3(a) (party may obtain discovery of matters not privileged that are relevant to the “subject matter of the pending action,” whether relating to claims or defenses).

³⁵ *In re Allstate Fire & Cas. Ins. Co.*, 617 S.W.3d at 643 (emphasis added).

³⁶ *See In Re Sears, Roebuck & Co.*, 123 S.W.3d 573, 578 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

³⁷ *In re Am. Home Assurance Co.*, 88 S.W.3d 370, 376 (Tex. App.—Texarkana 2002, orig. proceeding) (emphasis added); *In Re Sears, Roebuck & Co.*, 123 S.W.3d at 578

- “Discovery undertaken with the purpose of finding an issue, rather than in support of an issue ***already raised by the pleadings***, will constitute an impermissible fishing expedition.”³⁷
- Requests for production may not be used simply to explore the viability of unplead claims.³⁸

Information sought in discovery is ‘patently irrelevant’ when reasonable minds would not differ that it has no tendency to prove or disprove any issue involved in the subject matter of the suit and the information’s irrelevancy is apparent from the face of the record.”³⁹ Discovery requests that seek irrelevant information are also overbroad.⁴⁰

2. Substantive Law.

Additionally, determining what facts are “of consequence” to the action also involves analyzing the substantive law applicable to the claims and defenses. Where substantive law makes the proposition one the factfinder must consider, evidence bearing on that proposition is relevant.⁴¹ For example, in a will contest

(defining an improper “fishing expedition” as “one aimed not at supporting existing claims but finding new ones”).

³⁸ *Dillard Dep’t Stores, Inc. v. Hall*, 909 S.W.2d 491, 492 (Tex. 1995)(holding that in an action involving an alleged false arrest, discovery geared “to explor[ing] whether [[the plaintiff] can in good faith allege racial discrimination” was an improper fishing expedition); *see also Al Parker Buick Co. v. Touchy*, 788 S.W.2d 129, 131 (Tex. App.—Houston [1st Dist.] 1990, no writ)(stating “because Schirra’s petition fails to allege a basis for the assessment of punitive damages against the relator, the [net worth] discovery sought has no probative value under the current state of the pleadings”; holding such net worth discovery should have been denied).

³⁹ *In re Sun Coast Res., Inc.*, 562 S.W.3d 138, 146 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

⁴⁰ *In re K & L Auto Crushers, LLC*, 627 S.W.3d 239, 251 (Tex. 2021), reh’g denied (Sept. 3, 2021) (“In essence, an overbroad discovery request is one that seeks irrelevant information.”) (quoting *In re Allstate Cnty. Mut. Ins. Co.*, 227 S.W.3d 667, 670 (Tex. 2007) (orig. proceeding) (per curiam); *Alford Chevrolet-Geo*, 997 S.W.2d 173, at 180 n.1 (Tex. 1999).

⁴¹ *See In re K & L Auto Crushers, LLC*, 627 S.W.3d 239, 248-249 (Tex. 2021) (because Texas law requires recovery of medical expenses to be limited to amounts that are reasonable, information bearing on reasonableness is relevant); *In re Cent. Oregon Truck Co., Inc.*, 644 S.W.3d 668, 670 (Tex. 2022) (“because defendants are liable ‘only for losses caused by their tortious conduct’ . . . other information bearing on the causal connection between the 2017 accident and Broussard’s economic and noneconomic losses may be relevant and discoverable”).

based on undue influence, information bearing on the *Rothermel* factors would be relevant.⁴²

3. Discovery Guideposts.

Thus, the Texas Supreme Court has explained that “the discovery guideposts” can be summarized as follows:

- A. only relevant evidence is discoverable;
- B. relevant evidence that is privileged is not discoverable;
- C. relevant evidence that is not privileged is discoverable when (i) it is admissible or (ii) it is inadmissible but reasonably calculated to lead to the discovery of admissible evidence; and
- D. failing either of those admissibility criteria, the request for discovery may be denied even if the requested information is relevant and unprivileged.”⁴³

A trial court abuses its discretion when it issues an order requiring the production of irrelevant matters.⁴⁴

B. Reasonably Calculated to Lead to Admissible Evidence

There is very little case law interpreting Rule 192.3(a)’s phrase: “reasonably calculated to lead to the discovery of admissible evidence.” As one Texas court recently observed, the phrase “*does not define the scope of discovery in Texas*.”⁴⁵ Instead, the phrase operates to prevent objections to relevancy based on admissibility.⁴⁶ Relevance (and privilege) still set the bounds of what is discoverable.⁴⁷ Indeed, the language “reasonably calculated to lead to the discovery of admissible evidence” comes from former federal rule of civil

procedure 26, which included within discovery’s scope any discovery reasonably calculated to lead to the discovery of admissible evidence — but that phrase was removed by the 2015 amendments to rule 26.⁴⁸ “In other words, consideration of whether information appears ‘reasonably calculated to lead to the discovery of admissible evidence’ is unnecessary unless the trial judge has first determined the information (1) is relevant to the subject matter of the pending action, (2) is not privileged, and (3) will be inadmissible at trial.”⁴⁹

C. Proportional

For information to be discoverable, the discovery request must be proportional to the needs of the case.⁵⁰ “Discovery is a tool to make the trial process more focused, not a weapon to make it more expensive.”⁵¹ “[A]ll discovery is subject to the proportionality overlay embedded in our discovery rules and inherent in the reasonableness standard....”⁵²

“[T]he discovery rules imbue trial courts with the authority to limit discovery based on the needs and circumstances of the case[.]”⁵³ Rule 192.4 imposes a “proportionality standard that requires ‘a case-by-case balancing of jurisprudential considerations.’”⁵⁴ Proportionality objections must generally be supported with evidence, not conclusory allegations,⁵⁵ but importantly, a trial court is empowered to *limit discovery* on its “*own initiative and on reasonable notice*.”⁵⁶

As Rule 192.4 instructs, discovery methods “should” be limited if: (1) “the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive”; or (2) “the burden or

⁴² *Rothermel v. Duncan*, 369 S.W.2d 917, 923 (Tex. 1963); *Matter of Kam*, 484 S.W.3d 642, 652 (Tex. App.—El Paso 2016, pet. denied); *Altice v. Hernandez*, 668 S.W.3d 399, 414 (Tex. App.—Houston [1st Dist.] 2022, no pet.).

⁴³ *In re Nat’l Lloyds Ins. Co.*, 532 S.W.3d 794, 808 (Tex. 2017).

⁴⁴ *In re UPS Ground Freight, Inc.*, 646 S.W.3d 828, 833 (Tex. 2022).

⁴⁵ *In re Gautreaux*, No. 05-25-00380-CV, 2025 WL 2076482, at *8 (Tex. App.—Dallas July 23, 2025, no pet.).

⁴⁶ *Id.* (“... the mistaken idea that discovery’s scope in this state includes any matter reasonably calculated to lead to the discovery of admissible evidence lives on.”); *see also In re Burkett*, 657 S.W.3d 728, 734 (Tex. App.—El Paso 2022, no pet.) (“... **relevance** for purposes of discovery is broader **than relevance** under the Texas Rules of Evidence).

⁴⁷ *Id.* at *9, n. 2 (citing in support the Texas Supreme Court’s comment to the 1999 rules amendments adding rule 192.3: “While the scope of discovery is quite broad, it is nevertheless confined by the subject matter of the case and reasonable expectations of obtaining information that will aid

resolution of the dispute. The rule must be read and applied in that context”).

⁴⁸ *Id.* (citing *Lopez v. Don Herring Ltd.*, 327 F.R.D. 567, 573 (N.D. Tex. 2018)).

⁴⁹ *Id.* (citing *In re Nat’l Lloyds Ins. Co.*, 532 S.W.3d 794, 808 (Tex. 2017) (orig. proceeding)).

⁵⁰ *See* Tex. R. Civ. P. 192.4(b); *see also In re K & L Auto Crushers, LLC*, 627 S.W.3d 239, 248 (Tex. 2021), reh’g denied (Sept. 3, 2021).

⁵¹ *In re Allstate Cnty. Mut. Ins. Co.*, 227 S.W.3d 667, 668 (Tex. 2007).

⁵² *In re State Farm Lloyds*, 520 S.W.3d 595, 599 (Tex. 2017).

⁵³ *Id.*

⁵⁴ *In re Home State Cnty. Mut. Ins. Co.*, No. 05-21-00873-CV, 2022 WL 1467984, at *3 (Tex. App.—Dallas May 10, 2022, no pet.) (citing *In re K & L Auto Crushers*, 627 S.W.3d 239, 253 (Tex. 2021) (orig. proceeding) (quoting *State Farm Lloyds*, 520 S.W.3d at 599)).

⁵⁵ *Id.*

⁵⁶ Tex. R. Civ. P. 192.4.

expense of the proposed discovery outweighs its likely benefit.”⁵⁷

Proportionality “acts as a governor to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry.”⁵⁸

- “[T]he simple fact that requested information is discoverable,” however, “does not mean that discovery must be had.”⁵⁹
- Even when discovery seeks relevant and nonprivileged information, courts should “make an effort to impose reasonable discovery limits . . . particularly when the burden or expense of the proposed discovery outweighs its likely benefit”⁶⁰

Proportionality is geared toward the ultimate objective of “obtain[ing] a just, fair, equitable and impartial adjudication” for the litigants “with as great expedition and dispatch at the least expense . . . as may be practicable.”⁶¹

D. Beyond the Scope

Discovery requests that seek information outside the scope of discovery are objectionable. A discovery request is outside the scope of discovery when it asks for information that is: (1) privileged; (2) not relevant; or (3) is not proportional to the needs of the case.⁶²

E. Standard of Review - Abuse of Discretion

A trial court abuses its discretion by ordering discovery that exceeds that permitted by the rules of procedure.⁶³ A trial court has no discretion in determining what the law is or applying the law to the facts.⁶⁴ Thus, a clear failure by the trial court to analyze

or apply the law correctly will constitute an abuse of discretion and may result in mandamus.⁶⁵

F. Application of Federal Case Law

In analyzing discovery issues, Texas courts may look to federal authority for guidance when state and federal laws contain analogous language, even if the laws are not identical.⁶⁶

G. Key Take Aways

- The scope of discovery is broad, but not unlimited.
- The party propounding the requests for production has the burden to demonstrate that the documents sought are relevant.
- Relevance primarily involves reviewing the pleadings, including the claims and defenses plead therein, and the substantive law applicable to those claims and defenses.
- Relevance for discovery purposes does not require that the information be admissible to be discoverable.
- All discovery must be proportional to the needs of the case.

VI. DRAFTING REQUESTS FOR PRODUCTION

Tex. R. Civ. P. 196 allows parties to serve on other parties a request for production or for inspection, seeking to inspect, sample, test, photograph, or copy documents or tangible things *within the general scope of discovery*.⁶⁷

A. Start With the End in Mind

When drafting requests for production, it can be useful to start with the end in mind—what the evidence

⁵⁷ *In re State Farm Mut. Auto. Ins. Co.*, 712 S.W.3d 53, 67–68 (Tex. 2025).

⁵⁸ *In re State Farm Lloyds*, 520 S.W.3d 595, 614 (Tex. 2017).

⁵⁹ *Id.* at 605.

⁶⁰ *In re K & L Auto Crushers, LLC*, 627 S.W.3d 239, 248 (Tex. 2021)(internal citations omitted).

⁶¹ *In re State Farm Lloyds*, 520 S.W.3d at 599 (quoting Tex. R. Civ. P. 1).

⁶² See Tex. R. Civ. P. 192.3(a); *In re North Cypress Med. Ctr. Oper. Co.*, 559 S.W.3d 128, 129 (Tex. 2018); *In re State Farm Lloyds*, 520 S.W.3d 595, 599 (Tex. 2017); *In re National Lloyds Ins.*, 449 S.W.3d 486, 488 (Tex. 2014); *In re Gautreaux*, No. 05-25-00380-CV, 2025 WL 2076482, at *8 (Tex. App.—Dallas July 23, 2025, no pet.).

⁶³ *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) (citing *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex.1995)).

⁶⁴ *In re Regency IHS of Longview, LLC*, No. 12-25-00082-CV, 2025 WL 2180535, at *4 (Tex. App.—Tyler July 31, 2025, no pet.) (citing *In re Sherwin-Williams Co.*, 668

S.W.3d 368, 370 (Tex. 2023) (orig. proceeding); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135 (Tex. 2004); *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding)).

⁶⁵ *Id.* (citing *Walker*, 827 S.W.2d at 840).

⁶⁶ *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 316–17 (Tex. 2009) (orig. proceeding) (recognizing that state discovery rules are not identical to federal rules, but “are not inconsistent,” and “therefore we look to the federal rules for guidance”); *In re Reynolds*, 721 S.W.3d 48, 54–55 (Tex. App.—Tyler 2025, no pet.) (comparing Fed. R. Civ. P. 34(a) to Tex. R. Civ. P. 196.1 on destructive testing); *In re Brown*, 653 S.W.3d 721 (Tex. 2022) (comparing Texas Rule of Civil Procedure 199.2(b)(1) to Federal Rule of Civil Procedure 30(b)(6)); see also *Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 857 n.6 (Tex. 2011) (“Where the Federal Rules of Evidence are similar, [Texas courts] may look to federal case law for guidance in interpreting the Texas evidentiary rules”).

⁶⁷ Tex. R. Civ. P. 196.1(a).

will actually look like and how it will be used at trial. For example, it can be helpful to begin with a draft of the preferred jury charge for findings of fact and conclusions of law and then working backwards to the discovery requests. While many practitioners are predisposed to loathe discovery objections and view them as reflexive or overused, that thinking can obscure a more important question: *whether the request itself works as intended*. As April Strahan explains:

The simplest way to evaluate whether a request is appropriate is to practice how you will explain to the judge what evidence a complete response would generate and how you would use that evidence to support an element of your client's claim. If you cannot give the judge an example of responsive evidence and explain how the jury or factfinder would use that evidence to answer a question at the end of the case, then think long and hard before complaining about the objections.”⁶⁸

B. Tailor the Requests to the Needs of the Case

The same day-to-day pressures that tempt lawyers to assert boilerplate objections also tempt them to recycle discovery requests from prior cases, rather than taking the time to tailor those requests to the needs of the current case.⁶⁹ Here is another great tip for drafting effective discovery requests:

- Limit the time;
- Limit location;
- Limit scope or subject matter;
- Limit subparts;
- Keep it simple; and
- Verify the pleadings have sufficient allegations to warrant the requested relief.⁷⁰

C. Time Period

Most practitioners will use a default time period set forth before the individual requests for production and note that it applies to the requests – unless modified by a specific request that uses a different time frame. The most common examples where a default time period might be modified are in will contests and non-probate disputes. For example, when seeking historical estate planning to show whether a particular disposition was

unnatural, many practitioners will add “without limitation as to time” in the language of the request. This phraseology might also be utilized in a co-tenant dispute when trying to ascertain adjustments, as no statutes of limitations applies to the adjustment of equities between co-tenants in a partition suit.⁷¹

D. Words and Phrases to Avoid

Phrasing requests for production in an overly expansive manner often creates discovery disputes before the response is ever served. In his discovery article *Discovery Practice Tips*, Judge John K. Dietz — who estimates he has handled over 4000 discovery hearings — identifies certain phrases to avoid when propounding requests for production:

I have a very serious question for you, do these phrases look like they confine or narrowly tailor anything??? “Any” “Any and All” “Every” “Each and Every” “In any way regarding, relating or concerning” The phrases don’t tailor anything and are expansive rather than confining.”⁷²

He doesn’t stop there. Judge Dietz goes on to explain the real-world consequences of using these phrases:

What these phrases do instead is guarantee that your discovery will be objected to as overly broad, unduly burdensome, and beyond the scope of discovery. This results in a discovery dispute, and most often a hearing. I believe that 90% of the discovery hearings I’ve heard were because of the use of these phrases in discovery requests. By their very use, the discovery request is not confined to the subject matter of the lawsuit and is not tailored to exclude tenuous information.”⁷³

1. Avoid Using the Phrase “Any and All”

Requests for production may properly ask a party to provide “all,” “each,” or “every” document pertaining

⁶⁸ April Strahan, *When and Why to Force Responses to Discovery Objections*, 57 Hous. Law. 10, 11 (2020)

⁶⁹ *Id.*

⁷⁰ Rachel Hancock, *Slaying the Discovery Dragon: Tailored Requests and Objections*, Prosecuting and Defending Truck and Auto Collision Cases, 3 (2024).

⁷¹ *Duke v. Squibb*, 392 S.W.2d 885, 888 (Tex. Civ. App.—Texarkana 1965, no writ).

⁷² John K. Dietz, *Discovery Practice Tips*, State Bar College 13th Annual Summer School, State Bar of Texas, 3 (2011).

⁷³ *Id.*

to a relevant, narrow subject of the litigation.⁷⁴ However, while the phrase “any and all” is not necessarily always improper, it may be unnecessary. For example, if a request properly defines a category (e.g., “Documents describing, discussing, or mentioning X”), then any document that fits that definition is responsive — making the use of the word “all” technically redundant.

But in practice, many people still include the word “all” for a few reasons. *First*, adding “all” signals at the request is meant to be comprehensive. *Second*, people believe that the term “all” guards against gamesmanship, specifically preempting arguments like “we produced some representative examples” or “we didn’t think he meant everything.” *Third*, lawyers are prone to rely on established convention. Because “all documents” is standard boilerplate, many lawyers feel more comfortable including it to avoid leaving room for ambiguity.

⁷⁴ *In re Sting Soccer Group, LP*, No. 05-17-00317-CV, 2017 WL 5897454, at *7 (Tex. App.—Dallas Nov. 30, 2017, no pet.) (citing *In re Allstate*, 227 S.W.3d 667, 669 (Tex. 2007) (orig. proceeding)).

⁷⁵ *Pulsecard, Inc. v. Discover Card Services, Inc.*, No. CIV.A.94-2304-EEO, 1995 WL 526533, at *3 (D. Kan. Aug. 31, 1995)(sustaining objection to requests which asked for documents “relevant to,” “concerning,” which “refer in any manner to,” or are “related in any manner to,” “pertains to,” or are similarly germane to various broad categories of subject matter and holding same were facially overbroad and burdensome; such phraseology “requires a responding party to exercise unnecessary time and effort to ponder, speculate, and decide to what extent it must rummage through documents to distinguish what is and what is not responsive”).

⁷⁶ *In re FedEx Ground Package Sys., Inc.*, 609 S.W.3d 153, 161 (Tex. App.—Houston [14th Dist.] 2020), mandamus conditionally granted sub nom. *In re Brown*, 653 S.W.3d 721 (Tex. 2022)(comparing Texas Rule of Civil Procedure 199.2(b)(1) to Federal Rule of Civil Procedure 30(b)(6)); *In re Weekly Homes, L.P.*, 295 S.W.3d 309, 316–17 (Tex. 2009) (orig. proceeding) (recognizing that state discovery rules are not identical to federal rules, but “are not inconsistent,” and “therefore we look to the federal rules for guidance”).

⁷⁷ See *Lindley v. Life Inv’rs Ins. Co. of Am.*, 08-CV-379-CVE-PJC, 2009 WL 3756659, at *1 (N.D. Okla. Nov. 9, 2009)(“Some courts have found use of the phrase “relating to” or “concerning” to be overbroad when used with a general category or a broad range of documents”); *Dauska v. Green Bay Packaging Inc.*, 291 F.R.D. 251 (E.D.Wisc.2013)(“A discovery request is overly broad and unduly burdensome on its face if it uses an omnibus term such as ‘relating to,’ ‘pertaining to,’ or ‘concerning’ to modify a general category or broad range of documents or information.”); *Audiotext Communications v. U.S. Telecom, Inc.*, No. CIV. A. 94-2395-GTV, 1995 WL 18759, at *1 (D. Kan. Jan. 17, 1995)(requests seeking documents “pertaining to” or “concerning” a broad range of items “are worded too broadly or are too all inclusive of a general topic [and] function like a giant broom, sweeping

2. Avoid Using the Phrase “Relating To”

While many different types of requests may violate Rule 196.1(b)’s “reasonable particularity” requirement, perhaps no offender is worse than those requests which use the phrase “relating to.”

The terms “relate to,” “relating to,” “refer to,” “referring to,” and/or “regarding” and/or “concerning” are almost always vague, ambiguous, and overbroad and/or burdensome.⁷⁵ It can be nearly impossible to determine from this phraseology what documents are responsive and what documents are not. Texas courts look to federal authority for guidance when the state law mirrors federal law.⁷⁶ Many federal courts have held the use of the phrase “relating to,” and its cousins “pertaining to,” “concerning,” “regarding,” and/or “referencing,” to be overbroad when used with a *general category* or a *broad range of documents*⁷⁷ as

everything in their path, useful or not. They require the respondent either to guess or move through mental gymnastics which are unreasonably time-consuming and burdensome to determine which of many pieces of paper may conceivably contain some detail, either obvious or hidden, within the scope of the request.”); *Aikens v. Deluxe Fin. Services, Inc.*, 217 F.R.D. 533, 538 (D. Kan. 2003)(noting that courts have held on numerous occasions that “a request *is unduly burdensome on its face* if it uses the omnibus term “relating to” or “regarding” with respect to a general category or group of documents . . . such broad language makes “arduous the task of deciding which of numerous documents may conceivably fall within their scope. The use of such omnibus terms also requires the answering party to engage in mental gymnastics to determine what information may or may not be remotely responsive.”)(quoting *Mackey v. IBP, Inc.*, 167 F.R.D. 186, 197 (D. Kan. 1996))(emphasis added); See also *Moses v. Halstead*, 236 F.R.D. 667, at 672–73 (D. Kan. 2006)(sustaining overbreadth objection when the term “concerning” modified an “enormous amount of information, i.e., all issues raised in the pleadings); See also *Cotracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 655, 665 (D. Kan. 1999)(“Request 17 seeks ‘[a]ll documents relating to Seaboard’s participation in any purchase of wheat in any country including, but not limited to, the United States and Argentina.’ The court finds . . . Request 17 facially overly broad, due to its use of the omnibus phrase ‘relating to.’ The phrase does not modify a specific type of document, but rather all documents. Its use thus makes the request overly broad.”); *No Spill, LLC v. Scepter Candada, Inc.*, No. 2:18-CV-2681-HLT-KGG, 2021 WL 5906042, at *7 (D. Kan. Dec. 14, 2021)(request which sought “all Documents and Communications *referencing* No Spill and/or its products from 2010 to present” was overly broad; request was not sufficiently specific and not stated with reasonable particularity)(emphasis added); see e.g. *Doricent v. American Airlines, Inc.*, 1993 WL 437670 (D. Mass. 1993) (“The phrase ‘relating to’ is, of course, the darling of young litigators—those lawyers who abuse the discovery and trial process by substituting harassment for thought. So vague and

opposed to a specific document.⁷⁸ Similarly, federal courts have noted that requests for documents that seek *all documents relating to or concerning a subject* are overbroad.⁷⁹ One federal court stated:

Requests should be reasonably specific, allowing the respondent to readily identify what is wanted. Requests which are worded too broadly or are too all inclusive of a general topic function like a giant broom, sweeping everything in their path, useful or not. They require the respondent either to guess or move through mental gymnastics which are unreasonably time-consuming and burdensome to determine which of many pieces of paper may conceivably contain some detail, either obvious or hidden, within the scope of the request.”⁸⁰

Expanded definitions do not always cure the use of this omnibus phrase.⁸¹

E. Describe Documents With “Reasonable Particularity”

Rule 196.1(b) mandates that “[t]he 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.”⁸² The reasonable particularity requirement is a substantive

limitation on discovery, ensuring that requests clearly define what is—and just as importantly, what is not—being sought. For further information on the reasonable particularity requirement, see the discussion at Section X, ¶ E(1).

F. Specify Documents Sought by Individual Item or Category

The requesting party’s goal in drafting requests for production is to obtain all documents relevant to the claims and defenses in the case — both your own and those asserted by any opposing party. To adequately analyze and prepare the case, you must draft requests that capture not only favorable documents, but also those that may be harmful or support your opponent’s claims and/or defenses. Well-drafted document requests are often a combination of pointed requests for individual items and categorical requests.⁸³

1. Individual Item

Individual-item requests typically satisfy the “particularity” requirement.⁸⁴ Examples of individual item requests are:

- The Last Will and Testament executed by Decedent, John Doe, dated June 1, 2015;
- The January 2025 Charles Schwab Account statement for Account ending x1234;
- The beneficiary designation form for the Fidelity IRA account ending in x4321;
- The death certificate of John Doe; and/or

imprecise is the usage, however, that it has frequently been held improper . . .”).

⁷⁸ See e.g. *Aikens v. Deluxe Fin. Services, Inc.*, 217 F.R.D. 533, 538 (D. Kan. 2003)(request sought documents relating to litigation activities; Court noted “the terms ‘regarding’ and ‘relating to’ do not modify a specific document, but rather very general categories of documents . . . The requests are so broad and open-ended that Defendant could not possibly fully determine—without undue burden—which documents would be responsive.”).

⁷⁹ *Roda Drilling Co. v. Siegal*, 2008 WL 2234652, *2 (N.D.Okla.) (finding that “many of the parties’ requests for production of documents are overbroad, as they request ‘all documents’ relating to or concerning a subject”), *reconsideration denied in part*, 2008 WL 3892067 (N.D.Okla.2008).

⁸⁰ *Dauska v. Green Bay Packaging Inc.*, 291 F.R.D. 251, 261 (E.D. Wis. 2013)(Request seeking “[a]ny files, notes, or other documents maintained by any current or former employee of Defendants identified in Plaintiff’s or Defendants’ Initial Disclosures *related to Plaintiff*” presumably calls for “numerous files, notes, or other documents under the control of the individuals listed in the parties’ initial disclosures that in some way “relate to” Dauska, but have nothing to do with his claims; Request

seeking “[a]ll correspondence, including emails, or written statements or notes *related to any contact or conversation* Defendants or their agents have had with persons with knowledge of the allegations in Plaintiff’s Complaint” requires responding party to gather and review a presumably vast array of paper or electronic “documents” “relating to” Dauska or produced by someone “with knowledge” of Dauska’s allegations, whether or not the documents have any relevant information to his claims”)(emphasis added).

⁸¹ *Trustees of Springs Transit Co. Employee’s Ret. & Disability Plan v. City of Colorado Springs*, CIV09CV02842WYDCBS, 2010 WL 1904509, at *5 (D. Colo. May 11, 2010)(stating it is difficult to imagine what documents or information would not be swept up in the following definition: “As used herein, ‘relate’ or ‘relating to’, when used with respect to a document, agreement, subject or fact, means reflecting, showing, embodying, containing, evidencing, concerning, pertaining to, regarding, reciting, recording, supporting, refuting or referring to such matter.”).

⁸² Tex. R. Civ. P. 196.1.

⁸³ *Brister & Boyd, Texas Pretrial Practice* § 27:44 (2013).

⁸⁴ *Id.* at § 27:48.

- The closing statement for the purchase of 123 Rose Street, Dallas, Texas 75248.

Despite their precision and strategic value, individualized requests for production are often underutilized in practice. The reason is simple: they require time, focus, and — most importantly — substantive thought about the case. Drafting targeted requests is not a mechanical exercise. It forces counsel to step back and ask a more difficult question: ***What specific documents would actually prove—or disprove—my claim or defense?***

By contrast, broad, boilerplate requests are easier to draft in some regards. They can be copied, pasted, and served with minimal effort. But their convenience comes at a cost. Overbroad requests invite objections, yield overly broad productions, and often obscure the very evidence counsel needs to identify early.

Individualized requests demand a different approach. They require counsel to work through the underlying facts and map the transaction or dispute at issue. That process, while more time-consuming on the front end, sharpens the theory of the case and leads to more meaningful discovery. For example, consider a dispute involving the disposition of certain sales proceeds. A generic request for “all documents relating to the sale” is likely to draw an objection and unlikely to produce a clear answer. But a lawyer who has taken the time to think through the transaction will identify the discrete categories of documents that tell the story:

- the closing statement reflecting the flow of funds;
- wire instructions directing where proceeds were sent; and
- bank statements confirming receipt and subsequent transfers.

Each request targets a specific piece of the evidentiary puzzle. Together, they reconstruct the transaction in a way that broad requests rarely accomplish.

This level of specificity does more than improve the quality of production. It also narrows disputes. Targeted requests are harder to resist with boilerplate objections and easier for courts to evaluate and enforce. They signal to opposing counsel—and, if necessary, the court—that the requesting party understands the case and is seeking information that matters. In short, individualized item requests are underutilized because they require disciplined thinking. Lawyers who invest that effort early are better positioned to obtain the documents that actually move the case forward.

⁸⁵ *Id.*

⁸⁶ Brister & Boyd, *Texas Pretrial Practice* § 27:58 (2013).

⁸⁷ *Id.*

2. Category

A request for production *by category* of items satisfies the “reasonable particularity” requirement if: (1) The request reasonably describes a particular subject matter or document type; (2) the respondent understands, or should understand, what is being sought; and (3) a court, on motion, could properly determine whether all requested items have been produced.⁸⁵

Examples of categorical requests include:

- Contracts signed by Decedent during the one-year period preceding the Decedent's death.
- Communications by and between you and [estate planner] describing, discussing, or mentioning, Decedent's testamentary intent.
- Documents describing, discussing, or mentioning Decedent's Alzheimer's diagnosis.

The challenge in drafting categorical requests for production is drafting them narrowly enough to appear reasonable and avoid an objection, but broad enough to gather important documents.⁸⁶ For example, if a document falls outside a request's scope, the respondent need not produce it; and the narrower the request, the greater the risk that important documents will fall outside its scope. Narrowly drafted requests are fine for obtaining specific individual items but such “requests are poor bait for reeling in documents you are not certain exist.”⁸⁷ This problem is compounded by the reality that responding counsel often construe requests as narrowly as possible.⁸⁸

Thus, it can be helpful when drafting categorical requests, to strive for a reasonable middle ground between requests that are patently broad and those that are narrow.⁸⁹ For example, when seeking to draft a reasonable categorical request for production, one discovery treatise suggests “focus on a specific aspect of the case, then draft a request or group of requests that will yield all relevant documents concerning that aspect.”⁹⁰

3. Combined Approach

Even carefully drafted, individual-item requests are susceptible to an overly literal reading by the responding party.⁹¹ As one discovery treatise points out, “even a document you describe with particularity may show up missing from the items produced by respondent” as a result of this overly literal interpretation. A useful way to think about addressing this problem is captured in the following analogy:

⁸⁸ *Id.*

⁸⁹ *Id.* at § 27:59.

⁹⁰ *Id.*

⁹¹ *Id.* at § 27:56.

- use individual-item requests like a baseball catcher's mitt.
- use categorical requests like the backstop behind home plate.⁹²

That is, “use them together to maximize your chances of obtaining the specific items you seek: items that get by the mitt should not get by the backstop.”⁹³

G. Bad, Better, Best

Here are some examples of requests for production in a typical breach of fiduciary duty case where the requesting party is trying to uncover the nature and extent of the Decedent's personal property at the beginning of the relevant time frame, what happened in the interim, and their current status. Obviously, the “best list” would need to be tailored for the needs of the case.

1. Bad

- All documents relating to personal property in which the Decedent owned an interest.

2. Better

- All documents describing, discussing, mentioning personal property in which the Decedent owned an interest.

3. Best

1. **Financial Accounts (Banking and Cash Equivalents)**

For checking, savings, money market, and other financial accounts holding cash or cash equivalents in which the Decedent owned an interest, produce the following:

- Account statements
- Account-opening documents and signature cards (without limitation as to time)
- Beneficiary, payable-on-death, and/or transfer-on-death designations (without limitation as to time)
- Records of deposits, withdrawals, wire transfers, and/or other internal or external transfers of funds between accounts

2. **Investment and Brokerage Accounts**

For investment and brokerage accounts in which the Decedent owned an interest, produce the following:

- Account statements
- Holdings summaries and portfolio statements

- Trade confirmations
- Records of deposits, withdrawals, wire transfers, and/or other internal or external transfers of funds between accounts
- Account agreements and beneficiary or transfer-on-death designations (without limitation as to time)
- Dividend and interest statements, including Forms 1099

3. **Retirement Accounts**

For IRA, Roth IRA, 401(k), pension, or other retirement accounts in which the Decedent owned an interest, produce the following:

- Plan summaries
- Beneficiary designations, payable on death, and/or transfer-on-death designations (without limitation as to time)
- Distribution records, including any pre-death withdrawals or loans

4. **Business Interests (Intangible Personal Property)**

For any corporation, limited liability company, partnership, or other business entity in which the Decedent owned an interest, produce the following:

- Stock certificates, membership certificates, or other documents describing, discussing, or mentioning Decedent's ownership interests
- Operating agreements, partnership agreements, shareholder agreements, and similar governing documents
- Buy-sell agreements
- Capital account statements
- Schedule K-1s and related tax documents
- Business appraisals, valuation reports, or similar analyses

5. **Life Insurance**

For life insurance policies insuring the life of the Decedent, or in which the Decedent owned an interest, produce the following:

- The policy
- Policy schedules, declarations pages, and endorsements
- Beneficiary designation forms
- Cash value statements for whole life, universal life, or similar policies

6. **Annuities**

For annuity contracts in which the Decedent owned an interest or other contractual right, produce the following:

⁹² Brister & Boyd, *Texas Pretrial Practice* § 27:56 (2013).

⁹³ *Id.*

- The annuity contract, including all applications and amendments
- Contract schedules, statements, riders, and endorsements
- Beneficiary designation forms and payout election forms
- Account statements, valuation statements, or surrender value statements
- Documents describing, discussing, or mentioning contributions, withdrawals, distributions, and/or transfers;
- Documents describing, discussing, or mentioning, death benefits, annuitization elections, or payout calculations

7. **Casualty Insurance**

For casualty, property, homeowners, or other similar insurance policy insuring personal property in which the Decedent owned an interest:

- The policy;
- Policy schedules, declarations pages, and endorsements
- Documents identifying the named insureds and covered property
- premium payment records;
- claim files, notices of loss, and claim-related communications
- documents describing, discussing, or mentioning any proceeds paid, payable, or denied under the policy.

8. **Safe Deposit Boxes**

For any safe deposit box maintained in the name of the Decedent, jointly with another person, or to which the Decedent had access or a right of access:

- Lease agreements and signature cards
- Documents, including logs, describing, discussing, or mentioning, entry and/or access
- Documents, notes, inventories, photographs, and/or videos created in connection with the opening, inspection, or inventorying of the safe deposit box

9. **Vehicles and Other Titled Personal Property**

For automobiles, boats, recreational vehicles, trailers, or similar property in which Decedent owned an interest:

- Certificates of title
- Registration documents
- Loan, lien, and/or financing documents
- Purchase agreements and bills of sale

10. **Tangible Personal Property (Household and High-Value Items)**

For tangible personal property in which Decedent owned an interest that was separately insured, appraised, or otherwise identified as having a value in excess of \$X, please produce the following:

- Personal property inventories, whether formal or informal
- Appraisals
- Purchase receipts or invoices

H. **Use Separate Requests for Documents and Communications**

Frequently the term “documents” is defined in the requests for production to include “communications.” Then, the requests for production will define the term “communications” separately. Rather than rely on the responding party to interpret a request seeking documents to know and understand the term “documents” includes “communications,” the better practice is to draft separate, explicit requests for “documents” and “communications.”

I. **Model Language for Categorical Requests**

1. Documents

- **Documents describing, discussing, or mentioning:**
 - Topic X
 - Topic Y
 - Topic Z

2. Communications

- **Communications by and among Party 1 and any Third Party describing, discussing, or mentioning:**
 - Topic X
 - Topic Y
 - Topic Z

3. Documents Relied On

- **Documents [fiduciary] relied upon in exercising discretion to [take or not take action X]**

J. **Key Take Aways**

- It can be helpful to begin with a draft of the preferred jury charge for findings of fact and conclusions of law and then working backwards to the discovery requests.
- When drafting requests for production, think about how you will explain what a complete response would look like and how you would use that evidence to support your claims.
- Drop the term “relating to” and replace it with “describe, discuss, or mention.”
- The word “all” in a request for production is usually unnecessary.

- Individual item requests are underutilized.
- Use individual item requests like a baseball catcher's mitt.
- Use category requests like the backstop behind home plate.

VII. CONTENTION REQUESTS

Under Tex. R. Civ. P. 192.3(j), the scope of discovery expressly encompasses a party's legal contentions and the factual bases supporting those contentions. Tex. R. Civ. P. 192.3(j) states: "A party may obtain discovery of any other party's legal contentions and the factual bases for those contentions."

A. Case Law

1. *In re Sting Soccer Group, LP*

In *In re Sting Soccer Group, LP*, the Dallas Court of Appeals held that requests for production seeking documents that supported the specific allegations in a party's pleading were valid.⁹⁴ There, the Dallas Court of Appeals specifically rejected the argument that such requests were improper because they required the party marshal its evidence.⁹⁵ The court reasoned that marshalling the evidence was "not considered a valid objection to a request for production because, unlike the rule of civil procedure regarding interrogatories and requests for disclosure, the rules regarding requests for production does not include any language concerning the marshalling of evidence."⁹⁶ In *In re Sting Soccer Group, LP*, the contention requests were basically worded: "**Documents [party] contends establish, demonstrate, or prove that ____.**"

Shepardizing *In re Sting Soccer Group, LP* at the time of this paper reveals that it has only been cited four times and no Texas case squarely cites to it to endorse the use of contention requests for production.⁹⁷

2. *In re Scherer*

On the other hand, in *In re Scherer*, the Eastland Court of Appeals recently held that requests for production seeking documents "support[ing]" or "substantiat[ing]" various claims that were set out in a

party's pleadings were improper.⁹⁸ Citing Tex. R. Civ. P. 192.3(j); R. 192, cmt. 5, the court explained that while a requesting party is entitled to discover the factual basis for another party's contentions, a requesting party may not simply demand that an opposing party marshal its evidence in support of a particular contention.⁹⁹ Comment 5 to Rule 192 states "Rule 192.3(j) makes a party's legal and factual contentions discoverable but does not require more than a basic statement of those contentions and does not require a marshaling of evidence." The court further explained that requests for production must, likewise, describe the documents sought with "reasonable particularity."¹⁰⁰

The court cited *Loftin v. Martin*, where the Texas Supreme Court held that a request that sought all documents that "an insurance carrier contended supported its allegations the Industrial Accident Board (IAB) had rendered an award that was contrary to the undisputed evidence."¹⁰¹ There, "after noting that requests under the rules of civil procedure 'must be specific, must establish materiality, and must recite precisely what is wanted,' the court held that the request for documents in support of the carrier's allegation regarding the IAB award failed to 'identify any particular class or type of documents' and that, instead, it was 'merely a request ... to generally peruse all evidence that the carrier might have.'"¹⁰²

The *Scherer* court further observed that "since *Loftin*, Texas courts have consistently held that requests that demand the production of *all* evidence in support of a party's allegations are beyond the scope of permissible discovery."¹⁰³ The *Scherer* court further explained that comments to Rule 193 (which covers objections to written discovery) likewise note that "a party may object to a request for 'all documents relevant to the lawsuit' as [being] overly broad and not in compliance with the rule requiring specific requests for documents and [may] refuse to comply with it entirely."¹⁰⁴ "[R]equests of this nature may be so vague that the responding party is

⁹⁴ *In re Sting Soccer Grp., LP*, No. 05-17-00317-CV, 2017 WL 5897454, at *7 (Tex. App.—Dallas Nov. 30, 2017, no pet.) (mem. op.).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See e.g. *In re Sarosi as Tr. of L&B Reig Tr.*, No. 05-25-00264-CV, 2025 WL 1737329, at *3 (Tex. App.—Dallas June 23, 2025, no pet.) (citing *In re Sting Soccer Grp., LP*, 2017 WL 5897454, at *7) (requests for production may properly ask a party to provide "all," "each," or "every" document pertaining to a relevant, narrow subject of the litigation)).

⁹⁸ *In re Scherer*, 684 S.W.3d 875, 890 (Tex. App.—Eastland 2024, no pet.).

⁹⁹ *Id.* at 891.

¹⁰⁰ *Id.* (citing Tex. R. Civ. P. 196.1(b)).

¹⁰¹ *Id.* at 891.

¹⁰² *Id.* (citing *Loftin*, 776 S.W.2d at 148).

¹⁰³ *Id.* (citing *In re Master Flo Valve Inc.*, 485 S.W.3d 207, 218 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding) (a request for "all documents, communications, tangible or intangible evidence relating in any way to *892 defendants' claims, defenses, or alleged damages" was overly broad); *In re TIG Ins. Co.*, 172 S.W.3d 160, 168 (Tex. App.—Beaumont 2005, orig. proceeding) (a series of requests seeking all documents that support an insurer's decision to deny a claim were improper under *Loftin*)).

¹⁰⁴ *Id.* (citing Tex. R. Civ. P. 193, cmt. 2).

‘unlikely to know what documents are required to be produced.’”¹⁰⁵

Notably, the *Scherer* Court rejected the argument that a party may avoid violating *Loftin v. Martin* by serving multiple, targeted requests seeking “all documents” supporting particular aspects of an opponent’s allegations.¹⁰⁶ Although the requesting party relied on *Davis v. Pate*, which held that a series of requests were appropriate when they asked for “any and all documents” that evidenced various, particular aspects of a plaintiff’s claims, the court declined to follow *Davis*, reasoning that: (1) *Davis* predated the 1999 amendments to the Texas Rules of Civil Procedure, which clarify that discovery does not require a party to marshal its evidence; (2) *Davis* misread *Loftin*, which rejected even requests tied to a specific aspect or element of a claim; and (3) *Davis* would permit an end-run around of *Loftin* by allowing parties to systematically demand “all documents” supporting a claim — which would effectively allow a party to issue a comprehensive call for an opponent to produce “all evidence.”¹⁰⁷ Accordingly, the court held that such requests remain overly broad and impermissible.

We conclude that, regardless of whether they are global or particularized, requests for production that seek all evidence (or documents) that support an opposing party’s allegations fail to describe the requested documents with “reasonable particularity,” as required by Rule 196.1(b) and *Loftin*. Likewise, because such requests require a party to marshal its evidence, they exceed the permissible scope of discovery under the rules.¹⁰⁸

3. Criticism of *In re Scherer*

One Texas discovery treatise has criticized the reasoning in *In re Scherer* with respect to contention requests for production.¹⁰⁹ Because the analysis is so comprehensive, it is quoted here at length (with minor formatting changes and emphasis for the purposes of this paper):

The authors believe that the reasoning in *Scherer* is incorrect.

¹⁰⁵ *In re Scherer*, 684 S.W.3d 875, 892 (Tex. App.—Eastland 2024, no pet.)(citing *TIG*, 172 S.W.3d at 168).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 893 (citing Tex. R. Civ. P. 192.3, cmt. 5)(emphasis in original).

¹⁰⁹ Robert K. Wise, Kennon L. Wooten, Francesca A. Di Troia & Joseph Paul McDuffie, *Texas Discovery* § 8.02 (2026).

¹¹⁰ *Id.* (citing *Loftin v. Martin*, 776 S.W.2d 145, 148 (Tex. 1989) (orig. proceeding), *disapproved of on other*

First, the decision’s reliance on *Loftin* is misplaced. In that case, the Texas Supreme Court held that a production request for “all notes, records, memoranda, documents and communications made that the carrier contends support its allegations” was not reasonably particular because it “does not identify any particular class or type of documents but it is merely a request that Loftin be allowed to generally peruse all evidence Lumbermens might have... . No one seeks to deny Loftin’s right to see evidence against him, but he must formulate his request for production with a certain degree of specificity to allow Lumbermens to comply.”¹¹⁰

The production requests in *Scherer*, unlike the production request in *Loftin*, were not global ones that asked for all documents regarding the opposing party’s contentions or allegations, but rather were particularized ones that sought the production of documents about specific allegations. The significance of this distinction is made clear by the official commentary to Texas Rule 193, which cites *Loftin* for the proposition that “a party may object to a request for ‘all documents relevant to the lawsuit’ as overly broad and not in compliance with the rule requiring specific requests for documents and refuse to comply with it entirely.”¹¹¹

Second, federal courts applying the identical “reasonable-particularity” requirement for production requests almost uniformly hold that contention production requests, like those in *Scherer*, are proper.¹¹²

Third, the conclusion in *Scherer* is inconsistent with the requirement of Texas Rule 194.2(b)(6), which requires each party in a suit not governed by the Family Code to disclose “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

grounds by *Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding)).

¹¹¹ *Id.* (internal citations omitted).

¹¹² *Id.* (internal citations omitted); see e.g. *Kleppinger v. Tex. Dept. of Transp.*, No. L-10-124, 2012 U.S. Dist. LEXIS 208441, at *47–48 (S.D. Tex. Mar. 4, 2012) (“[C]ourts have interpreted [Federal] Rule 34 to allow discovery of ‘contention’ type documents, specifically those documents supporting affirmative defenses.” (citing cases).

be solely for impeachment.”¹¹³ Certainly, if such a disclosure request has reasonable particularity and does not require marshaling neither do contention production requests concerning specific claims, defenses, allegations, or contentions because, like Texas Rule 194.2(b)(6), the requests seek the same types of documents that parties are required to disclose in their initial disclosures.¹¹⁴

Fourth, marshaling is not a proper objection to a production request. Unlike Texas Rule 197, which governs interrogatories, Rule 196 does not specifically prohibit marshaling.¹¹⁵ Because “marshaling” requires the “ ‘arranging all of [a responding party’s] evidence in the order that it will be presented at trial[.]’ ”¹¹⁶ a contention production requests asking for documents about specific claims, defenses, allegations, or contentions of the responding party does not require marshaling. Moreover, the Eastland Court of Appeals reliance on Texas Rule 192.3(j) and Comment 5 to the 1999 change to Texas Rule 192, which prohibit marshaling, is misplaced. As made clear by the comment, contention discovery is related to legal theories and facts, not documents: Texas “Rule 192.3(j) makes a party’s legal and factual contentions discoverable but does not require more than a basic statement of those contentions and does not require a marshaling of evidence.”¹¹⁷

Finally, *Scherer* ignores the fact that contention production requests are the only way in which a party can obtain documents concerning the responding party’s claims, defenses, contentions, and allegations . . . The only practical way for a requesting party to obtain documents about such allegations is to serve contention requests, which, under *Scherer*’s reasoning, would lack reasonable particularity and impermissibly require marshaling.¹¹⁸

But as the authors of *Texas Discovery* point out, “The fact that *Scherer* is wrong does not mean that a party faced with contention production requests is without a remedy.”¹¹⁹ The authors provide examples of contention requests that would ***not meet the reasonable particularity standard*** and offer guidance on how to

draft requests to avoid such objections (emphasis added and reformatted for clarity):

As pointed out above, ***any such request that is global*** (e.g., a request for “all documents concerning the plaintiff’s contentions in the action”), ***rather than directed to a specific claim, defense, contention, or allegation of the responding party*** (e.g., a request for “all documents concerning the allegation in Paragraph 10 of the Petition that the defendant violated its duty to supervise its employees”) ***is not reasonably particular***. And multiple contention production requests can be unduly burdensome or disproportionate to the needs of the case, which are the appropriate objections to such requests.

To avoid such objections, the requesting party should narrow its production requests as much as possible. For example, rather than asking for:

- “all documents concerning Plaintiff’s fraud claim,”
 - ***the party should ask for*** “documents sufficient to show each material misrepresentation or omission allegedly made by Defendant that allegedly induced Plaintiff to enter into the contract at issue” or “all documents concerning Plaintiff’s reliance on Defendant’s alleged misrepresentation about X.”
- “all documents concerning Defendant’s alleged negligence,”
 - ***the party should ask for*** “documents sufficient to show each legal duty allegedly breached by Defendant” or “all documents concerning the breach of Defendant’s duty to properly train its employees.”
- “all documents concerning Plaintiff’s breach-of-contract claim,”
 - ***the party should ask for*** “documents sufficient to show each alleged breach of contract [or the breach of Section __ of the contract].”
- “all documents concerning Defendant’s alleged gross negligence,”

¹¹³ *Id.* (citing Tex. R. Civ. P. 194.2(b)(6) and stating “Although Texas Rule 194.2(b)(6) was added in the 2021 Amendments to the Texas Rules of Civil Procedure, former Texas Rule 190.2(b)(6), which applied to Level 1 actions, required such a disclosure”).

¹¹⁴ Robert K. Wise, Kennon L. Wooten, Francesca A. Di Troia & Joseph Paul McDuffie, *Texas Discovery* § 8.02 (2026) (internal citations omitted).

¹¹⁵ *Id.* (internal citations omitted).

¹¹⁶ *Id.* (internal citations omitted).

¹¹⁷ *Id.* ((internal citations omitted)).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

- *the party should ask for* “all documents concerning any allegation that (1) Defendant’s acts and omissions involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others” or (2) Defendant “had actual, subjective awareness of the risk involved but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.”
- “all documents concerning Plaintiff’s alleged damages,”
 - *the party should ask separate requests for each category of damages* (e.g., “all documents concerning Plaintiff’s lost profits” or “all documents concerning the cost of repair or replacement”).

B. Key Take Aways

- Federal courts endorse the use of narrow contention requests for production.
- Even assuming contention requests for production are proper under Texas law, they still may be objectionable where they:
 - lack reasonable particularity (when drafted too broadly); and
 - are unduly burdensome (e.g. excessive in number).
- Contention requests should be drafted to narrowly focus on specific claim, defense, contention, or allegation of the responding party.

VIII. PREPARING TO RESPOND TO REQUESTS FOR PRODUCTION

A strong response begins before objections are drafted. There are several initial steps that must be taken when responding to requests for production. These steps include promptly reviewing the requests, calendaring the response deadline, instructing the client regarding their discovery obligations, preserving and collecting responsive materials, and organizing the documents for review and production.

A. Review the Requests and Calendar Due Date

Upon receiving requests for production, the responding party should promptly take three steps:

- conduct an initial review of the requests to understand their scope and the anticipated time required to respond;
- calendar the response deadline; and
- transmit the requests to the client, together with an instruction letter informing them of their duties.

B. Transmit to Client and Explain Client’s Duties

1. Inform the Client of the Deadline to Respond

The client should be told immediately when the response is due and that the deadline is important. The responding party must serve a written response on the requesting party within 30 days after service of the request.¹²⁰ Additionally, if the responding party seeks a protective order, they will need to have filed a motion for protection by the same date.¹²¹ There are consequences for not timely responding. Also, if a party fails to timely serve a written response to a request for production, any valid objections are waived.¹²² If a party fails to serve a written response to a request for production, the requesting party can move for an order compelling production and seek sanctions.¹²³

2. Possession, Custody, & Control

The client should be educated on their duty to produce documents in their possession, custody, or control.¹²⁴ “Possession, custody, or control” of an item for purposes of discovery means that the “person either has physical possession of the item or has a right to possession of the item that is equal or superior to the person who has physical possession of the item.”¹²⁵ According to the Texas Supreme Court, the phrase “possession, custody or control” within the meaning of Rule 192.3(b) includes not only actual physical possession, but constructive possession, and the right to obtain possession from a third party such as an agent or representative.¹²⁶ The right to obtain possession is a legal right based on the relationship between the party responding to discovery and the person or entity that has actual possession.¹²⁷ Therefore, from a practical standpoint, the client should be instructed to identify not only documents they physically have, but also documents they can obtain from:

- agents or representatives;
- accountants, bookkeepers, or consultants;
- banks and/or financial institutions; and/or
- other third parties from which the client has a legal right to obtain the records.

¹²⁰ Tex. R. Civ. P. 196.2(a).

¹²¹ Tex. R. Civ. P. 192.6(a).

¹²² Tex. R. Civ. P. 193.2(a).

¹²³ Tex. R. Civ. P. 215.1(1)(b)(3)(c).

¹²⁴ Tex. R. Civ. P. 196.3(a).

¹²⁵ Tex. R. Civ. P. 192.7(b).

¹²⁶ *In re Summersett*, 438 S.W.3d 74, 81 (Tex. App.—Corpus Christi–Edinburg 2013, no pet.) (citing *GTE Commc’ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 729 (Tex.1993)).

¹²⁷ *Id.*; *Kia Motors Corp. v. Ruiz*, 348 S.W.3d 465, 487 (Tex. App.—Dallas 2011, pet. granted).

The party seeking production has the burden of proving that the responding party has constructive possession or the right to obtain possession of the requested documents.¹²⁸ When seeking financial records pertaining to an estate, guardianship, or trust, and the responding party is a fiduciary, such an executor, guardian, or trustee will frequently have “constructive possession” of such records due to their right to obtain the records by virtue of their power as the fiduciary.¹²⁹

3. Diligent Search

The client should be educated on their duty to conduct a diligent search. A party responding to requests for production must perform a “diligent search” and must make a reasonable effort to locate responsive documents.¹³⁰ Therefore, the responding party must take reasonable steps to search all places where responsive information may exist, search those locations, and gather the materials found, including:

- paper files and physical records;
- email accounts;
- text messages, instant messaging applications, and other communications platforms;
- cloud storage platforms;
- shared network drives, servers, and collaboration platforms;

- laptops, desktops, tablets, and mobile phones;
- external storage media, such as USB drives and external hard drives;
- accounting, billing, and practice-management systems;
- social media or other online platforms, if relevant; and
- Any other repositories or media reasonably likely to contain responsive information.

Additionally, with respect to searching for responsive documents, the client should be educated on their duty to produce electronically stored information. The responding party then has a duty “to produce the electronic or magnetic data that is responsive to the request and is *reasonably available* to the responding party in its ordinary course of business” and in a “reasonably usable form.”¹³¹ This rule’s focus on production of data that is “reasonably available” in the “ordinary course of business” with “reasonable efforts” reflects a policy underlying discovery in general—and electronic discovery in particular—to achieve an appropriate balance between discoverability and accompanying burdens.¹³²

A diligent search does not require perfection.¹³³ For example, the Rules contemplate supplementing

¹²⁸ *In re Summerset*, 438 S.W.3d 74, 81 (Tex. App.—Corpus Christi–Edinburg 2013, no pet.) (citing *GTE Commc’ns Sys. Corp.*, 856 S.W.2d at 729; *In re U–Haul Int’l*, 87 S.W.3d 653, 656 (Tex. App.—San Antonio 2002, orig. proceeding)).

¹²⁹ **Executors.** See e.g. Tex. Est. Code § 101.003 (stating that on the issuance of letters testamentary or of administration on an estate, the executor or administrator has the right to possession of the estate as the estate existed at the death of the testator or intestate); TEC § 351.102(a) (providing that immediately after receiving letters testamentary or of administration, the personal representative of an estate shall collect and take possession of the estate’s personal property, record books, title papers, and other business papers); See also Tex. Est. Code § 111.102 (mandating that to the extent not prohibited by federal or other state law, a contracting third party shall, on request, provide to the personal representative of a deceased party’s estate all information the contracting third party would have provided to the deceased party as of the date of the deceased party’s death, if the deceased party had requested the information, without regard to whether the deceased party’s estate has an interest in the multiple-party account, the property subject to a possible nontestamentary transfer, or the insurance contract.); **Guardians.** See Tex. Est. Code § 1151.152 (guardian of the estate shall collect and take possession of the ward’s personal property, record books, title papers, and other business papers). **Trustees.** The trustee is vested with legal title and the right to possess the trust property but holds it for the benefit of the beneficiaries, who are vested with equitable title to the trust property. *Jameson v. Bain*, 693 S.W.2d 676, 680 (Tex. App.—San Antonio 1985, no writ); see also Tex.

Trust Code § 111.004(12) (defining “trust property” as any type of property, whether real, tangible or intangible, legal, or equitable, including property held in any digital or electronic medium, including choses in action, claims, and contract rights, including a contractual right to receive death benefits as designated beneficiary under a policy of insurance, contract, employees’ trust, retirement account, or other arrangement).

¹³⁰ Tex. R. Civ. P. 196.2(b) (requiring responding party to state “no items have been identified — after a diligent search — that are responsive to the request); see also *Porretto v. Tex. Gen. Land Office*, 448 S.W.3d 393, 403 (Tex. 2014)(responding party’s production of some records, while acknowledging additional records existed but had not been searched for, constituted no response and justified sanction; noting trial court could have found this was a situation in which responding party made “no reasonable effort to locate responsive documents”).

¹³¹ TEX. R. CIV. P. 196.4 and cmt. 3 thereto.

¹³² *In re Methodist Primary Care Group*, 553 S.W.3d 709, 715 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (citing Tex. R. Civ. P. 192.4, 192.6(b); see also *In re State Farm Lloyds*, 520 S.W.3d 595, 599 (Tex. 2017) (orig. proceeding) (“[A]ll discovery is subject to the proportionality overlay embedded in our discovery rules and inherent in the reasonableness standard to which our electronic-discovery rule is tethered.”).

¹³³ *Smith v. Garland*, No. EP-23-CV-00390-KC, 2024 WL 4683689, at *9 (W.D. Tex. Nov. 1, 2024)/ (“On the other hand, ‘there is no obligation on the part of a responding party to examine every scrap of paper in its potentially voluminous files,’ and ... ‘[c]ourts cannot and do not expect that any party

discovery responses.¹³⁴ Opposing counsel may challenge whether the search was adequate. Where “a motion for sanctions asserts that a respondent to a discovery request has failed to produce a document within its possession, custody or control, the movant has the burden to prove the assertion.”¹³⁵ Surmise or suspicion is not enough.¹³⁶ Ultimately, while establishing a responding party failed to produce responsive documents is a significant burden, the safest practice to guard against such challenges is to be prepared to explain (and, if necessary, support with evidence) a diligent search. Therefore, the responding party should be prepared to explain the specific steps they took to attempt to search for responsive documents: what sources were searched, who conducted the search, when it occurred, and what was done to locate responsive materials.

The search process can be more time-consuming and burdensome than the responding party may expect. Therefore, it is important that the responding party begin searching for responsive documents as soon as possible.

4. Duty to Preserve Evidence

The client should be instructed not to delete, destroy, overwrite, alter, or discard potentially responsive materials. A party has a duty to preserve evidence “only when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim.”¹³⁷ In turn, a “substantial chance of litigation” arises when “litigation is more than merely an abstract possibility or unwarranted fear.”¹³⁸

Therefore, the responding party should preserve potentially responsive materials, including, as applicable:

- **Communications:** letters, emails, text messages, chat messages, and other correspondence.
- **Transactional documents:** contracts, amendments, invoices, purchase orders, receipts, and account records.
- **Internal records:** notes, calendars, diaries, and internal memoranda.
- **Data and analyses:** spreadsheets, databases, reports, and presentations.
- **Media files:** photographs, videos, audio recordings, and voicemail messages.

- **Document versions:** drafts and prior versions of documents.
- **Storage locations:** materials stored on computers, servers, external drives, USB devices, mobile phones, tablets, and cloud-based platforms.
- **Social media and messaging platforms:** content or communications relevant to the case.
- **Other materials:** any other documents or records describing, discussing, or mentioning the allegations, claims, defenses, transactions, events, or persons identified in the requests.

If the responding party is uncertain whether a document or item may be relevant or responsive, they should preserve it and provide it for review. Along these same lines, it can be useful to serve a non-spoilation demand letter on opposing party/counsel immediately before or after filing suit.

5. Providing Responsive Documents to Counsel

The client should provide potentially responsive materials to counsel as early as possible and in the form in which they are ordinarily kept, unless counsel instructs otherwise. The client should also be instructed:

- not to edit or annotate documents before sending them to counsel;
- not to rename files in a way that changes their original context;
- not to delete metadata or convert files unnecessarily;
- not to withhold documents because they appear harmful;
- to identify where documents came from and who maintains them;
- to disclose any sources that may exist but are inaccessible, lost, missing, damaged, or controlled by third parties; and
- to identify documents that they believe are privileged.

Counsel, not the client, should determine responsiveness, objections, and privilege.

6. Duty to Supplement Production

The client should be educated on their duty to supplement their responses to requests for production. Generally, a party responding to requests for production has a duty to supplement their responses if the party

can meet a standard of perfection.”)(internal citations omitted).

¹³⁴ Tex. R. Civ. P. 193.5(a).

¹³⁵ *In re Newkirk Logistics, Inc.*, 718 S.W.3d 240, 247 (Tex. 2025), reh'g denied (Sept. 5, 2025) (internal citations omitted).

¹³⁶ See *In re Shipman*, 540 S.W.3d 562, 569 (Tex. 2018); *GTE Communications Sys. Corp. v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993).

¹³⁷ *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 722 (Tex. 2003) (internal citations omitted).

¹³⁸ *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 20 (Tex. 2014) (citing *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 204 (Tex.1993)).

learns that the party's response to written discovery was incomplete or incorrect when made, or, although complete and correct when made, is no longer complete and correct.¹³⁹ Additionally, an amended or supplemental response must be made reasonably promptly after the party discovers the necessity for such a response.¹⁴⁰ It is generally presumed that an amended or supplemental response made less than 30 days before trial was not made reasonably promptly. This means that if a party fails to timely supplement or amend its response to a request for production, it risks exclusion of the documents from use at trial under Texas Rule of Civil Procedure 193.6, which prohibits a party from using evidence that was not timely disclosed unless the court finds good cause or lack of unfair surprise or prejudice.¹⁴¹

C. Obtain and Analyze Possible Production

Once the client provides materials to counsel, counsel should review and categorize them as:

- responsive and producible;
- responsive but privileged or otherwise protected; and
- nonresponsive.

IX. OBJECTION CONSIDERATIONS

A. Basics & Burden

Proper objections define the outer boundary of the responding party's production obligations. Tex. R. Civ. P. 193 governs responses and objections to written discovery. As one Texas court observed, "[t]his rule was adopted in an effort to 'streamline procedures, reduce costs, and enhance the effectiveness of written discovery as a means of uncovering truth.'"¹⁴²

Under Rule 193:

- 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).
- A party may object to written discovery **only if** a good faith factual and legal basis for the objection exists at the time the objection is made. Tex. R. Civ. P. 193.2(c).
- 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. Tex. R. Civ. P. 193.2(a).
- A 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, or that is obscured by numerous unfounded objections, is waived unless the court excuses the waiver for good cause shown.¹⁴³ An objection or response to written discovery may be amended or supplemented to state an objection or basis that, at the time the objection or response initially was made, either was inapplicable or was unknown after reasonable inquiry.¹⁴⁴

In essence, objections made under Rule 193.2 "simply assert that the form or scope of a written discovery request does not comply with the rules."¹⁴⁵

B. Why Object to a Request for Production

1. Objections Define the Scope of What Must Be Produced

A well-crafted objection will narrow the universe of documents the responding party must search, review, and produce. By clearly defining the permissible scope of discovery—and excluding categories that are irrelevant, disproportionate, and/or overbroad—the objection limits the volume of materials that must be collected, analyzed and produced. This, in turn, directly reduces the costs associated with document collection, attorney review time, and production expenses. It also shortens the response timeline, minimizes the risk of inadvertent disclosure of privileged or confidential material, and may reduce the number and complexity of privilege-log entries. In other words, without an objection, the request defines the scope. With an objection, the responding party defines the scope.

2. Objections Protect Against Sanctions By Defining What You Are Not Producing

Objections also help create a clear record of the boundaries of the responding party's production. By either refusing to produce documents or by stating "the extent to which the responding party is refusing to comply with the request"¹⁴⁶—and on what legal or factual basis—the responding party reduces the risk of later being accused of concealing documents or providing an incomplete response. A properly stated objection shows that any non-production was intentional, disclosed, and tied to a specific objection such as overbreadth, irrelevance, disproportionality, privilege, and/or undue burden. That record can be critical if the requesting party later moves to compel or seeks sanctions.

¹³⁹ Tex. R. Civ. P. 193.5(a).

¹⁴⁰ Tex. R. Civ. P. 193.5(b).

¹⁴¹ Tex. R. Civ. P. 193.6(a).

¹⁴² *In re Park Cities Bank*, 409 S.W.3d 859, 876 (Tex. App.—Tyler 2013, no pet.)(citing Nathan L. Hecht & Robert H. Pemberton, *A Guide to the 1999 Texas Discovery Rules*

Revisions, Nov. 11, 1998, F, <http://www.supreme.courts.state.tx.us/rules/tdr/discle3.htm>)

¹⁴³ Tex. R. Civ. P. 193.2(e).

¹⁴⁴ Tex. R. Civ. P. 193.2(d).

¹⁴⁵ Alex Wilson Albright et al., *Texas Practice Series: Handbook on Texas Discovery Practice*, § 7:5. Objections.

¹⁴⁶ Tex. R. Civ. P. 193.2(a).

3. Objections Shift the Burden Back to the Requesting Party

The party resisting discovery has the burden to plead and prove the basis for its objections.¹⁴⁷ While any party may at any reasonable time request a hearing on an objection or claim of privilege asserted,¹⁴⁸ once objections or claims of privilege have been served, the party seeking discovery has the burden to secure a hearing to resolve the discovery dispute.¹⁴⁹ Importantly, a party cannot sit on an objection and then seek exclusion of the evidence at trial.¹⁵⁰ Rule 193.6's exclusionary sanction is only implicated if the party propounding discovery requests first establishes that the responding party had an obligation to produce the complained-of documents in discovery.¹⁵¹ In other words, once the responding party objects, the requesting party must evaluate the validity of the objection,

¹⁴⁷ *State v. Lowry*, 802 S.W.2d 669, 671 (Tex.1991) (“The burden is on the party seeking to avoid discovery to plead the basis for exemption or immunity and to produce evidence supporting that claim”); *In re Univar USA, Inc.*, 311 S.W.3d 175, 180 (Tex. App.—Beaumont 2010, no pet.) (stating “the general rule is that a party resisting discovery has the burden to plead and prove the basis for its objections”).

¹⁴⁸ Tex. R. Civ. P. 193.4(a).

¹⁴⁹ See Tex. R. Civ. P. 193.4(a); See *McKinney v. Nat'l Union Fire Ins. Co.*, 772 S.W.2d 72, 75 (Tex.1989) (“Because the party requesting discovery is in the best position to evaluate its need for information and sometimes recognizes the validity of an objection to a discovery request, the orderly administration of justice will be better served by placing responsibility for obtaining a hearing on discovery matters on the party requesting discovery.”); *Remington Arms Co. v. Caldwell*, 850 S.W.2d 167, 170 (Tex.1993) (“[T]he failure to obtain a pretrial ruling on discovery disputes that exist before commencement of trial constitutes a waiver of any claim for sanctions based on that conduct”); *In re City of Houston*, 418 S.W.3d 388, 394 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (“The law is well settled that when a party seeking discovery fails to request a hearing and obtain a ruling on discovery objections, it waives its right to the discovery sought”).

¹⁵⁰ *Balay v. Gamble*, No. 01-10-00017-CV, 2011 WL 2435929, at *6 (Tex. App.—Houston [1st Dist.] June 16, 2011, no pet.) (“When a party receives objections to its discovery, its failure to seek a ruling on those objections waives its right to the requested discovery. A party cannot sit on an objection and then seek exclusion of the evidence at trial”).

¹⁵¹ *Richard v. Towery*, 01-11-00132-CV, 2013 WL 1694861, at *5 (Tex. App.—Houston [1st Dist.] Apr. 18, 2013, no pet.); TEX. R. CIV. P. 193.6(b); see also *In re Marriage of Bivins*, No. 10-11-00018-CV, 2012 WL 6099066, at *8 (Tex. App.—Waco 2012, pet. denied) (“Where there are objections to discovery, the party seeking discovery can either file a Motion to Compel or seek a ruling on objections. The requestor waives the failure to produce

determine whether they can justify the the request and/or proportionality,¹⁵² and if so, whether to move to compel.

4. Objections Prevent the Opposing Party From Using Discovery as a Weapon

Request for production can be abused if unlimited in time and scope. Proper objections prevent irrelevant and disproportionate discovery, force the requesting party to “narrowly tailor their requests to avoid including tenuous information and still obtain the necessary, pertinent information.”¹⁵³ This can be especially important in cases where the parties have unequal resources.

documents when there is no ruling on the objections.”) (citing *Pace v. Jordan*, 999 S.W.2d 615, 622 (Tex. App.—Houston [1st Dist.] 1999, pet. denied)); *Balay v. Gamble*, No. 01-10-00017-CV, 2011 WL 2435929, at *6 (Tex. App.—Houston [1st Dist.] June 16, 2011, no pet.) (mem.op.)

¹⁵² It is the discovery proponent's burden to demonstrate that the requested documents fall within the scope-of-discovery of Tex. R. Civ. P. 192.3. *In re TIG Ins. Co.*, 172 S.W.3d 160 (Tex. App.—Beaumont 2005) (“The burden to propound discovery complying with the rules of discovery should be on the party propounding the discovery, and not on the courts to redraft overly broad discovery so that, as redrawn by the court, the requests comply with the discovery rules. Additional problems are created by “battlefield surgery” when a court attempts to deal with voluminous requests, many of which suffer from overbreadth . . . Although we could remand Beck's requests to the trial court and request that the trial court attempt to narrow the requests, where the discovery as drafted by a party involves over 100 requests, many of which are clearly outside the bounds of proper discovery, we decline to transfer the burden of drafting proper discovery from the party that drafted it in the first place and place it on the courts.”); *In re Childers*, No. 07-25-00344-CV, 2026 WL 41315, at *2 (Tex. App.—Amarillo Jan. 6, 2026, no pet. h.) (responding party objected on the basis the requests were overbroad, and the requesting party made no showing the requested documents were within the scope of appropriate discovery); *In re Resorts*, No. 03-24-00271-CV, 2024 WL 3187648, at *9 (Tex. App.—Austin June 26, 2024, no pet.) (“It is the discovery proponent's burden to demonstrate that the requested information falls within Rule 192.3's scope . . . The Real Parties have failed to demonstrate that the information they seek is unprivileged information that is relevant to the subject of the action, even if it would be inadmissible at trial, because it is “reasonably calculated to lead to the discovery of admissible evidence”; see also *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) (“Although the scope of discovery is broad, requests must show a reasonable expectation of obtaining information that will aid the dispute's resolution”).

¹⁵³ *In re CSX Corp.*, 124 S.W.3d 149, 153 (Tex. 2003).

5. Why Object Even if There are No Responsive Documents

Stating objections—even when no responsive documents are located—preserves objections that would otherwise be forfeited. A barebones “no items have been identified — after a diligent search — that are responsive to the request” can be read as conceding that the request was proper in scope (i.e. relevant, proportional, etc.). By asserting an objection, the responding party avoids the implied admission the request was proper while still making clear that a reasonable search yielded no responsive documents.

This practice is particularly important in light of Rule 193.2(e), which provides that objections not timely made are waived. If no objections are asserted simply because no documents *are presently known to exist*, the party risks permanently losing the ability to challenge the request—even if responsive documents are later discovered.¹⁵⁴

Relatedly, Rule 193.5(a) imposes an ongoing duty to amend or supplement discovery responses if the party learns that the response was incomplete or incorrect when made. A “no documents” response may not be the end of the inquiry. If responsive documents are later identified, they must be produced or disclosed. Thus, pairing objections with the initial response ensures that, upon supplementation, the party has not already conceded the validity or scope of the request.

Failing to follow this approach creates a second, practical risk: exclusion. When documents are later located and produced after an initial “none” response, courts may scrutinize whether the producing party preserved its objections and complied with its supplementation obligations. Without timely objections, the producing party may be exposed to arguments that the late production is improper or that the evidence should be excluded.

C. Boilerplate Objections

Whether an objection is labeled or dismissed as “boilerplate” often depends on the perspective of the reader. An objection “that is obscured by numerous unfounded objections, is waived.”¹⁵⁵ While many practitioners frequently use the term “boilerplate objection,” as the Dallas Court of Appeals in *In re Gautreaux* recently observed, “We are not aware of any Texas rule or case defining ‘boilerplate objections.’” The

court did acknowledge, however, that they were “aware of a definition recently cited by a federal district judge from our state.”¹⁵⁶ The court cited the federal case *VeroBlue Farms USA Inc. v. Wulf*,¹⁵⁷ which defined “boilerplate objections” as follows:

“Boilerplate objections are those that utilize ‘standardized text’ or ‘ready-made or all-purpose language,’ but ‘copying and pasting an objection, by itself does not render that objection a boilerplate objection’ – rather, “[o]bjections are typically deemed ‘boilerplate’ when they are identical and not tailored to the specific discovery request.”

In *In re Gautreaux*, the court explained that copying and pasting objections does not, by itself, violate Rule 193.2. The court rejected the argument that “boilerplate” objections were improper merely because they were repeated across multiple requests. The court noted that the discovery requests themselves were largely identical except for party names, making it unsurprising—and reasonable—that the corresponding objections were likewise identical. Using a word processor to replicate an objection and tailoring it to the specific request does not run afoul of the rules so long as the objection is substantively applicable. The key inquiry is whether the objection is actually responsive and appropriate to the request at issue and meets the standards provided in rule 193.2.¹⁵⁸ Turning to the specific objections at issue, relevance and overbreadth, the Court commented “It might have been better had relators more specifically stated that their objection was that the requests were outside the scope of discovery set forth in Rule 192.3, then explaining why they contended the requests exceeded such scope. However, objections complaining of relevance and overbreadth clearly sound in Rule 192.3.”¹⁵⁹ Ultimately, the Court concluded the objections were not waived.¹⁶⁰

D. Providing Responses that are “Subject to” Objections

Practitioners and numerous federal courts have condemned the practice of answering a discovery request “subject to” one or more objections.¹⁶¹ As one Texas federal court observed:

¹⁵⁸ *In re Gautreaux*, No. 05-25-00380-CV, 2025 WL 2076482, at *10 (Tex. App.—Dallas July 23, 2025, no pet.).

¹⁵⁹ *Id.* at *9, n. 4.

¹⁶⁰ *Id.*

¹⁶¹ See Robert K. Wise, Katherine Hendler Fayne, *A Guide to Properly Using and Responding to Requests for Admission Under the Texas Discovery Rules*, 45 St. Mary's L.J. 655, 696 (2014).

¹⁵⁴ Tex. R. Civ. P. 193.2(d) (“An objection or response to written discovery may be amended or supplemented to state an objection or basis that, at the time of the objection or response initially was made, either was inapplicable or was unknown after reasonable inquiry”).

¹⁵⁵ Tex. R. Civ. P. 193.2(e).

¹⁵⁶ *In re Gautreaux*, No. 05-25-00380-CV, 2025 WL 2076482, at *10 (Tex. App.—Dallas July 23, 2025, no pet.).

¹⁵⁷ 345 F.R.D. 406, 419 (N.D. Tex. 2021).

The practice of asserting objections and then answering “subject to” and/or “without waiving” the objections—like the practice of including a stand-alone list of general or blanket objections that precede any responses to specific discovery requests—may have developed as a reflexive habit passed on from one attorney to another without any attorney giving serious thought or reflection as to what this manner of responding means or could hope to accomplish as to a particular discovery request.¹⁶²

Federal courts have observed that this practice is “manifestly confusing (at best) and misleading (at worse), and has no basis at all in the Federal Rules of Civil Procedure.”¹⁶³ These courts reason that when a party responds to a discovery request in this manner, “[s]uch objection and answer ... leaves the requesting [p]arty uncertain as to whether the question has actually been fully answered or whether only a portion of the question has been answered.”¹⁶⁴ The author is not aware of, nor has he been able to identify, any Texas appellate decisions citing *Heller v. City of Dallas*, 303 F.R.D. 466, 487 (N.D. Tex. 2014), in support of its criticisms of responding to written discovery requests “subject to and without waiving” objections. Other Texas appellate cases do not appear to condemn the practice.¹⁶⁵

This raises an important question: does the federal critique of “subject to” responses apply with the same force under the Texas Rules of Civil Procedure? Unlike the federal rules, which explicitly require a responding

party to indicate whether any materials are being withheld,¹⁶⁶ the Texas Rules focus on specifying the extent of refusal to comply and producing all non-objectionable material.¹⁶⁷

For example, Rule 193.2(a) requires that “[t]he party must state . . . **the extent to which the party is refusing to comply** with the request.”¹⁶⁸ Moreover, Rule 193.2(b), partially titled “Duty to Respond when Partially Objecting” mandates that “[a] 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.”¹⁶⁹ Thus, the Texas Rules of Civil Procedure focus on the specificity of the objection and partial compliance, but Rule 193.2 stops short of explicitly requiring a responding party to disclose information withheld on the basis of an objection.

In contrast, Federal Rules 34(b)(2)(B) and 34(b)(2)(C) requires that objections be stated with specificity and that the response affirmatively state whether any responsive materials are being withheld on the basis of those objections.¹⁷⁰ Essentially, Rule 34(b)(2)(C) eliminates ambiguity about whether documents are being produced subject to objections or withheld entirely. In other words, the federal rules impose a more robust duty of transparency about what is not being produced and why.

Thus, when Rule 193.2(a)’s requirement that a party state “the extent to which” it is refusing to comply is read together with Rule 193.2(b)’s mandate to produce all non-objectionable material, one may be inclined to infer the Rules to implicitly require a

¹⁶² *Heller v. City of Dallas*, 303 F.R.D. 466, 486 (N.D. Tex. 2014) (“The Court concludes that, outside of the privilege and work product context as discussed above, responding to a document request or interrogatory “subject to” and “without waiving” objections is not consistent with the Federal Rules or warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law”).

¹⁶³ *Heller*, 303 F.R.D. at *487 (quoting *Sprint Communications Co., L.P. v. Comcast Cable Communications, LLC*, No. 11-2684-JWL, 2014 WL 545544, at *2 (D. Kan. Feb. 11, 2014)).

¹⁶⁴ *Id.* at 486–87 (quoting *Consumer Electronics Ass’n v. Compras & Buys Magazine, Inc.*, No. 08–21085–CIV, 2008 WL 4327253, at *3 (S.D. Fla. Sept. 18, 2008); see also *Firebirds Int’l, LLC v. Firebird Rest. Group, LLC*, No. 3:17-CV-2719-B, 2018 WL 3655574, at *6 (N.D. Tex. July 16, 2018); *Star Creek Ctr., LLC v. Seneca Ins. Co., Inc.*, No. 4:17-CV-00607, 2018 WL 1934084, at *2 (E.D. Tex. Apr. 23, 2018).

¹⁶⁵ *In re Sting Soccer Group, LP*, No. 05-17-00317-CV, 2017 WL 5897454, at *4 (Tex. App.—Dallas Nov. 30, 2017, no pet.) (opinion referencing response to request for production stated “Subject to the objection, Vola stated it

would produce documents responsive to the request” but otherwise not condemning that practice).

¹⁶⁶ Fed. R. Civ. P. 34(b)(2)(B) (“For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons”); Fed. R. Civ. P. 34(b)(2)(C) (“**An objection must state whether any responsive materials are being withheld on the basis of that objection**”)(emphasis added).

¹⁶⁷ Tex. R. Civ. P. 193.2(a)(party must state the extent to which the party is refusing to comply); Tex. R. Civ. P. 193.2(b) (party must generally comply with as much of the request to which the party has made no objection).

¹⁶⁸ Tex. R. Civ. P. 193.2(a).

¹⁶⁹ Tex. R. Civ. P. 193.2(b); see also Tex. R. Civ. P. 193.7, cmt. 2 (“An objection to written discovery does not excuse the responding party from complying with the request to the extent no objection is made”).

¹⁷⁰ Fed. R. Civ. P. 34(b)(2)(B) (“For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons”); Fed. R. Civ. P. 34(b)(2)(C) (“**An objection must state whether any responsive materials are being withheld on the basis of that objection**”).

responding party to define the scope of information being withheld—because, in explaining the extent of its noncompliance, the responding party necessarily identifies what it is not producing. Under this reasoning, the responding party is effectively saying “*if I’ve explained what I won’t do, I have effectively said what I am withholding.*” For example, parties often assert an “overbroad as to time” objection and limit their production — but without clearly identifying what documents are being withheld on the basis of that objection. This is not equivalent to stating whether responsive materials are being withheld and on what basis.

Under the Texas Rules of Civil Procedure, the permissibility of responding to discovery “subject to” objections is a nuanced analysis. Arguments can be made for and against this practice under the Texas Rules of Civil Procedure. By requiring a party to comply *with as much of the request to which the party has made no objection* Rule 193.2(b) suggests that the response must be limited to—and correspond with—the non-objectionable portion of the request. Similarly, Rule 193.2(a) requires the responding party to state the “*extent to which the party is refusing to comply.*” In other words, these Rules contemplate partial compliance — not a blended or conditional response be made generically “subject to” an objection, which leaves the scope of the compliance unclear.¹⁷¹ In fact, federal courts have questioned the efficacy of simultaneously objecting to a request and then answering it:

[I]f an objection to a discovery request is raised, and then the question is answered “subject to” or “without waiving” the objection, this court is reluctant to sustain the objection. Although this seems to be an increasingly common approach to discovery, it raises a fairly straightforward question: if a party objects to a question or request but then answers, has the objection been waived despite the claimed reservation of the objection? This court cannot logically conclude that the objection survives the answer. First, the rules do not on their face give a party that option . . . Thus, a responding party is given only two choices: to answer or to object. Objecting but answering

subject to the objection is not one of the allowed choices.¹⁷²

On the other hand, the Texas rules contain language that can be read to permit a combined objection-and-response approach. The comment to Tex. R. Civ. P. 193.2 states: “This rule imposes a duty upon parties to make a complete response to written discovery based upon all information reasonably available, *subject to objections and privileges.*” Tex. R. Civ. P. 193.2 cmt. 1 (emphasis added). Similar phrasing appears elsewhere. For example, Tex. R. Civ. P. 196.3(a) provides: “*Subject to any objections stated in the response*, the responding party must produce the requested documents or tangible things” And Tex. R. Civ. P. 196.2(b) appears to contemplate a combined objection/response format by requiring the responding party, for each item or category, to state objections *and* privileges and then state, as appropriate, one of four specified responses.

Ultimately, the focus should not be on whether a response to a request for production describes what information is being withheld, but on whether it clearly delineates:

- **the extent to which the party is refusing to comply;**¹⁷³ and
- **the portion of the request that is being complied with.**¹⁷⁴

This approach is consistent with the Texas Rules of Civil Procedure, which focus on clarifying the scope of noncompliance rather than imposing an affirmative duty to identify withheld materials.

Rather than responding “subject to” objections in a way that obscures whether materials are being withheld, an alternative practice is to state the objection and then clearly define the scope of the production that will be made.

[Responding Party] objects to this request as overbroad as to time and scope because . . . Pursuant to Tex. R. Civ. P. 193.2(a)–(b), [Responding Party] will produce all non-privileged, relevant documents within its possession, custody, or control for the period from [start date] to [end

¹⁷¹ See e.g. 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, 568–69 (2013); Matthew J. Hill, *The Art of Appropriate Discovery Objections Balancing Advocacy and Professionalism in Texas Civil Litigation*, 88 Tex. B.J. 197 (2025)(advocating that the better approach is to either object to the request in its entirety or, if only part is objectionable, clearly delineate the

specific portion objected to and precisely identify what information has been or will be produced in response).

¹⁷² *Heller v. City of Dallas*, 303 F.R.D. 466, 488 (N.D. Tex. 2014) (quoting *Mann v. Island Resorts Dev., Inc.*, No. 3:08cv297/RS/EMT, 2009 WL 6409113, at *3 (N.D.Fla. Feb. 21, 2009)).

¹⁷³ Tex. R. Civ. P. 193.2(a).

¹⁷⁴ Tex. R. Civ. P. 193.2(b).

date] describing, discussing, or mentioning [relevant topic]. [Responding Party] declines to produce documents outside this timeframe and scope.¹⁷⁵

Finally, if a requesting party receives responses that assert objections and produce documents “subject to” those objections, the requesting party should confirm in writing with the responding party whether any responsive documents were withheld — and if so, which objection was the basis for withholding each category of documents. That written confirmation creates the record necessary to support a motion to compel if the responding party has, in fact, withheld responsive documents without adequate justification.

E. Key Take Aways

- Objections must be timely, written, and specific—state the legal/factual basis and clearly describe the extent of any refusal to comply.
- Use objections strategically to define (and narrow) the scope of what must be searched, reviewed, and produced—and to create a clear record of what is not being produced.
- Avoid waiver: even when you believe no responsive documents exist, consider pairing the response with appropriate objections so you do not concede the request’s propriety if the response must later be supplemented.
- “Boilerplate” is less about repetition and more about fit: an objection is vulnerable when it fails to explain why the objection applies and/or why the request suffers from the objection.
- Responses should plainly delineates (1) the extent to which the party is refusing to comply (2) the portion of the request that is being complied with/

X. DRAFTING OBJECTIONS & RESPONSES

A. Objections Generally

The signature of an attorney or party on a discovery objection constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the objection:

(1) is consistent with the rules of civil procedure and the discovery rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) has a good faith factual basis; (3) is not interposed for any improper purpose,

such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) is not unreasonable . . . Tex. R. Civ. P. 191.3(c).

B. Two Main Response Methods

There are two methods to respond to a request for production when the responding party believes the request is objectionable:

- Object, interpret, and produce.
- Object, do not interpret, and do not produce.

1. Object, Interpret, and Produce.

The first approach is generally preferred when the request, although defective, has a *discernible relevant subset of information*—that is, an obvious relevant core. It is most appropriate when the request can be answered without guessing what documents or categories of documents the requesting party actually seeks, and when the responding party can apply a reasonable narrowing construction based on the pleadings, the claims and defenses at issue, and the obvious context of the request. This approach has the advantage of demonstrating reasonableness, reducing the likelihood of motion practice, and allowing the responding party to preserve its objections while still producing plainly responsive, non-objectionable material.

2. Object, Do Not Interpret, and Do Not Produce

The second approach—object, do not interpret, and do not produce—avoids legitimizing a facially defective request, avoids inadvertently expanding the scope of discovery through over-interpretation, and forces the requesting party to either redraft the request or move to compel. This approach is appropriate when any purportedly “reasonable” interpretation would, in reality, *require the responding party to rewrite the request for the requesting party*. From a practical standpoint, however, a responding party that overuses the “object, do not interpret, do not produce” approach risks inviting a motion to compel, facing arguments that its objections were waived or inadequately stated, and appearing obstructive to the court. Ultimately, the responding party who adopts this approach must be prepared to defend the objection in a motion to compel.

C. Objections to Requests

1. Explain Why the Objection Applies to the Request

In light of Rule 193.2(a)’s requirement that objections be stated with specificity, Texas courts have emphasized that a responding party should do more than recite boilerplate objections; rather, it should explain why a request is objectionable, observing that

¹⁷⁵ *Heller v. City of Dallas*, 303 F.R.D. 466, 489 (N.D. Tex. 2014).

“responding party who objects to a request for production because is it overbroad, unduly burdensome, vague, ambiguous, or unreasonably cumulative or duplicative should explain why the discovery request suffers from each asserted deficiency.”¹⁷⁶

D. Dealing With Requests that are Irrelevant

1. Irrelevant

The Texas Supreme Court has repeatedly held that requests for discovery must be tailored by the requesting party to include only matters relevant to the case.¹⁷⁷

2. Object, Interpret, and Produce

This method is generally appropriate when the request, although imperfectly drafted, has an obvious relevant core and can be answered without speculation as to what documents are being sought.

3. Object, Do Not Interpret, Do Not Produce

This is a harder-line position. Essentially, the responding party is saying the request is so improper that it doesn't warrant a response at all. This is usually the better approach when the request has no reasonable connection to any claim or defense in the case and any “interpretation” that would make it proper would be the responding party's own invention, not a fair reading of the request.

¹⁷⁶ See *In re Park Cities Bank*, 409 S.W.3d 859, 876 (Tex. App.—Tyler 2013, no pet.).

¹⁷⁷ *In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (Tex.1998) (orig. proceeding) (“[R]equests must be reasonably tailored to include only matters relevant to the case.”); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 814 (Tex.1995) (orig. proceeding) (“Discovery is limited to matters relevant to the case.”); see also *In re TIG Ins. Co.*, 172 S.W.3d 160, 168 (Tex. App.—Beaumont 2005, no pet.) (“Requests must be tailored to include only matters relevant to the case.”); *In re Mobil Oil Corp.*, No. 09-06-392 CV, 2006 WL 3028063, at *2 (Tex. App.—Beaumont Oct. 26, 2006, no pet.) (“We do not accept the assertion that the responding party must show the documents requested are irrelevant to the pending action. To the contrary, the requesting party has the initial responsibility of drafting discovery requests tailored to include only matters relevant to the case.”).

¹⁷⁸ *In re K & L Auto Crushers, LLC*, 627 S.W.3d 239, 251 (Tex. 2021) (citing *In re Allstate Cnty. Mut. Ins. Co.*, 227 S.W.3d 667, 670 (Tex. 2007) (orig. proceeding) (per curiam)).

¹⁷⁹ *Alford Chevrolet-Geo*, 997 S.W.2d 173, at 180 n.1 (Tex. 1999); see also, *In re CSX Corp.*, 124 S.W.3d 149, 152–53 (Tex. 2003) (“Discovery orders requiring document production from an unreasonably long period of time or from distant or unrelated locations are impermissibly overbroad.”).

¹⁸⁰ *In re BNSF Ry. Co.*, No. 09-07-538 CV, 2008 Tex. App. LEXIS 634, at *4 (Tex. App.—Beaumont Jan. 31, 2008,

E. Dealing with Overbroad, Lack Reasonable Particularity, Vague and/or Ambiguous

1. The Law

Overbroad. “In essence, an overbroad discovery request is one that seeks irrelevant information.”¹⁷⁸ The Texas Supreme Court has identified overbroad requests as “those encompassing time periods, products, or activities beyond those at issue in the case—in other words, matters of questionable relevancy to the case at hand.”¹⁷⁹ Additionally, “a discovery request that is unlimited as to time, place or subject matter is overbroad as a matter of law.”¹⁸⁰ By way of example, a federal court recently observed a request for documents “relating to any meetings a party, the party's employees, or the party's agents had with another party” and which was unbounded by “time, relevance or reason” was egregiously overbroad and “would take an extreme ‘subjective guessing game’ to understand whether a document—as broadly defined in the request—relates to any’ meetings that anyone involved with Plaintiffs had with Defendant.”¹⁸¹ “[A] central consideration in determining overbreadth is whether the request could have been more narrowly tailored to avoid including tenuous information and still obtain the necessary, pertinent information.”¹⁸² “A responding party does not have the burden to tailor a reasonable discovery request for the requesting party.”¹⁸³ While normally a party objecting must present any evidence necessary to support the claimed objection,¹⁸⁴ “[e]vidence is not necessary to support an objection if the discovery requests themselves demonstrate overbreadth as a

orig. proceeding) (mem. op.) (stating trial court had two choices when faced with overly broad requests for production: (1) narrowly tailor the requests; or (2) sustain the respondent's objections).

¹⁸¹ *Effyis, Inc. v. Kelly*, No. 18-13391, 2020 WL 4915559, at *2 (E.D. Mich. Aug. 21, 2020) (request for “Any and all DOCUMENTS in Plaintiff's possession, custody, or control which reflect or relate to any meetings Plaintiffs, Plaintiff's employees, or Plaintiff's agents had with Darren Kelly including any handwritten or typed notes” held overbroad and sanctions were properly awarded against party serving this and many other similarly overbroad discovery requests).

¹⁸² *In re UPS Ground Freight, Inc.*, 646 S.W.3d 828, 832 (Tex. 2022) (internal citations omitted).

¹⁸³ *In re Sears, Roebuck & Co.*, 146 S.W.3d 328, 331 (Tex. App.—Beaumont 2004, orig. proceeding); see also *In re Volt Power, LLC*, No. 12-23-00047-CV, 2023 WL 2804430, at *3 (Tex. App.—Tyler Apr. 5, 2023, no pet.) (citing *In re Houstonian Campus, L.L.C.*, 312 S.W.3d 178, 181 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding)).

¹⁸⁴ *In re Regency IHS of Longview, LLC*, No. 12-25-00082-CV, 2025 WL 2180535, at *5 (Tex. App.—Tyler July 31, 2025, no pet.) (citing Tex. R. Civ. P. 193.4(a); *In re United Fire Lloyds*, 578 S.W.3d 572, 580 (Tex. App.—Tyler 2019, no pet.)).

matter of law.”¹⁸⁵ Whether a discovery request is overbroad is distinct from whether it is burdensome or harassing.¹⁸⁶ Overbroad requests for irrelevant information are improper regardless of whether they are burdensome.¹⁸⁷ When a party propounds overly broad requests, the trial court must either sustain the objection or narrowly tailor the requests.¹⁸⁸ Texas courts are reluctant to redraft overly broad requests.¹⁸⁹

Lacks Reasonable Particularity. Tex. R. Civ. P. 196.1(b) mandates that a 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.” Requests for production of documents “must be specific, must establish materiality, and must recite precisely what is wanted ... [and] does not permit general inspection of the adversary’s records.”¹⁹⁰ “A request for “any and all” documents does not in itself violate the specificity requirements of *Loftin v. Martin*, 776 S.W.2d 145, 148 (Tex. 1989) **so long as the request is further restricted to a particular type or class of documents.**”¹⁹¹ For example, a request for “all Documents on which [a Defendant] will rely on to support any defense” fails to describe documents with reasonable particularity.¹⁹² Texas courts look to federal authority for guidance when the state law mirrors federal law.¹⁹³ Texas Rule of Civil Procedure

196.1(b), stating 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,” is almost identical to Federal Rule of Civil Procedure 34(b), stating the “request must describe with reasonable particularity each item or category of items to be inspected.” Applicable federal case law provides that the test for reasonable particularity is whether the request places the party upon “reasonable notice of what is called for and what is not.”¹⁹⁴ In other words, “the requesting party must provide ‘sufficient information to enable [the party to whom the request is directed] to identify responsive documents.’”¹⁹⁵ Federal courts have said that a “request made with reasonable particularity does not require a reasonable attorney or party attempting to properly respond **‘to ponder and to speculate in order to decide what is and what is not responsive.’**”¹⁹⁶ Although what qualifies as “reasonably particular” depends at least in part on the circumstances of each case, “a discovery request should be sufficiently definite and limited in scope **that it can be said to apprise a person of ordinary intelligence what documents are required and [to enable] the court ... to ascertain whether the requested documents have been produced.**”¹⁹⁷ Under Texas Supreme Court precedent, Texas state courts essentially

¹⁸⁵ *Id.* (citing *In re Wal-Mart Stores, Inc.*, 545 S.W.3d 626, 634 (Tex. App.—El Paso 2016, orig. proceeding)).

¹⁸⁶ *In re United Fire Lloyds*, 578 S.W.3d 572, 580 (Tex. App.—Tyler 2019, no pet.) (citing *In re Nat’l Lloyds Ins. Co.*, 449 S.W.3d 486, 488 (Tex. 2014) (orig. proceeding)).

¹⁸⁷ *In re Regency IHS of Longview, LLC*, No. 12-25-00082-CV, 2025 WL 2180535, at *5 (Tex. App.—Tyler July 31, 2025, no pet.) (citing *In re Allstate Cnty. Mut. Ins. Co.*, 227 S.W.3d 667, 670 (Tex. 2007)).

¹⁸⁸ *In re Home Depot U.S.A., Inc.*, No. 09-23-00076-CV, 2023 WL 4943328, at *4 (Tex. App.—Beaumont Aug. 3, 2023, no pet.) (citing *In re Mallinckrodt, Inc.*, 262 S.W.3d 469, 474 (Tex. App.—Beaumont 2008, orig. proceeding)).

¹⁸⁹ *In re Master Flo Valve Inc.*, 485 S.W.3d 207, 214 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

¹⁹⁰ *Davis v. Pate*, 915 S.W.2d 76, 78 (Tex. App.—Corpus Christi 1996, no writ) (holding request seeking documents and other items generally “evidencing, reflecting or pertaining in anyway [sic] to the subject matter of this litigation,” was not sufficiently specific under the guidelines of *Loftin*; the class of documents requested, with regard to subject matter and content, was uncertain and open to speculation.”).

¹⁹¹ *Id.* (quoting *Chamberlain v. Cherry*, 818 S.W.2d 201, 204 (Tex. App.—Amarillo 1991, orig. proceeding)); *see also In re Master Flo Valve Inc.*, 485 S.W.3d 207, 218 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (holding trial court abused its discretion by ordering compliance with a request for “all documents, communications, tangible or intangible evidence relating in any way to defendants’ claims, defenses, or alleged damages,” where the responding party objected that the request was overly broad and failed to identify documents with reasonable particularity); *Warriner v. Warriner*, 394

S.W.3d 240, 251 (Tex. App.—El Paso 2012, no pet.) (holding that a production request requesting “[a]ll documents which constitute or contain matter relevant to the subject matter of this lawsuit” was fatally nonspecific); Tex. R. Civ. P. 193 cmt. 2 to 1999 change (“[A] party may object to a request for ‘all documents relevant to the lawsuit’ as overly broad and not in compliance with the rule requiring specific requests for documents and refuse to comply with it entirely.”) (citing *Loftin v. Martin*, 776 S.W.2d 145 (Tex. 1989) (orig. proceeding), *disapproved of on other grounds by Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding))).

¹⁹² *In re EOG Res., Inc.*, No. 10-10-00455-CV, 2011 WL 455280, at *2 (Tex. App.—Waco Feb. 9, 2011, no pet.) (holding such request did not adequately specify what items or categories of items it seeks with reasonable particularity).

¹⁹³ *In re FedEx Ground Package Sys., Inc.*, 609 S.W.3d 153, 161 (Tex. App.—Houston [14th Dist.] 2020), mandamus conditionally granted sub nom. *In re Brown*, 653 S.W.3d 721 (Tex. 2022) (comparing Texas Rule of Civil Procedure 199.2(b)(1) to Federal Rule of Civil Procedure 30(b)(6)); *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 316–17 (Tex. 2009) (orig. proceeding) (recognizing that state discovery rules are not identical to federal rules, but “are not inconsistent,” and “therefore we look to the federal rules for guidance”).

¹⁹⁴ *Lopez v. Don Herring Ltd.*, 327 F.R.D. 567, 575 (N.D. Tex. 2018) (internal citations omitted).

¹⁹⁵ *Id.*

¹⁹⁶ *Lopez v. Don Herring Ltd.*, 327 F.R.D. 567, 575 (N.D. Tex. 2018).

¹⁹⁷ *Id.* (internal citations omitted).

follow the same standard.¹⁹⁸ A proper request “made with reasonable particularity does not require a reasonable attorney or party attempting to properly respond ‘to ponder and to speculate in order to decide what is and what is not responsive.’”¹⁹⁹

Vague and Ambiguous. Requests that are imprecise and are doubtful or uncertain as to what documents are being requested are objectionable.²⁰⁰ “The party objecting to discovery as vague or ambiguous has the burden to show such vagueness or ambiguity.”²⁰¹ “A party objecting on these grounds must explain the specific and particular way in which a request is vague.”²⁰² “The responding party ‘should exercise reason and common sense to attribute ordinary definitions to terms and phrases utilized in [discovery requests]. If necessary to clarify its answers [or responses], the responding party may include any reasonable definition of the term or phrase at issue.’”²⁰³

2. Object, Interpret, and Produce

To use this strategy in responding to a request that is overbroad, lacks reasonable particularity, and/or is vague and ambiguous:

- Assert your objection; and
- Interpret the request in a manner that eliminates the overbreadth, vagueness, or ambiguity; and
- Offer to produce a document or category of documents based on your interpretation of the request.²⁰⁴

This approach is often preferable where: (1) the request is not wholly irrelevant and the request can easily be narrowly tailored; (2) the vagueness or ambiguity can be resolved by applying reason and common sense to attribute ordinary definitions to terms

¹⁹⁸ *Loftin v. Martin*, 776 S.W.2d 145, 148 (Tex. 1989), disapproved of on other grounds by *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992)(requesting party must formulate his request for production with a certain degree of specificity to allow responding party to comply).

¹⁹⁹ *Lopez v. Don Herring Ltd.*, 327 F.R.D. 567, 575 (N.D. Tex. 2018); *Bruggeman ex rel. Bruggeman v. Blagojevich*, 219 F.R.D. 430, 436 (N.D. Ill. 2004)(holding that party’s request all documents that **reflect in any manner** noncompliance with the ADA or the RA” **did not place** the responding party upon “**reasonable notice of what is called for and what is not**,” because the language was overly-broad and extremely vague); see also *Pulsecard, Inc. v. Discover Card Servs., Inc.*, No. 94–2304–EEO, 1995 WL 526533, at *3 (D.Kan.1995) (finding as overly-broad the terms “refer in any manner to” and “related in any manner to”).

²⁰⁰ *Black’s Law Dictionary* 93, 1689 (12th ed. 2024) (defining “ambiguity” and “ambiguous” as “[a]n uncertainty of meaning or intention” and “vague” as “imprecise ... [and] uncertain”); *Merriam-Webster.com Dictionary*, (defining

and phrases;²⁰⁵ (3) there is a discernible subset of clearly responsive, relevant documents sought; (4) the responding party can articulate a narrowing construction that is fair and defensible; and (5) producing documents on that basis is less risky than refusing to respond altogether.

3. Object, Do Not Interpret, and Do Not Produce

To use this strategy in responding to overbroad, lacks reasonable particularity, vague, or ambiguous requests:

- Assert your objection.
- Do not interpret the request.
- Do not offer to produce documents in response to the request.²⁰⁶

This approach may be useful when the request is: (1) facially and impermissibly overbroad. (2) fundamentally unintelligible or indefinite; (3) multiple interpretations are possible and each would produce a different universe of documents; (4) the request is plainly a fishing expedition; and/or (5) the request is so broad that any response would require the responding party to complete rewrite the request.

“The burden to propound discovery complying with the rules of discovery should be on the party propounding the discovery, and not on the courts to redraft overly broad discovery so that, as re-drawn by the court, the requests comply with the discovery rules.”²⁰⁷ Indeed, courts are understandably reluctant to engage in this kind of “battlefield surgery,” as attempts to narrow facially overbroad requests often create more problems than they solve—forcing courts to guess at the drafter’s intent, inviting further disputes, and risking orders that sweep in large volumes of irrelevant or only marginally relevant material.²⁰⁸

“ambiguous” as “doubtful or uncertain or “capable of being understood in two or more possible senses or ways”); *Merriam-Webster.com Dictionary*, (defining “vague” as “not clearly expressed: stated in indefinite term” or “not having precise meaning”).

²⁰¹ *Heller v. City of Dallas*, 303 F.R.D. 466, 491 (N.D. Tex. 2014)(internal citations omitted).

²⁰² *Id.*

²⁰³ *Heller*, 303 F.R.D. at 491 (citations omitted).

²⁰⁴ *Brister & Boyd, Texas Pretrial Practice* § 27:202 (2013).

²⁰⁵ *Heller*, 303 F.R.D. at 491 (citations omitted).

²⁰⁶ *Brister & Boyd, Texas Pretrial Practice* § 27:203 (2013).

²⁰⁷ *In re TIG Ins. Co.*, 172 S.W.3d 160, 168 (Tex. App.—Beaumont 2005, no pet.); *In re Master Flo Valve Inc.*, 485 S.W.3d 207, 214 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding).

²⁰⁸ See *In re TIG Ins. Co.*, 172 S.W.3d at 168; see e.g. *In re Premcor Ref. Group, Inc.*, No. 09-09-00222-CV, 2009 WL

F. Dealing with Requests that are Unduly Burdensome and/or Disproportionate

1. The Law

Unduly Burdensome. Discovery may be limited if (1) it is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or (2) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.²⁰⁹ From a practical perspective, Texas case law establishes that an “undue burden” objection is often interrelated with other objections, such as overbreadth, relevance, and proportionality.²¹⁰

For example, a request may be unduly burdensome when the discovery sought is unreasonably calmativ or duplicative.²¹¹ Similarly, a request can be unduly burdensome when the requests seeks documents which are available through some other source that is more convenient, less burdensome and less expensive.²¹²

2253290, at *3 (Tex. App.—Beaumont July 30, 2009, no pet.) (“Here, even if we substituted the word document for information, all of the requests at issue still suffer from [the requesting party's] expansive definition of “document.” Request nine expands the problem of breadth even further by using the phrase, “any and all.” Under [these] requests, and to comply with the trial court's order, [the responding party] would be required to make an educated guess about which documents the trial court intended to make [them] produce...Substituting “document” for “information,” and considering the definition of document, this request could literally reach hundreds or thousands of documents because it includes every documented process involved in formulating each monthly statement. Clearly, a large number of the documents required by the order would likely range from irrelevant to highly relevant documents, with a significant number of them having only a tenuous bearing . . .”); *In re Christus Health Se. Tex.*, 399 S.W.3d 343, 348 (Tex. App.—Beaumont 2013, no pet.) (trial court did not abuse its discretion by denying motion to compel social media posts without a time limit because such the requests was overly broad on its face); *In re Insight Neurodiagnostics, LLC*, No. 05-23-00014-CV, 2023 WL 2782722, at *3 (Tex. App.—Dallas Apr. 5, 2023, no pet.) (document requests were overbroad because they were not limited to the relevant time frame involving the party's employment).

²⁰⁹ Tex. R. Civ. P. 192.4.

²¹⁰ *In re K & L Auto Crushers, LLC*, 627 S.W.3d 239, 253 (Tex. 2021) (Rule 192.4 imposes a proportionality standard).

²¹¹ *Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992) (“[an abuse of discretion] may also occur where a discovery order compels the production of patently irrelevant or duplicative documents, such that it clearly constitutes harassment or imposes a burden on the producing party far

A party asserting a request for production is unduly burdensome should be prepared to establish, beyond conclusory assertions, why the burden or expense entailed in responding to the requests outweighs the likely benefit, or why the requests are “unreasonably cumulative or duplicative.”²¹³ Conclusory allegations are insufficient to show that the requested discovery is unduly burdensome; the party must instead produce some evidence supporting its request for a protective order.²¹⁴ The fact that a discovery request is burdensome is not enough to justify protection; “it is only undue burden that warrants nonproduction.”²¹⁵ If a responding party's own conscious, discretionary decision, such as how he or she chooses to store and organize its materials, causes discovery to be burdensome, the burden is not considered “undue.”²¹⁶

Disproportionate. Discovery also must be proportional to the needs of the case.²¹⁷ The proportionality overlay imposes an obligation on courts to “‘make an effort to impose reasonable discovery limits,’ particularly when ‘the burden or expense of the proposed discovery outweighs its likely benefit.’”²¹⁸ A

out of proportion to any benefit that may obtain to the requesting party”).

²¹² *In re LCS SP, LLC*, 640 S.W.3d 848, 852–53 (Tex. 2022) (trial court did not abuse discretion in denying request for production seeking publicly available policies and procedures and observing “[r]equiring a party to produce documents has an associated cost. If the parties can reduce this cost by obtaining the requested material through another source, then that is a reason *not* to compel discovery).

²¹³ *In re ExxonMobil Corp.*, 635 S.W.3d 631, 635 (Tex. 2021).

²¹⁴ *In re K & L Auto Crushers, LLC*, 627 S.W.3d 239, 253 (Tex. 2021) (stating a party resisting discovery must do more than “make conclusory allegations that the requested discovery is unduly burdensome.”) (citing *In re Alford Chevrolet–Geo*, 997 S.W.2d at 181).

²¹⁵ *In re Brookfield Infrastructure Group, LLC*, No. 13-17-00486-CV, 2018 WL 1725467, at *12 (Tex. App.—Corpus Christi–Edinburg Apr. 9, 2018, no pet.) (citing *ISK Biotech Corp. v. Lindsay*, 933 S.W.2d 565, 568 (Tex. App.—Houston [1st Dist.] 1996, no pet.); see *In re Alford Chevrolet–Geo*, 997 S.W.2d 173, 181 (Tex. 1999) (orig. proceeding) (requiring demonstration of undue burden or harassment); *In re Energas Co.*, 63 S.W.3d 50, 55 (Tex. App.—Amarillo 2001, orig. proceeding)); *Cont'l Illinois Nat. Bank & Tr. Co. of Chicago v. Caton*, 136 F.R.D. 682, 684 (D. Kan. 1991) (“All discovery requests are a burden on the party who must respond thereto”).

²¹⁶ *In re K & L Auto Crushers, LLC*, 627 S.W.3d 239, 253 (Tex. 2021).

²¹⁷ *In re Liberty Cnty. Mut. Ins. Co.*, No. 22-0321, 2023 WL 7930099, at *3 (Tex. Nov. 17, 2023) (orig. proceeding) (citing *In re State Farm Lloyds*, 520 S.W.3d 595, 607 (Tex. 2017) (orig. proceeding)).

²¹⁸ *In re Cent. Oregon Truck Co., Inc.*, 644 S.W.3d 668, 671 (Tex. 2022) (*K&L Auto*, 627 S.W.3d at 248 (citations

party asserting a request for production is disproportionate should be prepared to explain why the burden or expense of the discovery outweighs its likely benefit given the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, the importance of the proposed discovery in resolving the litigation, and any other articulable factor bearing on proportionality.²¹⁹ A proportionality objection must be supported with evidence, not conclusory allegations.²²⁰

To establish a disproportionality objection, the responding party will usually need, at a minimum, a sworn affidavit, supported with numbers, explaining the steps and systems to be searched and the time, cost, and burden to respond to the discovery requests, and tying such information to Rule 192.4 factors.²²¹ Thus, a defensible disproportionality affidavit usually says:

1. **Who the witness is:**
 - role, familiarity with records, systems, and operations
2. **What must be searched:**
 - number of custodians
 - number of projects, files, emails, databases, etc.
 - date range(s)
3. **How the data is stored:**
 - active servers, archives, third-party platforms, legacy systems
4. **What steps are required:**
 - identify repositories
 - restore archived material
 - export data
 - run searches
 - deduplicate
 - review for responsiveness, privilege, confidentiality
 - redact
 - produce
5. **What it will cost:**
 - employee hours
 - vendor costs
 - attorney review costs
 - resulting disruption
6. **Why the request has limited benefit:**
 - marginal relevance
 - duplication
 - same information available elsewhere

- request is broader than the pleaded issues

NOTE: At the time of this paper, the case law in Texas dealing with proportionality in the context of estate, trust, and guardianship disputes is sparse (if not non-existent). Therefore, federal proportionality case law under Rule 26 will likely be persuasive authority in this context.

2. Object, Interpret, and Produce

This strategy may be utilized where the responding party can interpret or rephrase the request in a manner that eliminates the undue burden.²²² This approach also makes sense where the responding party wants to put the requesting party and the court on notice that the real dispute is not whether any production should occur, but how far the production obligation extends.

3. Object, Do Not Interpret, and Do Not Produce

It may be appropriate to simply object to an unduly burdensome or disproportionate discovery request where the request has no limiting principle (not limited by time, subject matter, etc.) and compliance would require significant search burdens in light of the likely low value of the requested documents.

4. Seek a Protective Order

Rule 192.6(a) authorizes a party or nonparty resisting discovery to seek a protective order in response to a discovery request. The person from whom discovery is sought, as well as any other person affected by the discovery request, have independent rights to seek a protective order.²²³ Rule 192.6(b) authorizes a court to issue a protective order to protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights.²²⁴

An objection to written discovery must be in writing and must state specifically the legal or factual basis for the objection.²²⁵ "An objection . . . that is not made within the time required . . . is waived unless the court excuses the waiver for good cause shown."²²⁶

A party from whom discovery is sought may move for a protective order within the time for the response.²²⁷ But the movant must comply with the discovery request to the extent protection is not sought unless it is

omitted) (quoting *In re State Farm Lloyds*, 520 S.W.3d 595, 604 (Tex. 2017), and Tex. R. Civ. P. 192.4(b), respectively).

²¹⁹ *In re Liberty Cnty. Mut. Ins. Co.*, 679 S.W.3d 170, 174 (Tex. 2023).

²²⁰ *In re State Farm Mut. Auto. Ins. Co.*, 712 S.W.3d 53, 68 (Tex. 2025).

²²¹ See *In re Bilfinger Westcon, Inc.*, No. 13-19-00466-CV, 2019 WL 6795870, at *6 - 8 (Tex. App.—Corpus Christi—Edinburg Dec. 12, 2019, no pet.).

²²² Brister & Boyd, *Texas Pretrial Practice* § 27:212 (2013).

²²³ Tex. R. Civ. P. 192.6(a).

²²⁴ Tex. R. Civ. P. 192.6(b).

²²⁵ Tex. R. Civ. P. 193.2(a).

²²⁶ Tex. R. Civ. P. 193.2(e).

²²⁷ Tex. R. Civ. P. 192.6(a).

unreasonable under the circumstances to do so before obtaining a ruling on the motion.²²⁸ Even if a person seeks a protective order, such person must still make timely specific objections to the discovery request from which protection is sought.²²⁹

Moreover, the objecting party must do more than make conclusory allegations that the requested discovery is unduly burdensome, harassing, annoying, and the like.²³⁰ The objecting party must offer admissible evidence to quantify the time, expense, and burden necessary to comply with the request.²³¹ Texas Supreme Court case law dictates that in the absence of such detailed evidence (via affidavit, declaration, or the like), the objection must be overruled.²³² Any such evidence must be presented in affidavit form served on all parties at least seven days before the hearing or by live testimony at the hearing.²³³

G. Dealing with Requests that Seek Information from Some Other Source

1. The Law

Tex. R. Civ. P. 192.4 provides, in relevant part, that a court can limit discovery if it determines, on motion or on its own initiative and on reasonable notice, that the discovery sought is obtainable from some other source that is more convenient, less burdensome, or less expensive. Importantly, “Texas law does not allow a party to evade discovery requests by simply asserting that the other party already has the information.”²³⁴ The mere fact that the requesting party may have the same categories of documents sought from another party does not make the request objectionable. “Not only do such requests ensure that the parties have the same basic documents, requiring your opponent to produce certain documents enables the party seeking discovery to activate the automatic authentication rights provided by Rule 193.7.”²³⁵ Such an objection is more properly supported by an argument that the documents are not within the possession, custody, or control of the responding party. This might be the case, for example, where the requesting party seeks public records.

²²⁸ *Id.*

²²⁹ *In re Park Cities Bank*, 409 S.W.3d 859, 877 (Tex. App.—Tyler 2013, no pet.) (rejecting the argument that objections were preserved by asserting general objections and reserving the right to raise specific objections if a motion for protective order were denied; holding that such a reservation does not prevent waiver or excuse the duty to timely assert specific objections).

²³⁰ *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 181 (Tex. 1999); *In re Amaya*, 34 S.W.3d 354, 358-59 (Tex. App.—Waco 2001, orig. proceeding).

²³¹ Tex. R. Civ. P. 193.4(a); *In re Amaya*, 34 S.W.3d at 357, 358.

H. Dealing With Requests that Implicate Privilege or Work Product

Tex. R. Evid. 501 governs privileges in general and provides unless a Constitution, a statute, or these or other rules prescribed under statutory authority provide otherwise, no person has a privilege to: (a) refuse to be a witness; (b) refuse to disclose any matter; (c) refuse to produce any object or writing; or (d) prevent another from being a witness, disclosing any matter, or producing any object or writing.

The Texas discovery “privileges” are codified in Tex. R. Civ. P. 192.1 to 192.7: (1) Attorney work product (Tex. R. Civ. P. 192.5); (2) Consulting, nontestifying experts (Tex. R. Civ. P. 192.3(e)); (3) Expert communications (Tex. R. Civ. P. 195.5(c)); and (4) Draft expert reports (Tex. R. Civ. P. 195.5(d)).²³⁶ “Although these rules may be referred to as ‘privileges,’ they are better characterized as limitations on the scope of discovery.”²³⁷

With respect to evaluating whether information is protected from discovery on the basis that is protected by the attorney client privilege, that analysis should begin with the exemption in Rule 193.3(c). Tex. R. Civ. P. 193.3(c) provides, in essence, that a party may withhold a privileged communication to or from a lawyer or lawyer's representative or a privileged document of a lawyer or lawyer's representative (1) created or made *from the point* at which a party consults a lawyer with a view to obtaining professional legal services from the lawyer in the prosecution or defense of a specific claim in *the litigation* in which discovery is requested or required, *and* (2) concerning the litigation in which the discovery is requested or required – *without having to provide a withholding statement*.

Tex. R. Civ. P. 193, cmt. 3 states “A party need not state that material created by or for lawyers for the litigation has been withheld as it can be assumed that such material will be withheld from virtually any request on the grounds of attorney-client privilege or work product.” Thus, material protected by attorney-client communications and work-product privilege are exempt from the privilege-log disclosure.²³⁸

²³² *In re K&L Auto Crushers, LLC*, 627 S.W.3d 239, 253 (Tex. 2021).

²³³ Tex. R. Civ. P. 193.4(a).

²³⁴ *In re Sting Soccer Group, LP*, No. 05-17-00317-CV, 2017 WL 5897454, at *7 (Tex. App.—Dallas Nov. 30, 2017, no pet.).

²³⁵ *Id.* (citing Tex. R. Civ. P. 193.7).

²³⁶ *Rachel Roosth*, 1 Tex. Prac. Guide Evid. § 5:8 (2025 ed.).

²³⁷ *Id.* (citing Tex. R. Civ. P. 192.3, 192.5(d)).

²³⁸ *In re Kona Coast Venture, LTD*, No. 03-25-00746-CV, 2026 WL 182871, at *11 (Tex. App.—Austin Jan. 22, 2026, no pet. h.).

For example, a defendant trustee need not separately assert privilege or provide a privilege log for communications created by or for current counsel in connection with defending the current breach-of-fiduciary-duty lawsuit, so long as those communications concern that litigation and fall within Rule 193.3(c). But responsive communications between the defendant trustee and their legal counsel from other potentially related matters—such as pre-suit advice from about the challenged transactions or governance issues—do not receive that automatic exemption and, if withheld, should be identified in a withholding statement and if requested, on a privilege log.

1. Work Product Privilege

“The work product privilege is **broad**er than the attorney-client privilege.”²³⁹ It includes all communications made in preparation for trial, including an attorney’s interviews with parties and nonparty witnesses.²⁴⁰ It covers more than just documents, extending to an attorney’s mental impressions, opinion, conclusions, and legal theories.²⁴¹ It also includes the selection and ordering of documents.²⁴²

Rule 192.5(a) defines “**work product**” and states:

Work product comprises:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.²⁴³

²³⁹ *In re Nat’l Lloyds Ins. Co.*, 532 S.W.3d 794, 803 (Tex. 2017) (quoting *In re Bexar Cty. Crim. Dist. Attorney’s Office*, 224 S.W.3d 182, 186 (Tex. 2007) (orig. proceeding)).

²⁴⁰ *In re Park Cities Bank*, 409 S.W.3d 859, 867 (Tex. App.—Tyler 2013, no pet.) (citing *In re Bexar Cnty. Criminal Dist. Attorney’s Office*, 224 S.W.3d 182, 186 (Tex. 2007) (emphasis added)).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Tex. R. Civ. P. 192.5(a).

²⁴⁴ *In re Nat’l Lloyds Ins. Co.*, 532 S.W.3d 794, 803 (Tex. 2017) (quoting *Owens-Corning Fiberglas Corp. v. Caldwell*, 818 S.W.2d 749, 750 (Tex. 1991) (orig. proceeding)).

²⁴⁵ *Occidental Chem. Corp. v. Banales*, 907 S.W.2d 488, 490 (Tex. 1995).

“The primary purpose of the work product rule is to shelter the mental processes, conclusions, and legal theories of the attorney, providing a privileged area within which the lawyer can analyze and prepare his or her case.”²⁴⁴ Indeed, the work-product privilege is essential to the attorney-client relationship.²⁴⁵ The work-product privilege promotes the adversary system by safeguarding the fruits of an attorney’s trial preparations from the other party.²⁴⁶

However, as the Texas Supreme Court has explained, “[c]ertain matters are expressly excluded from the definition of ‘work product’ . . . and are not protected from discovery even if made or prepared in anticipation of litigation or for trial.”²⁴⁷ The carve-outs include “information discoverable under Rule 192.3 concerning experts, trial witnesses, witness statements, and contentions.”²⁴⁸ The work product exemption is of continuing duration.²⁴⁹ The attorney’s mental impressions and opinions from one suit are not discoverable in another suit.²⁵⁰

Core work product—work product that contains “the mental impressions, opinions, conclusions, or legal theories” of an attorney or an attorney’s representative—**is not discoverable**.²⁵¹ The work product doctrine protects materials prepared by agents for the attorney as well as those prepared by the attorney himself.²⁵²

A trial court may order disclosure of **noncore work product**—defined as “[a]ny other work product” that is not core work product—only if the requesting party shows substantial need and undue hardship.²⁵³ In such a case, the trial court may order disclosure even if doing so “incidentally discloses by inference attorney mental processes otherwise protected [as core work product],” but “the court must—insofar as possible—protect against disclosure of the mental impressions, opinions, conclusions, or legal theories not otherwise discoverable.”²⁵⁴

²⁴⁶ *Wiley v. Williams*, 769 S.W.2d 715, 717 (Tex. App.—Austin 1989, orig. proceeding).

²⁴⁷ *In re Nat’l Lloyds Ins. Co.*, 532 S.W.3d 794, 803 (Tex. 2017) (citing Tex. R. Civ. P. 192.5(c)(1)-(5)).

²⁴⁸ *Id.*

²⁴⁹ *Occidental Chem. Corp. v. Banales*, 907 S.W.2d 488, 490 (Tex. 1995).

²⁵⁰ *Humphreys v. Caldwell*, 888 S.W.2d 469, 471 (Tex. 1994).

²⁵¹ *Id.* (citing Tex. R. Civ. P. 192.5(b)(1)).

²⁵² *Wiley v. Williams*, 769 S.W.2d 715, 717 (Tex. App.—Austin 1989, no writ) (citing *United States v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975)).

²⁵³ *Id.* (citing Tex. R. Civ. P. 192.5(b)(2)).

²⁵⁴ *Id.* (citing Tex. R. Civ. P. 192.5(b)(3), (4)).

2. Attorney Client Privilege

The scope of the attorney-client privilege is defined in Texas Rule of Evidence 503.²⁵⁵ Texas Rule of Evidence 503(b) provides:

(1) *General rule of privilege.* A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.²⁵⁶

A communication is “*confidential*” if it is not intended to be disclosed to third persons other than those to whom disclosure is made “in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.”²⁵⁷

This privilege attaches to the complete communication between attorney and client.²⁵⁸ The subject matter of the information communicated is irrelevant when determining whether the privilege applies.²⁵⁹ The privilege attaches to legal advice and

factual information included in completed communications between attorney and client.²⁶⁰

While the privilege extends to the entire communication, including facts contained therein, ***a person cannot cloak a material fact with the privilege merely by communicating it to an attorney.***²⁶¹ This issue frequently arises when a fiduciary’s conduct is at issue in the case. As the Dallas Court of Appeals explained in *Huie v. DeShazo*:

This distinction may be illustrated by the following hypothetical example: Assume that a trustee who has misappropriated money from a trust confidentially reveals this fact to his or her attorney for the purpose of obtaining legal advice. The trustee, when asked at trial whether he or she misappropriated money, cannot claim the attorney-client privilege. The act of misappropriation is a material fact of which the trustee has knowledge independently of the communication. The trustee must therefore disclose the fact (assuming no other privilege applies), even though the trustee confidentially conveyed the fact to the attorney. However, because the attorney's only knowledge of the misappropriation is through the confidential communication, the attorney cannot be called on to reveal this information.

Additionally, documents which pre-existed the attorney client relationship, delivered to the attorney by the client, are discoverable.²⁶²

Finally, the attorney client privilege can be waived when it is used offensively.²⁶³ For example, attorney billing records are generally discoverable when a party asserts a claim for attorneys' fees.²⁶⁴

3. Allied Litigant Privilege

The allied-litigant privilege is an exception to the general rule that disclosure of privileged information to third parties waives the privilege.²⁶⁵ To assert the allied-litigant privilege, the parties must be represented by

²⁵⁵ *In re Park Cities Bank*, 409 S.W.3d 859, 867 (Tex. App.—Tyler 2013, no pet.).

²⁵⁶ Tex. R. Evid. 503(b)(1).

²⁵⁷ Tex. R. Evid. 503(a)(5).

²⁵⁸ *In re Park Cities Bank*, 409 S.W.3d 859, 868 (Tex. App.—Tyler 2013, no pet.) (citing *In re Small*, 346 S.W.3d 657, 663 (Tex. App.—El Paso 2009, orig. proceeding).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (internal citations omitted).

²⁶² *MortgageAmerica Corp. v. Am. Nat. Bank of Austin*, 651 S.W.2d 851, 858 (Tex. App.—Austin 1983, writ ref’d n.r.e.).

²⁶³ *In re Scherer*, 684 S.W.3d 875, 893 (Tex. App.—Eastland 2024, no pet.) (citing *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993)).

²⁶⁴ See *In re Nat’l Lloyds Ins. Co.*, 532 S.W.3d 794, 813 (Tex. 2017) (“Attorney-billing information may be discoverable by virtue of the opposing party designating its counsel as a testifying expert.”).

²⁶⁵ *In re XL Specialty Ins.*, 373 S.W.3d 46, 49–50 (Tex.2012).

different attorneys, be parties to a pending litigation, and share a common legal interest.²⁶⁶ “But the privilege only protects communications between a party, its attorney, or a representative of either to another party’s attorney or its attorney’s representative about a matter of common interest; it does not protect communications made to the other party.”²⁶⁷

4. Asserting a Privilege

To protect privileged information from written discovery, a party must timely “assert” a privilege under Tex. R. Civ. P. 193.3. If a party believes that some of the materials that are responsive to a discovery request are subject to a privilege, the party may withhold the materials.²⁶⁸ In its response to the request, the withholding party must (1) indicate that materials have been withheld, (2) describe the request to which the material relates, and (3) describe the privilege asserted.²⁶⁹ A statement asserting a privilege should not be made unless specific, responsive material is protected by the privilege.²⁷⁰ The responding party may then submit a request to the withholding party and seek a privilege log, which describes the materials that are withheld and the privilege that applies to each withheld item or group of items.²⁷¹ It is improper to raise an objection to a discovery request on the grounds that it calls for the production of material that is privileged.²⁷²

I. **Dealing With Requests that Seek Documents Protected by a Confidentiality Doctrine**

Discovery frequently involves seeking information which is claimed to be either confidential, proprietary, or involves trade secrets.

1. Confidentiality

Federal and state constitutions are sources of privacy interests that must be scrutinized when raised as a challenge to pretrial discovery.²⁷³ While the right to privacy is not expressly mentioned in either the federal constitution or our state constitution, the United States Supreme Court has held that a right of personal privacy, or a guarantee of certain areas or zones of privacy, exists under the United States Constitution.²⁷⁴ Similarly, the Texas Supreme Court has held that the Texas Constitution protects personal privacy from unreasonable intrusion.²⁷⁵ The term “right to privacy” is a generic term encompassing various rights recognized in decisions of the United States Supreme Court as well as in other federal and state courts.²⁷⁶

For example, an individual has a constitutionally protected interest in avoiding disclosure of personal matters — sometimes referred to as “disclosural privacy,” — which encompasses the ability of individuals to determine for themselves when, how, and to what extent information about them is communicated to others.²⁷⁷ However, this does not mean that every publication of personal information about an individual constitutes an invasion of a constitutionally protected zone of privacy.²⁷⁸ Nor does it mean that information within a constitutionally protected zone of privacy can never be disclosed.²⁷⁹

Mere conclusory allegations that documents sought are “confidential” are insufficient to support a privacy claim.²⁸⁰ A party asserting that privacy rights protect information from disclosure must present evidence showing disclosure would cause “a particular, articulated and demonstrable injury.”²⁸¹ In other words, the party must establish that it has such a privacy interest in the information as to bar disclosure.²⁸²

²⁶⁶ *In re XL Specialty Ins.*, 373 S.W.3d at 51–53.

²⁶⁷ Tex. R. Evid. 503(b)(1)(C); *In re XL Specialty*, 373 S.W.3d at 52–53.

²⁶⁸ *In re Scherer*, 684 S.W.3d 875, 882 (Tex. App.—Eastland 2024, no pet.) (citing Tex. R. Civ. P. 193.3(a)); see also *In re Park Cities Bank*, 409 S.W.3d 859, 868 (Tex. App.—Tyler 2013, no pet.).

²⁶⁹ *Id.*

²⁷⁰ *Id.* (citing Tex. R. Civ. P. 193, cmt. 3).

²⁷¹ *Id.* (citing Tex. R. Civ. P. 193.3(b)).

²⁷² *Id.* (citing Tex. R. Civ. P. 193.2(f)).

²⁷³ *In re Crestcare Nursing & Rehab. Ctr.*, 222 S.W.3d 68, 72 (Tex. App.—Tyler 2006, no pet.).

²⁷⁴ *In re Crestcare Nursing & Rehab. Ctr.*, 222 S.W.3d 68, 72–73 (Tex. App.—Tyler 2006, no pet.) (citing *Griswold v. Connecticut*, 381 U.S. 479, 484, 85 S.Ct. 1678, 1681, 14 L.Ed.2d 510 (1965)).

²⁷⁵ *Id.* (citing *Tex. State Employees Union v. Tex. Dep’t of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205 (Tex.1987)).

²⁷⁶ *Id.*

²⁷⁷ *In re Kemper Lloyds Ins. Co.*, No. 12-05-00309-CV, 2006 WL 475436, at *4 (Tex. App.—Tyler Feb. 28, 2006, no pet.) (citing *Whalen v. Roe*, 429 U.S. 589, 599–600, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977); *Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 679 (Tex.1976)).

²⁷⁸ *In re Kemper Lloyds Ins. Co.*, 2006 WL 475436 at *4 (internal citations omitted).

²⁷⁹ *Id.* (internal citations omitted)

²⁸⁰ *In re Crestcare Nursing & Rehab. Ctr.*, 222 S.W.3d 68, 74 (Tex. App.—Tyler 2006, no pet.) (internal citations omitted) (internal citations omitted) (nursing home administrator’s affidavit that (1) personnel files are created with the individual employee’s right to privacy in mind, (2) the records in the files are disclosed only to the individual employee and are never made available to the general public, and (3) the files are intended to remain privileged and confidential were conclusory allegations that such records were “confidential”).

²⁸¹ *In re Kemper Lloyds Ins. Co.*, 2006 WL 475436 at *4 (internal citations omitted).

²⁸² *Id.*

2. Trade Secrets

Generally, a person has a qualified privilege to refuse to disclose and to prevent other persons from disclosing a trade secret that the person owns.²⁸³ A “Trade secret” means all forms and types of information, including business, scientific, technical, economic, or engineering information, and any formula, design, prototype, pattern, plan, compilation, program device, program, code, device, method, technique, process, procedure, financial data, or list of actual or potential customers or suppliers, if (1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret and (2) the information derives independent economic value from its secrecy (i.e., it is not generally known or readily ascertainable through proper means by another person who can obtain economic value from the information's disclosure or use).²⁸⁴

The party asserting the trade secret privilege has the burden of proving that the discovery information sought qualifies as a trade secret.²⁸⁵ If the resisting party meets its burden, the burden shifts to the party seeking the trade secret discovery to establish that the information is necessary for a fair adjudication of its claim.²⁸⁶ It is an abuse of discretion for the trial court to order production once trade secret status is proven if the party seeking production has not shown necessity for the requested materials.²⁸⁷

3. Proper Procedure: Object and Seek a Protective Order

The proper procedure to protect confidential, proprietary or trade secret information is to produce the documents subject to a protective order.²⁸⁸ Indeed, a trial court may issue a protective order to protect a movant from the invasion of personal, constitutional, or property rights.²⁸⁹ This is because a protective order can help reduce the potential harm of disclosure.²⁹⁰ Indeed, “discovery cannot be denied because of an asserted proprietary interest in the requested documents when a protective order would sufficiently preserve that interest.”²⁹¹ As one practitioner recently pointed out,

²⁸³ Tex. R. Evid. 507(a); *see also* Tex. R. Civ. P. 76a(2)(c) (court records open to public do not include discovery in cases initiated to preserve bona fide trade secrets).

²⁸⁴ Tex. Civ. Prac. & Rem. Code § 134A.002(6).

²⁸⁵ *In re Cooper Tire & Rubber Co.*, 313 S.W.3d 910, 915 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (citing *In re Bass*, 113 S.W.3d 735, 737 (Tex.2003) (orig. proceeding)).

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 738.

²⁸⁸ *See In re Cont'l Ins. Co.*, 994 S.W.2d 423, 425 (Tex. App.—Waco 1999, no pet.) (“Individuals cannot protect relevant information from discovery by confidentiality

reaching an agreed protective order can be mutually beneficial for all parties:

Having an agreed protective order in place favors not only the producing party because some protection is provided with the production of its business information as required in litigation, but the requesting party also benefits from obtaining the information more quickly through an agreed protective order. Parties may be required to produce trade secret, proprietary, and confidential information that warrants a protective order. Thus, parties may have an interest in restricting the use and dissemination of trade secret, proprietary, or confidential information.²⁹²

J. Objections to Instructions

1. A Word to the Wise

Sometimes less is more. It is not uncommon, however, for parties serving requests for production to attempt to include instructions in the requests that impose obligations or duties beyond those contained in the applicable Rules. Responses should be given as required by the Rules. Some of the most common offenders are included below.

2. Purporting to Require “Full Answers”

It is common to see instructions which purport to require the responding party to answer the requests according to the vague standard “fully.” Rule 193.1 only imposes the obligation on responding party to make a “complete response, based on all information reasonably available to her or her attorney at the time the response is made.”

3. Purporting to Alter the Duty to Supplement

Frequently, a requesting party will include an instruction purporting to alter the responding party’s supplementation requirements, contrary to Rule 193.5. A responding party has no obligation to supplement its responses in any manner not specified by Rule 193.5(a).

provisions in contracts, even settlement agreements. The private agreement between two individuals does not override the discovery rules”).

²⁸⁹ Tex. R. Civ. P. 192.6(b).

²⁹⁰ *In re K & L Auto Crushers, LLC*, 627 S.W.3d 239, 256 (Tex. 2021) (citing *In re Union Pac. R.R. Co.*, 294 S.W.3d 589, 593 (Tex. 2009) (orig. proceeding) (per curiam)).

²⁹¹ *Jampole v. Touchy*, 673 S.W.2d 569, 574–75 (Tex. 1984), disapproved of on other grounds by *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992).

²⁹² Di Troia, Francesca A., *Protective Orders & Confidentiality Issues*, 37th Annual Advanced Evidence and Discovery, 3 (2024).

For example, some requests will include instructions attempting to expand the responding party's supplement obligations under Rule 193.5, by attempting to require the responding party to amend or supplement the responses if the response "is no longer true and the circumstances are such that his or her failure to amend his or her written answers would be in substance a knowing concealment." Rule 193.5 only imposes on a responding party a burden to amend a response where a "complete or correct" response was initially made, but the response is no longer "complete and correct." The responding party should object to any attempt to impose a presumption or argument that the responding party agreed to supplement any response according to such faulty instruction.

4. Seeking Information Other than Documents

Unfortunately, it is not uncommon to see definitions for requests for production attempt to require responding party to respond with additional information which is not "reasonably available," in contravention of Rule 193.1. For example, this author has seen instructions purporting to require the responding party to "state the present location of the document, and the name, address, position or title, and the telephone number of the person or persons having custody of the document" which essentially create interrogatories within requests by adding unreasonable burdens on the responding party not required by the Rules.

5. Purporting to Preemptively Request a Privilege Log

It is not uncommon to encounter instructions which purport to require the responding party to "preemptively" produce a privilege log and/or alter the timing of responding to request for a privilege log once the responding party has designated documents as being withheld as privileged under Texas Rule of Civil Procedure 193.3(b).

K. **Objections to Definitions**

1. Definitions

There seem to be a few common definitions that come up time and time again in probate, trust, and guardianship litigation. However, problems arise, when the requesting party attempts to define terms in an unduly burdensome manner. Some of the most common offenders are listed below.

2. Unreasonable Definitions of "Persons"

For example, definitions which expansively define terms like "person" can be unduly burdensome, unnecessarily expensive, harassing, and annoying, and beyond the scope of permissible discovery. For example, some requests will attempt to include within the definition of "person" persons and/or entities besides the named individual or entity, especially the phrase "its predecessors or successors in interest" which forces responding party to come to legal conclusions as to who or what persons or entities might constitute "successors, predecessors, affiliates, agents" of third-parties.²⁹³

3. Unreasonable Definitions of "Identify"

Some requests for production will attempt to define terms like "identify" in an unreasonable, unduly burdensome, unnecessarily expensive, harassing and annoying manner beyond the scope of permissible discovery. Some definitions attempt to force responding party to spend countless hours researching "the identity of the author and of the signer of the document and of the person on whose behalf or at whose request or direction the document was prepared or delivered" which, again, is unduly burdensome, harassing, and would require the responding party to draw numerous legal and factual conclusions, which the Rules do not require. These kinds of definitions effectively amount to an interrogatory masquerading as a request for production of documents.

4. ESI & Forensic Imaging

Many requests for production use boilerplate electronically stored information ("ESI") definitions which assume one or more of the following: that the requesting party can define the scope of ESI however it wants; that the producing party must search every conceivable source; that production must be made in the exact form demanded; that metadata is automatically discoverable; that forensic access is routine; and/or that the responding party must bear all burden and cost of retrieval and production. It is also not uncommon for the definition of ESI to purport to include information in an electronic or magnetic form which is **not** "reasonably available" or in "readily usable format." Such definitions do not comply with Rule 196.4 and relevant e-discovery case law.²⁹⁴

Texas law provides otherwise:

- Neither party may attempt "to dictate the form of electronic discovery."²⁹⁵

²⁹³ See *In re TIG Insurance Company*, 172 S.W.3d 160, 166 (Tex. App.—Beaumont 2005, original proceeding) (document requests utilizing expanded definitions of the parties in the attempt to include agents, other representatives, affiliates, predecessors, and successors are overly broad and objections to same are sustained).

²⁹⁴ *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 320 (S.D.N.Y. 2003) ("Information deemed "accessible" is stored in a readily usable format").

²⁹⁵ *In re State Farm Lloyds*, 520 S.W.3d 595, 599 (Tex. 2017) ("Under our discovery rules, neither party may dictate the form of electronic discovery.")

- Rule 196.4 states that “to obtain discovery of data or information that exists in electronic or magnetic form, the requesting party *must* specifically request production of electronic or magnetic data and *specify the form in which the requesting party wants it produced.*”
- The responding party then has a duty “to produce the electronic or magnetic data that is responsive to the request and is *reasonably available* to the responding party in its *ordinary course of business*” and in a “reasonably usable form.”²⁹⁶ For example, back-up tapes, erased, fragmented, or damaged data, and legacy data are generally not reasonably available.²⁹⁷
- A requesting party is *not* automatically entitled to production of documents *in native format*.²⁹⁸

As the Texas Supreme Court recently announced, “the relevance of metadata and the relative significance to the case *must be determined on a case-by-case basis*” and its “relevance *must be obvious or at least linked, more or less concretely, to a claim or defense.*”²⁹⁹ “Hypothetical needs, surmise, and suspicion should be afforded no weight.”³⁰⁰ Thus, definitions that seek metadata where “the who, what, where, when, and why ESI was generated is [not] an actual issue in the case,” and instead is “merely a helpful or theoretical issue” are unnecessary and potentially disproportional.³⁰¹

5. Forensic Imaging

Definitions and/or instructions which purport to request or require forensic imaging of computers, hard drives, cell phones and/or other electronic devices are frequently objectionable because they seek an extraordinary and highly intrusive form of discovery that Texas law does not permit as a matter of course. Under Texas law, “Intrusive discovery measures—such as ordering direct access to an opponent’s electronic storage device—require, at a minimum, that the benefits of the discovery measure outweigh the burden imposed upon the discovered party.”³⁰² The Texas Supreme Court has emphasized that providing access to a party’s electronic storage device “is particularly intrusive and should be generally discouraged, just as permitting open

access to a party’s file cabinets for general perusal would be.”³⁰³ Before such relief may be considered, the requesting party must first show “that the responding party has somehow defaulted in its obligation to search its records and produce the requested data.”³⁰⁴ “Even if the requesting party makes this threshold showing, courts should not permit the requesting party itself to access the opponent’s storage device; rather, only a qualified expert should be afforded such access . . . and only when there is some indication that retrieval of the data sought is feasible.”³⁰⁵

Texas law also rejects unfettered exploratory access. Consistent with the prohibition against fishing expeditions, “a court may not give the expert carte blanche authorization to sort through the responding party’s electronic storage device; Instead, courts are advised to impose reasonable limits on production.”³⁰⁶

Courts must also address privilege, privacy, and confidentiality concerns.³⁰⁷ Federal courts typically reject a party’s request for request for a “direct investigation” of another party’s computer as an overly broad and disproportional request. In fact, rather than authorizing a direct production of a verified or mirror image to the requesting party, “most federal courts have approved some procedure or protocol to allow for keyword searches or other means to protect against the disclosure of privileged or irrelevant information.”³⁰⁸

Accordingly, boilerplate definitions or instructions in requests for production cannot create a routine right to forensic imaging, mirror-image creation, or direct access to devices or cloud-based systems. At most, such relief may be considered only after the requesting party makes the required threshold showing and the court imposes appropriate safeguards and limits.

L. **Objections to Time and Place**

The requests for production must state the time and place for production.³⁰⁹ Generally, the date to respond to the request is 30 days after the date the request was served.³¹⁰

When a party objects to the time or place of production or inspection, the response should state that it would be more reasonable to produce or inspect the

²⁹⁶ Tex. R. Civ. P. 196.4 and cmt. 3 thereto.

²⁹⁷ *Zubulake*, 217 F.R.D. at 319.

²⁹⁸ See e.g. *In re State Farm Lloyds*, 520 S.W.3d at 599 (“The taproot of this discovery dispute is whether production in native format is reasonable given the circumstances of this case”).

²⁹⁹ *In re State Farm Lloyds*, 520 S.W.3d 595, 609 (Tex. 2017).

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 322 (Tex. 2009) (orig. proceeding) (citing Tex. R. Civ. P. 196.4, 192.4).

³⁰³ *Id.* at 317.

³⁰⁴ *Id.* (internal citations omitted).

³⁰⁵ *Id.* at 318 (internal citations omitted).

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Brand Services, LLC v. Irex Corp.*, No. CV 15-5712, 2017 WL 67517, at *2 (E.D. La. Jan. 6, 2017)(rejecting carte blanche access to computer; ordering both parties to formulate a draft ESI protocol to govern search of computers).

³⁰⁹ Tex. R. Civ. P. 196.1(b).

³¹⁰ Tex. R. Civ. P. 196.2(a).

documents at a different time or place and describe the suggested terms.³¹¹ The responding party must then comply with that time and place without further request or order.³¹²

M. Responses

Rule 193.1 provides, in pertinent part, that the “responding party’s answers, objections, and other responses must be preceded by the request to which they apply.”³¹³

Rule 196.2(b) provides: “With respect to each item or category of items, the responding party must state objections and assert privileges as required by these rules, and state, as appropriate, that: (1) production, inspection, or other requested action will be permitted as requested; (2) the requested items are being served on the requesting party with the response; (3) production, inspection, or other requested action will take place at a specified time and place, if the responding party is objecting to the time and place of production; or (4) no items have been identified - after a diligent search - that are responsive to the request.”³¹⁴

XI. PRODUCING DOCUMENTS

Production is its own stage of discovery, and avoidable disputes often arise from when the documents are produced, how they are produced, and how they are organized. Rule 196.3 covers time and place of production, copies in lieu of originals, and organization of the documents or tangible things produced. Rule 196.6 covers the expense of production.

A. Time and Place

Rule 196.3(a) states that “Subject to any objections stated in the response, the responding party must produce the requested documents or tangible things within the person’s possession, custody or control at either the time and place requested or the time and place stated in the response, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them.”³¹⁵

A written response is not the end of the responding party’s obligation. Once objections are asserted and the

scope of production is defined, the responding party must actually produce the responsive materials at a definite time and place. A party cannot satisfy Rule 196 by promising future production without identifying when and how that production will occur. Thus, if the responding party is objecting to the time and place of production, the response must state both the objection and the solution.³¹⁶ Vague statements such as “documents will be produced at a mutually agreeable time” or “responsive documents will be made available later” invite disputes because they leave the actual production obligation undefined. If production will be a rolling basis, that should be stated expressly, along with a defined timeline.

The old days of counsel arriving to inspect bankers’ boxes filled with paper records has largely been replaced by electronic production through file-sharing platforms, hosted repositories, and downloadable links. In many cases today, “production” means a Dropbox link, a shared folder, a secure download, or some other electronic transfer rather than an invitation to come inspect hard-copy files in person. Thus, the “time and place” of production now effectively means the date a download link is sent, the period during which access remains available.

B. Production By “Come and Inspect”

Production by “come and inspect” creates a record-keeping problem that advance bates labeling solves. When documents are not labeled before inspection, there is no reliable record of which documents the responding party made available and which the inspecting party actually selected and copied. To close that gap, the inspecting party should bates label every document it selects and transmit a labeled copy to the responding party confirming the scope of what was taken. This creates a clear, agreed record of the production — and eliminates disputes at trial over what the inspecting party did or did not receive.

C. Copies

The responding party may produce copies in lieu of originals unless a question is raised as to the authenticity of the original or in the circumstances it would be unfair

³¹¹ Tex. R. Civ. P. 193.2(b)(stating “If the responding party objects to the requested time or place of production, the responding party must state a reasonable time and place for complying with the request and must comply at that time and place without further request or order”); Tex. R. Civ. P. 196.2(b)(3)(stating in relevant part that “With respect to each item or category of items, the responding party must state objections and assert privileges as required by these rules, and state, as appropriate, that: production, inspection, or other requested action will take place *at a specified time and place, if the responding party is objecting to the time and place of production*”)(emphasis added).

³¹² Tex. R. Civ. P. 193.2(b).

³¹³ Tex. R. Civ. P. 193.1.

³¹⁴ Tex. R. Civ. P. 196.2(b).

³¹⁵ Tex. R. Civ. P. 196.3(a); *see also* Tex. R. Civ. P. 196.2(b)(requiring the responding party to state production will take place at a specified time and place, if the responding party is objecting to the time and place of production).

³¹⁶ Robert K. Wise, Kennon L. Wooten, Francesca A. Di Troia & Joseph Paul McDuffie, 1 Texas Discovery § 8.04 (2026).

to produce copies in lieu of originals.³¹⁷ If originals are produced, the responding party is entitled to retain the originals while the requesting party inspects and copies them.³¹⁸

D. Expense

Rule 196.6 provides that unless otherwise ordered by the court for good cause:

- the expense of *producing items* will be borne by the *responding party*; and
- the expense of *inspecting, sampling, testing, photographing, and copying* items produced will be borne by the *requesting party*.³¹⁹

E. Organization

Rule 196.3(c) requires the responding party to produce documents in one of two ways:

- **either produce documents and tangible things as they are kept in the usual course of business; or**
- **organize and label them to correspond with the categories in the request.”** Tex. R. Civ. P. 196.3(c).

It appears the decision regarding which of the alternatives to use lies exclusively with the responding party.³²⁰ No Texas case has directly considered the question. In interpreting Federal Rule of Civil Procedure 34(b), federal courts have observed, that “if the producing party produces documents in the order in which they are kept in the usual course of business, the Rule imposes no duty to organize and label the documents, provide an index of the documents produced, or correlate the documents to the particular request to which they are responsive.”³²¹ Federal Rule 34(b)(2)(E)(i) is very similar to Rule 196.3 and provides: “Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents

or electronically stored information . . . A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request.” Requiring that responsive documents be segregated according to each request will often impose an undue burden on the responding party:

Requiring further that these requested documents be segregated according to the requests would impose a difficult and usually unnecessary additional burden on the producing party. **The categories are devised by the propounding party and often overlap or are elastic, so that the producing party might be compelled to decide which best suits each item in order to consign it to the proper batch.** Such an undertaking would usually not serve any substantial purpose, and it could become quite burdensome if considerable numbers of documents were involved.³²²

The case law in Texas addressing when a trial court may order a party to organize and label its production to correspond with the categories in each request is sparse.

In *In re Exmark Manufacturing Company*, the Corpus Christi Court of Appeals affirmed a trial court’s order requiring a responding party to “identify each... tangible item responsive to each Request for Production or by general categories of documents.”³²³ Citing Rule 196.3(c), the Court observed that the rules “expressly and explicitly allow[ed] for the mode of production specified by the trial court and in fact, the trial court’s order [was] less onerous than authorized by the rules because it allowed the responding party to identify each item by ‘general categories of documents.’”³²⁴ wall of the responding party argued that the time and expense

³¹⁷ Tex. R. Civ. P. 196.3(b).

³¹⁸ Tex. R. Civ. P. 196.3(b).

³¹⁹ Tex. R. Civ. P. 196.6.

³²⁰ *Barns v. Payne*, No. 22-2433-HLT-BGS, 2023 WL 9105050, at *7 (D. Kan. Dec. 14, 2023)(“The [Federal] Rule allows the producing party two methods for producing documents: either (1) producing documents in the usual course of business or (2) correlating documents with specific discovery requests. *Id.* The Rule is disjunctive and there is no obligation to correlate documents to discovery requests if the producing party produced documents as they are kept in the usual course of business.”); *Kunzler v. Wilkie*, No. 19-CV-7181 (JS) (ARL), 2021 WL 9244083, at *3 (E.D.N.Y. Nov. 5, 2021)(“[U]nder the provisions of Rule 34(b)(2) a responding party clearly controls the manner in which production will occur, and specifically which of the two prescribed methods of production will be employed”);

MGP Ingredients, Inc. v. Mars, Inc., No. CIV.A.06-2318JWL-DJW, 2007 WL 3010343, at *3 (D. Kan. Oct. 15, 2007)(interpreting Rule 34(b) and noting “The Rule is phrased in the disjunctive, and the producing party may choose either of the two methods for producing the documents”).

³²¹ *MGP Ingredients, Inc. v. Mars, Inc.*, No. CIV.A.06-2318JWL-DJW, 2007 WL 3010343, at *3 (D. Kan. Oct. 15, 2007) (internal citations omitted).

³²² *MGP Ingredients, Inc. v. Mars, Inc.*, No. CIV.A.06-2318JWL-DJW, 2007 WL 3010343, at *3 (D. Kan. Oct. 15, 2007) (citing Wright, Miller, & Marcus, *supra* note 8, § 2213 at p. 431).

³²³ *In re Exmark Mfg. Co., Inc.*, 299 S.W.3d 519, 532 (Tex. App.—Corpus Christi 2009, pet. denied)

³²⁴ *Id.* at 532.

required organize and label documents telling them to one or more of the discovery requests would be unduly burdensome. “Significantly . . . [The responding party] produced no evidence . . . Substantiating its claim that the trial court’s order[was] overburdened summer unduly expensive.”³²⁵

In another Texas case, the Tyler Court of Appeals affirmed a trial court’s order mandating that:

...all answers be made to opposing counsel in accordance with Texas Rules of Civil Procedure 193.1. All responses must be preceded by the request to which they apply. [Hite] is hereby ordered to provide opposing counsel with specific delineation of which documents respond to which requests of [Southern] regardless of how [Hite] maintains his records.

There, the requesting party had complained that the responding party had provided “seventeen PDF files, consisting of over six-hundred pages of documents,” which the requesting party characterized as a “mishmash of records.” The responding party acknowledged that the documents were “messy,” but represented “that they were presented as [the responding party] kept them in the normal course of business and that [the responding party’s counsel] could not ‘turn this into a corporate-looking set of records.’”³²⁶ As in *In re Exmark Manufacturing Company*, the responding party presented no testimony, affidavits, or other evidence to support his objections to reorganization of the documents.³²⁷

The court concluded “under these circumstances” the trial court did not abuse its discretion because “requiring [the responding party] to provide specific delineation of which documents respond to which request [was], therefore, authorized by the rules of civil procedure, and

[was] not tantamount to an improper discovery order that imposes more onerous requirements than the rules permit, such as an order requiring the creation of a document that does not already exist.”³²⁸

F. Key Take Aways

With respect to the manner of production, several key takeaways emerge from these authorities for the probate and trust practitioner:

- Neither Texas Rule 196.3(c) nor any case construing it defines the term “usual course of business.”³²⁹
- The purposes of Rule 196.3 and Rule 34 appear to be to prevent document dumps.³³⁰
- Moreover, there is no Texas case clearly defining “usual course of business” for individuals.
- A party who chooses to produce such documents as they are maintained in the ordinary course of business has the burden of proving that fact.³³¹
- While a responding party cannot be forced to create new documents in response to requests for production,³³² it may be forced to organize existing documents.
- The more voluminous and disorganized a responding party’s production, the greater the risk of judicial intervention;
- When a responding party’s production is voluminous, the responding party should consider imposing some kind of reasonable structure (e.g. emails as exported threats, phone screenshot grouped by conversation, files as stored in folders, etc.).³³³

³²⁵ *Id.*

³²⁶ *In re Hite*, No. 12-18-00121-CV, 2018 WL 2715300, at *3 (Tex. App.—Tyler June 6, 2018, no pet.).

³²⁷ *Id.* at *3.

³²⁸ *Id.* (citing *Texaco, Inc. v. Dominguez*, 812 S.W.2d 451, 458 (Tex. App.—San Antonio 1991, orig. proceeding) (“We do not find it unreasonable for the trial court, in an effort to clarify discovery and meet the purposes of discovery (to try cases based on what the facts reveal, not what they conceal), to order the party producing the documents, and who is most familiar with them, to identify which documents satisfy which request”).

³²⁹ William V. Dorsaneo III & Elizabeth G. Thornburg, 1 Texas Discovery § 8.04 (2026).

³³⁰ See *Speed RMG Partners, LLC v. Arctic Cat Sales Inc.*, No. 20-CV-609 (NEB/LIB), 2021 WL 5087362, at *8 (D. Minn. Jan. 5, 2021) (analyzing Federal Rule 34 and noting “Plaintiffs’ method of producing responsive documents in bulk is merely a improper document dump that does not

provide Defendants with any specification as to, or meaningful way of determining, which of the produced documents are responsive to which particular request or requests.”).

³³¹ *Texaco, Inc. v. Dominguez*, 812 S.W.2d 451, 457–58 (Tex. App.—San Antonio 1991, orig. proceeding) (holding that, under former Texas Rule 167(a)(1), it was the burden of the producing party to show that documents were produced in the usual course of business and a mere assertion that they were so produced is not sufficient to carry that burden).

³³² *In re Jacobs*, 300 S.W.3d 35, 46 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

³³³ See e.g. *Rychner v. Cont’l Res., Inc., No. 1:19-CV-071*, 2021 WL 2211110, at *5 (D.N.D. June 1, 2021) (“Having reviewed the record, the court concludes that Continental has produced the documents in substantially the same manner in which they were kept. Any unwieldiness of Continental’s production is mitigated by the provision of indexes by Continental to guide the Rychners. The indexes organize the

- There is a reasonable argument however that for individuals, it effectively means produce the documents in the way you actually keep them— so long as that method has some rational structure and is in a disguised document dump.
- While the Texas Rules of Civil Procedure do not require that documents produced in response to request for production be bates labeled, the better practice is to bates label every page that is produced to the requesting party. This way, the responding party can know what it has been produced.

XII. COMPELLING DOCUMENT PRODUCTION

Perhaps few aspects of civil litigation draw more judicial frustration than discovery disputes. Courts are predisposed to dislike motions to compel because these fights are often viewed as avoidable, inefficient, and disproportionately consume judicial resources. Trial courts generally expect counsel to resolve most discovery disagreements without intervention, consistent with their obligation to cooperate and confer in good faith under Tex. R. Civ. P. 191.2. At the end of the day, facts cannot be changed through motion practice. When parties fight over marginal requests, reflexively assert boilerplate objections, or refuse to engage in meaningful dialogue, most of the time they simply delay the inevitable exchange of information while increasing costs. From the trial court's perspective, many of these disputes often signal a breakdown in professionalism rather than a genuine need for judicial resolution.

Accordingly, motions to compel are most effective—and most favorably received—when they are a last resort. Courts are far more receptive when the record reflects that counsel have met their obligations to confer, have clearly framed the dispute, and have limited the issues to those that truly require a ruling.

A. The Deficiency Letter

Before filing a motion to compel, counsel for the moving party should send a written deficiency letter to the opposing counsel identifying with specificity each response believed to be deficient and the basis for that belief. Tex. R. Civ. P. 191.2 requires parties to confer in a reasonable attempt to resolve discovery disputes before seeking court intervention, and most courts

documents by Bates stamp and description. They also appear to sort the production of electronic communications by date. With this information, the Rychners should, with reasonable effort, be able to discern which documents are responsive to which requests. The documents were produced electronically and should therefore be searchable. Accordingly, the court finds that the manner of Continental's production comports with requirements of Fed. R. Civ. P. 34(b)(2)(E)(i)."); *see*

expect — and some require — that a deficiency letter precede any motion to compel.

A well-drafted deficiency letter serves three purposes beyond satisfying the meet-and-confer requirement. **First**, it creates a written record demonstrating that the moving party attempted in good faith to resolve the dispute without court intervention — a showing courts routinely consider when awarding fees and sanctions under Rule 215. **Second**, it sometimes actually works. A responding party that receives a specific, well-reasoned deficiency letter will occasionally supplement or amend its responses to avoid a motion to compel, particularly if the letter identifies a legitimate gap the responding party had not recognized. **Third**, it narrows the dispute. By the time the motion is filed, the issues in controversy should be limited to what the deficiency letter raised and the responding party declined to cure — which makes the motion shorter, the hearing more focused, and the court's task more manageable.

The deficiency letter should:

- Identify each request by number for which the response is believed to be deficient;
- State specifically why the response is deficient — whether the objection lacks a required explanation, whether documents appear to have been withheld without adequate justification, or whether the response is non-responsive on its face;
- Identify any documents or categories of documents the requesting party believes exist and have not been produced, with the factual basis for that belief where available;
- State a reasonable deadline for the responding party to supplement or amend — typically seven to fourteen days; and
- State that the requesting party will file a motion to compel if the deficiencies are not cured by the stated deadline.

On the other hand, a deficiency letter that is vague, overbroad, or itself a form of discovery abuse undermines its own purpose. A letter that simply states “your responses are deficient — please supplement” does not satisfy Rule 191.2 and will not impress a court reviewing whether a good-faith effort was made. Similarly, a letter that raises every conceivable deficiency in a twenty-page single-spaced document

*also Conservation Law Found., Inc. v. Shell Oil Co., No. 3:21-CV-00933 (JAM), 2023 WL 5434760, at *8 (D. Conn. Aug. 22, 2023) (“Thus, in deciding whether a document production qualifies as a “usual course” production, courts have considered whether it has an organizational logic that is either plainly evident or has otherwise been explained to the requesting party.”).*

may satisfy the technical requirement but signals to the court — and to opposing counsel — that the requesting party is using the process as a weapon rather than a tool.

In summary, the goal of the deficiency letter is a focused, good-faith communication that gives the responding party a genuine opportunity to cure. If it works, the requesting party avoids the time and expense of motion practice. If it does not, the letter becomes Exhibit A to the motion to compel. A well-drafted deficiency letter makes the motion to compel significantly easier to win.

B. The Motion

A motion to compel is most effective when it presents a narrow, well-conferred, and clearly framed dispute. In his recent article *Dealing with Objections to Written Discovery: The Modern Approach to Written Discovery Objections and Texas State and Federal Courts*, David Bright recommends several practice tips that are worth repeating, starting with considering “moving to compel on a limited number of discrete discovery request at a time that all pertain to a specific area of inquiry.”³³⁴ As he rightly points out, there is nothing more demoralizing to a trial judge than facing a Motion to Compel involving 60 separate requests on myriad of different issues.³³⁵ As he says:

I would generally rather have 3 separate, fairly brief Motion to Compel hearings, each involving 10 requests, than teeing up 50 separate discovery requests for a single hearing, which will likely require hours of the court’s time and patience. A shorter, less cumbersome Motion to Compel hearing makes it easier on your judge.³³⁶

When it comes to organizing the motion to compel, it can be helpful to break the motion into the following headings or subheadings.

1. Summary of the Case

A motion to compel should begin with a short, practical summary of the case. This section is not the place for a full procedural history or a lengthy recitation of the pleadings. Its purpose is to orient the court quickly to the nature of the dispute, the claims and defenses at issue, and the reason the requested documents matter. A busy trial judge should be able to read this section and immediately understand what the case is about, who the relevant parties are, and why the discovery dispute is important.

³³⁴ David Bright, *Dealing with Objections to Written Discovery: The Modern Approach to Written Discovery Objections and Texas State and Federal Courts*, 48th Ann. Adv. Civ. Trial, State Bar of Tex. 43 (2025).

2. Summary of the Motion

The motion to compel should then summarize the discovery dispute, explain why the requested documents matter, the objections preventing production, and the ruling the court is being asked to make.

3. The Discovery Requests, the Responses, & Attempts to Confer

The next section should summarize the factual record, starting with the actual requests at issue, followed by the responses served, and then ending with the attempts to confer (usually a deficiency letter and a response). If counsel conferred and the responding party clarified, supplemented, or stood on its objections, that procedural history should be summarized here. Likewise, if the production was incomplete, unintelligibly organized, or not made despite a promise to produce, that should be stated clearly. Similarly, if the responses were late and objections were waived, that should be noted here. Ultimately, this section should create a clean factual record of the dispute the court is being asked to decide.

4. The Legal Standard

After laying out the requests and responses, the motion should set out the legal standard and basic principles that govern written discovery. This usually means addressing the purpose and limits of discovery, the permissible scope of discovery, and the burden borne by the party resisting discovery.

5. The Categories of Documents Requested and Sought to Be Compelled Generally

If possible, it is often helpful to group the requests sought to be compelled into broader categories of documents. This makes the dispute more understandable and prevents the motion from becoming a long, repetitive march through dozens of individual requests. Trial courts loathe those kinds of “death” marches. Grouping the documents into categories offers several advantages.

First, organizing the requests this way helps the court see the substance of the dispute rather than getting lost in the wording of individual requests. It also allows counsel to show that the requests are not a scattershot effort to obtain “everything.”

Second, this approach is especially useful when the responding party has repeated the same objections across multiple requests. If ten requests all seek documents relating to a particular issue and the responding party asserts the same overbreadth or burden

³³⁵ *Id.*

³³⁶ *Id.*

objection to each one, the motion will often be more persuasive and efficient if it addresses those requests by category.

Third, this category-by-category method gives the court a manageable way to rule. It also improves the credibility of the moving party. Rather than appearing to demand every possible document, counsel appears focused on obtaining specific evidence that matters to the case. Courts are more receptive to a motion that demonstrates a clear connection between the requested documents and the actual issues in dispute.

6. Use a Chart Within the Categories

Once the disputed requests have been grouped into categories, the motion should analyze each category separately. Using a chart within each category can be extremely helpful. The chart could have three columns:

- **Column 1: The requests**
- **Column 2: The response/objection**
- **Column 3: Any deficiencies in the response/objection**

The court should not have to toggle back and forth between exhibits to determine what was asked and how the responding party answered. If possible, quote the requests and responses directly in the chart. Often the force of a motion to compel comes from showing the mismatch between a reasonable request and an evasive or unsupported response — and a chart is great way to do that.

Underneath each chart in the body of the motion, the moving party can add any additional explanation as to why the documents sought are relevant and how each category of documents is tied to specific elements, defenses, or disputed factual issues. The stronger the connection between the documents sought and a live issue in the case, the more persuasive the request to compel will be. The moving party can also add any additional arguments as to why the objections asserted by the responding party lack merit. This section is the core of the motion.

Some practitioners even include this chart in their proposed order to make it easier for the judge to rule.³³⁷

7. Consider Not Seeking Sanctions

Consider refraining from seeking sanctions when filing the first motion to compel in a case unless the obstructive behavior is repeated or particularly egregious. Often, a single instance of delayed, incomplete, or evasive discovery does not justify sanctions, and requesting them prematurely can appear like you are trying to vilify your opposing counsel or either the other party.³³⁸ Reserving sanctions for

repeated or deliberate violations underscores the moving party's professionalism.

C. **The Hearing**

When it comes to hearings on motions to compel, remember two things: ***the trial court's time and patience are usually limited***. Therefore, efficiency is key. The hearing on a motion to compel is rarely the place for a sprawling recitation of every request, every response, and every communication exchanged during the meet-and-confer process. Right out of the gate, most judges want counsel to get to the point quickly:

What is the dispute, why do the requested documents matter, what objection is preventing production, and what ruling is the court being asked to make?

Additionally, counsel for the moving party should resist the temptation to over argue. Discovery hearings are often won by the party who appears more reasonable, more prepared, and more restrained. A trial court is unlikely to be impressed by rhetoric about “gamesmanship” or “abuse” unless the record genuinely supports it. In most hearings, the better approach is to explain calmly why the documents sought are relevant, why the requests were appropriately limited, why the objections are unsupported or improper, and why production should be compelled.

XIII. CONCLUSION

Effective discovery requires discipline at the front end. Serving reasonable, targeted requests for documents—designed to obtain specific information tied to the issues that actually matter—reduces the incentive for obstruction, narrows the scope of legitimate disputes, and lowers costs for all involved. They also enhance the court's ability to resolve discovery disagreements when they arise, because the relevance and proportionality of the requests are expressly apparent.

³³⁷ David Bright, *Dealing with Objections to Written Discovery: The Modern Approach to Written Discovery*

Objections and Texas State and Federal Courts, 48th Ann. Adv. Civ. Trial, State Bar of Tex. 43 (2025).

³³⁸ *Id.* at 44.

NORTH TEXAS PROBATE BENCH BAR CONFERENCE

APRIL 30-MAY 1, 2026

Problems in Determination of Heirships

- I Offspring of Male Decedents
- II Offspring of Decedent who has predeceased Offspring with children
- III Formal vs. Informal Marriage “Common Law” Spouse
- IV Only One Witness
- V No Known Paternal Relative
- VI Amended Pleadings vs. Supplemented Pleadings
- VII Ad-Litem Appointments
- VIII Judgments

OPINION

- The opinions expressed in this presentation are those of the speaker and the speaker alone. They are not approved, endorsed, adopted, agreed to or recognized by any current or past judge of any court.
- The opinions expressed in this presentation do not constitute legal advice in any way shape or form.

JUDGMENTS PART 2

Name and Relationship	Interest in Estate
Sibling 1	1/2
Sibling 2	1/2

“MOMMA’S BABY DADDY’S MAYBE”

TEC § 201.052

TFC § 160.204

MOMMA'S BABY DADDY'S MAYBE REDUX

- OFFSPRING OF PREDECEASED MALE HEIR
- ESSENTIALLY NESTED DETERMINATIONS OF HEIRSHIP
- REQUIRE THE SAME PROOF AS A FULL DETERMINATION OF HEIRSHIP.

“COMMON LAW” FORMAL MARRIAGE VS INFORMAL MARRIAGE

- TFC Chapter 2 sections 2.001 – 2.032
- TFC § 2.401 – 2.404

“EVERYBODY’S DEAD”

- When you only have 1 witness to testify to the heirs at law.
- TEC § 202.151(c)
- MUST BE PLED!
- MUST BE PROVED!
- JUDGMENT REQUIRES SPECIAL FINDINGS!
- RECOMMEND A MOTION FOR AUTHORITY TO UTILIZE A PROFESSIONAL GENEALOGIST

“WHO’S THE DADDY” NO KNOWN FATHER

- State v. Estate of Loomis, 553 S.W.2d 166, 170 (Tex. Civ. App. 1977 writ ref’d)
- Kilpatrick v. Estate of Kane, 743 S.W.2d 371, 374 (Tex. App. 1988)

“TO AMEND OR TO SUPPLEMENT THAT IS THE QUESTION”

- Amend:

Minor corrections:

- To correct the date of death
- To correct the place of death
- To correct date(s) of marriage(s)
- To correct date(s) of divorce(s)
- To correct the fractional interest(s) of the listed heirs

Supplement:

Major Changes that need NOTICE!

NEW Heirs

“WHO’S SIDE ARE YOU ON?”

- TEC § 202.009
- (a) Ad litem appointed to represent unknown heirs
- (b) Ad Litem appointed to represent minor/incapacitated heirs
- Opinion:
- Part (b) is an abomination
- Attorney should **NEVER** accept dual representation.
- Courts should require a second Ad Litem deposit and appoint a separate Ad Litem in cases with minor heirs

JUDGMENTS

Name And Relationship	Separate Personal Property	Separate Real Property	Community Property
Spouse	1/3	Life Estate in 1/3	None
Child 1	1/3	½ Subject to the life estate in the surviving spouse	½
Child 2	1/3	½ Subject to the life estate in the surviving spouse	½



How to make a stellar court record

NORTH TEXAS BENCH BAR

APRIL 2026

HONORABLE JUDGE MARGARET JONES- JOHNSON



- Graduate of Texas A&M University (formerly Texas Wesleyan University), J.D., University of Arkansas, Little Rock, Arkansas, B.A. Radio, Television & Film with a Minor in Marketing
- As an attorney, over 30 years of legal experience handling Family Law, CPS, Criminal, Juvenile, and Probate matters, as well as Sports and Entertainment Law
- Presiding Judge of Probate Court No. 3 (2015 to present)
- Member of United States Supreme Court Bar, United States Northern District of Texas, State Bar of Texas, Fellow Dallas Bar Foundation, Dallas Bar Association, J.L. Turner Legal Society, Texas Center for the Judiciary, National College of Probate Judges, Texas College of Probate Judges, and National Alliance on Mental Illness



**Presiding Judge
Dallas County Probate
Court No. 3**

Charletta Breed, CSR, RPR



- The Court Reporting Institute of Dallas Graduate - Class of 1999
- Official Court Reporter for the Honorable Judge Margaret Jones-Johnson - Probate Court No. 3/Mental Illness Court of Dallas County
- Over 25 years of reporting experience and a longstanding member of the National Court Reporters Association, Texas Court Reporters Association (TCRA), Dallas Court Reporters Association, and currently serves as the TCRA Officials Committee Chair and TCRA Fifth Court of Appeals Liaison
- 2022 Dallas County Leadership & Management Academy Graduate, 2023 National Association of Counties (NACo) High-Performance Leadership Academy Graduate, 2025 NACo AI Academy Graduate



What are we doing?



Our job is to work together to create an *accurate* record of proceedings that will impact the lives of many individuals for years to come.





Important questions

No. 1

How is the record made?

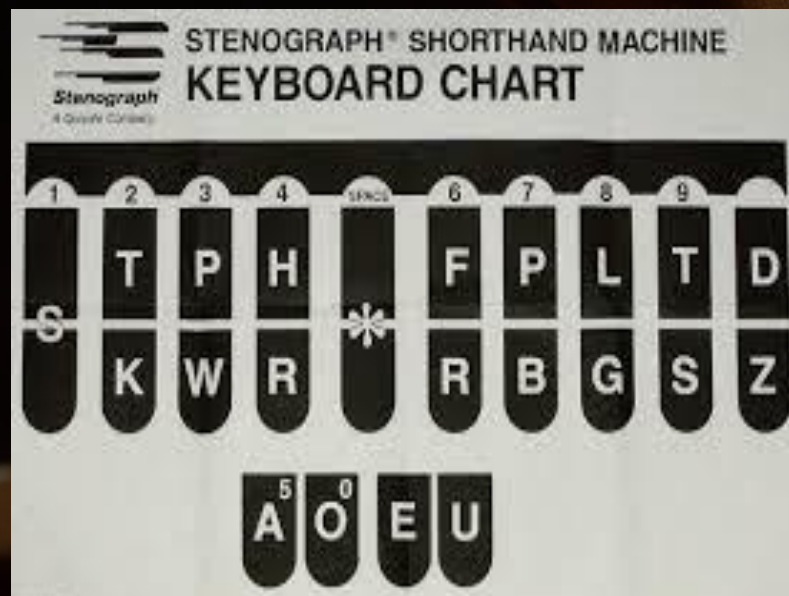
No. 2

What should I do to help make the record?

No. 3

What rules should I follow?

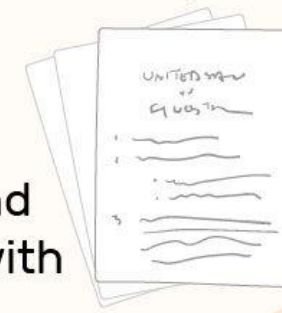
HOW?



A Day in the Life of A Court Reporter

Attend hearings, depositions, proceedings, and other types of events that need a written transcript

Provide the courts, legal counsels, and involved parties with copies of their transcriptions



Use specialized stenography machines, microphones, recording devices, audio, and video equipment





What should I do to help build a great record?



**SPEAK SLOWLY, CLEARLY, AND
CONCISELY, ESPECIALLY WHEN
READING FROM A DOCUMENT**



**PROVIDE SPELLINGS FOR THE BENEFIT
OF THE COURT AND RECORD**



**PLEASE DO NOT SPEAK OVER
ANOTHER SPEAKER!**



HELPFUL TIPS

Prior to a hearing, try to provide these things: Copies of pleadings, list of witnesses and exhibits, case citings (if not in pleadings), pre-marked exhibits in conformity with HIPPA and Court of Appeals' guidance.



REMINDER: When reading from documents, be mindful that the average person reads faster than they can speak. Please read slowly for the benefit of the Court, jury, witnesses, and the court reporter.



There are RULES??!!??

Texas Government Code, Section
52.046(a)(5) - Duties

Texas Government Code, Section
52.047(a)(1),(2) - Direct Request

Texas Rules of Appellate Procedure
34.6(b)(1) - Payment & 35.3(b)(2), (3) -
Designation of Record

9.9(a) - Sensitive Data redaction

Key takeaways



Without a good record,
lives are in limbo!

Slow and steady wins the
race. Shoot for accuracy
over speed!

The quality of the
record matters the
most!

Teamwork keeps our
judicial system in great
working order!





QUESTIONS??



No.

What happens when I say, "Strike that?"

No. 2

Should I notify the court reporter directly when I file an appeal?

No. 3

What are the steps to requesting a Reporter's Record/transcript?

Call to action

Let's work together to give quality
and standout services!

HRET/AOES/TKO/TH/STPH*FPLT

(Translation: Let's do this!)



Thank you!

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North Texas Bench Bar Conference

April 30, 2026



Squeeze and Freeze Planning with 678 Trusts

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JOHN R. HUNTER is an attorney and CPA based in Fort Worth, Texas. He is Board Certified in Tax Law and focuses his practice on estate planning, tax planning, and related matters involving the transfer and protection of wealth.

Mr. Hunter has practiced in both the private sector and government, where he represented the Commissioner of Internal Revenue before the U.S. Tax Court. He works closely with individuals, families, and business owners on sophisticated income tax and estate planning strategies, helping clients navigate complex planning issues and preserve wealth across generations.

Mr. Hunter has been consistently recognized as a Texas Super Lawyer by Thomson Reuters and has been named one of Tarrant County's Top Attorneys in Tax Law by *Fort Worth, Texas* magazine. He was also honored as Planning Professional of the Year by the Community Foundation of North Texas. He formerly served as President of the Fort Worth Business and Estate Council and as Chair of the Professional Advisor Outreach Committee for the Community Foundation of North Texas.

Mr. Hunter earned his J.D., cum laude, from the University of Houston Law Center and his Master of Accounting and B.A. in Economics, cum laude, from Rice University.

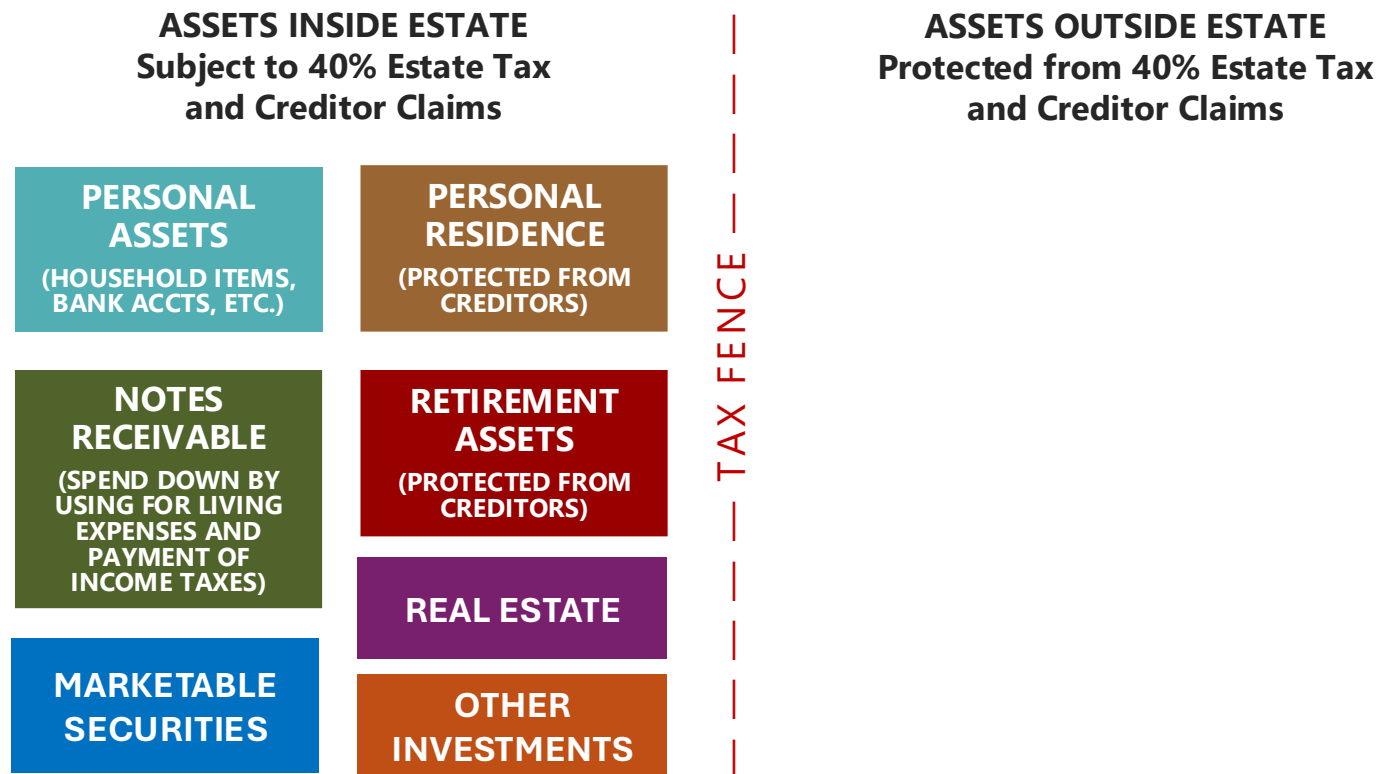
Estate Freeze Sales to a “678” Trust

- A 678 Trust (sometimes called a box) is a trust created with the client(s) as a primary beneficiary, as well as the “Grantor” or deemed owner for income tax purposes.
- After making discounted gifts to a Defective Grantor Trust (“DGT”) and/or Spousal Lifetime Access Trust (“SLATs”) using a portion of the client’s \$15,000,000 lifetime exemption (as of 1/1/2026), minimize estate tax on the rest of a client’s assets by doing “freeze” sales to a 678 Trust that are mathematically identical to a sale to a DGT or a SLAT.

Ultimate Goals

- Reduce or eliminate estate taxes.
- Preserve the use and benefit of the transferred assets for the client.

Results After Squeeze, Freeze, & Burn with a 678 Trust



Mechanics

- Client's parent/sibling/close friend establishes 678 Trust with an unreimbursed \$5,000 gift.
- Client **sells** discounted assets to 678 Trust in exchange for promissory note. (Note will be partially guaranteed.)
- Benefits:
 - Assets owned by 678 Trust not subject to estate or GST taxes for generations.
 - Assets owned by 678 Trust not subject to client's creditors.
 - Client continues to **have access, control, and flexibility over assets** in 678 Trust.

George and Sarah

- George and Sarah have a high net-worth, with a very illiquid estate of investment assets worth \$75 million and \$10 million of other assets (home, bank accounts, cars, personal assets). Without planning, they're looking at an estate tax bill of \$22 million.

Investment Assets	\$75,000,000
Other Assets	10,000,000
Total Assets	85,000,000
Less Estate Tax Exemption x 2	(30,000,000)
Taxable Estate	55,000,000
x 40% Estate Tax Rate	\$22,000,000

- Let's rewind the clock. George and Sarah came to us several years ago to help prepare an estate plan. At the time, their investment assets were worth \$60 million, and they had other assets worth \$10 million (home, bank accounts, cars, personal assets).

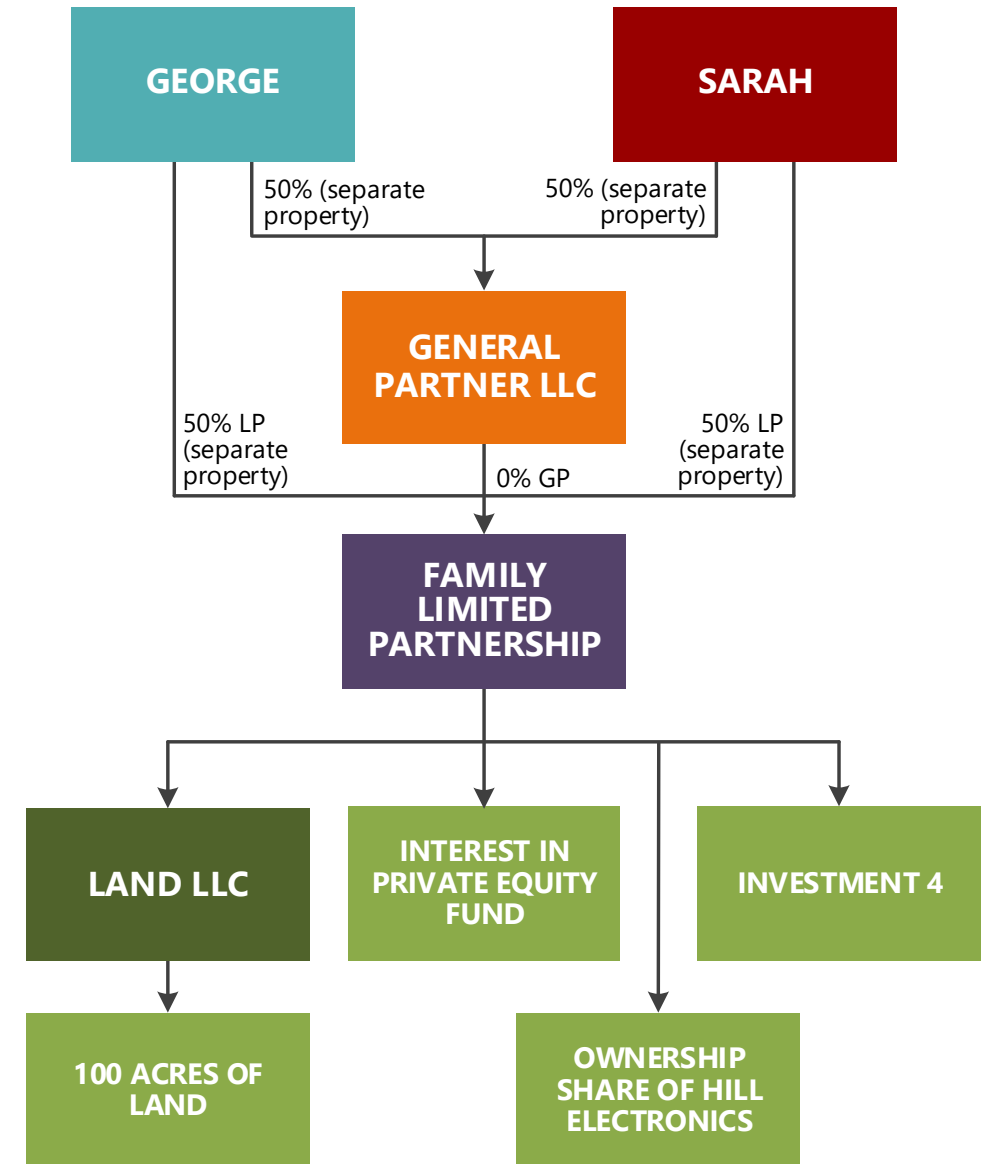
Stage 1: A Family Limited Partnership to “Squeeze” Down the Value of the Assets

- Limited partnership interests are less marketable than assets held outright or assets traded on an exchange, such as stock of public companies or bonds.
- By virtue of the partnership form and standard restrictions in partnership agreements, a partnership interest is worth less than the interests prorated portion of the partnership’s underlying assets.
- For minority, non-controlling interests, discounts for lack of marketability and lack of control are routinely recognized by the courts and the IRS when the partnership is formed and maintained properly.
- For example, if a partnership is formed and funded with \$1,000,000 in investment assets, the limited partnership interests associated with such assets might be valued at only \$650,000 (representing a 35% discount for lack of marketability and lack of control).

- **Create a structure that qualifies for the best possible valuation discount.**
 - If it's a limited liability company ("LLC") or limited partnership ("LP"), examine the agreement to ensure the entity will qualify for an optimum valuation discount.
 - For any entity, transfer non-voting interests or a non-controlling ownership portion.
 - Consider transferring assets to a limited partnership.
 - Consider recapitalizing the entity to establish voting and non-voting interests. Then, sell the non-voting interests and a non- controlling portion of the voting interests, which could qualify for a valuation discount.
 - A recapitalization is particularly useful for S corporations, because S corporation stock may not be owned by a limited partnership.

Illustration

- George and Sarah put their investment assets into an LP with an LLC as the general partner.
- George and Sarah are the initial limited partners of the LP, and they each own 50% of the LLC.
- Notice that they put an LLC “wrapper” around the real estate they owned outright before putting the real estate into the FLP to provide an extra layer of protection around a risky asset.



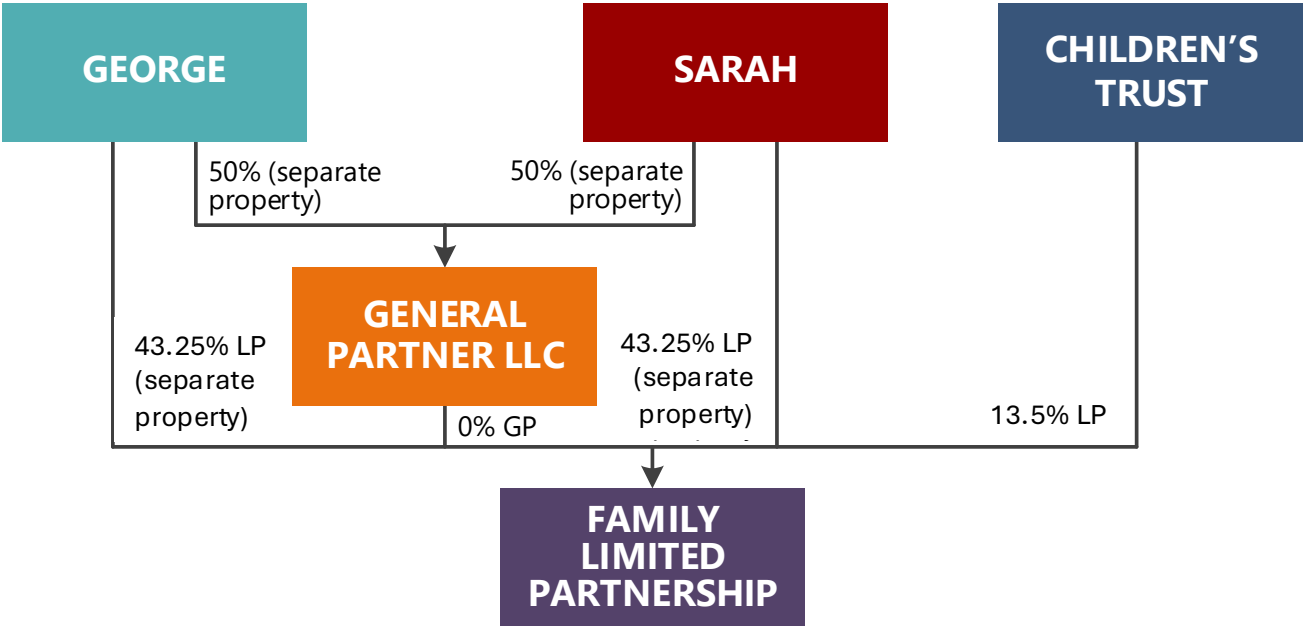
Stage 2: A Grantor Trust for the Children Begins the “Freeze”

- “Freeze” planning involves gifting and/or selling the limited partnership interests to a trust which is outside of the estate for estate tax purposes, such as an Intentionally Defective Grantor Trust, a 678 Trust, or a Spousal Lifetime Access Trust.
- George and Sarah choose to create an Intentionally Defective Grantor Trust to benefit their children (the “Children’s Trust”) and fund it by making gifts to the trust using a portion of each spouse’s lifetime gift tax exemption and GST tax exemption.
- With the trust structured as a grantor trust, the gift is “supercharged” because the grantors (George and Sarah) remain liable for the income tax attributable to the trust and pay the trust’s income taxes out of their own funds. This allows the trust assets to grow without being depleted by income taxes.
- The grantor trust status can be “toggled” off later if the client no longer wishes to bear the trust’s income tax liability.

- As beneficiaries of the Children's Trust, George and Sarah's children and their descendants would be entitled to distributions from the trust as necessary for their health, education, maintenance, and support ("HEMS") needs.
- At a child's death, he or she can be given a special power of appointment to direct the disposition of remaining trust assets.
- By George and Sarah allocating GST exemption to their gifts, the assets in the trust can pass free of estate taxes from generation to generation so long as law allows.
- The assets in the trust are also protected from the children's creditors and any divorcing spouses.

- George and Sarah gift 13.5% of their FLP interests to fund the Children’s Trust, resulting in a gift of \$2,632,500 from each of George and Sarah (\$5,265,000 total).

Underlying Assets	\$60,000,000
Less Valuation Discounts of 35%	(21,000,000)
Value of FLP	39,000,000
Value of 1/6 of FLP Interests	\$5,265,000



Disclosing the Gifts to the IRS

- George and Sarah file Gift Tax Returns (Forms 709) to disclose the gifts.
- The IRS has 3 years from the date a Gift Tax Return is filed to assert a gift tax. (Note: The statute of limitations is 6 years if gift amounts are underreported by more than 25%.)
- For the statute of limitations to begin, the disclosure must meet the requirements of Treasury Regulation Section 301.6501(c)-1(f)(2) for “adequate disclosure” which includes a copy of the trust agreement, the trust’s EIN, the identities and relationships of the transferors and transferees, a description of the property, any consideration received in return, and a detailed description of the method and financial data used.
- In place of the detailed description of the method and data used, an appraisal report can be attached to the Gift Tax Return.

Stage 3: “Freeze” the Taxable Value of the Estate

How do George and Sarah move the remaining 86.5% of the FLP out of their estates?

- They sell it to a 678 Trust.

Why did they choose a 678 Trust?

- George and Sarah can **remain in control as trustees**.
- George and Sarah can be beneficiaries of the 678 Trust and can continue to **have access to the assets** for their needs.
- The assets in the 678 Trust are **not included in George and Sarah’s taxable estates**.
- George and Sarah can have a **special power of appointment** to direct where the assets pass either during their lives or upon their deaths.
- The assets in the 678 Trust are **protected from personal creditors**.

678 Trust Basics

- A 678 Trust is established by a third party (such as the client's parents, sibling, or close friend) with an unreimbursed gift of \$5,000.
- The client is the primary beneficiary of the 678 Trust and can receive distributions for HEMS needs.
- With careful drafting, the client may also be named as trustee of the 678 Trust.
- The client-beneficiary is given a withdrawal right over the initial \$5,000 contribution.
- The trust agreement provides that a Special Trustee has the power to terminate the trust in favor of the client-beneficiary, even after the client-beneficiary's withdrawal right over the \$5,000 gift lapses.
- The 678 Trust technique works because of a “disconnect” between the income tax code and the estate tax code.

The “Disconnect”

- For estate and gift tax purposes, when the client-beneficiary allows the withdrawal right to lapse, the client-beneficiary *is not viewed* as the grantor of the trust because of the 5 and 5 exception in the estate tax code IRC sections (Chapter 11, Section 2041 (b) (2)), and so the **trust assets are not includable in the client-beneficiary's estate.**
- For income tax purposes, when the client-beneficiary is given the withdrawal right and when the withdrawal right lapses, the client-beneficiary *is viewed* as the grantor of the trust, making the client-beneficiary **the owner of the trust assets for income tax purposes.** (Note: Although the withdrawal right is limited to \$5,000, there is no 5 and 5 income tax exception in the income tax code IRC sections (Chapter 1.)

678 Trust Structure

- Structure the 678 Trust to be a **GST-exempt dynasty trust**.
 - When the initial \$5,000 gift is made to the 678 Trust, the third-party who makes the gift should file a Gift Tax Return allocating GST exemption to the gift.
 - After the initial \$5,000 gift to the 678 Trust, no other assets are gifted to the trust. All future transfers to the trust are done by sales for fair market value.
 - Because all assets gifted to the trust are covered by the third-party donor's GST exemption, the trust is fully GST-exempt. Therefore, the 678 Trust's assets can pass to future generations free of transfer taxes, including estate tax at the death of the client-beneficiary or the children of the client-beneficiary.

Even if our client-beneficiary is trustee of the 678 Trust, the trust assets are not reachable by the client-beneficiary's creditors if distributions are limited by a HEMS standard.

- Some states, such as Texas, protect the assets from creditors if the client-beneficiary's distributions are limited to an ascertainable standard.
- Texas Trust Code Section 112.035(f)(1)(A) provides that a beneficiary is not treated as a settlor of a trust merely because the beneficiary has the power to “consume, invade, appropriate, or distribute property to or for the benefit of the beneficiary if the power is limited by an ascertainable standard, including health, education, support, or maintenance of the beneficiary.”
- Therefore, if the client-beneficiary serves as trustee, **include a HEMS standard**, not only to prevent the trust from creating a general power of appointment which would cause the assets to be taxed in the client-beneficiary's estate, but also to protect the trust assets from creditors.
- If extremely concerned about creditor reach or if not in Texas, an option is to use an independent trustee. If using an independent trustee, the distributions could be purely discretionary (not limited to an ascertainable standard).

Giving the client–beneficiary a withdrawal right does not expose the trust assets to the reach of creditors.

- In some states, giving a beneficiary a withdrawal right could make a “spendthrift trust” into a “self-settled spendthrift trust” with no protection against the beneficiary’s creditors.
- However, some states (such as Texas) include a 5 and 5 exception in their trust laws, protecting trust assets from creditors as long as the value of the property which could have been withdrawn does not exceed the greater of \$5,000 or 5% of the trust assets. [See Texas Trust Code Section 112.035(e).]
- To protect the 678 Trust assets from creditors, choose a state that provides such a 5 and 5 exception.

Drafting Options

- The 678 Trust can be drafted to, upon the clients' deaths, pour into an existing trust for the children's benefit or divide into separate trusts for the children.
- The 678 Trust can also be drafted to allow the client-beneficiary to exercise a special power of appointment ("SPOA").
 - An inter vivos SPOA can give the client-beneficiary the power to provide for trust property to pass to individuals or charitable organizations during the client's life.
 - A testamentary SPOA can give the client-beneficiary the power to control how the property will be distributed at death.
 - The SPOA must be drafted so that assets cannot be appointed to the client-beneficiary, the client-beneficiary's estate, or the creditors of either.

Moving Assets Into the 678 Trust

- To move assets into the 678 Trust, the client-beneficiary **sells assets to the 678 Trust** in exchange for a promissory note. No gifts should be made to the 678 Trust beyond the initial \$5,000 gift contributed by a third party. Any additional gifts could alter the income tax and estate tax characteristics of the 678 Trust.
- It is important that the sale be structured so that it will be respected as a bona fide sale under IRC Section 2036.
- The sales price must be equal to the fair market value. If the IRS later determined the sales price was lower than the fair market value, the IRS would argue that the difference was a gift. Sale documents should include price adjustment clauses to guard against an unintentional gift.
- The interest rate on the promissory note should be at least equal to the applicable federal rate for the type and length of the loan.

- **The 678 Trust needs to have sufficient substance to support the sale.**
 - If the 678 Trust has not yet built-up significant value, it can have other trusts or individuals (other than the client-beneficiary) guarantee the note owing to the client-beneficiary in exchange for a guarantee fee.
 - The assets pledged should equal at least 10% to 20% of the size of the promissory note (the higher, the better).

Guarantee Fees

- In order to avoid an unintentional gift to the 678 Trust by the guarantor, the 678 Trust needs to pay the guarantor an annual guarantee fee that would be comparable to the fee charged by an unrelated guarantor. The fee would continue to be paid each year as long as the guarantee remains in place.
- The rule of thumb for this limited guarantee is 3% of the amount of assets pledged.
- For example, if the assets pledged equal 20% of the size of the note, the guarantee fee would be 60 basis points of the size of the entire note (or, the size of the note multiplied by 0.006.)
- The few times we have obtained appraisals to support the 3% fee, the appraisals have determined that the fee should be slightly below 3%.

George and Sarah's 678 Trust

- George's brother, Jim, created a 678 Trust to benefit George and Sarah and their descendants and funded it with a \$5,000 gift.
- George and Sarah sold their remaining 86.5% LP interest and all of their LLC interest (the general partner) to the 678 Trust and each received a 9-year promissory note for \$16,867,500 in return (totaling \$33,735,000), plus interest at the mid-term applicable federal rate.

Underlying Assets	\$60,000,000
Less Valuation Discounts	(21,000,000)
Value of FLP	39,000,000
Value of 86.5% of FLP Interests	\$33,735,000

- Having 13.5% of the partnership interests, the Children's Trust had sufficient assets to pledge as the guarantor of 15% of the promissory note amounts ($13.5\% / 86.5\% = 15.61\%$).
- In return for the guarantees, the 678 Trust executed guarantee fee agreements agreeing to pay the Children's Trust annual fees equal to 3% of the amount guaranteed.
- The annual guarantee fees paid by the 678 Trust to the Children's Trust are \$151,808.

Promissory Notes	\$33,735,000
Guaranteed Portion	x 15%
	\$5,060,250
Guarantee Fees	x 3%
	\$151,808

Disclosing the Sale to the IRS

- The \$5,000 gift-maker should file a Gift Tax Return to disclose the gift and to allocate \$5,000 of their GST exemption to the gift.
- The client-beneficiary should file a Gift Tax Return to disclose the sale.

Why would you want to disclose a transfer that's not a gift?

- Disclosing the sale on a Gift Tax Return starts the 3-year (or 6-year) statute of limitations during which the IRS can assert a gift tax deficiency.

Open Up IRS Audit?

Doesn't disclosing the sale just bring the transfer to the IRS's attention? If the IRS doesn't know about the transfer, how can they assert a gift tax?

- The transaction will have to be disclosed at some point, assuming the client's estate will be required to file an Estate Tax Return (Form 706). Part 4, Question 13e asks if the decedent transferred or sold an interest in a partnership, LLC, or closely-held corporation to a trust under which the decedent possessed any power or beneficial interest. **Without the statute of limitations running, the IRS could assert a gift tax deficiency at any time.**

How do you disclose a sale transaction on a Gift Tax Return?

- Attach a statement to the Gift Tax Return electing to disclose a non-gift completed transfer pursuant to Treasury Regulations Section 301.6501(c)-1(f)(4),
 - Indicate why the transfer does not constitute a gift, and
 - Include all the information required to adequately disclose a gift.
- The appraisal report already necessary for the earlier gifts can be used to value the assets sold.

Appraisal Reports

- The appraisal value sought should be on the mid-range of the scale of reasonableness. If the appraisal is too aggressive and results in a value lower than that reasonably determined by the IRS, it is possible that the client will be treated as having made a gift to the trust equal to the difference between the appraised value and the IRS-determined value.
- Hiring a qualified appraiser and obtaining a top-quality appraisal report to attach to a Gift Tax Return is money well spent.

- George and Sarah file Gift Tax Returns disclosing the sale.
- If George and Sarah were to die but before the promissory notes were paid down, the estate tax would be \$8,408,000.

Promissory Notes	\$33,735,000
Other Assets	\$10,000,000
Total Assets	\$43,735,000
Less Remaining Exemptions	(\$24,735,000)
Taxable Estate	\$19,000,000
x 40% Federal Estate Tax Rate	\$7,600,000

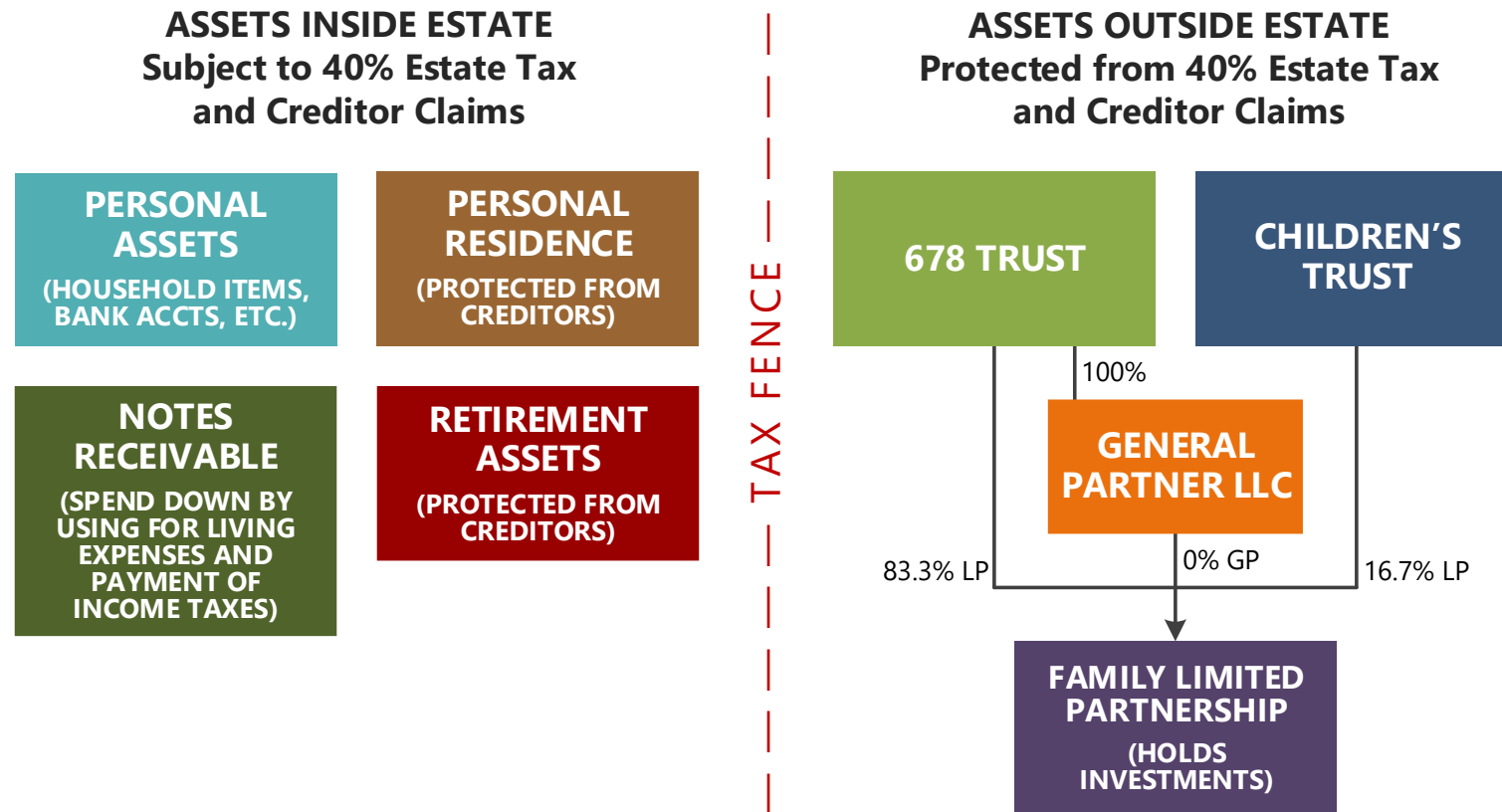
Estate tax with no planning: \$22,808,000

Estate tax with Squeeze & Freeze: \$7,600,000

Stage 4: “Burn” Down the Remaining Assets Subject to Estate Tax

- George and Sarah use the assets that remain in their taxable estate for their living expenses and to pay the income taxes generated by the Children’s Trust and the 678 Trust.
- As the note payments are “burned” down in order to provide George and Sarah with cash to pay living expenses and income taxes, the estate tax savings will be even greater.
- After the notes are paid off, the trustee of the 678 Trust will make distributions to George and Sarah under the HEMS standard to cover their living expenses and income taxes.

Results After Squeeze, Freeze, & Burn with a 678 Trust

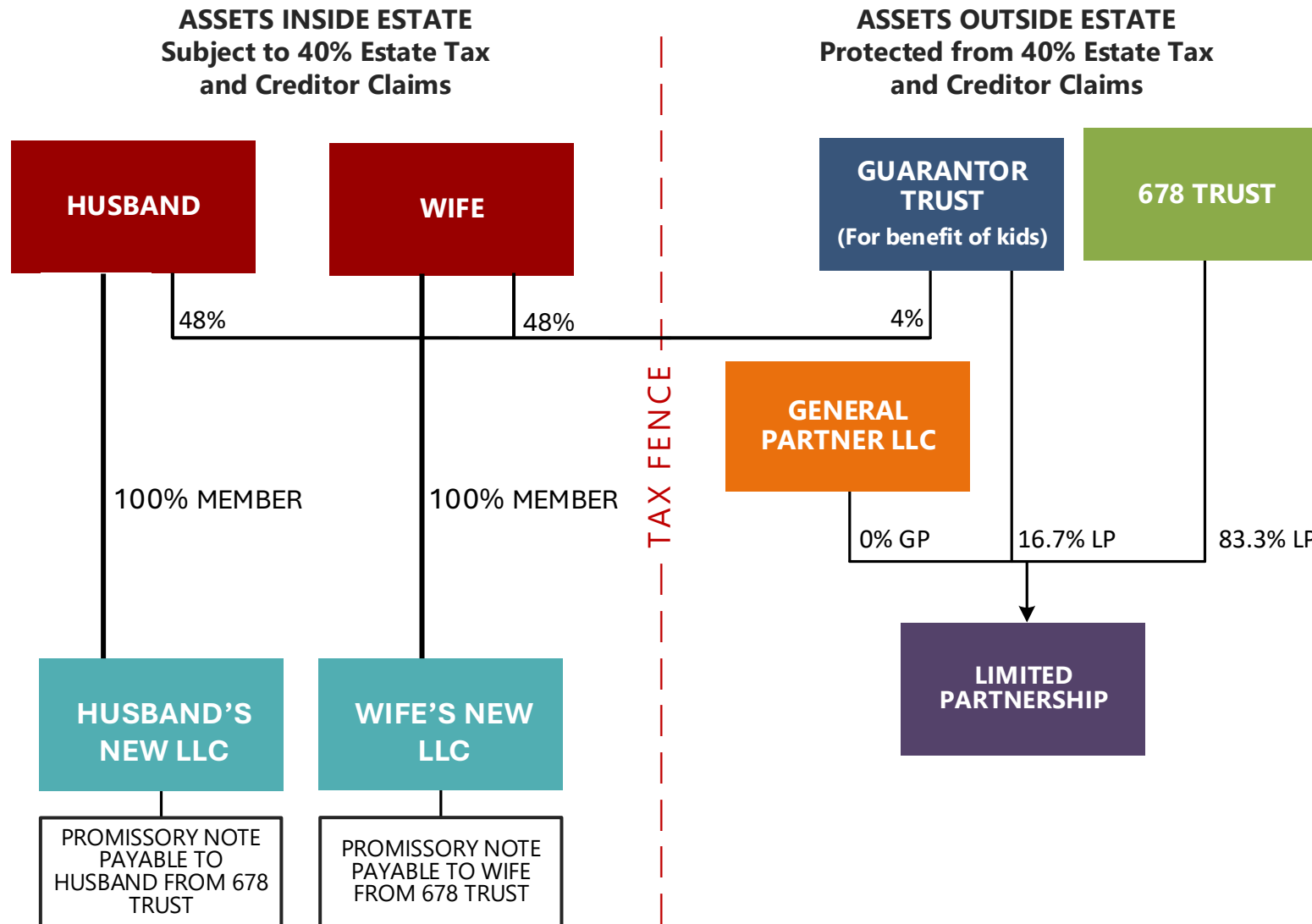


Protect Promissory Notes with a “Note Vault”

- With many planning techniques for minimizing estate tax, clients sell assets to a Grantor Trust and end up owning notes receivable.
- These notes are exposed to creditors.
- We’d like to move the notes receivable into an entity for asset protection, but that would potentially trigger a gain.
- To protect notes receivable without potentially triggering sale treatment, utilize the “Separate Note Vault” structure (two limited liability companies).

To create a separate Note Vault:

- Each spouse contributes their note to a limited liability company (“LLC”) that is wholly owned by that spouse as separate property. Because the LLC is wholly owned by the spouse, the LLC is disregarded for income tax purposes. Therefore, the contributions cannot trigger sale treatment, and prevents the note payments from being subject to income tax as they are received.
- Under Texas law, a creditor would be limited to a charging order. Therefore, the structure prevents a creditor from seizing either note receivable. This result gives the client a particularly strong bargaining position if the note is a 25-year interest only note.



Consider Implementing a “Cadillac Plan”

- After the sale to the 678 Trust, the LP is owned partly by the SLATs/DGTs and partly by the 678 Trust.
- Clients can leave the ownership that way (sometimes dubbed by The Blum Firm as a “Toyota Plan”), or they can engage in an additional step to convert it into a “Cadillac Plan.”

- **A “Cadillac Plan” combines a 678 Trust with SLATs and/or DGTs:**
 - Gifts to SLATs/DGTs are necessary to guarantee a sufficient portion of the sales price to create a bona fide sale.
 - After the gift to the SLATs/DGTs and the sales to the 678 Trust, the SLATs/DGTs may sell their interests to the 678 Trust, taking back notes. This results in an asset freeze for the SLATs/DGTs.
- **Advantages:**
 - By freezing the SLATs/DGTs, future appreciation occurs in the 678 Trust. At the first spouse’s death, the surviving spouse continues to benefit from 100% of the 678 Trust (whereas the surviving spouse has no access to the DGT and loses access to the deceased spouse’s SLAT).
 - If the entire LP is owned by the 678 Trust, all LP distributions are paid to the 678 Trust. As Trustees of the 678 Trust, the spouses may decide what portion of each distribution would be used to pay down the promissory notes, pay down the notes to the SLATs/DGTs or make distributions to Trust beneficiaries. This structure maximizes the flexibility enjoyed by the Trustee of the 678 Trust.



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Thank You!



Preparing a Business for a Sale

A Practical Guide for Business Owners

Author: Bart Nebergall

The most consequential decisions in a business sale are made long before a buyer appears. Owners who invest in pre-sale preparation consistently achieve higher valuations, shorter closing timelines and fewer post-closing disputes. This advisory outlines a few key steps business owners and their advisors should take, 12 to 36 months before engaging with buyers, to position a business for a successful transaction. The considerations below are illustrative, not exhaustive. Every business presents unique issues. This advisory is for educational purposes only and does not constitute legal advice.

Financial and Operational Readiness

Clean financials are the foundation of every transaction. Buyers price businesses on adjusted EBITDA, SDE (seller's discretionary earnings), operating income or some similar financial metric. If financials are cluttered with personal expenses, related-party/affiliate transactions, one-time/non-recurring items or inconsistent accounting, the buyer's quality-of-earnings (QoE) analysis will likely identify such items, and the price will reflect the adjusted metric and risk. Normalize earnings and make adjustments before any conversation with a potential buyer (ideally, at least 12 months prior, in order to show one year of cleaner financials): 1) understand working capital and if it deviates from GAAP (most transactions include a working capital adjustment, and meaningful disputes are common), 2) adjust working capital in anticipation for a sale (e.g., reducing excess inventory, reducing unnecessary expenses, collecting aged receivables, normalizing AP timing), 3) if utilizing cash-method accounting, consider converting to accrual-method, 4) explain any cyclicity or anomalies, and 5) make an effort to reduce customer concentration, if material, which will entail considerable foreplanning. *A fractional CFO with transaction experience can be invaluable in preparation for a sale.*

Organize Before Diligence Begins

Due diligence is exhaustive, even for well-prepared sellers. Buyers generally request several hundred documents, including corporate records, financials, tax returns, material contracts, employment files, benefit plans, insurance policies, IP registrations, leases, deeds, loan documents, asset lists, among others. Inability to produce these promptly signals risk to buyers. Address deferred items now (e.g., undocumented client agreements, undocumented stock issuances or transfers, deferred maintenance, lapsed insurance, compliance/regulatory/tax issues, unregistered IP) because what you may view as a minor oversight, buyer's counsel views as risk to be addressed through a reduced purchase price or increased indemnification. Gather as many documents as possible in a backed-up computer folder, data room or other centralized location in anticipation of an exhaustive diligence process.

Reduce Owner Dependence

One of the most significant issues suppressing value in closely held businesses is owner dependence. When key relationships, decisions and institutional knowledge reside in one person, buyers discount or decline to move forward; buyers desire to buy a turn-key business, not a job. A business that operates independently of its owner commands higher multiples, attracts more buyers and closes faster. Build a management team, delegate relationships, document processes and implement professional systems (e.g., CRM, accounting, written policies). A buyer needs confidence the business is a system, not a personality.

Engage the Right Advisors Early

The most costly M&A errors result from engaging the right advisor too late. Your advisory team should include the following team members (who can help engage other advisors as needed):

- **Trusts & Estates counsel:** to ensure desired pre-sale transfer planning, trust preparation, succession planning, etc.; often the first advisor to learn of the sale and pivotal in assembling a trusted advisor team.
- **CPA, tax advisor and/or fractional CFO:** to prepare the financials for sale as noted above and reduce tax leakage.
- **Mergers & Acquisitions counsel:** to provide transaction guidance; engage before signing an engagement letter with a broker or an investment banker and before signing a letter of intent (LOI) with a potential buyer—engaging after the LOI is too late; counsel is then negotiating the definitive agreement with the structure and other key terms already set and minimal leverage to renegotiate.

To discuss or if you are interested in selling or buying a business, please contact:

Bart Nebergall | bart@nebergall.com | (469) 431-0030



Mergers & Acquisitions

*An Overview and Practice Pointers
for Trusts & Estates Attorneys*

Presented by: Bart Nebergall
North Texas Probate Bench Bar Conference | April 30, 2026



Bart Nebergall

Nebergall PLLC

Bart Nebergall is a corporate attorney with over a decade of corporate law experience. Bart represents businesses, entrepreneurs, family offices, banks and investors in their mergers and acquisitions transactions, entity formation, corporate governance, capital raises/securities, commercial contracts, finance and other general business matters, as well as certain financial services regulatory matters.

Bart has acted as the primary or lead attorney in well over 100 transactions with deal values ranging from several billion dollars to six-figure transactions. Bart is the former Chair of the Mergers & Acquisitions Section of the Dallas Bar Association.

Bart also runs a search fund, Pine Cliff Succession Partners, seeking to acquire small businesses.



Nebergall PLLC



Pine Cliff
Succession Partners

Overview

01

M&A Timeline

Deal phases from initial discussions through closing

02

M&A Transaction Documents

Transaction documents and key provisions

03

Trusts & Estates Pointers

Practice considerations for T&E attorneys addressing future M&A activity

04

Preparing for a Sale

Practical advice for clients anticipating a business sale

Mergers & Acquisitions Timeline

“Timeline” — Overview

- Meeting of the Parties
- High-level and Financial Due Diligence
- Indication of Interest/Term Sheet/Letter of Intent
- Full Scope Due Diligence
- Drafting and Negotiation of Transaction Documents
- Signing and Closing



Timeline — Meeting of the Parties

- Intermediary-led/brokered: seller represented by financial advisor or broker
 - Represented by financial advisor: “business brokers” (<\$10M; small business; public listings); “investment bankers” (\$10M+; lower middle market and above; registered)
 - Confidential Information Memoranda (CIM) prepared by financial advisor
 - Larger businesses may need third party to conduct sale and satisfy board fiduciary duties
 - Engagement letter – *act with caution; corporate counsel should review*
- Direct/non-brokered: no financial advisor
 - Relationship through friends, family, trade organizations, advisors, local chambers, etc.
 - Common in small business and lower middle-market due to single owner or small and familiar shareholder base
 - Parties often proceed straight to LOI (no competitive process)

Timeline — Letter of Intent

- Typical LOI terms (generally non-binding)
 - Purchase price (cash-free, debt-free; working capital adjustment)
 - Structure (asset vs. equity); rollover, earnouts; tax structure
 - Exclusivity/no-shop period (binding)
 - Conditions to close/ancillary documents; due diligence parameters
 - Indemnification framework; escrow/holdback/setoff
 - Non-compete/restrictive covenants
 - Treatment of employees/employment agreements
- Level of detail: more → fewer surprises; less → faster LOI execution
- The LOI locks in economics and leverage, for better or for worse

More Common



Less Common

Timeline — Due Diligence

- Scope: financial, tax, organizational/capitalization, commercial contracts, operational, insurance, employment, benefits, real estate, environmental, IP, IT/cyber, among others
- The diligence team—how do we divide the above? There will be some overlap.
 - Buyer's counsel (and specialist counsel, as necessary)
 - Broker/investment banker
 - Accountants (generally and for Quality of Earnings (QoE))
 - Environmental, IT/cybersecurity, HR/benefits, etc.
- Scope varies by transaction
 - Industry, employee base, deal structure (less diligence in an asset deal)
- Agreements must be reviewed for change of control and anti-assignment provisions
- R&W insurance increasingly common and at lower deal values

Timeline — Signing and Closing

- Simultaneous: sign and close at the same time (typical in smaller deals)
- Staggered: sign today, close later—once conditions are satisfied
 - Reasons: government approvals (Hart-Scott-Rodino, heavily regulated industries), shareholder approvals, third-party consents, funding, etc.
- Signing/Closing mechanics
 - Pre-signing: complete diligence, finalize signing documents, gather signature pages (to be held in escrow)
 - Signing: signature pages released, funds wired
 - Pre-closing/Closing: estimated closing statement, closing confirmed, closing certificates delivered, funds wired
- Post-closing obligations
 - Working capital true-up (60–90 days); transition services; earnout cooperation
 - Restrictive covenants

Transaction Documents

and Key Provisions

Purchase Agreement — Structure

- Deal structure
 - Asset purchase: all or certain assets/divisions; requires individual transfers of assets; less liability, less diligence required (except successor liability—tax, ERISA, CERCLA, etc.)
 - Equity purchase: buyer acquires entity; all assets/liabilities transfer
 - Merger: statutory combination (less common in small business/lower middle market)
- Purchase price: cash-free, debt-free with working capital adjustment
 - Earnout (contingent consideration); rollover equity (retained stake)
- Tax structure drives deal structure *but can differ (an equity deal can be taxed like an asset deal)*
 - Buyers seek step-up in basis; sellers seek to minimize tax burden on exit
 - Tax counsel or M&A CPA should opine on structure
- T&E lens: form of consideration impacts transfer planning and risk

Purchase Agreement — Components

- Purchase price (amount, timing and form) and adjustments (working capital, indebtedness and transaction costs)
- Representations and warranties: statements of fact about the business
 - Fundamental vs. general
- Covenants
 - Interim covenants (ordinary course of business); post-closing (non-competes, earnout)
- Conditions precedent/conditions to closing
- Indemnification: allocation of post-closing risk
 - Special indemnities; caps, baskets, survival; misc.
- Disclosure schedules: qualifying the seller's representations

Ancillary Agreements

- Escrow agreement — funds held for indemnification and price adjustments
- Rollover agreement — seller received buyer equity as part of deal consideration
- Employment / consulting / bonus retention agreements
- Non-compete and non-solicitation agreements (can be in several documents)
- Transition services agreement
- Consents to assignment / change of control
- Real property deeds, title opinions, leases
- Closing certificates, secretary's certificates, other misc.

Partial or Minority Interest Sales

- Partial interest sales involve the aforementioned issues *plus additional considerations*
- Governing documents control — requires more detailed review
 - Right of first refusal may require offering to co-owners first (ROFO vs. ROFR)
 - Tag-along and drag-along rights
- Buyer universe narrows
 - Buyers demand governance protections (expect considerable org doc revisions); remaining owners may resist
 - Be prepared for valuation discounts: minority and marketability discounts
- Remaining owners face an involuntary new partner
- Representations and warranties scope is narrower (esp. for passive owner)
- Fiduciary considerations for trustees
 - Discounted sale vs. holding for full exit; beneficiary impartiality

Practice Pointers

for Trusts & Estates Attorneys

Drafting the Trust for Future Sale

- Ensure the trustee has authority to execute a transaction
 - Express power to sell, exchange and reorganize business interests
 - Authority to make representations, warranties and indemnities
 - Authority to accept non-cash consideration (rollover, notes, earnouts)
- Audit the trust's tax eligibility to hold the business (e.g., if S corp)
 - Monitor for disqualifying events: grantor death, decanting, beneficiary changes
- Review/revise entity governing documents
 - Review charter/articles, bylaws/operating agreement, shareholder agreement, buy-sell agreements to ensure alignment with trust and potential future M&A activity
 - Additionally, if an owner wants to maintain control, but gift economic interest—consider voting and non-voting shares/interests as part of plan

Pre-Sale Planning Through the Trust

- Utilize the planning window before any buyer engagement
 - Gifting to dynastic irrevocable trusts to keep appreciation outside of estate: IDGT (Intentionally Defective Grantor Trust); GRAT (Grantor Retained Annuity Trust); SLAT (Spousal Lifetime Access Trust)
 - Take action well before any sale process; before a sale, a business is valued on some earnings-based formula, but once an LOI is signed, it's difficult to argue for a value lower than the LOI purchase price—IRS "anticipatory assignment of income" doctrine
- Correct inflexible trusts early — not mid-transaction
 - Texas decanting (Trust Code §§ 112.071–.087); NJSAs; trust protectors
- Confirm titling and equity records
 - Verify equity/assets/etc. are held by the trust, not the individual; review/revise cap table
- Consider how business plays into the overall assets and goals of the grantor
 - There is no one size fits all, and goals are constantly changing; some want to pass business to heirs, some do not

Succession Planning/Owner Dependence

- Counsel clients to plan for death or incapacity
 - Within trust *and* outside of trust (operational succession planning)
 - Without a plan, the estate holds a rapidly depreciating asset
- Practical guidance for clients
 - Written succession plan; train a management team below the owner
 - Document processes, key relationships, and critical contracts
 - Reduce owner dependence — a turn-key business commands higher value
- This is a T&E conversation
 - No M&A expertise required — in T&E review with client: “What happens to the business?”

Preparing for Closing and Post-Sale

- Monitor beneficiary impartiality at closing
 - Income vs. remainder beneficiaries may prefer different structures
 - Cash vs. rollover vs. earnout—different risk profiles and time horizons
 - Document trustee decision-making
- Plan for post-closing trust administration
 - Transitioning from concentrated operating asset to diversified portfolio
 - Investment policy, distribution planning, liquidity event tax planning

Preparing Clients for a Future Sale

Financial and Operational Readiness

- Ensure financials are clean and defensible
 - Normalize earnings; remove personal expenses and one-time items
 - If cash method accounting, consider converting to accrual method
 - Understand true/adjusted EBITDA — the metric on which the deal will be priced
 - Consider a fractional CFO specializing in sale events
- Organize documents before diligence begins
 - Corporate records, contracts, 3–5 years of financials and related reports, employment files, insurance policies, tax returns, regulatory filings, etc.
 - Expect buyers to start diligence with hundreds of requests with detailed follow-ups
- Address deferred items now
 - Undocumented agreements, undocumented governing documents or share issuances, unapproved actions (where board or shareholder approval required), deferred maintenance, neglected compliance, etc.

Making the Business Buyer-Ready

- Reduce owner dependence
 - Build a management layer capable of operating independently
 - Delegate client relationships, vendor management, daily operations
- Professionalize operations
 - Written procedures for key functions (sales, operations, finance, HR)
 - Implement CRM, accounting systems, employee handbook
- Engage advisors early and ensure open communication between advisors
 - T&E counsel: pre-sale transfers, trust preparation, succession planning
 - CPA/tax advisor: preparing business/financials for sale, reducing tax leakage
 - M&A counsel: specialized counsel for business sales; engage before LOI and any engagement letter with a financial advisor



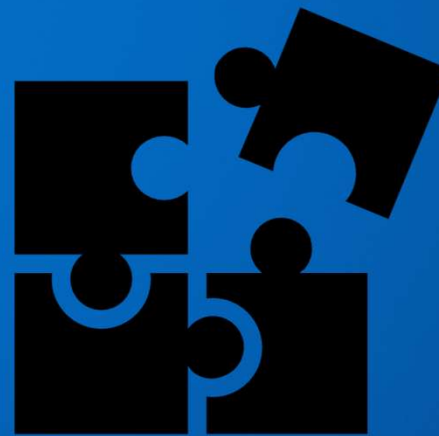
Most service provider value is created in the preparation stage.

T&E attorneys are uniquely positioned to:

- Identify issues early
- Integrate the right advisors
- Reduce tax leakage for the client and their family

Questions?

QSBS 101: Understanding the Section 1202 Gain Exclusion



Holland & Knight

Introduction



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Brandon Bloom is a tax partner in Holland & Knight's Dallas office. He advises on the structuring and tax implications of a broad range of transactions, including mergers and acquisitions (M&A), divestitures, restructurings, joint ventures, investment fund formation and financing transactions.

Mr. Bloom represents private equity funds and their portfolio companies, search funds, independent sponsors, venture capital-backed companies, family offices and public companies, as well as other closely held private companies and partnerships. He has experience assisting clients in a variety of industries and markets, and companies ranging from small private businesses to large public companies. He also advises on Section 1202 qualified small business stock issues.

Introduction



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Bryce Klein is a tax attorney and CPA in Holland & Knight's Dallas office, where he focuses his practice on structuring mergers, acquisitions and investments of private equity and hedge funds, as well as other investment partnerships, joint ventures, real estate investment trusts (REITs) and operating businesses. He also advises on Section 1202 qualified small business stock issues.

Road Map for Today

1. **What is QSBS:** Qualified Small Business and Active Business requirements. Stock issuance and holding period tests.
2. **Exclusion Amount:** How to calculate and think about the 1202 exclusion benefit. Holding period considerations.
3. **Pass-Thru Entities:** LLC partnerships and S-Corps.
4. **Sample Transactions:** Walk through a few structures.

(1) Section 1202 Basics

- Certain gains are excluded from taxable income on the sale of
 - Qualified Small Business Stock (QSBS)
 - That is held for a minimum holding period
- The amount of the exclusion varies depending on when the QSBS was acquired
- The minimum holding period varies (depending on the acquisition date) from a minimum of three years to a minimum of five years

What is QSBS?

- Stock in any C corporation is QSBS if:
 - The stock was issued after August 10, 1993
 - As of the date of issuance, the issuing corporation is a “Qualified Small Business” (QSB),
 - The corporation satisfies the “Active Business” requirement, and
 - The stock is acquired by the taxpayer at its original issuance (with some exceptions discussed below)
 - In exchange for money or other property (not including stock), or
 - As compensation for services provided to the corporation (other than services as an underwriter).

The QSBS Puzzle



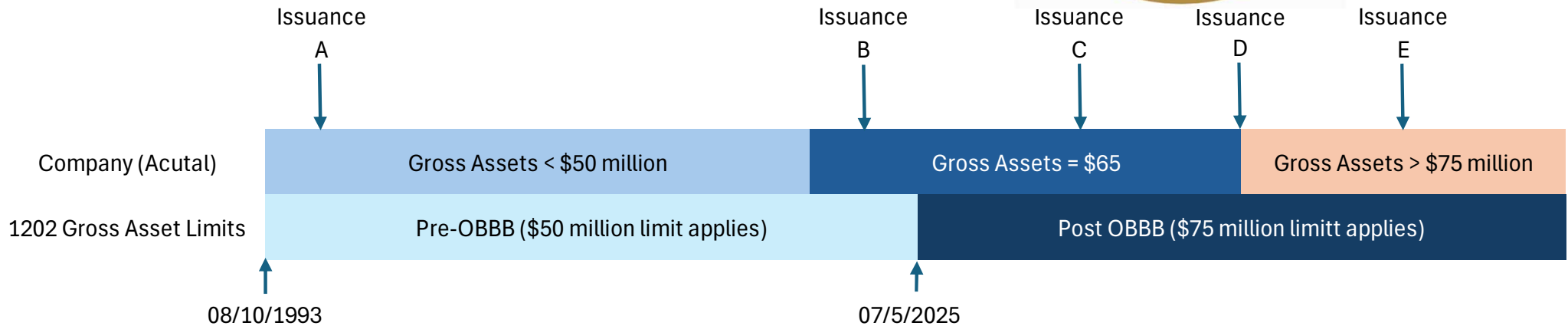
Qualified Small Business



- Must be a domestic C corporation.
- At all times prior to the issuance (back to August 10, 1993), the aggregate gross assets of the corporation must not exceed \$75 million.
- Immediately after the issuance, the aggregate gross assets of the corporation must not exceed \$75 million (adjusted for inflation annually).

NOTE: For stock issuances prior to July 5, 2025, the gross asset limitation was \$50 million

Qualified Small Business



- Issuance A – Good QSBS (Gross assets are < \$50 million at a time when the \$50 million limit applied)
- Issuance B – NOT Good QSBS (Gross assets exceed \$50 million limit)
- Issuance C – Good QSBS (Gross assets are < \$75 million at a time when the \$75 million limit applied)
- Issuance D – NOT Good QSBS (Gross assets immediately after issuance exceed \$75 million)
- Issuance E – NOT Good QSBS (Gross assets exceed \$75 million both before and after the issuance)

NOTE: Issuance B did not become good QSBS after the passage of OBBB because the \$75 million limit only applies to issuances after its passage (i.e., July 5, 2025 or later)

How are Gross Assets Measured?



- Gross Assets are equal to:
 - The corporation's **tax basis** in its assets (including cash)
 - Exception: Property contributed to the corporation in exchange for stock
- The Aggregation Rules:
 - The gross assets test looks at the aggregate gross assets of all corporations within the same parent-subsidary controlled group (50% ownership).

NOTE: Brother-sister corporations are not included within the aggregation rule. Accordingly, a single shareholder may own multiple corporations that each are under the limit.

Active Business Requirement



- During substantially all of the taxpayer's holding period of stock, the issuing corporation must:
 - Be a C corporation, and
 - Satisfy the active business requirements.
- For any period, a corporation satisfies the active business requirements if:
 - At least 80% (by value) of the assets of such corporation are used by such corporation in the active conduct of one or more “qualified trades or businesses,” and
 - The corporation is not a
 - DISC or former DISC,
 - A RIC, REIT, or REMIC, or
 - A Cooperative.

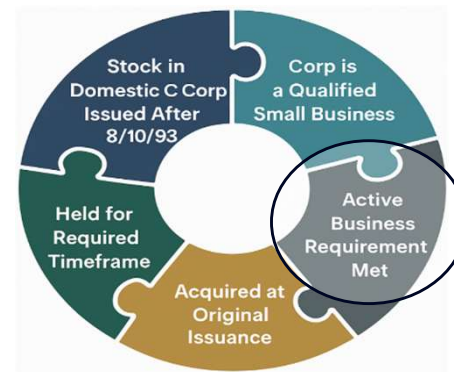
Active Business Requirement



- Qualified Trade or Business means any trade or business other than:
 - Any trade or business involving the performance of services in the fields of **health**, law, engineering, architecture, accounting, actuarial science, performing arts, **consulting**, athletics, financial services, brokerage services, or **any trade or business where the principal asset of such trade or business is the reputation or skill of one or more of its employees,***
 - Any banking, insurance, financing, leasing, investing, or similar business,
 - Any farming business (including timber),
 - Any business involving production or extraction of products subject to depletion, and
 - Any business of operating a hotel, motel, restaurant, or similar business.

*See Appendix A for list of private letter rulings on qualifying trades or businesses

Active Business Requirement



- Net Working Capital

- The following amounts are treated as used in the active conduct of a trade or business:
 - Amounts held as reasonably required working capital needs of a qualified trade or business of the corporation, and
 - Amounts held for investment that are reasonably expected
 - to be used within two years to finance research and experimentation, or
 - Increases in working capital needs.
- After the first two years of existence, working capital may not exceed 50% of the assets of the corporation (i.e., any excess above 50% won't be counted as a good asset for testing purposes).
- *Ownen v. Comm.*, TC Memo 2012-21 (2012) - Only 10% of the contributed capital was used to acquire inventory over a two-year period. The court found the new jewelry business was not a qualifying trade or business because the extra cash was not working capital under these facts.

Active Business Requirement



- Real Property – The corporation cannot hold real property that comprises more than 10% of its assets, unless the real property is used in the corporation's trade or business.
- Computer Software – rights to computer software that produce active business software royalties are treated as assets used in the active conduct of a trade or business.
- Start-Up Expenses – Assets used to perform certain start up, research and experimentation activities relating to a future qualified trade or business are treated as used in the active conduct of a trade or business, even if there is no current revenue.

Active Business Requirement



- Look-through Rule

- A parent corporation is deemed to own its ratable share of a subsidiary corporation's assets and to conduct its ratable share of a subsidiary corporation's activities if the parent corporation owns more than 50% of the corporate subsidiary (by vote or value).

There is no explicit look-through rule for partnership subsidiaries. Query whether a corporation (like a private equity style blocker) may look through a subsidiary partnership to satisfy the active business requirements?

- Portfolio Stock and Securities

- A corporation fails the active business requirement if 10% of its assets (in excess of liabilities) consists of stock or securities in other corporations that aren't 50% owned subsidiaries.
- Such stock and securities aren't counted if they are part of the corporation's "working capital."

Original Issuance



Base Case Examples (simplified):

- A contribution of cash into a new or existing C corp in exchange for shares in the C corp.
- Stock received in exchange for services rendered to C corp.
- An incorporation of an existing partnership (treated as a contribution of its assets into a new corporation for tax purposes).
- The conversion of a debt instrument into stock of a C corp.
- QSBS received in exchange for stock in a Section 351 transaction or Section 368 reorganization.
 - If the stock received in exchange also is QSBS, then the taxpayer's holding period will include the time period the original QSBS was held.
 - If the stock is received in exchange is NOT QSBS, then only the built-in gain at the time of the exchange will be eligible for exclusion on some future disposition.

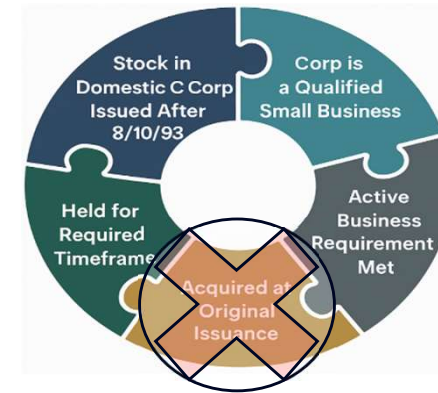
Original Issuance



Transfers of QSBS

- General Rule: A transferee of QSBS has not acquired the stock in an original issuance and will not be entitled to a Section 1202 exclusion.
- Certain transfers are allowed and the transferee is treated as having acquired the stock in the same manner as the transferor and as having held such stock for the same amount of time.
 - Gifts
 - Transfers upon death, or
 - From a partnership to a partner (to the extent the partner would be entitled to an exclusion had the partnership continued to hold the QSBS and sold it).

Original Issuance



Transfers of QSBS (*continued*)

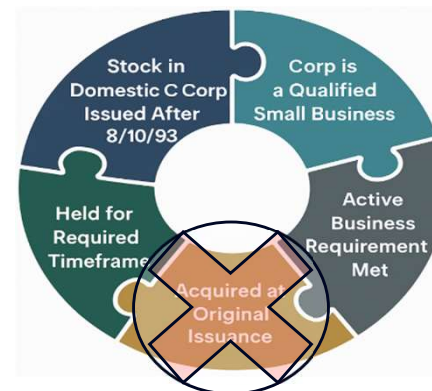
- ❌ There is no exception for transfers by a partner to a partnership. Such a transfer will eliminate the Section 1202 benefit.
- ❌ Warehoused QSBS cannot be transferred to a fund and retain its exclusion benefits.
- ❌ Transfers into a continuation fund may lose part or all of the Section 1202 exclusion benefit.
- ❌ Beware of an “assets over” transaction where partnership assets are deemed to be contributed to a new partnership followed by the old partnership liquidating.

Redemption Rule



- Redemption from Taxpayer or Related Party
 - **Four-Year Rule.** Newly issued stock is not QSBS if the corporation has redeemed **any** stock from the taxpayer (or a person related to the taxpayer) in the **preceding two years** OR if the company redeems stock from such person in the **two years following** the issuance.
- Other Redemptions
 - **Two-Year Rule.** Newly issued stock is not QSBS if the corporation has redeemed from **any other person** in the preceding year or does redeem stock from such person in the following year, the value of which is more than **5% of the aggregate value** of all company stock on the date that is one year prior to such issuance.
- Exceptions available for *de minimis* redemptions and redemptions incident to termination of employment or board seat, death, disability or divorce. Reg. 1.1202-2.

Redemption Rule



- Example:

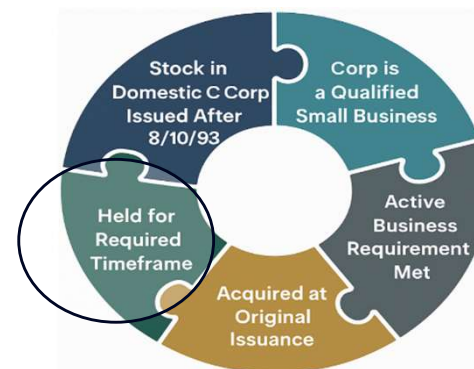
- Assume Investor 2 buys \$2 million of stock when the company's pre-money value is \$2 million. The post-money company value is \$4 million. One year earlier the company value was \$10 million. Six months after the issuance to Investor 2, the company redeems 6% of the Company's stock from Investor 1 for \$240,000. Investor 1 is unrelated to Investor 2.
- For Investor 2, this does not violate the Two-Year Rule because the redemption amount, while for more than 5% of the company's stock, is redeemed for less than 5% of the company's value measured one year prior to the new stock issuance.
- For Investor 1, the redemption may violate the Four-Year Rule, depending on Investor 1's acquisition date or applicability of exceptions.

Testing Date					
		Investor 1	Investor 2	Total Shares	Purchase Price
	1/1/2026	10,000		10,000	\$ 10,000,000
New Issuance	1/1/2027		10,000	20,000	\$ 2,000,000
	6/30/2027	(1,200)		18,800	\$ (240,000)

6% of stock overall

2.40% % of Testing Date Value

(2) Exclusion Amounts & Holding Periods

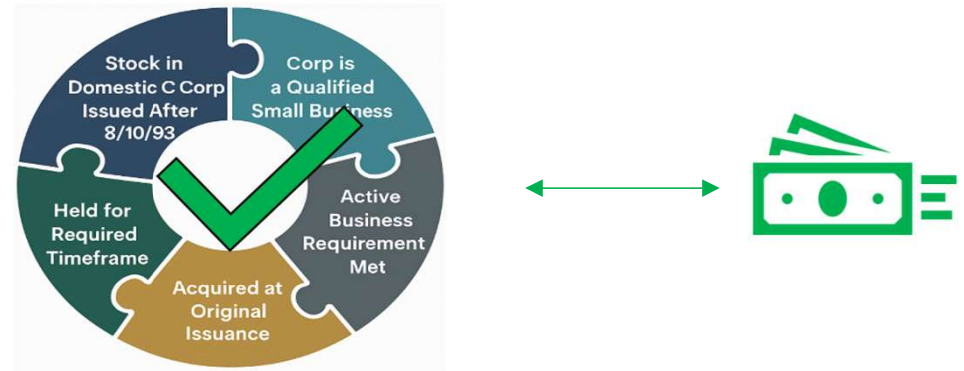


General Rule: The date the taxpayer receives the stock in an original issuance is the date that determines which **Base Exclusion Amount** and which **Exclusion Percentage** will apply.

QSBS Acquisition Date	Base Exclusion Limit	Minimum Holding Period	Exclusion %
After August 10, 1993 until February 17, 2009	\$10 million	More than 5 Years	50%
After February 17, 2009 until September 27, 2010	\$10 million	More than 5 Years	75%
After September 27, 2010 until July 4, 2025	\$10 million	More than 5 Years	100%
After July 4, 2025	\$15 million	3 Years	50%
		4 Years	75%
		5 Years	100%

There are some exceptions to the general rule, such as the Section 1223 Exception (For stock originally issued during the pre-OBBS 75% and 100% periods, and for stock originally issued post-OBBS).

Exclusion Amounts



- A taxpayer may exclude the Base Exclusion Amount or 10X their basis, whichever is higher.
- Base Exclusion Amount
 - Pre-OBBB (before July 5, 2025) - \$10 million
 - Post-OBBB - \$15 million (adjusted for inflation annually)
- 10X Basis Calculation
 - Basis is equal to FMV of cash or property exchanged for QSBS, or
 - The amount taken into income for a compensatory stock grant.

Exclusion Amounts

- The 10X basis amount is limited to the basis attributable to the original issuance (i.e., subsequent capital contributions on existing shares do not count). See Section 1202(b)(1).
- However, if the subsequent capital contribution is for new shares, then it will count for additional basis. This may result in additional exclusion, even if the new shares do not satisfy the holding period requirements.

Scenario 1		Scenario 2			
	Issuance 1		Issuance 1	Issuance 2	Total
Shares	1,000	Shares	1,000	1,000	2,000
Purchase Price	\$ 3,000,000	Purchase Price	\$ 3,000,000	\$ 1,000,000	\$ 4,000,000
Hold Period	Six Years	Hold Period	Six Years	Two Years	
Sale Price	\$ 50,000,000	Sale Price	\$50,000,000	\$50,000,000	\$ 100,000,000
Gain	\$ 47,000,000	Gain	\$47,000,000	\$49,000,000	\$ 96,000,000
					-
Total Exclusion	\$ 30,000,000	Total Exclusion	\$40,000,000	0	\$ 40,000,000
Taxable Gain	\$ 17,000,000	Taxable Gain	\$ 7,000,000	\$49,000,000	\$ 56,000,000

Exclusion Amounts

- Built-in gain in property contributed in exchange for QSBS is not excludable, but the FMV is used to set the 10X exclusion amount.
- This is a function of the definition of “eligible gain” in Section 1202(b)(2), which implicitly calculates gain based on the FMV as of the stock issuance date under Section 1202(i), even where the total gain would use a lower carryover basis.

Example: Taxpayer contributes property with a FMV of \$5 million and an adjusted tax basis of \$1 million.

- The first \$4 million of taxable gain is not excluded under Section 1202.
- The next \$50 million of gain is excludable (subject to % limitations based on acquisition date or holding period).

Exclusion Amounts

- Base Exclusion Amount (if more than the 10X Basis Limit)
 - Stock acquired pre-OBBS is subject to a \$10 million Base Exclusion Amount cap.
 - Stock acquired post-OBBS is subject to a \$15 million Base Exclusion Amount cap.
- Reductions for Prior Year Exclusions
 - For stock acquired pre-OBBS, the \$10 million cap is reduced by the amount of eligible gain taken into account in prior years (regardless of whether the prior year stock was acquired pre-OBBS or post-OBBS).
 - For stock acquired post-OBBS, the \$15 million cap is reduced by the sum of:
 - All prior year eligible gain taken into account on any shares regardless of when acquired, and
 - The current year eligible gain taken into account on pre-OBBS shares.

Exclusion Amounts

	Issuance 1	Issuance 2
Acquisition Date - 1/1/2025	10,000 shares	
Acquisition Date - 1/1/2026		10,000 shares
2031 Sales	5,000 shares	5,000 shares
Gain on Sale	\$ 4,000,000	\$ 4,000,000
Limit	\$ 10,000,000	\$ 15,000,000
Minus Prior Year Eligible Gain	\$ -	\$ -
Minus Current Year Pre-OBBS Eligible Gain		\$ (4,000,000)
Maximum Exclusion Available	\$ 10,000,000	\$ 11,000,000
Lesser of Eligible Gain or Available Exclusion	\$ 4,000,000	\$ 4,000,000
2032 Sales	5,000 shares	5,000 shares
Gain on Sale	\$ 10,000,000	\$ 10,000,000
Limit	\$ 10,000,000	\$ 15,000,000
Minus Prior Year Eligible Gain	\$ (8,000,000)	\$ (8,000,000)
Minus Current Year Pre-OBBS Eligible Gain		\$ (2,000,000)
Maximum Exclusion Available	\$ 2,000,000	\$ 5,000,000
Lesser of Eligible Gain or Available Exclusion	\$ 2,000,000	\$ 5,000,000

Note:

The total amount of excluded gain is not impacted by the ordering of the sales, but the timing of the exclusion could be.

For example, assume instead each block is sold for \$15 million. If only Issuance 1 is sold first, the exclusion is limited to \$10 million for that year, but if Issuance 2 is sold instead, the excluded gain would be \$14 million.

Exclusion Amounts

- The percentage exclusion is calculated based on the eligible gain that does not exceed the limitation amount.
- The Base Exclusion Amount is reduced by the eligible gain taken into account, not the actual gain excluded.

Example: Assume post-OBBS QSBS is held for three years and the Base Exclusion Limit applies. The taxpayer sells half the stock for \$20 million.

The eligible gain is \$20 million.

The Base Exclusion Limit is \$15 million

The exclusion percentage is 50% (\$7.5 million gain excluded)

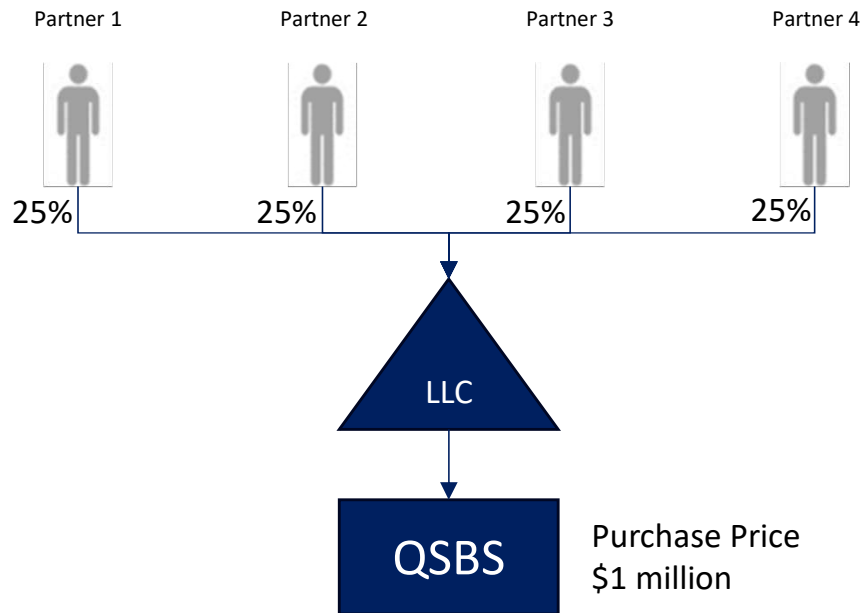
If the taxpayer sells the other half of the stock for another \$20 million the following year when the 75% exclusion percentage applies, the excludable gain will be zero because the eligible gain taken into account in the first year has already exceeded the aggregate Base Exclusion Amount.

(3) Pass-Thru Exclusions

- Allocations of gain from a pass-thru entity of gain from the sale of QSBS held by the pass-thru entity can be excluded by the taxpayer.
- A disposition of the equity of the pass-thru entity itself will not result in excludable gain.
- A pass-thru entity is:
 - Any partnership
 - Any S Corporation
 - Any RIC, and
 - Any common trust fund.

Pass-Thru Exclusions

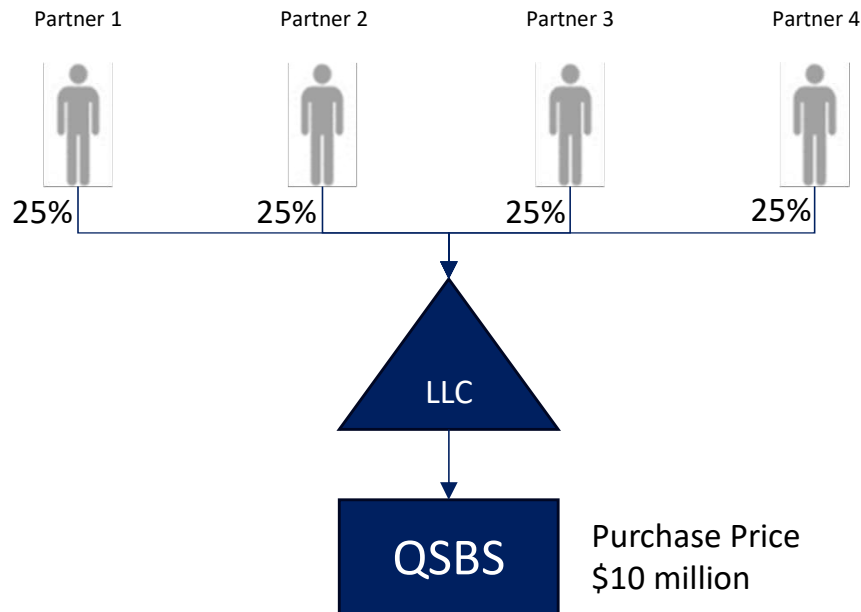
- The Section 1202 limitations are determined at the partner level.
- Each partner calculates their exclusion limitations separately.



- Each partner is allocated 25% of the LLC's basis in QSBS, or \$250k.
- Each partner therefore has a Base Exclusion Limitation of \$15 million.

Pass-Thru Exclusions

- The pass-thru owner must have held its interest in the pass-thru at the time the QSBS was acquired.
- The pass-thru owner is attributed its proportionate share of the adjusted basis of the pass-thru entity in such stock.



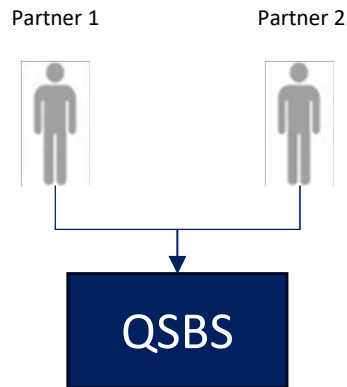
- Each partner is allocated 25% of the LLC's basis in QSBS, or \$2.5 million.
- Each partner therefore has a 10X Basis limitation of \$25 million.

Pass-Thru Exclusions

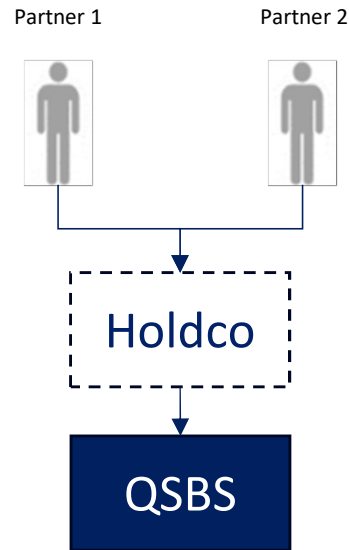
- The pass-thru exclusion does not apply to
 - Any amount to the extent such amount exceeds the amount that
 - Would have applied if such amount were determined by reference to the interest the taxpayer held in the pass-thru entity on the date the QSBS was acquired. See Section 1202(g)(3).
- Practical implications:
 - A partner that acquires additional partnership interests after the QSBS is acquired will only get an exclusion relating to its original partnership interest.
 - A question arises as to carried interest, but practitioners generally agree that carried interest is an interest held by the taxpayer when the QSBS was acquired (i.e., no appreciation exists on that date for any person to hold at that moment in time, and gain sharing is predetermined).
 - Fund investors in a second closing that occurs after the acquisition of QSBS will not be able to exclude gains on such stock.

(4) Transaction Examples

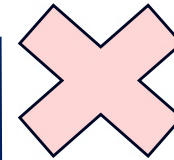
Starting Structure



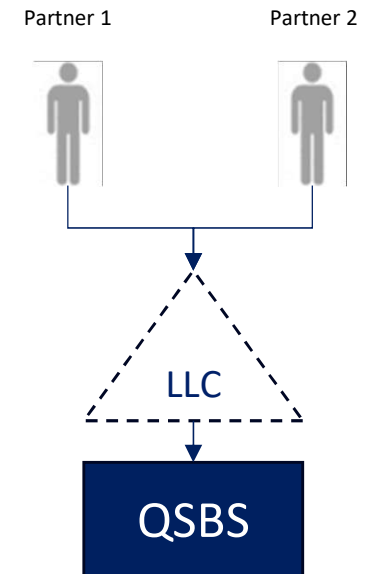
Contribution to a C Corporation §1202(h)(4)



- If Holdco is a QSB, Holdco stock will be QSBS with a tacked holding period.
- If Holdco is not a QSB, the exclusion will be limited to the built-in gain.

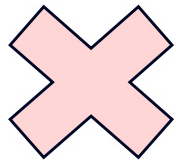


Contribution to a Partnership §721

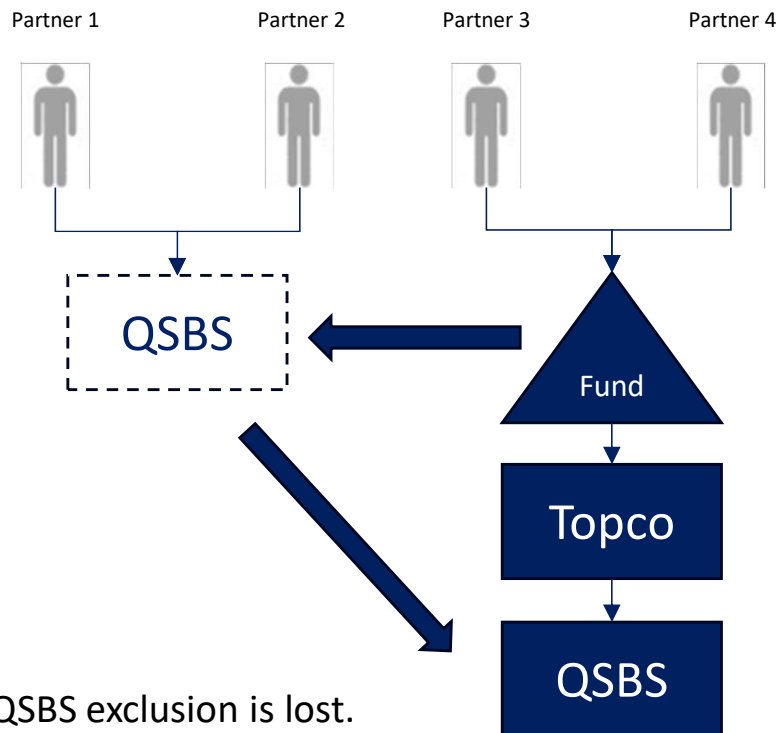


- Section 1202 Exclusion is lost.

Transaction Examples



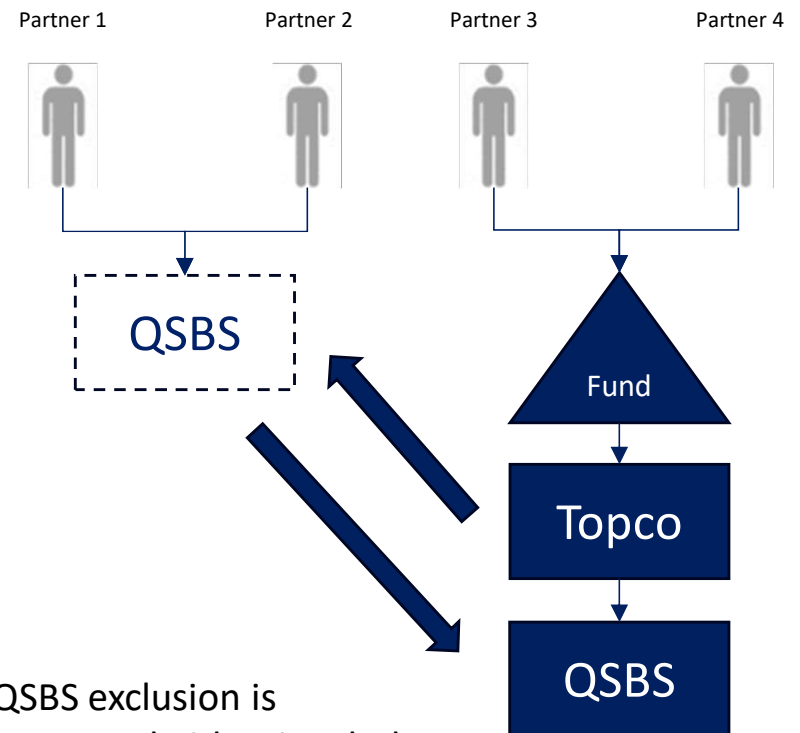
Rollover into Fund Partnership



- QSBS exclusion is lost.
- Consider taxable sale, followed by contribution to step up basis.



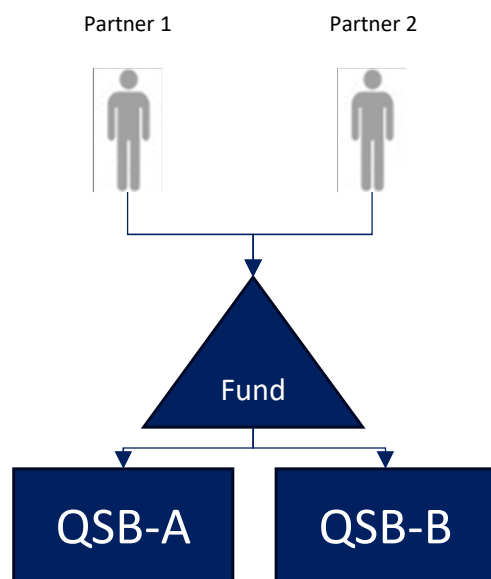
Rollover Directly into Topco



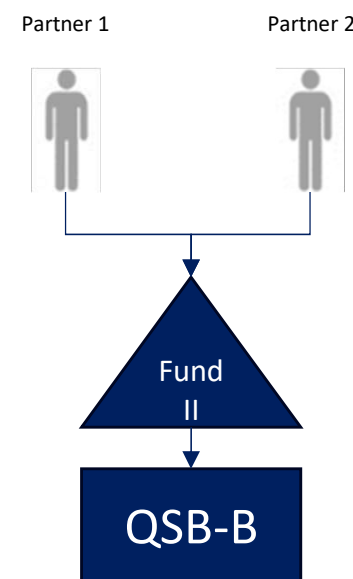
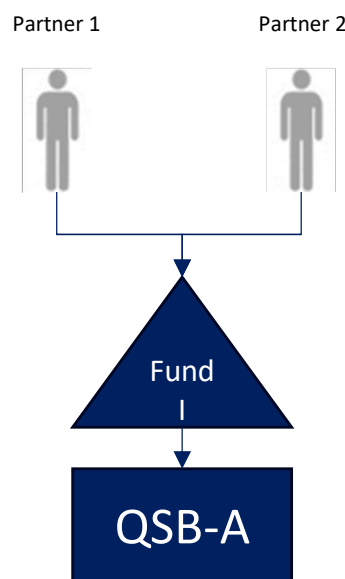
- QSBS exclusion is preserved either in whole or to the extent of built-in gain.

Transaction Examples

Starting Structure



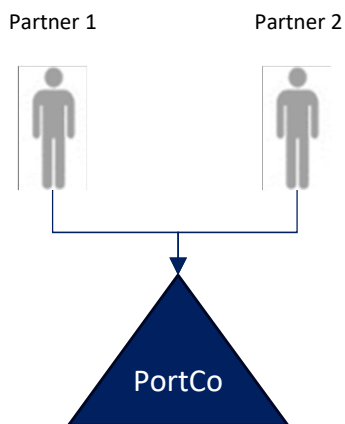
Partnership Division



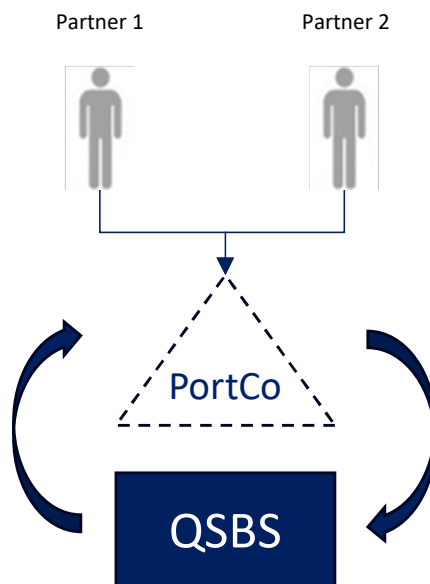
- Under an assets-over construct, one partnership will be treated as contributing assets to the other and then distributing the partnership interest. What if both continue?
- QSBS exclusion is preserved for the divided partnership, but likely lost for the resulting partnership. See Treas. Reg. Sec. 1.708-1(d)(3).

Transaction Examples

Starting Structure

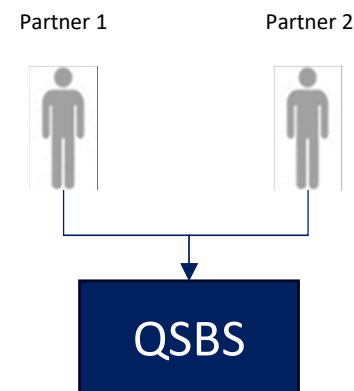


Contribution to New C Corporation



- Consider 357(c) if liabilities exceed basis.
- See Rev. Rul. 84-111.
- Check-the-box election on PortCo also should work.
- Consider Section 269.

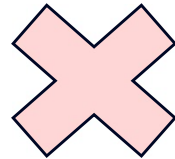
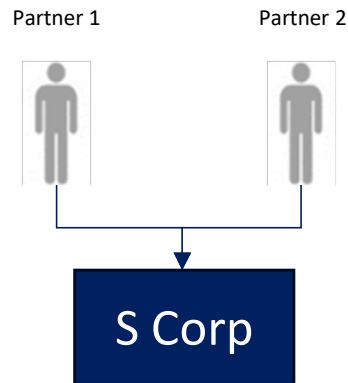
Final Structure



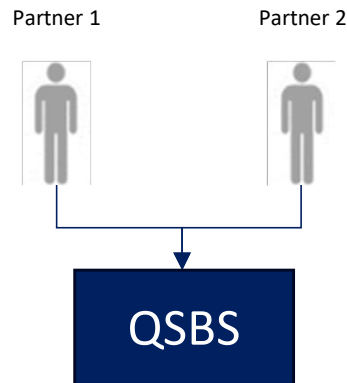
- Built-in gain isn't excludable.
- Should be treated as original issuance by C corporation.
- "Acquisition date" of new QSBS stock will vary based on the RR 84-111 method chosen.
- Also consider 1202(a)(6).

Transaction Examples

Starting Structure



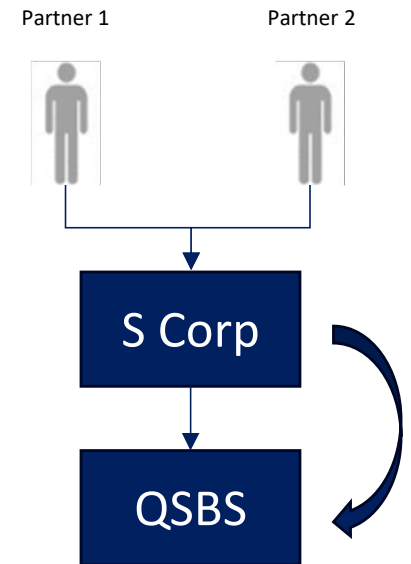
Conversion to C Corporation



- Doesn't work because stock is not issued as original issuance from a C corporation.



Contribution to New C Corporation



- Built-in gains are not excludable.
- Okay for S corporation to form and hold QSBS
- Could also use F reorg.
- Consider Section 269.
- Consider "acquisition date" issue per 1202(a)(6).

Appendix A – Rulings on Active Business Requirement

PLR	Notes
202244004	Partnership sold QSBS. Partner was late filing 1045 election due to late partnership k-1. Relief granted.
202245003	Same as above
202317008	Taxpayer received stock and ISO options, which he sold. He used the proceeds to buy another QSBS, but did not file 1045 election because he used Turbo tax and relied on its prompts to prepare his return. Relief granted.
202319013	Enterprise cloud application services software company is not a business the primary asset of which is the skill of its employees. Employees can be trained to use company's proprietary methods and tools to perform services at the same level.
202342013	Data migration and management services business is not consulting even though employees provide advice and counsel. Such advice and counsel is incidental to the provision of its migration services.
202342014	Same as above
202342015	Same as above
202352009	Temp staffing business is not based on skill or reputation of employees. It's a QTB. However, permanent placement (headhunter) business for a fee likely is brokerage services business.
202418001	Medical testing company is not a health business and does not rely on skill or reputation of employees. They must follow procedure and have no discretion to make decisions. They do not diagnose or provide information direct to patients.
CCA 202204007	Apartment locator (airBnB, etc) is a broker. Not a QTB.

Appendix A – Rulings on Active Business Requirement

PLR	Notes
201436001	Pharma company was not an excluded "health" business. Its activities included R&D on drug formulation effectiveness, pre-commercial testing procedures such as clinical testing, and manufacturing of drugs.
201603010	F reorg does not affect QSBS status.
201603011	Same as above
201603012	Same as above
201603013	Same as above
201603014	Same as above
201636003	F reorg from state law corp to LLC (with CTB election) is still QSBS
201717010	Medical testing company is a qualifying trade or business. It merely performs tests and does not interpret test or diagnose patients. Only top employee was licensed medical professional. Business does not rely reputation or skill of employees.
202114002	Insurance agency was a qualifying trade or business (and not a brokerage service) because agent has duties to do more than simply arrange sale of insurance contract (i.e., it must report and cooperate with resolving claims, keep records, etc.). The PLR implies that a mere sale of a contract for a commission with no further duties is an impermissible brokerage business.
202125004	Medical device manufacturer is a QTB (not a health business). Even though it meets with patients to fit the devices, that is merely incidental to the sale of tangible property (likely a hearing aid business).
202144026	Software developer is not in the health business. It does not diagnose patients or make medical decisions. Does not rely on expertise of its employees.
202221006	Pharmacy is not health services business and the primary asset is not the expertise of the employees; rather, it is the distribution rights to sell drugs.

Questions?



A low-angle, upward-looking photograph of a modern skyscraper with a glass facade. The building's structure is composed of a grid of dark metal frames and large glass panels. The sky is a clear, vibrant blue with a few wispy white clouds. The perspective creates a sense of height and architectural grandeur.

Holland & Knight



NOTICE & CITATION IN PROBATE COURT

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**Texas College of Probate Judges
Regional Workshop
March 11-13, 2026
Austin, Texas**

**Presented by Cathy Horvath
Judicial Information Analyst, Data & Research Division
Office of Court Administration
TCPJ Board Member**

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I. Overview of Notice and Citation in Probate Court

Great care is necessary to meet the complex notice and citation requirements for the actions that probate courts of Texas consider. Practitioners, clerks, and courts must determine not only whether notice or citation is necessary, but also, if necessary, how and when notice and citation are given. With attention to the law and attention to the meaning of such notice and citation, one is likely to come to an adequate conclusion.

The legal basis for service in a probate proceeding is not the same as it is for a non-probate civil proceeding in a district or county court. Texas Rules of Civil Procedure Rule 2 limits the application of the Rules of Civil Procedure as follows:

“Where any statute in effect immediately prior to September 1, 1941, prescribed a rule of procedure in lunacy, guardianship, or estates of decedents, or any other probate proceedings in the county court differing from these Rules, and not included in the ‘List of Repealed Statutes,’ such statute shall apply.”

None of the probate procedures were repealed in 1941, and, as a result, the specific provisions of the Estates Code (formerly the Probate Code), control over the Rules of Civil Procedure where the Estates Code procedure differs from the procedure in the Rules of Civil Procedure.

IMPORTANT – Tex. Supreme Court Misc. Docket 24-9107, was adopted 12/17/2024, to add Comments to Rules 21a, 106, and 119 TRCP clearly stating that **the Estates Code service requirements take precedence over the Rules of Civil Procedure.**

What’s the difference between notice and citation? “Notice” is the more general term. It is sometimes used in the Estates Code – especially in chapter and subchapter titles – to refer generally to notice *and* citation. For example, “Chapter 51: Notices and Process in Probate Proceedings in General” or “Subchapter B, Chapter 202: Notice of Proceeding to Declare Heirship.” The provisions under both of those titles include references to citations as well as notices. “Notice” usually refers to a notification required by law that informs rather than commands the recipient; a notice is often done by a party rather than the court or clerk. In contrast, a “citation” **must** come from the court or the clerk. A citation is a “court-issued writ that commands a person to appear at a certain time and place to do something demanded in the writ, or to show cause for not doing so.” *Black’s Law Dictionary*.

A. Purposes of Notice and Citation

Notice and citation are necessary (1) for the court to acquire jurisdiction over the subject matter and

persons involved in the proceeding and (2) to meet the procedural due process requirements by informing interested parties and defendants of the actions pending before the court. Notice and citation inform persons of the necessity to appear or answer and of the date, time, and place to appear.

B. Are Notice and Citation Necessary?

The default rule under the Estates Code is that notice and citation are not necessary unless the Code expressly provides for notice or citation or the court requires it. EC §§51.001 & 1051.001.

However, even when the Estates Code does not provide for service, the notice and citation provisions of the Texas Rules of Civil Procedure (TRCP) may apply. See, e.g., *Moore v. First Fin. Res. Enter., Inc.*, 277 S.W.3d 510, 517 (Tex. App. – Dallas 2009, no pet. h.). “The Texas Rules of Civil Procedure govern proceedings in probate matters except in those instances in which a specific provision has been made to the contrary.” *Buck v. Estate of Buck*, 291 S.W.3d 46, 54 (Tex. App. – Corpus Christi 2009, no pet. h.) (quoting *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 812 (Tex. 1983) (citing TRCP 2)).

“Where the Probate [Estates] Code is silent, the Texas Rules of Civil Procedure govern the procedures to be followed . . .” *Buck*, 291 S.W.3d at 54 (quoting *Coleson v. Bethan*, 931 S.W.2d 706, 712 (Tex. App. – Fort Worth 1996, no writ) (citing TRCP 2)). For example, in an action to construe a will, the Estates Code is silent as to notice and citation. Although the Estates Code does not require notice and citation in an action to construe a will, the Texas Rules of Civil Procedure do since the civil action falls within the purview of the Rules.

C. Criteria and Requisite for Issuance

If the Estates Code requires notice and citation, certain criteria and requisites must be satisfied before the probate court can act.

1. Request for Issuance of Citation

Pursuant to TRCP 99(a), citation is issued only upon request, even when required in a proceeding. TRCP 99(a). Because each county may have local notice/citation requirements in addition to citation expressly provided for in the Estates Code, it is common for an out-of-county practitioner to forget to inquire about local notice/citation requirements. The lawyer may then set his case or application for hearing before complying with the appropriate notice and citation requirements. Although the burden is on the attorney to learn what notice and citation is required, it will often save time and hassle for the clerk to spend a few minutes explaining any local requirements to an out-of-county practitioner.

NOTE: Courts must post their local rules, forms, and administrative orders on the OCA website in order to enforce the requirements. Rule 3a, Tex. Rules of Civil Procedure, as amended, Misc. Docket 22-9081, effective 1/1/2023.

2. Fees

The fee for issuance of a citation increased to **\$8.00** effective **January 1, 2022** (SB 41, 87th Leg., R.S.). The petitioner pays for the issuance of citation at the time requested. Texas Local Government Code §118.059(b). The local county commissioners set fees for the constable and sheriff. Parties may tender pleadings without requests for citation or payment of fees for citation, even on pleadings for which citation is mandatory. In many counties, it is the practice to accept the pleading, note that the attorney did not request or pay for service, and send the pleading to the court. Appropriately, the court returns the instrument unsigned or holds it in suspense. The clerk issues citation only when the attorney or applicant requests and pays for issuance and service of citation. The oversight costs the applicant time and money, an occurrence that is avoidable if the applicant checks with the clerk. Most clerks now publish fee schedules on their web pages, making it easier for practitioners to find current fee information.

Mandatory e-filing and SB 41, effective 1/1/2022, have changed the method by which fees for notice and citation are paid. Filers must select the necessary citation and service in the “Additional Services” screen during the e-filing submission process, ensuring that citation is “requested” by the party as required in Rule 99(a), TRCP.

3. Form and Content

If the requirement of notice and citation is to accomplish its purpose of granting jurisdiction and informing interested persons, the citation must provide certain minimum information such as the names of petitioner and respondent, the court in which the action is filed, the cause number, the style of the proceeding, and a general description of the nature of the proceeding to which the citation or notice is related. TRCP 99(b). The title of the application, if reasonably precise, is usually sufficient to convey the general nature of the proceedings. For example, “Guardianship of the Person and Estate,” “Probate of Will and Issuance of Letters Testamentary,” or “Probate of Will as Muniment of Title.” However, there may be important additional information stated in the body of the application but not in the title, such as when a copy of a Will is offered for probate when the original Will cannot be produced. This is information that must be included in the citation, as it has implications regarding admissibility of the Will

to probate and imposes additional notice and evidentiary requirements.

Citations must command the person(s) cited to appear to file a written contest or answer and to perform other acts required of the respondent, and must state when and where such appearance or performance is required. TRCP 99(b). If copies of a petition or application are necessary for service, the petitioner must provide or pay for the copies. TRCP 99(d).

Names in the citation must be spelled correctly – the proposed ward and the proposed guardian, the decedent and the applicant in a probate proceeding. Judges will order re-issuance of citation with significant typos and misspelled names. If the problem exists on the application, then additional fees for re-issuance are due before the Clerk can issue new citations. If the Clerk’s office made a mistake, citation is reissued at no additional cost.

Multiple actions within a single pleading may require more than one type of notice or citation and method of service. The attorneys or applicants should always take the time to ensure that they are obtaining the proper service to avoid unnecessary delays. The Clerk may notify the attorney or party, as a courtesy, if it is determined that required citation and service have not been requested nor the necessary fees paid.

D. Service of Citation

1. Service Requirement

Before the probate court may act upon a petition, service of citation must occur. See EC §§258.003, 303.002, 1051.104, & 1051.106.

In most instances, service occurs when the constable or sheriff posts the citation; however, certain circumstances require service of citation by methods other than posting such as personal service, qualified delivery method, or publication. If citation required by the Estates Code is served by any method other than by certified mail or other qualified delivery method, it must be served not less than 10 days before the return day, exclusive of the date of service. See EC §§51.051-.054, 51.101, & 1051.051-.054.

For service of citation by certified mail or other qualified delivery method, as defined by EC § 22.0295, the return period is 20 days. EC §§51.052 & 1051.052. The return period is also 20 days for any citation issued under the Tex. Rules of Civil Procedure, such as declaratory judgments, because declaratory judgments fall under the civil rules – TRCP 15 – not the Estates Code.

All citations are returned the first Monday after perfection of service of 10 or 20 days, with the proof of service filed before the hearing. EC §§51.103, 51.104 1051.154, & 1051.153.

The following formula should help with counting the days to determine the return day. Because the day the citation is issued is treated as “0” day, the countdown

starts **the day after** the citation is served. TRCP 4. Count each subsequent day until the prescribed amount of time has elapsed – usually 10 or 20 days, as noted above. (In rare cases, a pleading will have a return date with different number of days.) Holidays and weekends are included in the count. TRCP 4. The first Monday **after** the set number of days is the **return date**. EC §§51.103, 51.104, 1051.154, & 1051.153. If the tenth or twentieth day ends on a Monday, then the **return date** is the following Monday. If the returnable Monday falls on a holiday, the returnable day advances to the end of the next business day, i.e., Tuesday.

As with almost all the duties of the Clerk's office, issuance of citation is often a production operation. Therefore, in some counties the clerk may have a "posting day" each Thursday. In counties that adopt Thursday as "posting day," petitions that are filed on Friday are posted the following Thursday. By posting on Thursday all petitions filed during the week *that require a 10-day waiting period*, the clerk and the sheriff or constable guarantee that the petitions become ripe on the Monday that is 11 days from Thursday. *Incredible as it seems, that Monday would be the return date for all 10-day applications filed Monday through Thursday, even if posting were done every day, Monday through Thursday.* (You might want to point this out if anyone thinks there's a delay because of the schedule of weekly postings.)

2. Posting

Posting is done on the courthouse door or other established place nearby that is customary for public notices. EC §§51.053 & 1051.053.

A copy of the citation is posted for 10 days, and is returnable on the first Monday after 10 days, exclusive of the date of posting. Note that the sheriff or constable may file the return of citation immediately because a copy of the citation will be posted for the required period. EC §§51.102 & 1051.152.

A general problem with posted notice is that posting on or near the courthouse door is tantamount to non-notification. This can be stated with certainty in metropolitan counties and probably with assurance in lesser-populated ones because citizens no longer regularly congregate at the courthouse to catch up on the events of the community.

As digital images and electronically filed documents are more common, and as clerks publish those documents on the Internet, persons can access more easily the information in applications and other documents filed in probate and guardianship cases.

Larger counties may have several "courthouses," and few people are aware of either the locations or the fact that citations are posted at them. As families are often dispersed throughout the state and country, it is common for individuals who have an interest in an estate to be unaware that the estate is pending. Obviously, it is

unlikely that your county has many people who regularly scan through numerous posted citations on the possibility that an estate or guardianship might be filed in which he or she has an interest.

Financial and other institutions need to have this information, and they usually obtain the information through a third party who gathers lists of the posted notices. Although posted notice may not make the most sense in modern society, any changes that the Legislature could implement may increase the cost to the applicant (for example, if personal citation to any spouse or child of the deceased were required, the current sheriff/constable fee would be applicable). Notification by certified mail or private delivery service to the same individuals would also escalate the costs of even the routine hearings. Increased notice would also mean hearings could not be set on the docket as quickly.

3. Personal Service

If the constable or sheriff serves citation, the required fee is collected. Under Local Government Code §118.052(3)(A), the clerk may collect \$8.00 for issuing citation. Under the Estates Code, the general rule is that the first choice of service is the attorney of record of the person to be cited. EC §§51.051 & 1051.051. Note that there are many specific provisions in the Estates Code requiring that personal service be made directly on the respondent, and not solely through their attorney, such as citation on an action for removal.

If the attorney cannot be served, or if there is no attorney of record, then the individual is served. EC §§51.051 & 1051.051.

In any case, the clerk shall cause the person named in the pleading to be served, individually or through their attorney of record.

In regular probate proceedings, personal service must be accomplished at least 10 days before the return date, exclusive of the date of service. EC §§51.051, & 1051.051.

The requesting attorney should tender, or request and pay for, one copy of the application for each personal service requested. TRCP 99(d).

4. Publication

Citation by publication shall be in a general circulation newspaper (including weeklies) in the county in which the proceedings are pending. EC §§51.054 & 1051.054.

Larger counties will have several general circulation newspapers that publish legal notices, and applicants may arrange publication in the paper of their choice. Note that what's considered a "general circulation" newspaper may not be immediately obvious. For example, the *Austin Business Journal* serves all of Travis County and is acceptable under the Code, but papers that serve a geographical part of the

county – e.g., the *West Austin News* or the *Pflugerville Pflag* – are not.

Many clerks will not collect the fee that the newspaper charges for publishing the citation because the fee is a matter between the applicant and the publisher. If your county does not automatically arrange publication with the local newspaper (as is the case, for instance, in Travis County), it may be wise to tell the applicant that he or she needs to arrange the publication.

Since **June 1, 2020**, all citations issued for service by publication must also be published on the Office of Court Administration Public Information Website. Under certain circumstances, this will be the **ONLY** method of publication required (if the cost would exceed \$200, or there is no newspaper published in county). No cost is associated with publication on the OCA website, and a statement is provided containing the published citation and stating the date of publication on the website. *See §§ 51.054, 51.103(b), 1051.054, and 1051.153(b), Estates Code.*

5. Qualified Delivery Method

All Estates Code provisions that previously required service by registered or certified mail, return receipt requested, have been changed to qualified delivery method as defined by § 7502(f)(2) of the U.S. Internal Revenue Code. A qualified delivery method must:

- (a) *Be available to the general public;*
- (b) *Be at least as timely and reliable on a regular basis as the U.S. Postal Service;*
- (c) *Record electronically to its database, kept in the regular course of its business, or mark on the cover in which any item is to be delivered, the date on which such item was placed with the delivery service; and*
- (d) *Meets such other criteria as the Secretary [of the Treasury] may prescribe.*

“Qualified delivery method” includes registered or certified mail with return receipt, private delivery services such as UPS, Federal Express, DHL Express, etc., and private courier; to be qualified, the provider must be able to meet the criteria listed above.

When citation is served by qualified delivery method, a copy of the citation, together with the certificate of the clerk showing the fact and date of mailing or deposit with a private delivery provider or courier, are filed. EC §§ 51.052 & 1051.052. The return receipt or other proof of delivery will be filed later, with the certificate attached. EC §§ 51.103 & 1051.153.

In all cases, the date of service is the date of mailing, the date of deposit with the private delivery service, or the date of delivery by the courier, as applicable, which must be made at least 20 days before the return date. EC §§ 51.052 & 1051.052 as amended, SB 1373, SB 1457, effective 9/1/2023.

If the citation is returned undelivered, the party or attorney who requested the service must be notified and pay the costs of a new citation to be issued with service by posting. EC §§ 51.052 & 1051.052.

6. Secretary of State

An out-of-state corporation, trust, or bank doing business in the State of Texas without an agent to accept service of process is served through the Secretary of State. Texas Civil Practice & Remedies Code § 17.044. The citation is issued “by and through the Secretary of State of Texas.” Either the Clerk’s office or the attorney can mail the citation to the Secretary of State. See Texas Civil Practice & Remedies Code § 17.026 and Texas Administrative Code Rule 71.21. It is essential that the Secretary of State be given the complete and accurate address of the party to be cited because that office will not take independent action to ascertain another address. Copies for both the Secretary of State and the party to be served should be mailed to the address below. Each set of copies should include both the citation and the pleading to be served. For additional information visit the Secretary of State website at <http://www.sos.state.tx.us/corp/service-of-process.shtml>

<i>Certified or Regular Mail:</i>	<i>Delivery or Overnight Mail:</i>
Service of Process Secretary of State P.O. Box 12079 Austin, TX 78711-2079	Service of Process Secretary of State James E. Rudder Bldg. 1019 Brazos St., Rm 105 Austin, TX 78701

Note that a fee is assessed by the Secretary of State for receipt of such citation. The fee is currently \$55; Texas Government Code § 405.031.

7. Private Process Server? For an Estates Code proceeding, never for a Texas resident in Texas

The general rule is that “the *sheriff or constable* shall serve the citation or notice . . .” EC §§ 51.051(b)(1) & 1051.051(b)(1) (emphasis added). The only exception is when “the person to be cited or notified is absent from or is not a resident of this state.” EC §§ 51.051(b)(2) & 1051.051(b)(2). In that case “any disinterested person competent to make an oath that the citation or notice was served may serve the citation or notice...” These rules apply to all probate and guardianship proceedings because these provisions were in effect immediately before September 1, 1941, and were not repealed when the Texas Rules of Civil Procedure were adopted. See TRCP 2 (outlining the scope of the rules). Therefore, **the Texas Rules of Civil Procedure do not provide an alternative for the requirement that in-state citation and notice must be served by a sheriff or constable in probate and**

guardianship cases. This was affirmed through Supreme Court Misc. Docket 24-9107.

8. Electronic Service Under TRCP.

TRCP Rule 21a. Methods of Service.

With the advent of the e-filing mandate, significant changes were made to the Methods of Service on all parties. Note that this Rule does NOT relate to service of citation; it controls the method of service of required notices and copies to other parties to the case as required by Rule 21(a). The part of **Rule 21a** dealing with service methods reads as follows:

TRCP Rule 21a. METHODS OF SERVICE
(emphasis added)

(a) *Methods of Service.* Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, **other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules**, may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record in the manner specified below:

(1) Documents Filed Electronically. A document filed electronically under Rule 21 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. If the email address of the party or attorney to be served is not on file with the electronic filing manager, the document may be served on that party or attorney under subparagraph (2).

(2) Documents Not Filed Electronically. A document not filed electronically may be served in person, by mail, by commercial delivery service, by fax, by email, or by such other manner as the court in its discretion may direct.

9. Notices from Clerk and Court.

Government Code Chapter 80 authorizes a court, justice, judge, magistrate, or clerk to send any notice or document by mail or by email through the electronic filing system or regular e-mail depending on the circumstances. This chapter defines what is meant by "mail" and "email" in the context of Chapter 80. Look at the Rules to know what is permissible. For example, in this chapter "mail" does not include any form of mail that requires proof of delivery and "email" does not include instant messaging or facsimiles.

NEW – Government Code, § 80.002, as amended, requires a statutory county court, statutory probate court, district court, or appellate court to deliver copies of all orders the court enters for the case through the state e-

filing system to all parties in each case in which the e-filing system is required or authorized. Probate courts were not previously specified in the requirement to deliver orders; however, those courts were added to the statute by SB 1448 & HB 3421, eff. 9/1/2025.

See Section IX of this paper, **How to Create and Electronically Deliver Documents in eFileTexas.gov.**

II. Notice and Citation in Probate and Guardianship Cases

There are certain actions for which the Estates Code specifically prescribes the type of notice required and the manner of its service.

A. Probate

1. Probate of Written Will Produced in Court or Letters of Administration

The clerk must provide notice of an application for probate of a written will produced in court or for letters of administration by issuing citation to all interested persons. EC §§ 258.001 & 303.001.

The sheriff or constable serves the citation by posting it at the courthouse door or at the place in or near the courthouse where public notices customarily are posted. EC §§ 51.053, 258.001, & 303.001.

The posted citation must state: (1) that an application for probate of a will or for letters of administration has been filed; (2) the name of the deceased and of the applicant; (3) the time when the court may act upon the application; and (4) that all interested persons have an opportunity to appear at the proper time and contest the application, should they desire to do so. EC §§ 258.001 & 303.001.

2. Written Will Not Produced in Court

The clerk must provide notice of an application for probate of a written will not produced in court by issuing citation to all interested persons. EC § 258.002. The citation must contain substantially the statements made in the application, as well as the time when, place where, and the court before which the application will be acted upon. EC § 258.002. Because citation is served by personal service or by publication, depending on the circumstances, the 10-day returnable rule applies. See EC § 258.002.

- For non-applicant heirs who reside in ascertainable locations in Texas, the sheriff or constable serves the citation by personal service. EC § 258.002.
- If personal service is unsuccessful after due diligence, service by publication or substituted service may be made as provided in TRCP 109 or TRCP 109a. EC § 258.101.
- For non-resident, non-applicant heirs; heirs whose names or whereabouts are unknown; and heirs who are transient, citation may be served by publication. EC § 258.002. Some courts require personal service

for non-resident, non-applicant heirs. EC §§ 51.001 & 51.151.

An heir who is 16 years of age or older may waive service of citation. A parent, managing conservator, guardian, attorney ad litem, or guardian ad litem of an heir who is younger than 16 years may waive citation required to be served on the minor heir. EC § 258.002

Interestingly enough, EC § 258.002 does not require the sheriff or constable to post citation. Nevertheless, it is the better practice for the clerk to issue a citation for the sheriff or constable to post. Theoretically, posting ensures that all interested persons throughout the world, not just heirs of the testator, receive notice of the proceedings. The authority for the court to require that the clerk issue a citation to be posted is found in EC §§ 51.001 & 51.151.

3. Probate of Will after Four Years after Testator's Death

EC § 258.051 addresses applications to probate a will after four years after the death of the testator. The applicant must give notice by personal service to all heirs whose addresses can be ascertained by the applicant with reasonable diligence. Notice is not required to be served on any heir who files an affidavit stating that he or she does not object to the probate of the will and which waives the requirement for notice. EC § 258.051.

Notice must be given before the probate of the will and the notice, along with any affidavit, must provide certain information: (1) that the testator's property will pass to the testator's heirs if the will is not admitted to probate, and (2) that the person offering the testator's will for probate may not be in default for failing to present the will for probate during the four-year period immediately following the testator's death. EC § 258.051.

If another will of the testator has already been admitted to probate, the notice must be given to each beneficiary of the testator's previously probated will instead of the testator's heirs. EC § 258.053.

4. Determination of Heirship

For a proceeding to declare heirs, citation must be posted in the county in which the proceedings are commenced and in the county of decedent's last known residence, unless service of citation by publication has been provided to all unknown heirs and all known heirs whose addresses cannot be ascertained. EC § 202.053.

Since citation by publication is now mandatory in any proceeding to declare heirship, the exception to posting noted above would seem to govern all heirship cases. However, a judge should require the clerk to issue a citation for posting pursuant to the judge's authority to do so under EC § 51.001.

Posting offers notice to other interested parties who otherwise would be unaware that the applicant filed a

petition. Hence, it should be the general policy of every court in this state to require posting whenever a proceeding to declare heirship is filed.

An action to declare heirs is also a suit in which certain persons must be parties to the action – a requirement identical to other civil proceedings. As set forth in EC §§ 202.007-.008, those necessary parties are (1) the unknown heirs of the decedent, (2) all persons who are named in the application as heirs of the decedent, and (3) all persons who, at the date of the filing of the application, own any share or interest in any real property described in the application, as shown by the deed records of the county in which any real property is situated.

The known heirs must be served notice of the proceedings by qualified delivery method. EC § 202.051. The clerk issues the citation in compliance with EC § 51.001. While service by such method is all that is required, many probate courts require that the known heirs be personally served, as is authorized by EC § 202.054. Personal service ordered on a distributee not in Texas may be made by any disinterested person competent to make an oath that the citation was served. Personal service may be the better method because it eliminates risks such as unsigned mailings, mailings signed by persons other than the person to whom it is directed, and illegible returns that render the citation invalid.

For known heirs 12 years of age or older, the citation is to be directed to them. EC §§ 202.051 & 202.054. For an heir younger than 12 years of age, citation must be served upon the parent, managing conservator, or guardian of that heir. EC §§ 202.051 & 202.054.

This is an important distinction if the attorney prosecuting the heirship action plans to have heirs waive citation to minimize costs. Under EC § 51.201, any person "legally competent" may waive in writing notice of such hearing.

A distributee who is 16 years of age or older may waive service, assuming they are not under a guardianship. A parent, guardian, or managing conservator of a distributee who is younger than 16 years may waive citation required to be served on the distributee. EC § 202.056, as amended, SB 1373, effective 9/1/2023. This change in the law eliminates the mandatory service of citation on any heir age 12 through 17 years, provided a waiver is filed as set out above.

The Estates Code does not specify how any person who owns a share or interest in the decedent's real property is made a party to the suit. However, the Texas Rules of Civil Procedure apply because an heirship action is a civil suit subject to the Rules. TRCP 106 directs the citation to be served by delivery to the defendant, in person; however, a co-owner may waive

in writing service of process, as authorized by EC § 51.201 and TRCP 119.

Since 2014, a court **may not** enter an order in the proceeding to declare heirship until the affidavit or certificate required by EC § 202.057(a) has been filed. In this affidavit or certificate, the applicant or the applicant's attorney lets the court know that all citation required by Chapter 202, Subchapter B has been served. This requirement helps ensure that all of the notice and citation described above has been completed and helps the court to verify that service has been completed.

NOTE – The affidavit or certificate required under EC § 202.057(a) must identify any person who has waived citation on behalf of a minor under EC § 202.056(b)(1) and must state the nature of their relationship to that minor. EC § 202.057

5. Notice to Beneficiaries after Probate

For estates of decedents dying on or after September 1, 2007, all personal representatives must provide written notice of the probate of a decedent's will to each beneficiary of the estate within 60 days of probate unless (1) a beneficiary has made an appearance in the probate proceeding before the probate of the will or (2) a beneficiary has received a copy of the will and has waived in writing the right to receive the notice. EC § 308.002.

The notice must be given by qualified delivery method. EC § 308.002, as amended, SB 1373, eff. 9/1/2023.

Within 90 days of probate, the personal representatives must file an affidavit or certificate outlining what notice has been given and what waivers of that notice signed by the beneficiaries have been filed. EC § 308.004.

EC § 308.003 outlines specific requirements regarding what must be included in the notices, waivers, affidavits, and certificates, and also indicates who must receive notice in special circumstances such as when a beneficiary has a court-appointed guardian or when a trust is a beneficiary.

Note that there is no provision in the statute for the court to waive the filing of the affidavit or certificate, even if the petitioner is the sole beneficiary under the will. There is also no provision for the court to extend the deadline for filing the affidavit or certificate. Failure to timely file the affidavit or certificate required by EC § 308.002 is grounds for removal of a personal representative. EC §§ 404.0035 & 361.052.

6. Citation and Notice on Presentation of Final Account

Estates Code § 362.005 sets out the specific citation and notice requirements on the filing of an Account for Final Settlement in the administration of a decedent's estate. Estates Code § 362.005(f) adds the additional

requirement of the filing of an affidavit or certificate similar to that for heirship applications discussed above.

Citation must be served on each heir or distributee by qualified delivery method, unless the court directs another method by written order. The court may allow waiver of citation. The personal representative must provide a copy of the final accounting to each person entitled to citation under this section.

B. Guardianships

1. Guardianship Applications

In all cases, notice by posting is required for an application for appointment of a guardian of a person or estate, or both. EC § 1051.102. The citation must state that an application was filed, the name of the proposed ward and applicant, and the name of the proposed guardian, if that person is not the applicant. EC § 1051.102. A citation for the appointment of a guardian must direct all interested persons to appear at a specified time and place, should they wish to contest the application. EC § 1051.102. In addition, the citation must contain a "clear and conspicuous statement" regarding the right provided under Estates Code § 1051.252 to be notified of future motions, applications, or pleadings.

In addition to posted notice, EC § 1051.103 requires the sheriff or constable to serve citation personally upon certain parties: (1) a proposed ward who is 12 years of age or older; (2) the proposed ward's parents if the whereabouts of the parents are known or can be reasonably ascertained; (3) any conservator or person having control of the care and welfare of the proposed ward; (4) a proposed ward's spouse if the whereabouts of the spouse are known or can be reasonably ascertained; and (5) the person named in the application to be appointed guardian, if that person is not the applicant. These citations, too, must contain the statement regarding the right under EC § 1051.252 to be notified of future motions, applications, or pleadings. EC § 1051.103(b).

As an additional safeguard, EC § 1051.104 requires that certain enumerated interested persons receive notice of the proceeding by qualified delivery method. Thus, if the following persons' whereabouts are known or can be reasonably ascertained, the applicant must send a copy of the citation to: (1) all adult children of the proposed ward; (2) all adult siblings of the proposed ward; (3) the administrator of a nursing home facility or similar facility in which the proposed ward resides; (4) the operator of a residential facility in which the proposed ward resides; (5) a person whom the applicant knows to hold a power of attorney signed by the proposed ward; (6) persons designated to serve as guardian in a written declaration under Subchapter E, Chapter 1104 (if the applicant knows of its existence); (7) a person designated to serve as guardian of the

proposed ward in the probated will of the last surviving parent of the proposed ward; (8) a person designated to serve as guardian of the proposed ward by a written declaration of the proposed ward's last surviving parent, if the declarant is deceased and the applicant knows of the existence of the declaration; and (9) each adult named in the application as an "other living relative" of the proposed ward within the third degree by consanguinity as required by § 1101.001(b)(11) or (13) if the proposed ward's parents, adult siblings, and adult children are deceased or there is no spouse, parents, adult sibling, or adult child.

The citations issued to the spouse, parents, adult siblings and adult children of a proposed ward must include a notice that they must elect in writing to receive notice of the proposed ward's health and residence, should the guardianship be granted by the court. EC § 1051.103(c)

The applicant or the applicant's attorney shall file with the court (1) a copy of any required notice sent under EC § 1051.104, including proofs of delivery and (2) a sworn affidavit stating (a) that the notice was sent as required and (b) the name of each person to whom the notice was sent if the person's name is not shown on the proof of delivery. EC § 1051.104(b).

Under EC §§ 1051.105 & 1051.251, interested persons, other than a proposed ward, may waive personal service. *A proposed ward may not waive service.* EC § 1051.105.

2. Notice During Court Investigations

Estates Code § 1054.155, Notice Regarding Request to Financial Institution for Customer Records requires that if a request is made to a financial institution for a customer record in connection with an investigation conducted under § 1054.151 or 1054.152, the court shall provide written notice of that fact to the ward or proposed ward with respect to whom the investigation is conducted not later than the fifth day after the date the financial institution produces the customer record. NOTE: This notice is also required in a court-initiated guardianship investigation under EC § 1102.006.

3. Citation and Notice on Presentation of Final Account

Estates Code § 1204.105 sets out the specific citation and notice requirements on the filing of an Account for Final Settlement in the guardianship of a ward's estate. **NEW** – Estates Code § 1204.105(h), added by SB 1760, eff. 9/1/2025, adds the additional requirement of the filing of an affidavit or certificate stating the name of each person to whom citation was served under § 1204.105(c), including the method of service; the name of each person who executed a waiver of citation; and that each person whose whereabouts are known or can be reasonably ascertained received a copy

of the account for final settlement, indicating the method of delivery.

Citation must be personally served on:

- (1) the ward, if 14 years of age or older, a resident of this state, and the ward's residence is known; or
- (2) on the personal representative of a deceased ward's estate, unless the executor or administrator is the same person as the guardian.

Citation must be served by publication, or by posting if directed by written court order, if:

- (1) the ward's residence is unknown;
- (2) the ward is not a resident of this state; or
- (3) the ward is deceased and no representative of the ward's estate has been appointed and has qualified in this state.

The court may allow waiver of citation by any person required to be served with citation, including the ward, in person or by attorney, if 14 years of age and living. A copy of the final accounting must be provided to each person entitled to notice under this section, including any person who has filed a waiver of citation.

3. Transfers of Guardianships

When an application is filed to transfer a guardianship to another county, the guardian must be cited by personal service unless the guardian is the applicant. EC § 1023.004(b). The sureties on the bond of the guardian shall also be cited by qualified delivery method. EC § 1023.004(a) as amended, SB 1760, eff. 9/1/2025. If a motion is made by the Court to transfer a guardianship to another county, the guardian must be cited by qualified delivery method. ***Note that this applies only to guardianship proceedings commenced on or after 9/1/2021.*** HB 1296, eff. 9/1/2021; SB 1457 and HB 785, eff. 9/1/2023. Guardianships filed before that date are still subject to personal service of citation on the guardian on a court-initiated transfer.

The clerk of the transferring court must send a certified copy of the transfer order to any party affected by the order and to the transferee court using the state e-filing system, and also to an employer affected by the order electronically or by first class mail. Upon acceptance of the transfer, the clerk of the court to which the proceeding is transferred must give notice, using the state e-filing system, to all parties, the clerk of the transferring court and the transferring court's local registry that the case has been docketed. EC § 1023.006 as amended, SB 1612, HB 3474, eff. 9/1/2023.

4. Notice of Removal Orders

When a court has removed a guardian without prior notice, the clerk shall issue notice of the removal order. EC § 1203.0531.

The notice must be personally served on the removed guardian not later than the seventh day after the date the court signed the order of removal. The notice must: (1) state the names of the ward and the removed guardian; (2) state the date the court signed the order of removal; (3) contain as an attachment a copy of the order of removal; and (4) contain the following statement printed in 12-point bold font:

“If you have been removed from serving as guardian under Section 1203.051(a)(6)(A) or (B), Estates Code, you have the right to contest the order of removal by filing an application with the court for a hearing under Section 1203.056, Estates Code, to determine whether you should be reinstated as guardian. The application must be filed not later than the 30th day after the date the court signed the order of removal.”

C. Evidence & Depositions

The Texas Rules of Civil Procedure and the Texas Rules of Evidence are the default rules for proceedings involving decedents’ estates and guardianships. Estates Code § 54.051 specifically notes that the Texas Rules of Evidence apply in estates proceedings “to the extent practicable” **except for the Estates Code’s provisions for depositions on written questions.**

One of the primary reasons that there are Estates Code rules for depositions that are different from the civil rules is that the civil rules presume there are opposing parties who can be served – and there are no opposing parties in many Estates Code proceedings.

What about an attorney ad litem?

The Estates Code option for depositions can be used even if an attorney ad litem has been appointed. See EC § 1051.253 and EC § 202.151(b) as amended by SB 1373, eff. 9/1/2023.

Under the Civil Rules option for depositions, in contrast, an attorney ad litem **is** someone who represents an opposing party for purposes of the deposition.

When there is an opposing party or attorney of record (not an attorney ad litem) on whom notice and copies of interrogatories may be served, the Civil Rules alternatives for depositions **must** be used. See, for example, EC §§ 51.203 & 1051.253.

When there are no opposing parties, the Estates Code provides an alternative to the default rules for the deposition of witnesses – sometimes a required alternative, and sometimes an optional one. The Estates Code alternative is generally cheaper and faster, so most practitioners will use it when possible.

The Estates Code alternative is the **required** procedure for depositions to prove up the execution of a will when no contest has been filed. EC § 256.155.

The Estates Code alternative is also appropriate in other probate proceedings (e.g., for the Proof of Death in a will prove-up, for heirships, for guardianships) as long as there is no opposing party or attorney of record on whom to serve notice. EC §§ 51.203 & 1051.253.

On 8/29/2025, the Texas Supreme Court issued **Misc. Docket 25-9060**, which adopted the Uniform Interstate Depositions and Discovery Act (UIDDA) and gave final approval to amendments to Rules 201.1 and 201.2, Tex. Rules of Civil Procedure, and new Rule 201.3. The order states that the amendments take effect on 8/31/2025. New Rule 201.3 sets out specific instructions to the clerk for issuance of a subpoena when a party submits an out-of-state subpoena and requests issuance of a subpoena in the county in Texas where discovery is sought. The UIDDA simplifies the method by which a court in Texas may subpoena and depose witnesses who are in another UIDDA state, and vice versa. It should be noted that new Rule 201.3 excludes the UIDDA provisions permitting premises inspection by subpoena and retains the Texas rule requiring a court order for premises inspections for both in-state and out-of-state litigation. Effective 9/1/2025, Civil Practice & Remedies Code, § 20.002, is repealed per HB 3929, 88th R.S., based on the Court’s adoption of the UIDDA.

1. The Estates Code method: when there is no opposing party or attorney of record

For both decedents’ estates and guardianships, see the following for the process for depositions on written questions under the Estates Code from the clerk’s perspective. EC § 51.203 & § 1051.253. Remember that the clerk no longer issues commissions to take depositions on written questions.

- When a notice of intention to take depositions is filed and there is no opposing party or attorney of record on whom to serve notice and copies of interrogatories, the clerk posts notice of the intention to take deposition.
- When the notice by posting is filed with the clerk, a copy of the interrogatories must also be filed.
- At the expiration of the 10-day posting period, the depositions for which the notice was posted may be taken.
- At the expiration of the 10-day posting period, the judge may file cross-interrogatories if no person appears.
- Because a judge may file cross-interrogatories at the end of the 10-day posting period, the clerk should immediately bring to the court’s attention the filing of a notice of intention to take depositions when there is no opposing party.

The Estates Code allows the clerk to send a certified copy of a will rather than the original to a person who is testifying by written questions for purposes of proving up a will. EC §§ 256.153(e) & 256.154(b).

2. Under the Civil Rules: always when there is an opposing party or attorney of record

For depositions under the Rules of Civil Procedure, a party must serve the witness and all the parties, including any attorney ad litem (a step not required under the Estates Code option):

- For a deposition on oral examination, the Rules require the party requesting the deposition to serve the witness and all other parties (including an attorney ad litem) with the notice of intent and wait a “reasonable period” before taking the deposition. TRCP 199.2(a). An attorney ad litem should participate in the oral examination.
- For a deposition upon written questions, the Rules require the party requesting the deposition to serve the witness and all other parties (including an attorney ad litem) with the notice of intent and wait 20 days before taking the deposition. TRCP 200.1(a). In cases where there is no “opposing party” other than the party represented by an attorney ad litem, the best practice is to have the attorney ad litem and the judge add their own questions before the deposition is taken.

III. Notice and Citation in Special Probate and Guardianship Proceedings

A. Temporary Administrator

Unlike an application for the admission of a will to probate or for the issuance of letters of administration, which requires that notice of the proceeding be posted for some time before the court may take action on the application, an application for temporary administration may be acted upon without prior notice to interested persons. EC §§ 452.001-.008.

The notice of the proceeding occurs after the fact. On the day the clerk issues letters of appointment, possibly up to three days after the appointment, the clerk must post the notice of the appointment of the temporary administrator to all interested persons. EC § 452.006.

Only on the day that the temporary administrator receives letters of appointment does the temporary administrator have to give notice of his or her appointment to the known heirs by qualified delivery method. EC § 452.006.

The Temporary Administrator must file copies of each notice sent, with the proof of delivery or deposit with a private delivery service, with the Court, in the manner provided by § 51.103(b)(3), Estates Code. **NEW** – EC § 452.006 as amended requires the temporary administrator to file the proof of notice given

to the known heirs within 7 days of the date letters were issued. SB 1448 & HB 3421, eff. 9/1/2025.

The posted and personal notices must state that: (1) an interested person or an heir may request a hearing to contest the appointment not later than 15th day after the date that the letters of appointment are issued; (2) if no contest is made within the period specified by the notice, the appointment will continue for the time specified in the order of appointment; and (3) the court may make the appointment permanent. EC § 452.006.

B. Temporary Guardian

A proposed ward must be personally served with citation before the Court can grant a temporary guardianship. EC § 1251.005(a) The Court may not grant a temporary guardianship without a hearing or without an application on file. EC §§ 1251.001-.052.

The statute also provides that upon the filing of an application for temporary guardianship, the Court shall appoint an attorney ad litem to represent the proposed ward (EC § 1251.004) and shall set a hearing within 10 days (EC §§ 1251.006 & 1251.008).

EC § 1251.005 requires that the clerk of the Court shall issue citation to be served by the sheriff or constable on the proposed ward and the proposed ward’s proposed temporary guardian if that person is not the applicant; the clerk must issue notice to be served on the proposed ward’s appointed attorney, which may be delivered electronically through the state mandated e-filing system or other method permitted by Government Code, Chapter 80.

The notice must describe the rights of the parties and the date, time, place, purpose, and possible consequences of a hearing on the application. A copy of the application must be attached to the notice. See EC § 1251.005.

C. Show Cause Hearing for Removal of a Personal Representative

The probate court conducts a show cause hearing when it contemplates removing a personal representative with notice. Several statutes govern removal, each of which is specifically tailored to the type of personal representative being removed, as well as the specific reasons for removal. It is important to be familiar with each statute.

1. Independent Executor or Independent Administrator

EC § 404.003 & 404.0035 govern the removal of an independent executor or independent administrator.

The court may remove an independent executor or independent administrator with *or without* notice of the removal action, depending on the grounds for removal. EC §§ 404.003 (without notice) & 404.0035 (with notice).

When notice is required, the type required also depends on the grounds. EC § 404.0035(a) requires written notice by qualified delivery method if the independent executor either fails to qualify in the manner and time required by law or fails to timely file the required inventory. **The provision for service by qualified delivery method now also applies when the executor has failed to timely file the affidavit or certificate of notice required under EC § 308.004.** See box below. For other grounds that require notice, the statute continues to require personal service. EC § 404.0035(b).

NOTE: The court may remove an independent executor by providing 30 days' written notice by **qualified delivery method**, to the executor's last known address and to the last known address of the executor's attorney of record if the independent executor fails to timely file the affidavit or certificate required by EC §308.004. Prior law required personal service of citation on the executor for this reason for removal. § 404.0035(b).

a. Personal representative. Notwithstanding EC § 51.055, which states that "If a party is represented by an attorney of record in a probate proceeding, each citation or notice required to be served on the party in that proceeding shall be served instead on that attorney," **the independent executor or independent administrator must be served personally** when citation is required, as directed by EC § 404.0035(b).

Because important due process rights are at stake, service upon the attorney for the independent executor or independent administrator without service upon the independent executor or independent administrator is insufficient to confer jurisdiction. *Wetsel v. Estate of Perry*, 842 S.W.2d 374 (Tex. App. – Waco 1992, no writ).

b. Attorney. In addition to citing the independent executor or independent administrator, the clerk must cite the personal representative's attorney to appear. EC § 51.051.

EC § 51.051(a) states that if personal service of citation or notice is required on a party it must be served on the attorney of record for that party as provided under EC § 51.055, which specifies in-person delivery or qualified delivery method.

Although the statute provides alternatives, the sheriff or constable should serve the attorney in person. Because process must be delivered directly to the attorney to be perfected, qualified delivery method is too unreliable to guarantee that the court has acquired *in personam* jurisdiction of the attorney.

c. Bonding Company. Although rare, a few independent executors and independent administrators operate under the auspices of a bond. In a removal action, it is the better practice for the court to notify the

bonding company if there is one, even if the Estates Code does not require notice. Several reasons justify notifying the bonding company. One, it alerts the bonding company that a surcharge action may be in the offing. Second, once alerted of the possibility of a surcharge action, a bonding company has an interest in ensuring that the personal representative gets his or her act together. Because the notice of the removal action to the bonding company is a courtesy, there is no need to serve the company personally; certified mail or other qualified delivery method is sufficient. However, should a party file a surcharge action, the bonding company needs to be served personally; qualified delivery method would be insufficient at that stage.

2. **Dependent Executor or Dependent Administrator**

EC §§ 361.051-.054 govern the removal of a dependent executor or dependent administrator.

The court may remove a dependent executor or dependent administrator with *or without* notice. EC §§ 361.051, 361.052, & 361.054.

If the court contemplates removal with notice, notice is by personal service upon the dependent executor or dependent administrator, except as set out below. EC §§ 361.052.

The court may remove a dependent executor or administrator by providing 30 days' written notice by **qualified delivery method** to the personal representative's last known address and to the last known address of the personal representative's attorney of record if the personal representative fails to timely file the affidavit or certificate required by EC § 308.004. Prior law required personal service of citation on the personal representative for this reason for removal. EC § 361.052(b)

As previously mentioned, service upon the attorney of the dependent executor or dependent administrator alone is insufficient; the dependent executor or dependent administrator must be personally served because of due process concerns. See *Wetsel v. Estate of Perry*, 842 S.W.2d 374 (Tex. App. – Waco 1992, no writ).

The discussion above concerning service upon the attorney for the personal representative and notification to the issuer of the bond securing the personal representative's performance also applies in the case of dependent executors and dependent administrators.

3. **Guardian**

EC §§ 1203.051-.057 & 1203.102 govern the removal of a guardian. Although the court may remove a guardian without notice for certain defined acts, the court may also remove a guardian with notice. EC §§ 1203.051 & 1203.052.

If the court contemplates removal with notice, notice is by personal service upon the guardian. EC §§

1203.052. Service upon the attorney of the guardian alone is insufficient; the guardian must be personally served because of due process concerns. See *Wetsel v. Estate of Perry*, 842 S.W.2d 374 (Tex. App. – Waco 1992, no writ).

The discussion above concerning service upon the attorney for the personal representative and notification to the issuer of the bond securing the personal representative's performance also applies for guardians.

D. Sale of Real Property

Upon application to the court, the Estates Code authorizes the sale of real property by a guardian, a dependent administrator, or a dependent executor without power to sell real estate under the terms of the will. EC §§ 356.251 & 1158.251.

The clerk must issue a citation to all interested persons, which the sheriff or constable serves upon them by posting. EC §§ 356.253 & 1158.253.

EC §§ 356.253 & 1158.253 provide that the wording of the citation must inform the interested persons of the right under § 356.254 or § 1158.254 to file an opposition to the sale during the period prescribed by the Court in the citation.

EC §§ 356.255 & 1158.255 require the clerk to immediately call to the judge's attention any opposition to the sale that is filed during the period prescribed in the citation issued under § 356.253 or § 1158.253. If an opposition is filed, the court **shall** hold a hearing on the application. EC §§ 356.255 & 1158.255.

Until the posting becomes ripe on the first Monday after the expiration of 10 days, the court has no jurisdiction to hear an application to sell real property.

E. Sale of Personal Property

The Estates Code also authorizes a court-supervised personal representative to apply for the sale of personal property. The provisions for the sale of personal property are the same as they are for the sale of real property. EC §§ 356.051, 356.101-.102 (decedent's estates) & EC § 1158.051 and § 1158.101-.102 (guardianships). Thus, an application with a verified exhibit is necessary, as is the issuance of citation to all interested persons, which the sheriff or constable serves by posting.

F. Mineral Leases after Public Notice

EC § 358.051 allows a dependent administrator or dependent executor to execute mineral leases with court approval. The personal representative must file an application, which the judge orders set for a hearing at a specific date and time. EC §§ 358.052-.060.

The personal representative, not the clerk, must give notice to all interested persons of the hearing set by the court, with the notice published in a newspaper of general circulation in the county in which the proceeding is pending. EC § 358.054.

If no such newspaper exists, the personal representative gives the notice by posting it or having it posted. EC § 358.054.

Before the court may act upon the application, 10 days must elapse, exclusive of the date of publication or posting and of the date set for the hearing. EC § 358.054.

G. Sale of Minor's Interest in Property without a Guardianship

EC §§ 1351.001-.006 permits a parent or managing conservator of a minor to sell the minor's property without the need to create a guardianship if the net value of the property is \$250,000 or less. No interested person need be cited, nor any notice need be given, unless the court deems it necessary. EC § 1351.003. If the Court orders the sale, the purchaser pays the proceeds belonging to the minor into the court registry, EC § 1351.004, but the funds could be withdrawn under Chapter 1355.

H. Sale of Property of Ward without Guardianship of the Estate

EC §§ 1351.051-.057 permits a guardian of the person to sell the ward's property without the need to create a guardianship of the estate if the net value of the property is \$250,000 or less. No interested person need be cited, nor any notice given, unless the court deems it necessary. EC § 1351.054. If the Court orders the sale, the purchaser must pay the proceeds belonging to the ward into the court registry, EC § 1351.055, but the funds could then be withdrawn under Chapter 1355.

I. Creation of Management Trust

Effective September 1, 2021, the notice and citation requirements for an application to appoint a guardian also apply to the filing of an application to create a management trust under Chapter 1301 Estates Code. The notice is not required if an application for appointment of a guardian is also pending.

J. Borrowing Money by Guardian of Estate, Including Home Equity Loans

EC §§ 1151.201-.203 permits a guardian of the estate to borrow money up to \$250,000 for the benefit of a ward in certain circumstances – including the possibility of home-equity loans of homestead property. In all cases, the clerk must issue citation by posting. EC § 1151.202

K. Mortgage of Residential Homestead Interest of a Minor, with or without a Guardianship

In specified circumstances, the Code allows a minor's interest in a residential homestead up to \$250,000 to be mortgaged without establishing a guardianship of the estate. For minors who are not under

a guardianship, see EC §§ 1352.001-.059. For minor wards, see EC §§ 1352.101-.108.

In both sections, the statute provides that “[t]he court may cause citation to be issued if the court considers citation necessary.” EC §§ 1352.054 & 1352.104. It is advisable to require posted citation, with the standard return date.

L. Appointed Representative’s Notice to Claimants

EC § 308.051 (decedents’ estates) and EC § 1153.001 (guardianships) require that the personal representative shall, within thirty days after appointment, publish in a newspaper a notice of appointment that requires all persons having claims against the estate being administered to present the same within the time prescribed by law.

The notice must be published in a newspaper or publication “of general circulation” in the county where the letters were issued to the personal representative. Note that the publication is not required to be *printed* in the county, but must be available throughout the county. EC §§ 308.051 & 1153.001.

These notice provisions also require that a copy of the publication, along with the publisher’s affidavit, be filed in the court where the cause is pending. EC §§ 308.052 & 1153.002.

The statute also requires that the personal representative send to the comptroller of public accounts notice by qualified delivery method if the decedent or ward has remitted or should have remitted taxes administered by the comptroller of public accounts. EC §§ 308.051 & 1153.001. A copy of that notice must be filed in the court where the cause is pending. EC §§ 308.052 & 1153.002.

M. Notice to Holders of Secured or Recorded Claims

In decedents’ estates, **within two months** after receiving letters, the personal representative shall give notice of the issuance of such letters to every person known to the personal representative to have a claim for money against the estate of a decedent that is secured by real or personal property of the estate. EC § 308.053.

In guardianships of the estate, **within four months** of receiving letters, the guardian of the estate shall give notice of the issuance of letters to holders of recorded claims as well as to persons who have claims of which the guardian has actual knowledge. EC §§ 1153.003-.004.

In both cases, notice shall be given by qualified delivery method, addressed to the record holder of such indebtedness or claim at the record holder’s last known post office address. EC §§ 308.053 & 1153.003.

The personal representative of the estate shall file proof of the notice, along with a copy of the proof of delivery or deposit with a private delivery service, and

an affidavit stating that the notice was sent as required by law. EC §§ 308.053 & 1153.003.

N. Notice by Clerk of Claim Filed

Estates Code § 355.002 (decedents’ estates) and EC § 1157.002 (guardianships) require that when a claim is deposited with the clerk, the clerk shall advise the personal representative or the personal representative’s attorney of the claim by letter mailed to their last known address. Note that Government Code, Chapter 80, permits the clerk to deliver the notices electronically through eFileTexas.gov or e-mail. The clerk also shall enter a deposited claim on the claims docket. EC §§ 355.002 & 1157.002.

O. Funds Paid Into the State Treasury

Whenever the court signs an order escheating funds to the State of Texas, the Comptroller of Public Accounts is a necessary party. EC § 551.005. That section requires the clerk of the court in which such order was entered to provide to the comptroller, by qualified delivery method or e-mail, a certified copy of such order within five days after the order has been made. EC § 551.005. A court clerk who fails to timely comply with this notice requirement is subject to a \$100 penalty.

P. Application to Make Tax-Motivated Gifts

When the guardian of an estate files an application to make a tax-motivated gift, the clerk of the court shall issue posted notice of the filing of the application. EC § 1162.001.

Q. Reinstatement of Administrator or Guardian after Removal

EC § 361.054 (decedents’ estates) and EC § 1203.056 (guardianships) require the clerk to issue notice that a personal representative who was removed by the Court has filed an application for a hearing to be reinstated. The method of service or delivery of the notice is not specified in the statutes; however, the court may direct the method by a written order under EC §§ 51.001(b) and 1051.001(b).

In the case of a decedent’s estate, the clerk shall issue notice to the applicant and the successor representative of the decedent’s estate. The notice should cite all persons interested in the estate to appear at a time and place stated in the notice if they wish to contest the application. EC § 361.054.

In the case of a guardianship, the clerk shall issue notice to the applicant, to the ward, to a person interested in the welfare of the ward or the ward’s estate, and to a person who has control of the care and custody of the ward. The notice should cite all persons interested in the welfare of the ward to appear at the time and place stated in the notice if they wish to contest the application. EC § 1203.056.

R. Notice to Voter Registrar

The clerk must give notice to the voter registrar that a person has died. Tex. Election Code § 16.001(b). The clerk will get this information from the application to probate a will or to have an administrator appointed, the application to determine heirship, or from the filing of a small estate affidavit. An abstract of each record must be filed with the county voter registrar and Texas Secretary of State as soon as possible, but not later than the 7th day after the abstract is prepared. The Secretary of State requires the information to be submitted electronically; for assistance with online reporting, contact elections@sos.texas.gov.

For guardianships, a court must make specific findings before granting a guardianship that would eliminate the right to vote. The clerk must prepare an abstract for the county voter registrar **only** if the court's order finds the ward to be either "**totally mentally incapacitated**" or "**partially mentally incapacitated without the right to vote.**" It is thus very important that the Clerk read the order carefully before preparing the notice to the voter registrar. Tex. Election Code § 16.002(a). Guardianships of mentally incapacitated adults are reported only to the county voter registrar, but not to the Secretary of State.

Restoration of capacity: The clerk also prepares an abstract for the county voter registrar when a final judgment adjudges the mental capacity of a resident 18 years of age or older to be "completely restored" or modifies the guardianship of a person 18 years of age or older to specifically include the right to vote. Tex. Election Code § 16.002(a). This does not need to be reported to the Secretary of State.

S. Notice to the Department of Public Safety

The court order establishing a guardianship must specifically state whether the person is incapacitated because of a mental condition and, if so, whether the ward maintains eligibility to hold or obtain a license to operate a motor vehicle. EC §§ 1101.151-.153. If the order takes away that right, then the clerk shall give notice to the Department of Public Safety of the entry of the order by completing DPS Form DL-117 and forwarding it to the Department of Public Safety in Austin within 10 days of the judgment. Tex. Transp. Code § 521.319(d). The clerk will need to review the order appointing guardian to see if notice is required.

Transportation Code § 521.319(f) requires the clerk to notify DPS within 10 days after a person's capacity is restored by judicial decree.

IV. Notice and Citation in Ancillary Cases

Unlike county courts and statutory county courts, a statutory probate court has the jurisdiction to hear all suits, actions, and applications filed against or on behalf of any probate or guardianship estate. This means that the personal representative of an estate pending in a

statutory probate court may file a civil suit such as a wrongful death action in the statutory probate court. A statutory probate court also possesses concurrent jurisdiction with the district court in all actions by or against a personal representative, in the person's capacity as personal representative, regardless of whether the cause of action is related to an estate.

Because a matter related to an estate pending in a statutory probate court is a civil action, the Rules of Civil Procedure govern notice and citation.

A. Issuance and Form of Citation

As noted above, TRCP 99 sets forth the form and content of any citation issued in a civil suit. The citation puts the defendant on notice that he or she has been sued and that he or she must answer by 10:00 a.m. on the Monday next following the expiration of 20 days after being served the petition or suffer the possibility of default. TRCP 99(b) & (c). The party filing any pleading upon which citation is to be issued and served must provide a sufficient number of copies to the clerk. TRCP 99(d).

Rule 99 was amended effective 1/1/2021 to add certain language to the citation form and content relating to disclosure requirements and deadlines. Any citation issued under the Rules must include this additional language.

B. Persons Authorized to Serve Citations or Notices in an Ancillary Case

TRCP 103 defines those individuals who are able to serve citations and other notices in a civil matter. For personal service, a sheriff, constable, or any other disinterested adult authorized by law or written order of the court may serve process. TRCP 103. The clerk must serve certified or registered mail and citation by publication, if requested to do so. TRCP 103. The clerk may not collect a fee for the order authorizing a disinterested adult to serve process. TRCP 103.

C. Method of Service

TRCP 106 states that unless otherwise directed, citation must be served in the following manner:

1. Personal Service

The authorized person may deliver, in person, a true copy of the citation to the defendant. The date of delivery must be endorsed on the citation, and a copy of the petition must be attached as well.

OR

2. Certified or Registered Mail, Return Receipt Requested

A true copy of the citation and petition may be sent to the defendant by registered or certified mail; a return receipt must be requested and filed. NOTE: Because the method of service of citation in civil matters is controlled by TRCP, the statutory amendments

providing for qualified delivery method do not apply, although the Supreme Court will likely consider this change in the not too distant future.

OR

3. Substituted Service

In the event that both personal service and service through mail have not been successful, the court, relying upon certain information in a motion supported by affidavit, may authorize service by leaving a copy of the citation and of the petition with anyone over sixteen years of age at the location specified in the affidavit or by any other manner that the court finds reasonably effective to give notice.

Substituted Service by Social Media Rule 106 was amended in 2020, effective December 31, 2020, permitting, in proper circumstances and upon motion sworn to or made under penalty of perjury showing details of unsuccessful service, for substituted service through social media, pursuant to amended § 17.033, Civil Practice & Remedies Code (SB 891, 86th Leg. R.S., 2019). Note that the court will consider whether the technology actually belongs to, and is regularly or recently used by, the person to whom the notice is directed.

Rule 103, TRCP, controls who may serve citation by social media. Proof of service by social media is controlled by Rule 107, TRCP.

See Misc. Docket 20-9103, issued August 21, 2020, and finalized in Misc. Docket 20-9148, issued December 18, 2020.

In situations when notice must be given to a person whose residence is unknown, who is a transient who cannot be located, or who is a nonresident defendant who cannot be served through personal service, mail, or substitute service, TRCP 109 requires the clerk to issue citation by publication.

4. Publication

TRCP 114 states that the publication of citation shall contain the requisites of TRCP 15 & 99 (Writs of Process; Issuance and Form of Citation) unless it is inconsistent with TRCP 114. For example, unlike TRCP 99, the published citation is **not** accompanied by a petition, but, like TRCP 99, the published citation must contain the names of the parties and a brief statement of the nature of the suit. In addition, if the citation is issued from the district or county court, the parties must appear and answer by 10:00 a.m. of the first Monday after the expiration of 42 days from the date of issuance. TRCP 114.

TRCP 115 establishes the form for published citations in actions involving land. It is sufficient to include a brief statement of the claim and to state the

kind of suit, the number of acres of land involved, or number of the lot or block.

a. Method of Service. TRCP 116 requires that the sheriff, constable, or the clerk of the court serve the citation by having it published once each week for four consecutive weeks, the first publication to be at least 28 days before the return day. For suits that do not involve title to or partition of land, publication occurs in the county where the suit is pending. TRCP 116. For suits that do involve title to or partition of land, publication occurs in the county where the land sits. TRCP 116.

b. Substituted Service in Lieu of Publication. Whenever citation by publication is authorized, TRCP 109a permits the court, upon motion, to prescribe a different method of substituted service that it finds to be as effective as publication.

c. Return. TRCP 117 requires the person executing the citation to offer proof of its execution, which proof shall be accompanied by a printed copy of the publication.

d. Action Against Unknown Heirs or Stockholders of Defunct Corporations. TRCP 111 sets forth the procedure for delivering citation in an action against unknown heirs or stockholders of defunct corporations. If the names of heirs or stockholders against whom an action is authorized are unknown to the affiant, the clerk will issue a citation for service by publication. TRCP 111. The citation will be addressed to the defendants according to their classification: “the Unknown Heirs of A.B., deceased” or “Unknown Stockholders of _____ Corporation.” TRCP 111.

e. Action Against Unknown Owners or Claimants of Interest in Land and Parties to Such Action. TRCP 112 and 113 govern citation by publication in a suit against an unknown landowner. If the names of persons claiming under a conveyance are not known to the plaintiff, the plaintiff may cite by publication all persons who claim title or interest in the land and include them as parties to the suit. TRCP 112. It is permissible to join in one suit all persons claiming under two or more conveyances affecting title to the same tract of land. TRCP 112. The plaintiff must make and file with the clerk an affidavit stating: (1) the name of the grantee as set out in the conveyance constituting source of title of defendant; (2) that the affiant does not know the names of any persons claiming title or interest under such conveyance other than as stated in the plaintiff’s petition; and (3) if the conveyance is to a company or association name as grantee, that grantee is incorporated or unincorporated, if such fact is known.

f. Suits for Delinquent Ad Valorem Taxes. TRCP 117a establishes the procedure for citation in suits for delinquent ad valorem taxes. In all suits for collection of delinquent ad valorem taxes, the Rules of Civil Procedure governing issuance and service of

citation shall apply, except to the extent otherwise provided by TRCP 117a.

D. Proof of Service

TRCP 107 establishes the requirements for the return of service. The return of the person executing the citation shall be endorsed on or attached to the citation. The return should state how and when the citation was served and should be signed by the officer or by the authorized person (the return of an authorized person must be verified). If the citation was served by mail, the return must include a receipt with the signature of the addressee. Upon the failure to serve, the officer or authorized person must present the return that shows the manner and cause of failure to execute. TRCP 107.

E. Nonresident Defendant

TRCP 108 and 108a state that if the defendant is a non-resident of the State or is absent from the State, either within the United States or abroad in foreign countries, he shall be required to appear and answer in the same manner and time under the same penalties as if he had been personally served with a citation in Texas. Notice may be served on a nonresident defendant in the same manner as provided by TRCP 106, for example, personal service, mail, or substituted service.

F. Uniform Partition of Heirs Property Act

Clerks and judges should familiarize themselves with the provisions of Chapter 23A, Property Code, ‘**Uniform Partition of Heirs Property Act**,’ and the various notice requirements provided in that chapter, including publication, posting, and personal notice requirements as provided in Texas Rules of Civil Procedure.

V. Notices to be Sent by Clerk under Texas Rules of Civil Procedure

A. Notice of Final Judgments

Rule 306a of the Texas Rules of Civil Procedure requires that the clerk immediately send notice to all the parties or their attorneys of record when the court signs the final judgment *or other appealable order* in a matter. In probate and guardianship proceedings, there are many appealable orders in the course of the case. For example, where the court entered a judgment determining whether certain certificates of deposit were joint tenants with right of survivorship, the appellate court found that the judgment was an appealable final judgment on that issue. *Armstrong v Roberts*, 211 S.W.3d 867 (Tex. App. – El Paso 2006, pet. denied).

With the advent of mandatory e-filing, clerks now have a convenient tool for providing the notice required under Rule 306a and may deliver a notice of final judgment by e-service through eFileTexas.gov, if the

recipient’s email address is available. TRCP 21(f)(10). Notice to any party whose email address is not available in eFileTexas.gov is required to be sent by First Class Mail. TRCP 306a.

B. Notice of Dismissal for Want of Prosecution – Drop Docket

Rule 165a of the Texas Rules of Civil Procedure requires that the clerk send notices of intent to dismiss a case for want of prosecution when requested to do so by the court after the failure of any party seeking affirmative relief to appear for any hearing or trial of which the party had notice.

C. Delivery of Orders

Pursuant to Government Code, §80.002(b), as amended by HB 3474, eff. 9/1/2023, and Rule 21(f)(10), TRCP, as amended by Tex. Supreme Court Misc. Docket 23-9053, the clerk must deliver through the state e-filing system all court orders to all parties in each case in which electronic filing is authorized or required. Although Rule 21(f)(10)(B)(ii) provides an exception to the requirement for any unrepresented party for whom an email address has not been provided, the Supreme Court’s comment to the 2023 amendment states that other methods of delivery are not prohibited and therefore clerks are “strongly encouraged” to use additional methods when a party is unrepresented, and makes it clear that clerks should use alternative methods when necessary.

VI. Notices to be Provided to Patients under Health and Safety Code

Texas Health & Safety Code, § 574.006 requires written notice to be provided to the patient when an application for court-ordered mental health services is filed. The notice must specify the time and place of the hearing. The patient and the patient’s attorney are entitled to receive a copy of the application.

If the patient is a minor, the patient’s parent is to receive notice. If the patient is subject of a guardianship, the guardian is to receive notice. The statute does not specify that the notice is to be served by constable or sheriff. The statute does not even specify that the notice is to be issued by the clerk, but having it issued by the clerk would assure proof in the court record that proper notice was given. Any other method would appear to lack proof of delivery of the notice. Since the nature of the application is to authorize a hospital to take protective custody of a person and to deny that person freedom of movement and action, it is incumbent on the court and the clerk to assure that the patient’s rights to due process are protected.

If any person claims to have evidence to present in the hearing, “[A]ny clerk, judge, magistrate, court coordinator, or other officer of the court” must provide notice “in the form that is most understandable to the

person making such inquiry.” The notice includes the name, address, and phone number of the attorneys representing the state and the patient, but must not include the application, medical records, names of other witnesses, “or any other information whatsoever.”

Texas Supreme Court approved forms for Expedited Foreclosure Proceedings, including citation forms, are available at:
<https://www.txcourts.gov/forms/>

VII. Citations for Expedited Foreclosure Proceedings

See Texas Misc. Docket No. 14-9047, and Rules 735 and 736, Texas Rules of Civil Procedure.

VIII. Citation/Notice Chart

Rev. Sept. 1, 2025

** Red font indicates a new or amended requirement for notice and/or citation*

PROBATE - DECEDENTS' ESTATES & RELATED PROCEEDINGS		
APPLICATION/ACTION TYPE	REQUIRED CITATION/NOTICE	STATUTE
Application for Probate of Will Produced in Court	Posting-Citation (all interested parties)	EC <u>258.001</u>
Application for Probate of Will NOT Produced in Court (<i>including Probate of COPY of Will</i>)	Personal Service - Citation (Heirs & Personal Representative or Heirs/Distributees of a deceased surviving Heir in Texas)	EC <u>258.002</u> EC 51.057
	Publication - Citation (Heirs & Personal Representative or Heirs/Distributees of a Deceased Surviving Heir who are not in Texas or location unknown; newspaper unless cost >\$200 or no paper in county, OCA website)	
	<i>NOTE: Posting not specifically required under EC 258.002, but is required under EC <u>303.001</u> to open an administration; court may order under EC <u>51.001</u>.</i>	
Application for Probate of Will More than 4 Years After Testator's Death	Personal Service - Citation (Heirs & Personal Representative or Heirs/Distributees of a Deceased Surviving Heir in Texas whose addresses are known or can be ascertained)	EC <u>258.051</u> EC 51.057
Application for Letters of Administration (Independent & Dependent)	Posting - Citation (all interested parties)	EC <u>303.001</u>
Application for Independent Administration	Personal Citation (all distributees & Personal Representative or Heirs/Distributees of a Deceased Surviving Heir/Distributee; method not specified, as ordered by court)	EC <u>401.004</u> EC <u>51.151</u> EC 51.057
Application to Determine Heirship	Qualified Delivery Method - Citation (Heirs & Personal Representative or Heirs/Distributees of a deceased surviving Heir w/ known addresses, 12 or older; parent/guardian/managing conservator for heir(s) under 12; age 16+ may waive, parent/guardian/managing conservator may waive for minors younger than 16)	EC <u>202.051</u> EC <u>202.056</u> EC 51.057
	Publication - Citation (Unknown/Missing Heirs incl Personal Representative or Heirs/Distributees of a deceased surviving Heir; OCA website & newspaper, unless cost >\$200 or no paper in county)	EC <u>202.052</u> EC 51.057
	Posting (if ordered by court)	EC <u>202.053</u>
	Personal Service - Citation (heirs/distributees, as ordered by court)	EC <u>202.054</u>
Application for Temporary Administration	Posting - Citation (on date letters are issued; all interested parties)	EC <u>452.006</u> EC 51.057
	Qualified Delivery Method - Citation (temp. admin. sends notice to decedent's known heirs & Personal Representative or heirs/distributees of a deceased surviving heir)	
Small Estate Affidavit	No notice or citation prescribed; court may order under EC <u>51.001</u>	EC Ch. 205 EC <u>51.001</u>
Application for Administration After Probate as Muniment of Title	Posting - Citation (all interested parties)	EC <u>303.001</u>

PROBATE - DECEDENTS' ESTATES & RELATED PROCEEDINGS (CONT'D.)		
APPLICATION/ACTION TYPE	REQUIRED CITATION/NOTICE	STATUTE
Application for Declaratory Judgment Construing Will	Personal Citation on all interested parties (method as specified in Rules 99 & 103, <u>TRCP</u>)	EC <u>257.101</u> ; <u>TRCP</u> 99 & 103
Application to Adjudicate Community Property Survivorship Agreement	"As required by [Title 2]" (method unspecified; as ordered by the court)	EC <u>51.151</u> EC <u>112.102</u>
Show Cause - Produce Will/Estate Papers	Personal Service - Citation (person holding papers)	EC <u>252.202</u>
Notice of Will in Safekeeping Upon Death of Testator	Notice to persons named on Will wrapper, person(s) named executor, or devisees & Personal Representative or Heirs/Distributees of a deceased surviving devisee (written; method of delivery not specified - use information available, e.g., mailing address, email address)	EC <u>252.101</u> , <u>252.104</u> , <u>252.105</u> EC 51.057
Application for Reduction in Personal Representative's Bond	Posting - Citation (all interested persons, sureties on bond)	EC <u>305.255</u>
Application to Borrow Against Estate to Pay Certain Debts & Expenses	Posting - Citation (all interested parties)	EC <u>351.252</u>
Application to Foreclose Preferred Debt & Lien	Personal Service - Citation (Personal Representative)	EC <u>355.157</u>
	Personal Service - Citation (any person having debts secured by mortgage, lien or security interest in the property to be foreclosed)	
	Posting - Citation (all interested parties)	
Notice of Intention to Take Deposition(s)	Posting - Citation (all interested parties); when no opposition	EC <u>51.203</u>
	Personal Service or Qualified Delivery Method - Citation (witness, all parties); when opposing parties	<u>TRCP</u> 199.2; 200.1
Application for Sale of Real/Personal Property	Posting - Citation (all interested parties)	EC <u>356.253</u> EC <u>356.102</u>
Application for Partition & Distribution	Personal Service - Citation (Heirs & Personal Representative or heirs/distributees of a deceased surviving heir in Texas)	EC <u>360.051</u> EC 51.057
	Publication - Citation (Heirs & Personal Representative or heirs/distributees of a deceased surviving heir not in Texas or location unknown; OCA website & newspaper, unless cost >\$200 or no paper in county)	
	Personal Service - Citation (on PR, if not the movant)	
Application to Resign - Personal Representative	Posting - Citation (all interested parties)	EC <u>361.003</u>
Motion to Remove Personal Representative & Appoint Successor (multiple reasons, see EC 361.052)	Court's Own Motion – Qualified Delivery Method; Complaint of Interested Person – Personal Service – Citation (Personal Representative subject to removal)	EC <u>361.052</u> EC <u>361.101</u> EC 51.057

PROBATE - DECEDENTS' ESTATES & RELATED PROCEEDINGS (CONT'D.)		
APPLICATION/ACTION TYPE	REQUIRED CITATION/NOTICE	STATUTE
Court's Motion to Remove Independent Executor (failure to qualify, failure to file inventory or affidavit of notice given - Ch. 308 EC)	Notice by Qualified Delivery Method (Independent Executor)	EC <u>404.0035</u>
Court's or Party's Motion to Remove Independent Executor (failure to file required accounting, guilty of gross misconduct/management of estate, becomes medically or legally incapacitated, sentenced to penitentiary, unable to perform duties due to conflict of interest)	Personal Service - Citation (Independent Executor)	EC <u>404.0035</u>
Application for Appointment of Successor Administrator	Posting - Citation (all interested parties; court may appoint without issuance of citation if immediate need is found)	EC <u>361.152</u>
Application for Reinstatement After Removal - Personal Representative	Personal Notice (applicant, successor personal representative, all interested persons; method not specified, court must order)	EC <u>361.054</u>
Account for Final Settlement of Decedent's Estate	Qualified Delivery Method - Citation (each heir/distributee & Personal Representative or heirs/distributees of a deceased surviving heir)	EC <u>362.005</u> EC 51.057
	PR must provide copies of accounting	
Petition for Declaratory Judgment to Discharge Independent Executor	Personal Service - Citation (each distributee & Personal Representative or heirs/distributees of a deceased surviving heir)	EC <u>405.003(b)</u> EC 51.057
Application by Distributee to Close Independent Administration	Personal Service - Citation (Ind. Executor; method not specified; as ordered by the court)	EC <u>405.009</u> EC <u>51.151</u>
Application for Ancillary Probate of Foreign Will Admitted to Probate in Non-Domiciliary Jurisdiction	Qualified Delivery Method - Citation (each heir & devisee & Personal Representative or heirs/distributees of a deceased surviving devisee identified in application)	EC <u>501.003(b)</u> EC 51.057
Payment of Unclaimed Funds to Comptroller	Certified Copy of the Order to Remit Estate Funds to Comptroller – Qualified Delivery Method (Notice to Comptroller)	EC <u>551.005</u>
Will Contest/Will Construction Suit - Service on Charity or Institute of Higher Learning Named as Distributee	"Service of process" by person bringing suit –(method “in the manner provided by this title for service on other parties” – see <u>TRCP</u> Rule 21a)	EC <u>51.151</u> EC <u>55.053</u>
Creditor Application for Sale of Mortgaged Property	Personal Service (Personal Representative)	EC <u>356.202</u>

GUARDIANSHIP & RELATED PROCEEDINGS		
APPLICATION/ACTION TYPE	REQUIRED CITATION/NOTICE	STATUTE
Application for Letters of Guardianship -- OR -- Application for Creation of a Management Trust (notice not required if application for guardianship is also pending)	Posting (all interested parties)	EC <u>1051.102</u> EC <u>1301.0511</u>
	Personal Service (prop. Ward/Beneficiary 12 yrs. or older; parents of prop. Ward/Beneficiary if location known; any court-appointed conservator or caretaker; spouse of prop. Ward/Beneficiary if location known; prop. Guardian/Trustee if not applicant)	EC <u>1051.103</u> EC <u>1301.0511</u>
	Qualified Delivery Method (notice by applicant to specified interested parties; must file proof with court)	EC <u>1051.104</u> EC <u>1301.0511</u>
	Publication (any personal citation returned unserved; OCA website & newspaper, unless cost >\$200 or no paper in county)	EC <u>1051.051(d)</u> EC <u>1301.0511</u>
Application for Temporary Guardianship	Personal Service (prop. Ward, prop. Temp. Guardian if not the applicant)	EC <u>1251.005</u>
	Notice on attorney ad litem, delivered thru efiletexas.gov, email, or mail, per GC Chap. 80	EC <u>1251.005</u>
Application to Transfer Guardianship to Another TX County	Personal Service (guardian if not the applicant for transfer); Qualified Delivery Method (bond sureties) and on guardian when Court's own motion to transfer (only gdnshts commenced on or after 9/1/21)	EC <u>1023.004</u>
Application for Sale of Real/Personal Property	Posting (all interested parties)	EC <u>1158.253</u> EC <u>1158.102</u>
Application for Authority to Establish Estate or Other Transfer Plan (incl. tax-motivated gifts or transfers, charitable contributions)	Posting (all interested parties)	EC <u>1162.001</u>
	Notice given by Applicant – Qualified Delivery Method (all devisees under a Will, trust or other beneficial instrument relating to ward's estate; ward's spouse; ward's dependents; any other person as directed by the court)	EC <u>1162.003</u>
Notice of Intention to Take Deposition(s)	Posting (all interested parties); when no opposition	EC <u>1051.253</u>
	Personal Service or Cert Mail/Return Receipt (witnesses, all parties); when opposing parties	TRCP 199.2; 200.1
Application to Resign - Guardian	Posting (all interested parties; court may order citation to be published)	EC <u>1203.004</u>
Account for Final Settlement of Ward's Estate	Personal Service (ward, if living, 14+ yrs old & residence is known)	EC <u>1204.105</u>
	Personal Service (Executor/Administrator of deceased ward's estate, if appointed)	
	Publication (if ward is living but residence is unknown or out of state; or if ward is deceased & no PR appointed for ward's estate)	
Application to Reduce Guardian's Bond	Posting (all interested parties & sureties on bond)	EC <u>1105.255</u>
Order for New Guardian Bond - Show Cause Hearing	Personal Service (Guardian) (method not specified; as ordered by the court)	EC <u>1105.252</u> EC <u>1051.201</u>

GUARDIANSHIP & RELATED PROCEEDINGS (CONTINUED)		
APPLICATION/ACTION TYPE	REQUIRED CITATION/NOTICE	STATUTE
Application to Borrow Against Ward's Estate to Pay Certain Debts & Expenses	Posting (all interested parties)	EC 1151.202(c)
Motion to Remove Guardian by Court or Interested Party (<i>multiple reasons, see EC 1203.052</i>)	Personal Service (served on Guardian; when motion filed by interested party)	EC 1203.052
	Qualified Delivery Method (served on Guardian; on court's motion to remove)	
Notice of Order Removing Guardian (<i>When Guardian removed without prior notice, see EC 1203.051</i>)	Personal Service (served on Guardian not later than 7th day after date of order)	EC 1203.0531
Application for Appointment of Successor Guardian	Personal Service (Guardian to be removed) (method not specified; as ordered by the court)	EC 1203.101 EC 1051.201
Application for Reinstatement After Removal - Guardian	Personal Notice (applicant, ward, person interested in ward's welfare or estate, person having control and care of ward; method not specified, court must order)	EC 1203.056 EC 1051.201
Application for Restoration of Ward's Capacity or Modification of Guardianship	Personal Service (served on the Guardian; served on ward if not the applicant; method not specified, as ordered by the court)	EC 1202.053 EC 1051.201
Application to Sell Minor's Interest in Property Without Guardianship	None specified, court may order under EC 1051.001	EC 1351.003
Application for Sale of Ward's Property Without Guardianship of Estate	None specified, court may order under EC 1051.001	EC 1351.054
Application to Mortgage Minor's Interest in Homestead Without Guardianship	None specified, court may order under EC 1051.001	EC 1352.054

MENTAL HEALTH PROCEEDINGS		
APPLICATION/ACTION TYPE	REQUIRED CITATION/NOTICE	STATUTE
Application for Court-Ordered Mental Health Services	Notice of hearing – Proposed Patient and Atty Ad Litem; personal service by sheriff/constable or as directed by court	HSC 574.006(a) HSC 571.013
	Personal Service by sheriff/constable or Certified Mail – Notice & copy of application to Proposed Patient's parent(s) if a minor, appointed guardian or appointed managing and possessory conservator if applicable	HSC 574.006(b) HSC 571.013
	Notice of hearing may be given to next of kin who is the applicant if parent cannot be located and guardian or conservator has not been appointed.	HSC 574.006(c)
	Notice of hearing & certain information given to any person stating they have evidence on any material issue (do not provide application or any other info)	HSC 574.006(d)
Order for Protective Custody (OPC)	Notice of OPC Issuance & Probable Cause Hearing – Proposed Patient and Proposed Patient's attorney; personal service by sheriff/constable or as directed by court	HSC 574.024(b) HSC 571.013
Notification of Probable Cause Hearing	Filed by magistrate or associate judge with Court that entered the original Order of Protective Custody	HSC 574.026

MENTAL HEALTH PROCEEDINGS (Cont'd.)		
APPLICATION/ACTION TYPE	REQUIRED CITATION/NOTICE	STATUTE
Order for Involuntary Mental Health Services	(2) Copies of Writ of Commitment w/ Cert Copies of Application, both Medical exam certificates, and commitment order attached – Person authorized to transport patient to facility	HSC <u>574.046</u>
Notice of MH Facility Recommendation to Modify – Inpatient to Outpatient Treatment	Notice of Recommendation – Patient; personal service by sheriff/constable or as directed by court	HSC <u>574.061</u> HSC <u>571.013</u>
Motion to Modify Order for Outpatient Treatment	Notice of hearing – Proposed Patient and Atty Ad Litem; personal service by sheriff/constable or as directed by court	HSC <u>574.062</u> HSC <u>571.013</u>
	Personal Service or Certified Mail – Notice & copy of application to Proposed Patient's parent(s) if a minor, appointed guardian or appointed managing and possessory conservator if applicable	
	Notice of hearing to other persons as required under HSC <u>574.006</u>	
Order for Temporary Detention Pending Hearing on Motion to Modify	Notice of Order for Temporary Detention & Motion for Modification Hearing Date – Patient and Patient's appointed attorney; personal service by sheriff/constable or as directed by court	HSC <u>574.063</u> HSC <u>571.013</u>
Application to Renew Order for Extended Mental Health Services	Notice of Application – Patient and Patient's appointed attorney; personal service by sheriff/constable or as directed by court	HSC <u>574.066</u> HSC <u>571.013</u>
Request for Reexamination	Notice of Patient's Request for Reexamination – Treatment Facility Administrator; personal service by sheriff/constable or as directed by court	HSC <u>574.068</u> HSC <u>571.013</u>
	Notice of Hearing – Patient and Patient's appointed attorney, and facility administrator; personal service by sheriff/constable or as directed by court	HSC <u>574.069</u> HSC <u>571.013</u>
Application for Order Authorizing Psychoactive Medications	Notice of Application & Hearing – Patient and Patient's attorney; personal service by sheriff/constable or as directed by court	HSC <u>574.105</u> HSC <u>571.013</u>
	Notice of Court's Determination at Hearing – Patient and Patient's attorney; personal service by sheriff/constable or as directed by court	HSC <u>574.106</u> HSC <u>571.013</u>
Notice of Court's Use of Video Teleconferencing Technology – Physician or Other MH Professional Testimony	Notice to Patient and Patient's attorney; personal service by sheriff/constable or as directed by court	HSC <u>574.202(b)</u> HSC <u>571.013</u>
Guardian Notice to the Court of Application for Emergency Detention of a Ward	Notice to the probate court that granted the guardianship, method not specified; must be given immediately	HSC <u>573.004</u>

NOTICES GIVEN BY PERSONAL REPRESENTATIVE/GUARDIAN:		
TYPE OF NOTICE	METHOD OF DELIVERY	STATUTE
Notice to Beneficiaries after Probate of Will	Qualified Delivery Method	EC <u>308.002</u>
Notice to Claimants	Newspaper Publication	EC <u>308.051</u> EC <u>1153.001</u>
Notice to Comptroller - Taxes Remitted or Due	Qualified Delivery Method	EC <u>308.051</u>

NOTICES GIVEN BY PERSONAL REPRESENTATIVE/GUARDIAN (Cont'd.):		
TYPE OF NOTICE	METHOD OF DELIVERY	STATUTE
Notice to Secured Creditors	Qualified Delivery Method	EC <u>308.053</u> EC <u>1153.003</u>
Permissive Notice to Unsecured Creditors	Qualified Delivery Method	EC <u>308.054</u> EC <u>1153.004</u>
Application for Authority to Execute Lease for Mineral Exploration and Development	Newspaper Publication	EC <u>358.054</u> EC <u>1160.054</u>

NOTICES GIVEN BY COUNTY CLERK:		
TYPE OF NOTICE	METHOD OF DELIVERY	STATUTE
Notice to Voter Registrar AND Secretary of State:		
Abstract of Each Probate Application/Action	Must be filed w/ Voter Registrar by 7th day after the abstract is prepared	ELECTION CODE <u>16.001</u>
Notice to ONLY Voter Registrar:		
Abstract of Final Judgment of Total Incapacity/Partial Incapacity without the Right to Vote - Adult Residents of the County	Must be filed w/ Voter Registrar by 10th of the following month; adult guardianship,	ELECTION CODE <u>16.002</u>
Notice to TX Dept. of Public Safety - Judgment of Total Incapacity/Partial Incapacity (Driver's License)	Must be filed w/ TX Dept. of Public Safety by 10th of the following month	TRANSP. CODE <u>521.319</u>
Notice to Judicial Branch Certification Commission:		
Guardian's Qualification	Email: jbccguardianregistration@txcourts.gov	JBCC Rule 10.6(a)
Dismissal, Denial or Non-Suit of Guardianship	Email: jbccguardianregistration@txcourts.gov	JBCC Rule 10.6(c)
Applicant NOT Appointed Guardian	Email: jbccguardianregistration@txcourts.gov	JBCC Rule 10.6(c)
Removal of Guardian/Termination of Guardianship	Email: jbccguardianregistration@txcourts.gov	JBCC Rule 10.6(d)
Transfer of Guardianship to Another County	Email: jbccguardianregistration@txcourts.gov	JBCC Rule 10.6(e)
FBI-NICS Federal Firearm Reporting - Adult Guardianship, Involuntary Inpatient Mental Health Commitment (Adults & Minors), Long-Term Residential Placement of Intellectually Disabled, Incompetent to Stand Trial, Acquitted by Reason of Insanity	Reporting online through the TXDPS CJIS website NICS Indices Entry (NEI) portal	GC <u>411.052</u> , <u>411.0521</u> ; HSC <u>574.088</u>

**There are Traps in the TRAPs:
Some Highlights of the Texas Rules of Appellate Procedure**

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**North Texas Probate Bench Bar
May 1, 2026**



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Experience

Chad Ruback, Appellate Lawyer
appellate attorney 2005-present

Godwin Gruber, P.C. n/k/a Godwin Bowman, P.C.
appellate attorney 2001-2005

McCauley, Macdonald, Devin & Huddleston, P.C.
appellate attorney 1998-2001

Fort Worth Court of Appeals
briefing attorney to Justice Lee Ann Dauphinot 1997-1998

Education

Southern Methodist University School of Law
Juris Doctor 1997

The University of Texas at Austin
Bachelor of Business Administration 1994

Leadership

William “Mac” Taylor Inn of Court
president 2021-2023
executive committee 2017-present
various committee leadership roles 2013-2017

Dallas Association of Young Lawyers
president 2006

Dallas Bar Association
ambassador 2018-present

Honors

“Master of the Bench” in the William “Mac” Taylor Inn of Court

former member of the Patrick Higginbotham Inn of Court

“AV” rating (signifying “very high to preeminent legal ability”) by Martindale-Hubbell
(based on peer review by lawyers and judges)

included in the “Appellate Practice” section of The Best Lawyers in America
(based on peer review by appellate lawyers)

named one of the “Best Lawyers in Dallas” by D Magazine
(based on peer review by appellate lawyers)

included in the Thomson Reuters “Texas Super Lawyers” list (published in Texas Monthly)

included in “Top Rated Lawyers,” which is published by ALM (American Lawyer Magazine)

formerly included in the Law & Politics magazine “Texas Rising Stars” list
(before exceeding age limit for continued inclusion on this list)

5 star rating (the highest rating) by Lawyers.com
(based on peer review by lawyers and judges)

10.0 rating (the highest rating) by Avvo.com

National Merit Scholar

Fellow of the College of the State Bar of Texas

Fellow of the Dallas Bar Association Foundation

Published Articles

Dalla Bar Association Headnotes

Dallas Business Journal

Texas Lawyer

The Appellate Advocate (the journal of the State Bar of Texas Appellate Section)

The Dicta

The Texas Lawbook

Quoted in News Stories

Amarillo Globe-News
Austin Business Journal
Beaumont Enterprise
Bloomberg BNA
Cleburne Times-Review
Corsicana Daily Sun
Courthouse News Service
D Magazine
Dallas Business Journal
Dallas Observer
Denton Record-Chronicle
Eagle Pass Business Journal
El Paso Herald-Post
Fort Worth Star-Telegram
Herald Democrat (Sherman-Denison)
Houston Business Journal
Houston Chronicle
Killeen Daily Herald
Laredo Morning Times
Law 360
Longview News-Journal
Midland Reporter-Telegram
New Braunfels Herald-Zeitung
Newsweek
San Antonio Business Journal
San Antonio Express-News
Temple Daily Telegram
Texarkana Gazette
Texas Lawyer
Texas Tribune
The Courier of Montgomery County (Conroe)
The Dallas Morning News
The Daily Sentinel (Nacogdoches)
The Eagle (Bryan-College Station)
The Galveston County Daily News
The Huntsville Item
The Lufkin Daily News
The Paris (Texas) News
The Texas Lawbook
The Washington Post
Tyler Morning Telegraph
Valley Morning Star (Harlingen)
U.S. News & World Report
Victoria Advocate
Voice of America
Waco Tribune-Herald

Featured Speaker

College of the State Bar of Texas
Collin County Bar Association
Collin County Bench Bar
Dallas Area Paralegal Association
Dallas Association of Young Lawyers
Dallas Bar Association
Dallas - Fort Worth Joint Appellate Seminar
Dallas Hispanic Bar Association
DRI (formerly known as Defense Research Institute)
Ector County Bar Association
Fannin County Bar Association
Frisco Bar Association
Grayson County Bar Association
North Dallas Bar Association
North Texas Probate Bench Bar
Plano Bar Association
San Antonio Bar Association
Southern Methodist University School of Law
State Bar of Texas Advanced Evidence & Discovery course
State Bar of Texas Appellate Section
State Bar of Texas African-American Lawyers Section
State Bar of Texas Bill of Rights: Litigating the Constitution course
State Bar of Texas Consumer & Commercial Law Section
State Bar of Texas Health Law Section
Tarrant County Probate Bar Association
Texas A&M University School of Law
Texas Hospital Association
Texas Supreme Court Historical Society Judicial Oral History Project
Texas Tech University School of Law
Texas Young Lawyers Association
Texas Wesleyan University School of Law
University of North Texas Dallas College of Law
University of Tulsa School of Law

On-Air Interviews

KDFW channel 4 (Dallas – Fort Worth Fox TV affiliate)
KXAS channel 5 (Dallas – Fort Worth NBC TV affiliate)
WFAA channel 8 (Dallas – Fort Worth ABC TV affiliate)
KTVT channel 11 (Dallas – Fort Worth CBS TV affiliate)
KTRK channel 13 (Houston ABC affiliate)
KRIV channel 26 (Houston FOX affiliate)
KDAF channel 33 (Dallas – Fort Worth CW TV affiliate)
KXAN channel 36 (Austin NBC TV affiliate)
KERA 90.1 FM
KLIF 570 AM
WBAP 820 AM
KRLD 1080 AM
KFXR 1190 AM
Voice of America

I. **DEADLINES** - Handling an appeal is deadline-intensive, and missing a deadline can have serious consequences.

A. Notice of Appeal

1. As a general rule, the deadline to file a notice of appeal is 30 days after the judgment was signed. *See* TEX. R. APP. P. 26.1.
2. If there was a deadline-extending document (e.g., motion for new trial, motion to modify judgment, request for findings of fact and conclusions of law in a case where these could properly be considered by the appellate court) timely-filed, the deadline to file a notice of appeal is generally 90 days after the judgment was signed. *See* TEX. R. APP. P. 26.1.
3. For an accelerated appeal, the deadline to file a notice of appeal is twenty days after the judgment or order was signed, and this deadline is not extended by filing any sort of deadline-extending document. *See* TEX. R. APP. P. 26.1(b). When an appeal is permitted from an interlocutory order, that appeal is accelerated. *See* TEX. R. APP. P. 28.1(a).
4. For a restricted appeal, the deadline to file a notice of appeal is always six months after the judgment was signed. *See* TEX. R. APP. P. 26.1(c).
5. For any notice of appeal (including accelerated appeals and restricted appeals), if one party files a timely notice of appeal, the deadline for other parties to file a notice of appeal is the later of (1) the time periods stated above or (2) fourteen days after the first-filed notice of appeal. *See* TEX. R. APP. P. 26.1(d).
6. An appellee who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal. *See* TEX. R. APP. P. 26.1(c).

7. If a party wishes to have the deadline extended to file a notice of appeal, that party has a deadline of fifteen days after the notice of appeal was due to file (1) the notice of appeal and (2) a motion to extend the deadline for filing the notice of appeal. *See* TEX. R. APP. P. 26.3. The standard for such a motion is *Craddock*-esque. So, the motion should generally not indicate that the tardiness was intentional or the result of conscious indifference.
8. A notice of appeal should be filed with the trial court clerk, and a copy of the notice of appeal should be filed with the clerk of the court of appeals. *See* TEX. R. APP. P. 25.1(a, e). The exact same PDF should be e-filed both places.
9. There is no charge to file the notice of appeal with the trial court clerk, but the court of appeals charges a \$205 filing fee when the copy of the notice of appeal is received.

B. Docketing Statement

1. Texas Rule of Appellate Procedure 32.1 requires an appellant to file a docketing statement “**upon perfection of the appeal.**” However, that’s a rule that pretty universally ignored—and without any consequence. In practice, docketing statements are often not filed until after the notice of appeal.
2. If an appellant files a notice of appeal without contemporaneously filing a docketing statement, the court of appeals will set a deadline for filing of the docketing statement. This deadline is usually around ten days after the notice of appeal was filed.

C Reporter's Record Request

1. Texas Rule of Appellate Procedure 34.6(b)(1) requires an appellant to file a request for preparation of the reporter's record **"At or before the time for perfecting the appeal."** However, that's a rule that pretty universally ignored—and without any consequence. In practice, reporter's record requests are often not filed until after the notice of appeal—if at all (if they are filed at all).

D. Appellate Briefs

1. The deadline for an appellant to file an appellant's brief is generally thirty days after the date the clerk's record was filed or thirty days after the date the reporter's record was filed, whichever is later. *See* TEX. R. APP. P. 38.6(a). Not the day that the record is due—the day that the record is filed.
2. In an accelerated appeal, the deadline for an appellant to file an appellant's brief is twenty days after the date the clerk's record was filed or twenty days after the date the reporter's record was filed, whichever is later. *See* TEX. R. APP. P. 38.6(a).
3. The deadline for an appellee to file an appellee's brief is generally thirty days after the date the appellant's brief was filed. *See* TEX. R. APP. P. 38.6(b).
4. In an accelerated appeal, the deadline for an appellee to file an appellee's brief is twenty days after the date the appellant's brief was filed. *See* TEX. R. APP. P. 38.6(b).
5. The deadline for the appellant to file a reply brief is twenty days after the appellee's brief was filed. *See* TEX. R. APP. P. 38.6(c).

6. The court of appeals may, upon consideration of a motion to do so, extend the deadline to file any appellate brief. *See* TEX. R. APP. P. 38.6(d).

E. Post-Appeal Motions

1. The deadline for a motion for rehearing (also known as a motion for reconsideration) of the court of appeals judgment is fifteen days after the court of appeals rendered its judgment. *See* TEX. R. APP. P. 49.1.
2. If a party wishes to file a motion for en banc reconsideration (to have all of the judges on the court of appeals reconsider the judgment rendered by the three judges assigned to the appeal), the deadline for doing so is also fifteen days after the court of appeals rendered its judgment. *See* TEX. R. APP. P. 49.7.
3. The deadline to file a motion to extend the deadline to file a motion for rehearing or a motion for en banc reconsideration is thirty days after the court of appeals rendered its judgment. *See* TEX. R. APP. P. 49.1, 49.7, 49.8.

F. Petition for Review

1. If no timely motion for rehearing or en banc reconsideration was filed, the deadline to file a petition for review (informally known as an appeal to the Texas Supreme Court) is generally 45 days after the court of appeals its rendered judgment. *See* TEX. R. APP. P. 53.7(1).
2. If a timely motion for rehearing or en banc reconsideration was filed, the deadline to file a petition for review is generally 45 days after the court of appeals last ruling on the motion for rehearing or en banc reconsideration. *See* TEX. R. APP. P. 53.7(2).

3. If one party files a timely petition for review, the deadline for other parties to file a petition for review is the later of (1) 45 days after the last timely motion for rehearing is overruled or (2) thirty days after any other petition for review was filed. *See* TEX. R. APP. P. 53.7(c).
4. If a party wishes to have more time to file a petition for review, the party may file a motion to extend the deadline. The deadline for filing such a motion is fifteen days after the deadline to file the petition for review. *See* TEX. R. APP. P. 53.7(f).
5. The deadline for the respondent to file a response to the petitioner's petition for review is thirty days after the petition was filed. *See* TEX. R. APP. P. 53.7(d).
6. A respondent may file a motion for extension of the deadline to file a response to the petition for review, and there is no hard deadline for filing such a motion. *See* TEX. R. APP. P. 53.7(f).
7. For strategic reasons, a respondent may choose not to file a response to a petition for review unless the Supreme Court requests one. *See* TEX. R. APP. P. 53.3. In such a case, it is expected, although technically not required, to file a letter stating this (called a "waiver letter") prior to the response deadline. If no response is filed by the deadline, regardless of whether a waiver letter was filed, the supreme court may request a response. If the supreme court does so, it will set a new deadline for the response.
8. The deadline for the petitioner to file a reply is fifteen days after the respondent's response was filed. *See* TEX. R. APP. P. 53.7(e).
9. A petitioner may file a motion for extension of the deadline to file a reply to the respondent's response, and there is no hard deadline for filing such a motion. *See* TEX. R. APP. P. 53.7(f).

10. There is no notice of appeal in Texas Supreme Court practice, and the petition for review itself contains legal argument.
11. If the Supreme Court wants additional legal argument, the court will request that the parties file “briefs on the merits” (a/k/a full briefing”). The Supreme Court’s notice requesting briefs on the merits sets deadlines for their filing. However, in the unlikely event that the notice does not set deadlines, there are default deadlines contained in the Texas Rules of Appellate Procedure. *See* TEX. R. APP. P. 55.7.
12. A party may file a motion for extension of the deadline to file a brief on the merits, and there is no hard deadline for filing such a motion. *See* TEX. R. APP. P. 55.7.
13. The deadline to file a motion for rehearing in the Supreme Court is fifteen days after the Supreme Court renders judgment or makes an order disposing of a petition for review. *See* TEX. R. APP. P. 64.1.

G. Petition for Writ of Certiorari

1. The deadline to file a petition for writ of certiorari (informally known as an appeal to the U.S. Supreme Court) is 90 days after the Texas Supreme Court either (1) denies a petition for review or (2) renders judgment on a petition for review. *See* SUP. CT. R. 13(1).
2. The deadline to file a motion for extension of the petition deadline is ten days before the expiration of the petition deadline. *See* SUP. CT. R. 13(5).

H. Mandate

1. An appellate judgment becomes final when the mandate is issued.

2. The time lines applicable to mandate issuance are found in Texas Rule of Appellate Procedure 18.1.

II. PREPARATION OF DOCUMENTS - There are many rules governing the contents of appellate documents, and these rules are not necessarily intuitive.

- A. All appellate documents must use 14-point font (although footnotes may be in 12-point font). *See* TEX. R. APP. P. 9.4(e).
- B. Appellate documents must be e-filed unless (1) the filer is pro se or (2) the document is filed under seal.
- C. All appellate filings must include the attorney's email address. *See* TEX. R. APP. P. 9.1(a).
- D. All appellate filings must contain a "certificate of service" specifying (1) the date of service; (2) the manner of service; (3) the name and address of each person served; and (4) if the person served is an attorney, the party represented by that attorney. *See* TEX. R. APP. P. 9.5(d, e). Notably, the appellate rules require a lot more information than do the rules of civil procedure.
- E. Notice of Appeal
 1. Texas Rule of Appellate Procedure 25.1(d) lists what is required to be included in a notice of appeal.
 2. Note that Rule 25.1(d) requires additional matters to be included in a notice of accelerated appeal and in a notice of restricted appeal.
- F. Docketing Statement
 1. Texas Rule of Appellate Procedure 32.1 lists what is required to be included in the docketing statement.

2. Although not stated in the rules, the court of appeals clerks generally prefer that appellants use the PDF docketing statement form available on their respective websites.

G. Clerk's Record Request

1. **Up until the 2024 addition of Texas Rule of Appellate Procedure 34.5a**, in a regular appeal or a restricted appeal (as opposed to an interlocutory appeal or a mandamus), appellate courts have not permitted trial court documents (filings by the parties, orders signed by the judge, etc.) to be sent by counsel to the court of appeals. Rather, such documents needed to be sent directly from the trial court clerk's office as part of a clerk's record. Under the new rule, parties may send trial court documents directly to the court of appeals—but only if the appellant has filed a “notice of election” within 10 days after the date the appellant filed a notice of appeal.
2. The Rules of Appellate Procedure do not require the filing of a “clerk's record request,” a/k/a “request for preparation of the clerk's record” a/k/a “designation of items to include in the clerk's record.” But trial court clerks often call the appellant's counsel and request the filing of such a document and even provide a deadline (which is unenforceable and is often unreasonably short). I recommend filing a clerk's record request (listing all pertinent documents and their filing date or signing date) if for no other reason than to help ensure that the trial court clerk includes in the clerk's record all of the documents which you want sent to the court of appeals.
3. Texas Rule of Appellate Procedure 34.5 lists items which must be included in the clerk's record and, if you are making a list of documents for a clerk's record request, it makes sense to include all of those documents. Also be sure to include other trial court documents which are likely to be pertinent to the appeal.

4. The Rules of Appellate Procedure expressly prohibit a party from requesting that the entire case file be included in the clerk's record. *See* TEX. R. APP. P. 34.5(b)(2).
5. An appellee may file a written request specifying that additional documents be included in the clerk's record. *See* TEX. R. APP. P. 34.5(b)(1). It is customary for the appellee to wait until the appellant has filed a clerk's record request, review the appellant's request, and then file a "request for additional items to be included in the clerk's record" if the appellee determines that pertinent items were not included in the appellant's request. If the clerk has already prepared the clerk's record, but there is a pertinent item missing, it is appropriate to file a "request for preparation of supplemental clerk's record." *See* TEX. R. APP. P. 34.5(c).
6. The trial court clerk generally will not file the clerk's record with the court of appeals until the appellant has paid him for preparing the clerk's record. If the appellant does not pay fees required for preparation of the clerk's record, the court of appeals may dismiss the appellant's appeal for want of prosecution. *See* TEX. R. APP. P. 37.3(b).
7. When the clerk's record is filed with the court of appeals, be sure to get a copy¹ and check to make sure that all documents you requested were in fact included. If the trial court clerk cannot locate an item which you requested to be included in the clerk's record, he should contact you about this, but that doesn't always happen.

¹ After the trial court clerk has filed the clerk's record with the court of appeals, appellate counsel of record may download a copy from the "attorney portal" free-of-charge from the court of appeals (or obtain a copy CD-ROM in a sealed case). The same is true of the reporter's record.

8. If a clerk cannot locate an item which you requested to be included in the clerk's record, you may need to provide him with some proof that the item should truly have been in his file (e.g., providing him with a file-stamped copy of the document). So, for any item that you might ever want included in the clerk's record, be sure to file it with the trial court clerk and save a file-stamped copy.

H. Reporter's Record Request

1. The first step in requesting a reporter's record is to determine who was the court reporter for all of the pertinent hearings or trial dates. Sometimes this is quite easy, but other times it requires considerable investigation.
2. After determining the identity of the court reporter, he can provide you with an estimate of costs for preparation of the reporter's record.
3. The appellant is required to file with the trial court clerk a written request for preparation of a reporter's record. *See* TEX. R. APP. P. 34.6(b).
4. The written request should specify what hearing dates and trial dates should be included in the reporter's record. The written request should also specify whether all trial court exhibits should be included in the reporter's record.
5. If the appellant wishes to order only a partial reporter's record, the reporter's record request must specify the points or issues to be raised on appeal. *See* TEX. R. APP. P. 34.6(c)(1).
6. It is customary for the reporter's record request to be in letter form, addressed to the court reporter, with a cc to the trial court clerk for filing (and, of course, a cc to opposing counsel).

7. The court reporter generally requires a deposit to be paid to him before he will begin preparing the reporter's record. If the appellant does not request a reporter's record or does not pay fees required for preparation of the reporter's record, that is not a basis for dismissing the appellant's appeal for want of prosecution. *See* TEX. R. APP. P. 37.3(c). However, it is the appellant's burden to establish entitlement to reversal on appeal, and in many situations this would be quite difficult to accomplish without a reporter's record. For example, it would be impossible to show that there was insufficient evidence offered at trial without a reporter's record showing what testimony and other evidence was offered at trial.

I. Appellate Motions

1. An appellate motion (except for a motion for reconsideration / rehearing) must contain a certificate of conference. *See* TEX. R. APP. P. 10.1(a)(5).
2. A motion to extend time to file an appellate brief (the most common appellate motion) must contain (1) the deadline for filing the brief; (2) the length of extension sought; (3) an explanation of why an extension is needed; and (4) the number of previous extensions granted for filing the brief. *See* TEX. R. APP. P. 10.5(b).
3. Most appellate motions do not require a supporting verification or affidavit. A verification or affidavit is required only when the motion asserts a fact to which none of the following apply: (1) in the appellate record; (2) within the appellate court's knowledge; and (3) within personal knowledge of the attorney signing the motion. *See* TEX. R. APP. P. 10.2.
4. Most motions require a filing fee.

J. Cover of an Appellate Brief

1. Texas Rule of Appellate Procedure 9.4(g) lists what must be included on the cover of an appellate brief.
2. If a party wishes to request oral argument, that request must be on the cover of the party's brief. *See* TEX. R. APP. P. 9.4(g); *see also* TEX. R. APP. P. 39.7. However, this rule is not routinely enforced.

K. Appellant's Brief

1. The appellant's brief must contain an "identity of parties and counsel" section. *See* TEX. R. APP. P. 38.1(a). This section (which is used for recusal purposes) must include all lawyers who have served as trial counsel in the case. *See* TEX. R. APP. P. 38.1(a). To prepare this correctly really requires review of the clerk's record and reporter's record. This list should include all lawyers who appeared at hearings/trial or were listed on pleadings.
2. The appellant's brief must contain a "table of contents." *See* TEX. R. APP. P. 38.1(b).
3. The appellant's brief must contain an "index of authorities." *See* TEX. R. APP. P. 38.1(c).
4. Hyperlinks (from the table of contents, index of authorities, or otherwise) may be helpful to the court but are not required.
5. The appellant's brief must contain a "statement of the case" section. *See* TEX. R. APP. P. 38.1(d). The statement of the case should be approximately half a page or less, should be limited to a very basic recitation of the type of case (without discussing any of the facts of the case) and procedural history, and should be supported by record references. *See* TEX. R. APP. P. 38.1(d).

6. The appellant's brief must contain an "issues presented" section. *See* TEX. R. APP. P. 38.1(f). Regardless of whether argument about a matter is included in the appellate brief, a court of appeals can only reverse based on that matter if it is included in this "issues presented" section. *See Dallas County v. Crestview Corners Car Wash*, 370 S.W.3d 25, 56 (Tex. App.—Dallas 2012, pet. denied).
7. The appellant's brief must contain a "statement of facts" section. *See* TEX. R. APP. P. 38.1(g). The statement of facts should present the facts of the case which are pertinent to the argument being presented in the brief, should not itself include any argument, and should be supported by record references. *See* TEX. R. APP. P. 38.1(g).
8. The appellant's brief must contain a "summary of the argument" section. *See* TEX. R. APP. P. 38.1(h).
9. The appellant's brief must contain an "argument" section. *See* TEX. R. APP. P. 38.1(i). The argument must be supported by record references and citations to legal authority. *See* TEX. R. APP. P. 38.1(i). The argument must not be conclusory but rather must include substantive legal analysis. *See Gonzalez v. VATR Constr. LLC*, 418 S.W.3d 777, 783-84 (Tex. App.—Dallas 2013, no pet.). The citations to legal authority should be in Bluebook and Greenbook form, including pertinent writ history or petition history.

10. The appellant's brief must contain an appendix. *See* TEX. R. APP. P. 38.1(k)(1). The appendix must include (1) the trial court's judgment or other order being appealed; (2) the jury charge and verdict if the case has such documents; (3) the findings of fact and conclusions of law if the case has such documents; (4) the text of any rule, regulation, ordinance, constitutional provision, or other law (excluding case law) on which the argument is based; and (5) the text of any contract or other document that is central to the argument. *See* TEX. R. APP. P. 38.1(k)(1). The appendix may include other legal authority or appellate record excerpts when appropriate for advocacy purposes. *See* TEX. R. APP. P. 38.1(k)(2).²

For an appendix that includes more than one item, the appendix must contain bookmarks. *See* TEX. R. APP. P. 9.4(h).

Electronic bookmarks are preferred (as opposed to separator-page bookmarks). The appendix (like the rest of the brief) must be text-searchable. *See* TEX. R. APP. P. 9.4(j)(1).

Downloading appendix items (e.g., from Westlaw or a lower court's website), rather than scanning them, is required whenever downloading is possible. *See* TEX. R. APP. P.

9.4(j)(2). When filing, the appendix should be included in the same PDF as the appellate brief. *See* TEX. R. APP. P. 9.4(j)(4).

Hyperlinks from the body of the brief to the appendix may be helpful.

11. To demonstrate compliance with word count limits, an appellant's brief must contain a "certificate of compliance" specifying the number of words in certain specified portions of the brief. *See* TEX. R. APP. P. 9.4(i)(3).

² Because the appendix is not itself part of the appellate record (which is composed of only the clerk's record and the reporter's record), merely including a document in the appendix does not make that document subject to being considered by the appellate court as to the factual or procedural history of the case. For the appellate court to consider a document as to the factual or procedural history of the case, that document must be contained in the appellate record.

- L. Appellee's Brief - The appellee's brief must include most of the same sections as the appellant's brief. *See* TEX. R. APP. P. 38.2.
- M. Reply Brief - Although the rules don't specify this, if the appellant files a reply brief, the reply brief is expected to include a table of contents and an index of authorities.
- N. Petition for Writ of Mandamus
 - 1. A petition for writ of mandamus must include many of the same sections required in an appellant's brief plus some additional sections. *See* TEX. R. APP. P. 52.3(e).
 - 2. A petition for writ of mandamus must contain a "statement of jurisdiction" section. *See* TEX. R. APP. P. 52.3(e).
 - 3. A petition for writ of mandamus must contain a certification from counsel that he has reviewed the petition and confirmed that every factual statement therein is supported by competent evidence included in the appendix or record. *See* TEX. R. APP. P. 52.3(j).
 - 4. The appendix to a petition for writ of mandamus must contain a certified or sworn copy of any order complained of. *See* TEX. R. APP. P. 52.3(k)(1)(A).

5. When filing a petition for writ of mandamus, the filing party (called the “relator”) must also file a “mandamus record” containing (1) a certified or sworn (i.e., via affidavit from counsel) copy of every pertinent document; (2) an authenticated transcript of any relevant testimony or a statement that there was no testimony offered related to the complained-of matter; and (3) an index listing all of the materials included in the mandamus record. *See* TEX. R. APP. P. 52.7(a, c). The mandamus record is not the same thing as the appendix to the petition for writ of mandamus. Although not required by the rules, it is helpful to Bates label the mandamus record (like the trial court clerk does with a clerk’s record) and to reference those Bates labeled page numbers in the mandamus petition. For a mandamus record that includes more than one item, the mandamus record must contain bookmarks. *See* TEX. R. APP. P. 9.4(h). Electronic bookmarks are preferred (as opposed to separator-page bookmarks).

O. Petition for Review

1. A petition for review must include many of the same sections required in an appellant’s brief plus some additional sections. *See* TEX. R. APP. P. 53.2.
2. A petition for review must contain a “statement of jurisdiction” section. *See* TEX. R. APP. P. 53.2(e).

- P. An appendix in an appellate brief and a record in a mandamus proceeding often contain what the rules define as “sensitive data.” That includes drivers license numbers, social security numbers, and bank account numbers. *See* TEX. R. APP. P. 9.9(a). All sensitive data must be redacted from an appellate brief, a record in a mandamus proceeding, and any other appellate filing by a litigant (but not a filing by the trial court clerk or the court reporter). *See* TEX. R. APP. P. 9.9(a).



Communicating with Estate Planning and Probate Clients: Ethics, Best Practices, and Real Life Examples

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Lynn Waller Kelly, J.D., received her J.D. from Pepperdine University School of Law, where she was awarded a full academic scholarship. She graduated magna cum laude from Abilene Christian University with a B.A. in Government. Lynn has practiced law in North Texas since 1989 and has advocated for clients in front of hundreds of Texas juries.

As Associate Judge of Tarrant County Probate Court 2 from 2017 – 2023, she presided over more than 6,000 probate hearings. Her current practice focuses on representing clients in probate matters, estate litigation, and guardianship proceedings throughout North Texas. She also serves as mediator in contested probate litigation matters, bringing her judicial and advocacy experiences to the table to resolve conflicts.

Lynn has been a featured speaker for Texas Guardianship Association, Baylor Law School, Texas A&M Law School, Tarrant County Bar Association, North Texas Probate Bar Association, and support groups for parents of children with special needs.

WHEN THINGS GO AWRY...



WHAT ARE THE RULES ABOUT COMMUNICATING WITH CLIENTS?



Texas Disciplinary Rules of Professional Conduct

Rule 1.03. Communication

A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment: 1. The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps to permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel either an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable.

See Comment 2 to Rule 1.02. 2. Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. Moreover, in certain situations practical exigency may require a lawyer to act for a client without prior consultation. The guiding principle is that the lawyer should reasonably fulfill client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. 3. Ordinarily, a lawyer should provide to the client information that would be appropriate for a comprehending and responsible adult. However, communicating such information may be impractical if the client is a child or suffers from diminished capacity; see paragraph 5 and Rule 1.16. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its 16 members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization.

(a) See Rule 1.12. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Withholding Information 4. In some circumstances, a lawyer may be justified in delaying transmission of information when the lawyer reasonably believes the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. Similarly, rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.04(d) sets forth the lawyer's obligations with respect to such rules or orders. A lawyer may not, however, withhold information to serve the lawyer's own interest or convenience. Client with Diminished Capacity 5. If a client appears to suffer from diminished capacity, a lawyer should communicate with any legal representative and seek to maintain reasonable communication with the client, insofar as possible. Even if the client suffers from diminished capacity, it may be possible to maintain some aspects of a normal attorney-client relationship. The client may have the ability to understand, deliberate upon, and reach conclusions about some matters affecting the client's own well-being. Children's opinions regarding their own custody are given some weight. Regardless of whether a client suffers from diminished capacity, a client should always be treated with attention and respect. See also Rule 1.16 and Rule 1.05, Comment 17.

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Client Communications Policy



Client Responsiveness

To maintain high standards of client service, all incoming communications from clients must be acknowledged on the same day, and if not practicable, within 24 hours of receipt. This includes emails, phone calls, and any other forms of communication. If you do not have the information required to fully address a client's inquiry, you must still acknowledge their message. At a minimum, employees should inform the client their communication has been received and someone will follow up within a specific period of time. You should schedule a calendar event or task reminder in Outlook to ensure follow through with the client.

For example:

“Thank you for your message, Mr. Smith. We are looking into this and will get back with you no later than Friday, July 26th with the information you need.”

You must ensure the client receives a complete response within a reasonable timeframe. If you assign follow up to another team member, do not treat the matter as closed. Keep it on your radar until your delegate has responded appropriately. If additional time is needed, provide the client with a status update and timeline for a response.

If a client email is addressed to multiple people, do not assume someone else will reply for the group. You should determine who will respond and ensure a timely message is delivered to the client. All recipients must be copied on the email to keep everyone informed. Do not reply privately, leaving your team members in the dark. Additionally, you should reply to client messages when the primary recipient is on vacation or out of the office, regardless of whether the email was sent directly to you or not.

Employees must use out-of-office notifications in Outlook when away from work. Out-of-office messages should indicate dates you are away and provide an alternative contact for urgent matters.

**WHAT SHOULD OUR BEST
PRACTICES BE IN CLIENT
COMMUNICATIONS?**

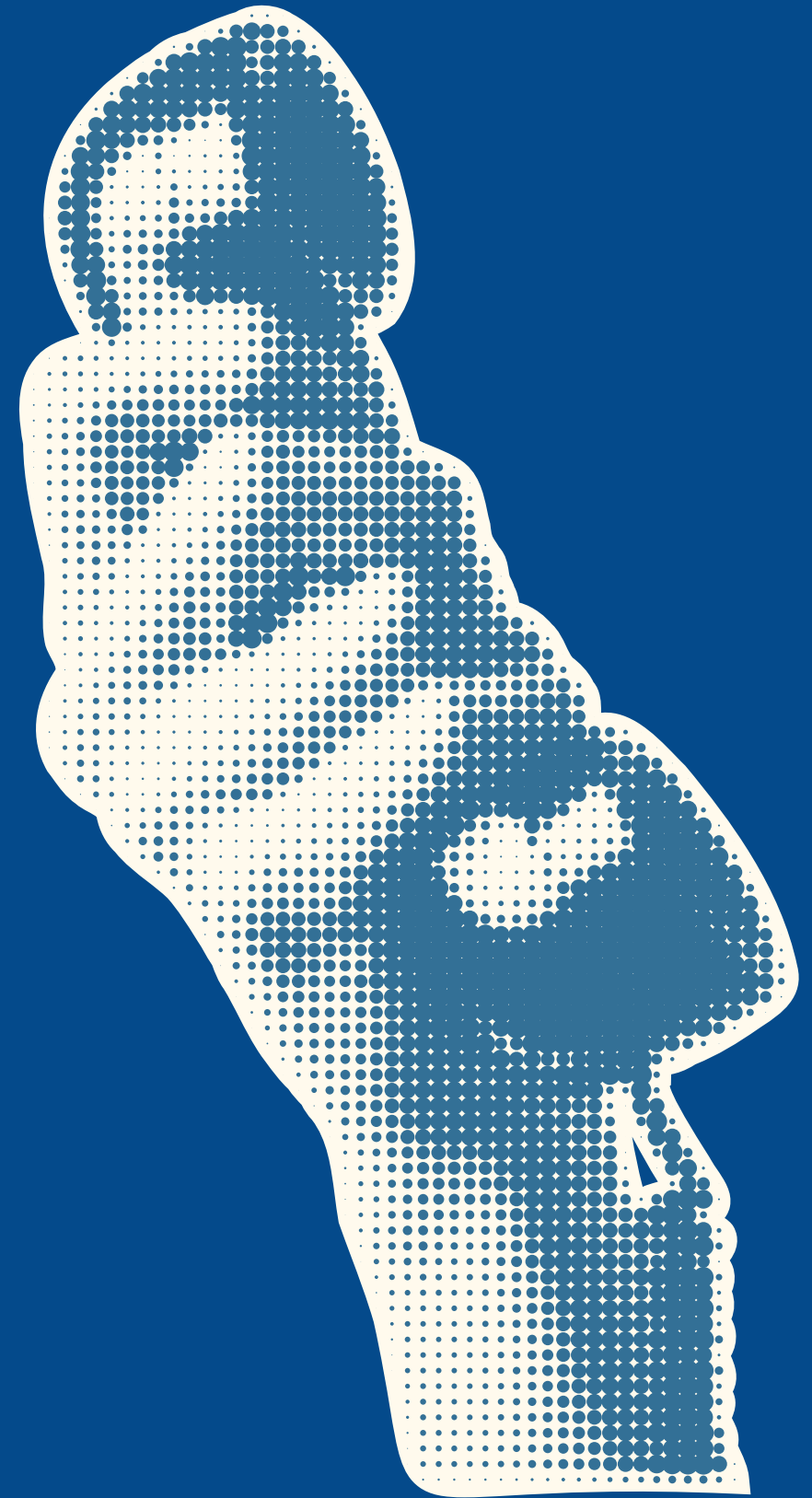


Setting Expectations

What are the expectations we need to set for this matter?

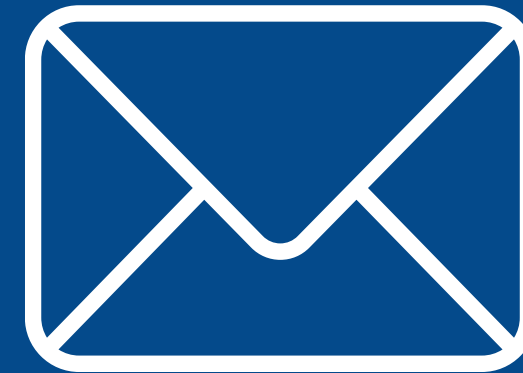
- method and frequency of communications;
- process;
- deliverables.

How Should We Communicate with This Client?



Continuum of Formality of Communications:

- email
- informal phone call
- scheduled phone conference
- Zoom meeting
- in person meeting
- formal letter



Content of Communications

1. Status update/next steps;
2. Extend an invitation for meaningful feedback by asking not only if client has any questions but specifically “what’s your biggest concern right now?” (opportunity to comfort by providing a solution);
3. Inform client right away about any challenges you are facing in your work for them. Goal is to achieve buy-in/collaboration;
4. Take ownership of any mistakes/oversights immediately.

Does a “team effort” of all team members knowing/having a rapport with client yield not just a more efficient/cost effective result, but a better result for the client? How can your team improve communications with your clients?



WHO is communicating with client on attorney's behalf?



Texas Disciplinary Rules of Professional Conduct

Rule 5.03 Responsibilities Regarding Nonlawyer Assistants

With respect to a non-lawyer employed or retained by or associated with a lawyer:

(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(b) a lawyer shall be subject to discipline for the conduct of such a person that would be a violation of these rules if engaged by a lawyer if:

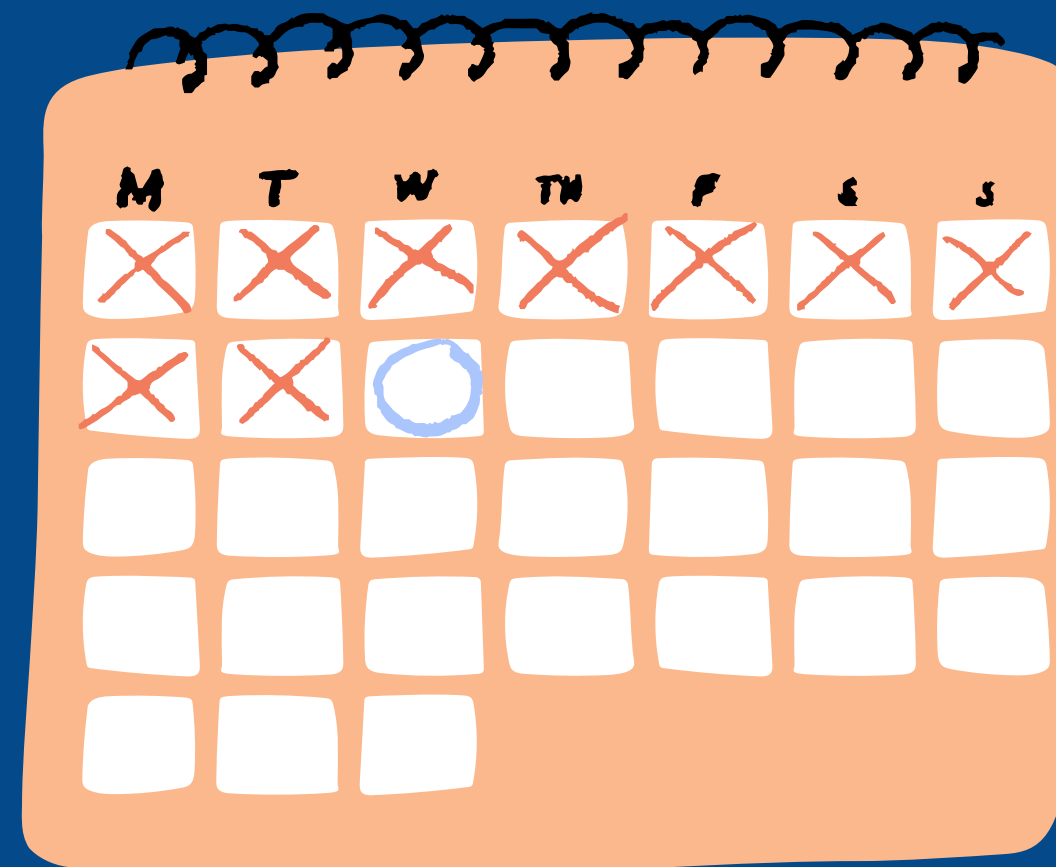
(1) the lawyer orders, encourages, or permits the conduct involved; or

(2) the lawyer:

(i) is a partner in the law firm in which the person is employed, retained by, or associated with; or is the general counsel of a government agency's legal department in which the person is employed, retained by, or associated with; or has direct supervisory authority over such person; and

(ii) with knowledge of such misconduct by the nonlawyer knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of that person's misconduct.

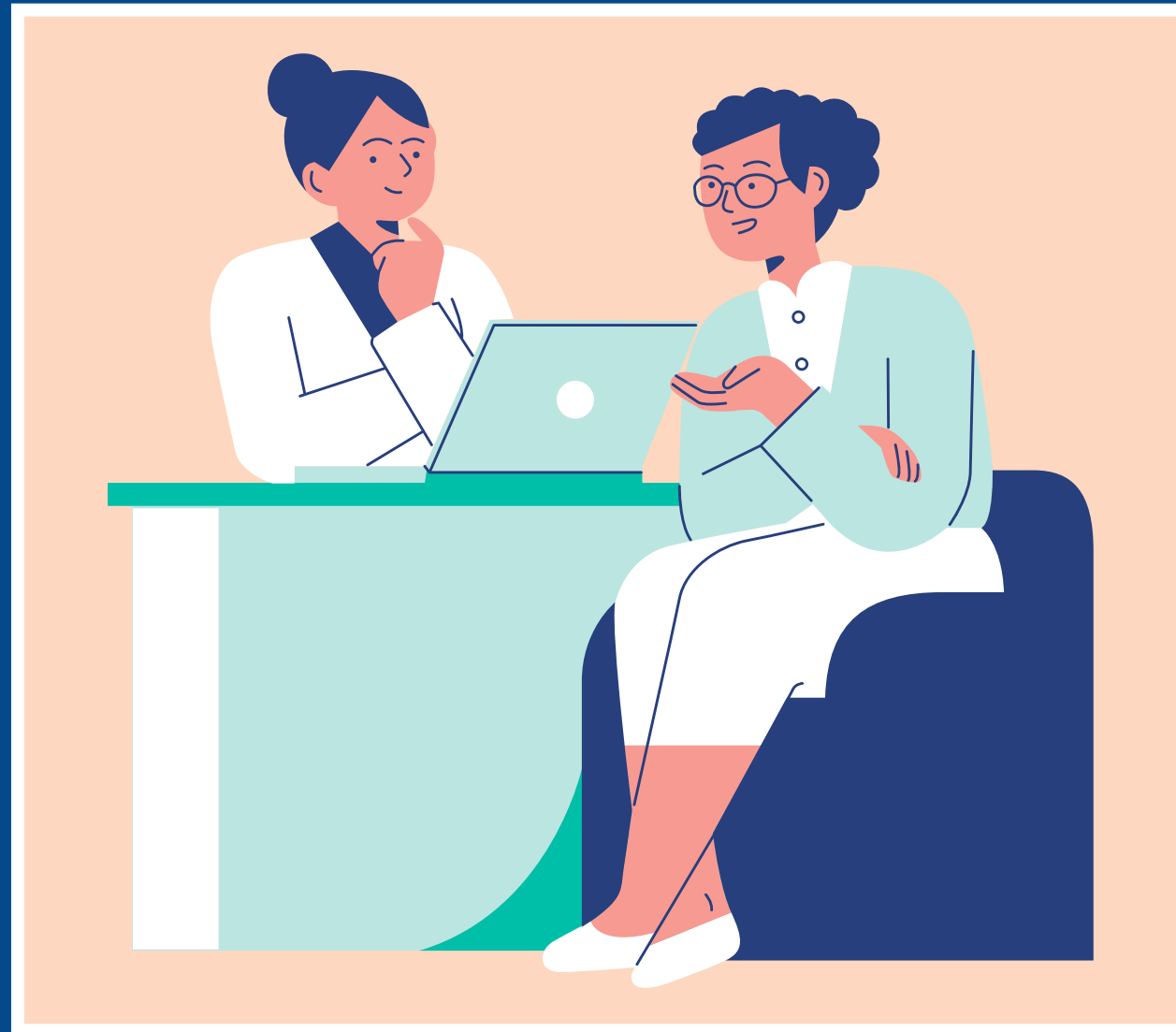
If nothing is going on, how often should we
“check in” and by what method?



How can technology be useful?



WHAT ABOUT COMMUNICATIONS WITH POTENTIAL/PROSPECTIVE NEW CLIENTS?



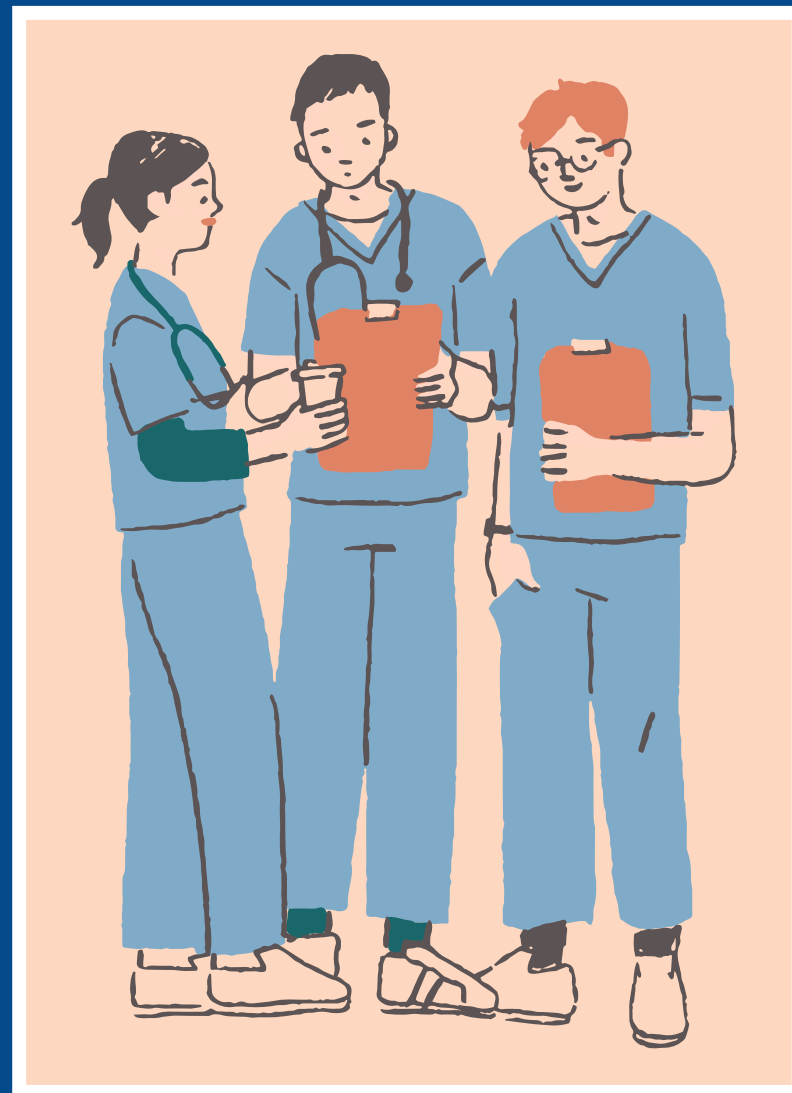
Ethical Issues:

- What are an attorney's duties of confidentiality toward a prospective client?
- If a prospective client contacts an attorney and the attorney recognizes a conflict due to communications the attorney has had with an adverse party or adverse potential party, what is the attorney permitted to say to the second prospective client?
- What is the applicable law on disqualification?

Texas Disciplinary Rules of Professional Conduct (Effective October 1, 2024):

Rule 1.18. Duties to Prospective Client (a) A person who consults with a lawyer in good faith about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client. A person who communicates with a lawyer for the purpose of disqualifying the lawyer, or for some other purpose that does not include a good faith intention to seek representation by the lawyer, is not a “prospective client” within the meaning of this Rule. 58 (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as these Rules would permit or require with respect to a client, or if the information has become generally known or would not be significantly harmful to the former prospective client. (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d). (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if: (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or: (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and (i) the disqualified lawyer is timely screened from any participation in the matter and is not directly apportioned any part of the fee therefrom; and (ii) written notice is promptly given to the prospective client.

If a prospective client contacts an attorney and the attorney recognizes a conflict due to communications the attorney has had with an adverse party or adverse potential party, what is the attorney permitted to say to the second prospective client?



What is the applicable law on disqualification?

- Severe remedy
- Reviewable by mandamus
- Exacting standard/ movant bears of proof
- Actual prejudice

WHAT ARE BEST PRACTICES IN COMMUNICATING WITH PROSPECTIVE NEW CLIENTS?



Communicating with Clients in Special Circumstances

(1) When Your Client has Communication Limitations



Communicating with Clients in Special Circumstances

(2) When Your Client Speaks a Different Language (language you don't speak; sign language)



Communicating with Clients in Special Circumstances

(3) When Third Party is Paying Your Client's Attorney Fees



When Your Client May Have Capacity Issues

Texas Disciplinary Rules of Professional Conduct (Effective October 1, 2024):

Rule 1.16. Clients with Diminished Capacity (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client 55 and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client. (c) When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests.



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Thank you!