ENDING EVASIVE RESPONSES TO WRITTEN DISCOVERY: A GUIDE FOR PROPERLY RESPONDING (AND OBJECTING) TO INTERROGATORIES AND DOCUMENT REQUESTS UNDER THE TEXAS DISCOVERY RULES

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I. INTRODUCTION

Discovery is the largest cost in most civil actions—as much as ninety percent in complex cases.[1] It also can be the most frustrating part of litigation because parties frequently fail to respond properly to the two principal types of written discovery: interrogatories and production requests.[2] Rather, many practitioners either intentionally, to withhold damaging information or material, or unintentionally, to protect against claims that a response is inadequate or an objection has been waived, provide evasive responses that are meaningless and leave the opposing party guessing as to whether all responsive information or material has been provided.[3]

The failure to respond (and object) properly to interrogatories and production requests greatly increases litigation costs by creating a bargaining dynamic in which the original discovery responses are treated merely as a first offer in what will become a protracted series of negotiations in which the original responses are followed by a conference,

[1] Court Rules, Amendments to Federal Rules of Civil Procedure, 192 F.R.D. 340, 357 (2000) ("[T]he cost of discovery represents approximately 50% of the litigation costs in all cases, and as much as 90% of the litigation costs in the cases where discovery is actively employed."); *see* NAVIGANT CONSULTING, *The State of Discovery Abuse in Civil Litigation: A Survey of Chief Legal Officers*, U.S. Chamber Inst. For Legal Reform 8 (Oct. 29, 2008), http://www.rtoonline.com/images/THE-STATE-OF-DISCOVERY-ABUSE.pdf ("On average, 45-50 percent of respondents' civil litigation costs in 2007 related to discovery activities."); Inst. for the Advancement of the Am. Legal Sys., *Preserving Access and Identifying Excess: Areas of Convergence and Consensus in the 2010 Conference Materials* 13 (2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/IAALS,%20Preserving%20Access%20and%20Identifying%20Excess.pdf (estimating the percentage of litigation costs attributable to discovery in cases not going to trial was 70 percent). *See also* Steenbergen v. Ford Motor Co., 814 S.W.2d 755, 758 (Tex. App.—Dallas 1991, writ denied) ("It is well known that discovery costs are a major part of the overall expense of a trial.").

[2] As noted by one federal court: "The use of interrogatories and production requests are as much the basics of discovery as blocking and tackling is to football." IMA N. Am., Inc., v. Marlyn Nutraceuticals, Inc., No. CV-06-0344-PHX-LOA, 2007 U.S. Dist. LEXIS 61269, at *6–8 (D. Ariz. Aug. 20, 2007).

[3] This typically is accomplished in one of two ways. First, by setting forth many boilerplate "general objections" at the beginning of the response and then incorporating the objections into each response "to the extent they apply." Second, by interposing a litany of boilerplate objections to each discovery request and then answering the request "subject to and without waiving" the objections. *See infra* Part IV.B.2.

amended responses, further conferences, and more amended responses, and ultimately a motion to compel.[4]

This article's purpose is to provide a guide for properly responding (and objecting) to interrogatories and production requests under the Texas discovery rules.[5] The following three sections respectively discuss interrogatories and the rules governing them; production requests and the rules governing them; and objections to interrogatories and production requests generally and the propriety of certain commonly interposed objections to such discovery requests.

II. INTERROGATORIES

A. Interrogatories in General

Texas Rule 197 governs interrogatories—written questions propounded by one party to another.[6] Like other written discovery requests,

[4] *See* Garcia v. Peeples, 734 S.W.2d 343, 347 (Tex. 1987) (orig. proceeding) ("Unfortunately, this goal of the discovery process is often frustrated by the adversarial approach to discovery. The 'rules of the game' encourage parties to hinder opponents by forcing them to utilize repetitive and expensive methods to find out the facts. The truth about relevant matters is often kept submerged beneath the surface of glossy denials and formal challenges to requests until an opponent unknowingly utters some magic phrase to cause the facts to rise." (citation omitted)).

[5] The Texas discovery rules are Texas Rules of Civil Procedure 190–215. Hereinafter, individual Texas Rules of Civil Procedure and Federal Rules of Civil Procedure will be referred to respectively as "Texas Rule __" and "Federal Rule ___."

[6] TEX. R. CIV. P. 197.1 ("A party may serve on another party . . . written interrogatories."). The other Texas discovery rules relating to interrogatories are Rules 190–93, 195, 215. *Id.* 190–93, 195, 215.

Interrogatories cannot be served on nonparties. *Id.* 197.1 ("A party may serve on another *party* . . . written interrogatories . . . ." (emphasis added)); *cf.* Univ. of Tex. v. Vratil, 96 F.3d 1337, 1340 (10th Cir. 1996) ("Under FED. R. CIV. P. 33(a), interrogatories may only be directed to a party to an action."); Jackson v. Boise Locomotive, No. H-08-2545, 2009 U.S. Dist. LEXIS 64832, at *20–21 (S.D. Tex. July, 28, 2009) ("Under Federal Rule of Civil Procedure 33, 'courts have uniformly denied litigants' attempts to use interrogatories to obtain information from nonparties.'" (quoting Ackah v. Greenville Cnty. Sch. Dist., No. 6:07-2796-HFF-WMC, 2008 U.S. Dist. LEXIS 29227, at *1–2 (D.S.C. Apr. 9, 2008))). They, however, can be served on parties whose interests are not adverse. *Cf.* Ferrara v. United States, No. 90 Civ. 0972 (DNE), 1992 U.S. Dist. LEXIS 601, at *3 (S.D.N.Y. Jan. 23, 1992) ("The [Federal] Rule does not limit discovery only to parties that have a hostile stance toward each other in the litigation."); Andrulonis v. United States, 96 F.R.D. 43, 45 (N.D.N.Y. 1982) ("[N]o degree of adversity between the parties is required . . . to serve interrogatories.").

interrogatories must be served no later than thirty days (and in some cases thirty-three or thirty-four days) before the discovery period ends.[7]

Interrogatories may inquire about any discoverable matter other than matters covered by Texas Rule 195, which relates to testifying experts.[8] They are a relatively inexpensive method of discovery and, when properly worded, can be an effective way to obtain facts and narrow the issues. Answers to interrogatories may be used only against the responding party at trial or a hearing.[9]

B. Interrogatory Types

There are two basic types of interrogatories: identification and contention interrogatories.[10] Identification interrogatories call for factual

[7] TEX. R. CIV. P. 197.1. If the interrogatories are served by mail or fax before 5:00 p.m., they must be served at least thirty-three days before the discovery period's end. *Id.* 21a. If they are served by fax after 5:00 p.m., the interrogatories must be served at least thirty-four days before the discovery period ends. *Id.*

[8] *Id.* 195.1 ("A party may request another party to designate and disclose information concerning testifying expert witnesses only through a request for disclosure under Rule 194 and through depositions and reports permitted by this rule." (footnote omitted)). Interrogatories, however, can be used to obtain information about discoverable consulting-expert witnesses. *Id.* 195 cmt. 1.

[9] *Id.* 197.3; Vodicka v. Lahr, No. 03-10-00126-CV, 2012 Tex. App. LEXIS 4557, at *29 n.10 (Tex. App.—Austin June 6, 2012, no pet.) (holding that one defendant's interrogatory answer was not proper summary judgment evidence against another defendant); Buck v. Blum, 130 S.W.3d 285, 290 (Tex. App.—Houston [14th Dist.] 2004, no pet.) ("[A] party's answers to interrogatories can only be used against that party and not against another party, including a codefendant."). Nor can a party rely on its own interrogatory answers as evidence. Maxwell v. Willis, 316 S.W.3d 680, 685–86 (Tex. App.—Eastland 2010, no pet.) (holding that trial court erred in relying on the moving party's own interrogatory answer in granting the party summary judgment); Zarzosa v. Flynn, 266 S.W.3d 614, 619 (Tex. App.—El Paso 2008, no pet.) (holding that party's interrogatory answers did not raise a fact issue in response to a summary judgment motion even though the opposing party put them into evidence); Garcia v. Nat'l Eligibility Express, Inc., 4 S.W.3d 887, 890–91 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (holding that a party's own interrogatory answers are incompetent summary judgment evidence). However, in a multi-party case, any party may use the responding party's interrogatories against the responding party, thereby obviating the need for redundant interrogatories. Ticor Title Ins. Co. v. Lacy, 803 S.W.2d 265, 266 (Tex. 1991).

[10] Buckner v. Montgomery Cnty. Jobs & Family Servs. Div., No. 3:11-cv-320, 2012 U.S. Dist. LEXIS 43251, at *3 (S.D. Ohio Mar. 29, 2012) ("There are basically two types of interrogatories: identification interrogatories and contention interrogatories."); Reittinger v. Verizon Commc'ns, Inc., No. 1:05-CV-1487 (FJS/RFT), 2006 U.S. Dist. LEXIS 83293, at *18 (N.D.N.Y. Nov. 15, 2006) ("[Interrogatories] can come in two forms, identification and contention

information, such as the identity of documents, tangible things, persons with knowledge of relevant facts, or communications.[11]

Texas Rule 197.1 defines a contention interrogatory as one "inquir[ing] whether a party makes a specific legal or factual contention" or "ask[s] the responding party to state the legal theories and to describe in general the factual bases for the party's claims or defenses."[12] Such interrogatories

interrogatories."); Citibank (S.D.), N.A. v. Savage (*In re* Savage), 303 B.R. 766, 773 (Bankr. D. Md. 2003) (""There are basically two types of interrogatories: identification interrogatories and contention interrogatories.'" (quoting Ian D. Johnston & Robert G. Johnston, *Contention Interrogatories in Federal Court*, 148 F.R.D. 441, 442 (July 1993))).

[11] *Buckner*, 2012 U.S. Dist. LEXIS 43251, at *3; Kolker v. VNUS Med. Techs., Inc., No. C 10-0900 SBA (PSG), 2011 U.S. Dist. LEXIS 122810, at *19–20 (N.D. Cal. Oct. 24, 2011); *Reittinger*, 2006 U.S. Dist. LEXIS 83293, at *18; *In re Savage*, 303 B.R. at 773.

[12] TEX. R. CIV. P. 197.1. Federal Rule 33(a)(2) defines a contention interrogatory as one "asking for an opinion or contention that relates to fact or the application of law to fact . . . ." FED R. CIV. P. 33(a)(2). *See also* Barnes v. District of Columbia, 270 F.R.D. 21, 24 (D.D.C. 2010) (""Contention interrogatories generally ask a party: to state what it contends, or state all the facts upon which it bases a contention.'" (quoting Everett v. USAir Grp., Inc., 165 F.R.D. 1, 3 (D.D.C. 1995))). As one federal court has explained:

> [T]he phrase "contention interrogatory" is used imprecisely to refer to many different kinds of questions. Some people would classify as a contention interrogatory any question that asks another party to indicate *what* it contends. Some people would define contention interrogatories as embracing only questions that ask another party *whether* it makes some specified contention. Interrogatories of this kind typically would begin with the phrase "Do you contend that . . . ." Another kind of question that some people put in the category of "contention interrogatory" asks an opposing party to state all the *facts* on which it *bases* some specified contention. Yet another form of this category of interrogatory asks an opponent to state all the *evidence* on which it *bases* some specified contention. Some contention interrogatories ask the responding party to take a position, and then explain or defend that position, with respect to *how the law applies to facts.* A variation on this theme involves interrogatories that ask parties to spell out the *legal basis* for, or theory behind, some specified contention.

In re Convergent Techs. Sec. Litig., 108 F.R.D. 328, 332 (N.D. Cal. 1985); *accord* SEC v. Berry, No. C07-04431 RMW (HRL), 2011 U.S. Dist. LEXIS 64437, at *4 n.1 (N.D. Cal. June 15, 2011) (quoting the language from the *In re Convergent* court); Gregg v. Local 305 IBEW, No. 1:08-CV-160, 2009 U.S. Dist. LEXIS 40761, at *15 (N.D. Ind. May 13, 2009) ("Contention interrogatories can be classified as questions asking a party to: 'indicate what it contends or whether the party makes some specified contention[;] . . . state all facts or evidence upon which it bases some specific contention; take a position and apply law and facts in defense of that position; or explain the theory behind some specified contention.'" (quoting BASF Catalysts LLC v. Aristo, Inc., No. 2:07-cv-222, 2009 U.S. Dist. LEXIS 4780 (N.D. Ind. Jan. 23, 2009))); *see* Ziemack v. Centel Corp., No. 92 C 3551, 1995 U.S. Dist. LEXIS 18192, at *5 (N.D. Ill. Dec. 6, 1995) ("Basically,

may, for example, ask a party to (1) state what it contends or whether it is making a particular factual or legal contention, (2) explain the facts underlying an allegation, claim, or defense, (3) assert a position or explain a position with regard to how the law applies to the facts, and (4) articulate the legal or theoretical reason for a contention or allegation.[13] In other words, contention interrogatories require parties to put meat on the barebones information required by Texas notice pleading.[14]

Although Texas Rule 197 expressly permits contention interrogatories,[15] it makes clear that such interrogatories cannot be used "to require the responding party to marshal all of its available proof or the proof it intends to offer at trial."[16] Neither Texas Rule 197 nor Texas Rule 194, which similarly provides that "the responding party need not marshal all evidence that may be offered at trial" in responding to a Rule 194.2(c) disclosure

contention interrogatories require the answering party to commit to a position and give factual specifics supporting its claim.").

[13] *In re Convergent*, 108 F.R.D. at 332, *quoted or cited with approval in* Kodak Graphic Commc'ns Can. Co. v. E. I. Du Pont de Nemours & Co., 08-CV-6553T, 2012 U.S. Dist. LEXIS 15752, at *7–8 (W.D.N.Y. Feb. 8, 2012), *Berry*, 2011 U.S. Dist. LEXIS 64437, at *4 n.1, ACLU v. Gonzales, 237 F.R.D. 120, 123 (E.D. Pa. 2006), *and* Brassell v. Turner, No. 3:05CV476LS, 2006 U.S. Dist. LEXIS 48810, at *7–8 (S.D. Miss. June 28, 2006)).

[14] *See* State Farm Fire & Cas. Co. v. Morua, 979 S.W.2d 616, 618 (Tex. 1998) ("Interrogatories serve to flesh out the facts of the case and prevent trial by ambush."); *cf. Barnes*, 270 F.R.D. at 24 ("This type of request 'can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery.'" (quoting FED. R. CIV. P. 33 advisory committee's note)); Bell v. Woodward Governor Co., No. 03 C 50190, 2005 U.S. Dist. LEXIS 27051, at *9 (N.D. Ill. Nov. 9, 2005) ("Answers to [contention] interrogatories are useful because they, amongst other things, aid the propounding party in 'pinning down' *a party's position* and determining the proof required to rebut the *party's position*."); *In re Savage*, 303 B.R. at 773–74 ("The purpose of contention interrogatories is also to determine the theory of a party's case."); Roberts v. Heim, 130 F.R.D. 424, 427 (N.D. Cal. 1989) ("Courts generally approve of appropriately timed contention interrogatories as they tend to narrow issues, avoid wasteful preparation, and it is hoped, expedite a resolution of the litigation.").

[15] TEX. R. CIV. P. 197.1 ("An interrogatory may inquire whether a party makes a specific legal or factual contention" or "ask the responding party to state the legal theories and to describe in general the factual bases for the party's claims or defenses . . . ."); *id.* cmt. 1 ("Interrogatories about specific legal or factual assertions—such as whether a party claims a breach of implied warranty, or when a party contends that limitations began to run—are proper . . . .").

[16] *Id.* 197.1; *see id.* 194.2 cmt. 2 (stating contention interrogatories "are not properly used to require a party to marshal evidence or brief legal issues"); *id.* 197 cmt. 1 ("[I]nterrogatories that ask a party to state all legal and factual assertions are improper. . . . [I]nterrogatories may be used to ascertain basic legal and factual claims and defenses, but may not be used to force a party to marshal evidence.").

requesting "the legal theories and, in general, the factual bases of the responding party's claims or defenses," clearly explains what constitutes evidence marshalling.[17] Rather, Comment 2 to Rule 197 merely explains that "interrogatories that ask a party to state all factual and legal assertions are improper," and no case has provided guidance regarding what constitutes evidence marshalling.[18]

An interrogatory asking the responding party to state "all" facts or "every" or "each" fact concerning a cause of action or defense appears to be improper.[19] In contrast, an interrogatory asking for the "general bases" or the "material" or "principal" facts concerning such a matter should be

[17] TEX. R. CIV. P. 194.2(c); *accord id.* 194 cmt. 2.

[18] *Id.* 197 cmt. 2. In *In re Swepi L.P.*, 103 S.W.3d 578 (Tex. App.—San Antonio, 2003, orig. proceeding), the court rejected the argument that contention interrogatories *ipso facto* require evidence marshalling:

> Casas complains the interrogatories require plaintiffs to marshal all their proof or all the proof they intend to present at trial. We disagree with this interpretation of the questions. The interrogatories seek the facts underlying the plaintiffs' claims. This is the very purpose of discovery. Casas cannot avoid providing facts by assuming Shell is asking for more than the rules allow.

Id. at 590; *see In re* Ochoa, No. 12-04-00163-CV, 2004 Tex. App. LEXIS 4866, at *4 (Tex. App.—Tyler May 28, 2004, orig. proceeding) ("A party's legal contentions and factual bases for them are discoverable. . . . However, [disclosures and interrogatories cannot] be used to require a party to marshal all of its available proof.").

[19] *Cf.* Ritchie Risk-Linked Strategies Trading (Ir.), Ltd. v. Coventry First LLC, 273 F.R.D. 367, 369 (S.D.N.Y. 2010) ("[W]hile contention interrogatories are a perfectly acceptable form of discovery, Defendants' requests, insofar as they seek every fact, every piece of evidence, every witness, and every application of law to fact . . . are overly broad and unduly burdensome." (citations omitted)); Gregg v. Local 305 IBEW, No. 1:08-CV-160, 2009 U.S. Dist. LEXIS 40761, at *16 (N.D. Ind. May 13, 2009) ("Gregg's interrogatory encompasses virtually every factual basis for all of the Defendants' contentions. To respond would be an unduly burdensome task, since it would require the Defendants to produce veritable narratives of their entire case." (citation omitted)); Lucero v. Valdez, 240 F.R.D. 591, 594 (D.N.M. 2007) ("Contention interrogatories should not require a party to provide the equivalent of a narrative account of its case, including every evidentiary fact, details of testimony of supporting witnesses, and the contents of supporting documents."); Moses v. Halstead, 236 F.R.D. 667, 674 (D. Kan. 2006) ("At the same time, however, this Court has made it clear that such contention interrogatories are overly broad and unduly burdensome on their face if they seek all facts supporting a claim or defense, such that the answering party is required to provide a narrative account of its case. Thus, the general rule in this Court is that interrogatories may properly ask for the principal or material facts which support an allegation or defense. In addition, interrogatories may seek the identities of knowledgeable persons and supporting documents for the principal or material facts supporting an allegation or defense." (footnotes omitted) (internal quotation marks omitted)).

proper.[20] Accordingly, an interrogatory asking a plaintiff to "state, in general, the facts supporting its breach of contract claim" or a defendant to "state the principal [or material] facts supporting its estoppel defense" does not require evidence marshalling and is proper.[21] Moreover, an interrogatory asking the responding party to identify "all documents concerning or relating to" or "all persons with knowledge about" a particular matter or subject is an identification, rather than a contention, interrogatory that does not require evidence marshalling and generally is appropriate.[22]

[20] *Cf., e.g.*, Lubrication Techs., Inc. v. Lee's Oil Serv., LLC, No. 11-2226 (DSD/LIB), 2012 U.S. Dist. LEXIS 69440, at *28 (D. Minn. Apr. 10, 2012) ("'The parties' interrogatories may properly ask for the principal or material facts which support an allegation or defense, and may seek the identities of knowledgeable persons and supporting documents for the principal or material facts supporting an allegation or defense.'" (quoting Turner v. Moen Steel Erection Co., No. 8:06CV227, 2006 U.S. Dist. LEXIS 72874, at *12–13 (D. Neb. Oct. 5, 2006))); Atkinson v. L-3 Commc'ns Vertex Aerospace, LLC, No. CIV-07-1194-M, 2008 U.S. Dist. LEXIS 27256, at *3 (W.D. Okla. Apr. 1, 2008) ("[T]he Court finds that plaintiff's request that L-3 identify 'material' facts and documents is clearly not improper but is a recognized and approved method of narrowing interrogatories seeking facts and documents which support identified allegations or defenses.").

[21] *See Atkinson*, 2008 U.S. Dist. LEXIS 27256, at *3 ("The Court further finds that plaintiff is entitled to discover the facts upon which L-3's affirmative defenses are based . . . .").

[22] *See* TEX. R. CIV. P. 194.2(e) (allowing a party to request the disclosure of "the name . . . of persons having knowledge or relevant facts, and a brief statement of each identified person's connection with the case"); *cf.* EEOC v. Sterling Jewelers Inc., No. 08-CV-00706(A)(M), 2012 U.S. Dist. LEXIS 67220, at *24 (W.D.N.Y. May 14, 2012) ("'[Q]uestions seeking the identification of witnesses or documents are not contention interrogatories.'" (quoting B. Braun Med. Inc. v. Abbott Labs., 155 F.R.D. 525, 527 (E.D. Pa. 1994))); Helmert v. Butterball, LLC, No. 4:08CV00342 JLH, 2010 U.S. Dist. LEXIS 121902, at *6 (E.D. Ark. Nov. 3, 2010) ("Questions that request the identification of witnesses, like questions requesting the identification of documents, are not contention interrogatories."); *Lucero*, 240 F.R.D. at 594 ("Contention interrogatories are distinct from interrogatories that request identification of witnesses or documents that support a party's contentions."); United States *ex rel.* Hunt v. Merck-Medco Managed Care, LLC, No. 00-CV-737, 2005 U.S. Dist. LEXIS 17014, at *8 (E.D. Pa. Aug. 15, 2005) (noting that contention interrogatories "are distinct from interrogatories that request identification of witnesses or documents that bear on the allegations."); *In re* Grand Casinos, Inc., 181 F.R.D. 615, 618–19 (D. Minn. 1998) ("Moreover, the 'non-contentious' nature of the Interrogatory [requesting witness identification] is confirmed by the fact that it is largely duplicative of the disclosure obligations of [Federal] Rule 26(a)(1)(A) . . . , which require a party to initially disclose the identity of 'each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings . . . .'"); *see also* cases cited *supra* note 11, which define an identification interrogatory.

Further, the mere fact that an interrogatory uses the word "all," "every," or "each" does not necessarily mean that it requires evidence marshalling.[23] There is a significant and discernible difference between an interrogatory that, for example, asks the plaintiff "to state every fact supporting your breach of contract claim" and one that asks the plaintiff "to identify each allegedly breached contract provision and, separately for each, to describe generally how it was breached" or "to state every fact concerning your contention that the defendant attended the January 12, 2012 meeting." The latter two interrogatories clearly are reasonable inquiries and do not require evidence marshalling whereas the former is unreasonable and does require such marshalling.[24]

The difficulty is that there is a large middle ground between these extremes.[25] Accordingly, what constitutes evidence marshalling often must be decided on an interrogatory-by-interrogatory basis.[26] In doing so, a court should use a pragmatic, common-sense approach that weighs the interrogatory's scope, the burden and expense involved in responding to it, the action's complexity, and whether the information can be more readily obtained through depositions or another discovery form.[27]

The fact that such an interrogatory does not require evidence marshalling does not mean that it is not unduly burdensome. Depending on the question asked, it may be so. *See* cases cited *supra* note 19.

[23] *See* cases cited *infra* note 27.

[24] Roberts v. Heim, 130 F.R.D. 424, 427 (N.D. Cal. 1989); *see Ritchie Risk-Linked Strategies*, 273 F.R.D. at 369.

[25] *Roberts*, 130 F.R.D. at 427.

[26] *Id.*

[27] *Cf.* Cardenas v. Dorel Juvenile Grp., Inc., 231 F.R.D. 616, 619 (D. Kan. 2005) ("[T]his interrogatory does not ask Plaintiffs to identify 'each and every fact' or 'all facts' that support their allegations. Rather, this interrogatory asks Plaintiffs to identify 'each and every element of the design' that Plaintiffs' contend is defective, and to identify how the design was defective and the manner in which Plaintiffs' injuries were causes by each alleged defect. . . . The Court finds that this interrogatory is sufficiently narrow so as to not be unduly burdensome or overly broad on its face."); *Roberts*, 130 F.R.D. at 427 (explaining that, in determining whether an interrogatory that ask a party to "state all facts on which an allegation or a denial is based" is objectionable violated a discovery guideline, it must, "be judged in terms of its scope and in terms of the overall context of the case at the time it is asked.").

Interrogatories that ask a complaining party to identify, for example, every contract provision breached, each fraudulent representation or omission, each negligent act, each fiduciary breach, and the like should never be found to require evidence marshalling because interrogatories clearly are the best and often the only discovery tool available to obtain such information. For example,

Although a court may defer answers to contention interrogatories until after other designated discovery has been completed,[28] there is no reason why a court cannot require the responding party to answer contention

an individual plaintiff or even a corporate representative will likely be unable to identify such matters in a deposition.

[28] TEX. R. CIV. P. 192.6(b)(4) (allowing a court to enter a protective order that specifies when certain discovery can be undertaken); *In re* Alford Chevrolet–Geo, 997 S.W.2d 173, 182 (Tex. 1999) (orig. proceeding) ("[I]t is within the trial court's discretion to schedule discovery and decide whether and how much discovery is warranted . . . ."); Ramon v. Teacher Ret. Sys., No. 01-09-00684-CV, 2010 Tex. App. LEXIS 2316, at *17 (Tex. App.—Houston [1st Dist.] Apr. 1, 2010, pet. denied) ("A trial court has broad discretion to schedule and define the scope of discovery."); *In re* CNA Lloyds, No. 13-07-386-CV, 2007 Tex. App. LEXIS 7790, at *3 (Tex. App.—Corpus Christi Spet. 24, 2007, orig. proceeding) (mem. op.) (same).

Federal Rule 33(a), unlike Texas Rule 197.1, specifically allows a trial court to "order" that contention interrogatories "need not be answered until designated discovery is complete, or until a pretrial conference, or some other time." *Compare* FED. R. CIV. P. 33(a), *with* TEX. R. CIV. P. 197.1. Accordingly, federal courts often hold that contention interrogatories are most appropriate after the parties have had the opportunity for a substantial amount of discovery. *See, e.g.*, SEC v. Berry, No. C07-4431 RMW (HRL), 2011 U.S. Dist. LEXIS 64437, at *6 (N.D. Cal. June, 15, 2011) ("'[C]ourts tend to deny contention interrogatories filed before substantial discovery has taken place, but grant them if discovery is almost complete.'" (quoting *In re* eBay Seller Antitrust Litig., No. C 07-1882 JF (RS), 2008 U.S. Dist. LEXIS 102815, at *4 (N.D. Cal. Dec. 11, 2008))); Helmert v. Butterball, LLC, No. 4:08CV00342 JLH, 2010 U.S. Dist. LEXIS 121902, at *4 (E.D. Ark. Nov. 3, 2010) ("[A] number of district courts, including several in this circuit, have determined that contention interrogatories need not be answered until discovery is complete or nearing completion."); Cornell Research Found., Inc. v. Hewlett Packard Co., 223 F.R.D. 55, 66–67 (N.D.N.Y. 2003) ("[C]ontention interrogatories are often reserved for use at the end of discovery in order to crystallize the issues to be presented to the court . . . ."). *But see* Firetrace USA, LLC v. Jesclard, No. CV-07-2001-PHX-ROS, 2009 U.S. Dist. LEXIS 2972, at *7–8 (D. Ariz. Jan. 9, 2009) ("Although the Court does have the authority to defer Defendants' response to Plaintiffs' second interrogatory, Defendants have not convincingly argued that the Court should exercise its discretion in this way"); *Cornell Research*, 223 F.R.D. at 67 ("[W]hen in the process [contention interrogatories] should be permitted[] will be dependent upon the circumstances of each particular case, as well as the issues implicated. In this instance, fundatmental fairness dicates, at a minimum, that HP be required to flesh out the contentions associated with this affirmative defense . . . ."); *In re* Arlington Heights Funds Consol. Pretrial, No. 89 C 701, 1989 U.S. Dist. LEXIS 8177, at *1 (N.D. Ill. July 7, 1989) ("*[G]eneralizations about the appropriate use and timing of contention interrogatories* . . . cannot substitute for the specific analysis of the propriety of their use here and now . . . ." (citation omitted)).

Unlike contention interrogatories, identification interrogatories generally should be answered whenever they are served. *Cf.* Kolker v. VNUS Med. Techs., Inc., No. C 10-0900 SBA (PSG), 2011 U.S. Dist. LEXIS 122810, at *19–20 (N.D. Cal. Oct. 24, 2011) ("Along the lines of [Federal] Rule 26's initial disclosures, courts generally approve of such 'identification interrogatories,' whether early or late in a case.").

interrogatories early in the action. Such a requirement is consistent with Texas Rule 192.2, which provides that "the permissible forms of discovery . . . may be taken in any order or sequence," and more importantly, with Texas Rule 13, which requires a party to have some factual basis for its claims or defenses.[29] Thus, the responding party can answer a contention interrogatory served early in the action with the information presently available and seasonably amend or supplement its answer as more information becomes available through discovery.[30] In this regard, the responding party is not prejudiced by having to respond to contention interrogatories early in the action because, under Rule 197.3, "an answer to an interrogatory inquiring about [the opposing party's contentions or damages] that has been amended or supplemented may not be used for impeachment."[31]

Contrary to the belief of many practitioners, contention interrogatories that ask for the factual bases for an allegation, claim, or defense do not seek information protected by the work-product privilege even if the facts were learned by the party or its attorney during witness interviews or the investigation during, or in anticipation of, the litigation.[32] In fact, Texas Rule 192.5(c)(1) makes this clear by providing that "information discoverable under Rule 192.3 concerning . . . contentions" is not work product protected from discovery "[e]ven if made or prepared in

[29] TEX. R. CIV. P. 13, 192.2; *cf. Firetrace*, 2009 U.S. Dist. LEXIS 2972, at *6 ("Defendants, who asserted affirmative defenses in their Answer, must have contemplated a [Federal] Rule 11 basis in law or fact when they asserted these defenses and should be required to reveal this Rule 11 basis, as well as other presently-known facts on the matter, when responding to Plaintiffs' contention interrogatories, regardless of how much discovery has transpired."); United States *ex rel.* O'Connell v. Chapman Univ., 245 F.R.D. 646, 649 (C.D. Cal. 2007) ("Requiring a party to answer contention interrogatories is 'consistent with Rule 11 of the Federal Rules of Civil Procedure, [which requires that] plaintiffs must have some factual basis for the allegations in their complaint . . . .'" (quoting Cooperman v. One Bancorp (*In re* One Bancorp Sec. Litig.), 134 F.R.D. 4, 8 (D. Me. 1991))).

Well-tailored contention interrogatories are particularly appropriate early in an action when true "notice pleading" are involved because they help the requesting party learn the responding party's theories. This, in turn, allows the requesting party to narrow discovery's scope and seek information relevant to the claim or defense, thereby saving valuable time and resources.

[30] *Cf. Firetrace*, 2009 U.S. Dist. LEXIS 2972, at *7; *Cornell Research*, 223 F.R.D. at 67; Cable & Computer Tech. v. Lockheed Saunders, Inc., 175 F.R.D. 646, 651 (C.D. Cal. 1997); Cooperman v. One Bancorp (*In re* One Bancorp Sec. Litig.), 134 F.R.D. 4, 8 (D. Me. 1991).

[31] TEX. R. CIV. P. 197.3.

[32] *See id.* 192.5(c)(1).

anticipation of litigation or for trial."[33] In the same vein, the work-product privilege does not apply to interrogatories asking a party to identify persons with knowledge about, or documents concerning, an allegation, claim, or defense or particular facts, irrespective of how the party or its attorney learned about the persons' or documents' identity.[34]

[33] *Id.*; *accord id.* 194.2(c) (providing that a party may request disclosure of legal theories and factual bases of responding party's claims or defenses), 197.1 (providing that an interrogatory may ask responding party to state legal theories and to describe in general the factual bases for its claims or defenses); *In re* Ochoa, No. 12-04-00163-CV, 2004 Tex. App. LEXIS 4866, at *4 (Tex. App.—Tyler May 28, 2004, orig. proceeding) ("A party's legal contentions and the factual bases for those contentions are discoverable. Even if made or prepared in anticipation of litigation or for trial, information discoverable under Rule 192.3 concerning a party's contentions is not work product protected from discovery." (citation omitted)); Owens v. Wallace, 821 S.W.2d 746, 748 (Tex. App.—Tyler 1992, orig. proceeding) ("It is also not ground for objection that an interrogatory propounded pursuant to [former Texas] Rule 168 involves an opinion or contention that relates to fact or the application of law to fact.' The six interrogatories at issue fall squarely within that provision. The plaintiffs' work product objections to interrogatories numbers 3, 5, 7, 8, 9, and 10, were without merit." (citations omitted)).

Federal courts have consistently held that the work-product and attorney-client privileges do *not* apply to contention interrogatories. *E.g.*, Spadaro v. City of Miramar, No. 11-61607-CIV-COHN/SELTZER, 2012 U.S. Dist. LEXIS 103278, at *8–10 (S.D. Fla. July 25, 2012) ("Numerous courts have rejected the proposition that interrogatories which seek material or principal facts that support a party's allegations violate the work product doctrine. . . . The City Defendants' interrogatories are designed to elicit the factual bases which encompass Plaintiff's specific factual assertions in the Amended Complaint. These narrowly tailored requests do not impinge on counsel's work product and are instead designed to narrow the issues."); *In re* Rail Freight Surcharge Antitrust Litig., 281 F.R.D. 1, 4 (D.D.C. 2011) ("[I]n answering contention interrogatories the party is only giving the factual specifics which the party contends supports a claim, and this in no way impinges on the attorney's impressions or analysis as to how the attorney will endeavor to apply the law to the facts. If this elementary principle were not applicable, contention interrogatories would not exist." (quoting King v. E.F. Hutton & Co., Inc., 117 F.R.D. 2, 5 n.3 (D.D.C. 1987))); Presbyterian Manors, Inc. v. Simplexgrinnell, L.P., No. 09-2656-KHV, 2010 U.S. Dist. LEXIS 126390, at *10 (D. Kan. Nov. 30, 2010) (holding that neither the attorney-client nor the work-product privileges apply to contention interrogatories); Oklahoma v. Tyson Foods, Inc., 262 F.R.D. 617, 630, 630 n. 15 (N.D. Okla. 2009) ("Attorneys often refuse to disclose during discovery those facts that they have acquired through their investigative efforts and assert, as a basis for their refusal, the protections of the work product doctrine. Where such facts are concerned, as opposed to the documents containing them or the impressions drawn from them, they must be disclosed to the opposing party in response to a proper request for discovery. Otherwise discovery would be a meaningless tool . . . . Indeed, [Federal] Rule 33 expressly permits contention interrogatories that delve into attorney work product 'because it asks for an opinion or contention that relates to fact or the application of law to fact.'").

[34] *See* TEX. R. CIV. P. 192.3(b)–(c), 192.5(c)(3); *cf.* Pouncil v. Branch Law Firm, 277 F.R.D. 642, 649 (D. Kan. 2011) ("The interrogatories ask for Defendants' contentions with respect to the

C. Number of Interrogatories

The discovery control plan applicable to the case, rather than Texas Rule 197, governs the number of interrogatories.[35] Level 1 and 2 cases are limited to twenty-five interrogatories, including "discrete subparts" other than those seeking to identify or authenticate documents.[36] The same limitation applies to a Level 3 case unless the discovery control order expressly provides for more interrogatories.[37]

As pointed out above, under Texas Rules 190.2 and 190.3 and most Level 3 discovery control plans, the limit on the number of interrogatories includes "all discrete subparts." Comment 3 to the Rule explains that a

factual issues of [the case] . . . . The interrogatories also request that Defendants identify the facts and documents supporting their contentions. Defendants, who have the burden of supporting their work product objection, have not shown that answering these interrogatories would reveal the mental impressions, conclusions, opinions, or legal theories of their counsel. Accordingly, Defendants' work product objection . . . is overruled."); *Kolker*, 2011 U.S. Dist. LEXIS 122810, at *20-21 ("The court agrees with Covidien that Kolker cannot claim a privilege over the identity or description of witnesses or documents that may be used to support Kolker's allegations. Covidien has not requested a summary or even identification of 'interviews, statements, memoranda, correspondence, briefs, mental impressions,' or other aspects of an attorney's work-product subject to the protections of the work-product doctrine. Kolker argues that the identity of '[t]he exact witness by whom a relevant fact may be proven at the trial' is protected work product. In *McNamara v. Erschen*, [8 F.R.D. 427, 429 (D. Del. 1948)], however, the court distinguished between an interrogatory 'seeking only the identity of persons known to the plaintiff in connection with those allegations of the complaint' and 'the subsequent mental determination of what precise witnesses are best available to prove a relevant fact,' especially when such identity is requested at an early stage of the litigation." (footnote omitted)); Smith v. Café Asia, 256 F.R.D. 247, 255 (D.D.C. 2009) ("This Court has stated that an interrogatory which requests the identification of documents relating to facts may be served on a party."); U.S. v. Exxon Corp., 87 F.R.D. 624, 638 (D.D.C. 1980) ("For example, Interrogatory 42 asks the DOE to identify documents directing FEA personnel that a lease-by-lease BPCL was permissible for unitized property. Exxon argues that, even if the underlying documents constitute work-product materials, the DOE cannot claim work-product in refusing to at least identify these documents. The mere identification of documents fails to violate the work-product privilege.").

[35] TEX. R. CIV. P. 190 cmt. 1. Texas Rule 190 provides for three levels of discovery: Levels 1, 2, and 3. *Id.* 190.2–.4.

[36] *Id.* 190.2–.3.

[37] *Id.* 190.4(b) ("The discovery limitations of Rule 190.2, if applicable, otherwise of Rule 190.3 apply [to a Level 3 case] unless specifically changed in the discovery control plan ordered by the court.").

"discrete subpart" "is, in general, one that calls for information that is not logically or factually related to the primary interrogatory."[38]

[38] *Id.* 190 cmt. 3. The 25-interrogatory limit as well as the concept of "discrete subparts" is derived from Federal Rule 33(a), which limits parties to "25 written interrogatories, including all discrete subparts." *See id.*190 cmt. 1 (citing FED. R. CIV. P. 33 advisory committee's note).

Neither Federal Rule 33 nor its Advisory Committee Note defines "discrete subpart." Rather, the note provides a single illustration of non-discrete subparts: "a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the times, place, persons present, and contents be stated separately for each communication." FED. R. CIV. P. 33 advisory committee's note.

Many federal courts use the "related-question" test in determining whether interrogatory subparts are discrete. *See, e.g.*, Perez v. Aircom Mgmt. Corp., No. 12-60322-CIV-WILLIAMS/SELTZER, 2012 U.S. Dist. LEXIS 136140, at *2 (S.D. Fla. Sept. 24, 2012) ("District courts in the Eleventh Circuit, like most district courts in other circuits, have adopted and applied 'the "related question" test to determine whether the subparts are discrete, asking whether the particular subparts are "logically or factually subsumed within and necessarily related to the primary question."' (quoting Mitchell Co. v. Campus, No. CA 07-0177-KD-C, 2008 U.S. Dist. LEXIS 47505, at *42 (S.D. Ala. June 16, 2008))); Hasan v. Johnson, No. 1:08-cv-00381-GSA-PC, 2012 U.S. Dist. LEXIS 21578, at *12–13 (E.D. Cal. Feb. 21, 2012) ("Although the term 'discrete subparts' does not have a precise meaning, courts generally agree that 'interrogatory subparts are to be counted as one interrogatory . . . if they are logically or factually subsumed within and necessarily related to the primary question.'" (quoting Safeco of Am. v. Rawstron, 181 F.R.D. 441, 445 (C.D. Cal. 1998))); Imbody v. C & R. Plating Corp., No. 1:08-CV-00218, 2010 U.S. Dist. LEXIS 12682, at *2 (N.D. Ind. Feb. 12, 2010) ("Interrogatory subparts are to be counted as one interrogatory if they are logically or factually subsumed within and necessary related to the primary question.").

Other courts use the "discrete bits of information" test. *See, e.g.*, Powell v. Home Depot USA, Inc., No. 07-80435-Civ-Hurley/Hopkins, 2008 U.S. Dist. LEXIS 49144, at *6–7 (S.D. Fla. June 16, 2008) ("[O]ther courts have applied a different 'discrete information test,' which requires that interrogatory subparts that seek discrete pieces of information may be counted separately . . . ."); Oliver v. City of Orlando, No. 6:06-cv-1671-Orl-31DAB, 2007 U.S. Dist. LEXIS 80552, at *8 (M.D. Fla. Oct. 31, 2007) (same).

Still, other federal courts use the "common theme" test. *See, e.g.*, Jacks v. DirectSat USA, LLC, No. 10 C 1707, 2011 U.S. Dist. LEXIS 9351, at *5 (N.D. Ill. Feb. 1, 2011) ("'[A]n interrogatory containing subparts directed at eliciting details concerning a common theme should be considered a single question . . . .'"); Semsroth v. City of Wichita, No. 06-2376-KHV-DJW, 2008 U.S. Dist. LEXIS 35380, at *6 (D. Kan. Apr. 28, 2008) ("[T]his Court has observed that an interrogatory containing subparts directed at eliciting details concerning a 'common theme' should generally be considered a single interrogatory."); *In re* Ullico Inc. Litig., No. 03-01556 (RJL/AK), 2006 U.S. Dist. LEXIS 97578, at *10–*11 (D.D.C. July 18, 2006) ("In analyzing whether a subpart is a separate question, this court looks to whether the subpart introduces a line of inquiry that is separate and distinct from the inquiry made by the portion of the interrogatory that proceeds it. An interrogatory directed at eliciting details concerning a *common theme* should not be counted as multiple interrogatories." (internal quotation marks and citations omitted)).

Although no Texas decision discusses what constitutes a "discrete subpart,"[39] many federal courts have done so under the federal rule on which the Texas rule is based: Federal Rule 33(a)(1). Federal courts uniformly have held that a "discrete subpart" is not determined by whether the inquiry is a sub-numbered or sub-lettered part of an interrogatory.[40] If such numbering or lettering were required, a party could easily circumvent the limit by eliminating numbering or lettering. In other words, unnumbered or unlettered "subparts" can be counted as "discrete subparts"[41] and, conversely, sub-numbered or sub-lettered parts of an interrogatory may not be "discrete subparts."[42]

The best test of whether questions within a single interrogatory are "logically or factually related" is:

> [W]hether the first question is primary and subsequent questions are secondary to the primary question; or whether the subsequent question could stand alone and is independent of the first question? In other words, "if the first question can be answered fully and completely without answering the second question, then the second question is totally independent of the first and not factually subsumed within and necessarily related to the primary question."[43]

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[39] In *In re Swepi L.P.*, 103 S.W.3d 578, 589 (Tex. App.—San Antonio 2003, orig. proceeding), the court, after parroting the definition in Comment 3 to Rule 190.3, concluded without explanation that the interrogatories at issue did not contain discrete subparts. *Id.*

[40] *Hasan*, 2012 U.S. Dist. LEXIS 21578, at *12–13.

[41] *Cf.* Sampson v. Schenck, No. 8:07CV155, 2010 U.S. Dist. LEXIS 82486, at *14 (D. Neb. July 9, 2010) ("'Not numbering the subparts of interrogatories does not change the fact that, if the interrogatories require discrete pieces of information, those interrogatories are to be counted as if the subparts were specifically itemized.'" (quoting Prochaska & Assoc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 155 F.R.D. 189, 191 (D. Neb. 1993))); *Semsroth*, 2008 U.S. Dist. LEXIS 35380, at *4–5 ("'Extensive use of subparts, whether explicit or implicit, could defeat the purposes of the numerical limit contained in Rule 33(a), or in a scheduling order, by rendering it meaningless unless each subpart counts as a separate interrogatory.'" (quoting Williams v. Bd. of Cnty. Comm'rs, 192 F.R.D. 698, 701 (D. Kan. 2000))); Safeco of Am. v. Rawstron, 181 F.R.D. 441, 445 (C.D. Cal. 1998) ("One question that is easily answered is whether subparts must be separately numbered or lettered to count as multiple interrogatories. The better view is that they need not be, or any party could easily circumvent the rule simply by eliminating the separate numbering or lettering of the subparts.").

[42] *See* cases cited *infra* notes 43–45.

[43] Estate of Manship v. United States, 232 F.R.D. 552, 555 (M.D. La. 2005) (footnote and citation omitted) (quoting Krawczyk v. City of Dallas, No. 3:03-CV-0584-D, 2004 U.S. Dist.

Stating the rule, however, is easier than applying it.[44] At bottom, the determination of what constitutes a discrete subpart must be decided on an interrogatory-by-interrogatory basis. In doing so, a court should "utilize a common-sense, rather than overly technical, approach to construing subparts of interrogatories. This is in line with the approach recommended in [8B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2168.1 (3d ed. 2010)] . . . ."[45] Nonetheless, a few hard and fast rules regarding what constitutes a discrete subpart exist.

For example, an interrogatory asking for the factual bases for the denial of *each* request for admission in a set of requests for admission containing multiple requests generally should be counted as one interrogatory for each denied request.[46] This is because each request for admission usually deals with a separate or discrete topic.[47] Similarly, an interrogatory seeking the factual bases for multiple affirmative defenses typically is counted as a separate interrogatory for each defense.[48] And, an interrogatory asking for

LEXIS 30011, at *7 (N.D. Tex. Feb. 27, 2004)); *accord* Mezu v. Morgan State Univ., 269 F.R.D. 565, 572–73 (D. Md. 2010); Kendall v. GES Exposition Servs., Inc., 174 F.R.D. 684, 685–86 (D. Nev. 1997).

[44] Counting interrogatories requires a pragmatic approach that is reminiscent of Supreme Court Justice Stewart's memorable definition of obscenity. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964). That is, most courts know a discrete subpart when they see it. *See id.* ("I know [obscenity] when I see it.").

[45] Jackson v. Alton & S. Ry. Co., No. 07-807-GPM, 2008 U.S. Dist. LEXIS 53310, at *3 (S.D. Ill. July 11, 2008); *accord* Imbody v. C & R Plating Corp., No. 1:08-CV-00218, 2010 U.S. Dist. LEXIS 12682, at *3 (N.D. Ind. Feb. 12, 2010).

[46] *Cf.* Bourdganis v. N. Trust Bank, No. 08-CV-11282, 2008 U.S. Dist. LEXIS 82089, at *6 n.2 (E.D. Mich. Oct. 16, 2008) (holding that an interrogatory asking for the factual basis for the denial of each request for admission "which is not admitted in full" counts as twelve discrete subparts because the responding party denied twelve requests); Mitchell Co. v. Campus, No. CA 07-0177-KD-C, 2008 U.S. Dist. LEXIS 47505, at *55–56 (S.D. Ala. June 16, 2008) (same); *Estate of Manship*, 232 F.R.D. at 557 (same); Am. Chiropractic Ass'n v. Trigon Healthcare, Inc., No. 1:00CV00113, 2002 U.S. Dist. LEXIS 6199, at *8 (W.D. Va. Mar. 18, 2002) (same); *Rawstron*, 181 F.R.D. at 446 (same).

[47] *See Estate of Manship*, 232 F.R.D. at 557. This may not always be the case: "[A]n interrogatory seeking the basis for the denial of several requests for admission may be viewed as a single interrogatory where each area of the requests for admission concerns the same subject area." *Id.*

[48] Bovarie v. Schwarzenegger, No. 08cv1661 LAB (NLS), 2011 U.S. Dist. LEXIS 17006, at *5 (S.D. Cal. Feb. 22, 2011) ("An interrogatory that seeks a response as to multiple affirmative defenses is counted as a separate interrogatory for each affirmative defense."); *see* FTC v. Think All Publ'g, L.L.C., No. 4:07-cv-011, 2008 U.S. Dist. LEXIS 18557, at *4–5 (E.D. Tex. Mar. 10,

information as well as the identity of persons with knowledge about the information often is held to constitute two interrogatories.[49]

In contrast, an interrogatory asking for the details about communications or allegedly false or fraudulent representations are counted as one interrogatory "even though it requests that the times, places, persons present, and contents be stated separately for each communication" or representation.[50] Similarly, an interrogatory asking about (1) persons with knowledge about a claim, defense, allegation, or fact and the subject area of their knowledge, or (2) other lawsuits, including the identity of each cause of action asserted, the parties, the court in which it was filed, the date it was

2008) (holding that an interrogatory asking for the legal and factual bases for each allegation denied in a complaint is two interrogatories times number of denials under Federal Rule 33(a)(1)).

[49] *Cf.* Walech v. Target Corp., No. C11-254 RAJ, 2012 U.S. Dist. LEXIS 44119, at *12 (W.D. Wash. Mar. 28, 2012) ("[T]hese are two separate inquiries: (1) state the relevant facts for a particular contention, and (2) identify the evidence (either documents or witnesses) that support the facts stated."); *Imbody*, 2010 U.S. Dist. LEXIS 12682, at *11 ("This interrogatory propounds two separate interrogatories—[one] inquiring about the physical requirements of the job, and the remaining subpart requesting the names of co-workers."); Superior Commc'ns v. Earhugger, Inc., 257 F.R.D. 215, 218 (C.D. Cal. 2009) ("Interrogatory no. 1 still has at least three distinct subparts: facts; persons; and documents."); United States *ex rel.* Pogue v. Diabetes Treatment Ctrs. of Am., Inc., 235 F.R.D. 521, 527 (D.D.C. 2006) (noting that an interrogatory seeking "all facts supporting Relator's contention . . . ; asks Relator to identify each person who knew[;] . . . [and] requests that Relator identify all documents that support the contention" is "more accurately counted as three separate interrogatories").

Some federal courts have found that a request for information and a request for documents that pertain to an event are two separate interrogatories "because knowing that an event occurred is entirely different from learning about documents that evidence that it occurred." *Superior Commc'ns*, 257 F.R.D. at 218; *accord Walech*, 2012 U.S. Dist. LEXIS 44119, at *12; Ulibarri v. City & Cnty. of Denver, No. 07-cv-1814-WDM-MJW, 2008 U.S. Dist. LEXIS 93270, at *4–5 (D. Colo. Nov. 10, 2008); IOSTAR Corp. v. Stuart, No. 1:07 CV 133 DB, 2008 U.S. Dist. LEXIS 123646, at *4 (D. Utah Apr. 25, 2008); Dimitrijevic v. TV&C GP Holding, Inc., No. H-04-3457, 2005 U.S. Dist. LEXIS 41399, at *11 (S.D. Tex. Aug. 24, 2005); Banks v. Office of Senate Sergeant-At-Arms, 222 F.R.D. 7, 10 (D.D.C. 2004). This is not, however, the case under the Texas discovery rules because Rules 190.2 and .3 specifically provide that interrogatories asking a party to "only to identify or authenticate specific documents" do not count against an interrogatory limit. TEX. R. CIV. P. 190.2(c)(3), .3(3).

[50] *Cf.* FED. R. CIV. P. 33 advisory committee's note; *see* Theobles v. Indus. Maint. Co., 247 F.R.D. 483, 485 (D.V.I. 2006) (noting that an interrogatory asking the responding party "to state whether a particular product was tested and then . . . when the tests occurred, who performed them, how . . . they were conducted and the result" constituted a single interrogatory (quoting *Banks*, 222 F.R.D. at 10) (internal quotation marks omitted)); *Estate of Manship*, 232 F.R.D. at 555 (holding that interrogatory subparts seeking the substance of communications, their dates and places, and all persons participating in them constituted a single interrogatory).

filed, and its outcome, are one interrogatory.[51] Further, an interrogatory asking the responding party to identify each negligent act or omission, contract breach, fraudulent representation, fiduciary breach and the like underlying a claim is a single interrogatory even though the answer may reveal multiple acts, breaches, representations, or omissions.[52]

[51] *Cf. Walech*, 2012 U.S. Dist. LEXIS 44119, at *15–16 ("[I]dentifying parties, nature of case, agency or court, etc. are logically subsumed within and necessarily relate to the primary question of identifying lawsuits . . . ."); Calderon v. Reederei Claus-Peter Offen GmbH & Co., No. 07-61022-CIV-COHN/SELTZER, 2008 U.S. Dist. LEXIS 76323, at *5, (S.D. Fla. Sept. 11, 2008) (noting that questions about prior lawsuits "have been deemed to be not discrete and, hence, constitute one interrogatory"); Powell v. Home Depot USA, Inc., No. 07-80435-Civ-Hurley/Hopkins, 2008 U.S. Dist. LEXIS 49144, at *8–9 (S.D. Fla. June 16, 2008) (stating that an interrogatory requesting the names, addresses, telephone numbers of persons with knowledge concerning the facts or claims, as well as the subject matter of the knowledge, "should be treated as a single interrogatory"); Forum Architects LLC v. Candela, No. 1:07CV190-SPM/AK, 2008 U.S. Dist. LEXIS 4705, at *4 (N.D. Fla. Jan. 23, 2008) ("No. 2 is also a standard question about persons with knowledge and the subject matters of their knowledge. This is considered one item of the initial disclosure requirement of Rule 26(a)(1)(A) and will be considered one question here as well."); *see* Semsroth v. City Of Wichita, No. 06-2376-KHV-DJW, 2008 U.S. Dist. LEXIS 35380, at *17–18 (D. Kan. Apr. 28, 2008) (stating that instructions requiring multiple facets of information in order to indentify people, documents or events did not "automatically convert a single question into multiple interrogatories").

[52] For example, in *Cardenas v. Dorel Juvenile Group, Inc.*, 231 F.R.D. 616, 619–20 (D. Kan. 2005), an interrogatory asked the plaintiffs:

> If you contend that the Child Restraint System was defectively designed, state with particularity each and every element of the design which you contend was defective, how such design was defective and the manner in which the injuries were caused, contributed to and/or permitted to occur as the result of each alleged design defect.

Id. at 617. The plaintiffs refused to answer it, claiming that it comprised more than forty separate interrogatories, exceeding the number allotted to the parties. *Id.* Although the court recognized that the interrogatory spanned multiple alleged design defects, the court ultimately disagreed with the plaintiffs and held that the question constituted a single interrogatory surrounding a common theme:

> While this interrogatory could be construed as having three discrete subparts (i.e., (1) identify the element of each alleged design defect, (2) state how such element of design was defective, and (3) identify the manner in which each defect caused any alleged injuries), the fact that it seeks this information about multiple alleged design defects does not turn it into multiple interrogatories. This interrogatory does not contain multiple subparts that discuss various, unrelated topics.

Id. at 619–20.

Of course, not all "identification" questions necessarily relate to a common theme. For example, an interrogatory asking for the identity of executives who have been disciplined but not

Unlike the number of interrogatories, which almost always are limited, there is no limit on the number of sets of interrogatories that can be served as long as the total number of interrogatories does not exceed the limitation of Texas Rule 190.2 or 190.3 or the discovery-control plan.[53]

D. Interrogatory Responses

A party must respond to interrogatories within thirty days after their service[54] unless the time is extended due to the manner of service, by the parties' agreement, or by court order,[55] "except that a defendant served with interrogatories before the defendant's answer is due need not respond until 50 days after service of the interrogatories."[56] The response to each interrogatory must be in writing,[57] preceded by the interrogatory,[58] and must include the party's answer, if the interrogatory is not objected to in its entirety,[59] and may include objections and privilege assertions as allowed by Texas Rule 193.[60]

terminated for five different types of actions counts as five distinct interrogatories. Swackhammer v. Sprint Corp. PCS, 225 F.R.D. 658, 663–65 (D. Kan. 2004).

The following cases provide examples of interrogatories with and without discrete subparts: *Walech*, 2012 U.S. Dist. LEXIS 44119, at *11–17; Hasan v. Johnson, No. 1:08-cv-00381-GSA-PC, 2012 U.S. Dist. LEXIS 21578, at *11–15 (E.D. Cal. Feb. 21, 2012); High Point Sarl v. Sprint Nextel Corp., No. 09-2269-CM-DJW, 2011 U.S. Dist. LEXIS 103118, at *13–33 (D. Kan. Sept. 12, 2011); Mitchell Co. v. Campus, No. CA 07-0177-KD-C, 2008 U.S. Dist. LEXIS 47505, at *42–56 (S.D. Ala. June 16, 2008); *In re* Ullico Inc. Litig., No. 03-01556 (RJL/AK), 2006 U.S. Dist. LEXIS 97578, at *9–17 (D.D.C. July 18, 2006).

[53] *See* TEX. R. CIV. P. 190.2(c)(3), .3(b)(3).

[54] *Id.* 197.2(a).

[55] *See id.* 193.1 ("A party must respond to written discovery within the time provided by court order or these rules.").

[56] *Id.* 197.2(a).

[57] *Id.* 197.2(a). Oral information is not a substitute for written answers. *See, e.g.*, Sharp v. Broadway Nat'l Bank, 784 S.W.2d 669, 671 (Tex. 1990) (holding that oral identification of witnesses was insufficient).

[58] TEX. R. CIV. P. 193.1 ("The responding party's answers, objections, and other responses must be preceded by the request to which they apply.").

[59] *See id.* 193.2(b) ("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.").

[60] *Id.* Objections in general and the assertion of privilege are discussed in Parts IV.A and IV.B.2, *infra.*

The responding party should answer each interrogatory separately and completely.[61] This means that answers to interrogatories must include sufficient detail to respond fully to the question.[62] If the responding party cannot answer the interrogatory because it lacks the information to do so, it should not simply refuse to answer.[63] Rather, the responding party should respond in such a way that apprises the requesting party that the information is unavailable.[64] Moreover, "a promise to provide the requested information in the future is not a sufficient response to an interrogatory."[65]

Additionally, because each interrogatory must be answered separately and fully, it generally is improper to incorporate outside material by reference.[66] Nonetheless, the propriety of such incorporation by reference is

[61] *Id.*; *id.* 193.1 ("When responding to written discovery, a party must make a complete response based on all information reasonably available to the responding party or its attorney at the time the response is made."); Orkin Exterminating Co. v. Williamson, 785 S.W.2d 905, 910 (Tex. App.—Austin 1990, writ denied) (holding, under former Texas Rule 168, that "interrogatories must be answered separately and fully"); *cf.* Stevens v. Federated Mut. Ins. Co., No. 5:05-CV-149, 2006 U.S. Dist. LEXIS 51001, at *10 (N.D.W. Va. July 25, 2006) (noting that a party must answer each interrogatory "fully").

[62] *Id.* 193.1.

[63] *Cf.* IMA N. Am., Inc., v. Marlyn Nutraceuticals, Inc., No. CV-06-0344-PHX-LOA, 2007 U.S. Dist. LEXIS 61269, at *8–9 (D. Ariz. Aug. 17, 2007) ("If a party is unable to supply the requested information, the party may not simply refuse to answer, but must state under oath that he is unable to provide the information and set forth the efforts he used to obtain the information." (quoting Stevens v. Federated Mut. Ins. Co., No. 5:05-CV-149, 2006 U.S. Dist. LEXIS 51001 (N.D.W. Va. July 25, 2006); FED. R. CIV. P. 33(b)(3)) (internal quotation marks omitted)); EEOC v. Kovacevich "5" Farms, No. 1:06-cv-0165-OWW-TAG, 2007 U.S. Dist. LEXIS 43672, at *6–7 (E.D. Cal. June 1, 2007) (same); Frontier-Kemper Contructors, Inc. v. Elk Run Coal Co., 246 F.R.D. 522, 529 (S.D.W. Va. 2007) (same); Hansel v. Shell Oil Corp., 169 F.R.D. 303, 305 (E.D. Pa. 1996) (same).

[64] *Cf.* Rega v. Beard, No. 08-156, 2010 U.S. Dist. LEXIS 57668, at *4–6 (W.D. Pa. June 10, 2010); *Kovacevich "5" Farms*, 2007 U.S. Dist. LEXIS 43672, at *6–7; *Frontier-Kemper*, 246 F.R.D. at 529; *Hansel*, 169 F.R.D. at 305–06. The best way to do this is for the responding party to state under oath its inability to provide the information sought, disclose any information it has, and describe generally its effort to obtain the information. *See Rega*, 2010 U.S. Dist. LEXIS 57668, at *4–5; *Kovacevich "5" Farms*, 2007 U.S. Dist. LEXIS 43672, at *6–7; *Hansel*, 169 F.R.D. at 305–06.

[65] Innovative Piledriving Prods., LLC v. Unisto Oy, No. 1:04-CV-453, 2005 U.S. Dist. LEXIS 23652, at *4 (N.D. Ind. Oct. 14, 2005); *accord* Oleson v. Kmart Corp., 175 F.R.D. 560, 564 (D. Kan. 1997).

[66] *Cf.* French v. Wachovia Bank NA, No. 06-CV-869, 2010 U.S. Dist. LEXIS 82222, at *4 (E.D. Wis. June 29, 2010) ("Referring to a multiple page expert report does not constitute a proper response to an interrogatory. It is not the defendant's duty to sift through an expert report in an attempt to glean the information sought in the interrogatory."); Gipson v. Sw. Bell Tel. Co., No.

evaluated on an interrogatory-by-interrogatory basis, and it may be acceptable for an interrogatory answer to refer to other interrogatories or discovery if the referral is clear and precise and the other discovery fully answers the interrogatory.[67] It is, however, never proper to incorporate by reference the allegations in the responding party's pleadings even if the pleadings are verified.[68] This is because interrogatory answers are

08-2017-EFM-DJW, 2009 U.S. Dist. LEXIS 25457, at *19–20 (D. Kan. Mar. 24, 2009) ("As a general rule, a responding party may not answer an interrogatory by simply referring the requesting party to other documents."); Equal Rights Ctr. v. Post Props., Inc., 246 F.R.D. 29, 35 (D.D.C. 2007) ("[I]t is technically improper and unresponsive for an answer to an interrogatory to refer to outside material, such as pleadings, depositions, or other interrogatories."); Pac. Lumber Co. v. Nat'l Union Fire Ins. Co., No. C 02-4799 SBA (JL), 2005 U.S. Dist. LEXIS 1773, at *14–15 (N.D. Cal. Jan 5, 2005) ("Responding to an interrogatory with a reference to another interrogatory or to a document or pleading is improper. 'It is well established that an answer to an interrogatory must be responsive to the question. It should be complete in itself and should not refer to the pleadings, or to depositions or other documents, or to other interrogatories, at least when such references make it impossible to determine whether an adequate answer has been given without an elaborate comparison of answers.'" (quoting Smith v. Logansport Comm. Sch. Corp., 139 F.R.D. 637, 650 (N.D. Ind. 1991))); Melius v. Nat'l Indian Gaming Comm'n, No. 98-2210 (TFH/JMF), 2000 U.S. Dist. LEXIS 22747, at *4 (D.D.C. July 21, 2000) (holding that it is improper to answer an interrogatory by cross-referencing pleadings and exhibits); Martin v. Easton Pub. Co., 85 F.R.D. 312, 315 (E.D. Pa. 1980) ("Incorporation by reference to a deposition is not a responsive answer for '[t]he fact that a witness testified on a particular subject does not necessary mean that a party who is required to answer interrogatories adopts the substance of the testimony to support his claim or contention.' Plaintiff also cannot answer one interrogatory simply by referring defendants to another equally unresponsive answer.").

[67] *Cf.* Walls v. Paulson, 250 F.R.D. 48, 52 (D.D.C. 2008) ("While not 'strictly proper,' there is authority that one may answer one interrogatory by referring to another interrogatory. Such determinations must be made on a case-by-case basis . . . ." (citations omitted)).

[68] *Cf.* Hawn v. Shoreline Towers Phase I Condo. Ass'n, No. 3:07cv97/RV/EMT, 2007 U.S. Dist. LEXIS 58032, at *6–7 (N.D. Fla. Aug. 9, 2007) ("[I]t is insufficient to answer an interrogatory by merely referencing allegations of a pleading. Plaintiff's verbatim copying of paragraphs contained in the complaint is no more effective an answer to question two than his bare citation to the complaint." (citations omitted)); Davidson v. Goord, 215 F.R.D. 73, 77 (W.D.N.Y. 2003) ("Nor it is [sic] permissible to refuse to provide answers to interrogatories . . . or documents in response to a request . . . on the ground that information sought can be gleaned from the requested party's pleading . . . . As answers to interrogatories . . . must be in a form suitable for use at trial, it is insufficient to answer by merely referencing allegations of a pleading."); DiPietro v. Jefferson Bank, 144 F.R.D. 279, 282 (E.D. Pa. 1992) ("[T]he fact that plaintiff's complaint is sworn does not make it any more acceptable to answer an interrogatory solely by referencing paragraphs of that sworn complaint."); Stabilus v. Haynsworth, Baldwin, Johnson & Greaves, P.A., 144 F.R.D. 258, 263–64 (E.D. Pa. 1992) ("As defendant argues, merely restating the general allegations of the complaint is not a proper answer to an interrogatory. However, plaintiff does not even restate the allegations in the complaint. Rather, plaintiff's response is to

admissible in support of a summary judgment motion and as affirmative or impeachment evidence at trial, whereas pleadings cannot be used by the pleader to establish facts in support of its claim or defense as they are merely statements of the drafting attorney.[69]

Under Texas Rule 193.1, a party answering an interrogatory "must make a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made."[70] In other words, the responding party must provide all information reasonably available to it, even information in the possession of its attorneys, investigators, or other agents.[71] In the case of an organizational party, such as a corporation, partnership, limited-liability company, or unincorporated association, the duty to provide all information reasonably available includes information reasonably imputed to the party, including information possessed by its officers, directors, employees, partners, managers, or members.[72] For example, a corporation answering interrogatories must

'See plaintiff's Complaint.' Plaintiff cannot avoid answering interrogatories by referring the defendant to the complaint, no matter how detailed. Thus it is improper to answer an interrogatory merely by repeating the allegations of the complaint."); King v. E.F. Hutton & Co., 117 F.R.D. 2, 6 (D.D.C. 1987) ("Nor is it an adequate response to say that the information is reflected in the complaint, no matter how detailed . . . .").

[69] *Cf. King*, 117 F.R.D. at 6 ("Answers to interrogatories may be relied upon by the opposing party in connection with a motion for summary judgment, can be used as affirmative evidence at trial, and certainly can be used for cross-examination and impeachment. Assertions in the complaint cannot be so used since they are merely the statements of counsel." (footnote omitted)).

[70] TEX. R. CIV. P. 193.1.

[71] *In re* Allied Chem. Corp., 287 S.W.3d 115, 130 (Tex. App.—Corpus Christi 2009, orig. proceeding) (A responding party is "not at liberty to withhold any information from defendant if such information is reasonably available."); *cf.* Felix v. Am. Airlines, Inc., No. 1997/20, 2003 U.S. Dist. LEXIS 10362, at *3–4 (D.V.I. June 16, 2003) ("Answers to interrogatories must include all information with the party's control or known by the party's agents."); Axler v. Scientific Ecology Grp., Inc., 196 F.R.D. 210, 212 (D. Mass. 2000) ("'[A] party is charged with knowledge of what its agents know . . . . A party must disclose facts in its attorneys' possession even though these facts have not been transmitted to the party.'" (quoting 8A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2177 (2d ed. 1994)).

[72] *Cf.* Thomas v. Cate, 715 F. Supp. 2d 1012, 1032 (E.D. Cal. 2010) ("[Federal] Rule 33 imposes a duty on the responding party to secure all information *available* to it. Where an interrogatory is directed at a party that is a governmental entity, Rule 33(b)(1)(B) requires the party to furnish information 'available' to an officer or agent of the governmental entity." (citations omitted)); Weddington v. Consol. Rail Corp., 101 F.R.D. 71, 74 (N.D. Ind. 1984) (holding that corporation had duty to discover information from its employees); Trane Co. v. Klutznick, 87 F.R.D. 473, 476 (W.D. Wis. 1980) ("In each of these instances, the courts held that an official answering the interrogatories for a corporation had an affirmative duty to search out all

provide information within the personal knowledge of anyone in the corporation.[73] In the case of an unincorporated association, the organization must provide information known to its members and others under its control.[74]

E. Option to Produce Business Records

When an interrogatory answer can be derived or ascertained from public records, the responding party's business records, or from a compilation, abstract, or summary of the responding party's business records, the responding party, under Texas Rule 197.2(c), may, instead of answering the interrogatory, specify the records from which the answer may be derived, giving sufficient detail to permit the requesting party to identify the records and then, if the records are its business records or a compilation, abstract, or summary of them, afford the requesting party a reasonable opportunity to examine the records, compilation, abstract, or summary.[75] There, however, are a number of prerequisites to the Rule's invocation.

First, the option is limited to the types of records specified in Rule 197.2(c)—"public records, the responding party's business records, or from a compilation, abstract, or summary of the responding party's business records."[76] Thus, for example, the responding party cannot properly refer the requesting party to its own records;[77] to pleadings, deposition

information under the control of the corporation and could not evade answering the interrogatories based on his own limited knowledge. Although this rule of law is based, in part, on the theory that a corporation's knowledge is an amalgamation of the knowledge of each individual officer or employee, it is equally grounded on the theory that a party cannot plead personal ignorance as an excuse for not answering interrogatories if indeed the information is within his control."); Int'l Ass'n of Machinists, Dist. 169 v. Amana Refrigeration, Inc., 90 F.R.D. 1, 2 (E.D. Tenn. 1978) ("[T]he answering agent must consult with other members of the organization who are in possession of the information sought to be discovered and then answer."); Weddington v. Consol. Rail Corp., 101 F.R.D. 71, 75 (N.D. Ind. 1984) (holding that corporation had duty to discover information from its employees).

[73] *Weddington*, 101 F.R.D. at 74; *Trane*, 87 F.R.D. at 476.

[74] *Amana Refrigeration*, 90 F.R.D. at 2.

[75] TEX. R. CIV. P. 197.2(c). Although the Rule is based on Federal Rule 33(d), it is broader than the Federal Rule because the Federal Rule does not allow for a refererence to public records, but rather is limited to the responding party's "business records (including electronically stored information)." FED. R. CIV. P. 33(d).

[76] TEX. R. CIV. P. 197.2(c).

[77] *Cf.* Covad Commc'ns Co. v. Revonet, Inc., 258 F.R.D. 17, 19–20 (D.D.C. 2009) ("Covad is not answering the interrogatories by producing its own records and directing Revonet to search for

transcripts, interrogatory answers, affidavits, or exhibits;[78] documents submitted by the responding party to a federal or state agency;[79] or to a private nonparty's documents.[80] Further, when the responding party is a natural person, it cannot refer the requesting party to its personal records unless they, in fact, are business records.[81]

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the answers in them. It is referring Revonet to Revonet's internal files. This approach is not sanctioned by the Federal Rules of Civil Procedure."); Gipson v. Sw. Bell Tel. Co., No. 08-2017-EFM-DJW, 2009 U.S. Dist. LEXIS 25457, at *20 n.40 (D. Kan. Mar. 24, 2009) (noting that Federal Rule 33(d) "is construed narrowly to apply only to answers that can be derived from the answering party's own 'business records'"); Hawn v. Shoreline Towers Phase I Condo. Ass'n, No. 3:07cv97/RV/EMT, 2007 U.S. Dist. LEXIS 58032, at *7 (N.D. Fla. Aug. 9, 2007) ("Plaintiff's reference to Defendants' business records also is not a sufficient answer to question two."); *In re* Savitt/Adler Litig., 176 F.R.D. 44, 49 (N.D.N.Y. 1997) (holding that Federal Rule 33(d)'s invocation was improper because "the records to which plaintiffs refer in their responses are not their business records as required for use of Rule 33(d)").

[78] *Cf.* SEC v. Elfindepan, 206 F.R.D. 574, 577–78 (M.D.N.C. 2002) ("Next, the documents plaintiff intends to use are not business records as required by [Federal] Rule 33(d). Pleadings, depositions, exhibits, and affidavits . . . are not Rule 33(d) business records." (footnote omitted)); Melius v. Nat'l Indian Gaming Comm'n, No. 98-2210 (TFH/JMF), 2000 U.S. Dist. LEXIS 22747, at *4 n.2 (D.D.C. July 21, 2000) ("Plaintiff cannot seriously protest that [Federal Rule] 33(d) . . . permits him to answer the interrogatory the way he did. The assertion that pleadings, depositions, or exhibits are 'business records' under this rule has been rejected by every court to consider it."); *In re Savitt/Adler*, 176 F.R.D. at 49–50 ("The records referred to by plaintiffs include depositions, answers to interrogatories by other parties and documents produced by defendants during discovery. None of these documents constitute business records of plaintiffs and, therefore, references to those documents and materials by plaintiffs in response to interrogatories was improper."); Cont'l Ill. Nat'l Bank & Trust Co. v. Canton, 136 F.R.D. 682, 687 (D. Kan. 1991) (Federal Rule 33(d) "does not mention deposition transcripts, documents or writings that were generated or discovered, respectively, during the course of prior discovery in the same case.").

[79] *Cf.* Hoffman v. United Telecomms., Inc., 117 F.R.D. 436, 438 (D. Kan. 1987) (holding that documents submitted to the EEOC by defendants in connection with the EEOC's investigation of discrimination claims remain the submitor's business records and do not become the EEOC's business records).

[80] *See* E. & J. Gallo Winery v. Cantine Rallo, S. p. A., No. 1:04cv5153 OWW DLB, 2006 U.S. Dist. LEXIS 84048, at *7 (E.D. Cal. Nov. 8, 2006) ("[M]any of the documents do not qualify as 'business records of the party upon whom the interrogatory has been served' as they appear to be third party business records."); Jobin v. Bank of Boulder (*In re* M & L Business Machine Co.), 167 B.R. 631, 634 n.3 (Bankr. D. Colo. 1994) ("The records referred to, at least those of the Bank or prepared by third party experts, are not M & L's business records. Therefore, [Former Federal] Rule 33(c), which the Trustee has repeatedly invoked, is not applicable.").

[81] *Cf. Gipson*, 2009 U.S. Dist. LEXIS 25457, at *20 n.40 ("Plaintiffs are individuals who would not possess 'business' records within the meaning of [Federal] Rule 33(d). . . . If the answering party is not engaged in a business, it would appear unlikely that it would have 'business records.'" (citation omitted)).

Second, even though Rule 197.2(c) says that the interrogatory answer need only indicate that the information "may" be found in the specified records, by invoking it, the responding party necessarily is representing that the information needed to fully answer the interrogatory is in the designated records.[82]

Of course, not every type of interrogatory can be answered by a review of public or the responding party's business records. For example, an interrogatory asking a party to identify specific documents relating to a subject, contention, claim, defense, or the recollections of parties or their employees generally cannot be answered by a reference to such records.[83] Similarly, contention interrogatories generally cannot be answered by a review of public or the responding party's records because a search of such records is unlikely to reveal the party's contentions or the facts supporting them.[84]

Third, even though Rule 197.2(c) does not explicitly say so, courts uniformly have held that the Rule is implicitly limited to situations in which answering the interrogatory would impose a significant burden or expense

[82] *Cf.* *Elfindepan*, 206 F.R.D. at 576 ("[T]he producing party must show that the named documents contain all of the information requested by the interrogatories."); Sabel v. Mead Johnson & Co., 110 F.R.D. 553, 555 (D. Mass. 1986) ("[T]he party invoking the option provided by [former Federal] Rule 33(c) may not do so if all which can be said is that the answer 'might' be found in the records; the party invoking the option must be able to represent that the party will be able to secure the information which is sought by the interrogatory in the records.").

[83] *Cf.* Budget Rent-A-Car of Mo., Inc. v. Hertz Corp., 55 F.R.D. 354, 358 (W.D. Mo. 1972) ("Since interrogatory numbered 29 basically seeks to elicit such specificity in identifying certain documents rather than a compilation of information, this is clearly not a situation in which [former Federal] Rule 33(c) may properly be used.").

[84] *Cf.* Colony Ins. Co. v. 9400 Abercom, LLC, No. 4:11-cv-255, 2012 U.S. Dist. LEXIS 131839, at *15 (S.D. Ga. Sept. 12, 2012) ("[R]esponding parties normally may not utilize [Federal] Rule 33(d) in answering contention interrogatories because documents reveal evidence, not the facts or contentions a party alleges support its assertions."); United Oil Co. v. Parts Assocs., Inc., 227 F.R.D. 404, 419 (D. Md. 2005) ("'[D]efendants are entitled to know the factual content of plaintiff's claims with a reasonable degree of precision[,]'" which cannot be done by a search of documents.); *Elfindepan*, 206 F.R.D. at 577 ("[Federal] Rule 33(d) was intended to be used in the situation where an interrogatory makes broad inquires and numerous documents must be consulted to ascertain facts, such as identities, quantities, data, action, tests, results, etc. . . . [T]he interrogatories were a mixture of contention interrogatories and requests for statements of fact. These types of interrogatories do not lend themselves to answer by use of Rule 33(d)." (citation omitted)); *In re Savitt/Adler*, 176 F.R.D. at 49 ("Each of the interrogatories at issue directs a plaintiff to 'state the facts' supporting various allegations. Given the particular allegations, . . . the resort to Rule 33(d) in response to these interrogatories was inappropriate.").

on the responding party.[85] The burden, however, need not be so great as to warrant a protective order's entry. And, there is no burden or expense if the responding party would have to answer the interrogatory to properly prosecute its claims or defend against the action.[86]

Fourth, as expressly required by Rule 197.2(c), the burden of compiling the information must be "substantially the same" for the requesting and responding parties.[87] This requires, at the minimum, that the interrogatory's answer only can be obtained from the pertinent records—if the interrogatory can be answered in another way, the other way should be used.[88] For example, if the responding party has already culled the

[85] *Cf.* Hege v. Aegon USA, LLC, No. 8:10-cv-01578-GRA, 2011 U.S. Dist. LEXIS 31772, at *10–11 (D.S.C. Mar. 25, 2011) ("[T]he burden on the respondent must be significant; information that can readily be found by simple reference to documents is insufficient."); Anderson v. Wade, No. 94-111, 1997 U.S. Dist. LEXIS 24079, at *40 (E.D. Ky. Aug. 13, 1997) ("An interrogated party may rely on [Federal Rule] 33(d) only if there is some burden involved in compiling or extracting the requested information, above and beyond the simple task of referring to the records in order to obtain the information necessary to answer the interrogatory."); Am. Hoist & Derrick Co. v. Manitowoc Co., No. 86 C 9383, 1990 U.S. Dist. LEXIS 18569, at *79 n.31 (N.D. Ill. Dec. 14, 1990) ("The rule does not relieve the party of all obligation to answer, especially where only limited information is sought and the interrogated party can easily answer the interrogatories with reference to its own records."); *Sabel*, 110 F.R.D. at 556 ("The next prerequisite for invoking the [Federal] Rule 33(c) option is that there be a burden on the interrogated party if it were required to answer the interrogatory. This perquisite, although not explicitly contained in the rule, is implicit in its provisions."); Clean Burn Fuels v. Purdue Bioenergy, LLC, 2012 Bankr. LEXIS 4732, at *15 (Bankr. M.D.N.C.) ("[T]he interrogated party can rely on [Federal] Rule 33(d) only upon a showing that it would be burdensome to compile or extract the information beyond what is necessary to sufficiently refer to the records.").

[86] *Cf.* L.H. v. Schwarzenegger, No. S-06-2042 LKK GGH, 2007 U.S. Dist. LEXIS 73752, at *9–10 (E.D. Cal. Sept. 21, 2007) ([I]f the responding party would necessarily have to gather the requested information to prepare its own case, objections that it is too difficult to obtain the information for the requesting party are not honored."); Flour Mills of Am., Inc. v. Pace, 75 F.R.D. 676, 680 (E.D. Okla. 1977) (same).

[87] TEX. R. CIV. P. 197.2(c); *cf.* Daiflon, Inc. v. Allied Chem. Corp., 534 F.2d 221, 226–27 (10th Cir. 1976); P.R. Aqueduct & Sewer Auth. v. Clow Corp., 108 F.R.D. 304, 307 (D.P.R. 1985); Pulsecard, Inc. v. Discover Card Servs., Inc., 168 F.R.D. 295, 304–05 (D. Kans. 1996). In *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 357 (1978), the United States Supreme Court framed the test as "where the burden of deriving the answer would not be 'substantially the same,' and the task could be performed more efficiently by the responding party, the discovery rules normally require the responding party to derive the answer itself." *Id.*

[88] *Cf. Daiflon*, 534 F.2d at 226 ("[I]f an answer is readily available in a more convenient form, [former Federal] Rule 33(c) should not be used to avoid giving the ready information to a serving party."); ITT Life Ins. Co. v. Thomas Nastoff, Inc., 108 F.R.D. 664, 666 (N.D. Ind. 1985) (same);

requested information as part of its trial preparation or for other purposes, the burden is not substantially equal.[89]

Although the burden need not be equal, the mere fact that the responding party is more familiar with its records often is insufficient to tip the balance.[90] Instead, other factors must be balanced with the responding party's familiarity with the records, such as the expense of reviewing them and their nature.[91] Familiarity, however, may be the deciding factor with respect to certain records, such as where the documents are difficult to read,

Petroleum Ins. Agency, Inc. v. Hartford Accident & Indem. Co., 111 F.R.D. 318, 321 (D. Mass. 1983) (same).

[89] *Cf. In re* Sulfuric Acid Antitrust Litig., 231 F.R.D. 351, 366 (N.D. Ill. 2005) ("Added to that familiarity is the familiarity of defense counsel, who have already undertaken at least one review of the documents. Consequently, the defense will be more easily able to locate the answers in the documents than would plaintiffs."); *Elfindepan*, 206 F.R.D. at 577 (holding that the plaintiff did not meet the threshold for using [Federal] Rule 33(d) because it already culled the documents for answers to some or all of the interrogatories, meaning it was not equally or less burdensome for defendants to obtain the information); *Petroleum Ins. Agency*, 111 F.R.D. at 322 ("[T]he fact is that as of this time, the defendants have done considerable work to gather the information requested by interrogatories # 25(d) and (e), and, it therefore follows that it is not equally burdensome for the parties to search the records to come up with the answers, since the defendants have already done so.").

[90] *Cf.* Sadofsky v. Fiesta Prods., LLC, 252 F.R.D. 143, 148 (E.D.N.Y. 2008) ("'[O]ne party's familiarity with the documents does not necessarily create a disparity in the ease of discovery that would preclude resort to [former Federal] Rule 33(c).'" (quoting Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 44 (S.D.N.Y. 1984))); *Hege*, 2011 U.S. Dist. LEXIS 31772, at *8 ("'[A Federal] Rule 33(d) response is inappropriate where the interrogatory calls for 'the exercise of particular knowledge and judgment on the part of the responding party.' In that case, the respondent must fully answer the interrogatory by traditional means." (citation omitted) (quoting United Oil Co. v. Parts Assocs., Inc., 227 F.R.D. 404, 419 (D. Md. 2005))); Sabel v. Mead Johnson & Co., 110 F.R.D. 553, 556 (D. Mass. 1986) ("While an interrogated party will always be more familiar with its own records than the interrogating party, familiarity with the records cannot be the sole test. The inquiry is whether the relative burdens are *substantially* the same, not whether they are precisely equal.").

[91] *See* State Farm Mut. Auto Ins. Co. v. Engelke, 824 S.W.2d 747, 752 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding) ("Clearly, the plain terms of [former Texas R]ule 168 require a balancing analysis of the relative burden imposed upon the party seeking and the party responding to discovery by the assertion that the information sought is a matter of public record."); *cf.* Goodrich Corp. v. Emhart Indus., Inc., No. EDCV 04-00079-VAP (SSx), 2005 U.S. Dist. LEXIS 25158, at *10–11 (C.D. Cal. Oct. 12, 2005) ("In determining the relative burdens to the parties, the court must balance the costs of research, the nature of the business records, and the familiarity of the interrogated party with its own documents."); *P.R. Aqueduct*, 108 F.R.D. at 308 (same).

handwritten notes, or the responding party's financial records.[92] If the burden is substantially the same for the parties, the fact that the requesting party's burden is a heavy one does not prevent the responding party from exercising its option to refer to the records rather than compiling the answer.[93]

Fifth, the responding party must specify the records "in sufficient detail to permit the requesting party to locate and identify them as readily as can the responding party."[94] At the minimum, the responding part must specify by location, the category or type of record from which the interrogatory answer can be derived or ascertained.[95] Directing the requesting party to a mass of undifferentiated or unspecified records is insufficient.[96]

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[92] *Cf.* Al Barnett & Son, Inc. v. Outboard Marine Corp., 611 F.2d 32, 35 (3d Cir. 1979) ("Many of the records were handwritten, and apparently difficult to read. The district further observed that each party served with interrogatories was more familiar with his bookkeeping methods and records than the defendant."); RSI Corp. v. IBM Corp., No. 5:08-cv-3414 RMW, 2012 U.S. Dist. LEXIS 105986, at *5–6 (N.D. Cal. July 30, 2012) ("IBM emphasizes that it 'has distinct legal entities operating in more than 170 countries,' each with its 'own accounting systems and entries,' supporting RSI's contention that deciphering IBM's records is 'feasible only for one familiar with the records.'"); *Hege*, 2011 U.S. Dist. LEXIS 31772, at *12 ("Given the complexity of the calculations, the judgment involved in claims processing, and as Mr. Byrne's demonstrated familiarity with the calculation process, this Court cannot conclude that the burden is substantially the same for both parties.").

[93] *Cf.* HTC Corp. v. Tech. Props. Ltd., No. C08-00882 JF (HRL), 2011 U.S. Dist. LEXIS 4531, at *16–18 (N.D. Cal. Jan. 12, 2011) (requiring requesting party to review 1.8 million documents); *P.R. Aqueduct*, 108 F.R.D. at 309 ("The mere fact that an interrogated party has to screen 30,000 documents . . . does not, without more, trigger [former Federal] Rule 33(c)."); Mid-Am. Facilities, Inc. v. Argonaut Ins. Co., 78 F.R.D. 497, 498 (E.D. Wis. 1978) (holding that because the burden of obtaining the information was substantially the same for the parties, the fact that it might take the requesting party thirty days to obtain the information was immaterial).

Of course, if the court decides that the burden is not substantially the same for the parties and that Texas Rule 197.2(c)'s option is unavailable to the responding party, it may still refrain from ordering the interrogatory answered under Texas Rules 192.4 or 192.6, if the interrogatory is unreasonably cumulative or duplicative discovery or the burden or expense of production outweighs the likely benefit. TEX. R. CIV. P. 192.4, 192.6(b).

[94] TEX. R. CIV. P. 197.2(c).

[95] *Cf.* Dunkin' Donuts, Inc. v. N.A.S.T., Inc., 428 F. Supp. 2d 761, 770 (N.D. Ill. 2005) ("Any party that seeks to pursue that [Federal] Rule 33(d) option has the duty to specify 'by category and location, the records from which answers to interrogatories can be derived.'"); *In re* G–I Holdings Inc., 218 F.R.D. 428, 438 (D.N.J. 2003) ("[T]he responding party has a 'duty to specify, by category and location' the records from which he knows the answers to the interrogatories can be found."); Walt Disney Co. v. DeFabiis, 168 F.R.D. 281, 284 (C.D. Cal. 1996) (same).

[96] Finley Oilwell Serv., Inc. v. Retamco Operating, Inc., 248 S.W.3d 314, 321 (Tex. App.—San Antonio 2007, pet. denied) (holding that responding to an interrogatory with boxes of

Finally, if the responding party's business records or a compilation, abstract, or summary of them are specified, the responding party must state a reasonable time and place for examining the records in its response, produce the records at the stated time and place, unless another time and place is agreed to or ordered, and provide the requesting party a reasonable opportunity to review the records.[97]

Of course, the mere fact that Rule 197.2(c)'s option is available to the responding party does not mean that the party needs to avail itself of it.[98] The responding party may decide not to exercise the option because the pertinent records contain other information that it does not want to disclose to the requesting party or because different conclusions can be drawn from the records and it wants to set forth its own conclusion in the interrogatory answer.

F. Signature and Verification

The party's attorney (or the party when *pro se*) must sign the interrogatory response.[99] In addition, the responding party must sign most interrogatory answers under oath.[100] The verification must be unqualified

documents and a paper instructing the requesting party to look in specific boxes filled with documents for information related to the interrogatory did not comply with Texas Rule 197.2(c)); *cf.* Mancini v. Ins. Corp., No. 07cv1750-L(NLS), 2009 U.S. Dist. LEXIS 51321, at *7 (S.D. Cal. June 18, 2009) ("[R]eferring to a wide universe of documents does not specify the records in sufficient detail."); Dibbs v. Franklin Mint, No. C06-604RSM, 2007 U.S. Dist. LEXIS 98903, at *5 (W.D. Wash. Dec. 10, 2007) (holding that a reference to the responding party's entire document production does not specify records in sufficient detail); Cambridge Elecs. Corp. v. MGA Elecs., Inc., 227 F.R.D. 313, 322–23 (C.D. Cal. 2004) (holding that responding party's failure to identify where in its records answers could be found was insufficient under Federal Rule 33(d)).

[97] TEX. R. CIV. P. 197.2(c).

[98] *Cf.* Gipson v. Sw. Bell Tel. Co., No. 08-2017-EFM-DJW, 2009 U.S. Dist. LEXIS 25457, at *19–20 (D. Kan. Mar. 24, 2009) ("An answering party may, however, produce its business records in accordance with [Federal] Rule 33 in lieu of providing a written response, but only if it makes an 'affirmative election' to do so.").

[99] TEX. R. CIV. P. 191.3(a), 197 cmt 2.

[100] Because interrogatories must be answered by the party on whom they are served, verified, and generally answered under oath, emails from the responding party's attorney purporting to answer the interrogatories are insufficient. *See, e.g.*, Villarreal v. El Chile, Inc., 266 F.R.D. 207, 211 (N.D. Ill. 2010). Oral responses also are insufficient. *See, e.g.*, Sharp v. Broadway Nat'l Bank, 784 S.W.2d 669, 671 (Tex. 1990). The party's attorney need not verify the interrogatory answers. TEX. R. CIV. P. 197.2(d).

and cannot be made "to the best of [the party's] knowledge."[101] There are two exceptions to the rule requiring an unqualified verification. First, the responding party may qualify its verification by stating that an answer was "based on information obtained from other persons."[102] This conforms to the reality of how entities often gather responsive information.

Second, "a party need not sign answers to interrogatories about persons with knowledge of relevant facts, trial witnesses, and legal contentions"[103] because such matters generally are determined by the party's attorney's investigation or involve issues of strategy that are not within the responding party's personal knowledge.

Amended or supplemental interrogatory answers must be signed by the party under oath only if the original answers were required to be signed under oath.[104] "The failure to sign or verify answers is only a formal defect that does not otherwise impair the answers unless the party refuses to sign or verify the answers after the defect is pointed out."[105]

III. PRODUCTION REQUESTS

A. Production Requests in General

Texas Rule 196 governs requests for the production, inspection, sampling, photographing, and copying of documents and tangible things.[106]

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[101] *See* Ebeling v. Gawlik, 487 S.W.2d 187, 189 (Tex. App.—Houston [1st Dist.] 1972, no writ) (construing former Texas Rule 168); *see also* Kramer v. Lewisville Mem'l Hosp., 858 S.W.2d 397, 407 (Tex. 1993) ("The supplemental answers were verified based on mere 'knowledge and belief,' while [former] Texas Rule of Civil Procedure 168(5) requires *original* answers to interrogatories to be verified under oath. We have held similar requirements not to be satisfied by verification upon 'information and belief.'" (citation omitted) (citing Burke v. Satterfield, 525 S.W.2d 950, 954–55 (Tex. 1975))).

[102] TEX. R. CIV. P. 197.2(d); *see In re* Swepi L.P., 103 S.W.3d 578, 590 (Tex. App.—San Antonio 2003, orig. proceeding) ("The discovery rules specifically allow a party to state when facts in his or her answer are derived from some other source, such as an expert or another witness.").

[103] TEX. R. CIV. P. 197.2(d).

[104] *Id.* 197 cmt. 2.

[105] *Id.*

[106] *Id.* 196.1 ("A party may serve on another party . . . a request for production or for inspection, to inspect, sample, test, photograph and copy documents or tangible things . . . ."). The other discovery rules relating to production requests are Texas Rules 190, 191, 192, 193, 199.2(5), and 215. *Id.* 190–93, 199.2(5), 215. Under Texas Rule 199.2(5), a deposition notice can require a party to produce documents at its deposition. *Id.* 199.2(5). Such requests are governed by Texas

As with interrogatories and other written discovery requests, production requests must be served no later than thirty days (and in some cases thirty-three or thirty-four days) before the discovery period ends.[107]

Production requests can seek the inspection, sampling, testing, photographing, or copying of any documents or tangible things within discovery's scope.[108] Given Texas Rule 196.1's use of the broad term "tangible things," it is difficult to imagine anything that cannot be required to be produced, tested, or sampled under appropriate circumstances. For example, one federal court, under Federal Rule 34, on which Texas Rule 196 is based, ordered a dead body exhumed and produced[109] and others have ordered DNA testing[110] and handwriting exemplars.[111]

Rule 196. *Id.* Although a Texas Rule 196 production request cannot be served on nonparties, documents and tangible things can be obtained from them under Texas Rule 205.3(a). *Id.* 205.3(a); *see id.* 196.1(a). Texas Rule 196 also governs requests and motions for entry upon parties and nonparties' real property. *Id.* 196.7.

[107] *Id.* 196.1(a). If the production request is served by mail or fax before 5:00 p.m., it must be served at least thirty-three days before the discovery period's end. *Id.* 21a. If it is served by fax after 5:00 p.m., the request must be served at least thirty-four days before the discovery period ends. *Id.*

[108] *Id.* 196.1(a).

[109] Zalatuka v. Metro. Life Ins. Co., 108 F.2d 405, 405 (7th Cir. 1939).

[110] *E.g.*, McGrath v. Nassau Health Care Corp., 209 F.R.D. 55, 61 (E.D.N.Y. 2002).

[111] *E.g.*, Harris v. Athol-Royalston Reg'l Sch. Dist. Comm., 200 F.R.D. 18, 20–21 (D. Mass. 2001) (citing cases).

Courts have ordered the following items produced: (1) business records, *In re* Rogers, 200 S.W.3d 318, 322 (Tex. App.—Dallas 2006, orig. proceeding); Fed. Sav. & Loan Ins. Corp. v. Commonwealth Land Title Ins. Co., 130 F.R.D. 507, 509 (D.D.C. 1990); (3) tax returns, Hall v. Lawlis, 907 S.W.2d 493, 494–95 (Tex. 1995) (orig. proceeding); Scott v. Arex, Inc., 124 F.R.D. 39, 41 (D. Conn. 1989); (4) social security records, Grove v. Aetna Cas. & Sur. Co., 855 F. Supp. 113, 116 (W.D. Pa. 1993); (5) bank records, *In re* Gonzalez, No. 14-10-01186-CV, 2010 Tex. App. LEXIS 9831, at *1–2 (Tex. App.—Houston [14th Dist.] Dec. 14, 2010, orig. proceeding) (mem. op.); Daval Steel Prods., Div. of Francosteel Corp. v. M/V Fakredine, 951 F.2d 1357, 1367–68 (2d Cir. 1991); (6) photographs, TEX. R. CIV. P. 192.3(b); (7) movies and videotapes, Daniels v. Nat'l R.R. Passenger Corp., 110 F.R.D. 160, 161 (S.D.N.Y. 1986); Food Lion, Inc. v. Capital Cities/ABC, Inc., 165 F.R.D. 454, 457 (M.D.N.C. 1996); (8) drawings, TEX. R. CIV. P. 192.3(b); Fin. Bldg. Consultants, Inc. v. Am. Druggists Ins. Co., 91 F.R.D. 59, 60 (N.D. Ga. 1981); (9) employment records, Tri-State Wholesale Associated Grocers, Inc. v. Barrerra, 917 S.W.2d 391, 399 (Tex. App.—El Paso 1996, writ dism'd); Cason v. Builders Firstsource-Se. Grp., Inc., 159 F. Supp. 2d 242, 248 (W.D.N.C. 2001); (10) contracts, Chamberlain v. Cherry, 818 S.W.2d 201, 204 (Tex. App.—Amarillo 1991, orig. proceeding); Carey-Can., Inc. v. Cal. Union Ins. Co., 118 F.R.D. 242, 244–45 (D.D.C. 1986); (11) deposition transcripts, In re Domestic Air Transp. Antitrust Litig., 142 F.R.D. 354, 355–56 (N.D. Ga. 1992); Biben v. Card, 119 F.R.D. 421, 425 (W.D. Mo. 1987); (12) fingerprints, *Harris*, 206 F.R.D. at 33; Alford v. Ne. Ins. Co., 102

Each production request must specify the items to be produced or inspected individually or by category and, further, describe each item or category with "reasonably particularity."[112] "Reasonable particularity," however, is not susceptible of a precise definition.[113] It depends on whether a reasonable person would know what documents or things are called for by the request.[114] The degree of specificity required depends on the requesting party's knowledge about the documents or things sought as well as the action's progress when the request is made. Thus, a request served early in an action generally can be less precisely drafted than one served after substantial discovery has been taken.[115]

F.R.D. 99, 101 (N.D. Fla. 1984); (13) vaccine samples, Williams v. Am. Cyanamid, 164 F.R.D. 608, 611 (D.N.J. 1995); (14) diaries, Merrill v. Waffle House, Inc., 227 F.R.D. 467, 472 (N.D. Tex. 2005); and (15) scientific-research data, Simon v. G.D. Searle & Co., 119 F.R.D. 680, 681 (D. Minn. 1987).

[112] TEX. R. CIV. P. 196.1(b) ("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."); *accord* Loftin v. Martin, 776 S.W.2d 145, 148 (Tex. 1989) (orig. proceeding) (holding that production requests "'must be specific, . . . and must recite precisely what is wanted'"), *disapproved of on other grounds by* Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding); *In re* Belmore, No. 05-04-01035-CV, 2004 Tex. App. LEXIS 8160, at *12 (Tex. App.—Dallas, Sept. 8, 2004, orig. proceeding) (holding that production requests must describe "with reasonable particularity" each item sought or category); *cf.* FED. R. CIV. P. 34(b)(1)(A) ("The request[] . . . must describe with reasonable particularity each item or category of items to be inspected.").

[113] *Cf.* Mallinckrodt Chem. Works v. Goldman, Sachs & Co., 58 F.R.D. 348, 353 (S.D.N.Y. 1973) ("'[R]easonable particularity' . . . is not susceptible to exact definition. What is reasonably particular is dependent upon the facts and circumstances in each case."), *quoted with approval in* Lopez v. Chertoff, No. CV 07-1566-LEW, 2009 U.S. Dist. LEXIS 50419, at *5 (E.D. Cal. June 2, 2009).

[114] *Cf.* Hager v. Graham, 267 F.R.D. 486, 493 (N.D.W. Va. 2010) ("The test for reasonable particularity is whether the request places the party upon reasonable notice of what is called for and what is not. Therefore, the party requesting the production of documents must provide sufficient information to enable [the party to whom the request is directed] to identify responsive documents. This test, however, is a matter of degree depending on the circumstances of the case." (citations omitted) (quoting Kidwiler v. Progressive Paloverde Ins. Co., 192 F.R.D. 193, 202 (N.D.W. Va. 2000)) (internal quotation marks omitted)); Bruggeman *ex rel.* Bruggeman v. Blagojevich, 219 F.R.D. 430, 436 (N.D. Ill. 2004) (same); St. Paul Reinsurance Co. v. Comm. Fin. Corp., 198 F.R.D. 508, 514 (N.D. Iowa 2000) (same); United States v. Nat'l Steel Corp., 26 F.R.D. 607, 610 (S.D. Tex. 1960) ("The goal [of particularity] is that the description be sufficient to apprise a man of ordinary intelligence which documents are required.").

[115] *Cf.* Taylor v. Fla. Atl. Univ., 132 F.R.D. 304, 305 (S.D. Fla. 1990) (holding that the categories of documents were set forth "with as much reasonable particularity as can be expected at this stage of discovery"), *aff'd sub nom.*, Taylor v. Popovich, 976 F.2d 743 (11th Cir. 1992).

Each production request must specify a reasonable time and place for the production or inspection on or after the date when the written response to the request is due.[116] In other words, the request should set a deadline for the response (typically thirty days after service), the place and time of production or inspection (for documents, typically thirty days after service at the requesting party's attorney's office; for testing or sampling, typically thirty days after service at the tangible thing's location).[117]

If the requesting party intends to test or sample the requested item, the requesting party must also specify testing's or sampling's manner and its means and procedure with "sufficient specificity" to allow the responding party to make appropriate objections.[118] Absent the parties' agreement, the requested testing, sampling, or examination may not destroy or materially alter an item without prior court approval.[119]

B. Number of Production Requests

Unlike interrogatories, there is no limit in Texas Rule 196 or any other Texas discovery rule on either the number of production requests or the number of sets of requests that a party can serve. Of course, under Rule 192.4(b), a responding party can seek protection from excessive production requests if they are unreasonably cumulative or duplicative discovery or the burden or expense of production outweighs the likely benefit.[120]

C. Responding to Production Requests

A party must respond in writing to a production request within thirty days after its service[121] unless the time is extended due to the manner of service, by the parties' agreement, or by court order,[122] "except that a

[116] TEX. R. CIV. P. 196.1(b). There is no reason why the requesting party cannot call for inspection at the time and place convenient for the responding party, leaving it to the responding party to designate the time and place in his response. *See id.* 196.3(a).

[117] *See id.* 196.1(b), .2(a). A production request can provide more than thirty days to either respond or produce the documents or tangible things. It cannot, however, require less than thirty days. *Id.* 196.2(a).

[118] *Id.* 196.1(b).

[119] *Id.* 196.5.

[120] *Id.* 192.4(b).

[121] *Id.* 196.2(a).

[122] *See id.* 193.1 ("A party must respond to written discovery in writing within the time provided by court order or these rules."). If the production request is contained in a deposition

defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request."[123] Each response must be preceded by the request[124] and may include objections and assertions of privilege as allowed by Texas Rule 193.[125]

There are four proper responses to the substance of a production request: (1) a response agreeing to produce the requested items, (2) a response objecting to the request in its entirety, (3) a response objecting to the request in part, for example, because it is overly broad as to time, place, or subject matter,[126] and (4)a response stating that no responsive documents have been located.[127] Thus, a response that relevant non-privileged documents will be produced "to *the extent* they exist" is improper.[128]

notice, the party or a person under its control must be given thirty days to respond to the request and produce its documents. *Id.* 199.2(b)(5) ("When the witness is a party or subject to the control of a party, document requests under this subdivision are governed by Rules 193 and 196.").

[123] *Id.* 196.2(a).

[124] *Id.* 193.1 ("The responding party's answers, objections, and other responses must be preceded by the request to which they apply.").

[125] *Id.* Objections in general and the assertion of privilege are discussed respectively in Parts IV.A and IV.B.2, *infra.*

[126] As discussed below, *see infra* notes 198–200 & accompanying text, if the request is objected to only in part, the responding party must clearly indicate the extent to which the request is objected and state what it will produce in response to the request. *See* TEX. R. CIV. P. 193.2(b).

[127] Under Texas Rule 196.2(b)(4), if the responding party has no responsive documents, it must state that "no items have been identified—after diligent search—that are responsive to the request." TEX. R. CIV. P. 196.2(b)(4).

[128] *Cf.* Armor Screen Corp. v. Storm Catcher, Inc., No. 07-81091-Civ-Ryskamp/Vitunac, 2009 U.S. Dist. LEXIS 63538, at *9–10 (S.D. Fla. Feb. 5, 2009) (emphasis added) ("As to requests 1, 3, 9, 10, 12, 17 and 20, Plaintiff responds by objecting, but then states that 'subject to and without waiving the foregoing objection, [Plaintiff] will make responsive documents, to the extent they exist, available for inspection.' This response does not constitute a clear response and provides no reasonable means for Defendant to know precisely whether and which responsive documents exist. [Federal] Rule 34(b)(2)(B) requires Plaintiff, as the responding party to either state that an inspection will be permitted *or* object with reasons . . . but not both."); Pulsecard, Inc. v. Discover Card Servs., Inc., 168 F.R.D. 295, 307 (D. Kan. 1996) (explaining that a response that responsive documents will be produced is insufficient; the response must indicate that "all" responsive documents will be produced); Innovative Piledriving Prods., LLC v. Unisto Oy, No. 1:04-CV-453, 2005 U.S. Dist. LEXIS 23652, at *5–6 (N.D. Ind. Oct. 14, 2005) ("[E]ven if IPP/HMC has no documents to produce in response to a request, Unisto is at least entitled to a response stating as much. Accordingly, Unisto is ORDERED to execute an affidavit by October 31, 2005, (1) stating that after diligent search there are no responsive documents in its 'possession, custody or control,' . . . , and (2) describing its efforts to locate documents responsive to the requests at issue in Unisto's motion to compel." (citations omitted)).

In addition, under Texas Rule 196.2(b), the responding party "must" specifically state in the written response to each production request whether it is objecting to the time and place for the production or inspection set forth in the production request.[129] In doing so, the responding party must state one of three things.

First, if the time and place of the production is acceptable to the responding party and it intends to produce the items then and there, the written response must state that "production, inspection, or other requested action will be permitted as requested."[130]

Second, if the responding party desires to serve its documents with its written response, the response must state that "the requested items are being served on the requesting party with the response."[131]

Third, if the responding party objects to the time or place of the production specified in the production request, the written response must state that "production, inspection, or other requested action will take place at a specified time and place."[132] In other words, the response must state both the objection and the solution.[133] That is, the responding party must state exactly when and where it will produce the items, and then must produce them at that time and place without further request or order.[134]

A promise to provide the requested information in the future is not a sufficient response to a production request. *See Innovative Piledriving*, 2005 U.S. Dist. LEXIS 23652, at *4; Oleson v. Kmart Corp., 175 F.R.D. 560, 564 (D. Kan. 1997).

[129] TEX. R. CIV. P. 196.2(b)(1).

[130] *Id.*

[131] *Id.* 196.2(b)(2).

[132] *Id.* 196.2(b)(3).

[133] *Id.* 193.2(b) ("If the responding party objects to the requested time and 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."), 196.3 ("[T]he responding party must produce the requested documents or tangible things . . . at either the time and place requested or the time and place stated in the response, unless otherwise agreed to by the parties or ordered by the court . . . .").

[134] *Id.* 193.2(b), 196.3. A response that the items will be produced without stating a time or place for the production is improper. *Cf.* Kinetic Concepts, Inc. v. Convatec Inc., 268 F.R.D. 226, 240 (M.D.N.C. 2010) ("'[A] response to a request for production of documents which merely promises to produce the requested documents at some unidentified time in the future without offering a specific time, place and manner, is not a complete answer as required by [Federal] Rule 34(b) and, therefore, pursuant to [the provision now codified at [Federal] Rule 37(a)(4)] is treated as a failure to answer or respond.'" (quoting Jayne H. Lee, Inc. v. Flagstaff Indus. Corp., 173 F.R.D. 651, 656 (D. Md. 1997))). It is also "improper to state . . . that production will be made at some unspecified time in the future," for example, stating that the items will be produced at a

Except in the rare case where the time or place of production is of unusual importance, this usually is satisfactory and the production will occur without court intervention.[135]

Unlike interrogatory answers, the response to a production request need not be verified, but rather only signed by the responding party's attorney (or the party when *pro se*).[136]

D. Production or Inspection

The responding party must produce documents and things within its "possession, custody or control" at either the time and place requested or the alternate time and place set forth in the written response.[137] It also must provide the requesting party a reasonable opportunity to inspect its documents and things.[138] Unless the court finds good cause to do otherwise, the responding party is responsible for the cost of producing the items, and the requesting party is responsible for the cost of inspecting, sampling, photographing, and copying them.[139]

Copies rather than original documents may be produced unless either "a question is raised as to the authenticity of the original" or, under the circumstances, "it would be unfair to produce copies in lieu of originals."[140] For example, a party may request the production of an original document to determine if there are handwritten notes on it that are illegible or difficult to read on the copy or to determine if the notes are in different color ink, which would suggest that they were made at different times.

The responding party must produce the documents or things either "as they are kept in the usual course of business or organize and label them to correspond with the categories in the request."[141] Although this directive

mutually agreeable time and place. Mezu v. Morgan State Univ., 269 F.R.D. 565, 574 (D. Md. 2010); *accord* Martinez v. Neiman Marcus Grp., Inc., No. 3:05-CV-0422-P, 2005 U.S. Dist. LEXIS 19694, at *17 (N.D. Tex. Sept. 7, 2005); Jayne H. Lee, Inc. v. Flagstaff Indus. Corp., 173 F.R.D. 651, 656 (D. Md. 1997).

[135] *Jayne H. Lee, Inc.*, 173 F.R.D. at 655 (quoting 8B CHARLES A. WRIGHT ET AL., Federal Practice and Procedure § 2207 (3d. ed. 2010).

[136] TEX. R. CIV. P. 191.3.

[137] *Id.* 196.3(a).

[138] *Id.*

[139] *Id.* 196.6.

[140] *Id.* 196.3(b).

[141] *Id.* 196.3(c). Merely producing a mass of disorganized documents does not comply with either of Texas Rule 196.3(c)'s alternatives. *Cf.* Coopervision, Inc. v. CIBA Vision Corp., No.

and the one requiring the responding party to produce documents and things in its "possession, custody or control" are seemingly simple and straightforward, questions exist regarding both, which are discussed below.[142]

1. Possession, Custody, or Control

As noted above, to be subject to production or inspection under Texas Rule 196, the documents or things sought must be within the responding party's "possession, custody, or control." Because the terms are in the disjunctive, only one of the requirements must be met.[143]

Of course, a responding party cannot be compelled to produce items that it neither has nor controls.[144] A document that does not exist is not within a party's possession, custody, or control.[145] Thus, a responding party cannot

2:06CV149, 2007 U.S. Dist. LEXIS 57111, at *13 (E.D. Tex. Aug. 6, 2007) ("[S]imply placing documents in boxes and making them available does not conform to [Federal R]ule [34]."); Wagner v. Dryvit Sys., Inc., 208 F.R.D. 606, 610 (D. Neb. 2001) ("[P]roducing large amounts of documents in no apparent order does not comply with a party's obligation under [Federal] Rule 34."); Stiller v. Arnold, 167 F.R.D. 68, 71 (N.D. Ind. 1996) ("Producing 7,000 pages of documents in no apparent order does not comply with a party's obligation under [Federal] Rule 34(b).").

[142] TEX. R. CIV. P. 192.3(b).

[143] *Cf.* Soto v. City of Concord, 162 F.R.D. 603, 619 (N.D. Cal. 1995) ("'The phrase 'possession, custody or control' is in the disjunctive and only one of the numerated requirements need be met.'"); Cumis Ins. Soc'y, Inc. v. S.-Coast Bank, 610 F. Supp. 193, 196 (N.D. Ind. 1985) (same).

[144] *Cf.* New York *ex rel.* Boardman v. Nat'l R.R. Passenger Corp., 233 F.R.D. 259, 267–68 (N.D.N.Y. 2006) (denying motion to compel because one New York state agency does not have control of another agency's documents); Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp., 222 F.R.D. 594, 598 (E.D. Wis. 2004) ("A party need not produce documents or tangible things that are not in existence or within its control."); Burton Mech. Contractors, Inc. v. Foreman, 148 F.R.D. 230, 236 (N.D. Ind. 1992) (denying motion to compel because requesting party failed to show that documents were in the responding party's possession, custody, or control).

[145] *See In re* Colonial Pipeline Co., 968 S.W.2d 938, 942 (Tex. 1998) (orig. proceeding) (holding that defendants could not be ordered to prepare an inventory of documents); McKinney v. Nat'l Union Fire Ins. Co., 772 S.W.2d 72, 73 n.2 (Tex. 1989) (explaining that a production request "cannot be used to force a party to make lists or reduce information to tangible form"); *In re* Family Dollar Stores of Tex., LLC, No. 09-11-00432-CV, 2011 Tex. App. LEXIS 8782, at *4–5 (Tex. App.—Beaumont Sept. 19, 2011, orig. proceeding) (per curiam) ("We conclude that requiring a [responding] party to reduce raw data from an electronic database to a paper report or to a list in an electronic form requires [the party] to make a list that does not currently exist. Because Rule 196.1 does not allow one party to require that others make lists, the . . . amended discovery order is broader than the scope of discovery permitted . . . ." (citation omitted)); *In re*

be required to produce a document that no longer exists or that never existed.[146] Nor can it be ordered to create a document that does not exist.[147]

It unclear whether, under Texas Rule 196, a responding party can be ordered to provide an authorization to obtain tax returns or other records in the possession of a governmental agency or nonparty.[148] For example, in *Martinez v. Rutledge*,[149] the Dallas Court of Appeals rejected the argument that a trial court had no authority to compel a party to provide a medical authorization under former Texas Rule 167 because its provision required the creation of a document that was not in existence:

> Plaintiff first complains that the court's order is unauthorized because it requires the creation of a document not in existence whereas Rule 167 requires a party to produce only designated documents or tangible things for inspection. Because of the decisions granting to trial courts wide discretion in ordering discovery to effect the purpose of obtaining fullest knowledge of facts and issues prior to

Jacobs, 300 S.W.3d 35, 47 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding) (refusing to require the defendant-employee to create affidavit concerning his net worth).

[146] Gilmore v. SCI Tex. Funeral Servs., Inc., 234 S.W.3d 251, 263 n.12 (Tex. App.—Waco 2007, pet. denied) ("If a particular item has been lost or destroyed before a request for production is served, it is no longer in the party's possession and its non-production necessarily cannot constitute a discovery violation."); *cf.* Dunn v. Trans World Airlines, Inc., 589 F.2d 408, 415 (9th Cir. 1978) ("We find that the district judge did not abuse his discretion in not imposing any sanctions for plaintiff's failure to produce medical records which were no longer in existence."); Steil v. Humana Kan. City, Inc., 197 F.R.D. 445, 448 (D. Kan. 2000) (holding that, under Federal Rule 34, a response that there are "no documents" was a proper response to a production request because party cannot be compelled to produce documents that do not exist); SEC. v. Canadian Javelin Ltd., 64 F.R.D. 648, 651 (S.D.N.Y. 1974) (holding that, because no deposition transcripts existed, they could not be ordered produced under Federal Rule 34). Of course, if the document was improperly destroyed, the responding party may be subject to sanctions.

[147] *See* cases cited *supra* notes 145–146. In the same vein, a party cannot be compelled to produce, or sanctioned for failing to produce, documents or things that it has not been requested to produce. *E.g.*, *In re* Exmark Mfg. Co., 299 S.W.3d 519, 531 (Tex. App.—Corpus Christi 2009, orig. proceeding); *In re* Lowe's Cos., 134 S.W.3d 876, 880 n.7 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding).

[148] Texas Rule 194.2(j) provides for the following disclosure "in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills." TEX. R. CIV. P. 194.2(j).

[149] 592 S.W.2d 398 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

> trial, we cannot agree that the rule compels this limited construction. The tangible thing here sought is the record which is in existence. The authorization is merely the means of acquiring that which is sought. We do not agree that the order required creation of a document and therefore overrule plaintiff's first point.[150]

In contrast in *In re Guzman*,[151] the Corpus Christi Court of Appeals reached the opposite result, holding that the trial court abused its discretion in ordering the defendant's employee to execute authorizations for his driver's, medical, and employment history because the effect of the court's order was to order the employee to create documents which did not exist solely to comply with a request for production.[152] The court concluded that "the Texas Rules of Civil Procedures [sic] do not authorize a court to order the creation of an authorization for a third party to deliver information to a litigant."[153]

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[150] *Id*. at 400; *accord In re* Mitsubishi Heavy Indus. Am., Inc., 269 S.W.3d 679, 680 (Tex. App.—Dallas 2008, orig. proceeding) (rejecting the responding party's argument that the trial court abused its discretion in ordering it to sign an authorization permitting the release of proprietary documents in the files and databases of the Federal Aviation Administration).

[151] 19 S.W.3d 522 (Tex. App.—Corpus Christi 2000, orig. proceeding).

[152] *Id.* at 525.

[153] *Id*.; *see In re* Home State Cnty. Mut. Ins. Co., No. 12-06-00144-CV, 2006 Tex. App. LEXIS 9919, at *10 & n.5 (Tex. App.—Tyler Nov. 15, 2006, orig. proceeding) (holding that trial court did not abuse discretion in refusing to order the plaintiff to provide authorizations to obtain his Medicare records).

Federal courts are divided on the issue with some holding that, under Federal Rule 34, a trial court can order a party to provide authorizations and others holding the contrary. *Compare*, *e.g.*, Thomas v. Deloitte Consulting LP, No. 3-02-CV-0343-M, 2004 U.S. Dist. LEXIS 29154, at *12–13 (N.D. Tex. June 14, 2004) (ordering the responding party to sign authorizations so the requesting party could obtain the responding party's bank records), Whatley v. S.C. Dept. of Pub. Safety, No. 3:05-0042-JFA-JRM, 2006 U.S. Dist. LEXIS 94950, at *51–52 (D.S.C. Sept. 1, 2006) (ordering the responding party to sign consent forms to allow the requesting party to obtain the responding party's tax returns), *and* Smith v. Logansport Cmty. Sch. Corp., 139 F.R.D. 637, 649 (N.D. Ind. 1991) (compelling the responding party to sign a medical authorization), *with, e.g.*, EEOC v. Thorman & Wright Corp., 243 F.R.D. 426, 428 (D. Kan. 2007) (denying a motion to compel the responding party to execute a release authorizing her current employer to release her employment records to the requesting party), Clark v. Vega Wholesale, Inc., 181 F.R.D. 470, 472 (D. Nev. 1998) (denying motion to compel a medical authorization while acknowledging that other courts have ruled to the contrary), *and* J.J.C. v. Fridell, 165 F.R.D. 513, 517 (D. Minn. 1995) (denying a motion to compel a medical authorization).

A motion to compel generally should be denied when the responding party asserts that the requested documents do not exist or are not in its possession, custody, or control unless there is evidence suggesting the contrary.[154] If, however, it appears either that the requested documents or things may exist or that they are within the possession, custody, or control of the responding party, the responding party must do more than simply provide an unsworn assertion to the contrary.[155]

"Possession, custody, or control" of an item is defined by Texas Rule 192.7 to "mean 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."[156] Mere access to documents,

[154] *Cf.* Sonnino v. Univ. of Kan. Hosp. Auth., 220 F.R.D. 633, 640 (D. Kan. 2004) ("The Court cannot compel a party to produce documents that do not exist or that are not in that party's possession, custody, or control. Plaintiff has not provided the Court with information sufficient to lead the Court to question the veracity of the Hospital Defendants' statement that no additional responsive documents exist. The Court thus has no basis upon which to compel the Hospital Defendants to produce any additional documents . . . ." (footnote omitted)); Benchmark Design, Inc. v. BDC, Inc., No. 88-1007-FR, 1989 U.S. Dist. LEXIS 8240, at *5 (D. Ore. July 5, 1989) ("Defendants represent that no such documents exist . . . . The court will not order defendants to produce documents which do not exist."); *In re* Air Crash Disaster, 130 F.R.D. 641, 646 (E.D. Mich. 1989) (denying motion to compel after the responding party represented that all of its documents had been produced, but denial was without prejudice to renewal if requesting party obtained reliable information that the responding party's representations were not accurate).

[155] *Cf.* Norman v. Young, 422 F.2d 470, 473 (10th Cir. 1970) (holding that the requesting party established a prima facie case regarding existence and control by virtue of the requested documents' nature, and the responding party failed to properly deny their existence); Schwartz v. Mktg. Publ'g Co., 153 F.R.D. 16, 21 (D. Conn. 1994) (granting motion to compel because the responding party failed to swear to the lack of possession, custody, or control); Comeau v. Rupp, 810 F. Supp. 1127, 1166 (D. Kan. 1992) (holding that, because the FDIC was in a superior position to gain access to documents, naked averment that particular documents were not in its possession was insufficient).

[156] TEX. R. CIV. P. 192.7. The federal discovery rules do not define "possession, custody, or control." Federal courts define "control" as "the legal right to obtain the documents on demand." Gerling Int'l Ins. Co. v. Comm'r, 839 F.2d 131, 140 (3d Cir. 1988); *accord* Searock v. Stripling, 736 F.2d 650, 653 (11th Cir. 1984) ("Control is defined not only as possession, but as the legal right to obtain the documents requested upon demand."); FTC v. Braswell, No. CV 03-3700-DT (PJWx), 2005 U.S. Dist. LEXIS 42817, at *8 (C.D. Cal. Sept. 26, 2005) ("Plaintiff does not really challenge Defendant's arguments relating to possession or custody, but argues that Defendant has control. 'Control is defined as the legal right to obtain documents on demand.'"); *see* New York *ex rel.* Boardman v. Nat'l R.R Passenger Corp., 233 F.R.D. 259, 268 (N.D.N.Y. 2006) ("The term control in the context of discovery is to be broadly construed. . . . The rubric of this query is not limited to whether the party has a legal right to those documents but rather that there is 'access to the documents' and 'ability to obtain the documents.'" (citations omitted)).

however, does not constitute possession, custody, or control.[157] Accordingly, when documents are owned by another, it is error to require a party with mere access to them to produce them.[158]

Legal ownership of the requested documents or things, however, is not determinative. A responding party who has actual possession or custody of a document or thing is required to produce it even if belongs to a non-party[159] or even if it is located beyond the court's jurisdiction.[160] In fact,

[157] *In re* Kuntz, 124 S.W.3d 179, 184 (Tex. 2003) (orig. proceeding) ("Hal's mere access to the relevant letters of recommendation does not constitute 'physical possession' of the documents under the definition of 'possession, custody, or control' set forth in Texas Rule of Civil Procedure 192.7(b)."); *cf.* Wiwa v. Royal Dutch Petroleum Co., 392 F.3d 812, 821 (5th Cir. 2004) ("The phrase 'to which he has access' is overbroad; it would require the retrieval of documents from Nigeria—documents not under Oteri's custody, control, or possession, but to which he could conceivably have access by virtue of his prior position with Shell."); United States v. Kent (*In re* Grand Jury Subpoena), 646 F.2d 963, 969 (5th Cir. 1981) ("[The employee's] subpoena, if upheld, would be illegal because it would direct her to produce documents not in her possession, custody, or control. Because [the employee] had mere access, her compliance with the subpoena would have required that she illegally take exclusive possession of [her employer's] documents and deliver them to the grand jury.").

[158] *Kuntz*, 124 S.W.3d at 184 (holding that "mere access" does not satisfy the possession, custody, or control requirement of Texas Rule 197.2(b)); *see In re* Shell E & P, Inc., 179 S.W.3d 125, 131 (Tex. App.—San Antonio 2005, orig. proceeding) (holding that an attorney has mere access rather than possession, custody, or control of an opposing party's confidential documents obtained pursuant to discovery in another lawsuit); *cf. Wiwa*, 392 F.3d at 821 (finding that a subpoena requesting documents to which the party has "access" was overbroad).

[159] *In re* Rogers, 200 S.W.3d 318, 322 (Tex. App.—Dallas 2006, orig. proceeding) (ordering responding party to produce documents relating to a non-party and corporations and partnerships in his possession); *cf. In re* Bankers Trust Co., 61 F.3d 465, 469–70 (6th Cir. 1995) (holding that Federal Reserve regulations prohibiting disclosure of confidential documents in responding party's possession held invalid when they conflicted with a discovery order); Pilkington N. Am., Inc. v. Smith, No. 11-176-BAJ-DLD, 2012 U.S. Dist. LEXIS 50877, at *5 (M.D. La. Apr. 11, 2012) ("'[Federal] Rule 34 is broadly construed and documents within a party's control are subject to discovery, even if owned by a nonparty.'"); Allen v. Woodford, No. CV-F-05-1104 OWW LJO, 2007 U.S. Dist. LEXIS 11026, at *5 (E.D. Cal. Jan. 30, 2007) ("A party having actual possession of documents must allow discovery even if the documents belong to someone else; legal ownership of the documents is not determinative.").

A non-party has the right to seek protection from its documents' disclosure. TEX. R. CIV. P. 192.6(a) ("[A] person affected by the discovery request, may move . . . for an order protecting that person from the discovery sought."); *see Kuntz*, 124 S.W.3d at 184 n.4 (stating that the third party owner of the documents "may move for a protective order"); *Shell E & P*, 179 S.W.3d at 129–30 (same).

[160] *Cf.* Novelty, Inc. v. Mt. View Mktg, Inc., 265 F.R.D. 370, 377 (S.D. Ind. 2009) ("'The fact that . . . documents are situated in a foreign country does not bar their discovery.'" (quoting

legal restrictions limiting a party's ability to obtain certain documents or to disclose them to others will not necessarily preclude a finding that the party has possession, custody, or control over those documents.[161]

Conversely, actual possession of the document or thing is unnecessary if the party has control of it. As noted by the Texas Supreme Court:

> The phrase "possession, custody, or control" . . . 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. The right to obtain possession is a legal right based upon the relationship between the party from whom a document is sought and the person who has actual possession of it.[162]

Cooper Indus., Inc. v. British Aerospace, Inc., 102 F.R.D. 918, 920 (S.D.N.Y.1984))); Hunter Douglas, Inc. v. Comfortex Corp., No. M8-85 (WHP), 1999 U.S. Dist. LEXIS 101, at *10 (S.D.N.Y. Jan. 11, 1999) ("[T]he mere fact that the subpoenaed documents are in Canada does not exempt them from discovery.").

[161] *Cf.* Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 205–06 (1958) (affirming, under Federal Rule 34, a discovery order ordering the responding party, who had control of documents, to produce them despite Swiss penal law that limited the party's ability to produce the documents); Nat'l Union Fire Ins. Co. v. Midland Bancor, Inc., 159 F.R.D. 562, 566–67 (D. Kan. 1994) (compelling bank, under Federal Rule 34, to produce bank examination reports even though reports were owned by FDIC and its regulations provided that the reports remained its property and could be released only with its consent); Japan Halon Co. v. Great Lakes Chem. Corp., 155 F.R.D. 626, 627–29 (N.D. Ind. 1993) (holding, under Federal Rule 34, that the responding party had control of documents in the possession of its parent corporations despite the fact that Japanese law limited its right to demand the documents from them).

When the responding party asserts foreign law as a bar to production, federal courts perform a comity analysis to determine the weight to be given to the foreign jurisdiction's law and consider the following factors: (1) the importance of the documents or information requested to the litigation; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of retrieving the information; and (5) the extent to which noncompliance with the request would undermine important interests in the United States, or compliance with the request would undermine important interests of the state where the information is located. *E.g.*, Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S.D. Iowa, 482 U.S. 522, 544 n.28 (1987); Tiffany (NJ) LLC v. Qi Andrew, 276 F.R.D. 143, 151 (S.D.N.Y. 2011) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c) (1987)).

[162] GTE Commc'ns Sys. Corp. v. Tanner, 856 S.W.2d 725, 729 (Tex. 1993) (orig. proceeding) (construing former Texas Rule 166b(2)).

Thus, a responding party may be required to produce a document that it has the legal right to obtain even though it does not have a copy of the document in its possession.[163] For example, a responding party can be compelled to produce documents or things in the possession of its officers, directors, employees, and agents[164] or that it provided to its attorney,[165] accountant,[166] or insurer.[167]

[163] *Cf.* Anderson v. Cryovac, Inc., 862 F.2d 910, 928–29 (1st Cir. 1988) (holding that a seller had control of a report prepared for the purchaser and maintained in the purchaser's possession by virtue of a provision in the sales contract requiring the purchaser to make its records available to the seller); Green v. Fulton, 157 F.R.D. 136, 142 (D. Me. 1994) (noting that when the responding party has the "right, authority, or ability to obtain those documents upon demand," they will deemed to be under its control); *In re* Legato Sys., Inc. Sec. Litig., 204 F.R.D. 167, 170 (N.D. Cal. 2001) (holding that a corporate CEO had control over the transcript of his testimony before the SEC in a formal investigative proceeding because a SEC regulation gave him the right to obtain it); Prokosch v. Catalina Lighting, Inc., 193 F.R.D. 633, 636 (D. Minn. 2000) (holding that "control" does not require legal ownership or actual physical possession, as long as there is ability to obtain a document on demand).

[164] *See* State v. Lowry, 802 S.W.2d 669, 673–74 (Tex. 1991) (orig. proceeding) (holding that Texas Attorney General had to produce documents in the possession, custody, and control of his entire office and not just the antitrust division); *cf.* McBryar v. Int'l Union of United Auto. Aerospace & Agric. Implement Workers of Am., 160 F.R.D. 691, 701 (S.D. Ind. 1993) (ordering union to produce documents in the possession of its officers); Gray v. Faulkner, 148 F.R.D. 220, 223 (N.D. Ind. 1992) (compelling the responding party to seek information reasonably available from its employees, agents, or others subject to party's control).

An officer, director, employee, or agent who is not a party to an action against a corporation does not have to produce his or her personal documents. *Cf. McBryar*, 160 F.R.D. at 696–97 (providing test for determining whether documents belong to the entity or an employee). Nonetheless, when an officer, director, or majority shareholder of a corporation is a party to an action, he or she may be compelled to produce documents in the corporation's possession. *Cf.* Gen. Env't Sci. Corp. v. Horsfall, 136 F.R.D. 130, 133 (N.D. Ohio 1991) ("An individual party to a lawsuit can be compelled to produce relevant information and documents relating to a non-party corporation of which it is an officer, director or shareholder."); Scott v. Arex, Inc., 124 F.R.D. 39, 41 (D. Conn. 1989) (compelling the owner and officer of a corporation to produce the corporation's tax returns). However, if the action is against the officer, director, or shareholder individually, production generally will be denied unless the corporation is his or her alter ego. *Cf.* Shcherbakovskiy v. Da Capo Al Fine, Ltd., 490 F.3d 130, 139 (2d Cir. 2007) (explaining that, under Federal Rule 34, if the trial court determines that the corporation is the plaintiff's alter ego or his investment in it is sufficient to give him undisputed control of its board, the plaintiff could be required to produce corporate documents); Am. Maplan Corp. v. Heilmayr, 203 F.R.D. 499, 502 (D. Kan. 2001) (holding that in an action against corporation's president individually, and not against the corporation itself, the president could not be compelled under Federal Rule 34 to produce corporate records because there was no evidence that president was the corporation's alter ego).

A business-entity party generally does not have possession, custody, or control of documents in the possession of its parent, subsidiary, or sibling entities.[168] Nonetheless, courts frequently have required such a party to produce documents possessed by its parent[169] or affiliates[170] or the parent to produce documents possessed by its subsidiary.[171] Although the cases are highly fact-specific, certain factors have been reviewed by the courts to determine whether the party from whom documents are sought has sufficient control, including (1) whether the alter-ego doctrine would justify piercing the corporate veil, (2) the nonparty's connection to the transaction

[165] *Cf.* Jans v. Gap Stores, Inc., No. 6:05-cv-1534-Orl-31JGG, 2006 U.S. Dist. LEXIS 67266, at *3 (M.D. Fla. Sept. 20, 2006) ("Numerous cases have held that a client has a legal right to demand documents from its former or present counsel."); ASPCA v. Ringling Bros. & Barnum & Bailey Circus, 233 F.R.D. 209, 212 (D.D.C. 2006) ("Because a client has the right, and the ready ability, to obtain copies of documents gathered or created by its attorneys pursuant to their representation of that client, such documents are clearly within the client's control."); MTB Bank v. Fed. Armored Express, Inc., No. 93 Civ. 5594 (LBS), 1998 U.S. Dist. LEXIS 922, at *12 (S.D.N.Y. Feb. 2, 1998) ("[T]he clear rule is that documents in the possession of a party's *current or former* counsel are deemed to be within the party's 'possession, custody and control.'"). Of course, whether production will be required depends on other issues, such as privilege. *Ringling Bros.*, 233 F.R.D. at 212 (holding that the documents were within defendants' "control" for purposes of Federal Rule 34, but were not discoverable because they also constituted work product).

[166] *Cf.* Wardrip v. Hart, 934 F. Supp. 1282, 1286 (D. Kan. 1996) (compelling, under Federal Rule 34, the responding party to produce its financial records in its accountant's possession).

[167] Innovative Piledriving Prods., LLC v. Unisto Oy, No. 1:04-CV-453, 2005 U.S. Dist. LEXIS 23652, at *3 (N.D. Ind. Oct. 14, 2005) ("Documents are in the 'possession, custody or control' of the served party if 'the party has actual possession, custody, or control, or has the legal right to obtain the documents on demand.' Accordingly, a party may be required to produce documents turned over to an agent, such as its attorney or insurer." (citations omitted)); Henderson v. Zurn Indus., Inc., 131 F.R.D. 560, 567 (S.D. Ind. 1990) (same).

[168] *In re* U-Haul Int'l, Inc., 87 S.W.3d 653, 657 (Tex. App.—San Antonio 2002, orig. proceeding) (reversing sanctions against responding party for failing to produce its affiliates' documents).

[169] *Cf.* Japan Halon Co. v. Great Lakes Chem. Corp., 155 F.R.D. 626, 627–29 (N.D. Ind. 1993) (foreign parent corporation); M.L.C., Inc. v. N. Am. Philips Corp., 109 F.R.D. 134, 138 (S.D.N.Y. 1986) (same); Camden Iron & Metal, Inc. v. Marubeni Am. Corp., 138 F.R.D. 438, 441–444 (D.N.J. 1991) (same).

[170] *Cf.* Steele Software Sys., Corp. v. DataQuick Info. Sys., Inc., 237 F.R.D. 561, 564–65 (D. Md. 2006); Uniden Am. Corp. v. Ericsson Inc., 181 F.R.D. 302, 307 (M.D.N.C. 1998); Cooper Indus., Inc. v. British Aerospace, Inc., 102 F.R.D. 918, 919–20 (S.D.N.Y. 1984).

[171] *Cf.* Wachovia Sec., LLC v. Loop Corp., No. 05 C 3788, 2008 U.S. Dist. LEXIS 49251, at *5–7 (N.D. Ill. June 27, 2008); Choice-Intersoil Microsystems, Inc. v. Agere Sys., Inc., 224 F.R.D. 471, 472–73 (N.D. Cal. 2004); *see Camden Iron*, 138 F.R.D. at 441–44.

at issue, (3) whether and to what degree the nonparty will receive the benefit of any award in the action, (4) the ability of the party to the action to obtain the documents when it wants them, and (5) whether by stock ownership or otherwise, one entity effectively controls the other.[172]

The burden of establishing control over the requested documents or things is on the requesting party.[173] However, once it demonstrates that the responding party has a legal right to obtain the requested documents, the burden shifts to responding party to show why it lacks control.[174]

2. Usual Course of Business or Organized and Labeled to Correspond with the Categories in the Request

Two questions exist with respect to the directive that documents be produced as they are maintained in the "usual course of business or organize[d] and label[ed] . . . to correspond with the categories in the request."[175] First, when are documents "kept in the usual course of

[172] *Cf. Uniden Am. Corp.*, 181 F.R.D. at 306 (considering the following factors: (1) commonality of ownership, (2) exchange or intermingling of directors, officers, or employees of the two corporations, (3) exchange of documents between the corporations in the ordinary course of business, (4) any benefit or involvement by the nonparty corporation in the transaction, and (5) involvement of the nonparty corporation in the litigation); *Japan Halon*, 155 F.R.D. at 626–29 (noting "extreme closeness" of the plaintiff and its parent corporations and that parents would benefit from any award to plaintiff); *Camden Iron*, 138 F.R.D. at 443–44 (finding that, because parent played significant role in the transaction at issue, there was sufficient control even though the parent and wholly owned subsidiary maintained separate corporate formalities); *M.L.C.*, 109 F.R.D. at 138 (finding of control was supported by the defendants' ability to "easily obtain" the documents when it was in their interest to do so); *Cooper Indus.*, 102 F.R.D. at 919–20 (finding that it was "inconceivable that defendant would not have access to these documents and the ability to obtain them for its usual business").

[173] *Cf.* Norman v. Young, 422 F.2d 470, 472–73 (10th Cir. 1970); Mt. Hawley Ins. Co. v. Felman Prod., Inc., 269 F.R.D. 609, 620 (S.D.W. Va. 2010); New York *ex rel.* Boardman v. Nat'l R.R. Passenger Corp., 233 F.R.D. 259, 268 (N.D.N.Y. 2006); *Camden Iron*, 138 F.R.D. at 441.

[174] *In re* Nat'l Century Fin. Enters., Inc. Fin. Inv. Litig., No. 2:03-md-1565, 2009 U.S. Dist. LEXIS 92237, at *31 (S.D. Ohio Sept. 1, 2009) ("The fact remains, however, that it was Pharos' burden to demonstrate that the email was not in its possession, custody, or control, and it failed to do so."); Banff Ltd. v. Limited, Inc., No. 93 Civ. 2514 (CSH)(RLE), 1994 U.S. Dist. LEXIS 1779, at *5 (S.D.N.Y. Feb. 18, 1994) ("[Federal Rule 34] requires a party to produce things which are in its 'possession, custody or control.' Items which have been lost cannot be deemed to fit this description. The party claiming this situation would, of course, have the burden of demonstrating that the items are lost or should be considered lost.").

[175] TEX. R. CIV. P. 196.3(C).

business"? Second, does the decision regarding which alternative to use lie exclusively with the producing party?

a. Documents Are "Kept in the Usual Course of Business" When the Litigant Functions in the Manner of a Commercial Enterprise or They Result from "Regularly Conducted Activity."

To determine what constitutes an appropriate production of records as they are kept in the "usual course of business," it is first necessary to define the term. Unfortunately, neither Texas Rule 196.3(c) nor any case construing it does so. One federal court, in interpreting the term "usual course of business," as used in Federal Rule 34,[176] explained that:

> [T]he option of producing documents "as they are kept in the usual course of business" under [Federal] Rule 34 requires the producing party to meet either of two tests. *First*, this option is available to commercial enterprises or entities that function in the manner of commercial enterprises. *Second*, this option may also apply to records resulting from "regularly conducted activity." Where a producing party's activities are not "routine and repetitive" such as to require a well-organized record-keeping system—in other words when the records do not result from an "ordinary course of business"—the party must produce documents according to the sole remaining option under Rule 34: "organize[d] and label[ed] . . . to correspond to the categories in the request."
>
> The logic of [Federal] Rule 34 supports this limitation. When records do not result from "routine and repetitive" activity, there is no incentive to organize them in a predictable system. The purpose of the Rule is to facilitate production of records in a useful manner and to minimize discovery costs; thus it is reasonable to require litigants who do not create and/or maintain records in a "routine and

[176] The term is not defined in Federal Rule 34 or its Advisory Committee Note. SEC v. Collins & Aikman Corp., 256 F.R.D. 403, 412 n.44 (S.D.N.Y. 2009); Williams v. Taser Int'l, Inc., No. 1:06-CV-0051-RWS, 2006 U.S. Dist. LEXIS 47255, at *23 (N.D. Ga.); Cardenas v. Dorel Juvenile Group, Inc., 230 F.R.D. 611, 618 (D. Kan. 2005).

> repetitive" manner to organize the records in a usable fashion prior to producing them.[177]

For example, documents in storage are only maintained "in the ordinary course of business" if they were stored in the same manner in which they were used in the business or they have been used with regularity since they were placed in storage.[178]

b. The Responding Party Generally Decides the Manner of Production.

A party who chooses to produce its documents as they are maintained in the ordinary course of business has the burden of proving that fact.[179] Of course, this may be proved from the document production itself. If it is not readily apparent from the production, the producing party must do more than merely represent to the court and the requesting party that the documents have been produced as they are maintained in the ordinary

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[177] *Collins & Aikman Corp.*, 256 F.R.D. at 412–13 (footnotes omitted).

[178] *Cf.* Mizner Grand Condo. Ass'n v. Traveler's Prop. Cas. Co. of Am., 270 F.R.D. 698, 701 (S.D. Fla. 2010) ("[T]he fact that an organization regularly stores documents as part of its business operations does not mean that production of *any* documents in storage automatically satisfies Rule 34."); *In re* Sulphuric Acid Antitrust Litig., 231 F.R.D. 351, 363 (N.D. Ill. 2005) (holding that records sent to a storage facility were not used with regularity and were only kept in the "usual course of '*storage*' because documents had no relation to day-to-day business operations and were not organized as they were used in the ordinary course of business").

[179] 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); *cf. Collins & Aikman*, 256 F.R.D. at 409 ("A party choosing to produce documents as maintained in the ordinary course of business 'bears the burden of demonstrating that the documents made available were in fact produced consistent with that mandate.'" (quoting Pass & Seymour, Inc. v. Hubbel, Inc., 255 F.R.D. 331, 334 (N.D.N.Y. 2008)); *In re Sulphuric Acid*, 231 F.R.D. at 363 (same); Johnson v. Kraft Foods N. Am., Inc., 236 F.R.D. 535, 540–41 (D. Kan. 2006) (same). As one court has noted:

> 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.

MGP Ingredients, Inc., v. Mars, Inc., No. 06-2318-JWL-DJW, 2007 U.S. Dist. LEXIS 76853, at *10 (D. Kan. Oct. 15, 2007); *accord* 3M Co. v. Kanbar, No. CO6-01225 JW (HRL), 2007 U.S. Dist. LEXIS 45232, at *6, *9 (N. D. Cal. June 14, 2007); In re G–I Holdings Inc., 218 F.R.D. 428, 439 (D.N.J. 2003).

course of business.[180] Rather, the responding party must "provide 'some modicum of information' regarding how documents are ordinarily kept in the course of business, which would ideally include 'the identity of the custodian or person from whom the documents were obtained, . . .[] assurance that the documents have been produced in the order in which they are maintained, and a general description of the filing system from which they were recovered.'"[181] A court faced with an absence of any evidence that documents were produced as they were kept in the usual course of business, can order the party producing documents "to identify which documents satisfy which request."[182]

It is unclear, however, whether the decision regarding which of the alternatives to use lies exclusively with the responding party. No Texas case has directly considered the question,[183] and federal courts interpreting the

[180] *Cf.* Century Jets Aviation LLC v. Alchemist Jet Air LLC, 08 Civ. 9892, 2011 U.S. Dist. LEXIS 20540, at *10 (S.D.N.Y. Feb. 7, 2011) ("[T]he disclosing party must provide at least some information about how documents are organized in the party's ordinary course of business."); GP Indus., LLC v. Bachman, No. 8:06CV50, 2008 U.S. Dist. LEXIS 90292, at *11 (D. Neb. Apr. 10, 2008) ("'[A] party who chooses the . . . option to produce documents as they are kept in the ordinary course of business bears the burden of showing that the documents were in fact produced in that matter.'"); *Johnson*, 236 F.R.D. at 540–41 (same); Pass & Seymour, Inc. v. Hubbel, Inc., 255 F.R.D. 331, 334 (N.D.N.Y. 2008) (same); Cardenas v. Dorel Juvenile Grp., Inc., 230 F.R.D. 611, 618 (D. Kan. 2005) (same).

[181] *Mizner Grand Condo.*, 270 F.R.D. at 701 (quoting *Pass & Seymour*, 255 F.R.D. at 337); *accord* Synventive Molding Solutions, Inc. v. Husky Injection Molding Sys., Inc., 262 F.R.D. 365, 370–71 & n.9 (D. Vt. 2009).

[182] *Texaco*, 812 S.W.2d at 458; *cf. Johnson*, 236 F.R.D. at 541 ("[T]he Court finds that Plaintiff has not met his burden to establish that he produced these documents 'as they are kept in the usual course of business.' Because Plaintiff did not do so, he should have organized and labeled them to correspond with the categories in each request . . . ."); *In re Sulphuric Acid.*, 231 F.R.D. at 363–64 (same); *Synventive Molding*, 262 F.R.D. at 371 (same).

[183] One Texas case suggests that the decision does not belong exclusively to that responding party, *Texaco*, 812 S.W.2d at 457–58, whereas another holds:

> [A] trial court cannot sanction a party for failing to organize responsive material according to the method its opponent prefers when the discovery response complies with an alternate method permitted under the rules. Because the state's response to the Porretto's request for production does not violate the discovery rules, the trial court abused its discretion in imposing sanctions.

Tex. Gen. Land Office v. Porretto, 369 S.W.3d 276, 290 (Tex. App.—Houston [1st Dist.] 2011, pet. filed).

identical federal rule are divided on the issue.[184] The best approach is to allow the responding party to choose which of the two alternative methods of production to use, unless its system for organizing and maintaining documents is so deficient as to undermine the usefulness of production under the maintained-in-the-ordinary-course-of-business alternative.[185]

This conclusion is supported by several factors. Initially, Texas Rule 196.3(c) is based on Federal Rule 34(b). Federal Rule 34(b) was amended in 1980 to provide for production as the documents are maintained in the ordinary course of business to prevent a producing party from shuffling materials to make them harder to find.[186] Moreover, the responding party

[184] *Cf.* Innovative Piledriving Prods., LLC v. Unisto Oy, No. 1:04-CV-453, 2005 U.S. Dist. LEXIS 14745, at *3 (N.D. Ind. July 21, 2005) ("[I]t is not entirely clear whether the producing party has the exclusive option to determine which of the two methods will be used."). *Compare*, *e.g.*, MGP Ingredients, Inc., v. Mars, Inc., No. 06-2318-JWL-DJW, 2007 U.S. Dist. LEXIS 76853, at *10 (D. Kan. Oct. 15, 2007**)** ("The Rule is phrased in the disjunctive, and the producing party may choose either of the two methods for producing the documents."), *and In re* G–I Holdings Inc., 218 F.R.D. 428, 439 (D. N.J. 2003) ("The plain phrasing of [Federal] Rule 34(b) reveals that the producing party has the option of presenting information in one of two ways.") *with*, *e.g.*, Bd. of Educ. v. Admiral Heating & Ventilating, Inc., 104 F.R.D. 23, 36 (N.D. Ill. 1984) (stating that the defendant's reading of [Federal] Rule 34(b) giving it the choice of method of response is incorrect, as it "inserts a period (the British 'full stop') too early in Rule 34(b)").

[185] *Cf. Innovative Piledriving*, 2005 U.S. Dist. LEXIS 14745, at *3–4 ("[T]he best approach . . . generally allows the producing party to choose which of the two alternative methods of production to use except when some special factor justifies allowing the requesting party to select the method, such as when the method chosen places an unreasonable burden on the party seeking production."); Williams v. Taser Int'l, Inc., No. 1:06-CV-0051-RWS, 2006 U.S. Dist. LEXIS 47255, at *23–24 (N.D. Ga. June 30, 2006) ("[T]he Court makes clear that while Taser has the option to produce documents as they are kept in the ordinary course of business, . . . [w]ere the Court to conclude that the filing system utilized was so disorganized as to prevent Plaintiffs from making a meaningful review of the requested documents, the Court would not hesitate to compel Taser to organize and specifically label documents as responsive to Plaintiffs' requests."); *Mizner Grand Condo.*, 270 F.R.D. at 701 ("In this case, Mizner's production is so disorganized that it is insufficient under [Federal] Rule 34(b)(2)(E)(i). . . . In order to obtain documents responsive to its requests, Travelers would therefore have to examine and sort through each individual file folder. This is a task that [Federal] Rule 34(b)(2)(E)(i) clearly assigns to the producing party, whether it is completed in the usual course of business or in response to a specific request.").

[186] FED. R. CIV. P. 34 advisory committee's note (noting that the committee was advised that it was not rare for "'parties deliberately to mix critical documents with others in the hope of obscuring signficance'"); *see Texaco*, 812 S.W.2d at 457 ("A federal court has noted that the purpose of the 1980 amendment to [Federal Rule] 34(b), which contains the same language as the provision in [former Texas rule] 167(1)(f), 'was aimed at forestalling such abuses as the deliberate mixing of critical documents with others in the hope of obscuring significance.'" (quoting *Bd. of Educ.*, 104 F.R.D. at 36)); *Johnson*, 236 F.R.D. at 540 (same).

has the burden to select and produce the items requested rather than dumping large quantities of unrelated material on the requesting party along with the documents actually requested.[187] Finally, requiring that the requested materials be segregated according to the requests often would impose a difficult and unnecessary burden on the responding party. The categories are devised by the requesting party and often overlap or are so elastic that the responding party may have difficulty determining which documents respond to which requests. Not only does such a segregation serve no substantial purpose, but it also becomes quite burdensome when a substantial amount of documents are involved and even worse can invite claims of the very sort of "hiding" materials that the rule was intended to prevent.[188]

IV. OBJECTIONS

A. Objections in General

Texas Rule 193.2 sets forth the obligations and procedures for objecting to written discovery requests, such as interrogatories and production requests.[189] An objection must be made in writing within the time allowed for the response to an interrogatory or a production request[190]—usually thirty days after the discovery request's service. Generally, the failure to object timely to an interrogatory or a production request, no matter how improper, waives the objection.[191] There are, however, two exceptions to this rule.

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[187] *E.g.*, Rothman v. Emory Univ., 123 F.3d 446, 455 (7th Cir. 1997) (sanctioning the responding party for producing unrelated, non-responsive documents); *Taser Int'l*, 2006 U.S. Dist. LEXIS 47255, at *24 ("Moreover, were the Court to conclude that Taser had been 'overly generous' in identifying responsive documents so as to unduly burden Plaintiffs in their search of those documents, the Court would similarly require Taser to organize and label documents as responsive to Plaintiffs' requests.").

[188] *MGP Ingredients*, 2007 U.S. Dist. LEXIS 76853, at *10 ("[I]mposing such a duty could result in undue burden on the producing party.").

[189] TEX. R. CIV. P. 193.2.

[190] *Id.* 193.2(a) ("A party must make any objection to written discovery in writing—either in the response or in a separate document—within the time for the response."). If, however, the interrogatories or production request is not signed by the requesting party's attorney, the responding party is not required to take any action in response to it. *Id.* 191.3(d).

[191] *Id.* 193.2(e) ("An objection that is not made within the time required . . . is waived unless the court excuses the waiver for good cause shown."); *In re* Soto, 270 S.W.3d 732, 734–35 (Tex. App.—Amarillo 2008, orig. proceeding) (holding that the responding parties waived their

First, under Texas Rule 193.2(e), a court can excuse the failure to assert a timely and proper objection for "good cause shown."[192] Unfortunately, there are no cases that define "good cause shown" under that Rule or its predecessor, former Texas Rule 166b(4).[193] In the context of the withdrawal or amendment of an admission under Texas Rule 198.3,[194] "[g]ood cause is established by showing that the failure [to properly answer] was an accident or mistake, not intentional or the result of conscious indifference."[195] There is no reason why a more exacting standard should apply under Texas Rule 193.2(e).[196]

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privilege objection because it was not timely asserted); Reynolds v. Murphy, 188 S.W.3d 252, 260 (Tex. App.—Fort Worth 2006, pet. denied) ("An objection that is not made within the time required by the discovery rules or court order . . . is waived unless the court excuses the waive for good cause shown."); Wells v. Lewis, No. 05-01-01327-CV, 2002 Tex. App. LEXIS 6102, at *7 (Tex. App.—Dallas Aug. 22, 2002, pet. denied) (holding that the responding party waived his objection that discovery was untimely by not timely objecting to the discovery); *see* Hobson v. Moore, 734 S.W.2d 340, 341 (Tex. 1987) (orig. proceeding) (holding that, under former Texas Rule 166b(2), "a failure to timely object to interrogatories waives any objection, unless an extension of time is granted or good cause is shown for the delay").

An objection to an interrogatory or a production request also may be waived by an answer that purports to answer the objected-to portion of the interrogatory fully or by purporting to produce all of the objected-to documents, *cf.* Berlinger v. Wells Fargo, N.A., No. 2:11-cv-459-FtM-99SPC, 2012 U.S. Dist. LEXIS 26650, at *12–13 (M.D. Fla. Mar. 1, 2012); Anderson v. Hansen, No. 1:09-cv-01924-LJO-MJS (PC), 2012 U.S. Dist. LEXIS 131010, at *18–19 (E.D. Cal. Sept. 13, 2012), or by not asserting the objection in response to a motion to compel, *cf.* Herrmann v. Rain Link, Inc., No. 11-1123-RDR, 2012 U.S. Dist. LEXIS 50553, at *3 (D. Kan. Apr. 11, 2012); Martin K. Eby Constr. Co. v. OneBeacon Ins. Co., No. 08-1250-MLB-KGG, 2012 U.S. Dist. LEXIS 43141, at *17 n.1 (D. Kan. Mar. 29, 2012).

[192] TEX. R. CIV. P. 193.2(e).

[193] In *Remington Arms Co. v. Canales*, the Texas Supreme Court held that inadvertence of counsel was insufficient to prevent the waiver of a discovery objection under former Texas Rule 166b(4)'s good-cause exception. 837 S.W.2d 624, 625 (Tex. 1992) (orig. proceeding).

[194] Texas Rule 198.3 allows a court to "permit the party to withdraw or amend the admission if," the party, among other things, "shows good cause for the withdrawal or admission." TEX. R. CIV. P. 198.3.

[195] *E.g.*, Wheeler v. Green, 157 S.W.3d 439, 442 (Tex. 2005).

[196] Federal courts, in making a good-cause determination in connection with a failure to timely object to discovery, often apply a balancing test that weighs the following factors: (1) the delay's length; (2) the reason for the delay; (3) whether the responding party was dilatory or acted in bad faith; (4) whether the requesting party has been prejudiced by the failure; (5) the burdensomeness of the interrogatory or production request; and (6) whether waiver would impose an excessively harsh result on the responding party. *E.g.*, Enron Corp. Savs. Plan v. Hewitt Assocs., L.L.C., 258 F.R.D. 149, 156–57 (S.D. Tex. 2009); Hall v. Sullivan, 231 F.R.D. 468, 474

Second, a party may amend or supplement its response to an interrogatory or a production request to state additional objections that were "inapplicable or unknown [at the time of the response] after reasonable inquiry."[197] The "reasonable inquiry" requirement precludes a party from interposing new objections in an amended or supplemental response that were omitted from the original response by inadvertence or mere oversight. Thus, new objections are proper when, for example, additional documents responsive to a request are discovered after the initial response and a previously unmade objection is applicable to those documents.

The responding party must have "a good faith factual and legal basis" for each objection to an interrogatory or a production request "at the time the objection is made."[198] The objection's legal or factual basis also must be stated specifically.[199] Thus, a responding party who objects to an interrogatory or a production request because it is overbroad, unduly burdensome, vague, ambiguous, or unreasonably cumulative or duplicative should explain why the discovery request suffers from each asserted malady. Moreover, an objection "that is obscured by numerous unfounded objections[] is waived unless the court excuses the waiver for good cause shown."[200] These provisions' obvious purpose is to eliminate the practice of interposing numerous hypothetical or prophylactic objections to obfuscate what information or material is being withheld or to prevent a waiver of objections.[201]

In addition, in interposing an objection, the responding party, under Texas Rule 193.2(a), must state the extent to which it is refusing to comply

(D. Md. 2005). This is an excellent approach, and there is no reason why Texas courts cannot follow it.

[197] TEX. R. CIV. P. 193.2(d).

[198] *Id*. 193.2(c).

[199] *Id*. 193.2(a); *cf.* Hager v. Graham., 267 F.R.D. 486, 498 (N.D.W. Va. 2010) ("Defendant's objection that the request is vague, ambiguous, and overly broad is a general objection . . . . The objection is only a general statement that does not specify how the Request is vague, ambiguous, and overly broad. Therefore, the objection is improper."); *Enron Corp. Sav. Plan*, 258 F.R.D. at 159 ("[B]oilerplate objections are not acceptable; specific objections are required in responding to a Rule 34 request." (quoting Frontier-Kemper Constructors, Inc. v. Elk Run Coal Co., 246 F.R.D. 522, 528 (S.D.W. Va. 2007)) (internal quotation marks omitted)); Carnes v. Crete Carrier Corp., 244 F.R.D. 694, 698 (N.D. Ga. 2007) ("'Merely stating that a discovery request is vague or ambiguous, without specifically stating how it is so, is not a legitimate objection to discovery.'").

[200] TEX. R. CIV. P. 193.2(e).

[201] *See infra* Part IV.B.1.

with the interrogatory or production request[202] and comply with that part of the discovery request to which there is no objection.[203] In other words, if an interrogatory or a production request is objectionable only in part, for example, because its scope is overly broad, the responding party must respond to as much of the request as it deems is proper.[204] That is, the responding party should "blue-pencil" or rewrite the interrogatory or production request so that is not objectionable. However, there may be circumstances under which it is unreasonable to make a partial response. For example, if the responding party's documents are organized in a way that requires the same search regardless of the request's scope, the responding party can wait until the parties or court resolve the scope issues to produce any documents.[205] Of course, the responding party may choose to provide some information or material in response to the discovery request as a tactical matter in hope that the requesting party will be satisfied or that the court, in connection with a motion to compel, will look more favorably on the partial response.

Although Texas Rule 193.2(e)'s purpose is to allow discovery to proceed despite objections, it does not prohibit a responding party from objecting to an interrogatory or a production request in its entirety.[206] To the contrary, as Comment 2 to Texas Rule 193 recognizes, a discovery request might be wholly objectionable.[207]

Either the requesting or responding party can request a hearing on a discovery objection.[208] If neither party requests a hearing, the requesting

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[202] TEX. R. CIV. P. 193.2(a).

[203] *Id.* 193.2(b).

[204] *Id.* 193.2(b), 193 cmt. 2 ("A party who objects to a production of documents from a remote time period should produce documents from a more recent period unless that production would be burdensome and duplicative should the objection be overruled.").

[205] *Id.*

[206] *Id.* 193 cmt. 2 ("But 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. A party may also object to request for a litigation file on the ground that it is overly broad and . . . seeks only materials protected by privilege." (citation omitted)).

[207] *Id.*

[208] *Id.* 193.4(a); *see In re* AEP Tex. Cent. Co., 128 S.W.3d 687, 690 (Tex. App.—San Antonio 2003, orig. proceeding) ("[Texas] Rule 193.4(a) authorizes either the requesting or objecting party to request a hearing on objections to discovery."); *In re* Born, No. 01-01-00971-CV, 2002 Tex. App. LEXIS 3279, at *6 (Tex. App.—Houston [1st] May 9, 2002, orig. proceeding) (mem. op., not designated for publication) (same).

party waives the objected-to discovery.[209] Thus, once objections or privilege claims have been asserted, the requesting party has the burden of securing a hearing to resolve any dispute regarding them.[210]

The responding party almost always has the burden of proving an objection's or a privilege's applicability.[211] And it must present any evidence necessary to support the objection or privilege.[212] "The evidence

[209] Balay v. Gamble, No. 01-10-00017-CV, 2011 Tex. App. LEXIS 4576, at *19 (Tex. App.—Houston [1st Dist.] June 16, 2011, no pet.) (mem. op.); Roberts v. Whitfill, 191 S.W.3d 348, 361 n.3 (Tex. App.—Waco 2006, no pet.).

[210] Trahan v. Lone Star Title Co., 247 S.W.3d 269, 282–83 (Tex. App.—El Paso 2007, pet denied) ("[T]he case law indicates that as a general rule, only failure to obtain a pretrial ruling on discovery disputes constitutes a waiver of a claim for sanctions based on that conduct."); Klein & Assocs. Political Relations v. Port Arthur Indep. Sch. Dist., 92 S.W.3d 889, 894 (Tex. App.—Beaumont 2002, pet. denied) ("The Texas Supreme Court has explained that 'because the party requesting discovery is in the best position to evaluate its need for information . . . , the orderly administration of justice will be better served by placing responsibility for obtaining a hearing on discovery matters on the party requesting discovery.'" (quoting McKinney v. Nat'l Union Fire Ins. Co., 772 S.W.2d 72, 75 (Tex. 1989))).

[211] State v. Lowry, 802 S.W.2d 669, 671 (Tex. 1991) (orig. proceeding) ("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, orig. proceeding) ("[T]he general rule is that a party resisting discovery has the burden to plead and prove the basis for its objections."); *In re* Rogers, 200 S.W.3d 318, 321–22 (Tex. App.—Dallas 2006, orig. proceeding) ("In the trial court, the party objecting to discovery bears the burden of proving the request is outside the rules' guidelines."); *AEP Tex. Co.*, 128 S.W.3d at 690 ("If a hearing is held, the party who has objected or asserted a privilege must present any evidence necessary to support the objection or privilege.").

The one exception to this rule relates to income-tax returns. Because public policy disfavors their disclosure, *see infra* Part IV.B.3.a, once an objection is made to the production of tax returns, the requesting party has the burden of showing both their relevance and materiality. *E.g.*, Hall v. Lawlis, 907 S.W.2d 493, 494–95 (Tex. 1995) (orig. proceeding); Maresca v. Marks, 362 S.W.2d 299, 301 (Tex. 1962) (orig. proceeding); *In re* Beeson, 378 S.W.3d 8, 12 (Tex. App.—Houston [1st Dist.] 2011, orig. proceeding); *In re* Brewer Leasing, Inc., 255 S.W3d 708, 714–15 (Tex. App.—Houston [1st Dist. 2008, orig. proceeding); *In re* Patel, 218 S.W.3d 911, 916 (Tex. App.—Corpus Christi 2007, orig. proceeding).

[212] *In re* Waste Mgmt. of Tex., Inc., No. 13-11-00197-CV, 2011 Tex. App. LEXIS 7192, at *14 n.5 (Tex. App.—Corpus Christi Aug. 31, 2011, orig. proceeding) (mem. op.) ("[T]his court and others have placed the burden of proof regarding relevance ,or lack thereof, on the party seeking to avoid discovery."); *In re* Exmark Mfg. Co., 299 S.W.3d 519, 524 (Tex. App.—Corpus Christi 2009, orig. proceeding) ("The party objecting to discovery must present any evidence necessary to support its objection. . . . When it is not self-evident that the discovery order is overly broad, the party resisting discovery bears the burden of offering evidence to provide its objection."); *In re* Gen. Elec. Railcar Servs. Corp., No. 09-03-530 CV, 2004 Tex. App. LEXIS 630, at *5–6 (Tex. App.—Beaumont Jan. 22, 2004, orig. proceeding) (mem. op.); *In re* John

may be testimony presented at the hearing or affidavits served at least seven days before the hearing or at such other reasonable time as the court permits."[213]

"To the extent the court sustains the objection or privilege claim, the responding party has no further duty to respond to the interrogatory or production request."[214] However, to the extent the objection or privilege claim is overruled, the responding party must provide the requested information or produce the requested material within thirty days after the court's ruling or at such time as the court orders.[215]

An interesting question is how a court faced with a proper objection to a partially objectionable interrogatory or production request should proceed. In such a case, the court has two options: it can either narrow the discovery request or sustain the objection in its entirety.[216] In most instances in which the discovery request is only partially objectionable, the appropriate course is to narrow the request so that is proper. As one federal court explained:

> It is within the discretion of a court ruling on a motion to compel to narrow the requests rather than sustain the responding party's objections to them in toto. In doing so, the court effectively sustains an objection that the requests are vague, ambiguous, or overbroad in part, and overrules it in part.[217]

Crane Inc., No. 01-03-00698-CV, 2003 Tex. App. LEXIS 9684, at *5 (Tex. App.—Houston [1st Dist.] Nov. 13, 2003, orig. proceeding) (mem. op.) ("A party resisting discovery, however, cannot simply make conclusory allegations . . . . The party must produce some evidence supporting its request for a protective order."); Tjernagil v. Roberts, 928 S.W.2d 297, 302 (Tex. App.—Amarillo 1994, orig. proceeding) ("[A] party who seeks to exclude matters from discovery on the ground the request is unduly burdensome or overly broad has the burden to plead and prove the work necessary to comply with the discovery."); Valley Forge Ins. Co. v. Jones, 733 S.W.2d 319, 321 (Tex. App.—Texarkana 1987, orig. proceeding) (holding that, as a general rule, the burden of pleading and proving the requested evidence is not relevant falls upon the party seeking to prevent discovery).

[213] TEX. R. CIV. P. 193.4(a).

[214] *Id.* 193.4(b).

[215] *Id.*

[216] *See, e.g.*, Francis v. Bryant, No. CV F 04 5077 REC SMS P, 2006 U.S. Dist. LEXIS 21211, at *5–12 (E.D. Cal. Apr. 10, 2006) (sustaining objections to discovery as overbroad and irrelevant); Wiley v. Williams, 769 S.W.2d 715, 716–717 (Tex. App.—Austin 1989, orig. proceeding) (sustaining objection to a discovery request).

[217] Green v. Baca, 219 F.R.D. 485, 490 (C.D. Cal. 2003); *accord* Robinson v. Adams, No. 1:08-cv-01380-AWI-BAM PC, 2012 U.S. Dist. LEXIS 41165, at *6 (E.D. Cal. Mar. 24, 2012) ("It

This approach is consistent with Texas Rule 193.2(b), which, as discussed contemplates the "blue-penciling" of an overly broad or unduly burdensome interrogatory or production request, as well as Texas Rule 192.6(b)(4), which allows a court to enter a protective order that "the discovery be undertaken only . . . upon such terms and conditions . . . directed by the court . . . ."[218] This approach also is consistent with the interests of judicial economy because it will prevent the requesting party from serving additional interrogatories and production requests to obtain the information or material and the expense, time, and delay associated with a second motion to compel when the responding party invariably interposes the same objections to the new discovery.[219]

is well within the discretion of the court in ruling on a motion to compel to narrow the request rather than sustaining the responding parties [sic] objections."); *In re* Control Data Corp. Sec. Litig., No. 3-85-1341, 1987 U.S. Dist. LEXIS 16829, at *10, (D. Minn. Dec. 10, 1987) ("In order to resolve a discovery dispute, the court may properly narrow the scope of a discovery request."); *see In re* Alford Chevrolet–Geo, 997 S.W.2d 173, 191–92 (Tex. 1999) (Hecht, J., concurring in part, dissenting in part) ("When a party's attempted reach exceeds its legal grasp, we routinely limit the reach; we do not amputate the hand.").

[218] TEX. R. CIV. P. 192.6(b)(4).

[219] In recent decisions, the Beaumont Court of Appeals appears to have rejected this approach. *In re* Family Dollar Stores of Tex., LLC, No. 09-11-00432-CV, 2011 Tex. App. LEXIS 8782, at *9–10 (Tex. App.—Beaumont Sept. 19, 2011, orig. proceeding) (mem. op.) ("The burden to propound discovery that complies with the rules of procedure is placed on the party propounding the discovery. . . . [T]hat burden should not be transferred to the courts to redraft a party's discovery requests."); *In re* Premcor Ref. Grp., Inc., No. 09-09-00222-CV, 2009 Tex. App. LEXIS 5850, at *11 (Tex. App.—Beaumont June 8, 2009, orig. proceeding) (mem. op.) ("We believe that the remedy for a party's overbroad discover request lies principally with the discovery's draftsman as we have stated: 'The burden to propound discovery complying with the discovery rules should be on the party and not on the courts to redraft overbroad discovery. We again decline to transfer the burden to properly draft narrowly tailed discovery to the courts and direct the trial court to enter the ruling that is should have entered at the hearing and to sustain Valero's objection.'"); *In re* Mobil Oil Corp., No. 09-06-392 CV, 2006 Tex. App. LEXIS 9187, at *5 (Tex. App.—Beaumont Oct. 26, 2006, orig. proceeding) (mem. op.) ("The requesting part has the responsibility to tailor its discovery requests; the tailoring is not the responsibility of the court or the responding party."); *In re* TIG Ins. Co., 172 S.W.3d 160, 168 (Tex. App.—Beaumont 2005, orig. proceeding) (per curiam) ("The burden to propound discovery complying with the rules of discovery should be on the party propounding the discovery and not on the court to re-draft overly broad discovery so that redrawn by the court the requests compel with the discovery rules."); *In re* Sears, Roebuck & Co., 146 S.W3d 328, 333 (Tex. App.—Beaumont 2004, orig. proceeding) (per curiam) ("[A] responding party does not have the burden to tailor a reasonable request for the requesting party.").

B. Proper and Improper Objections to Interrogatories and Production Requests

Most practitioners do not realize that, besides objections regarding scope (*i.e.*, that the interrogatory or production request seeks irrelevant information or material or information or material not reasonably calculated to lead to the discovery of admissible evidence), the proper objections to interrogatories and production requests are set forth in the Texas discovery rules. For example, Texas Rule 192.6, which sets for the bases for the entry of a protective order, also sets forth proper objections to interrogatories and production requests: "undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights . . . ."[220] Similarly, Texas Rule 192.4, which relates to limitations on discovery's scope, defines undue burden and unnecessary expense[221] and sets forth other proper objections—the discovery is "unreasonably cumulative or duplicative[.]"[222]

1. "General" and "Subject-to" Objections Are Improper.

Many practitioners, even the most sophisticated and experienced ones, use one of two evasive methods in responding to interrogatories and document requests. The first is to have a section at the beginning of the response entitled "general objections," which contains every imaginable objection, such as overbreadth, undue burden, relevance, vagueness, ambiguity, harassment, cumulativeness, duplicativeness, and privilege,[223]

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[220] TEX. R. CIV. P. 192.6(b).

[221] *Id.* 192.4(b); *see id.* 176.7 (relating to subpoenas and providing that "[a] party causing a subpoena to issue must take reasonable steps to avoid imposing undue burden or expense on the person served."); *see also* discussion *infra* Part IV.B.5.

[222] TEX. R. CIV. P. 192.4(a).

[223] The objections in the "General Objection" section typically read as follows:

> **General Objections**
>
> 1.[Responding party] objects to each document request *to the extent* that it is overly broad.
>
> 2.[Responding party] objects to each document request *to the extent* that it is unduly burdensome.
>
> 3. [Responding party] objects to each document request *to the extent* that it seeks documents that are neither relevant or nor reasonably calculated to lead to the discovery of admissible evidence.

followed by a separate section with answers to each discovery request that incorporate the "general objections" by reference "to the extent" they apply to the pertinent discovery request.[224] The second method is to set forth in the response to each discovery request a litany of prophylactic, boilerplate objections, such as those set forth above, and then "subject to and without waiving" the objections state, for example, that "non-privileged responsive documents will be produced."[225]

These methodologies have three purposes—one nefarious and two benign. The nefarious purpose is pure gamesmanship—to hide damaging information or material behind a wall of objections. The benign purposes are to protect against the possibility that an answer might be found to be inadequate or that an objection has been waived. Both methodologies are improper.

First, they violate Texas Rule 192.3(c) because they are hypothetical, and hypothetical objections are impermissible under the Rule, which limits objections to those for which "a good faith factual and legal basis . . . exists *at the time* the objection is made."[226]

Second, "general" and "subject-to" objections violate Texas Rule 193.2(a), which requires the responding party to "state . . . the extent to

> 4.[Responding party] objects to each document request *to the extent* it is vague and ambiguous.
>
> 5.[Responding party] objects to each document request *to the extent* it is harassing, cumulative, or duplicative.
>
> 6.[Responding party] objects to each document request *to the extent* it seeks the production of documents within the attorney-client, work-product, or other privilege.

Often the general objections contain a catch-all objection, such as "[responding party] objects to each document request *to the extent* it exceeds the scope of discovery permitted by Texas Rule 196 or 197."

[224] For example, the response to each discovery request may be: "[Responding party] incorporates each General Objection *to the extent* it applies. Subject to and without waiving the general objections, responsive non-privileged documents will be produced at a mutually convenient time and place." Worse, the discovery response, after incorporating the general objections by reference, may contain specific objections, many of which repeat one or more of the general objections.

[225] An example of this type of response is: "Objection, this document request is vague, ambiguous, overly broad, unduly burdensome, harassing, and seeks documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. *Subject to and without waiving* these objections, responsive non-privileged documents will be produced at a mutually convenient time and place."

[226] TEX. R. CIV. P. 193.2(c) (emphasis added).

which the party is refusing to comply with the request" and to "state specifically the legal and factual basis for the objection," because general objections are nonspecific and "hide the ball" with respect to what information or material is being provided and what information or material is being withheld and why.[227] In fact, both methodologies have been universally condemned by courts for this very reason. As explained by one federal court in holding that "subject-to" objections are improper:

> Plaintiff responded initially that she would answer the interrogatories "subject to and without waiving these objections." This commonly used equivocation is ineffective. Except for inadvertent disclosures, a party cannot produce something without waiving the objection. Worse, this kind of equivocal response to discovery leaves the opposing party in the dark as to whether something unidentified has been withheld.[228]

Another federal court has reasoned similarly in condemning the use of general objections:

> Defendant's "General Objections" and "General Statements" contained in its Amended Objections do not

[227] *Id.* 193.2(a).

[228] Myers v. Goldco, Inc., No. 4:08cv8-RH/WCS, 2008 U.S. Dist. LEXIS 37089, at *2–3 (N.D. Fla. May 6, 2008); *accord, e.g.*, Ochoa v. Empresas ICA, S.A.B. de C.V., No. 11-23898-CIV SEITZ/SIMONTON, 2012 U.S. Dist. LEXIS 111182, at *4 (S.D. Fla. Aug. 8, 2012) ("It has become common practice for a Party to object on the basis of any of the above reasons, and then state that 'notwithstanding the above,' the Party will respond to the discovery request, subject to or without waiving such objection. Such an objection and answer preserves nothing and serves only to waste the time and resources of both the Parties and the Court. Further, such practice leaves the requesting Party uncertain as to whether the question has actually been fully answered or whether only a portion of the question has been answered."); Russell v. Daiichi-Sankyo, Inc., No. CV 11-34-BLG-CSO, 2012 U.S. Dist. LEXIS 49161, at *10 (D. Mont. Apr. 6, 2012) ("The Court here is also concerned about DSI's practice of objecting and then responding 'without waiving the objection.' That it is a common practice does not make it acceptable. It was expressly disapproved by this Court nearly a decade ago. As Russell here argues, DSI's partial answers given 'subject to' its stated boilerplate objections confuse the issue whether the requested information was provided in full."); Leisure Hospitality, Inc. v. Hunt Props., Inc., No. 09-CV-272-GKF-PJC, 2010 U.S. Dist. LEXIS 93680, at *9–10 (N.D. Okla. Sept. 8, 2010) ("Here, Hunt has attempted to both object *and* produce, but produce only "subject to and without waiving" its objections. [Federal] Rule 34 makes no provision for this sort of response. A party may object to some or all of the requested discovery, but it must be clear whether the responding party is objecting or not and, if objecting, to what part of the request and on what specific grounds.").

> relate to any particular discovery request and, in fact, are nothing more than boilerplate, designed to obfuscate. It is impossible to tell which, if any, of these General Objections or General Statements would actually be relied upon with respect to any particular interrogatory. They are not specific nor appropriate and are, therefore, stricken.[229]

Third, "general" and "subject-to" objections violate Texas Rule 191.3(c)'s requirement that:

[229] Barb v. Brown's Buick, Inc., No. 1:09cv785, 2010 U.S. Dist. LEXIS 8655, at *1–2 (E.D. Va. Feb. 2, 2010); *accord, e.g.*, Weems v. Hodnett, No. 10-cv-1452, 2011 U.S. Dist. LEXIS 80746, at *3–4 (W.D. La. July 25, 2011) ("Plaintiff's responses are prefaced with seven 'General Objections.' These objections purport to object to 'any and all' discovery requests 'to the extent' the requests are 'too vague, overly broad in time or scope, unduly vexatious or are burdensome and/or harassing;' or seek privileged or protected information, irrelevant information, information in the public domain, information otherwise available to Defendants, information previously provided to Defendants, or mental impression, opinions, calculations, and projections. General objections such as the ones asserted by Plaintiff are meaningless and constitute a waste of time for opposing counsel and the court. In the face of such objections, it is impossible to know what information has been withheld and, if so, why. This is particularly true in cases like this where multiple 'general objections' are incorporated into many of the response with no attempt to show the application of each objection to the particular request. . . . [T]he court deems Plaintiff's general objections waived . . . ."); Morgenstern v. Fox TV Stations, No. 08-0562, 2010 U.S. Dist. LEXIS 15874, at *14–15 (E.D. Pa. Feb. 23, 2010) ("In his objections, Dougherty includes seven general objections. Then, to each of seven interrogatories, Dougherty merely states 'Dougherty incorporates the General Objections as set forth fully herein.' This form of objection falls far short of meeting [Federal] Rule 33's standard that each objection be stated with specificity. By objecting in this general manner, Dougherty requests both plaintiff and the Court to review each of the seven general objections and anticipate which may apply to each interrogatory. The purpose of Rule 33's specificity standard is to avoid exactly this expenditure of time and resources."); DL v. District of Columbia, 251 F.R.D. 38, 43 (D.D.C. 2008) ("The District begins each of its responses to plaintiffs' discovery requests with a list of boilerplate 'general objections.' The District fails to explain with any specificity how these general objections are applicable to particular discovery requests. For example, the District responds to forty-three of the forty-four requests contained in Plaintiffs' First Document Requests by stating: '[s]ubject to the General Objections above, the District will produce documents responsive to this request.' . . . The District's response to Plaintiffs' First Interrogatories also begins with a list of eighteen general objections. The responses that follow frequently reference individual general objections without explanation or elaboration. . . . [T]he Court notes that the District's 'boilerplate' general objections to plaintiffs' discovery requests, without more, fail to satisfy the District's burdens under the Federal Rules of Civil Procedure to justify its objections to discovery. The District's general objections are not applied with sufficient specificity to enable this court to evaluate their merits. In situations such as these, this Court will overrule District's objections in their entirety.").

> The signature of an attorney or party on a discovery request, notice, response, or objection constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, notice, response, or objection:
>
> (1)is consistent with the rules of civil procedure and these 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 . . . .[230]

Fourth, even the benign rationales for such objections—to prevent a later ruling that a discovery response was inadequate or that an objection has been waived—are inapplicable. The excuse that "general" or "subject-to" objections prevent discovery responses from being found to be insufficient or incomplete at a later date is nonsensical because, under Rule 193.5(a), a party must seasonably amend or supplement an incomplete or incorrect response to a discovery request and because, under Rule 197.3, "an answer to interrogatory inquiring about [the opposing party's contentions or damages] that has been amended or supplemented may not be used for impeachment."[231] The excuse that such objections are needed to prevent a waiver of applicable objections has no merit because Rule 193.2(d) allows a responding party to amend a response to state an objection not made initially if the objection either was "inapplicable or was unknown after reasonable inquiry" when the original response was made.[232]

Accordingly, general and subject-to objections such as the ones discussed above are improper and trial courts should strike them, ruling that each general or subject-to objection has been waived.[233] On the other hand, a general objection stated in a clear and discernible manner and based on

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[230] TEX. R. CIV. P. 191.3(c); *cf.* High Point Sarl v. Sprint Nextel Corp., No. 09-2269-CM-DJW, 2011 U.S. Dist. LEXIS 103118, at *33–36 (D. Kan. Sept. 12, 2011) (sanctioning the responding party for interposing "general objections" because they violate Federal Rule 26(g)).

[231] TEX. R. CIV. P. 193.5(a), 197.3.

[232] *Id.* 193.2(d).

[233] *Id.* 193.2(e). Such a ruling is required even if one of the series of prophylactic, boilerplate "general" or "subject to" objections has merit because, under Texas Rule 193.2(e), "[a]n objection . . . that is obscured by numerous unfounded, is waived . . . ." *Id.*

the facts of the action—such as an objection to all interrogatories or production requests asking for information before a certain date or relating to certain products or facilities—may be acceptable because repeating the objection in multiple responses is pointless and there is no uncertainty regarding what information or material is being withheld and why.[234]

2. Privilege

Privilege is no longer a proper objection to an interrogatory or a production request. Texas Rule 193.2(f) provides "[a] party should *not* object to a request for written discovery on the grounds that it calls for production of material that is privileged but should instead comply with Rule 193.3."[235] Texas Rule 193.3, in turn, requires a responding party, who withholds privileged information or material, to make a withholding statement (1) advising the requesting party that responsive material is being withheld as privileged, (2) identifying the specific privilege(s) asserted, and (3) identifying the individual requests to which the withheld material relates.[236] A party, however, is not required to assert privilege in the withholding statement for materials created by or for attorneys for the litigation or in anticipation of it.[237]

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[234] *Cf.* Berlinger v. Wells Fargo, N.A., No. 2:11-cv-459-FtM-99SPC, 2012 U.S. Dist. LEXIS 26650, at *12–13 (M.D. Fla. Mar. 1, 2012) ("'General or blanket objections should be used only when they apply to every discovery request at issue.' Otherwise, 'specific objections should be matched to specific' interrogatories or requests for production." (quoting Desoto Health & Rehab., L.L.C. v. Phila. Indem. Ins. Co., No. 2:09-cv-599-FtM-99SPC, 2010 U.S. Dist. LEXIS 61503, at *2–3 (M.D. Fla. June 10, 2010))).

[235] TEX. R. CIV. P. 193.2(f) (emphasis added); *see In re* Graco Children's Prods., Inc., 173 S.W.3d 600, 605 (Tex. App.—Corpus Christi 2005, orig. proceeding) ("[N]o objection needs to be made to preserve a privilege . . . .) *In re* Christus Health Se. Tex., 167 S.W.3d 596, 599 (Tex. App.—Beaumont 2005, orig. proceeding) (same); *In re* Anderson, 163 S.W.3d 136, 140 (Tex. App.—San Antonio 2005, orig. proceeding) (same); *In re* Shipmon, 68 S.W.3d 815, 822 (Tex. App.—Amarillo 2001, orig. proceeding) (same); *In re* Monsanto Co., 998 S.W.2d 917, 924 (Tex. App.—Waco 1999, orig. proceeding) (same).

[236] TEX. R. CIV. P. 193.3(a); *see Anderson*, 163 S.W.3d at 140. One way to comply with Texas Rule 193.3's requirements is to have a section in the response entitled "withholding statement" that identifies each discovery request to which privileged information or material has been withheld and the pertinent privileges on which the information or material has been withheld.

[237] TEX. R. CIV. P. 193.3(c). It is assumed that such materials will be withheld under the attorney-client and work-product privileges. *Id.* 193 cmt. 3. Of course, Rule 193.3(c) "does not prohibit a party from specifically requesting [privileged] material or information if the party has a good faith basis for asserting that it is discoverable. An example would be material or information described by Rule 503(d)(1) of the Rules of Evidence[, the crime-fraud exception]." *Id.*

A failure to follow Texas Rule 193.3's procedure, however, does not waive privilege.[238] Rather, a privilege objection is sufficient to preserve the privilege claim if the "error" is not pointed out.[239] Once the error is pointed out, however, the responding party must assert privilege in accordance with Rule 193.3 or waive it.[240]

Moreover, a failure to assert a privilege in response to an interrogatory or a production request in the first instance should result in the privilege's waiver unless the responding party establishes that there was good cause for the failure under Texas Rule 193.2(e) or the objection was either inapplicable or unknown after reasonable inquiry when the response was filed under Texas Rule 193.2(d).[241]

3. Scope Objections: Relevance and Not Reasonably Calculated to Lead to the Discovery of Admissible Evidence

Discovery's purpose is to allow the parties to obtain full knowledge of the issues and facts before trial with the goal being "'to seek the truth so that disputes are decided by what the facts reveal, not by what facts are

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[238] *Id.* 193.2(f).

[239] *Id.*; *see In re* Monsanto Co., 998 S.W.2d 917, 924 n.5 (Tex. App.—Waco 1999, orig. proceeding) ("[A]n objection is apparently sufficient to preserve the claim of privilege if the "error" is not pointed out.").

[240] TEX. R. CIV. P. 193.2(f); *see In re* Univ. of Tex. Health Ctr., 33 S.W.3d 822, 826 (Tex. 2000) (orig. proceeding); *Monsanto*, 998 S.W.2d at 924 n.5 ("Once the error is pointed out, the objecting party must assert the privilege in compliance with Rule 193.3."). If the requesting party desires to pursue information or documents to which a privilege has been claimed, it can "serve a written request that the withholding party identify the information and material withheld." TEX. R. CIV. P. 193.3(b); *see Monsanto*, 998 S.W.2d at 924. The responding party, within fifteen days after receiving the request, must serve a response—commonly called a privilege log—that (1) asserts a specific privilege for each item or group of items, and (2) describes the information or material in such a way that the requesting party can assess the privilege's applicability without revealing the privileged information or otherwise waiving the privilege. TEX. R. CIV. P. 193.3(b); *see Monsanto*, 998 S.W.2d at 924.

[241] *E.g.*, TEX. R. CIV. P. 196.2, 197.2(b) (providing that a responses to production requests or interrogatories "must state objections and assert privileges as required by these rules"); *Anderson*, 163 S.W.3d at 142 ("Because the City failed to assert its privilege in accordance with rule 193.3(a), the trial court erred in denying Anderson's motion to compel . . . ."); *see* Valdez v. Progressive Cnty. Mut. Ins. Co., No. 04-11-00254-CV, 2011 Tex. App. LEXIS 9773, at *11–12 (Tex. App.—San Antonio Dec. 14, 2011, no pet.) (mem. op.) ("We hold that even if Valdez had a valid Fifth Amendment or other constitutional privilege to refuse production of his tax returns, he waived these rights by failing to timely object in writing to the discovery request on this basis.").

concealed.'"[242] Although discovery's scope is largely with the trial court's discretion,[243] that discretion is limited by Texas Rule 192.3(a), which provides:

> In general, 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. It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[244]

Accordingly, if an interrogatory seeks information or a production request seeks material that neither is relevant to the action's subject matter nor reasonably calculated to lead to the discovery of admissible evidence, the responding party should object on those grounds.[245]

Texas Rule 192.3(a)'s general provision relating to discovery's scope is virtually identical to that in former Texas Rule 166b.2.a, which, in turn, was modeled on former Federal Rule 26.[246] The key phrase in the

[242] *In re* Colonial Pipeline Co., 968 S.W.2d 938, 941 (Tex.1989) (orig. proceeding) (quoting Jampole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984) (orig. proceeding), *disapproved of on other grounds by* Walker v. Parker, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding)); *accord* Able Supply Co. v. Moye, 898 S.W.2d 766, 773 (Tex. 1995) (orig. proceeding) (holding that parties are "entitled to full, fair discovery" and to have their cases decided on the merits); State v. Lowry, 802 S.W.2d 669, 671 (Tex. 1991) (orig. proceeding) ("Affording parties full discovery promotes the fair resolution of disputes by the judiciary.").

[243] *E.g.*, *In re* CSX Corp., 124 S.W.3d 149, 152 (Tex. 2003) (orig. proceeding); *Colonial Pipeline*, 968 S.W.2d at 941.

[244] TEX. R. CIV. P. 192.3(a).

[245] *See id.*

[246] In 2000, Federal Rule 26(b) was amended to provide a two-tiered discovery scope:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears to be reasonable calculated to lead to the discovery of admissible evidence. . . .

FED. R. CIV. P. 26(b)(1). Before the amendment, Federal Rule of Civil Procedure 26(b)(1) provided:

definition—"relevant to the subject matter of the action"—has been construed broadly.[247] For example, the United States Supreme Court has interpreted it:

> [T]o encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. Consistently with the notice-pleading system establish by the [Federal] Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. Nor is discovery limited to the merits of the case, for a variety of fact-oriented issues may arise during the litigation of that are not related to the merits.[248]

Texas courts have similarly interpreted the crucial phrase.[249] As such, discovery's reach extends to any matter that has a bearing, or that reasonably could lead to other matter that has a bearing, on any issue in the action.[250] It appears, however, that, under the Texas discovery rules,

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> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, which it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonable calculated to the discovery of admissible evidence.

FED. R. CIV. P. 26(b)(1) (1999) (amended 2000); *see* Sanyo Laser Prods., Inc. v. Artista Records, Inc., 214 F.R.D. 496, 498–99 (S.D. Ind. 2003) (comparing discovery's scope under the 2000 amendment to Federal Rule 26(b)(1) to the pre-2000 version of the Rule).

[247] Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978).

[248] *Id.* (citations omitted).

[249] *E.g.*, *In re* CSX Corp., 124 S.W.3d 149, 152 (Tex. 2003) ("Our procedural rules define the general scope of discovery as any unprivileged information that is relevant to the subject of the action, even if it would be inadmissible at trial, as long as the information sought is 'reasonably calculated to lead to the discovery of admissible evidence.'" (quoting TEX. R. CIV. P.192.3(a))); Eli Lilly Co. v. Marshall, 850 S.W.2d 155, 160 (Tex. 1993) ("To effectuate the truth-finding function of the legal system, discovery is not limited to what may be admissible at trial, but includes any information relevant to the pending subject matter that is reasonably calculated to lead to the discovery of admissible evidence.").

[250] TEX. R. CIV. P. 192.3(a); *CSX Corp.*, 124 S.W.3d at 152.

discovery is limited to the causes of action identified in the pleadings and cannot be used to develop new ones.[251]

To a large extent, what is discoverable is set forth in Texas Rule 192.3, which first defines discovery's scope generally and then sets forth specific matters that are within discovery's scope: (1) "the existence, description, nature, custody, condition, location and contents of documents and tangible things[,]" (2) "the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection to the case[,]" (3) "the name, address, and telephone number of any person who is expected to be called to testify at trial" other than "rebuttal or impeaching witnesses . . . whose testimony cannot be reasonably anticipated[,]" (4) information regarding testifying experts and consulting experts whose mental impressions and opinions have been reviewed by a testifying expert, (5) "the existence and contents of any indemnity or insurance agreements under which any person may be liable to satisfy part or all of a judgment rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment[,]" (6) "relevant portions of settlement agreements[,]" (7) "witness statement[s,]" (8) "the name, address, and telephone number of any potential party[,]" and (9) "any other party's legal contentions and the factual bases for those contentions."[252] A discussion of the discoverability of specific types of information and material is set forth below.

a. Income-Tax Returns

Public policy disfavors discovery of income-tax returns.[253] This public policy is founded in provisions of the Internal Revenue Code providing that

[251] *E.g.*, Dillard Dept. Stores, Inc. v. Hall, 909 S.W.2d 491, 491–92 (Tex. 1995) (orig. proceeding) (per curiam) (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); *In re* Sears, Roebuck & Co., 123 S.W.3d 573, 578 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (defining an improper "fishing expedition" as "one aimed not as supporting existing claims but finding new ones"); *In re* Am. Home Assurance Co., 88 S.W.3d 370, 376 (Tex. App.—Texarkana 2002, orig. proceeding) (holding that "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").

[252] TEX. R. CIV. P.192.3(b)-(j). Many of the items are subject to disclosure under Texas Rule 194. *See id.* 194.2.

[253] *See, e.g.*, Sears, Roebuck & Co. v. Ramirez, 824 S.W.2d 558, 559 (Tex. 1992) (orig. proceeding) (per curiam) (mandamus's issuance was "guided by our reluctance to allow

federal income-tax returns are confidential communications between taxpayers and the government.[254]

Income-tax returns, however, are not absolutely privileged, and a court may order their production if they are relevant and material[255] and the information in them is unavailable from another source.[256] If part, but not all, of an income-tax return is relevant, discovery should be limited to the relevant part.[257] Generally, income-tax returns are relevant to show income[258] and possibly lost profits.[259] They, however, do not show net worth.[260]

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uncontrolled and unnecessary discovery of federal tax returns"); *In re* Brewer Leasing, Inc., 255 S.W3d 708, 714 (Tex. App.—Houston [1st Dist.] 2008, orig. proceeding). ("The reason tax returns are treated differently from other discovery of financial information is because federal income tax returns are considered private and the protection of that privacy is determined to be of constitutional importance."); *cf.* Premium Serv. Corp. v. Sperry & Hutchinson Co., 511 F.2d 225, 229 (9th Cir. 1975) (holding that, although tax returns do not enjoy absolute privilege from discovery, there is a public policy against unnecessary disclosure to encourage taxpayers to file accurate forms); Progressive N. Ins. Co. v. Sampson, No. 10-CV-566-GKF-PJC, 2011 U.S. Dist. LEXIS 76486, at *5–6 (N.D. Okla. July 14, 2011) ("Whether or not characterized as a 'qualified privilege,' federal and state courts recognize the confidential nature of tax returns and disfavor disclosure.").

In determining whether to compel production of tax returns, federal courts apply a two-prong test that requires findings that "[(1)] the returns are relevant to the subject matter of the action, and [(2)] there is a compelling need for the tax returns because the information is not otherwise readily obtainable." *Progressive N. Ins.*, 2011 U.S. Dist. LEXIS 76486, at *2. Tax returns of entities are entitled to the same protection as those of individuals. *Brewer Leasing*, 255 S.W.3d at 715.

[254] I.R.C. §§ 6103, 7213(a) (2010); *see* Payne v. Howard, 75 F.R.D. 465, 469–70 (D.D.C. 1977) (noting that courts broadly construe Internal Revenue Code provisions making federal tax returns confidential communications between taxpayer and government as expressing federal policy against disclosing tax returns generally).

[255] Hall v. Lawlis, 907 S.W.2d 493, 494 (Tex. 1995) (orig. proceeding) (per curiam) ("Income tax returns are discoverable to the extent they are relevant and material to the issues presented in the lawsuit."); *Brewer Leasing*, 255 S.W3d at 714 ("[Federal] tax returns may be discovered only when the pursuit of justice . . . outweighs the protection of privacy." (internal quotation marks omitted)).

[256] *E.g.*, *Sears, Roebuck & Co.*, 824 S.W.2d at 559; *In re* Williams, 328 S.W.3d 103, 116 (Tex. App.—Corpus Christi 2010, orig. proceeding); *Brewer Leasing*, 255 S.W.3d at 714.

[257] Maresca v. Marks, 362 S.W.2d 299, 301 (Tex. 1962) (orig. proceeding).

[258] *See In re* Williams, No. 07-00-0136-CV, 2000 Tex. App. LEXIS 2362, at *7–8 (Tex. App.—Amarillo Apr. 11, 2000, orig. proceeding); *cf.* Bourne v. Arruda, No. 10-cv-393-LM, 2012 U.S. Dist. LEXIS 45938, at *9–10 (D.N.H. Apr. 2, 2012); *Progressive N. Ins.*, 2011 U.S. Dist. LEXIS 76486, at *3.

[259] *In re* Guniganti, No. 12-10-00199-CV, 2010 Tex. App. LEXIS 6624, at *6–8 (Tex. App.—Tyler Aug. 17, 2010, orig. proceeding) (mem. op.) (finding that the production of individual tax

b. Financial Information and Bank Records

Information about a party's financial information, bank records, or net worth seldom is relevant for discovery purposes absent special circumstances.[261] It, however, can be relevant when it implicates a specific element of a claim or defense asserted in the dispute or the responding party's damages.[262]

Unlike tax returns, there is no right to privacy attached to financial information or bank records.[263] Accordingly, the general rule that the responding party has the burden to establish that they are not discoverable

returns were relevant for showing that net profits were distributed); *see* D/FW Comm. Roofing Co. v. Mehra, 854 S.W.2d 182, 187–88 (Tex. App.—Dallas 1993, no writ) (holding there was factually sufficient evidence of lost profits when tax returns were part of the evidence presented to the jury); *see also* Benchmark Design, Inc. v. BDC, Inc., No. 88-1007-FR, 1989 U.S. Dist. LEXIS 8240, at *3 (D. Ore. July 5, 1989) ("The tax returns of the individual defendants may help ascertain the extent and nature of financial dealings between the individual defendants. Tax returns are discoverable in order to determine the interconnections between interrelated parties."); *Williams*, 2000 Tex. App. LEXIS 2362, at *7–8 (holding that income tax returns were relevant to show the plaintiff's work history).

[260] *Hall*, 907 S.W.2d at 495; *In re* House of Yahweh, 266 S.W.3d 668, 674 (Tex. App.—Eastland 2008, orig. proceeding); *Brewer Leasing*, 255 S.W.3d at 711; Chamberlain v. Cherry, 818 S.W.2d 201, 205–06 (Tex. App.—Amarillo 1991, orig. proceeding).

[261] *See In re* Ameriplan Corp., No. 05-09-01407-CV, 2010 Tex. App. LEXIS 31, at *2 (Tex. App.—Dallas Jan. 6, 2010, orig. proceeding) (mem. op.) (holding that, though the requesting party was entitled to current net worth, it was not entitled to certain documents including "income statements or old balance sheets"); *House of Yahweh*, 266 S.W.3d at 673–74 ("However, the trial court erred in failing to limit discovery to relators' current balance sheet because earlier balance sheets would not be relevant to relators' current net worth."); *cf.* Ranney-Brown Distrib., Inc. v. E.T. Barwick Indus., Inc., 75 F.R.D. 3, 5 (S.D. Ohio 1977) (holding that facts concerning defendant's financial status or ability to satisfy judgments generally are not relevant).

[262] *In re* Gonzalez, No. 14-10-01186-CV, 2010 Tex. App. LEXIS 9831, at *4–5 (Tex. App.—Houston [1st Dist.] Dec. 14, 2010, orig. proceeding) (mem. op.) (holding that the defendant's bank records were discoverable because they were relevant to the plaintiff's claim that he received payment for the sale of certain Federal Express routes); *In re* Manion, No. 07-08-0318-CV, 2008 Tex. App. LEXIS 6813, at *8 (Tex. App.—Amarillo Sept. 11, 2008, orig. proceeding) (holding that "financial information for the period [the defendant] was Stallion Manager is relevant and discoverable" in action alleging that he used his position for financial gain in violation of his fiduciary duties.); *cf.* Daval Steel Prods., Div. of Francosteel Corp. v. M/V Fakredine, 951 F.2d 1357, 1367–68 (2d Cir. 1991) (holding that bank records were relevant and discoverable in connection with an "alter ego" claim).

[263] *Manion*, 2008 Tex. App. LEXIS 6813, at *6 ("[I]t has previously been determined that there is no constitutionally protected privacy right in one's personal financial records."); Martin v. Darnell, 960 S.W.2d 838, 844 (Tex. App.—Amarillo 1997, orig. proceeding) (same).

on relevance or other grounds applies to such records.[264] Relevancy, however, is never established merely because the requesting party wants to know the responding party's financial condition to determine if it can satisfy a judgment.[265]

When a pleading asserts a claim for which exemplary damages can be recovered and seeks the recovery of such damages, discovery of the defendant's net worth is permissible without the establishment a prima facie case on the issue of exemplary damages.[266] Net worth is relevant to punitive-damages claims because one of the questions the fact finder considers in arriving at the award's amount is the defendant's financial condition.[267] The requesting party, however, is only entitled to discover documents showing current net worth.[268] Of course, if the pleadings do not

[264] *Gonzalez*, 2010 Tex. App. LEXIS 9831, at *3–4 ("[T]here are no constitutional rights to privacy affected by the disclosure of banking records."); *In re* Jacobs, 300 S.W.3d 35, 40 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding) ("Generally, in cases concerning the production of financial records, the burden rests upon the party seeking to prevent production."); *Brewer Leasing*, 255 S.W.3d at 712 ("The general rule in financial records production cases is that the burden lies with the party seeking to prevent production."); *Manion*, 2008 Tex. App. LEXIS 6813, at *6 ("The general rule in financial records production cases is that the party attempting to prevent or restrict discovery has the burden of pleading and proving the basis for the desired limitation. Absent a privilege or specific exemption, a party is entitled to discover relevant material. There are no presumptions of privilege.").

[265] *Cf.* Metal Mgmt., Inc. v. Schiavone, 514 F. Supp. 2d 227, 239–40 (D. Conn. 2007); Bahrain Telecomm. Co. v. Discoverytel, Inc., 476 F. Supp. 2d 176, 187–88 (D. Conn. 2007).

[266] Lunsford v. Morris, 746 S.W.2d 471, 473 (Tex. 1988) (orig. proceeding) ("Our rules of civil procedure do not require [a prima facie showing of entitlement to exemplary damages] before net worth can be discovered."), *disapproved of on other grounds by* Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1996) (orig. proceeding); *Jacobs*, 300 S.W.3d at 40–41 ("[U]nder Texas law, a party seeking discovery of net-worth information need not satisfy any evidentiary prerequisite, such as making a prima facie show of entitlement to punitive damages, before discovery of net worth is permitted."); *House of Yahweh*, 266 S.W.3d at 673 ("Information regarding net worth is discoverable in cases for which exemplary damages may be awarded. A party seeking discovery of net worth is not required to make a prima facie showing of a right to recover exemplary damages before discovery is permitted.").

[267] TEX. CIV. PRAC. & REM. CODE ANN. § 41.011(a)(6) (2012); Owens-Corning Fiberglas Co. v. Malone, 972 S.W.2d 35, 39–40 (Tex. 1998).

[268] *In re* Ameriplan Corp., No. 05-09-01407-CV, 2010 Tex. App. LEXIS 31, *2 (Tex. App.—Dallas Jan. 6, 2010, orig. proceeding) (mem. op.) (holding that a discovery order ordering defendant to produce financial documents that did not show current net worth was an abuse of discretion); *Jacobs*, 300 S.W.3d at 44–45 & n.9 (holding that a discovery order ordering the defendants to produce two years of net worth information was overly broad because only their "current net worth is relevant[,] that is, their net worth as of the time the discovery is responded to,

assert a claim for which exemplary damages are recoverable or do not seek their recovery, the opposing party's net worth generally is not discoverable.[269]

Discovery of a party's financial information is often appropriate to support, or defend against, a claim for damages.[270] However, interrogatories regarding damages, in many respects, but not completely, have been supplanted by Texas Rule 194.2(d), which requires a party to disclose "the amount and any method of calculating economic damages."[271]

c. Insurance and Indemnity Agreements

As noted above, Texas Rule 192.3(f) permits the discovery of insurance and indemnity agreements,[272] and Texas Rule 194.2(g) requires a party to disclose them upon request.[273] Insurance and indemnity agreements are discoverable because they assist the complaining party in determining the action's settlement value.[274] Their discoverablity, however, does not make them admissible.[275] In addition, the fact that Texas Rule 192.3(f) only refers to "the existence and contents" of relevant insurance or indemnity agreements does not preclude other discovery regarding such agreements if

though net worth information should be updated through supplementation . . . if it changes materially between the service of the discovery response and the time of trial."); *House of Yahweh*, 266 S.W.3d at 673 ("Information regarding net worth is discoverable in cases for which exemplary damages may be awarded . . . . The trial court ordered defendants to produce 'all documents that evidence or reflect [defendants'] net worth.' . . . However, the use of the word 'all' in [the request]may make it overly broad because [defendants] should only be required to produce documents sufficient to show their net worth.").

[269] *E.g.*, Al Parker Buick Co. v. Touchy, 788 S.W.2d 129, 131 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding).

[270] *Cf.* Sinclair Ref. Co. v. Jenkins Petroleum Process Co., 289 U.S. 689, 693 (1933) ("[D]iscovery is as appropriate for proof of a plaintiff's damages as it is for proof of other facts essential to his case."); Resolution Trust Corp. v. Bright, 157 F.R.D. 397, 399–401 (N.D. Tex. 1994) (holding that the plaintiff's documents relating to the value of a savings and loan association's properties were discoverable by the association's former directors and officers because the properties allegedly had "no value" at time of the association was placed in conservatorship).

[271] TEX. R. CIV. P. 194.2(d).

[272] *Id.* 192.3(f). *See supra* note 252 and accompanying text.

[273] TEX. R. CIV. P. 194.2(g).

[274] *In re* Dana Corp., 138 S.W.3d 298, 304 (Tex. 2004) (orig. proceeding); Carroll Cable Co. v. Miller, 501 S.W.2d 299, 299 (Tex. 1973) (orig. proceeding) (per curiam).

[275] TEX. R. CIV. P. 192.3(f) ("Information concerning the indemnity or insurance agreement is not by reason of disclosure admissible in evidence at trial.").

the discovery is otherwise relevant or would lead to the discovery of admissible information.[276] Reservation-of-rights letters, however, generally are not discoverable.[277] Nor is information about the remaining amount of insurance coverage.[278]

d. Settlement Agreements

As noted above, Texas Rule 192.3(g) permits the discovery of the "existence and contents of any relevant portions of a settlement agreement,"[279] and Texas Rule 194.2(h) requires a party to disclose them upon request.[280] Generally, the relevant portions of a settlement agreement in a pending action are (1) those containing the consideration paid by the settling party because they are relevant to the determination of any non-settling defendant's settlement credit after trial and to the question of a settlement demand's reasonableness,[281] and (2) those requiring the settling party either to provide testimony or other cooperation to the other party or not to cooperate with a non-settling party because they are relevant to bias.[282]

A settlement agreement in another action is discoverable if it is relevant to issues in the pending action.[283] The dollar amount of a settlement in

[276] *Dana Corp.*, 138 S.W.3d at 302 ("Rule 192.3(f) does not foreclose discovery of insurance information beyond that identified in the rule; however, we also conclude that the plain language of Rule 192.3(f) by itself, does not provide a sufficient basis to order discovery beyond the 'existence and contents' of the policies. . . . [A] party may discover information beyond an insurance agreement's existence and contents only if the information is otherwise discoverable under our scope-of-discovery rules.").

[277] *In re* Madrid, 242 S.W.3d 563, 567–68 (Tex. App.—El Paso 2007, orig. proceeding) (holding that a reservation-of-rights letter was not discoverable under (1) Texas Rule 192.3(f) because it was not part of the insurance policy, or (2) Texas Rule 192.3(a) because it was not relevant to any claim or defense).

[278] *Dana Corp.*, 138 S.W.3d at 302–04.

[279] TEX. R. CIV. P. 192.3(g).

[280] *See id.* 194.2(h).

[281] *In re* Univar USA, Inc., 311 S.W.3d 175, 179, 181 (Tex. App.—Beaumont 2010, orig. proceeding).

[282] *Univar*, 311 S.W.3d at 182; *see* TEX. R. EVID. 408 (noting that a settlement agreements need not be excluded from evidence when it is offered to prove "bias or prejudice or interest of a witness").

[283] Ford Motor Co. v. Leggat, 904 S.W.2d 643, 649 (Tex. 1995) (orig. proceeding); *In re* Frank A. Smith Sales, 32 S.W.3d 871, 874 (Tex. App.—Corpus Christi 1990, orig. proceeding).

another action, however, generally is not relevant or discoverable.[284] Even though a settlement agreement may be discoverable, it is not admissible to prove or disprove liability at trial.[285]

e. Impeachment Information

Information usable to impeach a witness at trial generally is discoverable.[286] For example, the identity of the person or party paying litigation expenses may be relevant to the credibility of a witness, particularly a named party.[287] Similarly, the criminal record of an opposing party or a witness is relevant and discoverable because it may be useful for impeachment purposes.[288] Further, evidence of conduct or character of a

[284] *Ford Motor*, 904 S.W.2d at 649; Palo Duro Pipeline Co. v. Cochran, 785 S.W.2d 455, 457 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding).

[285] TEX. R. CIV. P. 192.3(f); TEX. R. EVID. 408 (providing that settlement agreements are not admissible to prove or disprove liability); *Ford Motor*, 904 S.W.2d at 649 (holding that settlement agreements are not admissible to prove liability).

[286] TEX. R. CIV. P. 192.3(e)(5) (allowing discovery of information to show "any bias" of an expert witness); *In re* K.L. & J. L.P., 336 S.W.3d 286, 290–91 (Tex. App.—San Antonio 2010, orig. proceeding) (compelling the plaintiff to disclose her social security number so that the defendant could conduct a background investigation to find information that could impeach her credibility); *Univar*, 311 S.W.3d at 182–83 (ordering production of relevant portions of a settlement agreement because it showed witness's bias); *cf.* Hickman v. Taylor, 329 U.S. 495, 511 (1947) (holding that information that might be used for impeachment or corroboration is discoverable); Penn v. Knox Cnty., No. 2:11-cv-363-NT, 2012 U.S. Dist. LEXIS 67025, at *6 (D. Me. May 14, 2012) ("Courts and leading commentators likewise have recognized that evidence bearing on a witness's credibility can be discoverable."); Cabana v. Forcier, 200 F.R.D. 9, 17 (D. Mass. 2001) (granting motion to compel the plaintiff's expert witness/treating physician to answer questions regarding her involvement in prior litigation or disciplinary proceedings, which was "likely to lead to evidence relevant both to [her] skill as a physician and her credibility").

[287] *Cf.* Uinta Oil Ref. Co. v. Cont'l Oil Co., 226 F. Supp. 495, 500 (D. Utah 1964) (holding that an interrogatory requesting names of persons sharing cost of litigation was proper).

[288] TEX. R. EVID. 609(a) (allowing impeachment by evidence of conviction of a crime); *In re* Freeman, No. 03-99-00005-CV, 1999 Tex. App. LEXIS 1037, at *2–4 (Tex. App.—Austin Feb. 19, 1999, orig. proceeding) (per curiam) (refusing to reverse a discovery order requiring the production of "a list of all criminal and civil lawsuits of which Freeman has been a party or witness in the last ten years"); *cf.* Harris v. United States., 121 F.R.D. 652, 656 (W.D.N.C. 1988) (holding that, in an administrator's action to recover estate's present monetary value, the heirs' criminal records were relevant for impeachment purposes); Tisby v. Buffalo Gen. Hosp., 157 F.R.D. 157, 170 (W.D.N.Y. 1994) ("'Discovery is commonly allowed in which the discovering party seeks information with which to impeach witnesses for the opposition. Inquiry is routinely allowed about criminal convictions of a party or witness and similar matters that go to his credibility.'" (quoting Coyne v. Houss, 584 F. Supp. 1105, 1107 (E.D.N.Y. 1984)).

party or witness that suggests the party or witness might be less than truthful is discoverable.[289] Finally, it appears that a party can discover at least certain types of information that an opponent plans to use for impeachment purposes against itself or its witness.[290]

f. Discoverable Information Need Not Be Admissible at Trial.

Discovery of inadmissible information or material is permissible,[291] provided that the information or material is both "relevant," that is, the information or material pertains to the action's subject matter, or is reasonably calculated to lead to the discovery of admissible evidence.[292] For example, inadmissible hearsay evidence is discoverable.[293] Evidence that would otherwise be inadmissible at trial because of its unduly prejudicial

[289] TEX. R. EVID. 608 (allowing impeachment with evidence of character and conduct of witness); *cf.* Davidson Pipe Co. v. Laventhol & Horwath, 120 F.R.D. 455, 461 (S.D.N.Y. 1988). ("By its terms, Rule 26(b)(1) of the Federal Rules of Civil Procedure authorizes only that discovery 'which is relevant to the subject matter involved in the pending actions.' Occasionally courts have construed this language literally to foreclose discovery of information useful only for impeachment. But the far more common and logical analysis is that '[i]nformation showing that a person having knowledge of discoverable facts may not be worthy of belief is always relevant to the subject matter of the action." (citations omitted)).

[290] *Cf.* Chiasson v. Zapata Gulf Marine Corp., 988 F.2d 513, 517–18 & n.4 (5th Cir. 1993) (holding that surveillance tape of a personal-injury plaintiff is discoverable); Washburn v. Lawrence Cnty. Bd. of Comm'rs, No. 1:10-cv-464, 2012 U.S. Dist. LEXIS 75498, at *3–4 (S.D. Ohio May 31, 2012) (allowing discovery of surveillance tapes). *But see In re* Weeks Marine, Inc., 31 S.W.3d 389, 391 (Tex. App.—San Antonio 2000, orig. proceeding) (holding that surveillance material is non-discoverable work product) (per curiam).

[291] TEX. R. CIV. P. 192.3(a); *cf. In re* Potash Antitrust Litig., 161 F.R.D. 405, 409 (D. Minn. 1995) (holding that a trial court's analysis at discovery stage is not driven by issues of admissibility but rather relevancy); Multi-Core, Inc. v. S. Water Treatment Co., 139 F.R.D. 262, 264 n.2 (D. Mass. 1991) (noting that "relevancy encompasses more than admissibility at trial"); Fireman's Fund Ins. Co. v. ECM Motor Co., 132 F.R.D. 39, 40-41 (W.D. Pa. 1990) (holding that, in action arising out of a fire allegedly caused by a motor's overheating, the plaintiff was entitled to discover the underwriter's lab file for a different motor manufactured by the defendant because it could lead to admissible evidence); Lohr v. Stanley-Bostitch, Inc., 135 F.R.D. 162, 164 (W.D. Mich. 1991) (holding that, in a products-liability action, discovery of similar accidents was permissible even though at trial the accidents might not be admissible).

[292] TEX. R. CIV. P. 192.3(a).

[293] *Cf.* Coleman v. Am. Red Cross, 23 F.3d 1091, 1097 (6th Cir. 1994) (noting that discovery of hearsay evidence is permissible if it is possible that such evidence will lead to the discovery of admissible evidence); Lowe's of Roanoke, Inc. v. Jefferson Standard Life Ins. Co., 219 F. Supp. 181, 188 (S.D.N.Y. 1963) (compelling a doctor, in action to collect on life insurance policies, to answer questions about his conversations with another doctor regarding a patient).

effect also is discoverable.[294] So is evidence such as settlement or insurance information for which a strong public policy exists against its admissibility at trial.[295] However, discovery that can only lead to inadmissible evidence is improper.[296]

4. Overbreadth

Texas courts often use the term "overly broad" or "overbroad" in describing objectionable discovery requests.[297] An interrogatory or a production request suffers from this malady when it encompasses time periods, activities, locations, or products that are not relevant to the action's subject matter.[298] For example:

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[294] *Cf.* Schuurman v. Town of N. Reading, 139 F.R.D. 276, 277 (D. Mass. 1991) (allowing discovery of the plaintiff's probation records because objections regarding the evidence's tendency to prejudice or confuse jury should be raised at trial rather than during discovery).

[295] *Cf.* Thermal Design, Inc. v. Guardian Bldg. Prods., Inc., 270 F.R.D. 437, 438–39 (E.D. Wis. 2010) (pointing out that Federal Rule of Evidence 408 places "limits on the *admissibility* of settlement material rather than limits on their *discoverability*"); McQuade v. Michael Gassner Mech. & Elec. Contractors, Inc., 587 F. Supp. 1183, 1190 (D. Conn. 1984) (allowing discovery of the contents of tapes of telephone calls in action seeking damages for illegally taping phone conversations even though the tapes' contents were potentially excludable from evidence and the disclosure was punishable under federal statute).

[296] *Cf.* Ford Motor Co. v. Edgewood Props., Inc., 257 F.R.D. 418, 423–24 (D.N.J. 2009) ("'[D]iscovery which can only lead to inadmissible evidence is prohibited by the plain language of [Federal] Rule 26 and would violate the command of [Federal] Rule 1 . . . , which requires that the Rules be construed and administered to secure the just, speedy, and inexpensive determination of every action.'" (quoting Steele v. Lincoln Fin. Grp., No. 05 C 7163, 2007 U.S. Dist. LEXIS 25587, at *14 (N.D. Ill. Apr. 3, 2007))).

[297] *E.g.*, *In re* Graco Children's Prods., Inc., 210 S.W.3d 598, 600–01 (Tex. 2006) (orig. proceeding) (per curiam); *In re* CSX Corp., 124 S.W.3d 149, 152–53 (Tex. 2003) (orig. proceeding); *In re* Alford Chevrolet–Geo, 997 S.W.2d 173, 180 n.1 (Tex. 1999) (orig. proceeding); Texaco, Inc. v. Sanderson, 898 S.W.2d 813, 815 (Tex. 1995) (orig. proceeding) (per curiam). An overbreadth objection generally is a surrogate for an objection that the discovery request seeks information or documents that either are not relevant or are not reasonably calculated to lead to the discovery of admissible evidence. *See, e.g.*, *Graco Children's Prods.*, 210 S.W.3d at 600.

[298] *E.g.*, *CSX Corp.*, 124 S.W.3d at 152–53 ("Discovery orders requiring document production from an unreasonably long period of time or from distant or unrelated locations are impermissibly overbroad."); *Alford Chevrolet–Geo*, 997 S.W.2d at 180 n.1 ("We have identified as overbroad requests those encompassing time periods, products, or activates beyond those at issue in the case—in other words, matters of questionable relevancy to the case at hand."); *In re* BNSF Ry. Co., No. 09-07-538 CV, 2008 Tex. App. LEXIS 634, at *4 (Tex. App.—Beaumont Jan. 31, 2008, orig. proceeding) (mem. op.) ("A discovery request that is unlimited as to time, place or subject

- A production request for about 20,000 pages of documents relating to products not at issue in the action is overbroad.[299]
- In an action in which the plaintiff was abducted from the parking lot of one of the defendant's stores and then assaulted, interrogatories requesting information about all criminal activities at the store for seven years and similar crimes at all of the defendant's stores nationwide for ten years were overbroad.[300]

matter is overbroad as a matter of law."); *In re* BP Prods. N. Am., Inc., No. 01-06-00140-CV, 2006 Tex. App. LEXIS 7861, at *6–7 (Tex. App.—Houston [1st Dist.] Sept. 1, 2006, orig. proceeding) ("We agree that Request 81 is overbroad because there are no limits as to time, location, and subject matter on what type of documents provided to the Baker Panel are sought.").

[299] *Graco Children's Prods.*, 210 S.W.3d at 600–01; *see In re* Am. Optical Corp., 988 S.W.2d 711, 713 (Tex. 1998) (orig. proceeding) (per curiam) (holding that a discovery order ordering the defendant to produce every document generated in relation to asbestos products was overbroad in action alleging defective respiratory-protection products); Gen. Motors Corp. v. Lawrence, 651 S.W.2d 732, 734 (Tex. 1983) (orig. proceeding) (holding that discovery requests concerning the necks in all GM vehicle models were overbroad in an action involving an allegedly defective fuel-filler design in a particular truck model); *In re* Valvoline Co., No. 01-10-00208-CV, 2010 Tex. App. LEXIS 3696, at *4–5 (Tex. App.—Houston [1st Dist.] May 14, 2010, orig. proceeding) ("[Defendant] asserts that the trial court improperly compelled discovery relating to Ashland products that had not been identified by [plaintiff] as products that [decedent] had used."); *BNSF*, 2008 Tex. App. LEXIS 734, at *7–8 ("The discovery request requests are not reasonably tailored. They are not limited to ergonomic issues related to knee issues or to employee conditions related to plaintiff's employment as a brakeman, switchman and conductor. Several requests seek documents related to back injuries.").

[300] K Mart Corp. v. Sanderson, 937 S.W.2d 429, 431 (Tex. 1996) (orig. proceeding) (per curiam); *see In re* Family Dollar Stores of Tex., LLC, No. 09-11-00432-CV, 2011 Tex. App. LEXIS 8782, at *6–7 (Tex. App.—Beaumont Nov. 3, 2011, orig. proceeding) (mem. op.) (holding that production requests seeking documents about every injury at the defendant's stores involving merchandise falling off a shelf were overbroad as a matter of law because "the discovery could have been easily narrowed to require production for a relevant geographic area of claims involving merchandise that fell off shelves of a similar design as the one involved in the incident"); *In re* EOG Res., Inc., No. 10-10-00455-CV, 2011 Tex. App. LEXIS 969, at *2, *4–5 (Tex. App—Waco Feb 9, 2011, orig. proceeding) (mem. op.) (holding that discovery requests seeking information and documents about policies for the use and installation of all trailers in any geographic region where the defendant did business for a period of ten years was overly broad because it was not limited in geographic scope and to the same type of trailer that the plaintiff was in when it shifted during a storm and injured him).

However, broad requests still must be analyzed within the context of the pleadings. As the Corpus Christi Court of Appeals has noted: "[A] discovery order that covered a ten-year period might be too broad under some circumstances, but there is certainly nothing too broad as a matter of law about all discovery orders covering ten years." *In re* HEB Grocery Co., No. 13-10-00533-CV, 2010 Tex. App. LEXIS 9014, at *7 n.3 (Tex. App.—Corpus Christi Nov. 8, 2010, orig. proceeding) (mem. op.) (internal quotation marks omitted). In *HEB Grocery*, the plaintiff

- Production requests in a "simple" false-arrest case for all lawsuits, claims, or incident reports for a five-year period in all 227 stores owned by the defendant alleging false arrest, civil rights violation, and excessive use of force was "overly broad as a matter of law."[301]
- Where the "plaintiff could have worked at [the defendant's] factory for two years, 1998-1999," a production request that "went back to 1948" was overbroad.[302]

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requested all incident reports related to motorized vehicles ridden by customers inside HEB stores for the years 2004 through November 2009. *Id.* at *5–6. The court, in allowing the discovery, reasoned that:

> [T]he instant case concerns allegations of negligence based . . . on its nationwide policy decisions regarding the provision and utilization of mechanized electronic carts for customers. Thus, unlike *Dillard Department Stores* [*v. Hall*, 909 S.W.2d 491 (Tex. 1995) (orig. proceeding)] and *K Mart*[, 937 S.W.2d 429], the discovery sought in this case is relevant to the specific allegations at issue in the lawsuit.
>
> . . . Moreover, HEB has not presented argument or evidence indicating that the policies and procedures vary from store to store and, accordingly, has failed to show that other locations are not relevant.

Id. at *14–15.

[301] *Dillard Dept. Stores*, 909 S.W.2d at 492; *see In re* Allstate Cnty. Mut. Ins. Co., 227 S.W.3d 667, 669 (Tex. 2007) (orig. proceeding) (per curiam) (finding that discovery requests seeking information and documents about, among other things, "every court order finding that Allstate wrongfully adjusted the value of a damaged vehicle" were improper because they "are overbroad as to time, location, and scope, and could easily have been more narrowly tailored to the dispute at hand"); *In re* Steadfast Ins. Co., No. 01-09-00235-CV, 2009 Tex. App. LEXIS 3556, at *3–4, *9–11 (Tex. App.—Houston [14th Dist.] May 18, 2009, orig. proceeding) (mem. op.) (finding that interrogatory asking the defendant-insurance company to "[i]dentify each insurance claim in which you have been alleged to have acted in bad faith or in breach of an insurance policy with respect to a claim against an employee, borrowed servant, consultant or subcontractor for your insured" was improper in a suit against the insurer for breach of contract and the duty of good faith and fair dealing).

[302] *In re* Reynolds Metal Co., No. 14-04-00001-CV, 2004 Tex. App. LEXIS 3405, at *5–6, *10 (Tex. App.—Houston [14st Dist.] Apr. 15, 2004, orig. proceeding); *see* Texaco, Inc. v. Sanderson, 898 S.W.2d 813, 815 (Tex. 1995) (orig. proceeding) (per curiam) ("While plaintiffs are entitled to discover evidence of defendants' safety policies and practices as they relate to the circumstances involved in their allegations, a request for all documents authored by Sexton on the subject of safety, without limitation as to time, place, or subject matter is overbroad."); *In re* Atchison, Topeka & Santa Fe Ry. Co., No. 09-98-095 CV, 1998 Tex. App. LEXIS 2888, at *3 (Tex. App.—Beaumont May 14, 1998, orig. proceeding) (per curiam) ("ATSF has over 200 railroad facilities and sites in the United States. [The decedent] was an employee from 1952 to 1969 at the Newton, Kansas site and worked in the backshop of it. The order covers all years

- A discovery order ordering an electric utility to answer an interrogatory and produce all documents regarding all lawsuits involving its electrical poles, power lines, guy wires, or anchors for the five years preceding the accident was overbroad because it was not limited to accidents similar to the one at issue, which involved an allegedly rotten utility pole.[303]

The volume of responsive information or material does not necessarily make an interrogatory or a production request overbroad.[304] Similarly,

before 1983. While plaintiff is entitled to discover evidence of asbestos related injuries, a discovery request asking for all documents that indicate in any way that individuals claimed injury to their lungs from asbestos at any ATSF facility with no limit as to time, place, or subject matter is simply overly broad.").

[303] *In re* Oncor, 313 S.W.3d 910, 910 (Tex. App.—Dallas 2010, orig. proceeding); *see also In re* Hernandez, No. 14-11-00408-CV, 2011 Tex. App. LEXIS 7981, at *9–10 (Tex. App.—Houston [14th Dist.] Oct. 6, 2011, orig. proceeding) (mem. op.) (holding, in a malpractice action alleging that the plaintiffs' settlement was inferior to other settlements, that production requests seeking information about all settlements obtained by the defendant-attorney were overbroad because the "discovery is not tailored to discover information about similarly situated clients"); *In re* Halliburton Energy Servs., Inc., No. 01-11-00358-CV, 2011 Tex. App. LEXIS 7974, at *10–13 (Tex. App.—Houston [1st Dist.] Oct. 4, 2011, orig. proceeding) (mem. op.) (holding, in a contract action alleging that the defendant-client had agreed to use the plaintiff-attorney for its Louisiana and Gulf of Mexico offshore cases, personal-injury cases, workers-compensation disputes, and routine matters, that a discovery order ordering the production of "all documents evidencing fees paid to outside counsel for legal matters originating in Louisiana of the Gulf of Mexico regions since July 1, 2007" was overbroad); *In re* GMAC Direct Ins. Co., No. 09-10-00493-CV, 2010 Tex. App. LEXIS 10336, at *3–4 (Tex. App.—Beaumont Dec. 30, 2010, orig. proceeding) ("The Carlsons contend they were harmed by the Relators' 'deliberate business practice of fraudulently adjusting property-damage claims in an outcome-oriented manner so as to minimize the amounts they paid out under the homeowners' policies they issued.' Thus, they argue, their requests are designed to produce evidence of a company-wide business practice for which the Carlsons may recover statutory additional damages and exemplary damages. Rather than tailor the request to include the electronic information actually used in adjusting the Carlsons' claim, the request asks for any electronically-stored information regarding any property damage without regard to time or geographical location. The tenuous connection to the Carlsons' claim is that if an analysis of the data shows that it is somehow 'skewed' in favor of the insurance company, then the Carlsons might be able to use that information to establish exemplary damages. This is precisely the sort of fishing expedition that harvests vast amounts of tenuous information along with the pertinent information that was used in adjusting the Carlsons' claim.").

[304] *In re* Alford Chevrolet–Geo, 997 S.W.2d 173, 180–81 n.1 (Tex. 1999) (orig. proceeding) ("[I]t is clear that the sheer volume of a discovery request does not in itself render the request irrelevant or overbroad as a matter of law."); *In re* Am. Home Assurance Co., 88 S.W.3d 370, 374 (Tex. App.—Texarkana 2002, orig. proceeding) (same); *In re* Whiteley, 79 S.W.3d 729, 734 (Tex.

discovery that is reasonably limited to activities, locations, or products may be overbroad if it not limited to a reasonable time period or visa-versa.[305]

A central consideration in determining overbreadth is whether the request could have been more narrowly tailored.[306] However, a reasonably tailored discovery request is not overbroad merely because it may include some information of doubtful relevance, and the parties have some latitude in fashioning proper discovery requests.[307]

The responding party is not required to show that responding to an overbroad interrogatory or production request is burdensome because such discovery requests are improper whether they are burdensome or not.[308] Oftentimes no evidence is needed to establish overbreadth.[309]

5. Undue Burden or Unnecessary Expense

The mere fact that answering an interrogatory or locating and producing the material responsive to a production request may be burdensome or expensive is insufficient.[310] It is only when answering the interrogatory or producing the material is unduly burdensome or unnecessarily expensive that the discovery request is objectionable.[311] As explained by one federal court:

> All discovery requests are a burden on the party who must respond thereto. Unless the task of producing or answering

App.—Corpus Christi 2002, orig. proceeding) (same). The volume of information or material, however, may make the discovery request unduly burdensome or unnecessarily expensive; *see infra* Part IV.B.5.

[305] *See, e.g.*, *In re* Valvoline Co., No. 01-10-00208-CV, 2010 Tex. App. LEXIS 3696, at *16 (Tex. App.—Houston [1st Dist.] May 14, 2010, orig. proceeding) (mem. op.).

[306] *Allstate*, 227 S.W.3d at 669; *In re* CSX Corp., 124 S.W.3d 149, 153 (Tex. 2003) (orig. proceeding) (per curiam); *In re* Am. Optical Corp., 988 S.W.2d 711, 713 (Tex. 1998) (orig. proceeding) (per curiam); *Halliburton Energy*, 2011 Tex. App. LEXIS 7974, at *9; *Hernandez*, 2011 Tex. App. LEXIS 7981, at *10; *In re* Waste Mgmt. of Tex., Inc., No. 13-11-00197-CV, 2011 Tex. App. LEXIS 7192, at *23 (Tex. App.—Corpus Christi Aug. 31, 2011, orig. proceeding).

[307] *E.g.*, *Am. Optical Corp.*, 988 S.W.2d at 713; *Texaco*, 898 S.W.2d at 815; *Waste Mgmt.*, 2011 Tex. App. LEXIS 7192, at *23; *In re* MHCB (USA) Leasing & Fin. Corp., No. 01-06-00075-CV, 2006 Tex. App. LEXIS 3515, at *23 (Tex. App.—Houston [1st Dist.] Apr. 27, 2006, orig. proceeding) (mem. op.).

[308] *E.g.*, *Allstate*, 227 S.W.3d at 670; *Waste Mgmt.*, 2011 Tex. App. LEXIS 7192, at *23.

[309] *Allstate*, 227 S.W.3d at 670; *Waste Mgmt.*, 2011 Tex. App. LEXIS 7192, at *22–23.

[310] *Cf.* Cont'l Ill. Nat'l Bank & Trust Co. v. Caton, 136 F.R.D. 682, 684–85 (D. Kan. 1991).

[311] *Id.*

> is unusual, undue or extraordinary, the general rule requires the entity answering or producing the documents to bear that burden. Where the requested material is relevant and necessary to the discovery of evidence, a protective order should not be entered merely because compliance with a request for production would be costly or time consuming.[312]

"Undue burden" or "unnecessary expense" is shorthand for the standard found in Texas Rule 192.4, which is that a trial court "should" limit discovery if "the discovery sought is obtainable from some other source that is more convenient, less burdensome, or less expensive"[313] or "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account 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 them."[314] In other words, the determination of whether an interrogatory or a production request is unduly burdensome or unnecessarily expensive is not solely dependent on the inconvenience or expense of gathering the responsive information or producing the responsive material. To the contrary, the inconvenience and

[312] *Id.* (citation omitted); *accord* TEX. R. CIV. P. 192.6(b) (providing for a protective order "to protect the movant from undue burden, unnecessary expense"); *Waste Mgmt.*, 2011 Tex. App. LEXIS 7192, at *33–34 ("The fact that a discovery request is burdensome is not enough to justify protection; 'it is only undue burden that warrants non–production.'" (quoting ISK Biotech Corp. v. Lindsay, 933 S.W.2d 565, 569 (Tex. App.—Houston [1st Dist.] 1996, orig. proceeding))); Forward v. Hous. Auth., 864 S.W.2d 167, 169 (Tex. App.—Tyler 1993, no writ) (same); *In re* Energas Co., 63 S.W.3d 50, 55 (Tex. App.—Amarillo 2001, orig. proceeding) (same).

[313] TEX. R. CIV. P. 194.2(a); *accord In re* Weekly Homes, L.P., 295 S.W.3d 309, 317 (Tex. 2009) (orig. proceeding) ("[B]oth the federal rule and ours require trial courts to weigh the benefits of production against the burden when the requested information is not reasonably available in the ordinary course of business."); *Waste Mgmt.*, 2011 Tex. App. LEXIS 7192, at *33 ("Under the rules of civil procedure, discovery should be limited if it . . . is obtainable from some other source that is more convenient, less burdensome or expensive."); *In re* Harris, 315 S.W.3d 685, 696 (Tex. App.—Houston [1st Dist.] 2010, orig. proceeding) ("[T]he discovery rules explicitly encourage trial courts to limit discovery when the burden or expense of the proposed discovery outweighs its likely benefit, taking into account 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." (quoting *In re Alford Chevrolet–Geo*, 997 S.W.2d 173, 181 (Tex. 1999) (orig. proceeding))).

[314] TEX. R. CIV. P. 192.4(b); *accord Weekly Homes*, 295 S.W.3d at 317; *Waste Mgmt.*, 2011 Tex. App. LEXIS 7192, at *33; *Harris*, 315 S.W.3d at 696.

expense must be weighed against the other factors set forth in Texas Rule 192.4.[315]

Although the responding party has the burden of pleading and proving undue burden or unnecessary expense, very rarely does a responding party attempt to describe the nature of the undue burden or why the answering of the interrogatory or producing the requested material is unnecessarily expensive. To prove undue burden or unnecessary expense, the responding must do more than make a conclusory assertion that answering the interrogatory or producing the requested material would be unduly burdensome or unnecessarily expensive.[316] Rather, it must adduce evidence establishing the undue burden or unnecessary expense or that the information or material is obtainable from a more convenient source or in a less burdensome or expensive manner.[317] Although most practitioners tend to equate undue burden and unnecessary expense with the number of hours of search time or the number of boxes of documents or the number of emails that must be reviewed, burden also includes the difficulty of the search process, including the interference with ongoing business activities and the number of diverse geographic locations and personnel that must be contacted, the commercial sensitivity of the information or documents, privacy issues, and personal embarrassment.[318]

An undue burden or unnecessary expense objection is improper if the burden or expense is the result of the party's "own conscious, discretionary decisions."[319] Thus, for example, a responding party cannot rely on problems in retrieving information or material resulting from the haphazard

[315] TEX. R. CIV. P. 192.4(b).

[316] *In re* Alfred Chevrolet–Geo, 997 S.W.2d 173, 181 (Tex. 1999) (orig. proceeding).

[317] *Id.*; *In re* Amaya, 34 S.W.3d 354, 358 (Tex. App.—Waco 2001, orig. proceeding); *In re* Gen. Elec. Railcar Servs. Corp., No. 09-03-530 CV, 2004 Tex. App. LEXIS 630, at *5–6 (Tex. App.—Beaumont Jan. 22, 2004, orig. proceeding) (mem. op.); ISK Biotech Corp. v. Lindsay, 933 S.W.2d 565, 568–69 (Tex. App.—Houston [1st Dist.] 1996, orig. proceeding); Tjernagel v. Roberts, 928 S.W.2d 297, 302 (Tex—Amarillo 1996, orig. proceeding).

[318] W. Mark Cotham, *Why Not Have Responses To Document Requests That Make Sense?*, THE HOUSTON LAWYER Jan.–Feb. 2006, http://www.thehoustonlawyer.com/aa_jan06/page22.htm (last visited on May 31, 2013).

[319] *Waste Mgmt.*, 2011 Tex. App. LEXIS 7192, at *33–34 (quoting *ISK Biotech*, 933 S.W.2d at 568–69) (internal quotation marks omitted); *accord In re* HEB Grocery Co., No. 13-10-00533-CV, 2010 Tex. App. LEXIS 9014, at *5 (Tex. App.—Corpus Christi Nov. 8, 2010, orig. proceeding).

manner in which it maintains its records.[320] An undue burden or unnecessary expense objection also is improper if the responding party would have to gather the requested information or material in the preparation of its own case.[321] Accordingly, such an objection to a contention interrogatory seeking the "general bases" or the "material" or "principal" facts of the responding party's allegation, claim, or defense generally should be overruled.[322]

6. Vagueness, Ambiguity, or Lack of Specificity

Objections can be interposed to interrogatories and production requests on the grounds that they lack specificity or that they are ambiguous or vague.[323] Contrary to the belief of many practitioners, these are distinct objections.

By definition an interrogatory or a production request that lacks specificity violates Rule 196.1(b)'s "reasonable particularity" requirement.[324] A production request, for example, lacks specificity if it does not describe either a specific document or item, such as a person's birth certificate, bank records, financial statements, or a specific contract,

[320] *Waste Mgmt.*, 2011 Tex. App. LEXIS 7192, at *33–34 ("A discovery request will not result in an undue burden when the burdensomeness of responding to it is the result of the responding party's own 'conscious, discretionary decisions.'"); *ISK Biotech*, 933 S.W.2d at 568–69 (same); *cf.* Fagan v. District of Columbia, 136 F.R.D. 5, 7 (D.D.C. 1991) (overruling the responding party's undue burden objection to interrogatories because the burden was due to the inefficiency of its filing system).

[321] *Cf.* Bell v. Woodward Governor Co., No. 03 C 50190, 2005 U.S. Dist. LEXIS 4451, at *7 (N.D. Ill. Feb. 7, 2005) ("[W]hen the responding party will need to research the same information requested to prepare their own case, courts are more inclined to require parties to compile information for other side.").

[322] *Cf. id.*; *In re* Folding Carton Antitrust Litig., 83 F.R.D. 256, 259 (N.D. Ill. 1979) (overruling an undue burden objection because the interrogatories related to the bases for the responding party's statute–of–limitations defense and, therefore, was information that the party would gather in preparation of its own case); Flour Mills of Am., Inc., v. Pace, 75 F.R.D. 676, 680–81 (E.D. Okla. 1977) ("An interrogatory will not be held objectionable as calling for research if it relates to details alleged in the pleading . . . or if the interrogated party would gather the information in the preparation of its own case."). As discussed above, contention interrogatories asking the responding party to state "all" facts or "every" or "each" fact concerning an allegation, claim, or defense generally require improper evidence marshalling. *See supra* notes 19–21 and accompanying text.

[323] *See* City of Seattle v. Prof'l Basketball Club, LLC, No. CO7-1620MJP, 2008 U.S. Dist. LEXIS 108533, at *8 (W.D. Wash. Feb. 25, 2008).

[324] *See supra* notes 112–115 and accompanying text.

letter, memorandum, or report, or a specific category of items, such as documents relating to a specific allegation, claim, or defense in a pleading, a type of damage, activity, or communication.[325] Thus, a request for "all notes, records, memorandum, documents, and communications made that [plaintiff] contends support its allegations" is fatally non-specific.[326] Similarly, "a request for all documents the defendant will rely on to support any defense" fails to describe documents with reasonable particularity."[327]

A discovery request is vague or ambiguous where the request's wording is such that it is uncertain what information or documents have been sought.[328] However, the fact that a word or phrase in an interrogatory or a production request is undefined does not necessarily make the discovery request vague or ambiguous. Rather, a responding party should use common sense when interpreting words and phrases used in discovery requests, giving them their ordinary meanings, their specialized meaning used in the industry at issue, or defining them as the opposing party has defined or used them in its pleadings.[329]

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[325] Loftin v. Martin, 776 S.W.2d 145, 148 (Tex. 1989) (orig. proceeding) (holding that a request that does not identify any particular class or type of documents was vague, ambiguous and overbroad), *disapproved of on other grounds by* Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding).

[326] *Id.*

[327] *In re* EOG Res., Inc., No. 10-10-00455-CV, 2011 Tex. App. LEXIS 969, at *5–6 (Tex. App.—Waco Feb. 9, 2011, orig. proceeding) (mem.op.). In *EOG Resources*, the court also held that a production request seeking "all Documents relating to the damages claimed by Plaintiffs in this case" was fatally nonspecific. *Id.*

[328] BLACK'S LAW DICTIONARY 93, 1689 (9th ed. 2009) (defining "ambiguity" and "ambiguous" as "[a]n uncertainty of meaning or intention" and "vague" as "imprecise . . . ; uncertain"); MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 36, 1304 (10th ed. 1997) (defining "ambiguous" as "doubtful or uncertain" or "capable of being understood in two or more possible senses or ways" and "vague" as "not clearly expressed: stated in indefinite term" or "not having precise meaning").

[329] *In re* Swepi L.P., 103 S.W.3d 578, 590 (Tex. App.—San Antonio, 2003, orig. proceeding) ("[S]ometimes the lack of a definition can render an interrogatory vague that is not the case here. . . . The terms Shell has used to describe these claims are easily defined in the context of the lawsuit."); *see* TEX. R. CIV. P. 192.3 (requiring the responding party to "blue pencil" a partially objectionable discovery request); *cf.* Thomas v. Cate, 715 F. Supp. 2d 1012, 1030–31, 1040 (E.D. Cal. 2010) ("The party objecting to discovery as vague or ambiguous has the burden to such vagueness or ambiguity by demonstrating that 'more tools beyond mere reason and common sense are necessary to attribute ordinary definitions to terms and phrases.' . . . [T]he only portion of Interrogatory No. 4 that can be characterized as vague and ambiguous in good faith is the phrase 'significant risk.' . . . The Governor also complains that the terms 'crime victims,' 'crime–victim organizations,' and 'crime–victim representatives' are too vague to permit a response. . . . A

One of the ultimate ironies is that most vague and ambiguous objections are wholly Delphic because they fail to explain why the discovery request suffers from the alleged malady. Thus, the objections leave both the requesting party and the court guessing as to why the request is unclear. Of course, such a bald objection does not meet Rule 193.2(a)'s specificity requirement for objections.

To properly object to a discovery request in its entirety as lacking specificity or as vague or ambiguous, the responding party should explain why the request lacks specificity or is vague or ambiguous. For example, it should not only identify the words or phrases in the request that are vague or ambiguous, but also should explain why they are such. That is, why they are reasonably susceptible of more than one meaning and why the responding party cannot use the word's or phrase's ordinary or other meaning in responding to the discovery request.

7. Unreasonably Cumulative or Duplicative

Cumulative discovery refers to discovery that tends to prove the same point,[330] whereas duplicative discovery is discovery that duplicates or

common sense reading of the disputed phrases permits the Governor to respond . . . ." (quoting Moss v. Blue Cross & Blue Shield of Kan., Inc., 241 F.R.D. 683, 696 (D. Kan. 2007))); Vlasich v. Fishback, No. 1:05-cv-016150-LJO-GSA-PC, 2009 U.S. Dist. LEXIS 43098, at *12–13 (E.D. Cal. May 11, 2009) ("These phrases are not so overbroad, vague, and ambiguous that defendant could not, in good faith, frame an intelligent reply using wording clarifying what defendant believes is meant."); Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc., No. 05-2164-MLB-DWB, 2007 U.S. Dist. LEXIS 16816, at *33, *41–42 (D. Kan. Mar. 8, 2007) ("The words objected to as vague and ambiguous ('knowledge and information') have an understandable meaning in the common, everyday usage of the words.").

Even if a responding party is unsure of the definition of a particular word or phrase, rather than objecting to the request in its entirety, the party should object to the term as vague or ambiguous, explain why it is vague or ambiguous, define it appropriately, and respond to the request using its definition.

[330] MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, supra note 328, at 283 (defining "cumulative," in part, as "tending to prove the same point < ~evidence >"); BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 239–40 (2nd ed. 1995) ("cumulative, in its general lay sense, means 'composed of successively added parts; acquiring or increasing in force or cogency in successive additions[]'" and "*[c]umulative* is used of evidence in the sense of 'tending to prove the same point that other evidence has already been offered to prove.'"); BLACK'S LAW DICTIONARY, *supra* note 328, at 636 (defining "cumulative evidence" as "[a]dditional evidence that supports a fact established by the existing evidence (esp. that which does not need further support)").

is substantively identical to earlier discovery.[331] A court generally will not limit discovery merely because it is somewhat cumulative or duplicative.[332] Rather, the discovery must be unreasonably so,[333] and can be unreasonably cumulative or duplicative of the same or a different type of discovery. For example, an interrogatory not only can be duplicative of other interrogatories, but also can be unreasonably duplicative of deposition testimony, requests for admission, or documents produced by the responding party.[334]

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[331] MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 328, at 359 (defining "duplicative" as "repeat"); BLACK'S LAW DICTIONARY, *supra* note 328, at 578 (defining "duplicative" as "having or characterized by having identical content"); *see* GARNER, *supra* note 330, at 300 (defining "duplicative").

[332] TEX. R. CIV. P. 192.4(a) (allowing a court to limit discovery when *unreasonably* cumulative or duplicate) (emphasis added).

[333] *Id.* 192.4; *cf.* Uniram Tech., Inc. v. Monolithic Sys. Tech., Inc., No. C 04-1268 VRW (MEJ), 2007 U.S. Dist. LEXIS 24869, at *6 (N.D. Cal. Mar. 23, 2007) ("[T]he question here is not whether topic 1 is duplicative of the June 2006 deposition, but whether topic 1 is *unreasonably* duplicative."); Van Wagenen v. Consol. Rail Corp., 170 F.R.D. 86, 87 (N.D.N.Y. 1997) (holding that requests seeking the admission of the truth of various sentences taken from a document, the authenticity of which had already been admitted, were unreasonably duplicative and cumulative); Aramburu v. Boeing Co., 885 F. Supp. 1434, 1444 (D. Kan. 1995) (holding that when information already provided by the defendant–employer should have been enough for the plaintiff–employee to make a preliminary determination as to whether the employer treated the employee's ethnic group differently, employee could not compel employer to cull information from 1,700 personnel files, even though files might contain some relevant information).

[334] *Cf.* SEC v. Berry, No. C07-04431 RMW (HRL), 2011 U.S. Dist. LEXIS 39907, at *9–11 (N.D. Cal. Apr. 1, 2011) (holding that interrogatories were not cumulative or duplicative of defendant's deposition testimony); Sloan v. Oakland Police Dep't, No. C-00-4117 CW (JCS), 2006 U.S. Dist. LEXIS 25100, at *15 n.2 (N.D. Cal. Mar. 23, 2006) (noting that should defendants bring a motion to compel responses to interrogatories served before plaintiff's deposition, such a motion will only be granted if the additional interrogatory responses sought are not duplicative of information already obtained, through deposition or otherwise); Pulsecard, Inc. v. Discover Card Servs., Inc., 168 F.R.D. 295, 306 (D. Kan. 1996) ("That litigants may engage in successive forms of discovery 'is not a license to engage in repetitious, redundant and tautological inquiries.'" (quoting Richlin v. Sigma Design W. Ltd., 88 F.R.D. 634, 640 (E.D. Cal. 1980))).

Nonetheless, "written interrogatories and requests for admission are not adequate substitutes for conducting a deposition." Barnett v. Norman, No. 1:05-cv-01022-SKOPC, 2010 U.S. Dist. LEXIS 92077, at *2–3 (E.D. Cal. Aug. 10, 2010). As one federal court aptly noted:

> Written interrogatories are rarely, if ever, an adequate substitute for a deposition . . . . Only by examining a witness live can a lawyer use the skills of his trade to plumb the depths of a witness' recollection, using to advantage not only what a witness may have admitted in answering interrogatories, but also any new tidbits that usually come out in the course of answering carefully framed and pin–pointed deposition questions. Written

To establish that a discovery request is unreasonably cumulative or duplicative, the responding party must specifically identify the other discovery to which the objected-to discovery is unreasonably cumulative or duplicative.[335]

8. Expert Opinion

Under the Texas discovery rules, there are four discovery procedures that can be used to secure information about or from a testifying expert: (1) a request for disclosure, (2) an expert report, (3) an oral deposition, and (4) an oral deposition with a production request.[336] A party cannot use interrogatories to obtain information about or from a testifying expert.[337] Accordingly, an objection that an interrogatory or a production request improperly seeks documents or information about or from a testifying expert is a proper objection. In fact, it is the only proper "expert-opinion" objection with respect to testifying experts.[338]

Despite this fact, many practitioners faced with contention interrogatories attempt to avoid answering them on the ground that doing so requires an "expert opinion." That is, to answer the interrogatories, the responding party must consult with its experts before its expert designations are due. This expert-opinion objection is nonsense because contention interrogatories do not seek "expert discovery." Rather, they merely seek the

> interrogatories are not designed for that purpose; pointed questions at deposition are the only effective way to discover facts bottled up in a witness' recollection, particularly when the witness is . . . hostile.

Id. (quoting Shoen v. Shoen, 5 F.3d 1289, 1297 (9th Cir. 1993)).

[335] *Cf.* Alexander v. FBI, 194 F.R.D. 299, 302 (D.D.C. 2000) (rejecting unreasonably cumulative and duplicative objection because responding party failed to identify duplicative documents already produced).

[336] TEX. R. CIV. P. 195.1, .5.

[337] *Id.* 195.1 ("A party may request another party to designate and disclose information concerning a testifying expert only through a request for disclosure under Rule 194 and through depositions and reports as permitted by this rule." (footnote omitted)). Nor can a deposition on written questions be used. *Id.* In contrast, interrogatories or a deposition on written questions can be used to obtain information about, or from, a consulting expert. *Id.* 195 cmt. 1 ("This rule does not limit the permissible methods of discovery concerning consulting experts whose mental impressions have been reviewed by a testifying expert.").

[338] "Information concerning purely consulting experts, of course, is not discoverable." *Id.* 195 cmt. 1.

factual bases for claims, defenses, or allegations in the responding party's pleadings.

Courts consistently and repeatedly have held that a contention interrogatory is *not* transformed into "expert discovery" merely because a complete answer requires the responding party to consult with its testifying experts to answer it fully.[339] For example, in *Wagner v. St. Paul Fire & Marine Insurance Co.*, the plaintiffs sued their insurer for bad faith.[340] In response to an interrogatory asking them whether they claimed that the attorneys hired by their insurer to represent them engaged in wrongful conduct and, if so, to state each wrongful act, the plaintiffs objected because "the interrogatory impermissibly asks for an expert opinion."[341] The court, in overruling the objection, reasoned:

> [P]arties may use interrogatories to "ask questions regarding: evidence on which an opposing party bases some specific contention; a position taken by a party and an explanation or defense for that position with respect to how the law applies to the facts; and the legal basis for, or theory behind, some specific contention."
>
> This interrogatory merely asks Plaintiffs to state whether they allege wrongful litigation conduct by defense attorneys and if so the facts upon which they base that argument. It does not ask for an expert opinion.[342]

More importantly, a responding party's failure to answer a contention interrogatory on the basis that it requires an "expert opinion" violates Rule 193.1, which requires a party, "[w]hen responding to written discovery," to "make a complete response, based on *all information reasonably available to the responding party or the attorney at the time the response is made*."[343] This means that a party should answer the interrogatory with the information that is currently available to the party or its attorney and

[339] Wagner v. St. Paul Fire & Marine Ins. Co., 238 F.R.D. 418, 428 (N.D.W. Va. 2006).

[340] *Id.* at 420.

[341] *Id.* at 420, 428.

[342] *Id.* at 428 (citation omitted) (quoting ACLU v. Gonzalez, 237 F.R.D. 120, 123 (E.D. Pa. 2006)); *accord* Geer v. Cox, No. 01-2583-JAR, 2003 U.S. Dist. LEXIS 9230, at *10–11 (D. Kan. May 21, 2003) ("Even if complete answers to discovery requests may require the answering party to consult with experts, such considerations do not transform permissible factual discovery into 'expert discovery.'"); Cook v. Rockwell Int'l Corp., 161 F.R.D. 103, 105 (D. Colo. 1995) (same).

[343] TEX. R. CIV. P. 193.1 (emphasis added).

supplement its answer after its experts are designated. For example, in *Forbes v. City of Jackson*, the plaintiff sued, among others, TASER International, Inc., claiming that a design defect in the TASER used on her son by the police caused his death.[344] The court, in rejecting an expert-opinion objection, held:

> The primary basis for Plaintiff's objections to the discovery is that the interrogatories pose questions regarding the alleged design defect which Plaintiff is unable to answer as a lay person; she must depend on her experts for the responses. And, as discussed, Plaintiff does not yet have her expert reports. Plaintiff requests that she not be compelled to respond to the discovery until such time as the expert reports are completed.
>
> It must be assumed that Plaintiff and her attorney have discussed the factual basis for why they believe TASER is liable for Rafael Forbes's death. It may be that Plaintiff's understanding of the technical aspects of any defect is rudimentary; however, her responses may reflect that lack of understanding. It is customary that counsel investigates the claim prior to filing the Complaint, discusses the claims with potential experts, and explains and discusses the factual basis for liability to Plaintiff. These are the facts which should be disclosed to Defendant at this stage of the litigation, to be supplemented as more expert information is obtained.
>
> For these reasons, Plaintiff shall be compelled to fully respond to the outstanding discovery; she should supplement her answers as more information is obtained.[345]

[344] No. 3:09CV423-HTW-LRA, 2010 U.S. Dist. LEXIS 58868, at *5–6 (S.D. Miss. May 14, 2010).

[345] *Id*. at *5–6; *accord In re* Urethane Antitrust Litig., No. 04-MD-1616-JWL, 2009 U.S. Dist. LEXIS 60496, at *28 (D. Kan. July 15, 2009); *Geer*, 2003 U.S. Dist. LEXIS 9230, at *10–11; Flying J Inc. v. TA Operating Corp., No. 1:06-CV-30 TC, 2007 U.S. Dist. LEXIS 32518, at *15–17 (D. Utah May 2, 2007); EEOC v. Kovacevich "5" Farms, No. 1:06-cv-0165-OWW-TAG, 2007 U.S. Dist. LEXIS 43672, at *30 (E.D. Cal. June 1, 2007).

9. Marshalling Evidence

Many practitioners object to production requests asking for "all," "each," or "every" document regarding a subject, claim, defense, or allegation because they improperly require the responding party to marshal its evidence. A marshalling-evidence objection, however, is *not* a proper objection to such a production request.

Unlike Texas Rules 194 and 197, which respectively provide that disclosures and interrogatories cannot be used "to require the responding party to marshal all of its available proof[,]"[346] nothing in Rule 196 or its commentary contains a specific prohibition on "marshalling."[347] To the contrary, it is common for a production request to ask for "all documents concerning, relating to, or referring to" specific matters, claims, defenses, or allegations. Such requests are perfectly appropriate provided that they are specific enough. That is, they are limited by time, location, or scope or to a type or class of documents.[348]

In contrast, as discussed above, Rule 197.1 provides that interrogatories may not be used to require the responding party to marshal its available proof.[349] Accordingly, a marshalling objection is proper to an interrogatory that asks for "all" facts or "each" or "every" fact concerning a cause of

[346] TEX. R. CIV. P. 194.2(c), 197.1.

[347] *See id.* 196.

[348] *In re* Allstate Cnty. Mut. Ins. Co., 227 S.W.3d 667, 669 (Tex. 2007) (orig. proceeding) (per curiam) ("A request for 'any and all' documents is not overly broad if limited by time, location, or scope or if it is restricted to a type or class of documents."); *In re Patel*, 218 S.W.3d 911, 915 (Tex. App.—Corpus Christi 2007, orig. proceeding) (same); Davis v. Pate, 915 S.W.2d 76, 78 (Tex. App.—Corpus Christi 1996, orig. proceeding) (same); Chamberlain v. Cherry, 818 S.W.2d 201, 204 (Tex. App.—Amarillo 1991, orig. proceeding) ("Rule 167 permits a party to request production of particular classes or types of documents but does not permit fishing expeditions for documents not of a particular type or class. In the present case, relators did request production of particular types of documents. For example, relators' first request for production asked Hogan for 'any and all lease agreements between yourself and [relators] regarding any portion of the subject property since 1974.' As another example, relators' twelfth request sought production of 'any and all leases or rental agreements, deposit agreements, and related documents concerning or pertaining to all or part of the property subject of this suit for the period since July 31, 1989.' These requests comply with Rule 167's mandate that requests for production must 'set forth the items to be inspected either by individual item or by category . . . with reasonable particularity.' The mere fact that the requests asked for 'any and all' such documents did not poison the requests." (quoting former Texas Rule 167(1)(c))).

[349] *See supra* note 16–27 and accompanying text.

action or defense.[350] It is improper with respect to an interrogatory asking for (1) the "general," "principal" or "material" facts concerning such matters, (2) the identity of persons with knowledge about a claim, defense, or allegation, (3) the identity of documents concerning a claim, defense, or allegation, or (4) the identification of each contractual provision breached, each negligent act or omission, each fraudulent misrepresentation or omission, and the like.[351]

10. Supernumerary Objections

Unlike interrogatories, the number of which are expressly limited by rule or the discovery control plan,[352] there is no express limit on the number of production requests. A responding party faced with an excessive number of production requests, however, is not without remedy. If it believes that the requesting party is abusing discovery by serving too many production requests, it can move for a protective order that either limits the number of requests or orders that it need not respond to requests already served.[353] In ruling on such a motion, the court is to be guide by the proportionality considerations contained in Texas Rule 192.4.[354]

In contrast, a responding party faced with too many interrogatories is in a much different and better position. It cannot, however, simply refuse to answer the entire interrogatory set—it should answer the first twenty-five interrogatories (or other number of interrogatories for which the discovery control order provides) and interpose a supernumerary objection to the

[350] *See supra* note 19 and accompanying text.

[351] *See supra* notes 20–22 and accompanying text.

[352] TEX. R. CIV. P. 190.2(b)(3), .3(b)(3), .4(b).

[353] *Id.* 192.6(b).

[354] *See supra* Part IV.B.5; *see also In re* Waste Mgmt. of Tex., Inc., No. 13-11-00197-CV, 2011 Tex. App. LEXIS 7192, at *33 (Tex. App.—Corpus Christi Aug. 31, 2011, orig. proceeding) (mem. op.) ("Under the rules of civil procedure, discovery should be limited if it . . . is obtainable from some other source that is more convenient, less burdensome or expensive."); *In re* Harris, 315 S.W.3d 685, 696 (Tex. App.—Houston [1st Dist.] 2010, orig. proceeding) ("[T]he discovery rules 'explicitly encourage trial courts to limit discovery when the burden or expense of the proposed discovery outweighs its likely benefit, taking into account 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.'" (quoting *In re* Alford Chevrolet–Geo, 997 S.W.2d 173, 181 (Tex. 1999) (orig. proceeding))).

rest.[355] Of course, answering a supernumerary interrogatory waives the objection.[356]

Just as the responding party is not allowed to pick and choose which supernumerary interrogatories to answer, the requesting party cannot circumvent its violation by voluntarily withdrawing selected supernumerary interrogatories. The operative word in Texas Rule 190 is "serve" and every interrogatory served counts against the numerical limit.[357] So do interrogatories to which objections have been interposed, and a requesting party cannot withdraw them.[358]

Finally, when the responding party believes that too many interrogatories have been asked, the better rule is that it need not interpose its substantive objections to the supernumerary interrogatories unless and

[355] *See* TEX. R. CIV. P. 192.6(a), 193.2(a) ("A person should not move for protection when an objection to written discovery . . . is appropriate. . . ."); Childs v. Argenbright, 927 S.W.2d 647, 652 (Tex. App.—Tyler 1992, no writ) (holding that, under former Texas Rule 168, which allowed no more than thirty answers, the responding party should answer the first thirty questions); Owens v. Wallace, 821 S.W.2d 746, 749 (Tex. App.—Tyler 1992, orig. proceeding) (same); *cf.* Paananem v. Celloc P'ship, No. C08-1042 RSM, 2009 U.S. Dist. LEXIS 98997, at *12 (W.D. Wash. Oct. 8, 2009) ("[T]he best rule, and the one this Court applies here, is that a responding party must answer the first 25 interrogatories."); Lowery v. Cnty. of Riley, No. 04-3101-JTM-DWB, 2009 U.S. Dist. LEXIS 19957, at *11 (D. Kan. Mar. 12, 2009) ("[T]he objecting party is to either seek a protective order and not answer the requests at issue or answer up to the numerical limit and object to the remaining requests without answering."). The reason why courts do not allow the responding party to choose which interrogatories to answer is because "[s]uch a rule will allow the responding party to 'selectively respond to the interrogatories and thereby strategically omit the most prejudicial information.'" *Paananem*, 2009 U.S. Dist. LEXIS 98997, at *12 (quoting Herdlein Techs. Inc. v. Century Contractors, Inc., 147 F.R.D. 103, 104 (W.D.N.C. 1993)).

[356] *Childs*, 927 S.W.2d at 652 (holding that a supernumerary objection was waived when the responding party interposed substantive objections to the excessive interrogatories); *cf. Paananem*, 2009 U.S. Dist. LEXIS 98997, at *12 ("If [the responding party] answers more, the numerousity objection is waived as to those interrogatories that were answered."); Allahverdi v. Regents of Univ. of N. Mex., 228 F.R.D.696, 698 (D.N.M. 2005) ("When a party believes that another party has asked too many interrogatories . . . [,] [t]he responding party should not answer some and object to the ones to which it does not want to respond."); Capacchione v. Charlotte–Mecklenburg Schs., 182 F.R.D. 486, 492 (W.D.N.C. 1998) ("Yet, CMS, by responding to Interrogatories 21–25 without moving for a protective order, waived any objection on grounds of the twenty–interrogatory limit. As stated by this Court: 'The responding party must object *(to the Court)* to the number of interrogatories before responding in order to rely on this rule.'" (quoting Herdlein Techs. Inc. v. Century Contractors, Inc., 147 F.R.D. 103, 104 (W.D.N.C. 1993)).

[357] *Cf.* Walker v. Lakewood Condo. Owners Ass'n, 186 F.R.D. 584, 586–88 (C.D. Cal. 1999) (construing Federal Rule 33(a)(1)).

[358] *Cf. id.* (construing Federal Rule 33(a)(1)).

until the supernumerary objections are resolved adversely to it. Otherwise, the responding party would have to answer and object, which is contrary to the very purpose of the supernumerary objections in the first instance.[359]

11. The Requested Information or Material Is in the Requesting Party's or a Non-Party's Possession.

Oftentimes a responding party will object to an interrogatory or a production request because the information or material already is in the requesting party's possession or is equally available from a nonparty or a public source.[360] Such an objection is almost always improper because the requesting party is entitled to ascertain what information and documents the responding party has and to review the responsive documents to determine if they are the same as those in its possession and whether they have any notes or other markings on them.[361]

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[359] *Cf.* Peach v. City of Kewanee, No. 05-4012, 2006 U.S. Dist. LEXIS 77379, at *6 (C.D. Ill. Oct. 23, 2006) ("In order to give meaningful teeth to the numeric limitation imposed by the Rule, this second line of cases defers the obligation to respond and object until [the supernumerary] objection is resolved. This second line of cases makes sense."); Herdlein Techs. Inc. v. Century Contractors, Inc., 147 F.R.D. 103, 104 (W.D.N.C. 1993) ("The responding party must object (to the Court) to the number of interrogatories before responding in order to rely on this rule.").

[360] As discussed above, if an interrogatory can be answered from public records, a responding party, in appropriate circumstances under Texas Rule 197.2(c) can refer the requesting party to the specific records from which the answer can be obtained. *See supra* Part II.E. This is much different than objecting to the interrogatory because its answer can be ascertained from unidentified public records.

[361] *See In re* Ochoa, No. 12-04-00163-CV, 2004 Tex. App. LEXIS 4866, at *5 (Tex. App.—Tyler May 28, 2004, orig. proceeding) (mem. op.) ("Plaintiffs contend that they do not have to answer contention interrogatories because defendants have equal access to their medical records and should be able to determine any prior pre–existing injuries. The rules contain no such limit on the use of contention interrogatories. . . . "); *cf.* Gomez v. Tyson Foods, Inc., No. 8:08CV21, 2012 U.S. Dist. LEXIS 106274, at *11 (D. Neb. July 31, 2012) ("[A] party is required to produce documents in its possession, custody, or control, regardless of whether it believes the requesting party already has those documents."); Kenneth v. Nationwide Mut. Fire Ins. Co., No. 03-CV-521F (Consent), 2007 U.S. Dist. LEXIS 83973, at *51 (W.D.N.Y. Nov. 13, 2007) ("A requested party may not refuse to respond to the requesting party's discovery request on the ground that the requested information is in the possession of the requesting party."); Davidson v. Goord, 215 F.R.D. 73, 77 (W.D.N.Y. 2003) (same); Italia di Navigazione, S.p.A. v. M.V. Hermes I, 564 F. Supp. 492, 495 (S.D.N.Y. 1983) (rejecting objection to production request on ground that the requesting party had access to the documents sought), *aff'd on other grounds*, 724 F.2d 21 (2d Cir. 1983).

The one exception to this rule is when the responding party establishes that answering the interrogatory or producing the requested materials would be unduly burdensome or expensive and

12. Fishing Expedition

A commonly used objection, particularly with respect to production requests, is that the discovery request constitutes a "fishing expedition." This objection derives from *Loftin v. Martin*, in which the Texas Supreme Court, in holding that certain production requests were improper, reasoned:

> Unlike interrogatories and depositions, [former Texas] Rule 167[, which governed production requests,] is not a fishing rule. It cannot be used simply to explore. You are permitted to fish under deposition procedures, but not under [former] Rule 167. The Motion for Discovery must be specific, must establish materiality, and must recite precisely what is wanted. The Rule does not permit general inspection of the adversary records.[362]

Although since *Martin*, the Supreme Court has rejected the "notion that any discovery device can be used to 'fish,'"[363] and several courts have attempted to define what constitutes a "fishing expedition,"[364] the "fishing-

that obtaining the information or material from a nonparty or public source is more convenient or less burdensome or expensive. *See supra* Part IV.B.5.

[362] 776 S.W.2d 145, 148 (Tex. 1989) (orig. proceeding) (internal quotation marks omitted), *disapproved of on other grounds by* Walker v. Parker, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding). Since *Martin*, Texas courts repeatedly have decried "fishing expeditions." *E.g.*, *In re* CSX Corp., 124 S.W.3d 149, 153 (Tex. 2003) (orig. proceeding) ("A request to identify all safety employees for over a 30–year period even though plaintiff never worked for relators or their parent company for that length of time is the type of fishing expedition this Court has repeatedly struck down."); *In re* Alford Chevrolet–Geo, 997 S.W.2d 173, 180–81 (Tex. 1999) (orig. proceeding) (noting that "discovery may not be used as a fishing expedition"); *In re* Am. Optical Corp., 988 S.W.2d 711, 713 (Tex. 1998) ("This court has repeatedly emphasized that discovery may not be used as a fishing expedition."); K Mart Corp. v. Sanderson, 937 S.W.2d 429, 431 (Tex. 1996) (orig. proceeding) ("We reject the notion that any discovery device can be used to 'fish.'"); Texaco, Inc. v. Sanderson, 898 S.W.2d 813, 815 (Tex. 1995) (orig. proceeding) ("Parties must have some latitude in fashioning proper discovery requests. The request in this case is not close. It is not merely an impermissible fishing expedition, it is an effort to dredge the lake in hope of finding a fish."); Dillard Dept. Stores, Inc. v. Hall, 909 S.W.2d 491, 492 (Tex. 1995) (orig. proceeding) ("This is the very kind of fishing expedition that is not allowable . . . . ").

[363] *K Mart Corp.*, 937 S.W.2d at 431; *see also* cases cited *supra* note 362.

[364] *In re* Steadfast Ins. Co., No. 01-09-00235-CV, 2009 Tex. App. LEXIS 3556 (Tex. App.—Houston [1st Dist.] May 18, 2009, orig. proceeding) (mem. op.) ("A party embarks on a fishing expedition when it submits discovery requests that are 'not narrowly tailored and are overly broad.'"); *In re* Sears, Roebuck & Co., 123 S.W.3d 573, 578 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (defining a "fishing expedition" as "one aimed not as supporting existing

expedition" objection is nothing more than a colorful, and wholly imprecise, way of objecting to the discovery request's scope. That is, that it either seeks irrelevant information or documents or seeks information or documents not reasonably calculated to lead to the discovery of admissible evidence. As such, it is not a proper objection.

13. The Responding Party's Failure to Provide Discovery

It is improper to refuse to respond to interrogatories or production requests on the ground that the requesting party has withheld discovery. As explained by one court:

> The argument advanced by plaintiffs here that, in essence, "two wrongs make a right" in the discovery context, has been rejected by this court before. The existence of a discovery dispute as to one matter does not justify withholding other discovery. The proper method of resolution when counsel believes that discovery is inadequate is to file a motion to compel. Counsel "may not retaliate and hold [discovery] hostage." Accordingly, plaintiffs are required to produce the discovery sought by defendants.[365]

claims but finding new ones"); *In re* Am. Home Assur. Co., 88 S.W.3d 370, 376 (Tex. App.—Texarkana 2002, orig. proceeding) (holding that "discovery undertaken with purpose of finding an issue, rather than in support of an issue already raised by the pleadings, will constitute an impermissible 'fishing expedition'"); *see Dillard Dept. Stores*, 909 S.W.2d at 492 (holding that, because the plaintiff sought the document discovery to explore the viability of an allegation of racial discrimination, it was an improper "fishing expedition").

[365] Estate of Broccolino v. McKesson Corp., No. WDQ-05-0438, 2006 U.S. Dist. LEXIS 97220, at *5 (D. Md. Feb. 23, 2006) (citations omitted) (quoting Jayne H. Lee, Inc. v. Flagstaff Indus. Corp., 173 F.R.D. 651, 657 (D. Md. 1997)); *accord* Kinetic Concepts, Inc. v. Convatec Inc., 268 F.R.D. 226, 242 n.23 (M.D.N.C. 2010); Covad Commc'ns Co. v. Revonet, Inc., 258 F.R.D. 17, 23–24 (D.D.C. 2009); Mahoney v Kempton, 142 F.R.D. 32, 33 (D. Mass. 1992).

Of course, under Texas Rule 215.2(b)(1), one of the sanctions available to a trial court is "an order disallowing any further discovery of any kind or a particular kind by the disobedient party." TEX. R. CIV. P. 215.2(b)(1). For a discussion when such an order is proper *see* Global Servs., Inc. v. Bianchi, 901 S.W.2d 934, 938 (Tex. 1995) (orig. proceeding).

14. Harassment

Although a "harassment" objection is clearly a proper one,[366] it is difficult to envision a situation in which such an objection is a proper one to an interrogatory or a production request. First, the definition of harassment does not readily lend itself to interrogatories or production requests. "Harassment" is defined as "[w]ords, conduct, or action (usu. repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose."[367] Thus, what constitutes harassment is generally subjective because what annoys or alarms one person may not annoy or alarm another.

Second, and more importantly, a discovery request that seeks information or documents that are relevant or reasonably calculated to lead to the discovery of admissible evidence exceptions generally cannot be harassing.[368] As the Amarillo Court of Appeals explained: "[W]e have already concluded, however, that these discovery requests were reasonably calculated to lead to the discovery of admissible evidence; a request that meets that criterion is manifestly not . . . 'sought *solely* for the purposes of harassment.'"[369]

[366] *E.g.*, TEX. R. CIV. P. 191.3(c)(3) (by signing written discovery requests, the attorney certifies that the discovery was not sought for the purpose of harassment), 192.6(b) (allowing party to ask for protection from harassing discovery), 215.3 (providing that harassing discovery is a ground for sanctions); Alexson, Inc. v. McIlhany, 798 S.W.2d 550, 553 (Tex. 1990) (orig. proceeding) ("The scope of discovery is also limited by the legitimate interest of the opposing party to avoid overbroad requests, harassment or the disclosure of privileged information."); Jampole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984) (orig. proceeding) (same), *disapproved of on other grounds by* Walker v. Parker, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding); *In re* John Crane, Inc., No. 01-03-00698-CV, 2003 Tex. App. LEXIS 9684, at *5 (Tex. App.—Houston [1st Dist.] Nov. 13, 2003, orig. proceeding) ("A party resisting discovery, however, cannot simply make conclusory allegations that the requested discovery is unduly burdensome or unnecessarily harassing."); *In re* State Farm Lloyds, No. 04-98-00018, 1998 Tex. App. LEXIS 2072, at *11 (Tex. App.—San Antonio Apr. 8, 1998, orig. proceeding) (not designated for publication) ("The right to broad discovery is limited by the opposing party's right to be free from harassment and the burden of overly broad requests.").

[367] BLACK'S LAW DICTIONARY, *supra* note 328, at 784; *accord* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 328, at 529 (defining "harass" as "to annoy persistently").

[368] ISK Biotech Corp. v. Lindsay, 933 S.W.2d 565, 568 (Tex. App.—Houston [1st Dist.] 1996, orig. proceeding).

[369] *Id.*

Of course, even a discovery request that seeks information or documents that are relevant or reasonably calculated to lead to the discovery of admissible evidence may be improper either because it either is unduly burdensome, unnecessarily expensive, or unreasonably cumulative or duplicative of other discovery.[370] Thus, even if the responding party believes that an interrogatory's or production request's sole purpose is to "harass," such an objection will be denied unless the discovery request seeks information or documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, is unduly burdensome, unnecessarily expensive, or unreasonably cumulative or duplicative.[371] And, it is those objections, rather than a harassment objection, that should be interposed.

15. Invasion of Protected Rights

An interrogatory or a production request that improperly invades a party's personal, constitutional, or property rights is objectionable.[372]

16. A Claim's or Defense's Invalidity

A responding party cannot properly object to an interrogatory or a production request is improper on the ground that the cause of action or defense to which it relates is invalid unless the cause of action or defense has been dismissed pursuant to special exception or summary judgment.[373]

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[370] *See* TEX. R. CIV. P. 192.6(b); *In re* Alford Chevrolet–Geo, 997 S.W.2d 173, 180–81 (Tex. 1999); *In re* Am. Home Assur. Co., 88 S.W.3d 370, 372–73 (Tex. App.—Texarkana 2002, orig. proceeding).

[371] *See supra* note 369 and accompanying text.

[372] TEX. R. CIV. P. 192.6(b) (authorizing protection from a discovery request that invades a "personal, constitutional, or property right."); *cf.* Soto v. City of Concord, 162 F.R.D. 603, 616 (N.D. Cal.1995) ("Federal Courts ordinarily recognize a constitutionally—based right of privacy that can be raised in response to discovery requests."). *See also supra* Part IV.B.3.a (discussing the discoverability of income–tax returns).

[373] Lunsford v. Morris, 746 S.W.2d 471, 473 (Tex. 1988) (orig. proceeding) (holding that discovery is based on matters relevant to the claims pleaded and a party need not prove a claim before being entitled to discovery on it), *disapproved of on other grounds by* Walker v. Parker, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding); *In re* Citizens Supporting Metro Solutions, Inc., No. 14-07-00190-CV, 2007 Tex. App. LEXIS 8550, at *8–9 (Tex. App.—Houston [14th Dist.] Oct. 18, 2007, orig. proceeding) (mem. op.) (holding that "the scope of discovery is measured by the live pleadings regarding the pending claims and, as here, where the trial court has not ruled on the merits of any of the claims, then the scope of discovery in the mandamus proceeding will be based on the pleadings"); *In re* Rogers, 200 S.W.3d 318, 324 (Tex. App.—

17. Confidentiality

An objection to an interrogatory or a production request on the ground that it seeks "confidential" or "proprietary" information generally is improper.[374] In fact, the Texas Supreme Court has held that "discovery cannot be denied because of an asserted proprietary interested in the requested document when a protective order would sufficiently preserve the interest."[375] Rather, the proper way for a responding party to deal with its contractual and other "confidentiality" obligations is to produce any allegedly confidential documents pursuant to a protective order's terms.[376]

Dallas 2006, orig. proceeding) (holding when a petition was "broadly pleaded" and had not been challenged or narrowed through special exceptions or any other pleading vehicle" responding party "cannot attempt to limit the scope of discovery through objection").

[374] Texas Rule of Evidence 507 creates a privilege for trade secrets, which are "any formula, pattern, device or compilation of information which is used in one's business and presents an opportunity to obtain an advantage over competitor who do not know or use it." TEX. R. EVID. 507; Computer Assocs. Int'l v. Altai, Inc., 918 S.W.2d 453, 455 (Tex. 1996). The privilege, however, is not an absolute one:

> The party asserting the trade secret privilege has the burden of proving that the discovery information sought qualifies as a trade secret. 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.

In re Cooper Tire & Rubber Co., 313 S.W.3d 910, 915 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding) (citations omitted); *see* TEX. R. EVID. 507 ("A person has a privilege . . . to refuse to disclose . . . a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.").

[375] Jampole v. Tourchy, 673 S.W.2d 569, 574–75 (Tex. 1984) (orig. proceeding), *disapproved of on other grounds by* Walker v. Parker, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding).

[376] *E.g.*, *In re* Cont'l Ins. Co., 994 S.W.2d 423, 426 (Tex. App.—Waco 1999) ("Individuals cannot protect relevant information from discovery by confidentiality provisions in contracts, even settlement agreement. The private agreement between two individuals does *not* override the discovery rules. The rules of civil procedure specifically allow for a method to produce relevant information to the opposing party in litigation while at the same time keep the information confidential." (emphasis added)), *mandamus granted on other grounds sub nom.*, *In re* Union Pac. Res. Co., 22 S.W.3d 338, 341 (Tex. 1999); *Jampole*, 673 S.W.2d at 574–75 ("[I]f the documents were relevant, any proprietary interest could be safeguarded by a protective order."); *cf.* EEOC v. Thorman & Wright Corp., 243 F.R.D. 426, 430 (D. Kan. 2007) ("[A]s this Court previously has held, 'a concern for protecting confidentiality does not equate to privilege.' With that said, a party may request the court enter a protective order pursuant to [Federal Rule] 26(c) as a means to protect such confidential information." (footnote omitted) (quoting DIRECTV, Inc. v. Puccinelli, 224 F.R.D. 677, 682 (D. Kan. 2004)); Tinkers & Chance v. Leapfrog Enters., No. 2:05–CV–349, 2006 U.S. Dist. LEXIS 10115, at *6–7 (E.D. Tex. Feb. 23, 2006) ("[T]his Court will order the production of all relevant documents and evidence, without regard to any private non-disclosure

18. Compound or Calls for a Legal Conclusion

Oftentimes an objection is interposed to an interrogatory because it allegedly is compound or calls for a legal conclusion. Both objections generally are without merit. The fact that an interrogatory is "compound" does not make it objectionable. To the contrary, the Texas discovery rules contemplate that interrogatories may cover more than one topic.[377]

Similarly, a legal-conclusion objection is without merit because Texas Rule 197.1 specifically permits a party to ask its opponent if it makes a "specific legal . . . contention" and to apply law to fact.[378] As pointed out by one federal court in construing the comparable federal interrogatory rule:

> Under Fed. R. Civ. P. 33(a)(2), [a]n interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact. Thus, to the extent plaintiffs contend that interrogatories may never seek legal opinions, they are incorrect. [T]he only kind of interrogatory that is objectionable on the basis that it calls for a legal conclusion

agreement between the parties. Any confidential matter shall be produced under a protective order."). A non–party owner of documents has the right to seek protection from the disclosure of its confidential documents. TEX. R. CIV. P. 192.6(a) ("[A]ny other person affected by the discovery request[] may move . . . for an order protecting that person from the discovery sought.").

[377] *See* TEX. R. CIV. P. 190.2(b)(3), .3(b)(3) (providing that each discrete subpart of an interrogatory is a separate interrogatory); *cf.* Silva v. McKenna, No. C11-5629 RBL/KLS, 2012 U.S. Dist. LEXIS 63973, at *9 (W.D. Wash. May 7, 2012) ("The interrogatories are compound. . . . However, Plaintiff is correct that the compound nature of these interrogatories would not absolve Defendants from answering them. Even if each interrogatory is counted as two or three, the number would simply count toward Plaintiff's limit of twenty–five interrogatories under [Federal Rule 33]." (citations omitted)); Kelly v. FedEx Ground Package Sys., Inc., No. 3:10-cv-01265, 2011 U.S. Dist. LEXIS 45180, at *21 (S.D.W. Va. Apr. 26, 2011) (holding that "being 'compound' does not make [an interrogatory] objectionable"); Jordan v. Chapnick, No. 1:07-cv-202-OWW-MJS (PC), 2010 U.S. Dist. LEXIS 84634, at *4–5 (E.D. Cal. July 15, 2010) ("The Court agrees that the interrogatories are compound . . . . However, the compound nature of these interrogatories does not absolve Plaintiff from answering them. Even if each interrogatory is counted as two . . .[,] Defendant is still within [Federal] Rule 33's limit of no more than twenty–five interrogatories." (citations omitted)).

[378] TEX. R. CIV. P. 197.1.

> is one that extends to legal issues unrelated to the facts of the case.[379]

V. CONCLUSION

Much of the frustration, gamesmanship, and unnecessary expense associated with discovery results from failures to properly respond (and object) to interrogatories and production requests. Perhaps the best example of this is the often-used practice of interposing "general" and "subject-to" objections to such requests.

Although old habits die hard, the frustration, gamesmanship, and unnecessary expense easily can be eliminated if parties comply with the letter of the Texas discovery rules in responding to interrogatories and production requests and if trial courts enforced those rules strictly by compelling proper responses, striking improper objections, and sanctioning, under Texas Rule 215, parties and practitioners who violate the discovery rules.

[379] Wichita Fireman's Relief Ass'n v. Kan. City Life Ins. Co., No. 11-1029-CM-KGG, 2011 U.S. Dist. LEXIS 118990, at *15 (D. Kan. Oct. 14, 2011) (quoting *In re* Motor Fuel Temperature Sales Practices Litig., No. 07-MD-1840-KHV, 2009 U.S. Dist. LEXIS 86423, at *3 (D. Kan. Sep. 21, 2009)) (internal quotation marks omitted); *accord* Gov't Benefits Analysts, Inc. v. Gradient Ins. Brokerage, Inc., No. 10-2558-KHV-DJW, 2012 U.S. Dist. LEXIS 113223, at *14–15 (D. Kan. Aug. 13, 2012) ("The Court begins by overruling Defendants' objection to Interrogatory No. 13 as calling for legal conclusions. Fed. R. Civ. P. 33(a)(2) clearly states that '[a]n interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact.' To the extent that it calls for application of law to the facts of this case, Plaintiffs' Interrogatory No. 13 is within the bounds of Rule 33."); Hunt v. Fields, No. CIV S-09-3525 FCD GGH P, 2011 U.S. Dist. LEXIS 76418, at *16–17 (E.D. Cal. July 8, 2011) ("Defendant objected to these interrogatories on the grounds that they are vague, ambiguous, compound, presume as true facts that have not been established as true, call for a legal conclusion, and are not reasonably calculated to lead to the discovery of admissible evidence. These objections are waived and overruled. An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact[.]" (quoting Fed. R. Civ. Proc. 33(a)(2))); *Kelly*, 2011 U.S. Dist. LEXIS 45180, at *12 ("FedEx objects to these interrogatories, because they are "overly broad" contention interrogatories, seek a legal conclusion, and request privileged information. Fed. R. Civ. P. 33(a)(2) anticipates the use of contention interrogatories and expressly sanctions their function.").