

# **DISCOVERY AND EVIDENCE A PRIMER FOR FAMILY LAW ATTORNEYS**

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## **I. Scope of Article**

At the most basic level, in the context of preparation for litigation or alternative dispute resolution, there are three steps to locating and utilizing information. First, investigate, discover and locate the information through legally available means. Second, analyze the information, i.e., determine if the information discovered helps or hurts your client. Finally, get the helpful information before the trier of fact for consideration, and keep the potentially hurtful information out if legally possible. These steps are governed by the rules and concepts of discovery and evidence. The following article is intended to be a primer on discovery and evidence as it relates to family law, including some tips and information specifically related to the quickly developing and constantly changing area of electronic evidence.

## **II. Discovery<sup>1</sup>**

TEXAS RULES OF CIVIL PROCEDURE 176, 190-205, and 215 address discovery. The discovery process is an invaluable tool in litigation, and discovery requests should be prepared with the goal of obtaining information that will be useful in resolving (or litigating) your case. If one does not put some thought behind drafting their discovery requests, discovery can be ineffective. Similarly, well-thought out and planned responses to discovery can provide strategic advantage in a case.

TEXAS RULE OF CIVIL PROCEDURE 192.1 provides a list of permissible forms of discovery:

- Request for Disclosure
- Requests for Production and Inspection of Documents and Tangible things
- Requests and Motions for Entry Upon and Examination of Real Property
- Interrogatories
- Requests for Admission
- Depositions (Oral or Written)

Though not listed in rule 192.1, subpoenas play an important role in obtaining discovery from nonparties.

## **III. General Rules and Guidelines for Discovery**

TEXAS RULES OF CIVIL PROCEDURE 191, 192, and 193 provide general guidelines for discovery and the discovery process. These guidelines should be kept in mind when requesting and responding to discovery:

- The scope of discovery is limited to any matter that is not privileged and is relevant to the subject matter of the pending action, whether it is related to the claim or defense of the party seeking discovery or the claim or defense of any other party.<sup>2</sup>
- 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.<sup>3</sup>
- A party has an affirmative duty to amend or supplement a response to written discovery if a party learns that the party's response was incomplete or incorrect when made or, although complete and correct when made, is no longer complete and correct.<sup>4</sup>
- A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds good cause for the failure and the failure will not unfairly surprise or unfairly prejudice the other parties.<sup>5</sup>
- A party's production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or trial unless the party objects to the authenticity of the document, or any part of it, and states the specific basis for the objection within ten days after the producing party has actual notice the document will be used.<sup>6</sup>
- Except where specifically prohibited in the TEXAS RULES OF CIVIL PROCEDURE, the procedures and limitations set forth in the rules pertaining to discovery may be modified by the agreement of the parties or by court order for good cause.<sup>7</sup>

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<sup>2</sup> TEX. R. CIV. P. 192.3(a).

<sup>3</sup> TEX. R. CIV. P. 193.1.

<sup>4</sup> TEX. R. CIV. P. 193.4.

<sup>5</sup> TEX. R. CIV. P. 193.6(a).

<sup>6</sup> TEX. R. CIV. P. 193.7.

<sup>7</sup> TEX. R. CIV. P. 191.1.

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<sup>1</sup>Heather King and Ramsey Patton, *Discovery and Evidence*, State Bar of Texas *Advanced Drafting*, December 2008, Austin.

- Every disclosure, discovery request, notice, response, and objection must be signed by the attorney representing the party. The attorney's signature on a disclosure constitutes a certification that the disclosure is complete and correct as of the time it is made, to the best of the attorney's knowledge, information, and belief, formed after a reasonable inquiry. The attorney's signature on a request, notice, response, or objection constitutes that the request, notice, response, or objection, to the best of the attorney's knowledge, information, and belief, formed after a reasonable inquiry is: (1) consistent with the rules of civil procedure and warranted by existing law or a good faith argument for the modification or reversal of existing law; (2) has a good faith factual basis; (3) is not interposed for any improper purpose; and (4) is not unreasonable or unduly burdensome or expensive.<sup>8</sup>

#### **IV. Forms of Discovery**

##### **A. Request for Disclosure**

TEXAS RULE OF CIVIL PROCEDURE 194 provides the content of a request for disclosure. The request is a standard document and is not modifiable. Neither party may object or assert work product to a request for disclosure.<sup>9</sup> Copies of documents and other responsive tangible items must be served with the response.<sup>10</sup> If the responsive documents are voluminous, the response must state a reasonable time and place for the production of documents.<sup>11</sup> The responding party must produce the documents at the time and place stated, unless the parties agree otherwise or the court orders otherwise, and must provide the requesting party a reasonable opportunity to inspect the documents.

As with every form of discovery, a responding party has a duty to supplement its response reasonably promptly after the party discovers the necessity to amend or supplement.<sup>12</sup> This is especially important with respect to responses to requests for disclosure. For example, if you neglect to supplement a response regarding your testifying expert, your testifying expert may be prohibited from testifying at trial.

##### **B. Request for Production and Inspection**

TEXAS RULE OF CIVIL PROCEDURE 196 addresses Requests for Production & Inspection to Parties. The production of documents is a key part of the discovery process. It has the potential of being one of your greatest tools in settling the case, as well as litigating the case. For example, you and/or opposing counsel may be reluctant to finalize settlement based solely on an inventory, without documents supporting your respective valuations of the marital estate. Threats of potential testimony or evidence supporting an award of custody to your client may be empty intimidations without photographs, reports, and other tangible evidence to support your allegations. You are certainly less likely to seriously consider the opposing party's separate property claim for economic contribution or reimbursement without a clear and convincing paper trail.

A request must specify the items to be produced or inspected, either by individual item or category.<sup>13</sup> The request must specify a reasonable time and place for production.<sup>14</sup> If the requesting party intends to sample or test the requested items, the requesting party must describe the means, manner, and procedure for testing or sampling with sufficient specificity to inform the producing party of the means, manner, and procedure for testing or sampling.<sup>15</sup> To obtain the discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced.<sup>16</sup>

Documents should be requested with the purpose of obtaining documentary evidence that will clarify the contested issues in the case. The intent should be to have all documents necessary to prove facts behind the allegations – facts which must be known in order to make well-informed decisions about settlement as well as whether to go to trial. Though it is often tempting to simply send out form requests for production that encompass every topic one can think of, good practice mandates including only the requests that seek documents for which you have a need.

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<sup>8</sup> TEX. R. CIV. P. 191.3.

<sup>9</sup> TEX. R. CIV. P. 194.5.

<sup>10</sup> TEX. R. CIV. P. 194.4.

<sup>11</sup> TEX. R. CIV. P. 194.4.

<sup>12</sup> TEX. R. CIV. P. 193.5(b).

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<sup>13</sup> TEX. R. CIV. P. 196.1(b).

<sup>14</sup> TEX. R. CIV. P. 196.1(b).

<sup>15</sup> TEX. R. CIV. P. 196.1(b).

<sup>16</sup> TEX. R. CIV. P. 196.4.