

PRESENTED AT

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**Making and Responding to Objections at SOAH:
Playing Offense & Defense & Preservation of Error**

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Know where to find the relevant rules.

We start with the Texas Administrative Code. To locate the rules governing the admissibility of evidence, we look to Chapter 1 (Administration), Part 7 (SOAH), Chapter 155 (Rules of Procedure), Subchapter I (Hearings & Prehearings):

Evidence

(a) Rules of evidence.

(1) The Texas Rules of Evidence as applied in a nonjury civil case in district court govern contested case hearings conducted by SOAH.

(2) Evidence may be admitted if it meets the standards set out in Texas Government Code § 2001.081. . . .

1 Tex. Admin. Code § 155.429.

The Government Code contains a helpful exception that can be significantly broader than the Texas Rules of Evidence:

Sec. 2001.081. RULES OF EVIDENCE. The rules of evidence as applied in a nonjury civil case in a district court of this state shall apply to a contested case **except that evidence inadmissible under those rules may be admitted if** the evidence is:

(1) necessary to ascertain facts not reasonably susceptible of proof under those rules;

(2) not precluded by statute; and

(3) of a type on which a reasonably prudent person commonly relies in the conduct of the person's affairs.

Tex. Gov't Code § 2001.081 (emphasis added).

In addition to the Texas Rules of Evidence, be familiar with the Texas Rules of Civil Procedure. 1 Tex. Admin. Code § 155.251(c) (“Parties have the discovery rights provided in this section, the APA, and the TRCP, other than the provisions relating to discovery control plans and except as modified by this chapter.”). In particular, if your opponent does not fulfill their duties in discovery, you can move to exclude information that was not produced timely:

193.6 Failing to Timely Respond—Effect on Trial (eff. for cases filed on or after Jan. 1, 2021).

(a) Exclusion of Evidence and Exceptions. A party who fails to make, amend, or supplement a discovery response, including a required disclosure, 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 that:

- (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or
- (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.

(b) Burden of Establishing Exception. The burden of establishing good cause or the lack of unfair surprise or unfair prejudice is on the party seeking to introduce the evidence or call the witness. A finding of good cause or of the lack of unfair surprise or unfair prejudice must be supported by the record.

(c) Continuance. Even if the party seeking to introduce the evidence or call the witness fails to carry the burden under paragraph (b), the

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