DISCOVERY IN TRUST AND ESTATE DISPUTES

Presenter & Author:
HON. JERRY SIMONEAUX, *Houston*
Judge, Harris County Probate Court No. 1

Co-authors:
AUTUMN R. BREHON, *Houston*
Jackson Walker, L.L.P.

SARAH DICKIE, *Austin*
Hopper Mikeska, PLLC

LAUREL SMITH, *The Woodlands*
Kean Miller, LLP

State Bar of Texas
50TH ANNUAL
ADVANCED ESTATE PLANNING & PROBATE
June 3-5, 2026
Frisco/Dallas

CHAPTER 13

Hon. Jerry W. Simoneaux, Jr.

Judge, Harris County Probate Court 1
201 Caroline St, Ste 600, Houston, Texas 77002
(office) 832-927-1401

Judge Jerry Simoneaux currently serves as the Presiding Judge of Harris County Probate Court 1, having taken the bench on January 1, 2019. He previously served as the Assistant State Presiding Judge of the Statutory Probate Courts for the 2023–2025 term. Prior to his judicial service, he practiced for over 17 years focusing on probate, trust, guardianship, and fiduciary litigation and appeals.

Throughout his career, Judge Simoneaux has established himself as a prominent educator and author within the legal community. He has delivered over 80 speeches and presentations on topics ranging from guardianship law and fiduciary responsibilities to judicial ethics and courtroom technology.

In addition to his speaking engagements, Judge Simoneaux has written more than 20 articles and legal papers. His work has been published in *The Houston Lawyer* and through his online Substack publication, "Jerry's Prudence," which provides regular reflections on probate law, procedure, and best practices.

Demonstrating a deep commitment to the legal profession and the judiciary, Judge Simoneaux is a Lifetime Jurist of the Texas Center for the Judiciary, a Life Fellow of the Texas Bar Foundation, and a Fellow of the Houston Bar Foundation. He is also the recipient of numerous honors, including the State Bar of Texas Judge Merrill Hartman Pro Bono Judge Award.

Judge Simoneaux earned his Doctor of Jurisprudence from South Texas College of Law in 2001. He is also a double graduate of the University of Houston, having received both a Bachelor of Business Administration in Management and a Bachelor of Arts in French in 1997.

Outside of his legal work, he holds a U.S. Coast Guard Master Captain license and regularly sails along the Gulf Coast and international destinations such as Croatia, Italy, and the British Virgin Islands. In 2016, he helped organize the first group of U.S. sailors to pilot privately owned boats into Havana Harbor, Cuba, marking the first such entry since 1958.

AUTUMN R. BREHON

JACKSON WALKER, LLP
1401 McKinney, Suite 1900
Houston, Texas 77010

Autumn R. Brehon is a fiduciary litigation associate in the Trial and Appellate section of Jackson Walker's Houston office. Her practice focuses on complicated estate and guardianship administrations, will contests and trust disputes, as well as fiduciary accountings. She regularly appears in hearings across multiple Texas counties and is skilled in developing persuasive arguments for motions and briefs.

Autumn is a native of Baltimore, Maryland, but moved to Houston, Texas where she taught AP English Literature & Composition and AP Seminar for six years. Autumn is a 2023 graduate of the University of Houston Law Center. Continuing her commitment to education, Autumn serves as an adjunct professor at the University of Houston Law Center, where she teaches Legal Negotiations as well as Client Counseling.

When not practicing law, you can find Autumn enjoying a good piece of investigative journalism, curled up with a work of fiction, or enjoying Maryland crabs.

SARAH DICKIE

HOPPER MIKESKA, PLLC
901 South MOPAC Expressway
Barton Oaks Plaza II, Suite 570
Austin, Texas 78746

Sarah Dickie is an associate of Hopper Mikeska, PLLC. Her practice focuses on fiduciary litigation, estate, guardianship, and trust administration, and estate planning. She works with clients throughout the entire probate process, from assisting in drafting to administering the estate, and advising thorough litigation. She also serves on the appointment wheel for the Travis County Probate Courts. Prior to joining Hopper Mikeska, PLLC, Sarah practiced oil and gas law in Dallas.

Sarah is a native of San Antonio, Texas. She earned her Doctor of Jurisprudence from Texas Tech University School of Law in 2023 where she worked as a Property tutor for Professor Gerry Beyer and was a student attorney for the Innocence Clinic. You can see some of her work in the Innocence Clinic in the documentary *Night in West Texas* on PBS. She is also a graduate of the University of Texas having received a Bachelor of Arts in Government in 2020. She was licensed in Texas in 2023 and in New Mexico in 2024.

When not practicing law, Sarah enjoys playing tennis, spending time with her family at Canyon Lake, or hosting game nights with friends.

LAUREL SMITH

KEAN MILLER, LLP
1400 Woodloch Forest Drive, Suite 1400
The Woodlands, Texas 77380

Laurel Smith is an associate at Kean Miller, LLP practicing primarily in the areas of probate, fiduciary, trust, and guardianship litigation. Laurel assists clients through the pretrial and trial phases of their cases, including preparing for and attending contested hearings, depositions, and both bench and jury trials. Laurel also handles uncontested estate and guardianship matters and serves on the appointment wheel for Probate Courts in both Harris and Montgomery Counties.

Laurel graduated in 2011 with a Bachelor of Science in Psychology from Texas A&M University, after which she joined the medical field as an embryologist in an IVF lab, assisting couples in achieving their goal in having children. In 2016, Laurel chose to return to school and began her legal education at South Texas College of Law. Laurel graduated from South Texas in December 2018 and became licensed to practice law in May 2019.

Laurel has been recognized as a "Rising Star" with Texas Super Lawyers in 2025 and as "Ones to Watch" for the years 2024, 2025, and 2026 by Best Lawyers in America. Laurel is a member of the Houston Bar Association and a Fellow of the Texas Bar Foundation. Laurel has also been a member of the Texas Probate Inns of Court since it was founded in 2021, and has served as Team Leader for the Inn in both the 2024-2025 and 2025-2026 sessions.

When she is not at work, Laurel loves to spend time with her husband, Cole, and two children, Scarlett and Walker. Laurel is an avid reader and pianist, and also greatly enjoys traveling with her family.

TABLE OF CONTENTS

I. RULE 202: PRE-SUIT DISCOVERY 1
A. Introduction to Rule 202 1
B. The Rule: Text, Purpose, and Structure 1
(1) Text and Effective Date 1
(2) Two Distinct Purposes 1
(3) Petition Requirements 2
(4) The Equitable Character of Rule 202 2
C. Jurisdiction and the "Proper Court" 2
(1) The General Requirement 2
(2) Subject Matter Jurisdiction 2
(3) Personal Jurisdiction: The "Trooper" Requirement 3
(4) Venue 3
(5) Rule 202 and the Statutory Probate Court 3
D. The Mandatory Findings: Rule 202.4 and the Burden of Proof 4
(1) The Mandatory-Finding Structure 4
(2) The Benefit-Outweighs-Burden Standard 4
(3) The "May Prevent" Standard for Anticipated Suits 4
(4) Findings Required in the Order 4
E. Scope of Discovery Under Rule 202.5 5
(1) The Mirror-Image Rule 5
(2) Ripeness and the *DePinho* Limitation 5
(3) The Healthcare Liability Analogy: *Jordan* and Its Reach 5
(4) Document Production: An Unresolved Circuit Split 5
F. Rule 202 in Probate and Fiduciary Litigation 6
(1) Why Rule 202 Matters in Estate Practice 6
(2) Investigating a Suspicious *Inter Vivos* Transfer 6
(3) Pre-Suit Investigation of a Trustee's Accounts 6
(4) Survival and Wrongful Death Claims Against Third Parties 7
(5) Will Contest Investigation 7
(6) The Limitations Trap 7
G. Limitations on Rule 202: Abuse, Oversight, and Constitutional Constraints 7
(1) The Mandatory Oversight Obligation 8
(2) Mandamus as the Check on Erroneous Orders 8
(3) The TCPA and Rule 202 8
(4) Anonymous Identity Disclosure and Constitutional Constraints 9
H. Rule 202 Practice Considerations 9
(1) Before Filing: The Pre-Petition Checklist 9
(2) Drafting the Verified Petition 10
(3) Defending Against a Rule 202 Petition 10
(4) The Decision to File: Strategic Calculus 10

I. Open Questions Regarding Rule 202 11
J. Conclusion To Rule 202 11
II. DISCOVERY MATTERS ADDRESSED WITH INITIAL CLAIMS 12
A. Statement of Relief Sought 12
B. The Effect of Early Motions Practice on Discovery 14
III. WRITTEN DISCOVERY 15
A. Discovery Step 1: Required Disclosures 15
B. Interrogatories 16
(1) Discrete Subparts and Interrogatory Limits 16
(2) Strategic Use of Interrogatories 16
(3) The Role of Interrogatories in Case Development 16
C. Requests for Production 17
D. Requests for Admissions 19
(1) Rule 198 and Its Scope 19
(2) The Mechanics of Deemed Admissions 19
(3) The Preclusive Effect: Judicial Admissions and Their Consequences 20
(4) Withdrawal of Deemed Admissions 20
a. The General Standard: Good Cause and Unfair Prejudice 20
b. Merit-Preclusive Admissions and the Due Process Floor 21
c. The Conscious Indifference Problem 21
(5) Requests for Admissions and the Fifth Amendment 21
(6) Probate-Specific Applications for RFAs 21
a. Authenticating Documents 21
b. Will Contests Involving Capacity and Undue Influence 22
c. Fiduciary Conduct and Financial Wrongdoing 22
(7) Practice Guidance for Using RFAs Effectively 22
E. Objections 23
F. Motions to Compel 25
G. Discovery Sanctions 26
H. Asserting the Privilege 27
(1) Attorney-Client Privilege 27
a. Lawyer 27
b. Lawyer's Representative 27
c. Clients and Their Representatives 27
d. Discoverability of Communications 28
e. Privilege Logs 28
(2) Work Product Privilege 28
(3) Mediation Privilege 29
(4) Physician-Patient Privilege 29
(5) Spousal Privilege 29
(6) Allied-Litigant Privilege 29
I. Electronically Stored Information 29

J. Governing Discovery Rules Applicable to ESI in Texas 30
K. Preservation Obligations and the Unique Role of Fiduciaries 30
L. Spoliation Standards and Remedies Under Texas Law 30
M. Scope and Types of ESI Commonly at Issue in Probate Litigation 31
(1) Electronic Communications 31
(2) Financial and Fiduciary ESI 31
(3) Social Media Evidence 31
(4) Photographs, Videos, and Audio Recordings 31
(5) Cloud-Based Documents and Drafts 32
(6) Calendars, Location Data, and Tracking Information 32
(7) Medical-Related ESI 32
(8) Discovery Limits and Forensic Access to Devices 32
N. Admissibility and Authentication of ESI in Texas Probate Litigation 32
(1) Authentication Under Rule 901 32
(2) Self-Authentication Under Rule 902 32
(3) Hearsay Issues and Common Exceptions 33
(4) Probate Court Authority and Procedural Considerations 33
(5) Practical Guidance for Texas Practitioners 33
O. Protective Orders 33
IV. DEPOSITIONS 35
A. Oral Depositions 35
B. Depositions on Written Questions 38
V. THIRD-PARTY DISCOVERY 39
A. Threshold Question: Subpoena or Court Order 39
B. Issuance of a Subpoena in Discovery Matters 39
C. Depositions of a Non-Party 41
D. Requests for Production to a Non-Party Without Deposition 41
E. Non-Retained Expert Witnesses Under Rule 205 43
(1) The Applicable Framework 43
(2) Compensation Claims and the Burden of Proof 43
(3) Medical Records and the Rule 205.3(c) Court Order 44
(4) Letters of Protection 44
(5) Non-Retained Expert Deposition Timing: A Trap Worth Knowing 44
F. Objections, Privilege, and Protective Orders 44
(1) Motion to Quash v. Written Objections 44
(2) The Boilerplate Problem 44
(3) Privilege and Confidentiality 45
(4) Undue Burden 45
G. Geographic Limits on Subpoena Power 45
H. Practical Guidance for Using Rule 205 in Probate and Fiduciary Litigation 45
VI. DISCOVERY FROM FINANCIAL INSTITUTIONS 46
A. Overview 46

B. The Statutory Framework 46
(1) Scope and Exclusivity 46
(2) Notice to the Financial Institution 47
(3) Payment of Reasonable Expenses 47
(4) Non-Party Customer Notice and Consent 47
(5) Consent or *In Camera* Inspection 47
(6) Production Deadlines 48
C. The Relationship to Rule 205 48
D. Practice Tips for Discovery to Financial Institutions 48
VII. SUMMARY JUDGMENTS 49
A. Summary Judgments and the Fiduciary Landscape 49
B. The Use of Evidence in Motions for Summary Judgment 49
C. Amended Deadlines and Their Impact on Discovery 50
(1) Filing Deadlines 50
(2) Hearing Deadlines 51
D. Objections to Evidence and Preserving Error 51
E. Pleadings as Evidence 51
F. Deposition Testimony as Summary Judgment Evidence 51
G. Answers to Interrogatories and Requests for Admissions as Summary Judgment Evidence 52
H. Deemed Admissions as Summary Judgment Evidence 52
I. Admissibility of Evidence in the Summary Judgment Context 52
J. Judicial Notice of Court Records 53
K. Affidavits and Declarations 53
VIII. PRETRIAL DISCLOSURES AND THE EXCLUSIONARY RULE 53
A. Pretrial Disclosures 53
B. Application of the Exclusionary Rule 55
IX. USING DISCOVERY AT TRIAL 58
A. Voir Dire 58
B. Opening Statements 59
C. Evidence at Trial 59
(1) Demonstratives 59
a. Common Types of Demonstratives 59
b. Demonstratives and Their Relationship to Discovery 60
c. Evidence Versus Aids 60
d. Demonstratives vs. Substantive Evidence 60
e. Demonstrative Evidence: Illustrative but Admitted 60
f. Demonstrative Aids: Persuasive But Not Evidence 61
g. Strategic Considerations 61
(2) Hearsay at the Probate Trial 61
a. The Hearsay Framework: What It Is and What It Is Not 61
b. The "Truth of the Matter Asserted" Threshold 62
c. Machines Do Not Speak: The Non-Declarant Problem 62

(3) Exclusions Under Rule 801(e): Not Hearsay by Definition 62
a. Admissions of a Party-Opponent 62
b. Judicial Admissions in Probate Pleadings 62
c. Prior Inconsistent Statements Under Oath 62
(4) Key Hearsay Exceptions in Probate Litigation 63
a. Present Sense Impression and Excited Utterance—Rules 803(1) and 803(2) 63
b. State of Mind and the Will Exception—Rule 803(3) 63
c. Statements for Medical Diagnosis—Rule 803(4) 63
d. Business Records—Rule 803(6) 63
e. Public Records—Rule 803(8) 64
f. Vital Statistics—Rule 803(9) 64
g. Ancient Documents—Rule 803(16) 64
(5) The Dead Man's Rule: A Competency Wolf in Hearsay Clothing 64
(6) Hearsay Within Hearsay and Expert Reliance 65
a. Layered Hearsay Under Rule 805 65
b. Expert Reliance on Hearsay Under Rule 703 65
(7) Digital Evidence and Modern Hearsay Challenges 65
a. Text Messages and Social Media 65
b. Emojis, GIFs, and Nonverbal Digital Communication 65
c. Computer-Generated Versus Computer-Stored Evidence 66
(8) Procedural Context Matters in the Hearsay Analysis 66
a. Summary Judgment 66
b. Temporary Restraining Orders and Temporary Injunctions 66
c. Bench Trial Versus Jury Trial 66
(9) Preserving Error: The Objection That Matters Is the One You Make 66
a. Specificity Requirements 67
b. Responding to Hearsay Objections 67
c. Harmless Error and Its Limits 67
(10) Practical Takeaways for the Probate Trial Lawyer 67
D. Closing Arguments 68
(1) Incorporating Discovery and the Trial Record 68
(3) Bench Trials versus Jury Trials 68

TABLE OF AUTHORITIES

Page(s)

Cases

AAA v. AAA Legal Clinic of Jefferson Crooke, P.C.,
930 F.2d 1117 (5th Cir. 1991) 20

In re Acclarent, Inc.,
No. 02-24-00228-CV, 2024 WL 2873617 (Tex. App.—Fort Worth June 7, 2024, orig. proceeding) 1, 2, 4, 6, 10, 12

In re Amazon.com, Inc.,
649 S.W.3d 182 (Tex. App.—Austin 2022, orig. proceeding) 67

American Flood Research, Inc. v. Jones,
192 S.W.3d 581 (Tex. 2006) 27

In re American Optical Corp.,
988 S.W.2d 711 (Tex. 1998) 17

In re A.M.M.,
No. 06–05–00039–CV, 2006 WL 42229 (Tex. App.—Texarkana Jan. 10, 2006, no pet.) 57

In re Andrew Silver,
540 S.W.3d 530 (Tex. 2018) 28

In re Arden,
2004 WL 576064 (Tex. App.—El Paso 2004) 24

Atlantic Richfield Co. v. Long Trusts,
860 S.W.2d 439 (Tex. App.—Texarkana 1993, writ denied) 57

Ball v. Smith,
150 S.W.3d 889 (Tex. App.—Dallas 2004, no pet.) 54

Barragan v. Mosler,
872 S.W.2d 20 (Tex. App.—Corpus Christi 1994, writ denied) 53

BASF Fina Petrochemicals Ltd. P'ship v. H.B. Zachry Co.,
168 S.W.3d 867 (Tex. App.—Houston [1st Dist.] 2005, no pet.) 43

In re Bennett,
960 S.W.2d 35 (Tex. 1997) 27

Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.,
595 S.W.3d 651 (Tex. 2020) 15

Bohmfalk v. Linwood
742 S.W.2d 518, 520 (Tex. App.—Dallas 1987, no writ) 37, 38

Braden v. Downey,
811 S.W.2d 922 (Tex. 1991) 27

Brewer v. Lennox Hearth Prods., LLC,
601 S.W.3d 704 (Tex. 2020) 27

Brookshire Bros., Ltd. v. Aldridge
438 S.W.3d 9, 20 (Tex. 2014) 31

Brown Sims, P.C. v. L.W. Matteson, Inc.,
594 S.W.3d 573 (Tex. App.—San Antonio 2019, no pet.) 16

In re Brown,
653 S.W.3d 721 (Tex. 2022) 46

Buckley v. American Constitutional Law Foundation
525 U.S. 182 (1999) 9

Butler v. State,
No. 01-16-00253-CR, 2017 WL 3279035 (Tex. App.—Houston [1st Dist.] Aug. 1, 2017, pet. ref'd) 67

Butnaru v. Ford Motor Co.,
84 S.W.3d 198 (Tex. 2002) 68

In re Butt,
495 S.W.3d 455 (Tex. App.—Corpus Christi 2016, no pet) 15

In re Carney,
258 F.3d 415 (5th Cir. 2001) 21, 23

Carrasco v. Texas Transportation,
908 S.W.2d 575 (Tex. App.—Waco 1995, no writ) 60

Chandler v. Carnes Co.,
604 S.W.2d 485 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.) 54

In re Christus Health Se. Tex.,
No. 09–06–515 CV, 2007 Tex. App. LEXIS 287 (Tex. App.—Beaumont Jan. 18, 2007, no pet.) 29

In re CI Host, Inc.,
92 S.W.3d 514 (Tex. 2022) (orig. proceeding) 34

City of Dallas v. Dallas Black Fire Fighters Ass'n,
353 S.W.3d 548 (Tex. App.—Dallas 2011, no pet.) 2

City of San Antonio v. Fulcher,
749 S.W.2d 217 (Tex. App.—San Antonio 1988, writ denied) 57

In re City of Tatum,
No. 12-18-00285-CV, 2018 WL 6715889 (Tex. App.—Tyler 2018, orig. proceeding) 5

City of Willow Park v. Squaw Creek Downs,
166 S.W.3d 336 (Tex. App.—Fort Worth 2005, no pet.) 2

Clark v. Clark,
2017 WL 1164594 (Tex. App.—El Paso 2017, no pet.) 24

Combs v. Morrill,
470 S.W.2d 224 (Tex. App.—Austin 1971, no writ) 53

In re Commitment of Day,
342 S.W.3d 193 (Tex. App.—Beaumont 2011, pet. denied) 66

In re Congregation B'Nai Zion of El Paso,
657 S.W.3d 578 (Tex. App.—El Paso 2022, no pet.) 15

Conn v. Campbell,
294 S.W.2d 435 (Tex. Civ. App.—Fort Worth 1956, writ ref'd n.r.e.) 66

Cooper v. Cochran,
288 S.W.3d 522 (Tex. App.—Dallas 2009, no pet.) 30

In re CSX Corp.,
124 S.W.3d 149 (Tex. 2003) 15

De Anda v. Jason C Webster, PC,
2018 WL 3580579 (Tex. App.—Houston [14th Dist.] 2018, pet. denied) 24, 25

DeAnder v. Montgomery,
No. 03–22–00565–CV, 2024 WL 2035791 (Tex. App.—Austin May 8, 2024, no pet.) 69

Dendrite Int'l, Inc. v. Doe No. 3,
342 N.J. Super. 134 (App. Div. 2001) 9

In re DePinho,
505 S.W.3d 621 (Tex. 2016) (orig. proceeding) 5, 6, 10, 12

Diocese of Galveston-Houston v. Stone,
892 S.W.2d 169 (Tex. App.—Houston [14th Dist.] 1994, no pet.) 15

In re Doe
444 S.W.3d 603, 608 (Tex. 2014) (orig. proceeding) 2, 3, 7, 8

Doe v. Mobile Video Tapes, Inc.,
43 S.W.3d 40 (Tex. App.—San Antonio 2001, no pet.) 64

In re Donna Indep. Sch. Dist.,
299 S.W.3d 456 (Tex. App.—Corpus Christi–Edinburg 2009, orig. proceeding) 2, 8

Dow Chem. Co. v. Francis,
46 S.W.3d 237 (Tex. 2001) 56

Downer v. Aquamarine Operations, Inc.,
701 S.W.2d 238 (Tex. 1985) 26

Dresser Industries, Inc. v. Solito,
668 S.W.2d 893 (Tex App.—Houston [14th Dist.] 1984, no writ) 36

In re E.I. DuPont de Nemours & Co.,
136 S.W.3d 218 (Tex. 2004) 26

El Apple I, Ltd. v. Olivas,
370 S.W.3d 757 (Tex. 2012) 27

In re Estate of Berger,
174 S.W.3d 845 (Tex. App.—Waco 2005, no pet.) 63, 64

In re Estate of Glover,
2020 WL 1536289 (Tex. App.—Amarillo Mar. 31, 2020, no pet.) (mem. op.) 66

In re Estate of Kuykendall,
206 S.W.3d 766 (Tex. App.—Texarkana 2006, no pet.) 60

In re Estate of Nash,
220 S.W.3d 914 (Tex. 2007) 65

In re Euless Pizza,
702 S.W.3d 543 (Tex. 2024) (orig. proceeding) 21, 23

Farmer v. Ben E. Keith Co.,
919 S.W.2d 171 (Tex. App.—Fort Worth 1996, no writ) 53

FieldTurf USA, Inc. v. Pleasant Grove Indep. Sch. Dist.,
642 S.W.3d 829 (Tex. 2022) 50, 61

Flentye v. Kathrein,
No. 06 C 3492, 2007 U.S. Dist. LEXIS 74260, 2007 WL 2903128 (N.D. Ill. Oct. 2, 2007) 34

Fritsch v. J.M. English Truck Line,
246 S.W.2d 856 (Tex. 1952) 41

Gardner v. Martin,
345 S.W.2d 274 (Tex. 1961) 54

Gellatly v. Unifund CCR Partners,
No. 01–07–00552–CV, 2008 WL 2611894 (Tex. App.—Houston [1st Dist.] July 3, 2008, no pet.) 53

Gonzales v. Dallas Cnty. App. Dist.,
No. 05–13–01658–CV, 2015 WL 3866530 (Tex. App.—Dallas June 23, 2015, no pet.) (mem. op.) 15

In re Gruss,
No. 14-25-00098-CV, 2025 Tex. App. LEXIS 6596 (Tex.App.—Houston [14th Dist.] Aug. 25, 2025) 17

Guerrero v. Smith,
864 S.W.2d 797 (Tex. App.—Houston [14th Dist.] 1993, no writ) 60

H2O Sols., Ltd. v. PM Realty Grp., LP,
438 S.W.3d 606 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) 52, 53

Hall v. Rutherford,
911 S.W.2d 422 (Tex. App.—San Antonio 1995, writ denied) 54

Hartman v. Trio Transp., Inc.,
937 S.W.2d 575 (Tex. App.—Texarkana 1996, writ denied) 53

Hayward v. Gomez
663 S.W.3d 790, 796 (Tex. App.—Texarkana 2023, orig. proceeding) 21

In re Hewlett Packard,
212 S.W.3d 356 (Tex. App.—Austin 2006, orig. proceeding) 8

Higginbotham v. Bonilla,
727 S.W.3d 277 (Tex. App.—Corpus Christi 2025, no pet.) 39

Hill v. Federal Trade Comm'n,
124 F.2d 104 (5th Cir. 1941) 20

Hogan v. Beckel,
783 S.W.2d 307 (Tex. App.—San Antonio 1989, writ denied) 37, 38

Huie v. DeShazo,
922 S.W.2d 920 (Tex. 1996) 17, 18, 28

In re Hughey
2025 WL 1523269, at *1 (Tex. App.—Beamont May 29, 2025, pet. pending) 37

Hycarbex, Inc. v. Anglo-Suisse, Inc.
927 S.W.2d 103, 111–12 (Tex. App.—Houston [14th Dist.] 1996, no pet.) 38

Int'l Awards, Inc. v. Medina,
900 S.W.2d 934 (Tex. App.—Amarillo 1995, orig. proceeding) 36

Int'l Shoe Co. v. Washington,
326 U.S. 310 (1945) 3

In re Issuance of Subpoenas for Depositions of Bennett,
502 S.W.3d 373 (Tex. App.—Dallas 2016, orig. proceeding) 46

In re J.P.B.,
180 S.W.3d 570 (Tex. 2005) (per curiam) 65

Jicarilla Apache Nation v. United States,
88 Fed. Cl. 1 (2009) 17

In re John Does 1 and 2,
337 S.W.3d at 862 ..... 8, 9

In re John Does 1-10
242 S.W.3d 805, 812 (Tex. App.—Texarkana 2007, no pet.) 9

In re Jordan,
249 S.W.3d 416 (Tex. 2008) (orig. proceeding) 5, 8

JPMorgan Chase Bank, N.A. v. Orca Assets G.P., LLC,
546 S.W.3d 648 (Tex. 2018) 56

Judwin Props., Inc. v. Griggs & Harrison,
911 S.W.2d 498 (Tex. App.—Houston [1st Dist.] 1995, no writ) 50, 62

In re K & L Auto Crushers, LLC,
607 S.W.3d 358 (Tex. 2021) (orig. proceeding) 42, 44, 45, 46

Kappus v. Kappus,
284 S.W.3d 831 (Tex. 2009) 27

Katin v. City of Lubbock,
655 S.W.2d 360 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.) 22

Koslow's v. Mackie,
796 S.W.2d 700 (Tex. 1990) 57

Lance v. Robinson,
543 S.W.3d 723 (Tex. 2018) 52

In re Learjet, Inc.,
59 S.W.3d 842 (Tex. App.—Texarkana 2001, no pet.) 29

Lee v. Unifund CCR Partners,
2008 WL 3539938 (Tex. App.—Austin 2008) 24

Lewis v. Illinois Employers Ins.,
590 S.W.2d 119 (Tex. 1979) 26

Life Ins. Co. of Va. v. Gar-Dal, Inc.,
570 S.W.2d 378 (Tex. 1978) 54

Lindley v. Johnson,
936 S.W.2d 53 (Tex. App.—Tyler 1996 writ denied) 56

In re Living Ctrs. of Texas, Inc.,
175 S.W.3d 253 (Tex. 2005) 29

Logan v. Mullis,
686 S.W.2d 605 (Tex. 1985) 56

Lorraine v. Markel Am. Ins. Co.,
241 F.R.D. 534 (D. Md. 2007) 64, 67

In re Lowe's Companies, Inc.,
134 S.W.3d 876 (Tex. App.—Houston [14th Dist.] 2004 no pet.) 38

In re Lumbermen's Underwriting All.,
421 S.W.3d 289 (Tex. App.—Texarkana 2014, no pet.) 29

Lynd v. Bass Pro Outdoor World, Inc.,
No. 05–12–00968–CV, 2014 WL 1010120 (Tex. App.—Dallas March 12, 2014, pet. denied) 41

Mansions in the Forest, L.P. v. Montgomery Cnty.,
365 S.W.3d 314 (Tex. 2012) (per curiam) 52

Marino v. King,
355 S.W.3d 629 (Tex. 2011) (per curiam) 21

Martinez v. Bally's La., Inc.,
244 F.3d 474 (5th Cir. 2001) 20

Masinga v. Whittington,
792 S.W.2d 940 (Tex. 1990) 24

McConathy v. McConathy,
869 S.W.2d 341 (Tex. 1994) (per curiam) 53

McIntyre v. Ohio Elections Commission
514 U.S. 334, 357 (1995). 9

Medical Prot. Co. v. Glanz,
721 S.W.2d 382 (Tex. App.—Corpus Christi 1986, writ ref'd) 26

In re Medina,
No. 13-19-00537-CV, 2019 WL 6906572 (Tex. App.—Corpus Christi 2019, orig. proceeding) 45

Mentis v. Barnard,
870 S.W.2d 14 (Tex. 1994) 57

In re Michael Wolfe,
341 S.W.3d 932 (Tex. 2011) (orig. proceeding) 1, 4, 5, 8

Mission Municipal Hospital v. Bryant,
563 S.W.2d 293, 295 (Tex. App.—Corpus Christi 1977, no pet.) 56

Molnar v. Engels, Inc.,
705 S.W.2d 224 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) 53

Morgan v. Anthony,
27 S.W.3d 928 (Tex. 2000) (per curiam) 53

MortgageAmerica Corp. v. American Nat'l Bank of Austin,
651 S.W.2d 851 (Tex. App.—Austin 1983, writ ref'd n.r.e.) 28

In re N.R.C.,
94 S.W.3d 799 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) 58

In re National Lloyds Ins. Co.,
507 S.W.3d 219 (Tex. 2016) 17

National OilWell Varco, L.P. v. Sanchez,
697 S.W.3d 361 (Tex. App.—El Paso 2024, no pet.) 58

Estate of Nicholas,
No. 14-19-00716-CV, 2020 Tex. App. LEXIS 2532 (Tex. App.—Houston [14th Dist.] Mar. 26, 2020, no pet.) 3, 7, 11

Norcross v. Conoco, Inc.,
720 S.W.2d 627 (Tex. App.—San Antonio 1986, no writ) 53

Okpere v. Nat'l Oilwell Varco, L.P.,
524 S.W.3d 818 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) 50, 61

In re P.M.B.,
2 S.W.3d 618 (Tex. App.—Houston [14th Dist.] 1999, no pet) 58

In re Park Cities Bank,
409 S.W.3d 859 (Tex. App.--Tyler 2013, no pet) 24, 35

In re Patrick Hughey,
No. 25-0463 (Tex. May 30, 2025) 37

In re Patton,
47 S.W.3d 825 (Tex. App.—Fort Worth 2001, no pet.) 57

Perez v. Embree Const. Group, Inc.,
228 S.W.3d 875 (Tex. App.—Austin 2007, pet. denied) 57

Pharo v. Chambers Cnty.,
922 S.W.2d 945 (Tex. 1996) 68

In re Pilgrim's Pride Corp.,
237 S.W.3d 591 (Tex. App.—Texarkana 2007, orig. proceeding) 5

In re Pilgrim's Pride Corp.,
237 S.W.3d 601 6

In re PrairieSmarts LLC,
421 S.W.3d 296 (Tex. App.—Fort Worth 2014, orig. proceeding) 4, 8

Prescod v. Tkach,
No. 02–21–00162–CV, 2022 WL 246858 (Tex. App.—Fort Worth Jan. 27, 2022 no pet.) 56

In re Prince,
No. 14-06-00895-CV, 2006 WL 3589484 (Tex. App.—Houston [14th Dist.] Dec. 12, 2006, orig. proceeding) 46

Provident Life & Acc. Ins. Co. v. Hazlitt,
216 S.W.2d 805 (Tex. 1949) 56

R.K. v. Ramirez,
887 S.W.2d 836 (Tex. 1994) 30

Ragsdale v. Progressive Voters League,
801 S.W.2d 880 (Tex. 1990) 66

Ranger Ins. Co. v. Rogers,
530 S.W.2d 162 (Tex. App.—Houston [14th Dist.] 1993, no writ) 60

Regency Field Servs., LLC v. Swift Energy Operating, LLC,
622 S.W.3d 807 (Tex. 2021) 52

Reno v. ACLU
521 U.S. 844, 870 (1997) 9

In re Rental Servs. Corp.,
No. 2–06–338–CV, 2006 Tex. App. LEXIS 10502 (Tex. App.—Fort Worth Dec. 7, 2006, no pet.) 28

Republic Nat'l Leasing Corp. v. Schindler,
717 S.W.2d 606 (Tex. 1986) (per curiam) 54

Reynolds v. Murphy,
188 S.W.3d 252 (Tex. App.—Fort Worth 2006, pet. denied) 24

Reynolds v. Quantlab Trading Partners US, LP,
608 S.W.3d 549 (Tex. App.—Houston [14th Dist.] 2020, no pet.) 15

Ridgway's Estate v. Comm'r,
No. 03-22-00412-CV, 2023 WL 7117291 (Tex. App.—Austin Oct. 27, 2023, no pet.) 65

Roosevelt v. Roosevelt
699 S.W.2d 372, 374 (Tex. App.—El Paso 1985, writ dism'd) 64

In re Marriage of Sandoval
589 S.W.3d 267 (Tex. App.—Waco 2019) 68

Ryland Group, Inc. v. Hood,
924 S.W.2d 120 (Tex. 1996) 67

Seim v. Allstate Tex. Lloyds,
551 S.W.3d 161 (Tex. 2018) 52

Siegel v. Smith,
836 S.W.2d 193 (Tex. App.—San Antonio 1992, writ denied) 37

Smith v. Home Indem. Co.,
683 S.W.2d 559 (Tex. App.—Fort Worth 1985, no writ) 53

Snider v. Stanley,
44 S.W.3d 713 (Tex. App.—Beamont 2001, pet. denied) 57

Solvex Sales Corp. v. Triton Manufacturing Co.,
888 S.W.2d 845 (Tex. App.—Tyler 1994, writ denied) 58

In re Speer,
965 S.W.2d 41 (Tex. App.—Fort Worth 1998, no pet.) 22

Spohn Hosp. v. Mayer,
104 S.W.3d 878 (Tex. 2003) 27

Spurck v. Texas Department of Family and Protective Services,
396 S.W.3d 205 (Tex. App.—Austin 2003, no pet.) 58

In re SSCP Management, Inc.,
573 S.W.3d 464 (Tex. App.—Fort Worth 2019) 16

St. Luke's Episcopal Hosp. v. Garcia,
928 S.W.2d 307 (Tex. App.—Houston [14th Dist.] 1996, orig. proceeding) 29

In re State Farm Lloyds,
519 S.W.3d 647 (Tex. App.—Corpus Christi-Edinburg, 2015, orig. proceeding) 24

In re State Farm Lloyds,
520 S.W.3d 595 (Tex. 2017) 24, 33

State v. Carillo,
885 S.W.2d 212 (Tex. App.—San Antonio 1994, no writ) 21, 23, 53

State v. Lowry,
802 S.W.2d 699 (Tex. 1991) 24

In re SWEPI L.P.,
103 S.W.3d 578 (Tex. App.—San Antonio 2003, no pet.) 16

Syrian American Oil Corporation, S.A. v. Pecten Orient Company,
524 S.W.3d 350 (Tex. App.—Houston [1st Dist.] 2017, no pet.) 57

Tacon Mech. Contractors v. Grant Sheet Metals, Inc.,
889 S.W.2d 666 (Tex. App.—Houston [14th Dist.] 1994, writ denied) 60

In re Tex. Farmers Ins. Exch.,
990 S.W.2d 337 (Tex. App.—Texarkana 1999) 28

Texas Commerce Bank Reagan Through Texas Commerce Bank Nat. Ass'n v. Lebco Constructors, Inc.,
865 S.W.2d 68 (Tex. App.—Corpus Christi 1993, writ denied) 56

Texas Department of Parks & Wildlife v. Miranda,
133 S.W.3d 217 (Tex. 2004) 15, 24

Tienda v. State
358 S.W.3d 633, 640–41 (Tex. Crim. App. 2012) 33

TransAmerican Natural Gas Corp. v. Powell,
811 S.W.2d 913 (Tex. 1991) 27, 57

In re Turner,
243 S.W.3d 843 (Tex. App.—Eastland 2008, no pet.) 36

U.S. Fid. & Guar. Co. v. Goudeau,
272 S.W.3d 603 (Tex. 2008) 53

Unition Carbide Corp. v. Martin,
349 S.W.3d 137 (Tex. App.—Dallas 2011) 26

Univ. of Tex. Sys. v. Franklin Ctr. for Gov't & Pub. Integrity,
675 S.W.3d 273 (Tex. 2023) 28

In re University of Texas Health Center at Tyler,
198 S.W.3d 392 (Tex. App.—Texarkana 2006, no pet.) 42

Vaughn v. Grand Prairie Indep. Sch. Dist.,
784 S.W.2d 474 (Tex. App.—Dallas 1989, rev'd on other grounds) 53

Velchoff v. Campbell,
710 S.W.2d 613 (Tex. App.—Dallas 1986, no writ) 21

Volkswagen of Am., Inc. v. Ramirez,
159 S.W.3d 897 (Tex. 2004) 64, 68

In re Volt Power, LLC,
No. 12–23–00047–CV, 2023 WL 2804430 (Tex. App.—Tyler April 5, 2023 (orig. proceeding)) 24

Walden v. Affiliated Computer Services, Inc.,
97 S.W.3d 303 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) 56

In re Weekly Homes, L.P.,
295 S.W.3d 309 (Tex. 2009) 33

Well Solutions, Inc. v. Stafford,
32 S.W.3d 313 (Tex. App.—San Antonio 2000, no pet.) 58

Weslaco Federation of Teachers v. Texas Education Agency,
27 S.W.3d 258 (Tex. App.—Austin 2002, no pet.) 60

Wheeler v. Green,
157 S.W.3d 439 (Tex. 2005) (per curiam) 21, 53

Williams v. Nunnally-Williams,
No. 04–23–00110–CV, 2025 WL 871626 (Tex. App.—San Antonio March 19, 2025, no pet.) 57

Willis v. Nucor Corp.,
282 S.W.3d 536 (Tex. App.—Waco 2008, no pet.) 52

Wilson v. Shamoun & Norman, LLP,
523 S.W.3d 222 (Tex. App.—Dallas 2017, pet. denied) 39

In re XL Specialty Ins. Co.,
373 S.W.3d 46 (Tex. 2012) 30

Yates v. Fisher,
988 S.W.2d 730 (Tex. 1998) (per curiam) 53

Young v. Ray,
916 S.W.2d 1 (Tex.App.—Houston [1st Dist] 1995, orig. proceeding) 24

Statutes

Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (HIPAA) 32, 45

Texas Citizens Participation Act, found in Title 2, Subtitle C, Chapter 27 of the Texas Civil Practice and Remedies Code (TCPA) 8, 9, 10, 11, 12, 15, 16

TEX. CIV. PRAC. & REM. CODE § 22.002 46

TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 15

TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(c) 15

TEX. CIV. PRAC. & REM. CODE § 27.003 8

TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) 15

TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(b) 15

TEX. CIV. PRAC. & REM. CODE § 74.351 5

TEX. CIV. PRAC. & REM. CODE § 132.001(a) 54

TEX. CIV. PRAC. & REM. CODE § 154.073(a)–(b) 29

TEX. CIV. PRAC. & REM. CODE § 154.073(c) 29

TEX. CIV. PRAC. & REM. CODE ANN. § 74.001 ET SEQ. (VERNON 2023) 5

TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 8

TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 29

TEX. EST. CODE ANN. § 31.001 13

TEX. EST. CODE § 32.001 33

TEX. EST. CODE ANN. § 32.005 3

TEX. EST. CODE § 32.007 ..... 7, 10

TEX. EST. CODE §§ 101.001, 113.051 31

TEX. EST. CODE ANN. § 309.051 64

TEX. EST. CODE ANN. §§ 32.001, 32.007 ..... 3, 7

TEX. EST. CODE ANN. §§ 32.005 3

TEX. EST. CODE ANN.§ 32.007 ..... 3, 7

TEX. EST. CODE ANN. § 53.107(1) 13

TEX. EST. CODE ANN. § 256.204 7

TEX. EST. CODE ANN. § 1002.015 13

TEX. EST. CODE § 1053.105 13

TEX. FIN. CODE § 59.006 ..... 48, 49

TEX. FIN. CODE § 59.006(a) 43, 47

TEX. FIN. CODE § 59.006(a)(1), (2) 48

TEX. FIN. CODE § 59.006(b)(1) 48

TEX. FIN. CODE § 59.006(b)(3) 49

TEX. FIN. CODE § 59.006(c) 48, 49, 50

TEX. FIN. CODE § 59.006(d) 49

TEX. FIN. CODE § 59.006(e) 48

TEX. GOV'T CODE § 312.011(1) 54

TEX. GOV'T CODE ANN. § 602.002 36

TEX. PROP. CODE §§ 113.082, 113.211, 404.0032 27

TEX. PROP. CODE §§ 113.151, 113.082, 404.001, 404.004 27

Uniform Interstate Depositions and Discovery Act (2007) 46

Constitutional Provisions

U.S. CONST. AMEND. I 9, 12

U.S. CONST. AMEND. V 19, 20, 21, 22, 23

Rules

FED. R. CIV. P. 26(b) 17

FED. R. CIV. P. 26(b)(1) 17

FED. R. CIV. P. 26(c) 34

FED. R. CIV. P. 26(c)(1) 34

FED. R. CIV. P. 34 17

FED. R. CIV. P. 37 25

FED. R. CIV. P. 45 45

FED. R. EVID. 1006 61

TEX. R. CIV. P. 1 15

TEX. R. CIV. P. 11 ..... 24, 46, 47, 51

TEX. R. CIV. P. 21a 42

TEX. R. APP. P. 33.1(a) 52, 58

TEX. R. APP. P. 44.1 68

TEX. R. APP. P. 44.1(a) 68

TEX. R. CIV. P. 47 ..... 12, 13

TEX. R. CIV. P. 47(c) 12, 13

TEX. R. CIV. P. 91 15

TEX. R. CIV. P. 91a 14, 15, 52

TEX. R. CIV. P. 91a.2 14

TEX. R. CIV. P. 91a.3 14

TEX. R. CIV. P. 91a.6 15

TEX. R. CIV. P.93.2(d), (e) 24

TEX. R. CIV. P.93.2(e) 24

TEX. R. CIV. P. 166 ..... 55, 56, 57

TEX. R. CIV. P. 166a 15, 50, 51, 52, 54

TEX. R. CIV. P. 166a(b)(3)(A) 52

TEX. R. CIV. P. 166a(b)(3)(B) 52

TEX. R. CIV. P. 166a(b), (d), (e) 51

TEX. R. CIV. P. 166a(c) 67

TEX. R. CIV. P. 166a(d)(1) 51, 54

TEX. R. CIV. P. 166a(d)(1), (e)(1) 51

TEX. R. CIV. P. 166a(d)(2) 51

TEX. R. CIV. P. 166a(d)(3) 51, 52

TEX. R. CIV. P. 166a(e)(1) 51

TEX. R. CIV. P. 166a(g)(1) 52

TEX. R. CIV. P. 166a(g)(1)(A) 52

TEX. R. CIV. P. 166a(g)(1)(B)(i)–(iii) 52

TEX. R. CIV. P. 166a(g)(4) 50, 61

TEX. R. CIV. P. 166a(h)(4)(i) 52

TEX. R. CIV. P. 166a(j)(1) 51

TEX. R. CIV. P. 166a(j)(1)(A) 53

TEX. R. CIV. P. 166a(j)(1)(B) 53

TEX. R. CIV. P. 166a(j)(1)(C) 54

TEX. R. CIV. P. 166a(j)(2) 51

TEX. R. CIV. P. 166a(j)(3) 51

TEX. R. CIV. P. 166a(j)(4) 54

TEX. R. CIV. P. 166a(j)(5) 54

TEX. R. CIV. P. 169 14

TEX. R. CIV. P. 176 ..... 39, 40, 41, 42, 48

TEX. R. CIV. P. 176 et seq. 41

TEX. R. CIV. P. 176.1 et seq. 40, 42

TEX. R. CIV. P. 176.2 40

TEX. R. CIV. P. 176.3 41

TEX. R. CIV. P. 176.3(a) 41, 46

TEX. R. CIV. P. 176.3(b) 40

TEX. R. CIV. P. 176.4 40

TEX. R. CIV. P. 176.4(a)–(c) 41

TEX. R. CIV. P. 176.5 ..... 40, 41

TEX. R. CIV. P. 176.5(a) 41

TEX. R. CIV. P. 176.6(a)–(b) 46

TEX. R. CIV. P. 176.6(c) 41

TEX. R. CIV. P. 176.6(d) 42, 45

TEX. R. CIV. P. 176.6(d)–(e) 42

TEX. R. CIV. P. 176.6(e) 42, 45, 46

TEX. R. CIV. P. 176.7 ..... 42, 46

TEX. R. CIV. P. 176.8 42

TEX. R. CIV. P. 186 et seq. 41

TEX. R. CIV. P. 190.1 13

TEX. R. CIV. P. 190.2 13

TEX. R. CIV. P. 191.4(b) 51

TEX. R. CIV. P. 192 ..... 26, 30, 38, 44

TEX. R. CIV. P. 192.3(e)(5) 44

TEX. R. CIV. P. 192.4 26

TEX. R. CIV. P. 192.6(a)–(b) 46

TEX. R. CIV. P. 193.3 ..... 29, 30, 42

TEX. R. CIV. P. 193.6 ..... 44, 56

TEX. R. CIV. P. 194.2 ..... 16, 55

TEX. R. CIV. P. 194.2(b) 16

TEX. R. CIV. P. 194.3 ..... 16 55

TEX. R. CIV. P. 194.4 ..... 16, 55

TEX. R. CIV. P. 196 ..... 26, 30. 37

TEX. R. CIV. P. 196.2 37

TEX. R. CIV. P. 196.4 30

TEX. R. CIV. P. 196.7 40

TEX. R. CIV. P. 198 ..... 19, 20, 21, 22, 23

TEX. R. CIV. P. 198.2 ..... 20, 22

TEX. R. CIV. P. 198.3 22

TEX. R. CIV. P. 199 ..... 39, 42

TEX. R. CIV. P. 199.1(c) 36, 37

TEX. R. CIV. P. 199.2 ..... 36, 41

TEX. R. CIV. P. 199.2(b)(1) 36, 38, 41, 46

TEX. R. CIV. P. 199.2(b)(2) 36, 41

TEX. R. CIV. P. 190.2(c) 14

TEX. R. CIV. P. 190.2(c)(1) 18

TEX. R. CIV. P. 190.3(b)(3) 17

TEX. R. CIV. P. 190.4 cmt. 3 16

TEX. R. CIV. P. 190.5 14

TEX. R. CIV. P. 191.2 ..... 26, 38

TEX. R. CIV. P. 191.3(a)(1)–(2) 18

TEX. R. CIV. P. 191.3(c) 18

TEX. R. CIV. P. 191.3(d) 18

TEX. R. CIV. P. 191.4(a) 18, 51

TEX. R. CIV. P. 191.4(a)–(b) 37

TEX. R. CIV. P. 191.4(a), (b) 18

TEX. R. CIV. P. 191.4(b)(1) 41

TEX. R. CIV. P. 191.4(b), (c) 18

TEX. R. CIV. P. 191.4(c)(1) 51

TEX. R. CIV. P. 191.5 18

TEX. R. CIV. P. 196.1(a) 18

TEX. R. CIV. P. 191 through 193 17

TEX. R. CIV. P. 192.3(b) 17

TEX. R. CIV. P. 192.6 ..... 34, 45

Tex. R. Civ. P. 192.2(a)(1) 16

TEX. R. CIV. P. 192.3 30

TEX. R. CIV. P. 192.3(a) 15

TEX. R. CIV. P. 192.5(b)(1) 29

TEX. R. CIV. P. 192.6, 193.2(b), 193.3(a) 25

TEX. R. CIV. P. 192.6, 193.2(b), cmt. 2 25

TEX. R. CIV. P. 192.6(a) 35

TEX. R. CIV. P. 192.6(b) 34, 42

TEX. R. CIV. P. 193, cmt. 3 24

TEX. R. CIV. P. 193.1 45

TEX. R. CIV. P. 193.1 *et seq.* 37

TEX. R. CIV. P. 193.2(a) 24, 45

TEX. R. CIV. P. 193.2(a)–(e),193.3(a), (b) 24

TEX. R. CIV. P. 193.2(b) 29

TEX. R. CIV. P. 193.2(c) 24

TEX. R. CIV. P. 193.2(c), (f) 24

TEX. R. CIV. P. 193.2(e) 24

TEX. R. CIV. P. 193.3(a) 29, 30

TEX. R. CIV. P. 193.3(b) 28, 51

TEX. R. CIV. P. 193.3(c) 29

TEX. R. CIV. P. 193.4(a) 29

TEX. R. CIV. P. 193.4(a), 199.6 26

TEX. R. CIV. P. 193.5(b) 56

TEX. R. CIV. P. 193.6(a) 56, 57, 58

TEX. R. CIV. P. 193.6(b) 56

TEX. R. CIV. P. 193.6(c) 56

TEX. R. CIV. P. 193.7 54

TEX. R. CIV. P. 194.1 16

TEX. R. CIV. P. 194.2(a) 16

TEX. R. CIV. P. 194.2(c) 16

TEX. R. CIV. P. 194.2(f) 44

TEX. R. CIV. P. 194.4 (a) 55

TEX. R. CIV. P. 194.4(b) 55

TEX. R. CIV. P. 196 ..... 17, 30

TEX. R. CIV. P. 195.1–.4 44

TEX. R. CIV. P. 196.1(b) 17, 37

TEX. R. CIV. P. 196.1 *et seq*. 37

TEX. R. CIV. P. 196.2(a) 18, 37

TEX. R. CIV. P. 196.2(a), 197.2(a), 198.2(a) 24

TEX. R. CIV. P. 196.3(b) 54

TEX. R. CIV. P. 197 16

Tex. R. Civ. P. 197.1 16

TEX. R. CIV. P. 197.3 53

TEX. R. CIV. P. 198.1 ..... 19, 20, 23

TEX. R. CIV. P. 198.2(c) 20, 22, 53

TEX. R. CIV. P. 198.3 ..... 20, 22, 53

TEX. R. CIV. P. 199.1 ..... 36, 37

TEX. R. CIV. P. 199.1(a) 36

TEX. R. CIV. P. 199.1(b) 36, 39

TEX. R. CIV. P. 199.2(a) 37, 38

TEX. R. CIV. P. 199.2(b) 36, 39

TEX. R. CIV. P. 199.2(b)(2)(3) 36

TEX. R. CIV. P. 199.2(b)(4) 37

TEX. R. CIV. P. 199.2(b)(5) 37, 39, 40, 42

TEX. R. CIV. P. 199.3 ..... 36, 41, 42, 46

TEX. R. CIV. P. 199.4 38

TEX. R. CIV. P. 199.5 ..... 36, 38, 39

TEX. R. CIV. P. 199.5(a)(3) 37, 39

TEX. R. CIV. P. 199.5(e) 53

TEX. R. CIV. P. 199.6 ..... 26, 38

TEX. R. CIV. P. 200 ..... 39, 41

TEX. R. CIV. P. 200.1 39

TEX. R. CIV. P. 200.1(a) 39

TEX. R. CIV. P. 200.1(b) 39, 40

TEX. R. CIV. P. 200.1 *et seq.* 42

TEX. R. CIV. P. 200.2 39

TEX. R. CIV. P. 200.3(a) 39, 42

TEX. R. CIV. P. 200.3(b) 39

TEX. R. CIV. P. 200.3 39

TEX. R. CIV. P. 200.4 39

TEX. R. CIV. P. 201.1(c) 46

TEX. R. CIV. P. 202 ..... 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 40

TEX. R. CIV. P. 202, cmt. 2 (1999) 1, 2

TEX. R. CIV. P. 202.1(a), (b) 1

TEX. R. CIV. P. 202.4(a)(1) 1, 4

TEX. R. CIV. P. 202.4(a)(2) 1, 4

TEX. R. CIV. P. 203 39

TEX. R. CIV. P. 204 ..... 40, 57

TEX. R. CIV. P. 205 ..... 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

TEX. R. CIV. P. 205.1 40

TEX. R. CIV. P. 205.1(a) 40

TEX. R. CIV. P. 205.1(a), (c) 42

TEX. R. CIV. P. 205.2 ..... 42, 43

TEX. R. CIV. P. 205.3 ..... 42, 43,44

TEX. R. CIV. P. 205.3(a) 43, 45, 47

Tex. R. Civ. P. 205.3(b)(1)–(3) 41

TEX. R. CIV. P. 205.3(b), (d) 42

TEX. R. CIV. P. 205.3(b) 42

TEX. R. CIV. P. 205.3(c) 40, 44, 45

TEX. R. CIV. P. 205.3(d) 45

TEX. R. CIV. P. 205.3(e) 42, 43

TEX. R. CIV. P. 205.3(f) 43

TEX. R. CIV. P. 215 ..... 26, 27, 30, 37. 56

TEX. R. CIV. P. 215.1 26

TEX. R. CIV. P. 215.1(b) 25

TEX. R. CIV. P. 215.1(b), (d) 26

TEX. R. CIV. P. 215.2 57

TEX. R. CIV. P. 252 41

TEX. R. CIV. P. 263 68

TEX. R. CIV. P. 265(a) 60

TEX. R. EVID. 103(a) 58

TEX. R. EVID. 103(a)(1) 68

TEX. R. EVID. 103(a)(2) 68

TEX. R. EVID. 103(b) 68

TEX. R. EVID. 103(c) 58

TEX. R. EVID. 103(d) 64, 68

TEX. R. EVID. 401 33

TEX. R. EVID. 801(a) 67

TEX. R. EVID. 801(a) 63, 64

TEX. R. EVID. 801(e)(2) 63

TEX. R. EVID. 801(e)(1)(A) 64

TEX. R. EVID. 803 69

TEX. R. EVID. 803(1) 64

TEX. R. EVID. 803(2) 64

TEX. R. EVID. 803(4) 65, 66

TEX. R. EVID. 803(8) 65, 66

TEX. R. EVID. 803(9) 65, 66

TEX. R. EVID. 803(16) 65

TEX. R. EVID. 805 66

TEX. R. EVID. 901 33

TEX. R. EVID. 902 33

TEX. R. EVID. 902 (11) 33

TEX. R. EVID. 902 (14) 33

TEX. R. EVID. 503 28

TEX. R. EVID. 503(a) 28

TEX. R. EVID. 503(a)(2) 28

TEX. R. EVID. 503(a)(4)(A) 28

TEX. R. EVID. 503(b)(1) 28

TEX. R. EVID. 503(b)(1)(C) 30

TEX. R. EVID. 503(d)(2) 19

TEX. R. EVID. 504(a) 30

TEX. R. EVID. 509 ..... 29, 30

TEX. R. EVID. 511(a)(1) 28

TEX. R. EVID. 601(b) 58, 64, 66

TEX. R. EVID. 601(b)(3) 58

TEX. R. EVID. 703 ..... 64, 66

TEX. R. EVID. 801(a)–(c) 63

TEX. R. EVID. 801(c) 63

TEX. R. EVID. 801(d) 63

TEX. R. EVID. 801(e) 63, 69

TEX. R. EVID. 802 63

TEX. R. EVID. 803(3) 33, 64

TEX. R. EVID. 801(e)(2) 33

TEX. R. EVID. 803(6) 33, 64, 65, 66

TEX. R. EVID. 803(11) 65

TEX. R. EVID. 901(b)(1), (4), (9) 33

TEX. R. EVID. 902(10), (11), (13), (14) 33

TEX. R. EVID. 801 63

TEX. R. EVID. 803(b) 53

TEX. R. EVID. 901(a) 33, 53

TEX. R. EVID. 902(10) 53

Other Authorities

Paul N. Gold, *Rooting for Acorns: Discovery Update 2025*, Ch. 12, 48th Annual Advanced Civil Trial, State Bar of Texas (2025) 9

Eric Goldman, *Emojis and the Law*, 93 WASH. L. REV. 1227, 1236–41 (2018) 67

David Hittner, Lynne Liberato, Kent Rutter & Jeremy Dunbar, *Summary Judgments in Texas: State and Federal Practice*, 62 S. TEX. L. REV. 99, 100 (2023) 50, 52, 53

King, Janicek & Leopold, *Hearsay and Other Evidentiary Issues—A Primer*, Ch. 20, 46th Annual Advanced Civil Trial Course (State Bar of Texas 2023) 67

Lindsey et al., *Misunderstood and Underused Discovery and Evidentiary Rules*, *supra* note 3 49

Lynne Liberato & Natasha Breaux, *Objecting to Summary Judgment Evidence in State Court: Recent Clarifications*, 57 S. TEX. L. REV. 1 (2015) 52

Scott E. Lindsey, Dwayne W. Smith & Jason C.N. Smith, *Misunderstood and Underused Discovery and Evidentiary Rules*, Ch. 6, 37th Annual Advanced Evidence and Discovery Course (State Bar of Texas 2024) 48

Amy M. Stewart, *Pre-Suit Discovery*, Ch. 7, 35th Annual Advanced Evidence & Discovery, State Bar of Texas (2022) 6, 7

Amy M. Stewart & Stewart Law Group, *Rule 202: Best Practices*, Ch. 8, 36th Annual Advanced Evidence & Discovery, State Bar of Texas (2023) 1

I. RULE 202: PRE-SUIT DISCOVERY

A. Introduction to Rule 202

Discovery matters in trust and estate disputes can begin before the filing of a lawsuit. Texas Rule of Civil Procedure 202 is one of the more powerful and least understood procedural tools available to probate and fiduciary litigators. It permits a person to take a deposition before any suit is filed—either to preserve testimony that might otherwise be lost or to investigate the factual basis of a claim that may never see a courthouse. In the right circumstances, it can expose a fraudulent transfer before the estate inventory is finalized, confirm a trustee's unauthorized distributions before the beneficiary files suit, or lock in the testimony of a key witness whose memory is failing. Used strategically, Rule 202 can shape litigation before it begins.

That power comes with real constraints. Texas courts have grown steadily less tolerant of Rule 202 petitions that function as fishing expeditions, harassment campaigns, or attempts to circumvent discovery rules that would apply in pending litigation. The Texas Supreme Court has said, without ambiguity, that Rule 202 "is not a license for forced interrogations." *In re Michael Wolfe*, 341 S.W.3d 932, 933 (Tex. 2011) (orig. proceeding). The Fort Worth Court of Appeals, in its most recent significant Rule 202 opinion, rejected a petition whose allegations did nothing more than parrot the rule's own language. *In re Acclarent, Inc.*, No. 02-24-00228-CV, 2024 WL 2873617 (Tex. App.—Fort Worth June 7, 2024, orig. proceeding). And the rule's equitable character—expressly acknowledged in the 1999 Comments—places a supervisory obligation on courts that has no clean analog in ordinary discovery practice. TEX. R. CIV. P. 202, cmt. 2 (1999) ("Rule 202 is equitable in nature, and a court must not permit it to be used inequitably.").

For the probate and fiduciary litigator, Rule 202 presents a set of questions that arise in no other practice area with the same frequency or consequence: Does the statutory probate court have jurisdiction to grant the petition? Does the anticipated defendant have sufficient contacts with the forum? Will the petition survive the benefit-outweighs-burden standard when the claim is still speculative? And critically—because Rule 202 does not toll the limitations period—how long does the practitioner have before investigating the claim costs the right to bring it?

This article examines Rule 202 as a strategic tool in probate and fiduciary litigation. Part B surveys the rule's text, purpose, and dual prongs. Parts C and D address jurisdictional prerequisites and the mandatory findings required to obtain an order. Part E examines the scope of permissible discovery. Part F focuses specifically on the probate and fiduciary litigation context—where the rule can be deployed, where the courts have supported it, and where it runs into structural problems unique to estate practice. Part G addresses limitations and the abuse concerns that courts have used to narrow the rule's reach. Part H offers practice-oriented guidance for both petitioners and respondents. Part I catalogs the open questions that remain unresolved.

B. The Rule: Text, Purpose, and Structure

(1) Text and Effective Date

Rule 202 took its current form in 1999, replacing the earlier rule that governed depositions before suit and while appeals were pending. *See* TEX. R. CIV. P. 202 (1999 revision); *see also* Amy M. Stewart & Stewart Law Group, *Rule 202: Best Practices*, Ch. 8, 36th Annual Advanced Evidence & Discovery, State Bar of Texas (2023). The rule is straightforward in structure if not always in application. It has five operative subdivisions: Rule 202.1 governs the petition and its required contents; Rule 202.2 governs venue; Rule 202.3 governs notice and service; Rule 202.4 specifies the findings a court must make before ordering a deposition; and Rule 202.5 governs the scope and permissible use of testimony obtained under the rule.

(2) Two Distinct Purposes

Rule 202 authorizes pre-suit depositions for two distinct purposes, and the distinction matters doctrinally. Under Rule 202.1(a), a person may petition to perpetuate or obtain testimony for use in an anticipated suit—that is, a suit the petitioner expects to file or expects to face. Under Rule 202.1(b), a person may petition to investigate a potential claim or suit—a broader, more speculative justification that does not require the petitioner to have already decided to litigate. TEX. R. CIV. P. 202.1(a), (b).

The two purposes carry different burdens under Rule 202.4(a). For anticipated-suit depositions, the court must find that allowing the deposition "may prevent a failure or delay of justice." TEX. R. CIV. P. 202.4(a)(1). For investigatory depositions, the standard is whether "the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure." TEX. R. CIV. P. 202.4(a)(2). The first standard—prevention of failure or delay of justice—is arguably more permissive in its framing;

the second, with its explicit weighing requirement, has generated more litigation over what constitutes adequate proof of benefit.

Practitioners should resist the temptation to treat these as interchangeable. Courts have declined petitions that invoke one purpose while the facts suggest the other, and the characterization of the petition's purpose can affect both the showing required and the scope of permissible discovery.

(3) Petition Requirements

Rule 202.1 imposes specific, mandatory content requirements on the verified petition. It must state: the subject matter of the anticipated action or potential claim; the petitioner's interest therein; the reason for perpetuating or obtaining the testimony; the name, address, and telephone number of each expected adverse party; and the name, address, and telephone number of each person to be deposed and the substance of the testimony the petitioner expects to elicit from that person. TEX. R. CIV. P. 202.1.

Each requirement deserves attention. "Subject matter" is not a license to describe the anticipated claim in the most general possible terms. As the Fort Worth Court of Appeals has recently held, the petition's description must go beyond conclusory recitation of Rule 202.4's language. *In re Acclarent, Inc.*, No. 02-24-00228-CV, 2024 WL 2873617 (Tex. App.—Fort Worth June 7, 2024, orig. proceeding). "Expected adverse party" is a term of art that determines who must receive notice and who has standing to challenge the petition; courts have not uniformly resolved when an entity qualifies, a question that bears directly on estate practice where the potential defendants may not be immediately obvious.

The verification requirement is not technical ceremony. Because the petition stands in for the pleadings of a case that does not yet exist, the verified statement is the only factual predicate the court has before it. Skimping on verification to preserve flexibility later is a false economy.

(4) The Equitable Character of Rule 202

The 1999 Comments to Rule 202 state explicitly that "Rule 202 is equitable in nature, and a court must not permit it to be used inequitably." TEX. R. CIV. P. 202, cmt. 2 (1999). This language is not a throwaway. It places an affirmative supervisory obligation on the court that has no direct parallel in ordinary discovery. Trial courts retain independent authority to restrict or prohibit depositions under Rule 202.5 "to prevent abuse," and the Texas Supreme Court has confirmed that this authority is real—not contingent on the respondent's ability to articulate a precise harm.

The equitable character of Rule 202 also means that a technically compliant petition is not an automatic ticket to discovery. Courts have denied petitions that, while formally correct, were filed for purposes the equitable framework cannot support: harassment of an anticipated opponent, intelligence-gathering unrelated to any viable claim, or circumvention of the discovery rules that would govern the suit if filed.

C. Jurisdiction and the "Proper Court"

(1) The General Requirement

Rule 202.2 requires that the petition be filed in "a proper court." That phrase does significantly more work than its three words suggest. Texas courts have interpreted it to require that the court have both subject matter jurisdiction over the anticipated claims and personal jurisdiction over the anticipated defendants—not merely venue in the geographic sense. *In re Doe a/k/a "Trooper"*, 444 S.W.3d 603, 608 (Tex. 2014) (orig. proceeding); *City of Willow Park v. Squaw Creek Downs*, 166 S.W.3d 336, 340 (Tex. App.—Fort Worth 2005, no pet.). The proper court determination is a condition precedent to ordering a Rule 202 deposition. *In re Donna Indep. Sch. Dist.*, 299 S.W.3d 456, 459 (Tex. App.—Corpus Christi–Edinburg 2009, orig. proceeding). A court that lacks the requisite jurisdiction may not grant the petition, and an order entered without jurisdiction is correctable by mandamus. *Id.*; *In re Doe a/k/a "Trooper"*, 444 S.W.3d at 608.

(2) Subject Matter Jurisdiction

The subject matter jurisdiction component of "proper court" means that the petitioner must file in a court that could exercise jurisdiction over the anticipated suit itself. Rule 202 does not confer or expand jurisdiction; it borrows it. *City of Dallas v. Dallas Black Fire Fighters Ass'n*, 353 S.W.3d 548, 554 (Tex. App.—Dallas 2011, no pet.). If the anticipated action falls within the exclusive jurisdiction of a specific court—a statutory probate court, for example, or a district court with exclusive jurisdiction over certain statutory claims—the Rule 202 petition must follow the anticipated suit there.

The corollary is that a Rule 202 petitioner cannot seek discovery in a convenient forum that lacks subject matter jurisdiction over the underlying dispute on the theory that the petition is merely procedural. Courts have rejected that argument, and correctly so. *Id.*

(3) Personal Jurisdiction: The "Trooper" Requirement

The personal jurisdiction requirement was established by the Texas Supreme Court in *In re Doe a/k/a "Trooper"*. 444 S.W.3d 603 (Tex. 2014) (orig. proceeding). The case involved an anonymous poster whose identity a party sought to compel through a Rule 202 petition. The Supreme Court held that a court is a "proper court" under Rule 202 only if it would have personal jurisdiction over the anticipated defendants in the anticipated suit. Rule 202, the court explained, cannot manufacture jurisdiction where none exists over the parties against whom suit will be brought. *Id.* at 608.

Trooper has significant implications in fiduciary litigation. Beneficiaries, co-trustees, and financial institutions who are expected adverse parties in an estate or trust dispute may reside outside Texas or outside the county of the probate court. Before filing a Rule 202 petition in any particular court, the practitioner must analyze whether that court could assert personal jurisdiction—general or specific—over each anticipated defendant under Texas long-arm principles and the constitutional minimum-contacts framework. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (establishing minimum-contacts framework for personal jurisdiction). The question is not merely whether the anticipated defendant could be served; it is whether the court selected for the Rule 202 petition could properly exercise jurisdiction in the eventual suit.

The practical consequence in estate litigation is that a statutory probate court in Harris County may not be a proper court for a Rule 202 petition targeting an out-of-state corporate trustee whose only connection to the estate is a trust instrument drafted elsewhere and administered from New York, unless the petitioner can establish the jurisdictional predicates for the Houston probate court in the anticipated suit.

(4) Venue

Rule 202.2(b) establishes two acceptable venues: the county where venue of the anticipated suit may lie, or, if no suit is yet anticipated, the county where the witness resides. TEX. R. CIV. P. 202.2(b). When a suit is anticipated, the petitioner must file in a county with proper venue for that anticipated suit under the applicable substantive venue provisions—which in probate and fiduciary cases typically means the county in which the decedent was domiciled, the trust was administered, or the guardianship was pending. Venue and proper court are related but not the same inquiry; satisfying the venue requirement under Rule 202.2(b) does not resolve whether the court selected has the subject matter and personal jurisdiction that Trooper and related cases require.

(5) Rule 202 and the Statutory Probate Court

The question of whether a statutory probate court can exercise jurisdiction over a Rule 202 petition—as opposed to a district court—was addressed directly in *In the Estate of Nicholas*, No. 14-19-00716-CV, 2020 Tex. App. LEXIS 2532 (Tex. App.—Houston [14th Dist.] Mar. 26, 2020, no pet.). The Houston Fourteenth Court of Appeals held that a statutory probate court had subject matter jurisdiction to grant a Rule 202 petition filed by a temporary administrator to investigate potential survival claims arising from a decedent's death at the hands of law enforcement. The court concluded that such claims are "related to a probate proceeding" within the meaning of the Texas Estates Code and that the statutory probate court's concurrent jurisdiction over survival and wrongful death claims brought by a personal representative extended to the Rule 202 investigative proceeding as well. *Id.*; *see also* TEX. EST. CODE ANN.§§ 32.001, 32.007.

Estate of Nicholas is the only identified appellate authority addressing this question directly. Its holding is sound as applied to survival claims, where the personal representative's authority derives from the probate estate and the recovery flows back to the estate. Its outer limits are less clear. Whether a statutory probate court can exercise Rule 202 jurisdiction to investigate claims that are only tangentially related to a pending estate—a beneficiary's potential claim against a third-party investment advisor, for example, or a trust beneficiary's potential claim for breach of fiduciary duty against a co-trustee in a county with a separate court structure—remains to be litigated.

The statutory framework for probate court jurisdiction is relevant here. Section 32.005 of the Texas Estates Code grants statutory probate courts exclusive jurisdiction over probate proceedings within their county. TEX. EST. CODE ANN. § 32.005. Section 32.007 confers concurrent jurisdiction with district courts over several categories of related actions, including personal injury and survival claims and actions involving *inter vivos* trusts and testamentary trusts. TEX. EST. CODE ANN.§ 32.007. Together, these provisions establish a jurisdictional architecture that supports Rule 202 petitions in the statutory probate court whenever the anticipated suit is one the probate court could otherwise adjudicate—which in Harris County, for instance, encompasses an extraordinarily broad range of fiduciary disputes.

D. The Mandatory Findings: Rule 202.4 and the Burden of Proof

(1) The Mandatory-Finding Structure

Rule 202.4 uses language that courts have taken seriously: the court "must" order a deposition to be taken "if, but only if" it makes one of two specified findings. TEX. R. CIV. P. 202.4(a). The structure is mandatory and exclusive. There is no general equitable discretion to order discovery absent the required findings, and there is no discretion to decline a deposition once the findings are made—except for the court's supervisory authority under Rule 202.5 to restrict or prohibit abuse. The trial court's task is thus constrained at both ends: it must deny the petition without the required findings, and it cannot deny a properly supported petition on grounds of general inconvenience or preference.

The two alternative findings track the rule's two purposes. For the perpetuation-of-testimony prong, the court must find that the deposition "may prevent a failure or delay of justice in an anticipated suit." TEX. R. CIV. P. 202.4(a)(1). For the investigation prong, the court must find that "the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure." TEX. R. CIV. P. 202.4(a)(2).

(2) The Benefit-Outweighs-Burden Standard

The investigation prong's benefit-outweighs-burden standard has attracted the most appellate attention. It requires the court to engage in genuine weighing, not a formalistic endorsement of the petition's stated purpose. What constitutes a "likely benefit" sufficient to satisfy the standard?

The Texas Supreme Court established the analytical framework in *In re Michael Wolfe*, holding that courts must "strictly limit and carefully supervise" pre-suit discovery to prevent abuse, and confirming that the rule's broad discovery scope makes rigorous application of the standard mandatory, not optional. 341 S.W.3d at 933. The Fort Worth Court of Appeals amplified that framework in *In re PrairieSmarts LLC*, granting mandamus against a trial court that had ordered discovery without adequately weighing the potential disclosure of trade secrets against the claimed benefit to the petitioner., 421 S.W.3d 296, 304 (Tex. App.—Fort Worth 2014, orig. proceeding).

The most recent and most demanding application of the standard comes from the Fort Worth Court of Appeals in *In re Acclarent, Inc.*, decided in June 2024. No. 02-24-00228-CV, 2024 WL 2873617 (Tex. App.—Fort Worth June 7, 2024, orig. proceeding). There, the court held that a petitioner's conclusory tracking of Rule 202.4's statutory language—essentially, the assertion that the benefit outweighs the burden because Rule 202 says that is the standard—is insufficient as a matter of law. The petitioner must plead specific facts explaining why the requested deposition will produce the benefit claimed, what that benefit consists of, and how it is proportional to the burden placed on the respondent. *Id.*

Acclarent represents the current ceiling on the specificity required of the petition. In the probate and fiduciary context, that means the petition cannot simply invoke the existence of an estate dispute and assert, without more, that a pre-suit deposition of the decedent's financial advisor will be beneficial. The petitioner must explain what specific information is sought, why it cannot be obtained in any other way, and how that information relates to a concrete potential claim—not a theoretical concern.

(3) The "May Prevent" Standard for Anticipated Suits

The perpetuation prong's "may prevent a failure or delay of justice" standard is more permissive in its literal framing—"may" rather than "will likely"—but it still requires a genuine showing that the testimony sought is at risk of being unavailable in the anticipated suit. Typical showings include the age or illness of the witness, the witness's intention to leave the jurisdiction, or other circumstances suggesting that delay will compromise access to the testimony. In fiduciary litigation, an elderly testator or grantor who remains the primary witness to the circumstances of a suspicious transfer presents exactly this situation.

(4) Findings Required in the Order

Rule 202.4(a) requires the court to make the findings—not simply issue an order granting the petition. The court's order should reflect which of the two prongs the petitioner has satisfied. Practitioners on both sides should examine the order itself with care; an order that merely grants the petition without identifying the required finding provides an inadequate basis for mandamus if the order is erroneous, but it also provides an inadequate record if compliance is later disputed.

E. Scope of Discovery Under Rule 202.5

(1) The Mirror-Image Rule

Rule 202.5 establishes what may be called the mirror-image rule: the scope of discovery under Rule 202 is "the same as if the anticipated suit or potential claim had been filed." TEX. R. CIV. P. 202.5. This is a limitation, not an expansion. A petitioner cannot use Rule 202 to obtain discovery that would be unavailable, restricted, or subject to a stay in the anticipated suit. The Texas Supreme Court has confirmed that pre-suit discovery "is not an end within itself"; its permissible scope is defined entirely by what the anticipated suit would allow. *In re Michael Wolfe*, 341 S.W.3d at 933.

The mirror-image rule has several practical implications. First, it means that the scope of Rule 202 depositions is governed by the same discovery rules—including proportionality limits, relevance requirements, and privilege protections—as apply in pending litigation. Second, it means that the petitioner cannot use the absence of filed pleadings as a basis for demanding discovery broader than what those pleadings would support. Third, and most importantly in fiduciary practice, it means that claims subject to substantive pre-suit restrictions cannot be investigated by Rule 202 deposition, unless those restrictions would have been satisfied in the anticipated suit.

(2) Ripeness and the *DePinho* Limitation

In *In re DePinho*, the Texas Supreme Court held that a court may not order Rule 202 depositions to investigate claims that are unripe. 505 S.W.3d 621 (Tex. 2016) (orig. proceeding). The logic is straightforward: because the scope of Rule 202 discovery is limited to what the anticipated suit would allow, and because an unripe suit would be dismissed on justiciability grounds, the petitioner cannot obtain through Rule 202 what a court would deny in the anticipated action itself. *Id.* The rule's investigatory prong does not cure a justiciability defect; it inherits it.

For fiduciary litigators, DePinho means that speculative claims—anticipated disputes over the future administration of an estate, potential claims for breach of fiduciary duty that have not yet crystallized into a concrete injury—cannot serve as the basis for a Rule 202 petition. The claim being investigated must be ripe enough that it could withstand a jurisdictional challenge in the anticipated suit. Courts have not precisely defined what that threshold requires, but it is more than a practitioner's hunch that something may have gone wrong.

(3) The Healthcare Liability Analogy: *Jordan* and Its Reach

In *In re Jordan*, the Texas Supreme Court confronted a petitioner who sought to use Rule 202 to conduct discovery in anticipation of a healthcare liability claim subject to the expert-report requirement of Chapter 74 of the Texas Civil Practice and Remedies Code. 249 S.W.3d 416 (Tex. 2008) (orig. proceeding); *see also* TEX. CIV. PRAC. & REM. CODE § 74.351. Chapter 74 imposes a stay on all discovery until an expert report is served; the petitioner argued that Rule 202 permitted pre-suit discovery that would circumvent that stay. The Supreme Court disagreed. Because the anticipated suit would be subject to the discovery stay, Rule 202 could not be used to obtain discovery that the statute would prohibit. *In re Pilgrim's Pride Corp.*, 237 S.W.3d 591, 601 (Tex. App.—Texarkana 2007, orig. proceeding).

Jordan is not just a healthcare case. Its underlying principle—that Rule 202's mirror-image rule imports the discovery limitations of the anticipated suit, including substantive statutory restrictions—applies wherever the anticipated suit is subject to pre-suit procedural requirements. In fiduciary litigation, this principle has not yet been tested against analogous pre-suit requirements, but the logic extends to any context in which the anticipated suit would restrict discovery at its outset.

(4) Document Production: An Unresolved Circuit Split

One of the most practically significant open questions under Rule 202 is whether the petitioner may compel document production—not merely the deponent's oral testimony. Texas intermediate courts are divided. The Tyler Court of Appeals has held that document production may be compelled as part of a Rule 202 deposition, on the theory that the deposition rules applicable in pending litigation—including the authority to issue subpoena duces tecum—are available under Rule 202.5's mirror-image framework. *In re City of Tatum*, No. 12-18-00285-CV, 2018 WL 6715889 (Tex. App.—Tyler 2018, orig. proceeding). The Texarkana Court of Appeals, by contrast, has held that Rule 202 does not authorize standalone document production through a subpoena duces tecum that effectively functions independently of the deposition itself. *In re Pilgrim's Pride Corp.*, 237 S.W.3d 601.

The Texas Supreme Court has not resolved the split. The practical consequence for probate and fiduciary practitioners is significant: a petitioner who files in a Tyler-area court and seeks financial records, trust accountings, or estate inventories as part of a Rule 202 deposition may succeed; the same petition filed in a Texarkana-area court

may be denied the document component while the oral deposition proceeds. Practitioners operating outside those two districts face genuine uncertainty. The safer course—and the approach more likely to survive mandamus review in any district—is to tie document requests specifically and individually to the deposition topics, making clear that the documents are sought as an adjunct to the deponent's anticipated testimony, not as a freestanding discovery mechanism.

F. Rule 202 in Probate and Fiduciary Litigation

(1) Why Rule 202 Matters in Estate Practice

Probate and fiduciary litigation presents a distinctive set of fact patterns in which pre-suit discovery can be genuinely valuable. The typical contested estate or trust dispute involves transactions that occurred in private—transfers between a decedent and a trusted family member, trust distributions documented only in the trustee's records, financial advice rendered without contemporaneous notes. The witnesses are often elderly, physically declining, or emotionally reluctant to cooperate voluntarily. The transactions may be years old. The evidence is scattered across financial institutions, advisors, and family members who may not even know what the administrator needs to know.

In this environment, the ability to take a pre-suit deposition—before defenses are hardened, before attorneys are retained to prep witnesses, and while memories are relatively fresh—has real strategic value. Rule 202 also permits the petitioner to assess the strength of a potential claim before committing to litigation. A deposition that reveals the contested transfer was in fact fully authorized and documented may save the estate years of expensive and divisive litigation.

Those benefits are real, but they do not operate without constraint. The discussion that follows examines the most common fiduciary litigation contexts in which Rule 202 is deployed, the jurisdictional and substantive obstacles the practitioner will encounter, and the points at which the tool is most likely to fail.

(2) Investigating a Suspicious *Inter Vivos* Transfer

The paradigmatic Rule 202 scenario in estate litigation is the suspicious *inter vivos* transfer: the decedent transferred significant assets shortly before death to a family member, caregiver, or trusted advisor, and the estate's representative or an aggrieved beneficiary suspects undue influence, lack of capacity, or outright fraud. The anticipated suit is a claim to set aside the transfer or impose a constructive trust on the transferred property, but the evidence needed to sustain that claim—testimony about the decedent's mental state, the circumstances of the transfer, the documents that accompanied it—is dispersed among witnesses who have no obligation to cooperate voluntarily.

Rule 202 is well-suited to this scenario, with conditions. First, the claim must be sufficiently ripe. A vague suspicion that something improper occurred is not, under *DePinho*, a sufficient basis for a Rule 202 petition. *In re DePinho*, 505 S.W.3d 621 (Tex. 2016) (orig. proceeding). The petitioner should be able to identify, with some specificity, what the suspicious circumstances are—unexpected change in estate plan, disproportionate transfer, questionable capacity—before filing. Second, the Rule 202.4 burden must be met with specific factual allegations explaining what the petitioner expects to learn and why that information is essential to evaluating the potential claim. *In re Acclarent, Inc.*, No. 02-24-00228-CV, 2024 WL 2873617 (Tex. App.—Fort Worth June 7, 2024, orig. proceeding).

Third—and this is the point practitioners most frequently overlook—the statute of limitations is running. Rule 202 does not toll the limitations period applicable to the anticipated claim. Amy M. Stewart, *Pre-Suit Discovery*, Ch. 7, 35th Annual Advanced Evidence & Discovery, State Bar of Texas (2022). A petitioner who spends nine months building a Rule 202 case against a fraudulent transfer may emerge from the process with a strong factual record and a limitations problem. The investigation and the clock run simultaneously.

(3) Pre-Suit Investigation of a Trustee's Accounts

When a beneficiary suspects a trustee of misappropriation, self-dealing, or breach of fiduciary duty, Rule 202 offers a mechanism to examine the trustee's records and secure the trustee's testimony before a formal accounting or demand is served. This scenario presents a cluster of practical considerations unique to trust litigation.

The first is the court selection problem. If the trust is administered under the jurisdiction of a statutory probate court—as is common in Harris County and Dallas County—the Rule 202 petition should be filed there, not in a district court, because the statutory probate court's concurrent jurisdiction under Estates Code § 32.007 covers actions involving *inter vivos* trusts and testamentary trusts. TEX. EST. CODE ANN. § 32.007. Filing in the wrong court does more than create a venue problem; under Trooper and related cases, it may mean the court is not a "proper court" at all, and any deposition order is subject to mandamus. *In re Doe a/k/a "Trooper"*, 444 S.W.3d 603 (Tex. 2014) (orig. proceeding).

The second is the personal jurisdiction question. If the trustee is an out-of-state trust company or a co-trustee who has relocated outside Texas, the petitioner must establish that the statutory probate court—or whatever court is selected—has personal jurisdiction over that entity or individual in the anticipated suit. Trust administration activities in Texas generally provide a sufficient basis for specific personal jurisdiction in a breach-of-fiduciary-duty claim, but that analysis must be done with care before filing. A Rule 202 petition that targets a trustee whose minimum contacts with Texas are insufficient to support jurisdiction in the anticipated suit will fail on *Trooper* grounds. *Id.* at 608.

Third, because the trustee's records are held by a third party—often a financial institution—the document production circuit split matters enormously here. If the trust's financial institution is the deponent and the petitioner needs its records as well as its testimony, the availability of document production through a Rule 202 subpoena duces tecum depends on which district's law controls.

(4) Survival and Wrongful Death Claims Against Third Parties

In the Estate of Nicholas addressed this scenario directly: a decedent dies under circumstances that may give rise to a survival claim against a third party, and the temporary administrator files a Rule 202 petition to investigate the potential claim before deciding whether to pursue it. No. 14-19-00716-CV, 2020 Tex. App. LEXIS 2532 (Tex. App.—Houston [14th Dist.] Mar. 26, 2020, no pet.). The Houston Fourteenth Court of Appeals held that the statutory probate court had jurisdiction over this petition because the potential survival claim is "related to" the probate proceeding—the recovery would flow back to the estate, the personal representative derives authority to investigate from the Letters of Administration, and the Estates Code's concurrent jurisdiction provisions encompass personal injury and survival actions brought by a personal representative. *Id.*; TEX. EST. CODE ANN. §§ 32.001, 32.007.

The probate court's jurisdiction in this context is supported by both the concurrent-jurisdiction grant of Estates Code § 32.007 and the estate's practical interest in a comprehensive and coordinated investigation of potential assets. The alternative—filing the Rule 202 petition in a district court while the probate proceeding continues in the statutory probate court—fragments the administration of the estate and creates parallel proceedings that serve no one. Centralizing the Rule 202 investigation in the probate court is legally supportable and administratively sound.

(5) Will Contest Investigation

A will contest presents Rule 202 opportunities on both sides. The contestant may seek to depose the attesting witnesses, the drafting attorney, or the decedent's physician before filing a formal contest, particularly where the testator's mental condition at execution is in question. The proponent may seek to secure testimony from persons with knowledge of the testator's capacity or the circumstances of the will's execution, particularly if those witnesses are elderly or infirm.

Two jurisdictional observations deserve mention here. First, the will contest itself falls within the exclusive jurisdiction of the statutory probate court in a county where one exists; TEX. EST. CODE ANN. § 256.204. The Rule 202 petition should follow accordingly. Second, the applicable limitations period for a will contest is two years from the date the will is admitted to probate. TEX. EST. CODE ANN. § 256.204. If the estate is in administration, that clock is running, and Rule 202 does nothing to extend it.

(6) The Limitations Trap

The limitations problem in Rule 202 practice deserves direct treatment because it is routinely underestimated and because the consequences of overlooking it are irreversible.

The SBOT CLE papers on Rule 202 consistently note that filing a pre-suit petition does not toll the applicable limitations period. Amy M. Stewart, *Pre-Suit Discovery*, Ch. 7, 35th Annual Advanced Evidence & Discovery, State Bar of Texas (2022). No Texas Supreme Court opinion expressly so holds, but no Texas court has held otherwise either, and the theoretical basis for tolling is thin. The discovery rule—Texas's primary judicially created tolling mechanism—tolls limitations from the accrual of the claim if the injury was inherently undiscoverable, not from the filing of a Rule 202 petition. A petitioner who relies on a Rule 202 investigation to build a case while assuming limitations are suspended will face an argument that even a confirmed Rule 202-based case is time-barred.

In fiduciary litigation, the relevant limitations periods vary by claim. Breach of fiduciary duty claims generally carry a four-year period under Section 16.004 of the Texas Civil Practice and Remedies Code. Fraud claims are similarly four years. DTPA claims are two years. Will contest claims are two years from admission to probate. Each of these periods runs independently of any Rule 202 investigation, and the practitioner who files a Rule 202 petition should simultaneously calendar every potentially applicable limitations deadline.

G. Limitations on Rule 202: Abuse, Oversight, and Constitutional Constraints

(1) The Mandatory Oversight Obligation

The Texas Supreme Court has not been passive about Rule 202 abuse. In *In re Michael Wolfe*, the court confirmed that courts must "strictly limit and carefully supervise pre-suit discovery." 341 S.W.3d at 933. In *In re John Does 1 and 2*, the court reinforced that obligation, holding that trial courts must exercise active oversight over Rule 202 petitions—not simply grant them when the formal requirements are satisfied—and that the remedy of limiting the deposition's use under Rule 202.5 does not adequately protect a respondent whose primary objection is to the disclosure that will occur during the deposition, not the subsequent use of what is disclosed. 337 S.W.3d 862 (Tex. 2011) (orig. proceeding).

The mandatory oversight obligation means that the court is not a rubber stamp. It is an active participant in ensuring that Rule 202's equitable purpose is served and that its potential for abuse is checked. Courts have a duty to examine the petition with genuine scrutiny, to impose conditions on any order they grant, and—when a petition is facially proper but substantively abusive—to exercise the authority Rule 202.5 expressly provides to restrict or prohibit the deposition entirely.

For the respondent, this is the primary line of defense short of mandamus. Presenting the trial court with a detailed record of why the petition is disproportionate, speculative, or designed for improper purposes—and asking the court to exercise its supervisory authority—is both substantively appropriate and practically important for any subsequent mandamus petition.

(2) Mandamus as the Check on Erroneous Orders

Mandamus is the standard vehicle for challenging an erroneous Rule 202 order, because orders granting or denying Rule 202 petitions are interlocutory and generally not subject to direct appeal. *In re Jordan*, 249 S.W.3d 416, 420 (Tex. 2008) (orig. proceeding). The Texas Supreme Court established in *In re Jordan* that a party has no adequate remedy by appeal if a court abuses its discretion by ordering Rule 202 discovery that would compromise substantive or procedural rights. *In re PrairieSmarts LLC*, 421 S.W.3d 296, 304 (Tex. App.—Fort Worth 2014, orig. proceeding).

The mandamus landscape in Rule 202 cases has a clear structure. If the petitioner fails to satisfy the Rule 202.4 findings, a court that grants the petition abuses its discretion. *In re PrairieSmarts LLC*, 421 S.W.3d 296, 304 (Tex. App.—Fort Worth 2014, orig. proceeding). If the court grants a petition that lacks the required jurisdictional predicates—subject matter jurisdiction, personal jurisdiction, proper venue—the order is correctable by mandamus. *In re Doe a/k/a "Trooper"*, 444 S.W.3d at 608; *In re Donna Indep. Sch. Dist.*, 299 S.W.3d 456, 459 (Tex. App.—Corpus Christi 2009, orig. proceeding). If the scope of the ordered deposition exceeds what Rule 202.5 permits, mandamus is appropriate. *In re John Does 1 and 2*, 337 S.W.3d at 862. Conversely, if the court denies a petition that satisfies the required findings and jurisdictional prerequisites, the petitioner may seek mandamus for that error as well. *In re Hewlett Packard*, 212 S.W.3d 356, 360 (Tex. App.—Austin 2006, orig. proceeding).

The availability of mandamus creates pressure on both sides of the Rule 202 proceeding. Petitioners who obtain overbroad orders face the prospect of post-order mandamus review that delays and potentially destroys the benefit of the pre-suit discovery. Respondents who face improperly granted orders must move quickly, because mandamus proceedings run on a compressed timeline and delay can result in a waiver of the right to challenge the deposition.

(3) The TCPA and Rule 202

One of the most actively litigated intersections in current Rule 202 practice is the application of the Texas Citizens Participation Act to Rule 202 petitions. The TCPA permits a defendant in a "legal action" that is based on the defendant's exercise of free speech, the right to association, or the right to petition to move for dismissal, shifting the burden to the plaintiff to establish a prima facie case. TEX. CIV. PRAC. & REM. CODE § 27.003. The question for Rule 202 purposes is whether a Rule 202 petition constitutes a "legal action" within the meaning of the TCPA—and courts have divided on the answer.

A February 2025 decision from the Fort Worth Court of Appeals reportedly held that a Rule 202 petition is not a "legal action" subject to TCPA dismissal. Paul N. Gold, *Rooting for Acorns: Discovery Update 2025*, Ch. 12, 48th Annual Advanced Civil Trial, State Bar of Texas (2025). The TCPA 2019 amendments narrowed the statute's scope significantly, but they did not expressly address Rule 202. The Texas Supreme Court has not resolved the question. In fiduciary litigation involving contested communications—trustee communications that might qualify as petitioning activity, family settlement agreement negotiations, or attorney-client communications among multiple family members—the TCPA-Rule 202 question is a genuine tactical concern for both petitioners and respondents.

The practitioner advising a petitioner in a TCPA-sensitive context should anticipate a TCPA motion to dismiss and structure the petition's stated purpose to fall outside the TCPA's core definitions. The practitioner advising a respondent who exercises speech or associational rights in connection with the disputed conduct should evaluate

whether a TCPA motion is available and whether the strategic benefits of the motion outweigh the risks of an adverse fees award if the motion fails.

(4) Anonymous Identity Disclosure and Constitutional Constraints

A category of Rule 202 cases that has generated its own line of authority involves petitions seeking to compel disclosure of an anonymous person's identity—typically an anonymous online poster, but the constitutional analysis applies to any case in which the anticipated defendant's identity is unknown and a Rule 202 proceeding is the vehicle for establishing it.

The constitutional framework is established by two United States Supreme Court decisions. *McIntyre v. Ohio Elections Commission* held that the First Amendment protects an author's decision to remain anonymous, describing anonymous political advocacy as "an honorable tradition of advocacy and of dissent." 514 U.S. 334, 357 (1995). *Buckley v. American Constitutional Law Foundation* extended that protection to petition circulators engaging in anonymous political activity. 525 U.S. 182 (1999). And *Reno v. ACLU* confirmed that First Amendment protections apply with full force to internet communications. 521 U.S. 844, 870 (1997).

Texas courts have applied these principles in Rule 202 proceedings seeking anonymous identity disclosure. In *In re John Does 1-10*, the Texarkana Court of Appeals described internet speech as "the modern equivalent of political pamphleteering" and applied First Amendment scrutiny to the Rule 202 petition 242 S.W.3d 805, 812 (Tex. App.—Texarkana 2007, no pet.). In *In re John Does 1 and 2*, the Texas Supreme Court confirmed that the trial court's mandatory oversight obligation is at its peak in identity-disclosure proceedings, and that the Rule 202.4 findings must be made with genuine rigor before the court can order disclosure of an anonymous speaker's identity. 337 S.W.3d 862 (Tex. 2011) (orig. proceeding).

Texas has not adopted a formal test for the required showing in anonymous identity-disclosure proceedings, in contrast to the multi-factor standards developed in other jurisdictions. *See, e.g., Dendrite Int'l, Inc. v. Doe No. 3*, 342 N.J. Super. 134 (App. Div. 2001). Courts in other states have applied standards ranging from a good-faith showing that the petition is not filed for harassment to a summary-judgment-equivalent standard requiring the petitioner to demonstrate a viable claim on the merits before the First Amendment protection yields. Texas courts have not selected among these standards. The question is open, and a respondent challenging an identity-disclosure petition in Texas should argue for the highest applicable standard—which is to say, the summary-judgment-equivalent test that requires the petitioner to demonstrate a prima facie viable claim and the necessity of the disclosure before the constitutional protection is overridden.

In fiduciary litigation, the anonymous-identity problem arises primarily in the context of online defamation of estates, trusts, or their administrators—a category of dispute that is more common than many practitioners recognize.

H. Rule 202 Practice Considerations

(1) Before Filing: The Pre-Petition Checklist

Filing a Rule 202 petition without adequate preparation is a reliable path to mandamus, wasted expense, and tactical embarrassment. The following analysis should precede every Rule 202 petition in a probate or fiduciary context.

First, identify the anticipated claim with specificity. The petition must state the subject matter of the potential claim. That statement cannot be a placeholder. Before filing, the petitioner's counsel should be able to articulate at least the legal theory (breach of fiduciary duty, fraud, undue influence), the approximate time period of the relevant conduct, and the specific individuals or entities against whom suit is anticipated. This analysis will also reveal whether the claim is ripe enough to withstand a *DePinho* challenge.

Second, select the correct court. The court selection analysis requires three independent inquiries: Does this court have subject matter jurisdiction over the anticipated suit? If the anticipated defendant is an out-of-state party, does this court have personal jurisdiction over that defendant in the anticipated suit? Is venue proper for the anticipated suit in this county? All three must be answered affirmatively. In a county with a statutory probate court, the analysis of whether to file in the probate court or a district court should track the nature of the anticipated suit—if it is one the probate court could adjudicate under Estates Code § 32.007, the probate court is the better choice for coordination and administrative efficiency.

Third, calendar the limitations period. Before filing, identify every potentially applicable limitations period and calendar it. The Rule 202 investigation will not extend these deadlines, and the investigation may take longer than anticipated.

Fourth, draft the petition to the *Acclarent* standard. Post-*Acclarent*, a petition that merely tracks Rule 202.4's language is facially deficient. The petition must include specific facts: what testimony is sought, from whom, on what subjects, why the anticipated discovery will provide the specific benefit claimed, and why that benefit is proportionate to the burden on the respondent. The verification should be substantive, not conclusory.

Fifth, evaluate the document production question. If documents are essential to the investigation, assess whether the target court's district has adopted the Tyler court's view (production permitted) or the Texarkana court's view (standalone production prohibited). Structure document requests as an explicit adjunct to the deponent's anticipated testimony, not as independent discovery demands.

Sixth, anticipate TCPA exposure. If the anticipated defendant engages in communications, association, or petitioning activity related to the dispute, evaluate whether a TCPA motion is likely. Consider whether the petition's stated purpose can be structured to minimize TCPA vulnerability without compromising the substantive need for the discovery.

(2) Drafting the Verified Petition

The verified petition is the foundation of the Rule 202 proceeding. Post-*Acclarent*, its factual content will determine whether the proceeding survives. A petition that adequately supports Rule 202.4 findings should include, at minimum, the following:

A description of the anticipated claim that identifies the legal theory, the key facts currently known, and the specific gap in the petitioner's knowledge that the deposition will fill. The description should be specific enough to establish ripeness under *DePinho* while being accurate enough to survive later scrutiny if the anticipated suit is filed.

An identification of the anticipated adverse parties and their relationship to the disputed transactions or conduct. The petition should demonstrate—not merely assert—that the petitioner knows who the potential defendants are and why this court has jurisdiction over them.

A description of each proposed deponent, the specific topics on which the deponent is expected to have knowledge, and the specific information the petitioner expects to learn from the deposition. Generic descriptions ("knowledge of the transactions at issue") will not satisfy *Acclarent*; specific descriptions ("testimony concerning the circumstances of the March 2022 transfer of the Bellaire property, including decedent's representations to the witness regarding his intentions and mental state at the time") are required.

A particularized statement of why the benefit of the deposition outweighs the burden on the respondent. This should address not just the abstract value of the information but the petitioner's inability to obtain that information through other means, the risk that the information will be lost if the deposition is not taken before suit (if the perpetuation prong is also invoked), and any mitigating factors that reduce the burden on the respondent.

(3) Defending Against a Rule 202 Petition

The respondent's primary tools against an improperly filed Rule 202 petition are: a motion to dismiss or deny based on lack of proper court (subject matter jurisdiction, personal jurisdiction, or venue); a challenge to the adequacy of the Rule 202.4 showing; a request that the trial court exercise its supervisory authority under Rule 202.5 to restrict or prohibit the deposition; and, if available, a TCPA motion to dismiss.

The challenge to the Rule 202.4 showing is the most consistently available defense. Post-*Acclarent*, petitions that rely on conclusory allegations are vulnerable. The respondent should demand, at the hearing on the petition, a specific accounting of what factual basis the petitioner has for each element of the Rule 202.4 findings. A court that grants a petition based on generalities has abused its discretion; that abuse is the predicate for mandamus.

Where personal jurisdiction over the respondent is genuinely in question, the respondent should file a verified denial of personal jurisdiction and require the petitioner to establish the jurisdictional predicates. The *Trooper* holding makes personal jurisdiction a threshold issue; the respondent should litigate it as such. Conflating it with the merits of the Rule 202.4 showing is a tactical error.

If the deposition is ordered and mandamus is being considered, the respondent should move quickly. Courts evaluating mandamus petitions look unfavorably on respondents who delay after the order issues, and the practical ability to stay the deposition pending mandamus review diminishes rapidly as the scheduled date approaches.

(4) The Decision to File: Strategic Calculus

Rule 202 is a tool of some strategic power, but filing a petition is not cost-free even when it succeeds. Several factors should inform the decision.

The filing of a Rule 202 petition puts anticipated defendants on notice. They will retain counsel, preserve evidence, and begin coordinating their defense. The element of surprise—to whatever extent it exists in fiduciary litigation—is gone. Practitioners should evaluate whether the information sought is worth the tactical cost of early disclosure.

Rule 202 proceedings are public. The petition, the order, and the deposition transcript become part of the court's record. In sensitive family disputes or closely-held business situations, that publicity can damage relationships, trigger collateral consequences, or expose the petitioner's theory of the case prematurely. Where confidentiality is a priority, the practitioner should assess whether informal investigation, voluntary disclosure requests, or other non-litigation means can achieve the same result.

The economics of Rule 202 proceedings require attention. They are not free. Filing fees, service costs, hearing preparation, and deposition costs accumulate quickly, particularly when the respondent contests the petition. In cases where the anticipated recovery is modest, the cost of the Rule 202 proceeding may not be justified by the information it produces.

Finally, and most importantly, the decision to file a Rule 202 petition should always be accompanied by an independent evaluation of whether the limitations period permits it. If limitations is close, filing the Rule 202 petition and simultaneously filing the underlying suit is often the better course.

I. Open Questions Regarding Rule 202

Several significant questions in Rule 202 practice remain unresolved, and the probate and fiduciary litigator should approach each of them with caution.

Document production. The circuit split between the Tyler and Texarkana courts on the availability of document production under Rule 202 has not been resolved by the Texas Supreme Court. Practitioners outside those districts face genuine uncertainty, and the safer course is to structure any document requests as auxiliary to the oral deposition, not as standalone production demands.

TCPA applicability. Whether a Rule 202 petition constitutes a "legal action" under the TCPA remains unsettled statewide. The February 2025 Fort Worth decision reportedly resolves the question within that district, but the citation has not been confirmed and other courts may differ. Until the Texas Supreme Court addresses the question, the TCPA defense to a Rule 202 petition remains a live option for respondents in many districts.

Limitations tolling. There is no confirmed Texas Supreme Court authority holding that Rule 202 does not toll the limitations period. The practitioner cannot safely assume the point is settled and should treat limitations as running throughout the Rule 202 investigation.

Statutory probate court jurisdiction over Rule 202 petitions. *Estate of Nicholas* establishes that the statutory probate court has jurisdiction over Rule 202 petitions involving survival claims related to a pending estate. Its outer limits—where the claim is related to the estate but not a survival claim, or where the probate and district courts share concurrent jur2isdiction—are undefined.

Personal jurisdiction over witnesses versus defendants. *Trooper* requires personal jurisdiction over anticipated defendants. Whether a separate personal jurisdiction analysis applies to the witness being deposed—as distinct from the anticipated defendant—has not been resolved.

The First Amendment standard for anonymous identity disclosure. Texas has not adopted a formal test for the showing required before a court may order disclosure of an anonymous identity under Rule 202. The question of whether the summary-judgment-equivalent test, the good-faith test, or some intermediate standard applies remains open, and the constitutional stakes—involving First Amendment protections that cannot be recovered once disclosure occurs—make it one of the most significant open questions in the field.

Rule 202 and arbitration. When the anticipated suit will be subject to a mandatory arbitration clause, courts have not resolved whether Rule 202 is available and, if so, whether the arbitration panel's discovery rules constrain the Rule 202 scope under Rule 202.5's mirror-image framework. Trust agreements and closely-held business succession plans commonly contain arbitration provisions, and the Rule 202/arbitration interaction is an unresolved question with practical consequences.

J. Conclusion To Rule 202

Rule 202 is, in the right circumstances, the probate and fiduciary litigator's most effective pre-trial tool. The ability to take testimony before suit is filed, to lock in admissions before defenses are coordinated, and to evaluate the

factual basis of a potential claim before committing to litigation represents a genuine advantage—one that no other procedural device in Texas practice replicates.

That advantage is not self-executing. The rule imposes real jurisdictional prerequisites, a meaningful evidentiary burden, and a supervisory standard that courts are exercising with increasing rigor. *Trooper* requires that the petitioner analyze personal jurisdiction before selecting a court. *Acclarent* requires that the petition plead specific facts, not statutory language. *DePinho* requires a ripe claim, not a speculative concern. And the limitations period, running independently of the Rule 202 proceeding, imposes a deadline that the investigation itself will not extend.

For the practitioner who approaches Rule 202 with the attention these requirements demand—selecting the correct court, drafting with factual specificity, and calendaring limitations with discipline—the tool performs as advertised. For the practitioner who treats it as a low-cost fishing expedition, it is a reliable source of mandamus exposure, sanctions risk, and wasted effort.

The open questions cataloged in Part I are not merely academic. Each of them presents a realistic risk of surprise in active litigation. The document production circuit split, the TCPA interplay, the limitations tolling gap, and the unsettled constitutional standard for identity disclosure will all surface in practice before the Texas Supreme Court addresses any of them. Practitioners who understand where the law is settled, where it is contested, and where it is genuinely unknown are better equipped to deploy Rule 202 strategically and to defend against its misuse.

II. DISCOVERY MATTERS ADDRESSED WITH INITIAL CLAIMS

A. Statement of Relief Sought

Even from the very inception of a lawsuit, a plaintiff or other party seeking affirmative relief from the court must consider the scope of discovery, which is guided by the nature of the claims alleged. All original pleadings which set forth a claim for relief, such as petitions, counterclaims, cross-claims, or third party claims, must include a specific statement of the relief sought by that party. TEX. R. CIV. P. 47. Except in suits governed by the Family Code, the claim for relief must allege that the party seeks the following:

> (1) only monetary relief of $250,000 or less, excluding interest, statutory or punitive damages and penalties, and attorney fees and costs;
>
> (2) monetary relief of $250,000 or less and non-monetary relief;
>
> (3) monetary relief over $250,000 but not more than $1,000,000;
>
> (4) monetary relief over $1,000,000; or
>
> (5) only non-monetary relief.
>
> TEX. R. CIV. P. 47(c)

The inclusion of a statement for relief under Rule 47(c) is crucial, because if it is omitted, the party cannot conduct discovery until its pleading is amended to comply with the rule. TEX. R. CIV. P. 47.

However, there are certain types of cases that do not require a statement for relief under Rule 47(c). These include probate and guardianship proceedings, suits governed by the Family Code, or suits filed in justice courts. See TEX. EST. CODE ANN. §§ 53.107(1) (probate), 1053.105(1) (guardianship); TEX. R. CIV. P. 47(c) (suits under the Family Code); Tex. Sup. Ct. Order, Misc. Docket No. 20-9153 (eff. Jan. 1, 2021) (suits in the justice courts).

With regard to probate proceedings, a party should not assume their claim brought under the Texas Estates Code automatically exempts them from including a statement for relief under Rule 47. The scope of a "probate proceeding" is defined as follows:

(1) the probate of a will, with or without administration of the estate;
(2) the issuance of letters testamentary and of administration;
(3) an heirship determination or small estate affidavit, community property administration, and homestead and family allowances;
(4) an application, petition, motion, or action regarding the probate of a will or an estate administration, including a claim for money owed by the decedent;
(5) a claim arising from an estate administration and any action brought on the claim;
(6) the settling of a personal representative's account of an estate and any other matter related to the settlement, partition, or distribution of an estate;
(7) a will construction suit; and
(8) will modification or reformation proceeding under Subchapter J, Chapter 255.

TEX. EST. CODE ANN. § 31.001.

Similarly, Section 1053.105 of the Estates Code provides that Rule 47(c) does not apply to guardianship proceedings. A "guardianship proceeding" means:

(1) the appointment of a guardian of a minor or other incapacitated person, including an incapacitated adult for whom another court obtained continuing, exclusive jurisdiction in a suit affecting the parent-child relationship when the person was a child;

(2) an application, petition, or motion regarding guardianship or a substitute for guardianship under this title;

(3) a mental health action; and

(4) an application, petition, or motion regarding a trust created under Chapter 1301.

TEX. EST. CODE ANN. § 1002.015.

As probate practitioners will know, there are other claims that can be brought under the Estates Code that do not fall under either of these definitions—for example, suits related to powers of attorney. And, it is also unclear from Rule 47 or the above definitions in the Estates Code whether the exception would still apply if the party has made claims that exceed the scope of the definition of a probate or guardianship proceeding (for example, alleging claims for damages within the context of a probate or guardianship proceeding). Although the Rules are unclear on this point, these authors would assert that claims that exceed the scope of the definition of a probate or guardianship proceeding would indeed require a statement under Rule 47(c), as the statement for relief governs the scope of discovery in that matter. Regardless, if a party is in doubt on this issue, it would be prudent for the party to include a Rule 47(c) statement out of an abundance of caution to ensure that party can timely conduct discovery after suit is filed.

In addition to a Rule 47(c) statement, a party intending to seek affirmative relief must further consider the scope of discovery prior to even filing his lawsuit. Rule 190.1 requires a party to be governed by a discovery control plan, and a plaintiff must allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under Level 1, 2, or 3 of that Rule. TEX. R. CIV. P. 190.1. A chart describing the differences in each discovery level is set forth below:

	Level 1 (TRCP 190.2)	**Level 2 (TRCP 190.3)**	**Level 3 (TRCP 190.4)**
Type of Case	Expedited actions under TRCP 169, suit for divorce without kids, martial estate is $250,000 or less	Suits not governed by Rule 190.2 or 190.4	When the specific circumstances of the suit require a tailored discovery control plan
Discovery Period	Family Code case: 180 days from the date suit is filed All other Level 1 cases: 180 days from the date initial disclosures are due	Family Code case: from the filing of suit until 30 days before trial All other Level 2 cases: from the date initial disclosures are due until the earlier of (i) 30 days before trial or (ii) nine months after disclosures are due	Level 2 limits apply (or otherwise Level 1 if applicable) unless specifically changed/set by the court
Deposition Time	20 hours per party	50 hours per side (i.e., litigants with general common interests in the litigation) If a side designates more than 2 experts, the other side may have 6 additional hours of deposition time for each additional expert designated	Level 2 limits apply (or otherwise Level 1 if applicable) unless specifically changed/set by the court
Interrogatories	15 interrogatories	25 interrogatories	Level 2 limits apply (or otherwise Level 1 if applicable) unless

			specifically changed/set by the court
Requests for Production	15 RFPs	No limit	Level 2 limits apply (or otherwise Level 1 if applicable) unless specifically changed/set by the court
Requests for Admission	15 RFAs	No limit	Level 2 limits apply (or otherwise Level 1 if applicable) unless specifically changed/set by the court

Although the Rules are specific regarding the limitations of each discovery plan (or as otherwise ordered by the court), the Rules also provide for circumstances and court discretion regarding reopening or modifying a discovery plan. If a suit is removed from the expedited actions process in Rule 169, or in a divorce, the filing of a pleading renders a Level 1 discovery plan inapplicable, discovery reopens and is controlled as a Level 2 or 3 plan, as applicable. TEX. R. CIV. P. 190.2(c). Any person that was deposed may be re-deposed and the Rules state that the court "should" continue the trial date if necessary to permit the completion of discovery. *Id.* Further, a court may modify a discovery control plan at any time and must do so when the interest of justice requires. TEX. R. CIV. P. 190.5. Rule 190.5 sets forth additional instances where the court must allow additional discovery, such as when a new, amended, or supplemental pleading is filed and the adverse party would be unfairly prejudiced without additional discovery, or there has been a material change in the case after discovery has ended. *Id.*

B. The Effect of Early Motions Practice on Discovery

A prudent practitioner will need to consider how motions practice may affect discovery prior to the discovery period even beginning. A litigant should explore all available options to limit the scope of a lawsuit, either from the standpoint of narrowing the claims and remedies alleged by the plaintiff or disposing of meritless defenses raised by the defendant. For example, if a lawsuit pleads a cause of action that has no basis in either law or fact, the defendant could consider filing a motion to dismiss under Rule 91a of the Texas Rules of Civil Procedure. TEX. R. CIV. P. 91a.1. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought. Id. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded. Id. The motion must specifically state whether the cause of action has no basis in law, in fact, or both. TEX. R. CIV. P. 91a.2. A motion under Rule 91a must be filed within sixty days of the first pleading containing the challenged cause of action and must be granted or denied within forty-five days after the motion is filed. TEX. R. CIV. P. 91a.3.

Importantly, the motion to dismiss under Rule 91a must be only based on the pleading of the cause of action, and not on the consideration of evidence. TEX. R. CIV. P. 91a.6; *Reynolds v. Quantlab Trading Partners US, LP*, 608 S.W.3d 549, 557 (Tex. App.—Houston [14th Dist.] 2020, no pet.). That being said, however, a Rule 91a motion may be filed in response to a baseless claim alleged by the plaintiff or on the basis of a meritorious affirmative defense. *See Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 656 (Tex. 2020) (finding that Rule 91a does not limit the "universe of legal theories" by which a movant may show that the claimant is not entitled to relief based on the facts as alleged, and that the defendant may use an affirmative defense as the basis for a 91a motion).

As it relates to discovery, the *Bethel* opinion further compared the purpose of the Rules of Procedure, the effect of a 91a motion, and how such a motion relates to discovery. Rule 1 of the Texas Rules of Civil Procedure states:

> The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.
>
> TEX. R. CIV. P. 1.

The Texas Supreme Court opined, "Our interpretation of Rule 91a serves these objectives by allowing courts to dismiss meritless cases before the parties engage in costly discovery. Forcing parties to conduct discovery when the claimant's allegations conclusively establish the existence of an affirmative defense would be a significant waste of state and private resources." *Bethel*, 595 S.W.3d at 656. In this instance, the Court dismissed the entirety of the suit

based on the defendant's affirmative defense of attorney immunity before discovery even began. *Id.* at 658. Under similar circumstances, even if a party was not able to dismiss all causes of action alleged by the plaintiff, a defendant could at least limit the scope of discovery if one or more of the claims were dismissed, as discovery would only pertain to any remaining claims.

The manner in which discovery proceeds may also be guided by the nature of the types of motions filed by either party. The Texas Rules of Civil Procedure authorize discovery requests for information that is "reasonably calculated to lead to the discovery of admissible evidence." TEX. R. CIV. P. 192.3(a). Permissible discovery requests are limited to those that show a reasonable expectation of obtaining information that will aid the dispute's resolution. *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003). Generally, a party is not entitled to discovery prior to a court's ruling on a 91a motion to dismiss. *In re Butt*, 495 S.W.3d 455, 463 (Tex. App.—Corpus Christi 2016, no pet) (discussing Rule 91 and the intention of the rule to be asserted and determined soon after the filing of the case); *Gonzales v. Dallas Cnty. App. Dist.*, No. 05–13–01658–CV, 2015 WL 3866530, at *5 (Tex. App.—Dallas June 23, 2015, no pet.) (mem. op.) (rejecting the contention that the trial court should not have granted a Rule 91a motion to dismiss until the plaintiff had an opportunity to conduct discovery).

On the other hand, if a party files a plea to the jurisdiction, limited discovery may be permitted. A plea to the jurisdiction can be presented as either an attack on the sufficiency of the pleadings, or as an evidentiary attack on the existence of jurisdictional facts. *Texas Department of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–27 (Tex. 2004). If a plea to the jurisdiction challenges the existence of jurisdictional facts, the court must consider relevant evidence submitted by the parties when necessary to resolve the issue. *Id.* at 227. As a result, limited discovery that is specifically directed at the evidence-based jurisdictional challenge may be allowed. *Diocese of Galveston-Houston v. Stone*, 892 S.W.2d 169, 174 (Tex. App.—Houston [14th Dist.] 1994, no pet.). However, the parties should not engage (and the court should not permit) discovery beyond the limited jurisdictional inquiry. *See, e.g., In re Congregation B'Nai Zion of El Paso*, 657 S.W.3d 578, 584–85 (Tex. App.—El Paso 2022, no pet.) (finding that limited discovery on the jurisdictional issue was appropriate, but the court abused its discretion in allowing discovery on the plaintiff's claim and defendant's defenses).

In certain cases, the defendant may also utilize a motion to dismiss under the Texas Citizen's Participation Act ("TCPA"), which also may allow limited discovery depending on the circumstances. The purpose of the TCPA is to safeguard the constitutional right to petition, the right to free speech, and the right of association, and otherwise participate in government, while also protecting the rights of a person to file meritorious lawsuits for demonstrable injury. TEX. CIV. PRAC. & REM. CODE ANN. § 27.002. Upon the filing of a TCPA motion to dismiss, the general rule is that all discovery in the legal action is suspended until the court has ruled on the motion. *Id.* at § 27.003(c). However, unlike a Rule 91a motion to dismiss, the court is required to consider the pleadings, evidence a court could consider under Texas Rule of Civil Procedure 166a, and supporting and opposing affidavits stating the facts on which liability or defense is based. *Id.* at § 27.006(a). Because the court is permitted to go beyond the pleadings and consider evidence in ruling on a TCPA motion, the court may allow specific and limited discovery relevant to the motion. *Id.* at § 27.006(b). However, the court has the discretion to determine whether the limited discovery is allowed, and good cause must be shown to permit such discovery. *Id.*; *see also Brown Sims, P.C. v. L.W. Matteson, Inc.*, 594 S.W.3d 573, 588–89 (Tex. App.—San Antonio 2019, no pet.) (finding that trial court acted within its discretion to permit limited discovery, as such discovery was necessary in determining whether the lawsuit was meritorious or frivolous); *c.f. In re SSCP Management, Inc.*, 573 S.W.3d 464, 473–74 (Tex. App.—Fort Worth 2019) (finding that the trial court abused its discretion by issuing a discovery order that exceeded the limited scope mandated by the TCPA, which permitted the plaintiff to conduct six corporate representative depositions for four hours each to address 43 comprehensive deposition topics and to serve 135 written discovery requests on defendants).

All of these examples show that the type of motion or plea alleged by a party can significantly affect how discovery is conducted early in a case, and largely before the case's official discovery period even begins. Depending on the type of motion or plea filed, a party should ensure he is carefully tailoring any permissible discovery to the statutes and case law to ensure it will be upheld if an appeal is filed. And, if a party is successful in conducting limited discovery, the result may result in a dismissal of all or part of a suit; or at minimum, this discovery will enable a party to learn key facts about a case early on, which can create key advantages in the prosecution or defense of a litigant's position moving forward.

III. WRITTEN DISCOVERY

A. Discovery Step 1: Required Disclosures

In 2021, the Texas legislature made significant amendments to the Texas Rules of Civil Procedure with regard to certain disclosures that are required to be made by the parties. Prior to 2021, parties would exchange disclosures

during the discovery period, but only if the opposing party made a request. Under the 2021 amendment, however, parties are required to make certain initial disclosures to each other without waiting for a request from the other side.

As a result, after the initial pleading and answer are filed in a lawsuit, the first step in the discovery process is for the parties to exchange their initial disclosures. Specifically, a party must, without awaiting a discovery request, provide to the other parties the information or material described in Rule 194.2, 194.3, and 194.4, which includes responsive documents. TEX. R. CIV. P. 194.1. The initial disclosures must be made within thirty days after the filing of the first answer or general appearance unless a different time is set by the parties' agreement or court order. TEX. R. CIV. P. 194.2(a). Rule 194.2(b) provides a list of the information that must be disclosed in a party's initial disclosures. By contrast, the following types of proceedings are exempt from the necessity of providing initial disclosures: an action for review on an administrative record, a forfeiture action arising from a state statute, a petition for habeas corpus, an action involving domestic violence, and an action on appeal from a justice court. TEX. R. CIV. P. 194.2(c).

In a suit not governed by the Family Code, and unless otherwise agreed to by the parties or ordered by the court, a party cannot serve discovery on another party until after the other party's initial disclosures are due. Tex. R. Civ. P. 192.2(a)(1). Practically speaking, as soon as the plaintiff receives the defendant's answer, he should calendar a thirty-day deadline for the service of initial disclosures. The defendant should do the same upon the filing of his answer. Once those disclosures are served and the thirty-day deadline for disclosures has passed, the plaintiff and defendant may serve other discovery requests, such as interrogatories, requests for production, or requests for admissions.

B. Interrogatories

Written interrogatories are a foundational discovery tool and, when drafted with precision, one of the most effective methods for narrowing issues, crystallizing claims and defenses, and developing a case theory early in litigation. Generic or poorly targeted interrogatories, however, waste limited discovery opportunities and frequently invite objections or evasive responses.

Written interrogatories are governed by Texas Rule of Civil Procedure 197. A written interrogatory is a question served on a party that must be answered in writing, under oath. Tex. R. Civ. P. 197.1. Rather than a vehicle forcing an opposing party to marshal all of their evidence, interrogatories are intended to elicit the responding party's specific legal theories, factual contentions, and positions supporting claims or defenses. Tex. R. Civ. P. 197.1.

(1) Discrete Subparts and Interrogatory Limits

Each discrete subpart of an interrogatory is counted as a separate interrogatory. TEX. R. CIV. P. 190.4 cmt. 3. A subpart is considered "discrete" when it seeks information that is not logically or factually related to the primary question. TEX. R. CIV. P. 190.4 cmt. 3.

Courts have upheld interrogatories where multiple factual details are requested so long as they relate to the same core contention or claim. *See In re SWEPI L.P.*, 103 S.W.3d 578, 589 (Tex. App.—San Antonio 2003, no pet.). In Discovery Level 2 cases, the requesting party is limited to 25 interrogatories. TEX. R. CIV. P. 190.3(b)(3). The exception to this rule is if the interrogatory is seeking only to authenticate a document. TEX. R. CIV. P. 190.3(b)(3). Interrogatories may only be served upon parties, not witnesses. TEX. R. CIV. P. 190.3(b)(3).

(2) Strategic Use of Interrogatories

Because interrogatories are numerically limited, they should be reserved for information that cannot be efficiently obtained through other discovery tools, such as requests for production or depositions. Practitioners should avoid wasting interrogatories on information already known, readily available through documents, or better addressed through narrower discovery methods. Well-drafted interrogatories are particularly effective for:

- Defining and narrowing disputed issues;
- Locking in positions for impeachment or summary disposition;
- Identifying factual bases for contested claims (e.g., separate property characterization, reimbursement claims, conservatorship positions); and
- Framing subsequent discovery, including depositions and targeted requests for production.

(3) The Role of Interrogatories in Case Development

Thoughtfully crafted interrogatory responses often serve as the roadmap for the remainder of discovery. The sworn factual assertions provided can inform deposition strategy, guide expert engagement, and determine what additional documents should be sought. They are especially useful in preparing for party depositions, identifying witnesses to depose, and refining trial themes. In short, interrogatories should be drafted with intention and restraint.

When properly tailored to the specific facts and issues of the case, they provide disproportionate value relative to their limited number and play a critical role in efficient, issue-driven discovery.

C. Requests for Production

Requests for Production ("RFPs") are the main tool by which an attorney can obtain documents and other tangible things relevant to the litigation from the opposing side. Fiduciary disputes often turn on documentary evidence—trust accountings, bank records, medical records, tax filings, emails, text messages, and communications with advisors. Because trustees and executors often control most of the relevant documents, carefully crafted RFPs are vital to evaluating claims of breach of fiduciary duty, lack of capacity, undue influence, mismanagement, or waste.

RFPs in Texas state court are primarily governed by Texas Rule of Civil Procedure 196. Texas Rules of Civil Procedure 191 through 193 cover signing, scope, proportionality, and responses. In federal court, RFPs are primarily governed by Federal Rule of Civil Procedure 34. Federal Rule of Civil Procedure 26(b) covers scope and proportionality.

RFPs are useful tools of written discovery but can be a bit of a double edged sword. On one hand, the requesting party wants to obtain as many documents and tangible things as they can to discover evidence they can use at trial. On the other hand, the requesting party does not want to obtain so many documents that they're overwhelmed by the volume and forced to sift through documents that will not provide much value to their claims, and they want to make sure their requests don't evoke too many objections. Further, the requesting party is prohibited from "fishing" for documents to attempt to create a claim that is not already established. *In re American Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998). Both Texas and federal rules aim to guide attorneys in this endeavor by limiting discovery to information that is 1) relevant to claims or defenses, and 2) proportional to the needs of the case. *See In re National Lloyds Ins. Co.*, 507 S.W.3d 219 (Tex. 2016) (ruling that discovery must be tied to the pleaded issues, not merely useful for potential new claims); FED. R. CIV. P. 26(b)(1). RFPs are used to acquire access to documents and tangible things, and these are defined terms in the Texas Rules of Civil Procedure. Texas Rules of Civil Procedure 192.3(b) defines "documents and tangible things" to include, but not be limited to "papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, data, and data compilations." RFPs must identify items, either individually or by category, and describe them with reasonable particularity so that the responding party can identify and produce them. TEX. R. CIV. P. 196.1(b). However, in trust and estates cases, courts recognize that trustees and executors owe duties of full disclosure and accounting, reflecting the reality that beneficiaries often lack independent access to information concerning fiduciary administration. *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996); *Jicarilla Apache Nation v. United States*, 88 Fed. Cl. 1, 12-13 (2009). Because of the information imbalance, courts may permit broader discovery in fiduciary litigation than in ordinary civil litigation. *In re Gruss*, No. 14-25-00098-CV, 2025 Tex. App. LEXIS 6596 (Tex.App.—Houston [14th Dist.] Aug. 25, 2025); *see also Jicarilla Apache Nation*, 88 Fed. Cl. 1 (acknowledging that fiduciary relationship may justify expanded discovery into trust mismanagement, including internal decision-making, subject to privilege limits). However, fiduciary status does not eliminate proportionality requirements governing discovery. *Huie*, 922 S.W.2d at 924–25.

A requesting party may serve a request for production any time after the suit is filed and, unless controlled by a docket control order, the deadline for serving a request for production is thirty days before the end of the discovery period. TEX. R. CIV. P. 190.2(c)(1), 196.1(a). Generally, a responding party must be granted at least thirty days to respond to the request for production. TEX. R. CIV. P. 196.2(a). If a responding party is served with RFPs before the date for response to the petition, the responding party has at least fifty days after service of the request to respond. TEX. R. CIV. P. 196.2(a). Unlike other types of written discovery, there are no limits to the number of RFPs or the number of sets of requests that can be served.

Every set of RFPs must be signed by an attorney, if the party is represented by an attorney, and must show the attorney's State Bar of Texas number, address, telephone number, and fax number, if any, or if the party is not represented by an attorney, by the party and must show the party's address, telephone number, and fax number, if any. TEX. R. CIV. P. 191.3(a)(1)–(2). The effect of the signature is to certify that the attorney or party has made a reasonable inquiry and that the request is legally supportable, factually grounded, made in good faith, and not for an improper purpose. TEX. R. CIV. P. 191.3(c). It also affirms that the discovery is proportional and not unreasonably burdensome given the needs of the suit. TEX. R. CIV. P. 191.3(c). If an RFP is unsigned, a party is not required to take any action regarding it and it must be stricken unless signed promptly after the omission is brought to the attention of the party making the request. TEX. R. CIV. P. 191.3(d).

When presenting a set of RFPs to a responding party, there are two methods: filing and not filing. TEX. R. CIV. P. 191.4(a), (b). RFPs to be served on non-parties must be filed and the court may order other discovery materials to be filed as well. TEX. R. CIV. P. 191.4(b), (c). RFPs to be served on parties must not be filed, and every RFP

required to be served on a party or person must be served on all parties of record. TEX. R. CIV. P. 191.4(a); TEX. R. CIV. P. 191.5.

When drafting RFPs, the first step is the definitions and instructions. Many attorneys simply use boilerplate language for this section, but this section does real work by setting the boundaries of what must be searched, how broadly the responding party must think, and how easy it will be to enforce the requests if disputes arise. Keep in mind that the best definitions and instructions are written for the court as much as for the responding party. The best approach is purposeful, tailored drafting rather than mere boilerplate language. Before drafting anything, identify 1) who holds the information and in what capacities they hold the information (individual, trustee, executor, attorney-in-fact, drafting attorney, family member, etc.), 2) what decisions or conduct are at issue – go back to your pleadings and the elements you must prove (capacity, undue influence, mismanagement, self-dealing, etc.), 3) what information imbalance you are trying to correct (accountings, communications, drafts, side deals, etc.). The definitions and instructions should be narrowly tailored to these objectives so they appear reasonable, proportional, and are defensible. Well-drafted definitions shrink the space for objections and "we didn't understand the request" responses. Well-drafted instructions should also guide compliance, not intimidate or be unreasonable. One of the most important instructions is a reasonable time frame – it is good practice to state time periods in individual requests where feasible in addition to defining the time period as an entire set of RFPs that is limited to documents reasonably related to the claims or defenses. This prevents "open-ended" or "unduly burdensome" objections while showing good faith. It can be helpful to clarify in the instructions that responsible documents include those in the party's possession, custody, or control and held by agents, representatives, or advisors acting on a fiduciary's behalf. Trust disputes often involve documents held by former trustees, advisors, drafting attorneys, corporate trustees, or banks, so drafting this instruction helps to avoid the "we don't physically have it" response. Another helpful instruction, especially when dealing with trust accountings and financial records, is to require production be provided as kept in the ordinary course of business or organized and labeled to correspond with the requests. An additional helpful instruction, considering estate cases are prone to overbroad privilege claims by fiduciaries, is a requirement to include a privilege log for withheld documents, specifying that the log must identify the date, author, recipients, subject matter, and basis for the claim, and clarifying that redactions must be explained. Make sure to always include a standard instruction that responsive materials discovered later must be produced promptly and ambiguities should be construed to favor disclosure. This helps in fiduciary cases where records are often uncovered piece by piece. Finally, ensure your definitions and instructions are clear, restrained, and professional and are not threatening or aggressive. Remember, judges often read definitions and instructions first when ruling on objections. A calm, precise definitions and instructions section signals that non-compliance, not overreach, is the issue.

When drafting RFPs, the goal is not volume; it is precision that survives objections and compels real disclosure from the responding party. Courts expect rigor, proportionality, and fiduciary awareness. An important thing to remember when drafting RFPs is to be broad enough to capture the documents you don't know about, but specific enough to capture the documents you do know (or think you know) about. In fiduciary litigation, it is essential to keep the fiduciary nature of the dispute at the forefront. Unlike typical civil cases, trustees and executors owe duties of disclosure, transparency, and accounting, and they often control most of the relevant information. Requests should focus on fiduciary administration and decision-making, seeking documents that explain not just what happened but why it happened. The more detailed an RFP is, the less wiggle room a responding party has to object to it or hide from it, but there is an opportunity to obtain broader discovery when beneficiaries lack independent access to information which can be balanced. Precision in drafting with respect to roles and capacities is critical. Requests should clearly distinguish between documents held in an individual capacity and those held in a fiduciary capacity and should account for multiple roles. Failure to do so opens the requests to objections that documents are being sought from the wrong role or time period. Similarly, requests should be tied to clearly defined issues and time periods, such as trust creation or amendment, periods of alleged incapacity, changes in asset management, or the appointment or removal of a fiduciary. These tailored requests are much more defensible than generic "all documents relating to" language.

Many attorneys use boiler plate RFPs, but make sure to be thoughtful in your drafting. Effective RFPs focus on document categories that actually prove contested issues. If you're a plaintiff, look at your pleadings and pull from the causes of action and the elements of proof required. Consider the parties involved and the timelines of the dispute and tailor your requests to include specifics. Instead of asking for production of "all communications from the defendant regarding the decedent's lack of capacity," ask for production of communications from the defendant to specific people regarding the decedent's memory. It can be helpful to include both the broad and more specific RFPs to capture both what you know and what you're looking for. Categories of RFPs will vary depending on the dispute and causes of action, but common requests in trust and estates disputes often target communications with accountants, investment advisors, and caregivers; communications between testator and beneficiaries, between fiduciaries and beneficiaries, and communications between parties limited to specific topics such as estate assets, fiduciary decisions, and capacity; financial statements and internal notes; accountancy, ledgers, and fiduciary reports; compensation

records; internal fiduciary communications; medical and capacity related records; and estate planning documents, drafts, and communications between testator and drafting attorney. Keep in mind that pursuant to Texas Rule of Evidence 503(d)(2), attorney client privilege does not apply to an estate dispute and an attorney must turn over their files including all documents and communications.

Remember that each request should be drafted in anticipation of objections from the responding party and with motion to compel readiness in mind using clean, rule-consistent language, avoiding duplication, and limiting each request to a single, clear subject so that its relevance and proportionality are immediately apparent to the court.

D. Requests for Admissions

Requests for admissions are among the most powerful—and most neglected—tools in the Texas discovery arsenal. The neglect is puzzling. Rule 198 offers something no other discovery device can: the ability to transform a contested factual question into a conclusively established one, beyond the power of evidence to undo. Miss the deadline, fail to answer, or respond carelessly, and the consequences can end the case. Yet practitioners routinely treat RFAs as an afterthought, serving them late, responding to them even later, and then discovering—at the summary judgment stage or beyond—that deemed admissions have foreclosed the merits entirely.

In probate litigation, the stakes are amplified. Will contests, capacity disputes, fiduciary surcharge actions, and guardianship proceedings all present document-intensive, credibility-sensitive factual landscapes where a well-placed request for admission can isolate a critical issue, authenticate a key document, or pin an opponent to a position they would rather keep fluid. The rule rewards the practitioner who uses it deliberately. It punishes the one who doesn't.

This section examines Rule 198, the mechanics of deemed admissions, the preclusive effect of admissions both made and deemed, the withdrawal doctrine, the intersection with the Fifth Amendment privilege, and the specific applications that arise with some frequency in probate and trust litigation.

(1) Rule 198 and Its Scope

Texas Rule of Civil Procedure 198.1 provides:

> A party may serve on another party—no later than 30 days before the end of the discovery period written requests that the other party admit the truth of any matter within the scope of discovery, including statements of opinion or of fact or of the application of law to fact, or the genuineness of any documents served with the request or otherwise made available for inspection and copying.
>
> TEX. R. CIV. P. 198.1.

Three aspects of this text deserve particular attention. First, the scope of what can be admitted is broad: opinion, fact, or the application of law to fact. RFAs are not limited to undisputed background facts or document authentication. A party can be asked to admit the legal significance of a transaction, the legal capacity of a fiduciary, or whether a specific act constituted a breach of a specific duty. Courts have consistently held that objections to such requests on grounds of "calls for a legal conclusion" are generally without merit when the request is properly framed as a contention inquiry. TEX. R. CIV. P. 198.3 (admissions "may be used solely in the pending action and not in any other proceeding").

Second, the genuineness of documents is expressly within scope. Requests directed at whether a document is what it purports to be—a will, a deed, a trust amendment, a bank record, a social media post—fall squarely within Rule 198.1. This makes RFAs a direct route to resolving authentication disputes without expending trial time on predicate witnesses. TEX. R. CIV. P. 198.1.

Third, the deadline matters. Requests must be served no later than 30 days before the end of the discovery period. This is not a soft deadline practitioners can treat as aspirational. Serve them late, and the responding party has no obligation to respond before the discovery period closes.

Rule 198.2 governs responses. A party must respond within 30 days of service—or within 50 days if the request was served before the defendant's answer was due. A response must admit, deny, or explain in detail why the party can neither admit nor deny. Objections must be stated. A failure to timely respond has one consequence: the matter is deemed admitted. TEX. R. CIV. P. 198.2(c) ("If a response is not timely served, the request is considered admitted without the necessity of a court order.").

Rule 198.3 imposes a use limitation that carries significant implications for the Fifth Amendment analysis discussed below: any admission made under Rule 198 "may be used solely in the pending action and not in any other proceeding." TEX. R. CIV. P. 198.3.

(2) The Mechanics of Deemed Admissions

Deemed admissions arise automatically. No motion is required, no court order is necessary, and no prior notice or warning is owed to the non-responding party. When the deadline passes without a response, the matter is deemed admitted as a matter of law. TEX. R. CIV. P. 198.2(c).

This automatic operation is both Rule 198's greatest strength and its most dangerous feature, depending on which side of the deemed admission you find yourself. For the propounding party, deemed admissions can crystallize an entire case: a well-crafted set of requests can establish liability, negate defenses, and authenticate every key document—all without the opposing party doing anything except failing to respond in time. For the responding party (or, more precisely, the responding party's counsel), the failure to calendar a response deadline has produced some of the more consequential malpractice claims in Texas civil litigation.

Practitioners sometimes assume that a party's eventual substantive engagement with the case—filing pleadings, appearing at hearings, producing documents in other discovery channels—somehow cures the failure to respond to requests for admissions. It does not. The deemed admission stands until the court, on motion, allows it to be withdrawn. Absent that motion and ruling, the admission is in the record and can be used against the nonresponding party at summary judgment or at trial.

(3) The Preclusive Effect: Judicial Admissions and Their Consequences

An admission under Rule 198—whether made expressly or by default—is a judicial admission. Judicial admissions occupy a different legal category from evidentiary admissions, and the distinction is not merely academic.

An evidentiary admission—a statement in a deposition, a concession in an affidavit, an answer to an interrogatory—is a prior assertion that a party made for some independent purpose. A party can contradict it, explain it away, or present evidence inconsistent with it. The fact-finder weighs the credibility of the response. An unexplained, clear, and unambiguous evidentiary admission may support summary judgment, but the opposing party retains the ability to contest it. *Martinez v. Bally's La., Inc.*, 244 F.3d 474, 476 (5th Cir. 2001).

A judicial admission is different in kind. It is "established not only beyond the need of evidence, but beyond the power of evidence to controvert it." *Hill v. Federal Trade Comm'n*, 124 F.2d 104, 106 (5th Cir. 1941); *see also Martinez v. Bally's La., Inc.*, 244 F.3d at 476. Discovery admissions under Rule 198—whether affirmative or by default—are judicial admissions that cannot be rebutted by contrary evidence or ignored by the court. *AAA v. AAA Legal Clinic of Jefferson Crooke, P.C.*, 930 F.2d 1117, 1120 (5th Cir. 1991). Such an admission, even one that became admitted only by operation of a missed deadline, precludes the party from offering contrary summary-judgment proof. *In re Carney*, 258 F.3d 415, 420 (5th Cir. 2001); *State v. Carillo*, 885 S.W.2d 212, 214 (Tex. App.—San Antonio 1994, no writ); *Velchoff v. Campbell*, 710 S.W.2d 613, 614 (Tex. App.—Dallas 1986, no writ).

This is the sharp edge of the rule. A defendant in a fiduciary surcharge action who fails to respond to requests for admission asking him to admit that he was the trustee, that he received distributions, and that no trust beneficiary authorized those distributions has judicially admitted those facts. The trustee cannot then submit an affidavit at summary judgment contradicting what Rule 198 has established against him. The trial court does not weigh the evidence; there is no evidence to weigh.

(4) Withdrawal of Deemed Admissions

a. The General Standard: Good Cause and Unfair Prejudice

A party may move to withdraw a deemed admission. The trial court has discretion to allow withdrawal upon a showing of good cause or an absence of unfair prejudice to the opposing party. The Texas Supreme Court has characterized good cause as a low bar: absent a demonstration of flagrant disregard, good cause is generally met if the moving party can demonstrate a mistake. *In re Euless Pizza*, 702 S.W.3d 543, 547–48 (Tex. 2024) (orig. proceeding); *Wheeler v. Green*, 157 S.W.3d 439, 442 (Tex. 2005) (per curiam).

The unfair prejudice analysis requires a fact-specific inquiry. In *In re Euless Pizza*, the Supreme Court found that when discovery was still ongoing and trial had not been set, any prejudice to the party that propounded the requests was insufficient to block withdrawal—the propounding party would have ample time to conduct discovery and adjust strategy in light of the new response. *Euless Pizza*, 702 S.W.3d at 548. The court's reasoning underscores the point: the prejudice inquiry is not whether the opposing party is inconvenienced or surprised; it is whether the case has progressed to a point where withdrawal leaves the opposing party without a meaningful opportunity to respond.

The result in a successful motion to withdraw is not that the admission disappears—it is that the party is permitted to serve a late response and the matter returns to contested status. The party that sought withdrawal then bears the burden of presenting evidence on the issue it had previously admitted.

b. Merit-Preclusive Admissions and the Due Process Floor

The general good-cause standard softens for admissions that would otherwise foreclose the merits entirely. When deemed admissions are merit-preclusive—when they form the basis for a summary judgment that would end the case without a hearing on the merits—due process intervenes with a more demanding standard on the party opposing withdrawal. In that circumstance, the party resisting withdrawal must establish that the failure to answer resulted from "flagrant bad faith or callous disregard of the rules." *Marino v. King*, 355 S.W.3d 629, 633 (Tex. 2011) (per curiam).

The logic of this standard, articulated by the Supreme Court in *Wheeler v. Green*, is that the same due-process concerns present in merits-preclusive sanctions arise when deemed admissions achieve the same result. 157 S.W.3d at 443. A court cannot, consistent with due process, bar a party from presenting a defense to the merits based solely on a procedural failure, unless that failure rises to the level of bad faith or conscious disregard. The standard does not protect the negligent practitioner who simply forgot; it does constrain the use of RFAs as a dispositional trap for parties whose counsel made an honest mistake with no intent to evade.

It bears noting what this means in practice: when a responding party moves to withdraw merit-preclusive deemed admissions and can demonstrate mistake rather than bad faith, the burden shifts to the propounding party to demonstrate flagrant bad faith or callous disregard. That is not a burden the propounding party will often be able to carry, absent evidence that the nonresponse was strategic or willful.

c. The Conscious Indifference Problem

The withdrawal doctrine is not a blank check for serial non-responders. In *Hayward v. Gomez*, the Texarkana Court of Appeals affirmed the denial of a motion to withdraw where the respondent's failure to answer demonstrated conscious indifference to the discovery obligations imposed by the rules. 663 S.W.3d 790, 796 (Tex. App.—Texarkana 2023, orig. proceeding). The respondent's motion was denied, and the summary judgment against the respondent stood.

Hayward illustrates the outer limit of the good-cause standard. A party that cannot identify a specific mistake, a calendaring error, a communication failure, or some other discrete event explaining the nonresponse will find the conscious-indifference characterization difficult to rebut. Courts have distinguished conscious indifference—a demonstrable pattern of disregard—from mere negligence, but the line is not always crisp, and the consequence of being on the wrong side of it is a deemed admission that forecloses the merits.

(5) Requests for Admissions and the Fifth Amendment

Probate litigation sometimes intersects with conduct—fraudulent transfers, financial exploitation, criminal elder abuse—that raises Fifth Amendment concerns in civil proceedings. The Texas Supreme Court has repeatedly affirmed that parties in civil cases may assert the Fifth Amendment privilege, and the rules of civil procedure have been designed to accommodate that privilege in most discovery contexts.

Requests for admissions are a partial exception. Some courts have held that the Fifth Amendment cannot be invoked in response to a Request for Admission at all, because Rule 198.3's use limitation—admissions "may be used solely in the pending action and not in any other proceeding"—removes the risk of self-incrimination in a subsequent criminal proceeding. *In re Speer*, 965 S.W.2d 41, 46 (Tex. App.—Fort Worth 1998, no pet.); *see* TEX. R. CIV. P. 198.3. The *Speer* court reasoned that because the admission cannot travel outside the pending case, the constitutional predicate for invoking the privilege (the risk of use in a criminal proceeding) is absent. *Id.* at 46.

That said, denying a Request for Admission does not waive the Fifth Amendment privilege as to other discovery. Rule 198.2 expressly provides that denying requests for admissions does not result in waiver of the privilege against self-incrimination. TEX. R. CIV. P. 198.2. A party can deny without penalty in the Fifth Amendment sense. What the party cannot do is assert the privilege as the stated basis for refusing to admit or deny. *Katin v. City of Lubbock*, 655 S.W.2d 360, 363 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.).

The practical implication is narrow but important: a party facing RFAs in a proceeding with parallel criminal exposure should respond with substantive denials rather than Fifth Amendment assertions. The denial does not waive the privilege in other contexts; the Fifth Amendment objection, if asserted as the stated basis for nonresponse, does not constitute a valid objection and likely will not protect against a deemed admission.

(6) Probate-Specific Applications for RFAs

a. Authenticating Documents

Rule 198.1's express inclusion of "the genuineness of any documents served with the request" makes RFAs a direct route to authentication. In contested probate proceedings, the authenticity of documents is frequently disputed: was that trust amendment actually signed by the settlor? Is this signature on the will authentic? Are these bank records

genuine? A failure to timely respond to a request that a document is genuine carries the same consequence as any other nonresponse: the genuineness of the document is deemed admitted. TEX. R. CIV. P. 198.2(c).

Attaching a document to a Request for Admission asking the opposing party to admit its genuineness—or to deny it—forces the issue before trial. If the opposing party admits genuineness, authentication at trial requires no further predicate. If the opposing party denies genuineness, the denial is on the record, the dispute is framed, and the propounding party can plan accordingly.

Courts have recognized RFAs as a valid authentication mechanism for documents that would otherwise require expert testimony or circumstantial evidence to authenticate. *See Cross Impeachment, Witness Rules and Demonstrative Exhibits*, Advanced Evidence and Discovery Course (State Bar of Texas) (2016). In document-intensive probate proceedings—where the authenticity of multiple instruments may be in dispute—a systematic series of authentication requests can dramatically narrow what needs to be proven at trial.

b. Will Contests Involving Capacity and Undue Influence

Will contests and trust contests frequently reduce to two issues: did the testator or settlor have testamentary or contractual capacity, and was their will overborne by another's influence? Both issues involve numerous subsidiary facts—medical diagnoses, behavioral observations, communications, transactions—that can be addressed through requests for admissions.

A party defending a capacity contest can use RFAs to lock the contestant into the specific factual basis for the challenge. A party prosecuting a capacity contest can use RFAs to establish that the proponent of the will cannot deny certain events: that the decedent was hospitalized on specific dates, received diagnoses the proponent cannot dispute, or executed multiple instruments in a short period under circumstances the proponent is forced to admit or deny on the record.

Neither side should serve RFAs asking flat-out whether the testator lacked capacity—that is a legal conclusion unlikely to survive objection. But the subsidiary facts that build toward (or undermine) that conclusion are squarely within Rule 198.1's scope.

c. Fiduciary Conduct and Financial Wrongdoing

Fiduciary litigation in probate courts—surcharge actions against trustees, executor liability claims, guardianship mismanagement—is inherently document-driven and frequently involves transactions the fiduciary would prefer to characterize as ambiguous. RFAs are well-suited to eliminating that ambiguity on discrete factual questions: did the trustee receive distribution checks? Did the trustee sign the account statements? Does the trustee's signature appear on the investment authorization form?

The judicial admission doctrine described above applies with full force here. A trustee who is deemed to have admitted that he authorized a specific unauthorized distribution, or who is deemed to have admitted that no beneficiary consented to a specific transaction, has foreclosed the central factual dispute. Combined with the preclusive-at-summary-judgment consequence described in *In re Carney* and *State v. Carillo* , a well-constructed set of RFAs can simplify a complex fiduciary surcharge action dramatically. *See* 258 F.3d at 420; *see also* 885 S.W.2d 212, 214 (Tex. App.—San Antonio 1994, no writ).

(7) Practice Guidance for Using RFAs Effectively

The following tips can assist a litigant in using RFAs in a manner that will be useful to his or her case:

- Serve RFAs early and deliberately. The 30-days-before-end-of-discovery-period deadline in Rule 198.1 is a ceiling, not a floor. Nothing prevents serving RFAs at the outset of litigation, when the responding party has the least information to work with in crafting narrowly tailored denials.
- Calendar response deadlines for any RFAs you receive the moment they arrive. The automatic deemed-admission consequence of a missed deadline requires no motion, no notice, and no hearing. A calendaring failure is a case risk.
- Use RFAs for what they do better than any other discovery tool: establishing that certain things are not disputed. Save interrogatories and depositions for contested issues that need narrative development. Use RFAs to lock down facts that the opposing party cannot genuinely contest, document authenticity, dates, identities, and the absence of specific authorizations.
- Frame requests precisely. A request that is overbroad, ambiguous, or calls for a legal conclusion will generate a legitimate objection—and the deemed-admission consequence will not attach to an

improperly framed request. The request should ask about a single, discrete factual matter. Compound requests are an invitation to compound objections.

- When you receive RFAs, respond substantively and on time. A denial that identifies the specific basis for the denial is more valuable than a bare denial and provides a framework for developing contrary evidence. An unexplained failure to respond will not be cured by subsequent active participation in the litigation.
- If you miss the deadline on RFAs served against your client, move to withdraw the deemed admissions immediately. The longer the delay between the missed deadline and the motion, the harder the good-cause showing becomes and the more plausible the conscious-indifference characterization becomes. File the motion, serve the late responses simultaneously, and attach evidence documenting the reason for the failure.
- In matters with potential criminal exposure, respond to RFAs with substantive denials rather than Fifth Amendment objections. The privilege is available elsewhere in the litigation; the RFA context is one where courts have largely held that it cannot serve as the basis for nonresponse.

Rule 198 is a tool that rewards intentionality. Its consequences—deemed admissions, conclusively established facts, foreclosed defenses—flow automatically from inattention, and no amount of subsequent diligence fully repairs the damage once a deemed admission is in the record. In probate litigation, where cases often turn on discrete factual questions about documents, transactions, and communications, RFAs are among the most efficient discovery vehicles available.

The doctrine is settled enough on the core questions to be reliable: admission by default is a judicial admission, judicial admissions are binding beyond the power of evidence to contradict, and withdrawal requires more than regret about the result. The recent Texas Supreme Court decisions in *Hayward* and *In re Euless Pizza* refine the margins without disturbing the fundamentals. For the practitioner who uses Rule 198 deliberately, the rule delivers; for the one who ignores it—on either side of the caption—it is waiting.

E. Objections

After being served with discovery requests, a responding party is required to respond to the requests; however, not every request may invite a response and instead may invite objections. Objections are a responding party's opportunity to state, for valid, specific, evidence based reasons, that the request should not be allowed. A responding party has thirty days after the service of the request (or fifty days if served before the defendant's answer is due) to serve a written response to the requesting party. TEX. R. CIV. P. 196.2(a), 197.2(a), 198.2(a). A party responding to discovery has the burden to plead their objections timely. *State v. Lowry*, 802 S.W.2d 699, 671 (Tex. 1991). If a responding party fails to object to the discovery request within the allotted time, the party waives its right to object. TEX. R. CIV. P. 193.2(a); *Young v. Ray*, 916 S.W.2d 1, 3 (Tex.App.—Houston [1st Dist] 1995, orig. proceeding). In order to be timely, the objections must be made at or before the deadline to respond to discovery. TEX. R. CIV. P. 193.2(e). The only exceptions are when the responding party has obtained an extension from the court, entered a Rule 11 agreement with the requesting party to extend the deadline or the party can show good cause for failing to timely object. TEX. R. CIV. P. 193.2(e). However, a responding party may amend its objections and/or provide additional objections if the objection was initially not applicable or was unknown after reasonable inquiry. This is most common when a party discovers previously undiscovered documents. TEX. R. CIV. P.93.2(d), (e).

All objections to written discovery must have "a good faith factual and legal basis" when made. TEX. R. CIV. P. 193.2(c). This requires more than boilerplate objections; in fact, the previous standard practice of including "general objections" at the beginning of discovery responses is now viewed as improper and ineffective. *See In re Park Cities Bank*, 409 S.W.3d 859, 878 (Tex. App.--Tyler 2013, no pet). "A responding party who objects to a request for production because it is overbroad, unduly burdensome, vague, ambiguous, or unreasonably cumulative or duplicative should explain why the discovery request suffers from each asserted deficiency." TEX. R. CIV. P. 193.2(c), (f); TEX. R. CIV. P. 193, cmt. 3; *In re Park Cities Bank*, 409 S.W.3d 859, 876 (Tex. App.—Tyler 2013, no pet); *In re Volt Power, LLC*, No. 12–23–00047–CV, 2023 WL 2804430 (Tex. App.—Tyler April 5, 2023 (orig. proceeding)). Attorneys must carefully analyze each request and indicate specific grounds for objections and support their objections with evidence. *In re State Farm Lloyds*, 520 S.W.3d 595, 605 (Tex. 2017).

Texas Courts have gone as far as to say "I don't like boilerplate objections. I don't like objections when I can't even tell what the objection is. I don't like the objections when they're not specific." *Clark v. Clark*, 2017 WL 1164594, at *6 (Tex. App.—El Paso 2017, no pet.). The responding party bears the burden of establishing why requested discovery exceeds permissible bounds. *See Masinga v. Whittington*, 792 S.W.2d 940, 940–41 (Tex.

1990). Each objection must explain precisely why the particular discovery request is objectionable and provide supporting evidence where necessary. TEX. R. CIV. P. 193.2(a). The evidence 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. If the court determines that an *in camera* review of some or all of the requested discovery is necessary, that material or information must be segregated and produced to the court in a sealed wrapper within a reasonable time following the hearing. TEX. R. CIV. P. 193.2(a)–(e),193.3(a), (b); 193.4(a). The party seeking discovery bears no similar burdens.

An attorney who makes identical boilerplate objections without specifically tailoring them to the request risks having all of their objections waived because valid objections which are obscured by unfounded objections are automatically waived. TEX. R. CIV. P. 193.2(e). The rules make this clear, but Texas courts have repeated this principle in many opinions. *See In re Park Cities Bank*, 409 S.W.3d 859, 877 (Tex. App.—Tyler orig. proceeding); *In re State Farm Lloyds*, 519 S.W.3d 647, n.6 (Tex. App.—Corpus Christi-Edinburg, 2015, orig. proceeding); *In re Arden*, 2004 WL 576064 (Tex. App.—El Paso 2004); *Reynolds v. Murphy*, 188 S.W.3d 252, 260 (Tex. App.—Fort Worth 2006, pet. denied); *De Anda v. Jason C Webster, PC*, 2018 WL 3580579 (Tex. App.—Houston [14th Dist.] 2018, pet. denied); *Lee v. Unifund CCR Partners*, 2008 WL 3539938 (Tex. App.—Austin 2008). In the *De Anda v. Jason C. Webster* case, the Court of Appeals held that when the responding party "lodged the same global, prophylactic string of objections to every interrogatory and request for production…[he] waived his objections to [requesting party's] discovery requests." 2018 WL 358059, at *7 (Tex. App.—Houston [14th Dist.] 2018, pet. denied). The string of objections was as follows:

> Defendants object to this request because a plea to the jurisdiction is pending. Pursuant to *Tex. Dept. of Parts & Wildlife v. Miranda*, 133 S.W.3d 217, 223 (Tex. 2004), the trial court should resolve the jurisdictional issues before proceeding with the case. In addition, Defendants object because the request seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Defendants further object because the request is overly broad and lacking specificity such that Defendants are unable to determine the substance of the information sought. Defendants further object because the information requested is duplicative or feasibly obtainable by Plaintiff from other sources. Defendants also assert the attorney/client and attorney work product privileges.
>
> *Id.* at *5.

Objections like this do not provide any tailoring to specific requests and this is precisely what the rules, and the court, do not allow. It may be easier to copy and paste the same objections, but it may cost a responding party its valid objections.

It is important to remember that a responding party is required by law to respond to any portion of the discovery request which is not objectionable and/or to which there is not a proper claim of privilege. TEX. R. CIV. P. 192.6, 193.2(b), 193.3(a). The rules provide the specific example that if a party objects to producing documents from a remote time period, they must still produce documents responsive to the request that are from a reasonable time period. TEX. R. CIV. P. 192.6, 193.2(b), cmt. 2. The responding party must present any evidence necessary to support the objection or privilege. This is another reason that it is good practice to make specific tailored objections, wherein the responding party explains exactly what portion of the request is being objected to and even potentially explains any portion to which they are not objecting. Using the remote time period example, a responding party might provide the time period to which there is no objection and thus are producing documents responsive to the request for that time period.

Additionally, when contemplating objections, it is important for a responding party—particularly if they are representing a fiduciary—to consider what the root cause might be for the suit and the requests for discovery. Often, plaintiffs are seeking transparency or to understand the reasons behind a fiduciary's actions and many times providing documents that explain those reasons and provide that transparency the plaintiffs are searching for can result in understanding and settlement of claims. Our jobs as attorneys are to zealously advocate for our clients, but we cannot lose sight of the human element and the potential for simple fixes.

While boilerplate objections are not permitted, an effective way of drafting is to have the boilerplate objections readily available and choose which, if any, are applicable to the request and then tailor the reasoning for the objection. The most common objections are:

- The request is vague, ambiguous, and not specific;
- The request is not properly limited in scope by time or subject matter;
- The request seeks information that is irrelevant to the subject matter of the pending action and is not reasonably calculated to lead to the discovery of admissible evidence;
- The request is redundant and duplicative;

- The request seeks information that is equally available to the requesting party;
- The request seeks information that is constitutionally protected from disclosure;
- The request seeks confidential information not subject to disclosure;
- The request is sought for the purpose of harassing the responding party;
- The request is unduly burdensome insofar as it would require Respondent to search any of her electronic devices for responsive documents;
- The request is unduly burdensome;
- The request seeks information that is not in Respondent's custody, possession, or control in her/his individual capacity;
- The request is not a proper request for production;
- The request is premature;
- The request is argumentative; and
- The request seeks to require Respondent to marshal his available proof.

Courts expect objections to be narrowly tailored and supported by the rules. By carefully analyzing each request, articulating precise objections, and remaining mindful of the broader purpose of discovery, attorneys can both protect their clients interest and uphold the integrity of the discovery process.

F. Motions to Compel

A motion to compel is a procedural device used to force an opposing party or non-party to comply with discovery obligations. Under Texas Rule of Civil Procedure 215.1(b) or Federal Rule of Civil Procedure 37, a requesting party may file a motion to compel asking the court to compel responses to discovery. A motion to compel can be used for inadequate responses to requests for disclosure, requests for production, requests for admissions or interrogatories, refusal to follow an agreed schedule, improper objections or claims of privilege to discovery requests or refusal to answer at a deposition. TEX. R. CIV. P. 215.1. However, just because a party fails to provide sufficient responses does not mean a motion to compel is immediately warranted. In Texas, pursuant to Texas Rule of Civil Procedure 191.2, a good-faith conference between parties is required before filing a motion to compel in order to attempt to solve the issue without court intervention. If such a conference does not resolve the issues at hand, the requesting party may file their motion to compel.

A motion to compel must include a certification of the good-faith conference and a description of the efforts made to resolve the dispute. The fundamental purpose of the certificate of conference "is to ensure that parties cooperate…and make reasonable efforts to resolve…disputes without the necessity of court intervention." *Unition Carbide Corp. v. Martin*, 349 S.W.3d 137, 146 (Tex. App.—Dallas 2011). Failing to comply with these requirements can result in swift denial of the motion. A well-drafted motion to compel is focused, rule-compliant, and designed to make the court's decision straightforward. Walk through each disputed request with enough detail that the court can understand the issue without having to search through the record. Courts see many broad discovery request complaints, so clearly identifying the specific discovery issues by referencing the exact requests, quoting or summarizing the responses, lack of responses, or objections, and explaining how those responses are deficient is very helpful.

Substantively, a strong motion ties its arguments to the applicable Texas Rules of Civil Procedure, most commonly Rules 192, 193, 196, and 215, and explains how those rules require the requested discovery to be produced. It demonstrates the relevance and proportionality of the discovery under Rule 192.4, showing why the information is important to the claims or defenses and why the burden of production is reasonable. In trust and estate cases, the motion is particularly effective when it situates the dispute in the fiduciary context, emphasizing that trustees, executors, or other fiduciaries have statutory and common-law duties to maintain and disclose financial and transactional records and that the requested documents are records that should already exist. The motion also directly addresses the opposing party's objections, such as relevance, overbreadth, undue burden, or privilege, by explaining why those objections are unsupported, waived, or improper under the rules, rather than dismissing them in a conclusory manner.

Finally, a well-drafted motion to compel requests specific, reasonable relief that the court can easily grant, such as an order compelling production by a certain date, requiring amended responses without improper objections, or directing the production of a proper privilege log. It is supported by well-organized exhibits that include the disputed discovery and relevant correspondence, and it maintains a professional tone focused on efficiency, fairness, and the law rather than assigning blame to opposing counsel. While a party filing a motion to compel may request sanctions and attorney's fees it is uncommon for a court to grant such requests on the first motion to compel. TEX. R. CIV. P. 215.1(b), (d); *Lewis v. Illinois Employers Ins.*, 590 S.W.2d 119, 120 (Tex. 1979).

A motion to compel typically requires a hearing, and such hearing are evidentiary hearings. The party making the objection or asserting the privilege bears the burden of proof to present evidence to support the objection or privilege, including presenting testimony at the hearing or affidavits served at least seven days before the hearing or at other such reasonable time as the court permits. TEX. R. CIV. P. 193.4(a), 199.6; *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 227 (Tex. 2004).

Motions to compel can be essential tools in trust and estate litigation if used effectively by ensuring that discovery obligations are enforced in a fair and orderly manner. When properly drafted, these motions do more than resolve specific discovery disputes; they can advance the case by promoting transparency, accountability, and adherence to the rules. Courts are most receptive to motions that are narrowly tailored, grounded in the rules, supported by good-faith efforts to resolve disputes, and mindful of proportionality and fiduciary duties.

G. Discovery Sanctions

When discovery obligations, court orders, or fiduciary obligations are ignored or abused, courts have the power to impose sanctions that can materially alter the course of the litigation. Unlike routine civil cases, discovery sanctions in fiduciary disputes can carry substantive consequences including trustee removal, fee forfeiture, adverse inferences, or findings of breach of fiduciary duty. Sanctions in trust and estates matters commonly arise under three overlapping authorities: 1) Texas Rule of Civil Procedure Rule 215, which governs discovery abuse and failure to comply with discovery orders, 2) the court's inherent authority—Texas courts have inherent power to sanction bad-faith conduct, abuse of the judicial process, or conduct that undermines the integrity of the court, and 3) the Texas Estates Code—certain sanctions are tied directly to fiduciary misconduct such as failure to account, mismanagement of estate or trust assets, or violation of statutory duties.

A court may consider all matters concerning the litigation to determine whether sanctions are appropriate. *Downer v. Aquamarine Operations, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985); *Medical Prot. Co. v. Glanz*, 721 S.W.2d 382, 288 (Tex. App.—Corpus Christi 1986, writ ref'd). Sanctions must be just, must have a direct relationship to the abusive conduct, and must not be excessive. *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991); *American Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006); *Spohn Hosp. v. Mayer*, 104 S.W.3d 878, 882 (Tex. 2003). Accordingly, moving parties often limit sanctions requests to the attorneys' fees and expenses which would not be incurred but for the responding party's failure to comply with proper discovery requests. *Id.*

In trust and estates litigation, sanctions are frequently tied not only to discovery misconduct, but also to fiduciary noncompliance. Courts may impose remedies and sanctions when a fiduciary fails to maintain or produce required records, refuses to provide an accounting, mismanages or conceals estate or trust assets, engages in self dealing, or violates court orders related to the administration of an estate or trust. *See* TEX. EST. CODE 113.151, 113.082, 404.001, 404.004. Sanctions in this context may include ordering a formal accounting, surcharging the fiduciary for losses caused by misconduct, reducing or denying compensation, assessing attorney's fees against the fiduciary personally, or removing the fiduciary. TEX. EST. CODE 113.082, 113.211, 404.0032; *see Kappus v. Kappus*, 284 S.W.3d 831, 838–39 (Tex. 2009).

Texas probate courts also possess inherent authority to impose sanctions for bad faith conduct or abuse of the judicial process that may fall outside the technical provisions of the discovery rules. This authority permits sanctions for conduct such as knowingly false representations to the court, abuse of filings, or deliberate delay tactics, but it requires specific findings of bad faith and must be exercised with restraint. *Brewer v. Lennox Hearth Prods., LLC*, 601 S.W.3d 704, 718-19 (Tex. 2020); *In re Bennett*, 960 S.W.2d 35, 40 (Tex. 1997).

Sanctions may be imposed against a party, counsel, or both, depending on who is responsible for the misconduct, and due process requires notice and an opportunity to be heard before sanctions are imposed. TEX. R. CIV. P. 215; *Braden v. Downey*, 811 S.W.2d 922, 929 (Tex. 1991). In probate and trust disputes, courts often distinguish between attorney-driven discovery disputes and conduct attributable to a fiduciary's breach of statutory and common-law duties, particularly because fiduciaries may be held personally liable for sanctions and fee awards.

When sanctions are imposed, to recover reasonable expenses, including attorneys' fees, the movant must prove the amount of reasonable expenses via the lodestar method. *See El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760–61 (Tex. 2012). Under the lodestar method, reasonable attorneys' fees are calculated by determining the reasonable hours worked and multiplying those hours by a reasonable hourly rate. This produces a presumptively reasonable base fee, which the court may adjust upward or downward depending on various factors. In order to prove reasonable hours, movant's counsel must show: detailed time entries, tasks performed, who performed them (attorney, paralegal, law clerk), no duplicative or excessive time, and time was necessary to secure the result. Courts disfavor block billing and vague entries, so it is best practice to specify amounts of time for each task entered and to include specifics in time entries (i.e. instead of "draft correspondence to client," enter "draft correspondence to client regarding [specifics about

correspondence]"). In order to prove reasonable rates, movant's counsel must show that the rates are reasonable for the attorney's experience, the local market rates in that county, and the type of work involved. Evidence to prove reasonable rates can look like an affidavit from the billing attorney, evidence of prevailing local rates, or a resume or experience summary. The Court may adjust the lodestar based on the *Arthur Andersen* factors, including: (i) novelty or difficulty of issues, (ii) skill and expertise required, (iii) results obtained, (iv) time limitations, (v) experience and reputation of counsel, (vi) whether the case prevented other employment. In discovery disputes, courts typically leave the lodestar unadjusted unless the opponent's conduct was unusually egregious.

When asking for sanctions in a motion, it is best practice to prepare a fee affidavit before the hearing as many probate judges do not allow supplementation. Such an affidavit should explain why the tasks were necessary and include exhibits showing Bates-stamped invoices or detailed entries for ease of review by the court. If the basis for sanctions is discovery-related be sure to separate discovery-related time from general case work.

In probate court, judges tend to enforce discovery obligations rigorously because fiduciary disputes depend on financial transparency and beneficiaries often lack access to information. Ultimately, sanctions function as an enforcement and case-management tool designed to protect parties, ensure transparency, and prevent abusive parties from gaining an unfair advantage through delay or obstruction, while ensuring disputes are resolved on their merits in accordance with Texas law.

H. Asserting the Privilege

Privileges are enshrined in the Texas Constitution, the Texas Rules of Evidence, and by other statutes and case law. These privileges exist to protect communications, information, and work product from disclosure. This section focuses on the attorney-client privilege, work-product privilege, mediation privilege, physician-patient privilege, spousal privilege, and joint defense privilege.

(1) Attorney-Client Privilege

The attorney-client privilege is governed by Texas Rule of Evidence 503. The attorney-client privilege, allows a client to refuse to disclose and prevent others from disclosing "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." TEX. R. EVID. 503(b)(1). The privilege applies to communications between and among the lawyer, client, and their representatives. *In re Andrew Silver*, 540 S.W.3d 530, 532 (Tex. 2018) (emphasis added); *see also* TEX. R. EVID. 503.

a. Lawyer

For purposes of the attorney-client privilege, a lawyer is defined as "a person authorized or who the client responsibly believes is authorized, to practice law in any state or nation." *In re Andrew Silver*, 540 S.W.3d 530, 532 (Tex. 2018). Even if the prospective client does not hire the attorney they consulted with, the communications are still considered privileged. *See MortgageAmerica Corp. v. American Nat'l Bank of Austin*, 651 S.W.2d 851, 857–58 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

Importantly, the privilege may not apply if any attorney is acting in a non-attorney capacity, such as an accountant, escrow agent, or notary public. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999).

b. Lawyer's Representative

A 'lawyer's representative' is one "employed by the lawyer to assist in the rendition of professional legal services." TEX. R. EVID. 503(a)(4)(A). To qualify for the privilege, "assisting in the rendition of professional legal services must be a significant purpose for which the representative was hired in the first instance." *Univ. of Tex. Sys. v. Franklin Ctr. for Gov't & Pub. Integrity*, 675 S.W.3d 273, 281 (Tex. 2023). The Texas Supreme Court has stressed that "[t]he focus of the privilege is on the purpose and confidentiality of the communications, rather than the formal title or classification of the lawyer's representative as an employee, agent, independent contractor, consultant, or any other designation." *Univ. of Tex. Sys. v. Franklin Ctr. for Gov't & Pub. Integrity*, 675 S.W.3d 273, 281 (Tex. 2023); TEX. R. EVID. 503(a)(4)(A).

c. Clients and Their Representatives

A client can be a person, public officer, corporation, or other entity that receives professional legal services by a lawyer or consults with a lawyer for the purpose of obtaining legal services. TEX. R. EVID. 503. In this context, attorney-client privilege protects confidential communications between a lawyer and a client, or their respective representatives, made to facilitate the rendition of professional legal services to the client. TEX. R. EVID. 503(b)(1). Under the Texas Rules of Evidence, a client representative is "a person who has authority to obtain professional legal

services for the client or to act for the client on the legal advice rendered; or […] any other person who, to facilitate the rendition of professional legal services to the client, makes or receives a confidential communication while acting in the scope of employment for the client." TEX. R. EVID. 503(a)(2).

d. Discoverability of Communications

A communication is privileged, and therefore undiscoverable, when made for the purposes of the rendition of professional legal services. *Huie v. DeShazo*, 922 S.W.2d 920, 922 (Tex. 1996). However, practitioners should be aware of, and make clients aware of, the impact of copying an attorney on a communication. The Texas Supreme Court has long held that the mere copying of legal counsel, in and of itself, does not transform an otherwise nonlegal communication into one made for a legal purpose." *Univ. of Tex. Sys. v. Franklin Ctr. for Gov't & Pub. Integrity*, 675 S.W.3d 273, 280 (Tex. 2023).

The Texas Rules of Evidence protect confidential communications. TEX. R. EVID. 503(b)(1). A communication is confidential if it is not intended to be disclosed to third persons other than (1) those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or (2) those reasonably necessary for the transmission of the communication. TEX. R. EVID. 503(a). If a third party is present, then the communication is not confidential. If the client voluntarily discloses the communication, then that communication is not confidential and is no longer privileged. TEX. R. EVID. 511(a)(1).

e. Privilege Logs

Preparation and service of a privilege log is mandatory when a log has been timely requested. TEX. R. CIV. P. 193.3(b). Texas courts have found privilege logs to be inadequate when the log fails to describe the information or materials withheld, fails to include all recipients of a given document, fails to provide details such as the author, and fails to include the date of creation of the documents. *In re Rental Servs. Corp.*, No. 2–06–338–CV, 2006 Tex. App. LEXIS 10502, *5 (Tex. App.—Fort Worth Dec. 7, 2006, no pet.). An adequate privilege log is one that describes records and their purpose sufficient to establish a prima facie case for a privilege. *In re Living Ctrs. of Texas, Inc.*, 175 S.W.3d 253, 261 (Tex. 2005). An affidavit accompanying a privilege log will help make a prima facie claim of privilege. *In re Christus Health Se. Tex.*, No. 09–06–515 CV, 2007 Tex. App. LEXIS 287, *3 (Tex. App.—Beaumont Jan. 18, 2007, no pet.).

An attorney-client communication is never required to be included in a privilege log if the communication "(1) [was] created or made from the point of view at which a party consults with lawyer with a view to obtaining professional legal services from the lawyer in the prosecution or defense of a specific claim in the litigation in which discovery is requested or required, and (2) concern[s] the litigation in which the discovery is requested or required." TEX. R. CIV. P. 193.3(c). Said differently, there is no obligation to produce a privilege log for attorney or attorney representation communications or documents, but the work product of the client's non-attorney representatives is not exempt from the privilege log. *See In re Lumbermen's Underwriting All.*, 421 S.W.3d 289, 293 (Tex. App.—Texarkana 2014, no pet.).

(2) Work Product Privilege

There are essentially two types of work product: core work product and non-core work product.

Core work product concerns an attorney's mental processes. Core work product is not discoverable. TEX. R. CIV. P. 192.5(b)(1). Consequently, core work product need not be included in a privilege log.

All other work product is non-core work product, and it is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means. TEX. R. CIV. P. 192.5(b)(1).

If a party believes information is privileged, the party has a right to assert that privilege in accordance with Rule 193.3 of the Texas Rules of Civil Procedure. TEX. R. CIV. P. 193.3. Rule 193.3 provides the procedure when a party claiming privilege may withhold the privileged material or information from its request. TEX. R. CIV. P. 193.3(a). In short, if a party chooses to withhold information under the shield of privilege, then that party must disclose that responsive material has been withheld, identify the requests to which the material is responsive, and identify the privilege or privileges asserted. TEX. R. CIV. P. 193.3(a). The party seeking discovery may then serve a written request asking the withholding party to identify the withheld information and material. TEX. R. CIV. P. 193.3(a); TEX. R. CIV. P. 193.2(b). Within the fifteen days, "the withholding party must serve a response" describing the withheld material or information, "without divulging the privileged information itself or waiving the privilege" but in a manner that "enables other parties to assess the applicability of the privilege." TEX. R. CIV. P. 193.3(a). The response must also assert "a specific privilege for each item or group of items withheld." TEX. R. CIV. P. 193.3(a).

A trial court can review the documents in camera if necessary to determine whether a privilege applies. TEX. R. CIV. P. 193.4(a). A trial court abuses its discretion when it fails to conduct an adequate in camera inspection. *In re Living Centers of Texas, Inc.*, 175 S.W.3d 253, 261 (Tex. 2005) (orig. proceeding).

(3) Mediation Privilege

Section 154.073 of the Texas Civil Practice and Remedies Code provides that any communication relating to the subject matter of a dispute made during mediation is confidential, not subject to disclosure, and cannot be used as evidence against the participating parties. TEX. CIV. PRAC. & REM. CODE § 154.073(a)–(b). The rule further provides that "[u]nless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone including the appointing court." TEX. CIV. PRAC. & REM. CODE § 154.073(c). However, materials used in mediation are discoverable if they are admissible or discoverable independent of the mediation. *In re Learjet, Inc.*, 59 S.W.3d 842, 844 (Tex. App.—Texarkana 2001, no pet.).

Objections under the mediation privilege are substantive. *See, e.g., St. Luke's Episcopal Hosp. v. Garcia*, 928 S.W.2d 307, 310 (Tex. App.—Houston [14th Dist.] 1996, orig. proceeding). To raise an objection, a practitioner should make an objection based on the mediation privilege and can be made in response to discovery or testimony. *Id.*

(4) Physician-Patient Privilege

Texas Rule of Evidence 509 primarily governs the physician-patient privilege in Texas and protects confidential communications between a physician and patient that are made in connection with any professional services rendered by the physician to the patient. TEX. R. EVID. 509. The privilege includes records of the patient's identity, diagnosis, evaluation, or treatment created or maintained by the physician. TEX. R. EVID. 509; 510.

Important to the fiduciary and probate litigation context, Rule 509 specifies that there are exceptions to the privilege, most importantly in civil litigation when the patient's physical, mental, or emotional condition is relevant to a claim or defense. TEX. R. EVID. 509; *see also R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994).

In the civil context, a patient has the right to refuse to disclose and to prevent any other person from disclosing these confidential communications and records. TEX. R. EVID. 509. The privilege can be claimed by the patient or the patient's representative. *Id.*

(5) Spousal Privilege

Spousal privilege can be asserted in a civil lawsuit; however, spousal privilege is limited in scope to confidential communications between married persons that are not intended to be disclosed to any other person. TEX. R. EVID. 504(a); *Cooper v. Cochran*, 288 S.W.3d 522, 539 (Tex. App.—Dallas 2009, no pet.).

A person has the privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made to their spouse while married. TEX. R. EVID. 504(a).

(6) Allied-Litigant Privilege

The joint defense privilege is essentially a subset of the attorney-client privilege and is recognized by the Texas Rules of Evidence. TEX. R. EVID. 503(b)(1)(C). The Texas Supreme Court has noted that, "it applies not just to defendants, but to any parties in a pending action. . . [and] is more appropriately termed an "allied litigant" privilege." *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 52 (Tex. 2012).

The joint defense privilege attaches to confidential communications made for the purpose of facilitating the rendition of legal services by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein. *Id.* The privilege does not extend beyond litigation. *Id.*

The allied litigant privilege may be asserted in response to a discovery request pursuant to the procedure discussed in Texas Rules of Civil Procedure 193.3 regarding a privilege log. TEX. R. CIV. P. 193.3(a). The privilege is narrow in scope and can only be applied when parties have separate counsel. *In re XL Specialty Ins. Co*., 373 S.W.3d 46, 52 (Tex. 2012).

I. Electronically Stored Information

Electronically stored information ("ESI") has become a central evidentiary component in trust and estates litigation in Texas. As personal, financial, and professional communications increasingly occur through electronic

means, disputes involving testamentary intent, mental capacity, undue influence, fiduciary misconduct, and asset tracing now routinely hinge on digital evidence rather than solely on paper records and witness testimony. Emails, text messages, mobile phone data, metadata, cloud-based files, and electronically maintained financial records often provide contemporaneous insight into a decedent's intent or a fiduciary's conduct that was historically unavailable.

Trust and estates litigation present distinct and recurring challenges in the management of ESI. The key custodian of relevant information is often deceased or incapacitated, family members may have overlapping access to devices and accounts, and fiduciaries frequently control electronically stored financial and administrative records long before litigation is formally initiated. Texas practitioners must therefore understand not only the general ESI rules under the Texas Rules of Civil Procedure, but also how those rules intersect with fiduciary obligations imposed by the Texas Estates Code and the realities of probate litigation.

J. Governing Discovery Rules Applicable to ESI in Texas

Discovery of electronically stored information in Texas is governed primarily by Rules 192 and 196 of the Texas Rules of Civil Procedure. Rule 192 establishes the broad scope of permissible discovery, allowing parties to obtain discovery regarding any non-privileged matter relevant to the subject matter of the pending action. TEX. R. CIV. P. 192.3. This expansive definition encompasses ESI of all types, including emails, text messages, digital photographs, electronic accounting records, and metadata, so long as the information is reasonably calculated to lead to the discovery of admissible evidence.

Rule 196 specifically addresses requests for production of documents and other tangible things and expressly includes ESI within its scope. Rule 196.4 requires a requesting party to specifically request ESI and allows the responding party to object if the request is unduly burdensome or costly. Importantly, a responding party asserting undue burden must support that objection with evidence, and the court must balance the likely benefit of the requested discovery against the burden or expense of production. In trust and estates litigation, this proportionality analysis may consider the nature of the fiduciary relationship, the amount in controversy, the importance of the issues at stake, and the availability of alternative sources of the information.

K. Preservation Obligations and the Unique Role of Fiduciaries

Under Texas law, a duty to preserve evidence arises when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control may be relevant to that claim. The Texas Supreme Court articulated this standard in *Brookshire Bros., Ltd. v. Aldridge*, confirming that preservation duties apply equally to ESI and traditional paper records. 438 S.W.3d 9, 20 (Tex. 2014).

In trust and estates matters, the duty to preserve frequently arises earlier than in ordinary commercial litigation. A fiduciary's receipt of a demand letter alleging mismanagement, a beneficiary's request for an accounting, or the filing of a will contest asserting lack of capacity or undue influence may all trigger preservation obligations. Because trustees and executors are fiduciaries as defined by the Texas Estates Code, they are subject to heightened expectations regarding diligence, transparency, and recordkeeping. *See* TEX. EST. CODE §§ 101.001, 113.051.

A fiduciary who fails to preserve relevant ESI after a preservation duty arises risks not only discovery sanctions, but also substantive claims for breach of fiduciary duty. For example, the deletion of emails reflecting trust administration decisions, or the loss of electronic financial records showing transfers between accounts, may be evidence of both spoliation and a failure to act in good faith. Practitioners representing fiduciaries should therefore advise clients to implement litigation holds promptly and preserve devices, cloud accounts, and backup data whenever a dispute is reasonably foreseeable.

L. Spoliation Standards and Remedies Under Texas Law

Texas courts apply the spoliation framework established by the Texas Supreme Court in *Brookshire Bros., Ltd. v. Aldridge*. Under this framework, spoliation occurs when a party breaches its duty to preserve relevant evidence and the destruction or loss of that evidence prejudices the opposing party. Importantly, trial courts, rather than juries, are charged with determining whether spoliation has occurred and what remedy is appropriate. 438 S.W.3d at 17–18.

The court's analysis focuses on both the spoliating party's level of culpability and the degree of prejudice suffered by the opposing party. Intentional or bad-faith destruction of ESI may warrant severe remedies, including a spoliation instruction or evidentiary sanctions that effectively decide the case. In contrast, negligent spoliation typically supports more limited remedies, such as allowing additional discovery, excluding secondary evidence, or permitting argument to the jury regarding the loss of evidence.

In trust and estates litigation, spoliation issues commonly arise when text messages evidencing influence over the decedent are deleted, when fiduciaries fail to retain electronic banking records, or when email accounts are closed or overwritten following a death. Because many electronic systems automatically delete data after certain retention periods, courts expect parties—particularly fiduciaries—to take affirmative steps to suspend routine deletion once litigation is reasonably anticipated.

M. Scope and Types of ESI Commonly at Issue in Probate Litigation

The categories of electronically stored information ("ESI") relevant to trust and estates litigation are broad and continue to expand. Understanding the different types of ESI is critical for Texas practitioners because each category raises distinct preservation, discovery, authenticity, and admissibility considerations. Unlike traditional paper documents, ESI often exists simultaneously in multiple locations, contains embedded metadata, and may be subject to automated deletion or retention policies outside the direct control of the user.

(1) Electronic Communications

One of the most common and significant categories of ESI in probate disputes is electronic communications. Emails, text messages, and instant messaging records frequently provide direct evidence of a decedent's intent, mental state, and interpersonal relationships. In will contests and undue-influence cases, communications between the decedent and beneficiaries, caregivers, or advisors can reveal susceptibility, dependence, pressure, or manipulation. Text messages and messaging-platform communications are particularly probative because they are informal, contemporaneous, and often candid. Communications between a decedent and beneficiaries or caregivers frequently form the backbone of capacity and undue-influence claims.

These communications are also among the most vulnerable to loss. Many messaging applications automatically delete messages after a defined period, and users may enable disappearing message functions without anticipating later litigation. Because probate disputes often arise months or years after death, early preservation through cooperation with personal representatives or third-party service providers is critical.

(2) Financial and Fiduciary ESI

Financial ESI is equally significant in trust and estate litigation. Trustees and executors commonly maintain records through electronic accounting software, online banking platforms, and brokerage portals. These records may reveal self-dealing, commingling of funds, failures to invest prudently, or deviations from governing instruments. Transaction histories, audit logs, and access records may also establish who exercised control over accounts and when.

Cloud-based storage platforms and mobile applications increasingly serve as repositories for notes, spreadsheets, calendars, and photographs relevant to asset ownership, caregiving arrangements, or expense reimbursement. Because this data is often stored outside the physical possession of the fiduciary, subpoenas to financial institutions and third-party service providers are frequently required.

(3) Social Media Evidence

Social media data including public posts, private messages, photographs, videos, location check-ins, and associated metadata can be highly probative in estate disputes. Public posts may reflect a decedent's relationships, hostility between family members, or physical and mental condition. Private messages between a decedent and a beneficiary or caregiver may provide direct evidence of undue influence or confidential dependence. Metadata associated with social-media activity can corroborate timelines, locations, and authorship.

Social-media ESI is typically decentralized, stored across personal devices and third-party servers, and subject to deletion or deactivation. Texas courts apply the same relevance, authentication, and hearsay rules to social-media evidence as to any other ESI, but practitioners must be prepared to establish authenticity through circumstantial evidence and account-specific characteristics.

(4) Photographs, Videos, and Audio Recordings

Digital photographs, videos, and audio recordings stored on smartphones, tablets, digital cameras, or cloud services often document caregiving arrangements, family interactions, asset conditions, and the decedent's appearance or functioning over time. Videos and audio recordings may be especially persuasive on issues of testamentary capacity, demeanor, and credibility.

Embedded metadata such as timestamps, geolocation data, and device identifiers can corroborate authenticity or rebut claims of fabrication. Texas courts routinely admit such evidence when supported by testimony from a witness with knowledge, distinctive characteristics, or evidence describing the system or process that generated the recording.

(5) Cloud-Based Documents and Drafts

Cloud platforms such as Google Drive, iCloud, Dropbox, and Microsoft OneDrive frequently contain drafts of estate-planning documents, personal notes, calendars, spreadsheets, and shared folders. Drafts may reflect evolving testamentary intent, third-party involvement, or inconsistencies relevant to fraud or undue-influence claims. Shared access records and edit histories can further establish the extent of a beneficiary's involvement in planning or revisions.

Because cloud-stored ESI is often outside a party's direct possession, discovery may require subpoenas to service providers or cooperation from personal representatives with lawful access credentials.

(6) Calendars, Location Data, and Tracking Information

Electronic calendars, reminder applications, GPS data, ride-share histories, and health-tracking applications may reveal patterns of dependency, isolation, medical decline, or third-party involvement. Location data can corroborate or contradict testimony regarding meetings, caregiving presence, or access to the decedent. These forms of ESI are increasingly relevant in undue-influence and fiduciary-misconduct cases but are easily overlooked and frequently lost without timely preservation.

(7) Medical-Related ESI

Electronic medical records, patient-portal communications, prescription histories, telehealth records, and wearable-device data may bear directly on testamentary capacity and susceptibility to influence. Discovery of this information is governed not only by the Texas Rules of Civil Procedure but also by HIPAA and state medical-privacy laws, often requiring court orders or qualified protective orders. While highly probative, requests for medical ESI must be proportionate and narrowly tailored.

(8) Discovery Limits and Forensic Access to Devices

Texas courts permit discovery of relevant ESI stored on personal devices when the information is proportional to the needs of the case. However, direct forensic inspection of devices is considered a highly intrusive remedy. The Texas Supreme Court has held that forensic access generally requires proof that the responding party has failed to meet its discovery obligations or that less intrusive means have been exhausted. *In re Weekly Homes, L.P.*, 295 S.W.3d 309, 317–18 (Tex. 2009). The request must also be proportionate to the needs of the case for resolution. *In re State Farm Lloyds*, 520 S.W.3d 595 (Tex. 2017) (orig. proceeding). This limitation is especially important in probate disputes, where surviving family members often control both responsive data and intensely personal information.

N. Admissibility and Authentication of ESI in Texas Probate Litigation

ESI is treated as documentary evidence under the Texas Rules of Evidence. To be admissible, it must satisfy relevance, authentication, and hearsay requirements. Digital format alone neither guarantees admissibility nor renders evidence suspect, but courts scrutinize authenticity and reliability more closely due to the ease of alteration and replication. TEX. R. EVID. 401, 901, 902.

(1) Authentication Under Rule 901

Under Texas Rule of Evidence 901(a), the proponent must produce evidence sufficient to support a finding that the ESI is what it purports to be. Authentication may be established through testimony from a witness with knowledge, distinctive characteristics of the content, metadata, evidence of device ownership, or proof of the system or process that generated the data. TEX. R. EVID. 901(b)(1), (4), (9). Texas courts routinely allow electronic communications to be authenticated through circumstantial evidence, including content, timing, writing style, and corroborating testimony.

In *Tienda v. State*, the Court of Criminal Appeals confirmed that social-media evidence may be authenticated through contextual clues tying an account to its purported author, even without direct testimony from the creator. 358 S.W.3d 633, 640–41 (Tex. Crim. App. 2012). Although a criminal case, Tienda's reasoning has been widely applied in civil litigation, including probate disputes.

(2) Self-Authentication Under Rule 902

Texas Rule of Evidence 902 provides powerful tools for admitting ESI without live testimony. Business records may be self-authenticated through a properly served affidavit under Rules 902(10) and (11). Certified records generated by an electronic process or system, as well as certified data copied from electronic devices, may be self-authenticated under Rules 902(13) and (14). These provisions are particularly valuable for bank records, brokerage statements, cloud-system logs, and forensic extractions. TEX. R. EVID. 902(10), (11), (13), (14).

(3) Hearsay Issues and Common Exceptions

Most ESI contains statements and therefore implicates the hearsay rule. Frequently applicable exceptions include the business-records exception, statements reflecting then-existing mental or emotional condition, admissions of a party opponent, and non-hearsay uses such as notice or knowledge. TEX. R. EVID. 803(3), (6), 801(e)(2). In probate litigation, statements evidencing testamentary intent or mental state are often admissible even when offered for their truth.

(4) Probate Court Authority and Procedural Considerations

Texas probate courts exercising statutory probate jurisdiction possess broad authority to manage discovery disputes, including those involving ESI. Tex. Est. Code § 32.001. Once a contested matter is filed, the Texas Rules of Civil Procedure apply, and probate courts regularly rule on motions to compel, motions for protection, and spoliation allegations arising from ESI disputes.

Because probate courts often handle both the administration of the estate and related litigation, judges may have particular sensitivity to fiduciary obligations and recordkeeping failures. Attorneys should be mindful that ESI disputes in probate courts frequently intersect with accounting issues, surcharge claims, and removal actions against fiduciaries.

(5) Practical Guidance for Texas Practitioners

Effective management of ESI in trust and estates litigation requires early planning and careful execution. Attorneys requesting ESI should tailor requests narrowly to contested issues, identify specific custodians and data sources, and specify the desired form of production. Overly broad requests increase the likelihood of proportionality objections and delay. Practitioners should evaluate not only what ESI exists, but where it is stored, who controls access, how it may be authenticated, and whether privacy statutes require court intervention. As Texas probate litigation increasingly turns on digital footprints, effective handling of ESI has become indispensable.

Attorneys representing fiduciaries should place immediate emphasis on preservation efforts, including suspending routine deletion policies, preserving devices and accounts, and documenting compliance. Clear communication with clients regarding their obligations and the potential consequences of ESI mismanagement is essential, particularly given the heightened scrutiny applied to fiduciaries under Texas law.

Electronically stored information now plays a critical and often determinative role in Texas trust and estates litigation. The intersection of ESI discovery obligations with fiduciary duties creates unique risks and opportunities for practitioners. Attorneys who understand the governing procedural rules, the spoliation framework established by Texas appellate courts, and the practical realities of modern electronic records will be better positioned to protect their clients and advance their cases effectively. Early attention to ESI preservation, thoughtful proportional discovery, and strategic use of electronic evidence can materially influence outcomes in contested probate and trust proceedings.

O. Protective Orders

By their nature, trust and estate matters often involve information that is confidential or proprietary and the discovery process is, by its nature, intrusive and invasive. *Flentye v. Kathrein*, No. 06 C 3492, 2007 U.S. Dist. LEXIS 74260, at *7, 2007 WL 2903128 (N.D. Ill. Oct. 2, 2007). When discovery threatens to unnecessarily expose deeply personal information such as financial records, medical information, family communications, and proprietary business data, courts may intervene through protective orders to balance the competing goals of full disclosure and confidentiality.

The primary purpose of a protective order is to shield parties and non-parties from discovery that is abusive, harassing, oppressive, or unduly burdensome. Texas courts may issue protective orders "to protect a party or person from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights." TEX. R. CIV. P. 192.6(b). Federal courts apply a similar standard, permitting protective orders for "good cause" to protect a party from annoyance, embarrassment, oppression, or undue burden or expense. FED. R. CIV. P. 26(c)(1). Protective orders are governed by Texas Rule of Civil Procedure 192.6 and Federal Rule of Civil Procedure 26(c). Under Texas Rule of Civil Procedure 192.6, both parties and nonparties have standing to seek protection when they are affected by a discovery request and a party responding to a discovery request can seek a protective order to protect a nonparty's private information. *In re CI Host, Inc.*, 92 S.W.3d 514, 517 (Tex. 2022) (orig. proceeding).

Protective orders are frequently used to safeguard confidential information including trust and estate financial records, beneficiary distributions and tax information, medical and mental health records, estate planning documents not at issue, and internal fiduciary communications. The rule grants courts broad discretion to tailor discovery protections to the circumstances of a given case, including prohibiting certain discovery altogether, limiting its scope,

prescribing the manner or timing of discovery, or restricting the dissemination of sensitive information. In practice, many probate courts are especially receptive to requests for protective relief because of the uniquely private nature of estate assets and family relationships, the frequent involvement of individuals with diminished capacity, and the likelihood that discovery materials could be misused to inflame family conflict or exert pressure on opposing parties.

Protective orders are commonly sought in trust and estate litigation involving requests for medical and mental health records. Allegations concerning testamentary capacity, undue influence, or the propriety of a guardianship appointment often make certain medical records relevant, but Texas courts routinely limit discovery to records that are narrowly tailored to the issues at hand. Protective orders in this context frequently restrict disclosure to specific time periods, conditions related to capacity, and relevant providers, while excluding unrelated diagnoses or treatments. Courts also commonly require HIPAA-compliant provisions and impose strict limitations on how such records may be used or disseminated.

Financial records similarly give rise to frequent disputes in probate litigation. Trust and estate cases may involve extensive banking, brokerage, tax, and business records, including documents relating to closely held entities in which the decedent or trust holds an interest. Courts are often persuaded to issue protective orders where discovery requests extend beyond the decedent's actual interests, seek personal financial information of nonparty family members without adequate justification, or implicate confidential business information or trade secrets. In these situations, protective orders may limit access to counsel and retained experts, require redactions, or permit the production of summaries rather than full underlying datasets.

Family communications and other personal materials, such as emails, text messages, social media posts, or private correspondence are also common in trust and estate disputes. While such materials may sometimes be relevant to claims of undue influence or motive, courts are wary of fishing expeditions that appear designed to embarrass parties or exploit personal grievances. Protective orders can be used to limit these requests by time frame, subject matter, or custodians, and to bar the public disclosure of sensitive or inflammatory content that has little bearing on the legal claims.

Protective orders also arise in connection with discovery directed to fiduciaries such as trustees and executors. Although Texas law does not recognize a broad fiduciary privilege, courts may issue protective orders to prevent disclosure of attorney-client communications, litigation strategy, internal deliberations, or draft accountings, particularly where such discovery would unfairly prejudice the fiduciary or disrupt the orderly administration of the estate. In some cases, courts use protective orders to sequence discovery so that accountings or explanations are produced before more intrusive document requests are allowed.

The party seeking a protective order bears the burden of showing good cause, which requires more than conclusory assertions that discovery is burdensome or invasive. Courts expect specific explanations, and in many cases evidentiary support, demonstrating how the requested discovery would result in undue burden, harassment, or invasion of rights. Overly broad requests for protection are disfavored, and probate courts are especially attentive to ensuring that protective orders do not become tools for obstruction.

Procedurally, a motion for protective order must be filed before the deadline for responding to the challenged discovery and must include a certificate of conference reflecting a good-faith effort to resolve the dispute without court intervention. Failure to timely seek protective relief may result in waiver of objections, a risk that is particularly significant in fast-moving probate cases involving temporary administrations or emergency relief.

Keep in mind that a party, not a nonparty, "should not move for protection when an objection to written discovery or an assertion of privilege is appropriate…" TEX. R. CIV. P. 192.6(a). There are two reasons for this rule, "First, it clarifies that persons should not move for a protective order when an objection is appropriate. Second, it attempts to avoid creating a 'trap' for the unwary or 'breeding satellite litigation' regarding whether a protective order or an objection was the appropriate vehicle for seeking relief from discovery." *In re Park Cities Bank*, 409 S.W.3d 859, 876, 878 (Tex. App.—Tyler 2013, orig. proceeding). If counsel files a motion for protection when an objection was the appropriate response, only the objections made in the motion are preserved and any objections not made in the motion are waived. TEX. R. CIV. P. 192.6(a); *Park Cities*, 409 S.W.3d at 878.

Strategically, protective orders serve an important role in managing the emotional dynamics of trust and estate litigation. Reasonable protective orders can de-escalate conflict, reduce the use of discovery as a pressure tactic, and help the court maintain control over cases that might otherwise spiral into personal warfare. At the same time, attorneys must be careful not to overreach. Probate courts are keenly aware of attempts to use protective orders to conceal misconduct or delay proceedings, and such tactics can undermine counsel's credibility with the court.

An effective strategy for implementing a protective order is by having an agreed order in place. An agreed order can be favorable to both the producing party and the requesting party. The producing party establishes some

protection of private information and the requesting party benefits by obtaining the information more quickly through an agreed protective order rather than fighting over the information.

Well-drafted protective orders in trust and estate cases are narrowly tailored, clearly tied to identifiable harm, and include explicit restrictions on the use of protected materials. They define the protected information, define who can receive and review the protected information, describe how protected information will be designated, describe the permissive use of the protected information, describe the procedure for contesting confidential designation. Effective orders also often contain clawback provisions for inadvertent disclosures of privileged information and address the handling of confidential materials after the litigation concludes, including requirements for return or destruction. Violations of protective orders can result in serious consequences, including contempt, monetary sanctions, exclusion of evidence, or adverse inference instructions, and probate courts take such violations seriously due to the sensitive interests at stake. Protective orders can play an important role in estate and trust litigation, but their use to protect privacy must be balanced with assuring the discovery process is fair and open.

IV. DEPOSITIONS

A. Oral Depositions

Depositions are a key tool in the discovery process to elicit either live or written testimony from a party or witness. A party may take the testimony of any person or entity by deposition on oral examination before any officer authorized by law to take depositions. TEX. R. CIV. P. 199.1(a). The testimony, objections, and any other statements during the deposition must be recorded at the time they are given or made. *Id.* A party may take an oral deposition by telephone or other remote electronic means if the party gives reasonable prior notice of intent to do so. TEX. R. CIV. P. 199.1(b).

Rule 199.2 provides a list of the required content of the deposition notice. TEX. R. CIV. P. 199.2(b). The notice must state the name of the witness, which may be either an individual or a public or private corporation, partnership, association, governmental agency, or other organization. *Id.* If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the notice of oral deposition upon the party's attorney has the same effect as a subpoena served on the witness. TEX. R. CIV. P. 199.3. If an organization is named as the witness, the notice must describe with reasonable particularity the matters on which examination is requested. *Id.* In response, the organization named in the notice must—a reasonable time before the deposition—designate one or more individuals to testify on its behalf and set forth, for each individual designated, the matters on which the individual will testify. *Id.* Each individual designated must testify as to matters that are known or reasonably available to the organization. *Id.*

The deposition notice must set forth the time and place of the deposition. TEX. R. CIV. P. 199.2(b). The deposition may be taken in the following places:

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

Id.

Notwithstanding the list above, Texas courts have taken into consideration the distance that parties would have to travel to a deposition at a location stated in Rule 199.2, particularly in instances of international travel. *In re Turner*, 243 S.W.3d 843, 846 (Tex. App.—Eastland 2008, no pet.) (citing the trial court's broad discretion to order a party to be deposed in the county of the suit, but that when international travel is involved, "additional considerations are implicated."). In such instances, trial courts must be sensitive to the actual need for the requested depositions and alternative means for taking the depositions. *Dresser Industries, Inc. v. Solito*, 668 S.W.2d 893, 895 (Tex App.—Houston [14th Dist.] 1984, no writ). And, when a deposition takes place outside of one of the locations specifically identified in Rule 199.2(b)(2), it must be a convenient place. *Turner*, 243 S.W.3d at 846. The trial court may also weigh counsel's preference for a face-to-face deposition against the particular circumstances of the case. *Int'l Awards, Inc. v. Medina*, 900 S.W.2d 934, 936 (Tex. App.—Amarillo 1995, orig. proceeding). The case law on this issue demonstrates additional considerations that the court should review beyond the described locations in Rule 199.2. Fortunately, in today's world of Zoom proceedings, the parties can easily coordinate a virtual deposition to avoid these disputes.

Additionally, regardless of the format in which the deposition is noticed, a party may attend an oral deposition in person, even if the deposition is taken by telephone or other remote electronic means. TEX. R. CIV. P. 199.5. If a deposition is taken by telephone or other remote electronic means, the party noticing the deposition must make arrangements for all persons to attend by the same means. *Id.* If the party noticing the deposition appears in person, any other party may appear by telephone or other remote electronic means if that party makes the necessary arrangements with the deposition officer and the party noticing the deposition. *Id.*

The notice must state whether the deposition is to be taken by telephone or other remote electronic means and identify the means. TEX. R. CIV. P. 199.2(b)(2)(3). If the deposition is to be recorded by non-stenographic means, the notice may include the notice required by Rule 199.1(c). Whether stenographic or non-stenographic, Texas law requires that the deposition be taken by a deposition officer who is authorized by law to administer an oath and who is in charge of the recording of the deposition. TEX. R. CIV. P. 199.1; see also TEX. GOV'T CODE ANN. § 602.002 (list of persons authorized to administer oaths).

The manner of recording the deposition has recently come under scrutiny by the Texas Supreme Court. Until the recent uptick in the use of artificial intelligence (AI), parties could take the record by stenographic or non-stenographic means, so long as the deposition was recorded in real time. *See* TEX. R. CIV. P. 199.1. Rule 199.1 further provides a deadline and notice requirement for the party noticing the deposition if the deposition will be taken by non-stenographic means (for example, by videotape). *See* TEX. R. CIV. P. 199.1(c). However, the Texas Supreme Court may soon be providing an opinion regarding the manner of recording an oral deposition using AI as opposed to a certified court reporter. Specifically, the case *In re Hughey* out of the Beaumont Court of Appeals involved a deposition that was taken by Skribe.ai, a digital reporting (and allegedly, "deposition intelligence") platform. No. 09 – 25 – 00194 – CV, 2025 WL 1523269, at *1 (Tex. App.—Beamont May 29, 2025, pet. pending). The trial court ordered that Skribe could not be used and struck the written transcription of an oral deposition because it was prepared by a means other than a certified court reporter. *Id.* The Beamont Court of Appeals further found that the trial court did not exclude the video deposition from evidence or preclude Hughey from playing the video deposition to the jury. *Id.* And, the Court found, the trial court's order was issued by the trial court sufficiently in advance of trial for Hughey to engage a certified court reporter to transcribe the deposition. *Id.* As a result, the Beamont Court of Appeals denied Hughey's petition for writ of mandamus. However, on May 30, 2025, the Texas Supreme Court granted Hughey's emergency motion for temporary relief and issued a stay order of the Court of Appeals' mandamus ruling. *See In re Patrick Hughey*, No. 25-0463 (Tex. May 30, 2025), available at https://www.txcourts.gov/supreme/orders-opinions/2025/may/may-30-2025/. As a result, there may be a forthcoming opinion from the Texas Supreme Court related to the transcription of oral depositions by AI or means other than a certified court reporter.

Additionally, if a party intends to have additional attendees at the deposition other than those permitted by the rules (i.e., the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the deposition), the party noticing the deposition must give reasonable notice to all parties of the identity of the additional persons. TEX. R. CIV. P. 199.5(a)(3). Ideally, this notice of additional attendees should be included in the deposition notice, but notice may be also given separately. *Id.*; *see also* TEX. R. CIV. P. 199.2(b)(4). This commonly occurs when a party wishes to bring an expert to listen to a deposition, so litigants should ensure that proper notice of the expert's attendance is given.

The deposition notice may include a request that the witness produce at the deposition documents or tangible things within the scope of discovery and within the witness's possession, custody, and control. TEX. R. CIV. P. 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. *See* TEX. R. CIV. P. 193.1 *et seq.*; *see also* TEX. R. CIV. P. 196.1 *et seq*.

Similar to the notice requirements of the deposition itself, the request for production must specify a reasonable time (on or after the date on which the response is due) and place for production. TEX. R. CIV. P. 196.1(b). In the context of an oral deposition, the production deadline should be specified to be due on the date and time of the deposition. Rule 196.2 specifies that the party must serve a written response on the requesting party within thirty days after the service of the request. TEX. R. CIV. P. 196.2(a). Reading Rule 196.1 and Rule 196.2 together, a litigant would need to serve the deposition notice with the production request at least thirty days in advance of the deposition date to ensure that the party or witness had sufficient time to comply with the production request. Litigants should consider also whether they want an opportunity to review documents prior to the deposition; if so, it would be advisable to serve the party with requests for production, or a non-party witness with a subpoena or deposition on written questions prior to the deposition being noticed. This procedure would also enable any objections to the production requests to be resolved before appearing for the deposition.

The party noticing the deposition must serve the notice upon the witness and all parties within a reasonable time before the deposition is taken. *Id.* at 199.2(a). Deposition notices served upon parties should not be filed with the court; however, deposition notices for non-parties should be both served and filed with the court. TEX. R. CIV. P. 191.4(a)–(b). If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the notice of oral deposition upon the party's attorney has the same effect as a subpoena served on the witness.

If a party who receives notice of deposition considers notice inadequate or has a scheduling conflict, he has a duty to protest to opposing counsel and to the trial court as soon as possible. *Siegel v. Smith*, 836 S.W.2d 193, 194 (Tex. App.—San Antonio 1992, writ denied). Whether notice is reasonable depends on the circumstances of each case. *Hogan v. Beckel*, 783 S.W.2d 307, 308 (Tex. App.—San Antonio 1989, writ denied). For example, four days' notice was found to be reasonable in *Bohmfalk v. Linwood* because the deposition was taken several weeks before trial and the opposing party waived error by waiting until trial to protest the deposition notice. 742 S.W.2d 518, 520 (Tex. App.—Dallas 1987, no writ). On the other hand, four days was not considered reasonable in *Hycarbex, Inc. v. Anglo-Suisse, Inc.* because that deposition was taken only a week before trial, and the court found that Hycarbex could have taken the deposition without such short notice. 927 S.W.2d 103, 111–12 (Tex. App.—Houston [14th Dist.] 1996, no pet.) ("The trial court found that Hycarbex's attorney acted 'at his peril' by relying on Summa's assurances [to be available at trial] rather than deposing Summa when he knew five months earlier that Summa's deposition was necessary to preserve Summa's testimony for trial."). Further, and in addition to quashing or otherwise disallowing the deposition to occur, discovery sanctions are available against those who abuse the notice requirements, and the choice of sanctions is within the discretion of the trial court. *Hogan*, 783 S.W.2d at 309; *see also Bohmfalk*, 742 S.W.2d at 520. The moral of the story: litigants should take depositions well in advance of trial and with plenty of notice to the witness and all parties.

Ideally, the parties and witness should agree on the date, time, and place for the deposition to avoid any conflict about scheduling. Parties and their attorneys are expected to cooperate in discovery and make any agreements reasonably necessary for the efficient disposition of the case. TEX. R. CIV. P. 191.2. Although parties should take depositions within the discovery period, the parties may agree otherwise or a party may obtain leave of court. TEX. R. CIV. P. 199.2(a).

However, parties or witnesses on the receiving end of a deposition notice have the right to object to the time and place of the deposition. TEX. R. CIV. P. 199.4. The objection may be made by motion for a protective order or by motion to quash the notice of deposition. Id. If the motion to quash the deposition is filed by the third business day after the service of the notice of deposition, the deposition is stayed until the motion can be considered and ruled upon by the court. *Id.*

At the deposition itself, the witness must remain in attendance from day to day until the deposition is begun and completed. TEX. R. CIV. P. 199.5 Every person whose deposition is taken by oral examination must first be placed under oath. Id. The parties may examine and cross-examine the witness. *Id.* Any party, in lieu of participating in the examination, may serve written questions in a sealed envelope on the party noticing the oral deposition, who must deliver them to the deposition officer, who must open the envelope and propound them to the witness. *Id.*

No side may examine or cross-examine an individual witness for more than six hours. Breaks during depositions do not count against this limitation. *Id.* However, for organizations, each person designated by an organization under Rule 199.2(b)(1) (i.e., designation by the organization of an individual(s) to testify on its behalf) is a separate witness for purposes of the six-hour rule. TEX. R. CIV. P. 199.6 cmt. 2; TEX. R. CIV. P. 199.2(b)(1).

The oral deposition must be conducted in the same manner as if the testimony were being obtained in court during trial. *Id.* However, this portion of the rule is intended to be a limit on the conduct of lawyers and witnesses at the deposition, not on the scope of the interrogation as permitted by Rule 192. TEX. R. CIV. P. 199.6 cmt. 3. Counsel should cooperate with and be courteous to each other and to the witness. TEX. R. CIV. P. 199.5. The witness should not be evasive and should not unduly delay the examination. *Id.*

Private conferences between the witness and the witness's attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. *Id.* Private conferences may be held, however, during agreed recesses and adjournments. *Id.* If the lawyers and witnesses do not comply with this rule, the court may allow in evidence at trial statements, objections, discussions, and other occurrences during the oral deposition that reflect upon the credibility of the witness or the testimony. *Id.*

Objections to questions during the oral deposition are limited to "Objection, leading" and "Objection, form." *Id.* Objections to testimony during the oral deposition are limited to "Objection, nonresponsive." *Id.* These objections

are waived if not stated as phrased during the oral deposition. *Id.* All other objections need not be made or recorded during the oral deposition to be later raised with the court. *Id.* In other words, a party should not make evidentiary objections during the deposition, as they can be raised with the court later.

The objecting party must give a clear and concise explanation of an objection if requested by the party taking the oral deposition, or the objection is waived. *Id.* Argumentative or suggestive objections or explanations waive the objection and may be grounds for terminating the oral deposition or assessing costs or other sanctions. *Id.* The officer taking the oral deposition will not rule on objections but must record them for ruling by the court. *Id.*

In addition to the objections identified above, an attorney may instruct a witness not to answer a question during an oral deposition only if necessary to preserve a privilege, comply with a court order or these rules, protect a witness from an abusive question or one for which any answer would be misleading, or secure a ruling pursuant to paragraph (g). The attorney instructing the witness not to answer must give a concise, nonargumentative, nonsuggestive explanation of the grounds for the instruction if requested by the party who asked the question. *Id.*; *see also In re Lowe's Companies, Inc.*, 134 S.W.3d 876, 878 (Tex. App.—Houston [14th Dist.] 2004 no pet.) (relevance objection not a valid ground for instructing a witness not to answer, but trade secret is privileged and can be a valid ground).

If the time limitations for the deposition have expired or the deposition is being conducted or defended in violation of Rule 199.5, a party or witness may suspend the oral deposition for the time necessary to obtain a ruling. TEX. R. CIV. P. 199.5. An attorney must not ask a question at an oral deposition solely to harass or mislead the witness, for any other improper purpose, or without a good faith legal basis at the time. *See, e.g., Higginbotham v. Bonilla*, 727 S.W.3d 277, 231 (Tex. App.—Corpus Christi 2025, no pet.) (during appellant's deposition, appellee's counsel made a variety of insulting comments towards appellant's counsel, calling her "dirty and naughty," stating she was not "ladylike," and accused her of pulling a "wilted flower routine."). An attorney must not object to a question at an oral deposition, instruct the witness not to answer a question, or suspend the deposition unless there is a good faith factual and legal basis for doing so at the time. TEX. R. CIV. P. 199.5; *see also Wilson v. Shamoun & Norman, LLP*, 523 S.W.3d 222, 232–33 (Tex. App.—Dallas 2017, pet. denied) (trial court's monetary sanctions upheld for counsel improperly suspending a deposition).

B. Depositions on Written Questions

In addition to the procedure identified in Rule 199 for oral depositions, a party may choose to take a deposition on written questions from either a party or non-party witness. The procedure for depositions on written questions is controlled by Rule 200 of the Texas Rules of Civil Procedure.

A party may take the testimony of any person or entity by deposition on written questions before any person authorized by law to take depositions on written questions. TEX. R. CIV. P. 200.1 (a). Like oral depositions, deposition on written questions may be taken outside the discovery period only by agreement of the parties or with leave of court. *Id.* The party noticing the deposition must also deliver to the deposition officer a copy of the notice and of all written questions to be asked during the deposition. *Id.*

In terms of compelling a witness to appear, the rules for depositions on written questions are nearly identical to those for oral depositions under Rule 199. Specifically, a party may compel the witness to attend the deposition on written questions by serving the witness with a subpoena under Rule 176. TEX. R. CIV. P. 200.2. If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the deposition notice upon the party's attorney has the same effect as a subpoena served on the witness. *Id.*

Notice of the deposition on written questions must comply with Rule 199.1(b) (taking a deposition by telephone or remote means), Rule 199.2(b) (contents of notices for oral depositions), and Rule 199.5(a)(3) (regarding notice of other attendees). TEX. R. CIV. P. 200.1(b). If the witness is an organization, the organization must comply with the requirements of Rule 199. *Id.* The direct questions to be propounded upon the witness must be attached to the notice. TEX. R. CIV. P. 200.3(a). The notice also may include a request for production of documents as permitted by Rule 199.2(b)(5), the provisions of which will govern the request, service, and response.

A notice of intent to take the deposition must be served on the witness and all parties at least 20 days before the deposition is taken. TEX. R. CIV. P. 200.1. The rules then provide for a procedure in which counsel may object and ask cross, re-direct, and re-cross questions, much like they would at a deposition or trial, except in written form. Within ten days after the notice and direct questions are served, any party may object to the direct questions and serve cross-questions on all other parties. TEX. R. CIV. P. 200.3(b). Within five days after cross-questions are served, any party may object to the cross-questions and serve redirect questions on all other parties. *Id.* Within three days after redirect questions are served, any party may object to the redirect questions and serve recross questions on all other parties. *Id.* Objections to recross questions must be served within five days after the earlier of when recross questions are served

or the time of the deposition on written questions. *Id.* Parties should further be aware that objections to the form of a question are waived unless asserted in accordance with Rule 200.3. *Id.*

The deposition officer must take the deposition on written questions at the time and place designated, record the testimony of the witness under oath in response to the questions, and prepare, certify, and deliver the deposition transcript in accordance with Rule 203. TEX. R. CIV. P. 200.4; *see also* TEX. R. EVID. 203 (concerning the certification and use of depositions). The deposition officer has authority when necessary to summon and swear an interpreter to facilitate the taking of the deposition. *Id.*

V. THIRD-PARTY DISCOVERY

Rule 205 is the operative framework for compelling information from non-party witnesses once litigation is filed. It is distinct from the pre-suit deposition mechanism addressed elsewhere in this article and from the specialized regime governing financial institution records. What Rule 205 covers, broadly, is everything else: oral depositions, depositions on written questions, and standalone production requests directed at persons who are not parties to the suit. TEX. R. CIV. P. 205.1.

In probate and fiduciary litigation, the Rule 205 toolkit matters more than in most civil contexts. A will contest or trust dispute routinely requires evidence from caregivers, accountants, financial advisors, prior attorneys, treating physicians, and business partners — none of whom are parties, and few of whom are eager to participate. Practitioners who treat non-party discovery as a secondary concern, something to address once the inter-party discovery is in hand, tend to find themselves in discovery disputes at the worst possible time. This section addresses the procedural requirements for non-party discovery, the special problems that arise with non-retained expert witnesses, and the objection and privilege landscape that practitioners should expect and plan for.

A. Threshold Question: Subpoena or Court Order

Most non-party discovery under Rule 205 proceeds by subpoena rather than court order. Rule 205.1 identifies the exceptions — situations in which a court order is required rather than merely available.

Entry on a non-party's land or property requires a motion and notice of hearing served on all parties and the third party under Rule 196.7(a). TEX. R. CIV. P. 196.7(a); TEX. R. CIV. P. 205.1(a). The order may issue "only for good cause shown and only if the land, property, or object thereon as to which discovery is sought is relevant" to the subject matter of the action. Compelling production of a third party's medical records requires a court order under Rule 205.3(c). Tex. R. Civ. P. 205.3(c). That provision has direct application in guardianship and elder abuse cases, where a ward's medical history may sit with a non-party healthcare provider who has no incentive to produce it voluntarily. Physical and mental examinations of a non-party require a court order under Rule 204.

Outside these categories, a subpoena is the appropriate instrument. For most of what probate practitioners need—documents from an accountant, testimony from a prior attorney, records from a care facility—the court order requirement does not arise.

B. Issuance of a Subpoena in Discovery Matters

A party may compel discovery from a non-party—that is, a person who is not subject to a party's control—only by obtaining a court order under Rule 196.7 (request or motion for entry upon property), Rule 202 (pre-suit discovery), or Rule 204 (physical and mental examination), or by serving a subpoena compelling the following:

- An oral deposition;
- A deposition on written questions;
- A request for production of documents or tangible things pursuant to Rule 199.2(b)(5) or Rule 200.1(b), served with a notice of deposition on oral examination or written questions; and
- A request for production of documents and tangible things under Rule 205.

TEX. R. CIV. P. 205.1.

Boiling down Rule 205.1 into simple terms, a party has the following options to compel discovery from a non-party witness: (1) an oral deposition, which may be accompanied with document production requests, (2) a deposition on written questions, which also may be accompanied by document production requests, or (3) requests for production by way of a subpoena that does not ask for the oral or written testimony of the witness. *See id.* Notably, all three of these procedures require a subpoena be issued under Rule 176 to compel the witness's attendance or response, unless the witness agrees to comply (for example, agrees to appear for their deposition without the necessity of a subpoena) or the witness is subject to the control of a party.

Rule 176.1 et seq. addresses the manner of the issuance of subpoenas. A subpoena may only be used for discovery in a manner specifically provided by the rules governing discovery procedure. TEX. R. CIV. P. 176.3(b). The required style and form of a subpoena is set forth in Rule 176.1. *See* TEX. R. CIV. P. 176.1. A subpoena must command the person to whom it is directed to attend and give testimony at a deposition, hearing, or trial, or produce and permit inspection and copying of designated documents or tangible things in the possession, custody, or control of that person, or both. TEX. R. CIV. P. 176.2. Rule 176.4 governs those who are permitted to issue subpoenas, which includes the clerk of a court, an attorney licensed in Texas, or an officer authorized to take depositions in Texas. TEX. R. CIV. P. 176.4.

A subpoena may be served at any place within the State of Texas by any sheriff or constable of the State of Texas, or any person who is not a party and is 18 years of age or older. TEX. R. CIV. P. 176.5. A subpoena must be served by delivering a copy to the witness and tendering to that person any fees required by law. *Id.* If the witness is a party and is represented by an attorney of record in the proceeding, the subpoena may be served on the witness's attorney of record. *Id.* Proof of service must be made by filing either the witness's signed written memorandum attached to the subpoena showing that the witness accepted the subpoena, or a statement by the person who made the service stating the date, time, and manner of service, and the name of the person served. *Id.*

The notice must identify three things: the items to be produced or inspected; the proper name of the non-party from whom production or inspection is sought; and a reasonable time and place for production or inspection. Tex. R. Civ. P. 205.3(b)(1)–(3). Courts have extended some tolerance for minor errors in the notice — including errors in party names — but tolerance is not a license for carelessness. Where a non-party's name is not immediately ascertainable, supplementing the notice with designations such as "also known as" or "doing business as" is generally permissible, provided the identification is reasonable from the information available.

Not everyone can issue a subpoena. Only attorneys admitted in Texas, clerks of an appropriate court, or officers authorized to take depositions in Texas may do so. TEX. R. CIV. P. 176.4(a)–(c). Service is completed by delivering copies to the witness and tendering any fees required by law. TEX. R. CIV. P. 176.5(a). These requirements are jurisdictional in the sense that defective service is a proper basis for a motion to quash.

Materials served on a non-party under Rule 205 must be filed with the relevant court. TEX. R. CIV. P. 191.4(b)(1). This differs from the rule governing inter-party discovery, which expressly prohibits filing discovery requests, deposition notices, and subpoenas required to be served only on parties. Id. The distinction is routinely overlooked by practitioners accustomed to inter-party discovery practice, and omitting the filing can become a problem when enforcement is sought.

A person may not be required by subpoena to appear or produce documents or other things in a county that is more than 150 miles from where the person resides or is served. TEX. R. CIV. P. 176.3(a); *see also Lynd v. Bass Pro Outdoor World, Inc.*, No. 05–12–00968–CV, 2014 WL 1010120, at *10 (Tex. App.—Dallas March 12, 2014, pet. denied) (holding subpoena not effective to compel the appearance of witnesses who were served more than 150 miles from the courthouse where they would need to appear). However, a person whose appearance or production at a deposition may be compelled by notice alone under Rules 199.3 or 200.2 may be required to appear and produce documents or other things at any location permitted under Rule 199.2(b)(2) (i.e., the time and place for an oral deposition). TEX. R. CIV. P. 176.3. Texas case law has frowned upon the complaints of a party's inability to compel the attendance of a key witness at trial where the party did not exercise diligence in procuring their testimony. The Texas Supreme Court has stated:

> Rules 176 et seq., authorizing the placing of witnesses residing in the county of suit under subpoena to compel their attendance until discharged by the court or the party summoning them and Rules 186 et seq. [repealed, now Rules 200 and 252] authorizing the taking of depositions, if utilized, offer parties to civil suits ready and fairly certain means of procuring the testimony of resident witnesses. More than that, if resorted to with promptitude and pursued with diligence, they offer parties absolute protection against being forced to trial by arbitrary and unreasonable action of a trial court without the benefit of the testimony of material witnesses. If parties choose to forego their rights under these rules and resort to other and less effective and less certain means of procuring the testimony of material witnesses, they must be held to do so at their own risk and with foreknowledge that they may be put to trial without the benefit of the testimony.
>
> *Fritsch v. J.M. English Truck Line*, 246 S.W.2d 856, 859 (Tex. 1952) (internal citations omitted).

So, even if a party is unable to compel a witness's appearance at trial due to distance, the discovery rules enable a party to compel the appearance of a witness for purposes of seeking their testimony by deposition or other discoverable means in anticipation of trial. Litigants should ensure that they are keeping the witness's location in mind and obtain deposition testimony well in advance of trial if the distance is anticipated to be an issue.

A person served with a subpoena must comply with the command stated therein unless discharged by the court or by the party summoning such witness. TEX. R. CIV. P. 176. A person commanded to appear and give testimony must remain at the place of deposition, hearing, or trial from day to day until discharged by the court or by the party summoning the witness. *Id.* As with Rule 199.2, an organization must designate an individual to testify on its behalf in response to a subpoena. *Id.*; TEX R. CIV. P. 199.2(b)(1).

A person commanded to produce documents or tangible things need not appear in person at the time and place of production unless the person is also commanded to attend and give testimony, either in the same subpoena or a separate one. TEX. R. CIV. P. 176.6(c). A person must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the demand. *Id.* A person may withhold material or information claimed to be privileged but must comply with Rule 193.3 (which describes the manner in which privileged items should be withheld). *Id.*

A person commanded to produce and permit inspection or copying of designated documents and tangible things may serve on the requesting party written objections to producing any or all of the designated materials. TEX. R. CIV. P. 176.6(d). In addition or in the alterative, the witness may move for a protective order under Rule 192.6(b). TEX. R. CIV. P. 176.6(e); TEX. R. CIV. P. 192.6(b). If a witness chooses to move for a protective order, that motion should be filed either in the court in which the action is pending or in a district court in the county where the subpoena was served, and must be served upon all parties in compliance with Rule 21a. TEX. R. CIV. P. 176.6(e). However, the objections or the motion for protective order must be served prior to the time specified for compliance, or the objections or other requested relief will be waived. TEX. R. CIV. P. 176.6(d)–(e); *see also In re University of Texas Health Center at Tyler*, 198 S.W.3d 392, 395 (Tex. App.—Texarkana 2006, no pet.) (hospital waived its objections by failing to timely object to a subpoena before time for compliance). A witness does not need to comply with the part of a subpoena to which objection is made or protection requested unless court-ordered to do so. TEX. R. CIV. P. 176.6(d)–(e). However, by the language of the rule, the witness should comply with the remainder of the subpoena to which it does not object. *Id.* In response to an objection from the witness, the party requesting the subpoena may move for an order compelling the response at any time after an objection is made. *Id.* In response to objections or a motion for protection, the requesting party who issued the subpoena may seek such an order at any time after the motion for protection is filed. *Id.* The court must take reasonable steps to avoid imposing undue burden or expense upon the person served, such as providing adequate time for compliance, protecting the witness from disclosing privileged information, or even ordering compensation to the witness for undue hardship. TEX. R. CIV. P. 176.7. However, if a witness fails to comply with a validly issued subpoena, the subpoena may be enforced by contempt, which may include fine, confinement, or both. TEX. R. CIV. P. 176.8.

C. Depositions of a Non-Party

The procedures governing depositions to non-parties—either oral or written—are largely similar to those for parties. A notice of oral or written deposition must be served before or at the same time as a subpoena compelling attendance or production under the notice is served. TEX. R. CIV. P. 205.2.

Oral depositions of a non-party are governed by Rule 199, similarly to those for parties, as discussed infra. A party may compel the witness to attend the oral deposition by serving the witness with a subpoena under Rule 176. TEX. R. CIV. P. 199.3.; *see also* TEX. R. CIV. P. 176.1 et seq. However, if the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, service of the notice of oral deposition upon the party's attorney has the same effect as a subpoena served on the witness. *Id.* The witness's appearance may be compelled by the valid issuance of a subpoena under Rule 176.

An important distinction with oral depositions of non-parties concerns the rules that apply to deposition notices with requests for the production of documents from the non-party. *See* TEX. R. CIV. P. 205.1(a), (c). A notice to produce documents or tangible things under Rule 205.3 must be served at least 10 days before the subpoena compelling production is served. And, a request that the witness produce documents or other tangible things in conjunction with their deposition must comply with Rule 205. TEX. R. CIV. P. 199.2(b)(5); *see also* TEX. R. CIV. P. 200.1 *et seq.* The designation of materials required to be identified in the subpoena must be attached to, or included in, the notice. *Id.* The nonparty's response to the request is governed by Rules 176 and 205.

D. Requests for Production to a Non-Party Without Deposition

A party may also send a standalone notice to a non-party to produce documents without including a deposition notice. A party may compel production of documents and tangible things from a nonparty by serving the notice required in Rule 205.2 and a subpoena compelling production or inspection of documents or tangible things. TEX. R. CIV. P. 200.3(a). The relevance standard tracks the general discovery framework: any matter not privileged and relevant to the

subject matter of the pending action. *In re K & L Auto Crushers, LLC*, 607 S.W.3d 358 (Tex. 2021) (orig. proceeding). The subpoena must be specific enough to identify what is being sought. Requests that are untethered to identifiable subject matter or defined time periods invite objections on overbreadth grounds that courts are inclined to sustain.

A notice to produce documents or tangible things under Rule 205.3 must be served at least 10 days before the subpoena compelling production is served. TEX. R. CIV. P. 205.2. The contents of the notice are governed by Rule 205.3(b), and the non-party's response must comply with Rule 176. TEX. R. CIV. P. 205.3(b), (d).

A non-party has no obligation to produce documents to anyone other than the requesting party. Under Rule 205.3(e), the requesting party is responsible for providing copies to any other party in the litigation who requests them. Tex. R. Civ. P. 205.3(e). Practitioners sometimes assume the non-party will handle distribution to all counsel of record. That assumption is wrong and can create friction when co-parties discover that documents have been produced but not shared. Build the distribution obligation into the document review workflow before the production arrives.

Rule 205 also imposes obligations upon the party receiving the documents or other materials from the non-party. First, the party obtaining the production must make all materials available for inspection by any other party on reasonable notice and must furnish copies to any party who requests them at that party's expense. TEX. R. CIV. P. 205.3(e).

Rule 205.3(f) requires the requesting party to reimburse the non-party's "reasonable costs of production." TEX. R. CIV. P. 205.3(f). Courts have construed this limitation narrowly. The recoverable amount is the exact cost of retrieving, processing, and transporting the documents produced — nothing more. *BASF Fina Petrochemicals Ltd. P'ship v. H.B. Zachry Co*., 168 S.W.3d 867, 874 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Attorney's fees incurred by the non-party in reviewing the subpoena and deciding how to respond are not recoverable as production costs. TEX. FIN. CODE § 59.006(a). Non-party counsel who insist otherwise are asserting a position Texas courts have rejected. When a non-party raises cost concerns during a meet-and-confer, confirm what the client understands "reasonable costs" to mean before memorializing any agreement in writing, because disputes over the scope of a cost agreement are expensive and avoidable.

Rule 205 does not govern the compelled production of financial institution customer records. TEX. FIN. CODE § 59.006 is the exclusive mechanism for obtaining those records, and a Rule 205 subpoena served on a bank or similar institution without § 59.006 compliance is procedurally defective from the moment it is served. TEX. R. CIV. P. 205.3(a); TEX. R. CIV. P. 205.2. Practitioners who move between general non-party subpoenas and financial institution subpoenas without recognizing the distinction do so at their clients' expense.

A chart comparing the Rules for discovery to non-parties is set forth below:

	Oral Deposition Only (TRCP 199, 205.1(a))	**Deposition on Written Questions Only (TRCP 200, 205.1(b))**	**Oral/written deposition with requests for production (TRCP 199 OR 200, 205.1(c))**	**Requests for production to non-party without deposition (TRCP 205.1(d)), 205.3)**
Subpoena required?	Yes, to compel attendance	Yes, to compel attendance	Yes	Yes
Timing of Service of Notice	Before or at the same time as the subpoena	Before or at the same time as the subpoena, along with proposed questions Must be served at least 20 days before depo is taken	Serve notice first, then the subpoena compelling production at least 10 days later	Serve notice first, then the subpoena compelling production at least 10 days later
Content of the Notice	TRCP 199	TRCP 199 and 200.1(b), and direct questions must be included	Must comply with 199.2(b)(5) and Rule 205 in addition to other notice requirements	Must comply with Rules 205.2 and 205.3
Time to object	Before date of deposition	Within 10 days after notice and direct questions are served: Objections and cross questions Within 5 days of cross-questions being served: Object to	Prior to the time for compliance (TRCP 176)	Prior to the time for compliance (TRCP 176, 200.3(d))

		cross-questions and serve redirect questions on all other parties Within 3 days after redirect questions are served: object to redirect questions and serve recross questions on all other parties Within 5 days of the earlier of service of recross questions or date/time of deposition: objections to re-cross questions		

E. Non-Retained Expert Witnesses Under Rule 205

This section warrants more attention than it typically receives in civil litigation practice, and considerably more than it receives in probate and fiduciary practice specifically. Cases involving testamentary capacity, undue influence, elder financial abuse, and fiduciary misconduct routinely produce a category of witness who occupies an awkward middle ground: persons with relevant expert-level knowledge who are not retained by any party but who have formed opinions about the very issues in dispute.

Treating physicians who evaluated the testator near the time of execution. Mental health professionals who saw a ward in a clinical setting. Forensic accountants engaged by a trustee before the dispute ripened into litigation. Geriatric care managers who documented a decedent's functional condition. These witnesses are non-parties. They are not subject to the retained expert disclosure deadlines. And they are not beyond the reach of Rule 205.

(1) The Applicable Framework

The Comment to Rule 192 makes clear that a party may not compel production from an opposing party of materials relating to a non-retained expert, nor of the materials identified in Rule 192.3(e)(5) and (6) relating to such experts. Discovery from a non-retained expert — as a non-party witness — may be obtained through Rules 176 and 205. TEX. R. CIV. P. 195.1–.4; *see also* TEX. R. CIV. P. 194.2(f). The consequence is that neither the expert designation deadlines nor the retained expert production obligations apply. The non-retained expert's deposition and the production request directed to her are governed by the non-party discovery rules, with all the notice and timing requirements that Rule 205 imposes.

A workable approach: obtain documents from the non-retained expert under Rule 205.3 first, review them, then notice the deposition. Trying to depose a treating physician without first reviewing her records is a common mistake. The records inform the deposition. Reversing the sequence wastes time, money, and frequently the only meaningful opportunity to question the witness.

(2) Compensation Claims and the Burden of Proof

Non-retained experts present a compensation problem that does not arise with ordinary fact witnesses or with retained experts whose fees are already settled. A treating physician asked to produce extensive records or appear for a deposition may assert that compliance imposes an undue burden — and may claim entitlement to compensation beyond the statutory witness fee. Whether that claim succeeds depends on whether the non-party supports it with actual evidence.

The Texas Supreme Court addressed this directly in *In re K & L Auto Crushers, LLC*. 607 S.W.3d 358 (Tex. 2021) (orig. proceeding). The case involved subpoenas served on treating physicians requesting documents relating to their billing practices and letters of protection—records that bear on a provider's financial interest in the outcome of the litigation. The treaters argued undue burden. They produced no evidence to support the claim. The Texas Supreme Court dismissed the argument. A non-retained expert who seeks compensation for complying with a subpoena duces tecum or a Rule 205 production request must produce evidence of the burden claimed, not merely assert it.

The *K & L Auto Crushers* holding applies directly in probate litigation. When a non-retained treating physician or mental health professional resists Rule 205 production by invoking burden—and this will happen—the requesting party can and should demand evidentiary support. A motion to compel that presents the trial court with an unsupported objection on one side and a properly served Rule 205 request on the other has a predictable outcome.

(3) Medical Records and the Rule 205.3(c) Court Order

Rule 205.3(c) specifically addresses compelled production of a third party's medical records, authorizing production by court order. This provision has relevance beyond the simple scenario of a patient's records in a treating physician's file. In capacity cases, the medical records are frequently the most probative evidence in the record, and the physician or care facility holding them may assert HIPAA or confidentiality grounds for non-compliance with a subpoena duces tecum. A Rule 205.3(c) court order is the appropriate vehicle for overcoming that resistance.

The interplay between Rule 205.3(c) and the non-retained expert framework becomes particularly important when the non-party medical witness holds both the patient's records and formed opinions about the patient's condition. Counsel should consider obtaining the Rule 205.3(c) order for records while separately addressing the deposition subpoena, rather than attempting to accomplish both through a single subpoena duces tecum that the witness can partially resist.

(4) Letters of Protection

Letters of protection—arrangements under which a provider defers billing in exchange for an assignment of potential litigation proceeds—create a financial relationship between a non-retained expert and the outcome of the litigation that is itself proper subject matter for Rule 205 discovery. The *K & L Auto Crushers* decision specifically arose from subpoenas seeking N. Cypress documents: records establishing a provider's billing practices and the terms of any letter of protection. Where a testator's treating physicians operated under such arrangements, those arrangements bear on the physician's financial interest in any adverse verdict and are discoverable through the Rule 205 subpoena process. TEX. R. CIV. P. 205.3(d).

(5) Non-Retained Expert Deposition Timing: A Trap Worth Knowing

Attorneys sometimes proceed on the assumption that a treating physician's deposition can be noticed at any time before trial. That assumption is incorrect if the discovery deadline has passed. The non-retained expert's deposition is subject to the same discovery period constraint as any other non-party deposition. Rule 205.3(a)'s requirement that production requests be served no later than 30 days before the end of the discovery period reflects the same principle: non-party discovery has to be accomplished during the discovery period, not after it closes. Courts are generally unsympathetic to parties who failed to pursue non-retained expert testimony during discovery and then seek relief after the deadline.

F. Objections, Privilege, and Protective Orders

(1) Motion to Quash v. Written Objections

The distinction between a motion to quash and written objections is procedural but important. A motion to quash is the appropriate vehicle for a party—as opposed to the non-party—challenging a subpoena directed at a third person. The non-party subject to the subpoena must serve written objections. TEX. R. CIV. P. 176.6(d). *See also In re Medina*, No. 13-19-00537-CV, 2019 WL 6906572, at *6 (Tex. App.—Corpus Christi 2019, orig. proceeding). Written objections must be served before the time specified for compliance; Texas rules do not impose a 14-day response deadline analogous to Federal Rule 45.

A successful motion to quash requires the requesting party to re-serve the subpoena from scratch. The non-party need not comply with the challenged portion of a subpoena unless and until ordered to do so after the court resolves the objection. TEX. R. CIV. P. 176.6(d). That procedural reality gives non-parties a meaningful ability to delay production—which is why early communication, before the subpoena is served, frequently produces a more efficient result than a cold subpoena followed by a contested objection.

(2) The Boilerplate Problem

Non-parties — particularly corporate entities with outside counsel — routinely respond to Rule 205 subpoenas with objections that are generic, formulaic, and legally insufficient. The rules require specificity. Objections to written discovery must state "the legal or factual basis for the objection and the extent to which the [party] is refusing to comply." TEX. R. CIV. P. 193.2(a); *see also* TEX. R. CIV. P. 193.1. The responding party's duty to make a complete response does not disappear because the respondent is a non-party. Objections asserting that requests are "overbroad," "harassing," "irrelevant," or "unduly burdensome"—without explanation of why—are insufficient and should be met with a motion to compel.

Courts are not patient with non-parties who invoke boilerplate objections as a delay tactic. TEX. R. CIV. P. 176.6(e); *see* TEX. R. CIV. P. 192.6. The requesting party who encounters a wall of generic objections is not without options: a motion to compel that demonstrates the requesting party's compliance with Rule 205's procedural

requirements and the non-party's failure to articulate a valid basis for withholding places the burden on the non-party to justify its position with specificity.

(3) Privilege and Confidentiality

Non-parties may raise legitimate privilege and confidentiality objections, and those objections deserve serious attention. A non-party has the right to object to disclosure of confidential documents and to seek enforcement of an existing protective order, even without a formal appearance in the underlying case, provided it participates in the discovery proceedings by raising the objection through the appropriate procedure. TEX. R. CIV. P. 176.6(e). A motion for protection is available under Rules 176.6(e) and 192.6(a)–(b), but must be filed within the time permitted for response to the discovery request.

Proactive disclosure of the operative protective order — before the non-party asks for it — is a simple courtesy that avoids a predictable skirmish. In significant probate disputes where non-party discovery is anticipated from the outset, the original protective order should be drafted with a mechanism for non-parties to sign on without further motion practice. A non-party that objects primarily because it has no assurance of confidentiality often stops objecting once that assurance is in place.

When the existing protective order does not address a non-party's specific concern, a Rule 11 agreement tailored to the confidentiality issue is a practical alternative. It gives the non-party clear and enforceable protection; it avoids the time and cost of motion practice; and it allows document production to proceed on schedule.

(4) Undue Burden

Rule 176.7 requires parties to "take reasonable steps to avoid imposing undue burden or expense on the person served." TEX. R. CIV. P. 176.7. The obligation runs in both directions. A non-party claiming undue burden must support that claim with evidence, not merely assert it—the principle established in *In re K & L Auto Crushers* applies broadly, not only to expert witnesses. A non-party's unsupported representation that production will be burdensome does not bind the requesting party or the court.

A reasonable compliance period runs over 30 days, though extensions are routinely negotiated. Any agreed extension should be confirmed in writing, with explicit attention to whether the scheduling order's discovery deadline still permits the extension. Verbal agreements about compliance dates are reliable only until they're disputed.

G. Geographic Limits on Subpoena Power

A non-party cannot be compelled to appear or produce documents in a county more than 150 miles from where the witness resides or is served. TEX. R. CIV. P. 176.3(a); TEX. CIV. PRAC. & REM. CODE § 22.002. Texas has not adopted the Uniform Interstate Depositions and Discovery Act, which means Texas practitioners must navigate more procedural complexity than their counterparts in most other states when seeking discovery from non-parties located at a distance. *Compare In re Prince*, No. 14-06-00895-CV, 2006 WL 3589484, at *1 (Tex. App.—Houston [14th Dist.] Dec. 12, 2006, orig. proceeding).

Within Texas, the 150-mile rule generates three scenarios. A witness located in Texas within 150 miles of the courthouse can be compelled to appear where the court sits. A witness located in Texas but more than 150 miles away can be subpoenaed from the originating court but can be compelled to comply only in the county where the witness resides or is served. A witness located outside Texas requires an alternative mechanism—voluntary compliance, an out-of-state deposition order, or a letter rogatory.

Results with out-of-state deposition orders have been mixed in Texas courts. TEX. R. CIV. P. 201.1(c); *see also In re Issuance of Subpoenas for Depositions of Bennett*, 502 S.W.3d 373, 376 (Tex. App.—Dallas 2016, orig. proceeding). Letters rogatory under Rule 201.1(c)—formal requests by one court to a court in another jurisdiction to gather evidence—are a more established mechanism, and Texas courts have been willing to issue them in response to requests from other states. *In re Brown*, 653 S.W.3d 721 (Tex. 2022). An open letter rogatory, which does not require repeated return trips to the issuing court, is worth requesting where multiple out-of-state non-party depositions are anticipated.

One question the Supreme Court has not definitively resolved is whether the 150-mile limitation applies to corporate representative depositions noticed under Rule 199.3. The parties in *In re Brown* briefed the issue, but the Court's holding addressed a trial subpoena and did not settle the question for pre-trial depositions. 653 S.W.3d 721 (Tex. 2022); *see also* TEX. R. CIV. P. 199.2(b)(1); TEX. R. CIV. P. 176.6(a)–(b). Practitioners noticing corporate representative depositions from entities with out-of-state management should anticipate the argument being raised.

H. Practical Guidance for Using Rule 205 in Probate and Fiduciary Litigation

Rule 205 is a precision instrument. The non-parties who matter most in probate and fiduciary disputes—treating physicians, geriatric care managers, accountants, prior counsel, financial advisors—are also the witnesses most likely to resist discovery, most likely to retain their own counsel, and most likely to generate the kind of compliance costs and procedural friction that consume litigation resources before a single document lands in your file. The following points address the most consequential practice issues.

Build the discovery schedule around Rule 205.3(a)'s 30-day cutoff. This is not a soft guideline. It is a hard limit, and it interacts with the 10-day notice-before-subpoena requirement for document production in a way that compresses the effective timeline even further. In a case where non-party financial records, medical records, or professional files are central to the dispute, the docket control order should identify non-party discovery targets by category and backtrack from the discovery cutoff to calculate compliance dates.

Communicate before you serve. A Rule 205 subpoena arriving without prior contact almost always generates a motion to quash or a stack of boilerplate objections. A call or email to the non-party or its counsel before service—explaining the nature of the case, the scope of what is needed, and a proposed compliance timeline—frequently converts a hostile response into a managed production. The investment in that conversation costs an hour. The motion practice it avoids costs multiples of that.

Sequence non-retained expert discovery carefully. For treating physicians, care providers, and other non-retained witnesses with expert-level knowledge, serve the Rule 205 document production request first. Review the records. Then notice the deposition. The records shape the questions; the questions don't generate the records.

Don not confuse Rule 205 with § 59.006 for financial institution records. This bears repeating in any discussion of probate practice. The instinct to reach for a Rule 205 subpoena when seeking bank records is understandable and consistently wrong. The consequences of getting it wrong — procedural defect, objection, wasted time, and a § 59.006 process that must be started from scratch — are entirely avoidable.

Memorialize everything. Agreed extensions of compliance deadlines should be confirmed in writing before the original deadline passes. Agreements about cost reimbursement should be in writing before production begins. Rule 11 agreements with non-parties should be signed before sensitive documents are exchanged. Practitioners who rely on verbal agreements with non-party counsel relitigate those agreements.

Draft protective orders to anticipate non-party participation. In significant estate and trust disputes, the original protective order—entered before non-party discovery is initiated—should include a mechanism for non-parties to sign on without further motion practice. A non-party's confidentiality objection often dissolves when the protective order clearly addresses the specific concern the non-party has about disclosure.

VI. DISCOVERY FROM FINANCIAL INSTITUTIONS

A. Overview

In probate and estate litigation, financial institution records are among the most important sources of evidence. Bank statements, account histories, wire transfer records, safe deposit box logs, and signature cards can establish the existence and location of assets, trace the movement of funds, expose unauthorized transactions, and illuminate the testator's or ward's financial condition at critical moments. Yet the procedure for compelling production of these records is one of the most consistently misapplied areas of Texas discovery practice.

Practitioners who reach for Texas Rule of Civil Procedure 205—the general rule governing third-party discovery through depositions on written questions or subpoenas—when they want bank records are working from the wrong statute. Texas Finance Code § 59.006 controls, and its first operative sentence removes all doubt: Section 59.006 states that it "is the exclusive method for compelled discovery" of financial institution customer records. TEX. FIN. CODE § 59.006(a). The consequences of that exclusivity run throughout the procedure. Notice timing, customer rights, production deadlines, and the *in camera* inspection process are all dictated by section 59.006, and departure from its requirements exposes the requesting party to objections that cannot be cured by appeal to the general discovery rules.

This section explains the § 59.006 procedure in the sequence a practitioner will encounter it: from the initial notice obligation to the financial institution, through the non-party customer notification and consent process, to the production deadlines that govern when the institution must actually deliver the records. A practice tips section follows.

B. The Statutory Framework

(1) Scope and Exclusivity

Section 59.006 applies to any judicial, administrative, or other proceeding in which compelled discovery of financial institution records is sought. *Id.* For purposes of the provisions most relevant to probate and estate litigation, the key phrase is "records relating to a customer"—meaning that section 59.006 governs whenever the records sought belong to or concern an account holder or other customer of the institution, regardless of whether that customer is a party to the lawsuit.

The exclusivity provision is categorical. A party may not compel production of financial institution customer records through Rule 205, Rule 176 (subpoena), or any other mechanism outside section 59.006. Scott E. Lindsey, Dwayne W. Smith & Jason C.N. Smith, *Misunderstood and Underused Discovery and Evidentiary Rules*, Ch. 6, 37th Annual Advanced Evidence and Discovery Course (State Bar of Texas 2024), at 15. This is not a procedural preference or a default rule that parties can contract around. Compliance with section 59.006's procedures is a prerequisite to production, not merely a technical formality.

That exclusivity matters immediately in probate practice. A will contestant seeking the decedent's account records to establish undue influence, an executor investigating unauthorized pre-death withdrawals, or a guardian ad litem tracing a ward's assets must all proceed under § 59.006—not a routine Rule 205 subpoena.

(2) Notice to the Financial Institution

The requesting party's first obligation under § 59.006 is to provide the financial institution with at least twenty-four days' notice before the day designated for compliance. TEX. FIN. CODE § 59.006(b)(1). This is a hard minimum. Unlike the general discovery rules, which permit the parties to alter response periods by agreement, the twenty-four-day floor for financial institution record requests reflects the legislature's judgment that institutions require adequate time to locate, review, and produce customer records and to manage their own notification obligations under the statute.

The notice must identify the records sought with sufficient specificity to allow the institution to locate and produce them. Although § 59.006 does not enumerate the formal contents of the notice with the same particularity that Rule 205 specifies for written questions, the requesting party should treat the notice with care appropriate to any legally operative document: identify the parties, describe the records by account, time period, and type, and specify the compliance deadline in terms that allow the institution to calculate the twenty-four-day period without ambiguity.

(3) Payment of Reasonable Expenses

Section 59.006 conditions the right to obtain records on the requesting party's agreement to pay the financial institution's reasonable expenses incurred in connection with production. *Id.* at § 59.006(a)(1), (2). This reflects a policy judgment—familiar from analogous federal frameworks—that the costs of responding to compelled third-party discovery should not fall entirely on uninvolved institutions. In practice, requesting parties should anticipate and budget for these costs, which typically include staff time, duplication charges, and data extraction fees. Disputes about the amount of reasonable expenses are subject to court resolution, but the obligation to pay is a precondition to production, not a post-production accounting exercise.

(4) Non-Party Customer Notice and Consent

The most procedurally demanding aspect of § 59.006 arises when the financial institution's customer is not a party to the litigation. This scenario is common in probate and estate matters. The account holder may be the decedent—whose estate is a party but whose individual legal existence has ended—a beneficiary not formally joined, a third party who received transfers from the estate account, or a business entity in which the estate held an interest.

When the customer is a non-party, the requesting party must satisfy three additional requirements. *Id.* § 59.006(c), (e). First, the requesting party must give notice to the customer. This notice must advise the customer of the pending request and of the customer's right to petition the court to prevent production under § 59.006(e). Second, the requesting party must file with the court a certificate establishing that proper notice to the customer was given. This certification requirement ensures that a record of compliance exists before production occurs. Third, the requesting party must request the customer's written consent to production by the financial institution.

These three steps are cumulative, not alternative. A party who notifies the customer but fails to file the certificate, or who obtains informal acknowledgment but not written consent, has not completed the non-party customer process required by § 59.006(c).

(5) Consent or *In Camera* Inspection

If the non-party customer provides written consent before the financial institution's compliance deadline, the institution may proceed to production. *Id.* at § 59.006(c). Written consent operates as a waiver of the customer's statutory privacy protections and relieves the requesting party of the obligation to seek court intervention.

If the customer does not provide written consent by the compliance deadline, the requesting party must petition the court for an in camera inspection of the records. *Id.* at § 59.006(d). Section 59.006(d) makes an *in camera* inspection the requesting party's "sole means of obtaining access to the requested record" absent consent. Critically, this process cannot be bypassed by agreement between the requesting party and the financial institution. The statute requires court involvement, and the institution is not authorized to produce records until that process is complete.

(6) Production Deadlines

The financial institution's deadline for producing records is the latest of three dates:

(1) the twenty-fourth day after the institution receives the record request;

(2) the fifteenth day after the institution receives the customer's written consent; or

(3) the fifteenth day after the court orders production following an in camera inspection.

Id. at § 59.006(b)(3).

This layered deadline structure tracks the procedural sequence the statute creates. The institution's compliance deadline does not run independently of the customer-notification process: if the customer's consent is received late, or if the *in camera* process extends beyond the initial twenty-four-day window, the institution's deadline adjusts accordingly. Requesting parties must account for these timing dependencies when structuring discovery schedules, particularly in cases with tight trial or hearing settings.

C. The Relationship to Rule 205

Texas Rule of Civil Procedure 205 governs discovery from non-party witnesses through depositions on written questions and requests for production attached to a subpoena or notice of deposition. On its face, Rule 205 would appear to provide an independent mechanism for obtaining bank records: serve a subpoena on the financial institution, attach a document request, and await production.

That analysis is incorrect. Section 59.006's exclusivity provision supersedes Rule 205 in this context. The Finance Code, as a specific statute governing a defined category of records, controls over the general framework for third-party civil discovery. Lindsey et al., *Misunderstood and Underused Discovery and Evidentiary Rules*, *supra* note 3, at 15. A Rule 205 subpoena served on a financial institution for customer records—without compliance with § 59.006's notice, certification, consent, and in camera procedures—is procedurally defective. Financial institutions may, and routinely do, object to compliance on that basis.

The practical import for probate and estate litigation is direct: before serving any discovery request directed at a financial institution for customer records, counsel must verify that the § 59.006 procedure governs and follow it accordingly.

D. Practice Tips for Discovery to Financial Institutions

The following are some practice tips that a litigator can employ when utilizing discovery to a financial institution:

- Build the twenty-four-day notice period into every discovery schedule. The twenty-four-day advance notice requirement means that financial institution discovery cannot be initiated on short notice. When drafting the case schedule or docket control order, identify financial institution discovery as a distinct category and back-calculate the notice deadline from the desired production date. Leave additional time for the non-party customer process if any accounts are held by non-parties.
- Identify all non-party account holders at the outset. In estate litigation, relevant accounts frequently belong to the decedent individually, to a trust or business entity, or to a co-owner. Before sending notice to the financial institution, determine whether any customer of record is a non-party and invoke the § 59.006(c) procedures accordingly. Failing to identify a non-party account holder at the start—and thus failing to provide the required customer notice—can delay production and create certification problems that require restarting the process.
- Send the customer notice simultaneously with—or immediately after—the institutional notice. The customer's written consent is needed before the financial institution's compliance deadline. If the customer notice is delayed, the consent window shrinks, increasing the likelihood that the *in camera* petition process will be triggered. Parallel timing minimizes that risk and keeps the schedule intact.

- Prepare the § 59.006(c) certificate for immediate filing. The certification of proper customer notice is a filing obligation, not an optional formality. Draft the certificate when the customer notice is sent so it can be filed promptly and the record of compliance is complete before any production dispute arises.
- Budget for the institution's reasonable expenses before issuing the request. Financial institutions are entitled to their reasonable costs of production as a precondition to compliance. Anticipate these costs, particularly for requests involving extended date ranges or multiple account types. A dispute over the amount of those expenses can delay production and is best addressed before—not after—the compliance deadline approaches.
- Do not attempt to substitute Rule 205 for § 59.006. The exclusivity of § 59.006 is not a technicality. Practitioners who serve conventional subpoenas on financial institutions for customer records invite objections that cannot be cured retroactively. Restarting the § 59.006 process from scratch consumes time that may be unavailable in cases near a trial or hearing setting, and can foreclose access to evidence entirely.
- Account for the layered production deadlines in any scheduling order. If the litigation schedule requires financial institution records by a particular date, structure the § 59.006 notice so that even the latest possible production deadline—triggered by the *in camera* process—falls within the required timeframe. Do not assume that service of the initial notice guarantees production by the twenty-fourth day.

VII. SUMMARY JUDGMENTS

The Texas Supreme Court has issued its Final Approval of Amendments to Rule 166a of the Texas Rules of Civil Procedure. FINAL APPROVAL OF AMENDMENTS TO RULE 166A OF THE TEXAS RULES OF CIVIL PROCEDURE, Supreme Court of Texas, Misc. Docket No. 24-9102 (effective May 1, 2024). The amended summary judgment rules only apply to summary judgment motions filed on or after March 1, 2026. TEX. R. CIV. P. 166a. While this paper focuses on how amended Rule 166a impacts discovery, the entire amended rule requires careful study not fully covered in this paper. Practitioners should review the full amendment to ensure their Rule 166a motions practices comply.

A. Summary Judgments and the Fiduciary Landscape

Summary judgment occupies a unique position in fiduciary litigation. While breach of fiduciary duty claims, removal actions, and heirship contests, etc. are often characterized as purely "fact intensive," many fiduciary and probate disputes present discrete legal issues that are well suited for pretrial resolution through a motion for summary judgment. Texas courts routinely resolve questions concerning the existence and scope of fiduciary duties, standing, limitations, reliance on governing instruments, and statutory compliance through summary judgment. As a result, summary judgment often functions not only as a dispositive mechanism, but also as a powerful tool for narrowing claims and defenses before trial. Fiduciary cases frequently involve layered relationships such as trustees, executors, agents under powers of attorney, corporate officers, beneficiaries, and heirs, which are each governed by different sources of authority and confer different duties. While most practitioners know that discovery serves as the foundation for identifying which claims can be resolved as a matter of law and which must proceed to trial, just as many overlook the vital role of discovery in the summary judgment context.

B. The Use of Evidence in Motions for Summary Judgment

In reviewing discovery in the summary judgment context, practitioners should remember that "[a] motion for summary judgment is a trial on paper." David Hittner, Lynne Liberato, Kent Rutter & Jeremy Dunbar, *Summary Judgments in Texas: State and Federal Practice*, 62 S. TEX. L. REV. 99, 100 (2023). In looking through a trial lens, summary judgment evidence must be presented in a form that would be admissible in a conventional trial proceeding. *Okpere v. Nat'l Oilwell Varco, L.P.*, 524 S.W.3d 818, 824 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). However, oral testimony may not be presented at a summary judgment hearing. TEX. R. CIV. P. 166a(g)(4); *FieldTurf USA, Inc. v. Pleasant Grove Indep. Sch. Dist.*, 642 S.W.3d 829, 838 (Tex. 2022).

As a general matter, the proper scope for a trial court's review of evidence for summary judgment "encompasses all evidence on file at the time of the hearing […]" *Judwin Props., Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 503 (Tex. App.—Houston [1st Dist.] 1995, no writ). The amended rule explicitly provides that "[e]vidence may be produced by making a specific reference to it and where it may be found in the Court's file." TEX. R. CIV. P. 166a(j)(2).

The Texas Rules of Civil Procedure only require certain discovery to be filed with the trial court. Pursuant to Rule 191.4(a), the following discovery materials must not be filed:

> (1) discovery requests, deposition notices, and subpoenas required to be served only on parties;

(2) responses and objections to discovery requests and deposition notices, regardless on whom the requests or notices were served;

(3) documents and tangible things produced in discovery; and

(4) statements prepared in compliance with Rule 193.3(b) or (d).

TEX. R. CIV. P. 191.4(a).

Conversely, Rule 191.4(b) provides that the following discovery materials must be filed:

(1) discovery requests, deposition notices, and subpoenas required to be served on nonparties;

(2) motions and responses to motions pertaining to discovery matters; and

(3) agreements concerning discovery matters, to the extent necessary to comply with Rule 11.

TEX. R. CIV. P. 191.4(b).

The Court may order that discovery materials be filed. TEX. R. CIV. P. 191.4(c)(1). Still, a practitioner has options if he or she wishes to use discovery materials not on file with the clerk. The amended rule provides that discovery not on file may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments are filed with a statement of intent to use the specified discovery as summary judgment evidence. TEX. R. CIV. P. 166a(j)(3).

But the amended rule requires that parties act quickly. If the evidence is to be used to support the motion for summary judgment, it must be filed with the motion. TEX. R. CIV. P. 166a(j)(3). Similarly, evidence must be filed with nonmovant's response. TEX. R. CIV. P. 166a(j)(3).

C. Amended Deadlines and Their Impact on Discovery

(1) Filing Deadlines

The summary judgment rules explicitly allow for an initial motion, a response, as well as a reply. TEX. R. CIV. P. 166a(b), (d), (e). Perhaps the most substantial revision, summary judgment deadlines are now tied to the date that the motion is filed, regardless of whether a hearing has been set. *See* TEX. R. CIV. P. 166a. For example, a nonmovant's response is due 21 days after the motion is filed TEX. R. CIV. P. 166a(d)(1)., and the movant's reply is due 7 days later. TEX. R. CIV. P. 166a(e)(1). While, these default rules may be changed upon agreement of the parties or leave of court, TEX. R. CIV. P. 166a(d)(1), (e)(1). motions that do not meet this deadline will be automatically denied absent leave of court TEX. R. CIV. P. 166a.

Practice Tip: Be sure to consult with your local rules. Dallas County, for example, issued an order in response to these changes and now requires parties to file summary judgment motions at least 90 days before any trial setting. *General Order*, Civil District Courts of Dallas County, Texas (Mar. 2, 2026).

When filing a response, the nonmovant "must produce any evidence in support of the response." TEX. R. CIV. P. 166a(d)(2). The amendment further clarifies the types of evidence that may be included. The amendment specifically provides that evidence may include:

- Deposition transcripts;
- An opposing party's pleadings, interrogatory answers, admissions, and other discovery responses;
- Affidavits and declarations;
- Stipulations; and
- Other authenticated evidence.

TEX. R. CIV. P. 166a(j)(1).

Under these new standards, practitioners need to beware of myriad considerations. With respect to nonmovant's response, the rules also explicitly provide procedure for the unavailability of evidence. TEX. R. CIV. P. 166a(d)(3). Specifically, the nonmovant "must file an affidavit or declaration specifying the reasons why the nonmovant cannot present facts essential to justify its opposition." TEX. R. CIV. P. 166a(d)(3). The rule provides the court three options. The court can "extend the time to file the response, deny the motion without prejudice to permit additional discovery, or issue another appropriate order." TEX. R. CIV. P. 166a(d)(3).

As a practical matter, practitioners need to consider early the type of evidence and the source, because that evidence may be required both to move for summary judgment and to defend against it. With these tighter deadlines, practitioners may find themselves scrambling to issue subpoenas, schedule depositions, or engage in other discovery

practices. This dilemma is possible both in the Traditional and the No Evidence context but raises substantial concerns in the No Evidence context. The amended rule allows a movant to move for Traditional Summary Judgment "any time after the nonmovant has appeared or answered." TEX. R. CIV. P. 166a(b)(3)(A). But, the amended rule allows a movant to move for a No Evidence Summary Judgment "after an adequate time for discovery." TEX. R. CIV. P. 166a(b)(3)(B). Cases that have been idling, or languishing, without a Docket Control Order issued by the Court or drafted and agreed upon by the parties, may suddenly find themselves without the evidence to defend against a No Evidence Motion. Worse, with these new deadlines they may not have time to secure necessary evidence.

(2) Hearing Deadlines

The hearing deadlines now follow a similar structure to the deadlines imposed by Texas Rule of Civil Procedure 91a. *See* TEX. R. CIV. P. 91a; *see* TEX. R. CIV. P. 166a. Hearing or submission dates cannot be earlier than 35 days after the motion is filed. TEX. R. CIV. P. 166a(g)(1). Courts must set a hearing or submission date within 60 days of the motion's filing TEX. R. CIV. P. 166a(g)(1)(A), or within 90 days if (1) the court's docket so requires; (2) on a showing of good cause; or, (3) if the movant agrees. TEX. R. CIV. P. 166a(g)(1)(B)(i)–(iii).

Courts must issue a ruling within 90 days after the hearing or submission date. TEX. R. CIV. P. 166a(h)(4)(i).

D. Objections to Evidence and Preserving Error

The rules of error preservation that apply in trial also apply in summary judgment proceedings. *See* Lynne Liberato & Natasha Breaux, *Objecting to Summary Judgment Evidence in State Court: Recent Clarifications*, 57 S. TEX. L. REV. 1 (2015).

To preserve complaint for appellate review, a party must (1) complain to the trial court in a timely request, objection, or motion; and, (2) the trial court must rule or refuse to rule. TEX. R. APP. P. 33.1(a); *Mansions in the Forest, L.P. v. Montgomery Cnty.*, 365 S.W.3d 314, 317 (Tex. 2012) (per curiam). Thus, unless the record shows a clearly implied ruling by the trial court, trial courts must expressly rule on evidentiary objections. *Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 166 (Tex. 2018).

Judge Hittner provides the following practice tips:

> 1. Practitioners should incorporate all of their objections to summary judgment evidence in proposed orders granting or denying summary judgment.
>
> 2. The party asserting the objections should obtain an express ruling at, before, or very near the time the trial court rules.
>
> 3. The trial court should disclose its ruling on all objections to summary judgment evidence at or before the time it enters the order granting or denying the summary judgment.
>
> Hittner et al., *Summary Judgments in Texas*, *supra* note 3.

Objections to the substance of summary judgment evidence may be raised for the first time on appeal; however, failure to object to the form of summary judgment evidence waives any defects concerning form. *Willis v. Nucor Corp.*, 282 S.W.3d 536, 548–49 (Tex. App.—Waco 2008, no pet.). But, practitioners should beware. Inconsistencies abound in the courts of appeal regarding what constitutes a defect in form versus one of substance. If summary judgment evidence is completely absent from the court's file, and said evidence was necessary to support summary judgment, the absence constitutes a substantive error that may be raised for the first time on appeal. *Lance v. Robinson*, 543 S.W.3d 723 (Tex. 2018).

E. Pleadings as Evidence

As a general matter, factual statements in pleadings do not constitute summary judgment. *Regency Field Servs., LLC v. Swift Energy Operating, LLC*, 622 S.W.3d 807, 818–19 (Tex. 2021). This general rule holds true of verified pleadings. *Id.* But a practitioner may use an opponent's pleadings if they contain judicial admissions. *H2O Sols., Ltd. v. PM Realty Grp., LP*, 438 S.W.3d 606, 617 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). Judicial admissions in this context means statements admitting facts or conclusions contrary to a claim or defense. *Id.*

F. Deposition Testimony as Summary Judgment Evidence

Deposition testimony may be used as summary judgment evidence. TEX. R. CIV. P. 166a(j)(1)(A). But, deposition testimony is subject to the same objections that might have been made to questions and answers if the witness had testified at trial. *See* TEX. R. CIV. P. 199.5(e). Rather, depositions only have "the force of an out of court admission and may be contradicted or explained in a summary judgment proceeding." *Molnar v. Engels, Inc.*, 705

S.W.2d 224, 226 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.); *Combs v. Morrill*, 470 S.W.2d 224, 228 (Tex. App.—Austin 1971, no writ). With respect to admissibility, deposition excerpts submitted as summary judgment evidence need not be authenticated. *McConathy v. McConathy*, 869 S.W.2d 341, 342 (Tex. 1994) (per curiam). Copies of the deposition pages alone are sufficient. *Id.* at 341–42.

G. Answers to Interrogatories and Requests for Admissions as Summary Judgment Evidence

Answers to interrogatories as well as requests for admissions are permissible forms of summary judgment evidence TEX. R. CIV. P. 166a(j)(1)(B).; however, like deposition testimony, answers to interrogatories and requests for admissions must otherwise be admissible as evidence. *See Farmer v. Ben E. Keith Co.*, 919 S.W.2d 171, 175 (Tex. App.—Fort Worth 1996, no writ). Practitioners should inspect interrogatories for conclusions, hearsay, and opinion testimony, because those objections must be brought to the attention of the trial court in a responsive pleading.

Answers to requests for admissions and interrogatories may only be used against the responding party. TEX. R. CIV. P. 197.3; *Yates v. Fisher*, 988 S.W.2d 730, 731 (Tex. 1998) (per curiam). In that same vein, a party may not use its own answers to interrogatories TEX. R. CIV. P. 197.3; *Morgan v. Anthony*, 27 S.W.3d 928, 929 (Tex. 2000) (per curiam) A party may also not use its denials to requests for admissions as summary judgment evidence. *Barragan v. Mosler*, 872 S.W.2d 20, 22 (Tex. App.—Corpus Christi 1994, writ denied).

H. Deemed Admissions as Summary Judgment Evidence

To start, an unanswered request for admission is automatically deemed admitted without the necessity of a court order. TEX. R. CIV. P. 198.2(c). Deemed admissions can also be competent summary judgment evidence. *Gellatly v. Unifund CCR Partners*, No. 01–07–00552–CV, 2008 WL 2611894, at *4 (Tex. App.—Houston [1st Dist.] July 3, 2008, no pet.). To properly be considered summary judgment evidence, the requests must be on file with the court at the time of submission of the motion for summary judgment. *Vaughn v. Grand Prairie Indep. Sch. Dist.*, 784 S.W.2d 474, 478 (Tex. App.—Dallas 1989, *rev'd on other grounds*). Further, any matter admitted is conclusively established against the party making the admission unless the court, on motion, allows the withdrawal of the admission. TEX. R. CIV. P. 198.3; *Hartman v. Trio Transp., Inc.*, 937 S.W.2d 575, 580 (Tex. App.—Texarkana 1996, writ denied). Consequently, if a party fails to answer requests for admissions, then that party is precluded from offering summary judgment proof contrary to those admissions. *State v. Carrillo*, 885 S.W.2d 212, 214 (Tex. App.—San Antonio 1994, no writ).

Once admissions are made or deemed by the court, they "may not be contradicted by any evidence, whether in the form of live testimony, or summary judgment affidavits." *Smith v. Home Indem. Co.*, 683 S.W.2d 559, 562 (Tex. App.—Fort Worth 1985, no writ). However, a response to a request for admission can only be used against "the party making the admissions." *U.S. Fid. & Guar. Co. v. Goudeau*, 272 S.W.3d 603, 608 (Tex. 2008).

Withdrawal of a deemed admission requires either a proper showing of (1) good cause, or (2) no undue prejudice. *Wheeler v. Green*, 157 S.W.3d 439, 442 (Tex. 2005) (per curiam). When the need to do so is not discovered before judgment, a request made in a motion for new trial may be sufficient to withdraw a deemed admission. *Id.*

I. Admissibility of Evidence in the Summary Judgment Context

Documentation relied on to support a summary judgment must be sound in terms of its own evidentiary value. Hittner et al., *Summary Judgments in Texas*, at 168–69. When using an affidavit to authenticate business records, the party offering the records must comply with Texas Rules of Evidence 803(b) and 902(10). *Norcross v. Conoco, Inc.*, 720 S.W.2d 627, 632 (Tex. App.—San Antonio 1986, no writ). The requirement of authentication as a condition precedent to admissibility of evidence may be satisfied by "evidence sufficient to support a finding that the item is what the proponent claims it is." TEX. R. EVID. 901(a).

Not all evidence needs to be authenticated. Texas Rule of Civil Procedure 193.7 provides that documents produced by the opposing party in response to written discovery are self-authenticating. TEX. R. CIV. P. 193.7. Specifically, 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 at trial unless - within ten days or a longer or shorter time ordered by the court, after the producing party has actual notice that the document will be used - the party objects to the authenticity of the document, or any part of it, stating the specific basis for objection. *Id.* An objection must be either on the record or in writing and must have a good faith factual and legal basis. *Id.* An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. *Id.* If objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity. *Id.*

In addition to document produced by an opposing party, the Texas Rules of Civil Procedure also allow for the admission of copies. Rue 196.3(b) allows the producing party to offer a copy of a document unless the authenticity of the document is under scrutiny or because fairness under the circumstances of the care requires production of the original. TEX. R. CIV. P. 196.3(b). Copies of original documents are acceptable if accompanied by a properly sworn affidavit that states that the attached documents are "true and correct copies of the originals." *Republic Nat'l Leasing Corp. v. Schindler*, 717 S.W.2d 606, 607 (Tex. 1986) (per curiam); *Hall v. Rutherford*, 911 S.W.2d 422, 425 (Tex. App.—San Antonio 1995, writ denied). The San Antonio Court of Courts, for example, has found that a copy of a letter that is unauthenticated, unsworn, and unsupported by affidavit was not proper summary judgment evidence. Hall, 911 S.W.2d at 425.

Because the objection to authenticity must be made within ten days after "actual notice that the document will be used," and the response is due twenty-one days after the motion is filed, a practitioner needs to begin reviewing the initial pleading and closely scrutinize any evidence that the movant intends to use. TEX. R. CIV. P. 193.7; TEX. R. CIV. P. 166a(d)(1).

Last, the Court may consider late-filed evidence if the court indicates its consideration in the record.

J. Judicial Notice of Court Records

A trial court may take judicial notice of its own records in a case involving the same subject matter between the same or near identical parties. *Ball v. Smith*, 150 S.W.3d 889, 895 (Tex. App.—Dallas 2004, no pet.); *Gardner v. Martin*, 345 S.W.2d 274, 276 (Tex. 1961). Importantly, on motion for summary judgment, certified copies of court records from a different case, even if pending in the same court, should be attached to the motion in the second case. *See Gardner*, 345 S.W.2d at 276–77. The failure of the movant to attach records from a different case precludes summary judgment. *Gardner*, 345 S.W.2d at 277; *Chandler v. Carnes Co.*, 604 S.W.2d 485, 487 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.).

K. Affidavits and Declarations

When an affidavit meets the Government Code's requirements, it may be used as summary judgment evidence. *See* TEX. R. CIV. P. 166a(j)(1)(C); *Life Ins. Co. of Va. v. Gar-Dal, Inc.*, 570 S.W.2d 378, 380 (Tex. 1978). Affidavits are sworn statements of fact signed by a competent witness. TEX. GOV'T CODE § 312.011(1). On the other hand, declarations are essentially unsworn affidavits. TEX. CIV. PRAC. & REM. CODE § 132.001(a) (West 2017). As long as declarations meet the requirements of the Civil Practice and Remedies Code, they may be used in place of an affidavit. TEX. CIV. PRAC. & REM. CODE § 132.001(a) (West 2017). The amended Rule 166a expressly provides that:

> An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify to the matters stated. A document referred to in an affidavit or declaration must be attached and either sworn or certified. The court may permit an affidavit or declaration to be supplemented or opposed by deposition or by another affidavit or declaration. Defects in the form of an affidavit or declaration or its attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.
>
> TEX. R. CIV. P. 166a(j)(4).

The amended rule also expressly provides penalties for affidavits or declarations submitted in bad faith. If satisfied that an affidavit or declaration is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subject to other appropriate sanctions. TEX. R. CIV. P. 166a(j)(5).

VIII. PRETRIAL DISCLOSURES AND THE EXCLUSIONARY RULE

A. Pretrial Disclosures

In preparing for trial, practitioners should be aware that there are two types of pretrial disclosures that must be made, which fall under Rule 194.4 and Rule 166 of the Texas Rules of Civil Procedure. While there may be some overlap between these two rules and the disclosures that must be made, there are significant differences in terms of timing and content of each set of disclosures.

The first set of pretrial disclosures that will be provided are those under Rule 194.4, which must be made thirty days before trial unless the court orders otherwise. TEX. R. CIV. P. 194.4(b). In addition to the disclosures required by

Rule 194.2 and 194.3, a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

- The name and, if not previously provided, the address, and telephone number of each witness-separately identifying those the party expects to present and those it may call if the need arises; and
- A list identifying each document or other exhibits, including summaries of other evidence-separately identifying those items the party expects to offer and those it may offer if the need arises.

TEX. R. CIV. P. 194.4 (a).

From a practical standpoint, and based on the language of the Rule, the parties could simply exchange exhibit and witness lists (which must be prepared for trial anyway) to comply with Rule 194.4.

On the other hand, Rule 166 contains a far more exhaustive list of items the court may, at its discretion, require for the parties to provide in conjunction with their pretrial conference. If ordered by the court, a party must provide the following under Rule 166:

a. All pending dilatory pleas, motions and exceptions;
b. The necessity or desirability of amendments to the pleadings;
c. A discovery schedule;
d. Requiring written statements of the parties' contentions;
e. Contested issues of fact and simplification of the issues;
f. The possibility of obtaining stipulations of fact;
g. The identification of legal matters to be ruled on or decided by the court;
h. The exchange of a list of direct fact witnesses, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before the time of trial, who will be called to testify at trial, stating their address and telephone number, and the subject of the testimony of each such witness;
i. The exchange of a list of expert witnesses who will be called to testify at trial, stating their address and telephone number, and the subject of the testimony and opinions that will be proffered by each expert witness;
j. Agreed applicable propositions of law and contested issues of law;
k. Proposed jury charge questions, instructions, and definitions for a jury case or proposed findings of fact and conclusions of law for a nonjury case;
l. The marking and exchanging of all exhibits that any party may use at trial and stipulation to the authenticity and admissibility of exhibits to be used at trial;
m. Written trial objections to the opposite party's exhibits, stating the basis for each objection;
n. The advisability of a preliminary reference of issues to a master or auditor for findings to be used as evidence when the trial is to be by jury;
o. The settlement of the case, and to aid such consideration, the court may encourage settlement;
p. Such other matters as may aid in the disposition of the action.

TEX. R. CIV. P. 166.

Rule 166 further requires the court to enter an order that recites the actions to be taken at the pretrial conference, the amendments allowed to the pleadings, the time within which such amendments may be filed, and the agreements made by the parties as to any of the matters considered. *Id.* The purpose of this order is to limit the issues for trial to those not disposed of by admissions, agreements of counsel, or rulings of the court. *Id.*; *Mission Municipal Hospital*, 563 S.W.2d 293, 295 (Tex. App.—Corpus Christi 1977, no pet.) (further stating that the purpose of the rule is "in narrowing the issues and in disposing of other matters which may aid in the final disposition of the action.").

The matters set forth in Rule 166 are most often required in the court's docket control order, as Rule 166 further permits the court to establish a pretrial calendar in that docket control order to set forth various pretrial deadlines for the entirety of the case. *Id.* A trial court has broad discretion to enforce a docket control order. *Id.*; *see also Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 240–41 (Tex. 2001). And, Texas case law demonstrates that the pretrial conference orders entered under Rule 166 are given deference over the general rules of procedure related to deadlines. *See Texas Commerce Bank Reagan Through Texas Commerce Bank Nat. Ass'n v. Lebco Constructors, Inc.*, 865 S.W.2d 68, 79 (Tex. App.—Corpus Christi 1993, writ denied) (party needed leave of court to file amended petition after the deadline

set in the pretrial conference order passed, regardless of the rule generally providing for amendment of pleadings offered more than seven days before trial); *Lindley v. Johnson*, 936 S.W.2d 53, 55–56 (Tex. App.—Tyler 1996 writ denied) (trial court's scheduling order prevails over deadlines set forth in procedural rule); *contra Mission*, 563 S.W.2d at 295 (trial court made no ruling at the pretrial conference regarding the timing of pleading amendments, so the plaintiff was at liberty to amend).

Controverted issues of fact cannot be adjudicated at a pretrial conference. *Provident Life & Acc. Ins. Co. v. Hazlitt*, 216 S.W.2d 805, 807 (Tex. 1949). However, issues of law may be disposed of at a pretrial conference. *Walden v. Affiliated Computer Services, Inc.*, 97 S.W.3d 303, 323 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) ("Just as the proper granting of a summary judgment or directed verdict does not offend the constitution, neither does the use of Rule 166 to dispose of legal issues"). And, issues that are fact questions become questions of law, which may be disposed of at a pretrial conference, when reasonable minds cannot differ on the outcome. *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., LLC*, 546 S.W.3d 648, 653 (Tex. 2018); *see also Logan v. Mullis*, 686 S.W.2d 605, 608 (Tex. 1985). Stipulations, orders, and agreements may also assist with the narrowing of issues and disposing of the case. *Providence Life*, 216 S.W.2d at 429.

B. Application of the Exclusionary Rule

At the pretrial conference or at trial, a party may invoke Rule 193.6 for any matter not timely disclosed by the opposing party, which is commonly called the "exclusionary rule." 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.
>
> TEX. R. CIV. P. 193.6(a).

A disclosure is presumed to be untimely if it was made less than thirty days before trial. TEX. R. CIV. P. 193.5(b). The burden of establishing good cause or the lack of unfair surprise or prejudice is on the party seeking to introduce the evidence or call the witness. TEX. R. CIV. P. 193.6(b). And, even if a party seeking to introduce the evidence fails to meet that burden, the court may grant a continuance or temporarily postpone trial to allow a response to be made, amended, or supplemented, and to allow opposing parties to conduct discovery regarding any new information presented by that response. TEX. R. CIV. P. 193.6(c). However, while the rule results in automatic exclusion of evidence not disclosed in discovery, it does not necessarily authorize the elimination of a party's legal theories. *Prescod v. Tkach*, No. 02–21–00162–CV, 2022 WL 246858, at *7 (Tex. App.—Fort Worth Jan. 27, 2022 no pet.) (finding that a party adequately pled a statute of limitations defense, even though it was not also disclosed in discovery). The timing of pleading the cause of action or defense, however, will matter when courts apply the exclusionary rule.

Rule 215 of the Texas Rules of Civil Procedure provides a list of sanctions that can be utilized against the offending party in varying degrees of severity:

a. an order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

b. an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

c. an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

d. an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

e. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

f. in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

g. when a party has failed to comply with an order under Rule 204 requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this

subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.

h. In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

TEX. R. CIV. P. 215.2

Further, Texas case law shows that the exclusionary rule is considered to be a sanction for the failure to disclose and is analyzed in that context. A trial court has power, implicit under Rule 166, to sanction a party for failing to obey the court's pretrial orders. *Koslow's v. Mackie*, 796 S.W.2d 700, 703–04 & n.1 (Tex. 1990). However, a trial court abuses its discretion if the sanctions imposed are not just. *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991) (orig. proceeding).

The court can exclude the admission of evidence or testimony, even if that testimony is from one of the parties. *See Williams v. Nunnally-Williams*, No. 04–23–00110–CV, 2025 WL 871626, *4 at n.4 (Tex. App.—San Antonio March 19, 2025, no pet.) (in divorce case, the trial court excluded the husband's testimony because he did not provide any disclosures prior to trial). By contrast, when a party fails to produce evidence and the evidence is detrimental to its case or favors the party that requested it, the appropriate sanction is not to exclude it, but to limit the offending party's evidence on the same issue. *See, e.g., City of San Antonio v. Fulcher*, 749 S.W.2d 217, 219 (Tex. App.—San Antonio 1988, writ denied).

A trial court's exclusion of evidence that has not been properly disclosed is reviewed under an abuse of discretion standard. TEX. R. CIV. P. 193.6(a); *Mentis v. Barnard*, 870 S.W.2d 14, 16 (Tex. 1994) (reviewing the exclusion of an expert). If the trial court erred in excluding a witness, the error is reversible if it is both controlling on a material issue and is not cumulative. *Id.* The trial court has broad discretion to determine whether a party seeking to introduce evidence that was not timely disclosed has met its burden of showing good cause or the lack of unfair surprise or prejudice. *Syrian American Oil Corporation, S.A. v. Pecten Orient Company*, 524 S.W.3d 350 (Tex. App.—Houston [1st Dist.] 2017, no pet.) Because of this standard, as long as the sanction imposed by the trial court is reasonable and proportionate to the lack of disclosure, trial courts' rulings excluding evidence or witness testimony are routinely upheld. *See Perez v. Embree Const. Group, Inc.*, 228 S.W.3d 875, 884 (Tex. App.—Austin 2007, pet. denied) (trial court did not abuse its discretion by denying Perez the opportunity to call an expert witness that was not properly designated by the deadline); *In re A.M.M.*, No. 06–05–00039–CV, 2006 WL 42229 at *7 (Tex. App.—Texarkana Jan. 10, 2006, no pet.) (trial court did not abuse its discretion to deny the mother's request to call two unexpected witnesses who were not timely disclosed); *Snider v. Stanley*, 44 S.W.3d 713, 718 (Tex. App.—Beamont 2001, pet. denied) (after precluding witness from testifying as defense expert in personal injury action due to untimely disclosure, trial court was not required to permit that witness to testify as fact witness, as he was not named as fact witness in response to discovery).

In some instances, however, the court's exclusion of evidence will be reversed. To determine if there has been abuse of discretion of determination of good cause to allow witnesses to testify, reviewing court must determine whether trial court acted without reference to any guiding principles and rules. *Atlantic Richfield Co. v. Long Trusts*, 860 S.W.2d 439, 449 (Tex. App.—Texarkana 1993, writ denied). In certain instances, the trial court's ruling will be reversed if the sanction is too severe or if the court did not consider less severe sanctions. *In re Patton*, 47 S.W.3d 825, 828 (Tex. App.—Fort Worth 2001, no pet.) (striking plaintiff's trial exhibits was excessive death-penalty sanction where pre-trial order did not require exhibits to be produced along with list, defendant was not prejudiced, the court did not provide the plaintiff an opportunity to correct the exhibit list, and court did not consider less severe sanctions); *In re P.M.B.*, 2 S.W.3d 618, 625 (Tex. App.—Houston [14th Dist.] 1999, no pet) (abuse of its discretion found where the court excluded former husband's evidence as sanction for his failure to respond to discovery without first attempting lesser sanction, because the excluded evidence was controlling on material issue and was not cumulative of evidence presented by former wife).

Even if a party fails to timely disclose evidence or witnesses, the party may still be able to have the evidence admitted or the witness testify if the party shows that there was good cause for the failure disclose the information, or that the failure to disclose does not unfairly surprise or prejudice the other parties. TEX. R. CIV. P. 193.6(a). The trial court has the discretion to determine whether a party seeking to admit untimely disclosed evidence has met burden of establishing this exception. *Id.* The timing of the disclosure when it is finally made, as well as the reason for the prior lack of disclosure, is crucial to the court's inquiry as to whether good cause, surprise, or prejudice exist. The court can consider the record of the case and even may consider undisputed representations of counsel. *National OilWell Varco,*

L.P. v. Sanchez, 697 S.W.3d 361, 369 (Tex. App.—El Paso 2024, no pet.). When a party learns about the existence of a witness during trial, the party may have good cause for failing to disclose the witness's identity to opposing counsel; on the other hand, if the party offering a witness would have learned about the witness's existence earlier if the party had conducted a reasonable investigation, the witness could be excluded based on lack of good cause. *Spurck v. Texas Department of Family and Protective Services*, 396 S.W.3d 205, 216 (Tex. App.—Austin 2003, no pet.); *see also Solvex Sales Corp. v. Triton Manufacturing Co.*, 888 S.W.2d 845, 846–47 (Tex. App.—Tyler 1994, writ denied) (although buyer failed to disclose addresses and phone numbers of two witnesses, the court found good cause to permit the testimony where the seller was familiar with the witnesses and their information).

Most importantly, if a litigant is attempting to introduce evidence and there is a challenge to the timing of the disclosure, the party should ensure that all objections and unfavorable rulings are preserved for appeal. To preserve a complaint for appellate review, the party must present the complaint to the trial court and secure an express or implicit ruling from the court. TEX. R. APP. P. 33.1(a). An implicit overruling is one that, though unspoken, reasonably can be inferred from something else. *Well Solutions, Inc. v. Stafford*, 32 S.W.3d 313, 316 (Tex. App.—San Antonio 2000, no pet.). Although implicit rulings may be acceptable, the best practice for practitioners would be to secure an explicit ruling from the trial court so that the record clearly reflects the attorney's effort to preserve the issue for appeal.

A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and, if the ruling admits evidence, a party, on the record: (1) timely objects or moves to strike, and (2) states the specific ground, unless it was apparent from the context. TEX. R. EVID. 103(a). If the ruling excludes evidence, a party preserves a claim of error if the party informs the court of its substance by an offer of proof, unless the substance was apparent from the context. *Id.* In either instance, the party seeking to preserve error should ensure that the court's ruling on the objections or offers of proof is clearly stated on the record; if the court does not verbally rule or the ruling is unclear, a party should ask the court for a ruling on the issue.

As a result, if a party is on the receiving end of an offer of undisclosed evidence or witness testimony, that party should immediately object and move to strike the evidence. *Id.* If the litigant is the party making the offer of evidence, and the court sustains the other side's objection, the litigant should then ask the court if he may make an offer of proof outside the presence of the jury. *See id.* Once the court has excused the jury, the party may proceed with making the offer of proof. To adequately and effectively preserve error, an offer of proof must show the nature of the evidence specifically enough so that the reviewing court can determine its admissibility. *In re N.R.C.*, 94 S.W.3d 799, 806 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). The offer of proof may be made by counsel, who should reasonably and specifically summarize the evidence offered and state its relevance, unless already apparent. *Id.* If counsel makes such an offer, he must describe the actual content of the testimony and not merely comment on the reasons for it. *Id.* However, upon a party's request, the court must direct that an offer of proof be made in question-and-answer form, or the court may require the offer in this format on its own. TEX. R. EVID. 103(c).

A practical example of an offer of proof can be shown from the use of the Dead Man's Rule, which provides that a party may not testify against another party about (1) an oral statement by the testator, intestate, or ward in cases by or against a party as executor, administrator, or guardian, or (2) an oral statement made by a decedent in cases by or against that decedent's heirs or legal representatives. TEX. R. EVID. 601(b). However, two exceptions to the Dead Man's Rule exist: if the party's testimony about the statement is corroborated. or the opposing party calls the party to testify at trial about the oral statement. TEX. R. EVID. 601(b)(3). If a party intends to use the corroboration exception to the Dead Man's Rule during a jury trial, he is faced with a conundrum: how to provide original statement from one witness as well as the corroborating testimony from the other witness to show the court that the oral statement is admissible without having the jury hear the statement before it is deemed admissible. The answer is: ask to approach the bench, advise the court that the testimony that is about to be elicited implicates the Dead Man's Rule, but that you would like to make an offer of proof to show the court the corroborating testimony prior to the jury hearing the statement. At that point, the court will send the jury out and the party can elicit the testimony from the first witness, and then briefly ask the second witness to put on the corroborating testimony as well. The court will make a ruling about the admissibility of the oral statement and will then call the jury back in. Presuming the court ruled in the party's favor to admit the oral statement, the party offering it can move forward with offering the statement with the jury present.

Although objections and offers of proof are more trial strategy than discovery issues, the reality is there is nonetheless a significant amount of interplay between the two. If a party fails to disclose evidence timely but seeks to have it admitted, the party may need to put on an offer of proof to show the court why there is good cause for the evidence to be admitted and no surprise or unfair prejudice to the other side. As a result, litigants should think strategically about discovery matters throughout the case and how their handling of discovery issues could affect the presentation of evidence at trial.

IX. USING DISCOVERY AT TRIAL

A. Voir Dire

Voir dire is often undervalued in trusts and estates litigation, in part because many probate matters are tried to the bench. However, when trusts and estates cases do go to trial, such as in will contests, breach of fiduciary duty claims, allegations of undue influence, or tortious interference with inheritance rights, voir dire becomes a critical strategic phase of trial. Discovery plays an important role in shaping effective voir dire by allowing counsel to identify themes, biases, credibility issues, and decision-making frameworks well in advance of trial. When used thoughtfully, discovery transforms voir dire into an opportunity to select jurors who can fairly evaluate complex fiduciary and family-based disputes.

Discovery provides the foundation for voir dire by revealing not only the facts of the case but also the narratives and emotional dynamics underlying the dispute. In trust and estates litigation, discovery often exposes family conflict, resentment among beneficiaries, allegations of caregiver manipulation, distrust of professionals, and deeply held beliefs about inheritance, wealth, and entitlement. These themes naturally inform voir dire questions aimed at uncovering juror attitudes toward family disputes, financial accountability, and lawsuits between relatives. Understanding these dynamics early allows counsel to frame voir dire questions that are relevant, neutral, and tied to the realities of the case.

Written discovery is particularly useful in shaping voir dire strategy. Responses to interrogatories and requests for disclosure often identify key players, outline asserted defenses, and reveal how parties justify fiduciary conduct. Requests for production frequently uncover missing records, informal financial practices, self-dealing, or unexplained transactions. Together, these materials provide insight into how the case will be defended and where credibility issues are likely to arise. Voir dire questions can then probe jurors' expectations regarding recordkeeping, transparency, and reliance on informal explanations when money and fiduciary duties are involved.

Depositions offer even deeper intelligence for voir dire preparation. Depositions of trustees, executors, and other fiduciaries often reveal attitudes toward disclosure obligations, rationalizations for conflicts of interest, and levels of hostility toward beneficiaries. Depositions of experts and drafting attorneys may expose disagreements over capacity or undue influence, reliance on professional authority, and tension between legal formalities and family expectations. These insights allow counsel to assess whether prospective jurors are inclined to defer to professionals, distrust experts, or struggle with evaluating competing technical opinions.

Discovery also helps counsel map voir dire questions to the legal standards jurors must apply. Trust and estate cases frequently require jurors to evaluate unfamiliar concepts such as fiduciary duties, burden shifting in undue influence claims, testamentary capacity, and the distinction between conduct that appears unfair versus conduct that is legally actionable. Discovery reveals where these concepts are most contested and where juror misunderstanding is most likely. Voir dire can then be used to determine whether jurors are willing and able to follow the law as instructed, even if it conflicts with their personal beliefs about family obligations or inheritance.

Another important function of discovery-informed voir dire is preserving challenges for cause. Discovery often highlights issues likely to trigger juror bias, such as strong views against family litigation, skepticism toward beneficiary lawsuits, or beliefs that inheritance disputes reflect greed rather than legitimate grievances. Carefully crafted voir dire questions based on these themes allow counsel to build a record demonstrating an inability to follow the law, which is essential for preserving challenges for cause and reducing reliance on peremptory strikes.

Although discovery is a powerful tool, its use in voir dire is subject to ethical and procedural limits. Counsel may not reference inadmissible evidence or confidential discovery materials in voir dire without a good-faith basis for admissibility. Voir dire must focus on juror qualifications, beliefs, and experiences, not premature argument or attempts to try the case before the evidence is presented. Probate courts, in particular, often exercise close control over voir dire, making it essential that discovery-based questions remain proportional, non-argumentative, and tied to legitimate juror screening purposes.

In practice, effective use of discovery in voir dire requires careful planning. Counsel should develop voir dire outlines only after core discovery is complete, translate discovery facts into neutral and open-ended questions, and focus on identifying juror attitudes rather than previewing disputed evidence. Questions should be linked where possible to concepts that will appear in the jury charge, reinforcing their legitimacy and relevance. When handled thoughtfully and within ethical bounds, discovery-driven voir dire becomes an indispensable tool in Texas trust and estates litigation.

Ultimately, discovery allows counsel to approach voir dire with a deep understanding of the issues, personalities, and values that will shape the jury's deliberations. By using discovery to identify themes, anticipate bias,

and test jurors' willingness to apply fiduciary principles objectively, practitioners can select juries better suited to resolve complex trust and estate disputes on their merits. In this way, discovery-informed voir dire enhances fairness, efficiency, and effective advocacy in Texas trust and estates jury trials.

B. Opening Statements

The purpose of opening statements is an opportunity to tell the jury "the nature of [your] claim or defense and what said party expects to prove and the relief sought." TEX. R. CIV. P. 265(a). A trial court has broad discretion to limit opening statements. *Tacon Mech. Contractors v. Grant Sheet Metals, Inc.*, 889 S.W.2d 666, 675 (Tex. App.—Houston [14th Dist.] 1994, writ denied). It is important to remember that opening statements are not judicial admissions and are not evidence. *See Weslaco Federation of Teachers v. Texas Education Agency*, 27 S.W.3d 258, 263 (Tex. App.—Austin 2002, no pet.); *Carrasco v. Texas Transportation*, 908 S.W.2d 575, 580 (Tex. App.—Waco 1995, no writ). An opening statement is not an opportunity to read, describe, or display evidence in detail, name witnesses you intend to call, or outline the substance of their testimony. *Ranger Ins. Co. v. Rogers*, 530 S.W.2d 162, 170 (Tex. App.—Houston [14th Dist.] 1993, no writ); *Guerrero v. Smith*, 864 S.W.2d 797, 799–800 (Tex. App.—Houston [14th Dist.] 1993, no writ). In general, evidence is not shown or admitted during opening statements; however, limited use of demonstrative or admitted exhibits may be allowed at the trial court's discretion during opening statements. Such materials are only permitted when they are used to assist the jury's understanding, are not argumentative, and are supported by a good-faith belief that the underlying evidence will be admitted at trial. *See In re Estate of Kuykendall*, 206 S.W.3d 766, 770-71 (Tex. App.—Texarkana 2006, no pet.) (recognizing that probate court has broad discretion to control trial proceedings). Even when allowed, demonstratives are not evidence and may not be treated as such by the jury.

Texas courts are far less likely to permit the display of disputed or potentially prejudicial materials during opening statements particularly in trust and estates cases where credibility and fiduciary conduct are central. Attempts to present such material prematurely may draw sustained objections or curative instructions and can undermine counsel's credibility. Accordingly, it is best practice to raise the issue of demonstratives in opening statements in advance, either at a pretrial conference or outside the presence of the jury, and to make clear that any visuals are offered for illustrative purposes only and not as evidence. Absent express permission from the court, counsel should confine opening statement to careful, forward-look language such as "the evidence will show," and avoid attempts to prove disputed facts before the evidentiary phase of trial begins.

C. Evidence at Trial

(1) Demonstratives

Each client has a story. A successful trial lawyer understands those stories and crafts an effective narrative. Demonstratives assist trial lawyers in crafting and telling that story. The demonstrative is the story book.

Demonstratives play an outsized role in fiduciary litigation because these cases frequently involve complex relationships, layered governing instruments, and voluminous financial records. Trust accountings, estate transactions, business entities, and overlapping fiduciary roles can be difficult for courts and juries to understand through testimony and exhibits alone. Well-designed demonstratives bridge that gap by organizing evidence into a coherent narrative and providing a visual framework through which the factfinder can evaluate fiduciary conduct.

Unlike substantive exhibits, demonstratives are often used to explain, summarize, or contextualize evidence rather than to independently prove facts. Their principal function is educational: to translate discovery-produced information into a form that clarifies duties, timelines, flows of authority, and financial consequences.

a. Common Types of Demonstratives

Certain categories of demonstratives appear frequently across civil litigation because they assist the factfinder in organizing complex information and understanding how the evidence fits together. While the substance of these visuals varies by case, the underlying forms remain consistent. Practitioners consistently rely relationship and organizational charts, timeline demonstratives, data summaries and visualizations, as well as document and contract summaries.

Relationship and Organizational Charts. Organizational charts are commonly used to depict relationships among parties, non-parties, decision-makers, and affiliated entities. In cases involving multiple individuals or corporate actors, these demonstratives help clarify lines of authority, reporting structures, contractual relationships, or overlapping roles. When responsibility or control is disputed, relationship charts can provide a visual framework for assessing liability.

Timeline Demonstratives. Timelines are among the most widely used demonstratives in civil litigation. They synthesize documentary discovery, testimony, and key events into a chronological narrative that assists the factfinder in evaluating causation, notice, delay, or intent. Timelines are especially effective in disputes involving limitations, reliance, sequence of events, or evolving obligations over time.

Data Summaries and Visualizations. Charts, graphs, and summary tables are frequently used to present large volumes of numerical or transactional data in a digestible format. These demonstratives may reflect financial records, damages calculations, pricing data, performance metrics, or other quantitative information. When properly grounded in admissible evidence, data summaries allow the factfinder to evaluate trends, comparisons, and outcomes without becoming lost in voluminous exhibits.

Testimonial Summaries. The Fifth Circuit has allowed the admission of testimonial summaries as substantive evidence where (1) the underlying evidence is available to the other side to test for correctness; (2) the person who prepared the charts is available for cross-examination; (3) the jury is properly instructed concerning consideration of the charts; and (4) the charts are based on competent evidence before the jury. FED. R. EVID. 1006.

Document and Contract Summaries. Civil cases often turn on the interpretation or application of governing documents such as contracts, policies, statutes, or regulations. Demonstratives summarizing key provisions or obligations can focus attention on disputed language and reduce confusion caused by lengthy or technical documents. These visuals are most effective when tied directly to testimony explaining how the documents operate in practice.

Summaries. Summaries of voluminous writings, recordings, or photographs may be presented in the form of a chart, drawing, or diagram. Summaries are distinguished from charts or diagrams used as testimonial aids because they are submitted as substantive evidence. *Okpere v. Nat'l Oilwell Varco, L.P.*, 524 S.W.3d 818, 824 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). Before a summary may be admitted under Rule 1006, the proponent must lay the proper foundation for the admissibility of the underlying evidence and demonstrate the accuracy of the summary. TEX. R. CIV. P. 166a(g)(4); *FieldTurf USA, Inc. v. Pleasant Grove Indep. Sch. Dist*., 642 S.W.3d 829, 838 (Tex. 2022).

b. Demonstratives and Their Relationship to Discovery

The effectiveness of demonstratives is directly tied to the quality and organization of discovery. Demonstratives should be grounded in evidence produced through discovery and aligned with sworn testimony, authenticated documents, and expert opinions disclosure.

Discovery responses frequently supply the building blocks for demonstratives, including:

- Admissions concerning fiduciary roles or authority
- Accounting data and supporting records;
- Dates of transactions or disclosures;
- Identity of decision-makers and advisors; and,
- Expert calculations and summaries.

Care must be taken to ensure that demonstratives accurately reflect the underlying evidence. Inconsistent or overstated visuals invite cross-examination and objections that can undermine credibility.

c. Evidence Versus Aids

Modern trials routinely employ visual and interactive materials to assist the fact-finder. These materials generally fall into two distinct categories: demonstrative evidence and demonstrative aids. While the terms are often used interchangeably in practice, the distinction is legally significant and directly affects admissibility, foundation requirements, and permissible jury use.

d. Demonstratives vs. Substantive Evidence

Substantive evidence is evidence offered to prove or disprove a fact of consequence and traditionally falls into three categories: testimonial, documentary, and real evidence (e.g., a defective product or physical object). Illustratively, an MRI admitted to show a claimant's injury constitutes substantive evidence. By contrast, demonstrative materials derive their legitimacy solely from their relationship to such admissible substantive evidence.

e. Demonstrative Evidence: Illustrative but Admitted

Demonstrative evidence is admitted into evidence for the limited purpose of explaining, illustrating, or clarifying substantive evidence already before the court. Unlike substantive evidence, demonstrative evidence does not

itself make a fact more or less probable; rather, its probative force depends entirely on the credibility and testimony of the sponsoring witness. *Judwin Props., Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 503 (Tex. App.—Houston [1st Dist.] 1995, no writ).

Courts have consistently defined demonstrative evidence as material "admitted solely to help the witness explain his or her testimony" and possessing "no probative force beyond that to which it is linked." To be admissible, demonstrative evidence must satisfy three core requirements:

- It must relate to admissible substantive evidence;
- It must fairly and accurately reflect that evidence; and,
- It must aid the trier of fact in understanding or evaluating the evidence.

Common examples include medical illustrations or animations used to depict what a radiologist should have seen on an MRI, or explanatory charts summarizing voluminous testimony where proper foundation is laid.

f. Demonstrative Aids: Persuasive But Not Evidence

By contrast, demonstrative aids (sometimes referred to as visual aids) are not admitted into evidence and carry no independent evidentiary weight. Instead, they function as pedagogical or rhetorical tools designed to assist counsel in presenting argument or organizing testimony for the jury. Examples of demonstrative aids include:

- PowerPoint slides outlining an opening statement;
- Anatomical models used solely for illustration; or,
- Damage charts used in opening statement or closing argument.

As one Texas commentator has explained, these materials are "merely props which counsel uses in trying his case," and they do not constitute proof or implicate the rules of admissibility governing evidence. Because they are not evidence, their use is subject primarily to the trial court's discretion and concerns about unfair prejudice or jury confusion.

g. Strategic Considerations

Demonstratives are most effective when they reinforce—not replace—the evidence. Overly complex visuals can confuse rather than clarify, particularly in bench trials where judges are already working through dense records. Conversely, overly simplistic demonstratives may appear argumentative or misleading.

Practitioners should tailor demonstratives to the audience. Bench trials may benefit from precision and direct citation to record evidence, while jury trials may require clearer storytelling and visual hierarchy. In either context, demonstratives should be integrated into witness examinations and closing argument rather than treated as standalone presentations.

In fiduciary litigation, demonstratives are not mere trial embellishments; they are essential tools for distilling discovery into a comprehensible narrative. When carefully grounded in the evidentiary record and thoughtfully designed to clarify duties, relationships, and financial consequences, demonstratives can significantly enhance the persuasive force of a fiduciary case and assist the factfinder in resolving complex issues efficiently and accurately.

(2) Hearsay at the Probate Trial

Every probate judge has watched it happen. A lawyer stands, clears her throat, and objects: "Hearsay, Your Honor." The objection lands like a reflex. Sometimes it is right. More often, it is wrong—or worse, right for the wrong reason. The attorney across the table responds with an exception that does not apply, or offers no response at all, and the court is left to sort through the wreckage. TEX. R. EVID. 801(a)–(c); TEX. R. EVID. 802.

Hearsay objections in probate and fiduciary litigation present distinctive challenges that practitioners schooled primarily in personal injury or commercial litigation often underestimate. The declarant is frequently dead. The records at issue may be decades old. The relationships among the parties—executor and beneficiary, guardian and ward, trustee and trust beneficiary—carry fiduciary obligations that color the evidentiary landscape in ways the rules themselves do not fully anticipate.

This section approaches hearsay from the bench, drawing on patterns that recur in probate courtrooms across Texas. The goal is twofold: to identify the errors practitioners make most frequently, and to provide a practical framework for getting hearsay right in the fiduciary trial context. Along the way, we will address the modern complications that digital evidence introduces, the procedural distinctions that change how hearsay analysis plays out, and the preservation issues that doom otherwise meritorious arguments on appeal. TEX. R. EVID. 801(c).

a. The Hearsay Framework: What It Is and What It Is Not

Texas Rule of Evidence 801 defines hearsay as a statement—oral, written, or nonverbal conduct intended as an assertion—that a party offers in evidence to prove the truth of the matter asserted. Three elements, each deceptively simple: a statement, by a declarant, offered for its truth. TEX. R. EVID. 801(d).

b. The "Truth of the Matter Asserted" Threshold

The most common analytical failure occurs at this threshold. Practitioners reflexively object to out-of-court statements without pausing to ask the foundational question: is the statement being offered to prove that what it says is true? In probate litigation, statements frequently serve non-hearsay purposes that counsel simply overlook.

Consider a will contest alleging undue influence. The proponent offers testimony that a caregiver told the testator, "Your children do not care about you and never visit." The contestant objects: hearsay. But the statement is not offered to prove that the children in fact never visited. It is offered to show the effect on the listener—the testator—and thus to demonstrate the mechanism of undue influence. The statement is not hearsay at all. Yet this objection, and this error, appears with startling regularity.

Similarly, verbal acts—statements that themselves constitute operative legal acts—escape the hearsay rule entirely. Offers, acceptances, and words of gift are not hearsay because they are the legally significant conduct at issue, not evidence about some other fact. A testator's words, "I give this to you," offered to prove a gift, are the gift itself.

c. Machines Do Not Speak: The Non-Declarant Problem

Rule 801(d) defines a declarant as "a person who makes a statement." This definition carries increasing significance as probate litigation absorbs more electronically generated evidence. Automated records—computer-generated logs, GPS data, algorithmic outputs—are not statements by a "person" and thus fall outside the hearsay definition entirely. TEX. R. EVID. 801(e).

The distinction matters practically. Bank account alerts generated automatically, timestamped access logs for a safe deposit box, automated email confirmations of wire transfers—none of these constitute hearsay because no person made an assertion. The challenge lies in distinguishing truly automated output from computer-stored human statements, a distinction that requires foundation testimony about how the system works.

(3) Exclusions Under Rule 801(e): Not Hearsay by Definition

Rule 801(e) designates certain categories of out-of-court statements as "not hearsay"—a classification with practical consequences. These statements are not subject to hearsay analysis at all; they need not satisfy any exception. Understanding this distinction matters because the foundation required for an exclusion differs markedly from the foundation required for an exception. *In re Estate of Berger*, 174 S.W.3d 845, 856 (Tex. App.—Waco 2005, no pet.).

a. Admissions of a Party-Opponent

Rule 801(e)(2) excludes from the hearsay definition any statement offered against a party that is the party's own statement, an adoptive admission, a statement by the party's agent, or a statement by a co-conspirator. In probate litigation, the party-opponent admission is the workhorse exclusion—and the one most frequently underutilized. TEX. R. EVID. 803(6).

An executor who testified at deposition that she used estate funds for personal expenses has made a party-opponent admission. That testimony is admissible against her in a subsequent breach of fiduciary duty action without any need to invoke a hearsay exception. Yet attorneys regularly attempt to lay a business records foundation or invoke some other exception when none is needed. The statement is not hearsay. Period.

b. Judicial Admissions in Probate Pleadings

Probate practitioners should be particularly attentive to judicial admissions embedded in required filings. A sworn inventory filed under Section 309.051 of the Estates Code constitutes a judicial admission binding on the filing party. The party cannot later contradict the inventory's representations absent amendment or withdrawal. TEX. R. EVID. 601(b).

The Houston First Court of Appeals confirmed this principle in *Roosevelt v. Roosevelt*, holding that a sworn inventory filed as a required pleading constitutes a judicial admission. Practitioners defending against breach of fiduciary duty claims should mine the opposing party's sworn inventory with care—every asset valuation, every debt listed, every omission is a binding representation. TEX. R. EVID. 703.

c. Prior Inconsistent Statements Under Oath

Rule 801(e)(1)(A) excludes from hearsay a declarant-witness's prior inconsistent statement, but only if it was given under penalty of perjury at a trial, hearing, other proceeding, or deposition. In probate litigation, where cases

may span years and involve multiple hearings before reaching trial, prior sworn testimony is abundant. *See Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 545–46 (D. Md. 2007).

A beneficiary who testified at a temporary hearing that she never received distributions from the trust, then testifies at trial that she received some—that prior testimony is not hearsay. It is substantive evidence, not merely impeachment. Practitioners who fail to appreciate this distinction lose opportunities to use prior sworn testimony offensively, treating it only as impeachment material when it is admissible for all purposes.

(4) Key Hearsay Exceptions in Probate Litigation

a. Present Sense Impression and Excited Utterance—Rules 803(1) and 803(2)

These time-sensitive exceptions appear in probate litigation less frequently than the exceptions discussed above, but they arise in guardianship cases involving allegations of abuse or neglect. A ward's spontaneous statement immediately after an incident—"He hit me"—may qualify as either a present sense impression or an excited utterance, depending on the temporal relationship to the event and the declarant's emotional state. TEX. R. EVID. 803(3).

The analytical challenge increases when the declarant is an incapacitated ward. Establishing the foundational elements—that the statement was made while perceiving the event (present sense impression) or under the stress of excitement caused by the event (excited utterance)—requires careful attention to the ward's cognitive condition and the circumstances surrounding the statement. *See, e.g., Doe v. Mobile Video Tapes, Inc.*, 43 S.W.3d 40, 53 (Tex. App.—San Antonio 2001, no pet.).

b. State of Mind and the Will Exception—Rule 803(3)

Rule 803(3) provides an exception for statements of the declarant's then-existing state of mind, including intent, plan, motive, or design. In probate litigation, this exception carries unique weight because it provides the primary vehicle for admitting a decedent's out-of-court statements about testamentary intent. *See Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 907 (Tex. 2004).

When a testator tells her neighbor, "I plan to leave the house to my daughter because she has cared for me," that statement is admissible to show the testator's then-existing intent regarding her will. The Waco Court of Appeals confirmed this application in *In re Estate of Berger*, holding that declarations of a testator regarding intent in making a will fall squarely within the state-of-mind exception. *See* TEX. R. EVID. 103(d).

The exception has limits that practitioners frequently overrun. It permits evidence of the declarant's then-existing mental state. It does not permit evidence of remembered facts offered to prove those facts. A testator's statement, "I want to leave the house to my daughter," goes to state of mind. "My son stole $50,000 from me last year, so I changed my will"—the clause about the theft is hearsay within hearsay. The intent is admissible; the accusation of theft is not, unless it independently qualifies under another exception. *In re Estate of Berger*, 174 S.W.3d at 856.

From the bench, this is one of the most commonly botched applications. Counsel routinely attempt to smuggle in factual allegations about the decedent's life under the umbrella of "state of mind" without recognizing that the exception covers feelings and intentions, not historical facts the declarant happened to mention in the same breath.

c. Statements for Medical Diagnosis—Rule 803(4)

Rule 803(4) admits statements made for purposes of medical diagnosis or treatment if they describe medical history, past or present symptoms, or the inception or general character of the cause of the condition, and are reasonably pertinent to diagnosis or treatment. In guardianship proceedings, the ward's statements to treating physicians often provide critical evidence regarding capacity, abuse, or the need for continued guardianship. TEX. R. EVID. 803(4).

The exception does not extend to statements identifying a perpetrator unless the identity is reasonably pertinent to diagnosis or treatment—a distinction that matters in abuse cases where the ward identifies the guardian as the source of harm. Some courts have found that identity is pertinent to treatment where the patient must be protected from a particular person, but this remains a contested application.

d. Business Records—Rule 803(6)

The business records exception requires that the record was made at or near the time of the event, by or from information transmitted by a person with knowledge, kept in the course of a regularly conducted business activity, and that making the record was a regular practice of that activity—unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. TEX. R. EVID. 803(6).

In probate litigation, business records challenges cluster around two recurring problems. First, the custodian or qualified witness who can establish the predicate is often unavailable—deceased, incapacitated, or simply unfindable after the passage of years. Courts have permitted successor custodians to establish the predicate for records they did

not personally create, provided they can demonstrate familiarity with the record-keeping system. *See In re J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005) (per curiam).

Second, estate accounting records present a particular trap. An executor's informal ledger of estate transactions may not satisfy the regularity requirement if it was prepared specifically for litigation rather than as part of a regular business practice. Conversely, formal accounting records maintained by a fiduciary in the ordinary course of estate administration readily qualify. *See Ridgway's Estate v. Comm'r*, No. 03-22-00412-CV, 2023 WL 7117291, at *4 (Tex. App.—Austin Oct. 27, 2023, no pet.).

e. Public Records—Rule 803(8)

Public records—records of a public office setting out the office's activities, matters observed under a legal duty to report, or factual findings from a legally authorized investigation—carry particular relevance in guardianship proceedings, where government agency reports and investigative findings are frequently offered. TEX. R. EVID. 803(8).

Letters testamentary, letters of guardianship, orders appointing receivers, and filed inventories all qualify as public records. So do death certificates for foundational facts—the fact of death, date, and place—though cause-of-death determinations on a death certificate may present hearsay-within-hearsay complications addressed below. *See In re Estate of Nash*, 220 S.W.3d 914, 917 (Tex. 2007).

f. Vital Statistics—Rule 803(9)

Probate practitioners frequently need birth certificates, death certificates, and marriage records. Rule 803(9) provides a specific exception for records of births, deaths, and marriages if the report was made to a public office as required by law. This exception simplifies foundation that counsel often overcomplicate by attempting to qualify these records under the more demanding business records exception. TEX. R. EVID. 803(9); TEX. R. EVID. 803(11).

g. Ancient Documents—Rule 803(16)

Probate litigation occasionally involves documents twenty or more years old—property deeds, handwritten letters, family records. Texas retains the ancient documents exception, which admits statements in a document twenty years old or more whose authenticity is established. This is worth noting because the federal rules eliminated this exception in 2017, and practitioners familiar with federal practice may incorrectly assume the exception is unavailable. TEX. R. EVID. 803(16).

Authenticating the ancient document remains a prerequisite. A document that appears genuine on its face, is found in a place where it would likely be if authentic, and has no suspicious characteristics satisfies this threshold. In estate litigation involving contested family history or property ownership spanning generations, the ancient documents exception provides a valuable pathway for admitting evidence that would otherwise be lost to time. *But see* FED. R. EVID. 803(16) (amended 2017 to eliminate the ancient documents hearsay exception for federal proceedings).

(5) The Dead Man's Rule: A Competency Wolf in Hearsay Clothing

No discussion of hearsay in probate litigation is complete without addressing Rule 601(b), the Dead Man's Rule—even though, strictly speaking, it is not a hearsay rule at all. It is a competency rule. And the persistent confusion between these two doctrines is one of the most frequent errors the bench observes. TEX. R. EVID. 601(b).

Rule 601(b) provides that in civil cases, a party may not testify about an oral statement by a decedent if the party is opposed by an heir, legal representative, or survivor of the decedent—unless the oral statement is corroborated or the witness is called by the opposing party. The Rule restricts who may testify about certain statements. It does not address whether those statements, once admitted, are hearsay. *See Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990).

The practical consequence of this confusion is significant. Counsel lodges a hearsay objection to a party's testimony about what the decedent said. The court sustains the objection. On appeal, the reviewing court finds the statement was not hearsay—it was offered, say, for its effect on the listener—and reverses. The correct objection was under the Dead Man's Rule: not that the statement was hearsay, but that this particular witness was incompetent to testify about it. TEX. R. EVID. 601(b).

The converse error is equally common. Counsel objects under the Dead Man's Rule to a statement that is actually being offered by a nonparty witness—someone to whom the Rule does not apply. The objection fails, the evidence comes in, but the attorney has now waived the hearsay objection she should have made instead.

The Dead Man's Rule applies only when three conditions converge: a civil case, a party witness (not merely any witness), and testimony about an oral statement by a decedent, where the opposing party is the decedent's heir, legal representative, or survivor. If any element is absent, the Rule does not apply.

Two exceptions warrant emphasis. First, the Rule yields when the party witness is called by the opposing party—the "door opening" exception. An executor who calls the surviving spouse to testify cannot then invoke the Dead Man's Rule to exclude the spouse's testimony about the decedent's oral statements. Second, the Rule does not apply when the oral statement is corroborated by other evidence. The corroborating evidence need not independently prove the fact; it must merely tend to confirm the interested witness's testimony. *See Conn v. Campbell*, 294 S.W.2d 435, 438 (Tex. Civ. App.—Fort Worth 1956, writ ref'd n.r.e.).

(6) Hearsay Within Hearsay and Expert Reliance

a. Layered Hearsay Under Rule 805

Rule 805 provides that hearsay within hearsay is admissible if each layer independently satisfies an exception or exclusion. In probate litigation, layered hearsay is the norm rather than the exception. Consider a death certificate offered to prove cause of death. The certificate itself qualifies as a public record under Rule 803(8) or a vital statistic under Rule 803(9). But the cause-of-death determination incorporates information from the attending physician—a second layer of hearsay that must independently qualify, typically under the medical diagnosis exception of Rule 803(4) or the business records exception of Rule 803(6). TEX. R. EVID. 805.

Estate accounting documents present similar layering. An accountant's report incorporating bank statements, invoices, and third-party correspondence contains multiple hearsay layers. Each layer—the accountant's compilation, the bank's original records, the third-party communications—must satisfy its own exception. Practitioners who authenticate the accountant's report as a business record without addressing the underlying layers leave the evidence vulnerable to a well-aimed objection. *See, e.g., In re Estate of Glover*, 2020 WL 1536289, at *6 (Tex. App.—Amarillo Mar. 31, 2020, no pet.) (mem. op.).

b. Expert Reliance on Hearsay Under Rule 703

Rule 703 permits an expert to base an opinion on facts or data that need not be admissible, provided experts in the field would reasonably rely on that kind of information. This rule plays a critical role in probate litigation, where forensic accountants, medical experts, and real estate appraisers routinely base opinions on hearsay materials. Tex. R. Evid. 703.

The crucial distinction—one that eludes many practitioners—is between an expert relying on hearsay as a basis for an opinion versus offering the hearsay itself as substantive evidence. A forensic accountant may testify, "Based on the financial records I reviewed, the estate lost $2.3 million during the executor's tenure." The expert may describe generally the type of records reviewed. But the expert may not read the underlying hearsay documents into the record as if they were independently admissible. The hearsay supports the opinion; it does not become admissible for all purposes merely because an expert considered it. *See In re Commitment of Day*, 342 S.W.3d 193, 197 (Tex. App.—Beaumont 2011, pet. denied).

(7) Digital Evidence and Modern Hearsay Challenges

The hearsay rules were drafted for a world of paper documents and live testimony. They must now accommodate text messages, social media posts, metadata, emojis, and algorithmically generated content. Probate litigation has not been immune to this transformation—family disputes increasingly play out in digital communications, and the evidence of undue influence, incapacity, or fiduciary breach may reside in a text thread rather than a letter. *See* King, Janicek & Leopold, *Hearsay and Other Evidentiary Issues—A Primer*, Ch. 20, 46th Annual Advanced Civil Trial Course (State Bar of Texas 2023).

a. Text Messages and Social Media

Text messages present a dual challenge: authentication and hearsay. Assuming proper authentication, the hearsay analysis turns on familiar principles—who made the statement and for what purpose is it offered? A text message from the decedent stating, "I changed my will yesterday," is hearsay if offered to prove the will was changed. It is not hearsay if offered to show the declarant's then-existing state of mind regarding testamentary intent. *See Butler v. State*, No. 01-16-00253-CR, 2017 WL 3279035, at *4–5 (Tex. App.—Houston [1st Dist.] Aug. 1, 2017, pet. ref'd).

Social media posts add complexity because they may be edited, shared, or reacted to by multiple users. A Facebook post by the decedent is the decedent's statement. A comment by another user on that post is a separate statement by a separate declarant. A "share" of someone else's content may or may not constitute an adoptive admission depending on the context. Each layer requires independent analysis.

b. Emojis, GIFs, and Nonverbal Digital Communication

Rule 801(a) defines a statement to include nonverbal conduct "if the person intended it as a substitute for verbal expression." This definition creates genuine interpretive puzzles when applied to emojis and GIFs. A thumbs-up emoji

in response to a question—"Did you agree to the distribution?"—is arguably nonverbal conduct intended as an assertion. A laughing emoji, standing alone, may or may not be assertive depending on context. *See Eric Goldman*, Emojis and the Law, 93 WASH. L. REV. 1227, 1236–41 (2018).

The bench's experience suggests that attorneys on both sides tend to either ignore the hearsay implications of emoji evidence entirely or attempt to exclude it categorically. Neither approach is analytically sound. The correct approach requires the same contextual analysis applied to any assertive conduct: did the person intend the emoji as a substitute for a verbal statement? Context—including the surrounding messages, the relationship between the parties, and the question to which the emoji responded—determines the answer.

c. Computer-Generated Versus Computer-Stored Evidence

As noted above, truly computer-generated evidence—produced by automated processes without human input—is not hearsay because no "person" made a "statement." Computer-stored evidence, by contrast, merely records human assertions in digital form and is subject to standard hearsay analysis. *See In re Amazon.com, Inc.*, 649 S.W.3d 182, 191 (Tex. App.—Austin 2022, orig. proceeding).

In probate practice, this distinction matters for bank records, email metadata, access logs, and financial software outputs. Automated transaction records from a bank's system are computer-generated. An email from the decedent stored on a server is computer-stored. The metadata associated with that email—timestamps, IP addresses, routing information generated by the email system—is computer-generated. Foundation testimony must establish which category applies. *See Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 545–46 (D. Md. 2007).

(8) Procedural Context Matters in the Hearsay Analysis

Hearsay analysis does not occur in a procedural vacuum. The same statement may face different treatment at a temporary restraining order hearing, a summary judgment hearing, and a bench trial. Practitioners who apply a single hearsay framework across all procedural contexts make avoidable errors. *See* TEX. R. CIV. P. 166a(c).

a. Summary Judgment

Summary judgment evidence must be presented in admissible form—typically affidavits, discovery responses, or authenticated documents. An affidavit that merely recites hearsay is incompetent summary judgment evidence, even if the hearsay might be admissible at trial under an exception. The affiant must demonstrate personal knowledge, and attached documents must be properly authenticated with hearsay exceptions identified. *See Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996).

A common error in probate summary judgment practice is attaching the decedent's letters or emails to an affidavit without identifying the hearsay exception under which each document is offered. The blanket assertion that "the attached documents are true and correct copies" authenticates the documents but does not address hearsay. The affidavit must go further, establishing the foundation for whatever exception applies.

b. Temporary Restraining Orders and Temporary Injunctions

Texas courts have historically permitted more relaxed evidentiary standards at TRO hearings, particularly when the applicant is seeking to preserve assets pending a full hearing. Verified applications and supporting affidavits may contain statements that would face hearsay challenges at trial. However, courts increasingly scrutinize the evidentiary basis for TROs, and practitioners should not assume that hearsay in a verified petition will go unchallenged. *See Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

c. Bench Trial Versus Jury Trial

In a bench trial—the default in most probate proceedings—the judge serves as both gatekeeper and factfinder. This dual role has practical consequences for hearsay practice. A bench judge may admit evidence "subject to connection" or overrule a hearsay objection on the implicit understanding that she will give the evidence appropriate weight. This flexibility does not exist in jury trials, where Rule 103(d) requires the court to prevent inadmissible evidence from reaching the jury. *See* TEX. R. CIV. P. 263; *Pharo v. Chambers Cnty.*, 922 S.W.2d 945, 948 (Tex. 1996).

Practitioners in bench trials sometimes grow lax about hearsay objections, reasoning that the judge "knows what to do with it." This is a dangerous assumption for two reasons. First, the failure to object waives the issue for appeal. Second, even experienced judges benefit from focused hearsay analysis that identifies precisely why evidence should or should not be considered. A well-articulated hearsay objection in a bench trial is not mere formalism—it is advocacy. *See* TEX. R. EVID. 103(d).

(9) Preserving Error: The Objection That Matters Is the One You Make

The Texas Rules of Evidence require a timely, specific objection to preserve error. For hearsay, this means more than uttering the word "hearsay." An objection that merely states "hearsay" without identifying which out-of-court statement is at issue, or which layer of hearsay the objection targets, may fail to preserve error—particularly when the evidence involves multiple layers or multiple statements. TEX. R. EVID. 103(a)(1).

a. Specificity Requirements

A bare "hearsay" objection preserves error only when the hearsay nature of the evidence is apparent from context. When the evidence involves complex hearsay issues—layered hearsay, partial hearsay, statements with both hearsay and non-hearsay purposes—the objecting party must specify the statement at issue and the basis for the objection. "Objection, hearsay—the witness is testifying about what the decedent told her, and no exception applies" is better than "Objection, hearsay." *See Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 907 (Tex. 2004).

The El Paso Court of Appeals emphasized this point in *In re Marriage of Sandoval*, requiring specificity in hearsay objections to preserve error when the challenged testimony contained both hearsay and non-hearsay components. Running objections, while available under Rule 103(b) to avoid repetitive objections to the same category of evidence, must be obtained on the record and must clearly define the scope of the objection. *See* TEX. R. EVID. 103(b).

b. Responding to Hearsay Objections

The proponent's obligations are equally demanding. When a hearsay objection is sustained, the proponent must make an offer of proof identifying the substance of the excluded evidence and the exception or exclusion under which it should be admitted. Without this offer, the exclusion is not reviewable on appeal—regardless of how clearly the evidence should have been admitted.

From the bench, the most frustrating pattern is the attorney who responds to a hearsay objection with a single, incorrect exception, sees it overruled, and moves on—when a different, correct exception was readily available. The rules do not limit the proponent to one attempt. If the first exception argued fails, identify the next one. If the statement is not hearsay at all, say so. TEX. R. EVID. 103(a)(2).

c. Harmless Error and Its Limits

Not every hearsay error warrants reversal. Under Texas Rule of Appellate Procedure 44.1, the error must have "probably caused the rendition of an improper judgment." When the same evidence was admitted elsewhere without objection, or when the hearsay was cumulative of other admissible evidence, appellate courts routinely find the error harmless. TEX. R. APP. P. 44.1(a).

Nevertheless, the recent decision in *DeAnder v. Montgomery* illustrates the cost of inadequate preservation. The Austin Court of Appeals reversed for failure to properly preserve a hearsay objection where the objecting party failed to obtain a ruling on the record. Attorneys must ensure the record reflects both the objection and the court's ruling—particularly in the faster-paced environment of probate proceedings where rulings can be informal or implied. *DeAnder v. Montgomery*, No. 03–22–00565–CV, 2024 WL 2035791, at *5 (Tex. App.—Austin May 8, 2024, no pet.).

(10) Practical Takeaways for the Probate Trial Lawyer

From the bench, certain patterns distinguish the practitioners who handle hearsay effectively from those who do not. These observations are not theoretical; they emerge from watching hearsay issues play out across hundreds of probate proceedings.

Start with the threshold question. Before objecting or responding, ask whether the statement is being offered for its truth. In probate litigation, where out-of-court statements frequently serve non-hearsay purposes—effect on the listener, verbal acts, circumstantial evidence of state of mind—this threshold question eliminates many hearsay disputes before they begin.

Know the exclusions before the exceptions. Rule 801(e) exclusions require less foundation and face fewer challenges than Rule 803 or 804 exceptions. An attorney who can identify a party-opponent admission or a prior inconsistent statement under oath avoids the heavier burden of establishing an exception's foundational requirements.

Distinguish the Dead Man's Rule from hearsay. They protect different interests, apply in different circumstances, and require different objections. Confusing them forfeits the correct objection while making the wrong one.

Address each layer of hearsay independently. When offering multi-layered documents—death certificates, estate accountings, expert reports incorporating third-party data—identify the exception or exclusion for each layer before trial. Build the foundation layer by layer in your witness examinations.

Confront digital evidence on its own terms. Text messages, emails, and social media posts follow the same hearsay principles as paper documents, but they require additional authentication foundation and raise novel questions about assertive versus non-assertive conduct. Do not assume that "it is what it is" will survive a hearsay challenge.

Preserve your objections with specificity. "Hearsay" alone may not suffice. Identify the statement, the declarant, and the specific deficiency. When the court overrules your objection, state your exception on the record. When the court sustains the opposing party's objection, make a complete offer of proof.

Never stop at one exception. If your first response to a hearsay objection fails, consider whether the statement qualifies under a different exception, under an exclusion, or as non-hearsay entirely. The rules are not a single-elimination tournament.

Hearsay at the probate trial is not harder than hearsay in other civil litigation—but it is different. The declarant is often dead, the records are old, the relationships are freighted, and the consequences for families are deeply personal. Getting hearsay right is not just a technical exercise. It is the mechanism by which the truth of those relationships reaches the factfinder. That mechanism deserves the practitioner's best work. Portions of this article were drafted with the assistance of artificial intelligence. All legal analysis, citations, and conclusions are the authors' own.

D. Closing Arguments

The closing argument is counsel's final opportunity to synthesize the evidence and guide the factfinder toward a legally and factually supported verdict. Unlike opening statements, which frame expectations, or witness examinations, which develop discrete facts, closing argument connects the dots between the governing law, the evidence admitted at trial, and the ultimate questions the factfinder must answer.

In both bench and jury trials, an effective closing statement organizes the case into a coherent narrative and explains why the evidence satisfies—or fails to satisfy—the applicable legal standards. The goal is not to introduce new facts, but to structure the decision-making process for the factfinder.

(1) Incorporating Discovery and the Trial Record

A persuasive closing argument relies heavily on discovery and how it matured into trial evidence. Admissions obtained through requests for admission, sworn interrogatory responses, authenticated documents, and deposition testimony frequently provide some of the strongest material for closing argument because they reflect the opposing party's own statements or uncontroverted evidence.

Counsel should use closing to highlight:

- Concessions made in discovery;
- Inconsistencies between trial testimony and prior sworn statements;
- Evidence the opposing party failed to produce; and,
- Issues that were clarified or narrowed through pretrial rulings or summary judgment.

Framing these points as logical conclusions—rather than accusations—enhances credibility and assists the factfinder in understanding why certain disputes are no longer genuine or material.

(2) Use of Demonstratives in Closing

Demonstratives often take on heightened importance during closing argument. Visual aids previously introduced during trial can be reused to reinforce themes, summarize evidence, and walk the factfinder through complex issues step-by-step. Commonly used demonstratives during closing include timelines, charts summarizing testimony or documents, and simplified presentations of damages or liability elements.

The most effective closing demonstratives:

- Track directly to admitted evidence;
- Avoid argumentative embellishment;
- Emphasize clarity over volume; and,
- Reflect the legal elements the factfinder must resolve.

Courts exercise broad discretion over the use of demonstratives in closing, and counsel should be mindful of any limitations imposed during trial. Where demonstratives have not been admitted as exhibits, they should be clearly presented as illustrative aids rather than independent evidence.

(3) Bench Trials versus Jury Trials

While the core purpose of a closing statement remains the same, its presentation may differ depending on the audience. In jury trials, clarity and narrative coherence are paramount, and counsel must assume limited familiarity with legal concepts. In bench trials, judges often prefer concise arguments that focus on the legal significance of the evidence and the specific findings requested.

In either setting, closing statements should respect the court's time, adhere strictly to the evidentiary record, and provide a clear roadmap to the requested judgment.