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# The Practitioner's Guide to Properly Responding to Requests for Disclosure Under the Texas Discovery Rules

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## ARTICLE

# THE PRACTITIONER’S GUIDE TO PROPERLY RESPONDING TO REQUESTS FOR DISCLOSURE UNDER THE TEXAS DISCOVERY RULES

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## I. INTRODUCTION

“Discovery” is the “[c]ompulsory disclosure, at a party’s request, of information that relates to the litigation.”<sup>1</sup> It allows the parties to “seek the truth, so that disputes may be decided by what the facts reveal, not by what facts are concealed.”<sup>2</sup> Discovery’s principal goals are to “provide[ ] parties

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1. *Discovery*, BLACK’S LAW DICTIONARY (9th ed. 2009); accord BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 281 (2d ed. 1995) (defining “discovery” as “disclosure by a party to an action, at the other party’s instance, of facts or documents relevant to the lawsuit”); *Sec. Nat’l Bank of Sioux City v. Abbott Labs.*, 299 F.R.D. 595, 596 (N.D. Iowa 2014) (noting “[d]iscovery” is “a process intended to facilitate the free flow of information between parties”), *rev’d on other grounds*, 800 F.3d 936 (8th Cir. 2015).

2. *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding) (per curiam) (first quoting *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984), *overruled on other grounds* by Walker

with notice of the evidence that the opposing party intends to present” and to “prevent[] trial by ambush.”<sup>3</sup> Notwithstanding its laudatory purpose and goals, discovery is “the bane of modern litigation.”<sup>4</sup> By its very nature, discovery is intrusive and invasive.<sup>5</sup>

“Discovery is [also] the largest cost in most civil actions—as much as ninety percent in complex cases.”<sup>6</sup> It can also be the most frustrating part of civil litigation because it is often mired in obstructionism. As observed by the Texas Supreme Court in explaining its comprehensive overhaul of the Texas discovery rules in 1998,<sup>7</sup> “[D]iscovery may be misused to deny

v. Packer, 827 S.W.2d 833 (Tex. 1992); then citing *Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556, 559 (Tex. 1990); *Garcia v. Peeples*, 734 S.W.2d 343, 347 (Tex. 1987)).

3. *Best Indus. Unif. Supply Co. v. Gulf Coast Alloy Welding, Inc.*, 41 S.W.3d 145, 147 (Tex. App.—Amarillo 2000, pet. denied) (citing *Clark v. Trailways, Inc.*, 774 S.W.2d 644, 646 (Tex. 1989)).

4. *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 542 (7th Cir. 2000); see *Liguria Foods, Inc. v. Griffith Labs, Inc.*, 320 F.R.D. 168, 182 (N.D. Iowa 2017) (“Few practicing attorneys would be surprised that discovery was singled out as ‘the primary cause for cost and delay,’ and often ‘can become an end in itself.’” (quoting Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C. L. REV. 495, 495–96 (2013))).

5. *Bond v. Utreras*, 585 F.3d 1061, 1067 (7th Cir. 2009); *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998); see *Flentye v. Kathrein*, No. 06-C-3492, 2007 WL 2903128, at \*2 (N.D. Ill. Oct. 2, 2007) (“[Discovery] is, like life itself, ‘nasty [and] brutish. . . .’ Unfortunately, it is not generally ‘short.’” (alteration in original) (citation omitted) (quoting THOMAS HOBBES, *LEVIATHAN*, ch. XIII (J.C.A. Gaskin ed., Oxford Univ. Press 1988) (1679))).

6. Robert K. Wise, *Ending Evasive Responses to Written Discovery: A Guide for Properly Responding (and Objecting) to Interrogatories and Document Requests Under the Texas Discovery Rules*, 65 BAYLOR L. REV. 510, 512 (2013); see *Liguria Foods, Inc.*, 320 F.R.D. at 182 (“By some estimates, discovery costs now comprise between 50 and 90 percent of the total litigation costs in a case[,] and ‘[d]iscovery abuse also represents one of the principal causes of delay and congestion in the judicial system.’” (quoting John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010))); *In re Nat’l Lloyds Ins. Co.*, 532 S.W.3d 794, 813 (Tex. 2017) (orig. proceeding) (“‘Discovery is often the most significant cost of litigation’ and a potential ‘weapon capable of imposing large and unjustifiable costs on one’s adversary.’ Especially in the context of multi-party litigation, costs are magnified by expanding the scope of discovery, and ‘the costs of multi-party litigation can drive defendants to settle regardless of the merits.’” (footnotes omitted) (quoting *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 (orig. proceeding)); *Steenbergen v. Ford Motor Co.*, 814 S.W.2d 755, 758 (Tex. App.—Dallas 1991, writ denied) (“It is well known that discovery costs are a major part of the overall expense of a trial.”); THOMAS E. WILLGING & EMERY G. LEE III, *FED. JUDICIAL CTR., IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION* 14 (Mar. 2010), <https://www.fjc.gov/sites/default/files/2012/CostCiv3.pdf> [<https://perma.cc/ATB3-WGPC>] (noting that “[d]iscovery is the number one cost-driver” without “a close second” and that discovery costs increase 5% for every non-expert deposition, another 5% for each additional type of discovery, and another 11% for every expert witness deposition).

7. The Texas Supreme Court’s overhaul of Texas discovery practice was done pursuant to orders issued in 1998. *E.g.*, *In the Supreme Court of Texas Misc. Docket No. 98–9196: Approval of Revisions*

justice . . . by driving up the costs of litigation until it is unaffordable and stalling resolution of cases.”<sup>8</sup> Many practitioners are quick to dispute discovery requests, slow to produce information, and all too eager to object at every stage of the process. For example, in responding to written discovery (i.e., “requests for disclosure, requests for production and inspection of documents and tangible things, requests for entry onto property, interrogatories, and requests for admission”<sup>9</sup>), many practitioners interpose every objection imaginable even though courts and commentators resoundingly disapprove of the use of boilerplate objections.<sup>10</sup>

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*to the Texas Rules of Civil Procedure*, 61 TEX. B.J. 1140, 1140 (1998). Because the rules generally became effective on January 1, 1999, they often are referred to as the “1999 rules” or the “1999 amendments.” See *In re GreCon, Inc.*, 542 S.W.3d 774, 783–84 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding) (referring to the “1999 amendments”); *Mid Continent Lift & Equip., LLC v. J. McNeill Pilot Car Serv.*, 537 S.W.3d 660, 673 n.40 (Tex. App.—Austin 2017, no pet.) (referring to the “1999 rules”).

8. *In the Supreme Court of Texas Misc. Docket No. 98–9196: Approval of Revisions to the Texas Rules of Civil Procedure*, *supra* note 7, at 1140; accord *In re Alford Chevrolet-Geo*, 997 S.W.2d at 180 (“[D]iscovery is not only ‘a tool for uncovering facts essential to accurate adjudication,’ but also ‘a weapon capable of imposing large and unjustifiable costs on one’s adversary.’ Discovery is often the most significant cost of litigation. Because the costs of compliance are usually borne solely by the replying party, a requesting party improves its bargaining position by maximizing those costs.” (citations omitted) (first quoting Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 636 (1989); then citing Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, AM. B. FOUND. RES. J., Spring 1980, at 219, 229)); Easterbrook, *supra*, at 636 (“Litigants with weak cases have little use for bringing the facts to light and every reason to heap costs on the adverse party . . . . The prospect of these higher costs leads the other side to settle on favorable terms.”). One of the goals underlying the 1999 rules was to “impose limits on the volume of discovery in an attempt to curb abuses and reduce cost and delay.” Nathan L. Hecht & Robert H. Pemberton, *A Guide to the 1999 Texas Discovery Rules Revisions* (Nov. 11, 1998), <https://www.adr.com/law1/rules.htm> [<https://perma.cc/UDU5-ZL6Z>].

9. TEX. R. CIV. P. 192.7(a).

10. See Wise, *supra* note 6, at 567–72 (discussing boilerplate objections and pointing out their impropriety under Texas rules); Matthew L. Jarvey, Note, *Boilerplate Discovery Objections: How They Are Used, Why They Are Wrong, and What We Can Do About Them*, 61 DRAKE L. REV. 913, 914 (2013) (“One of the most rampant abuses of the discovery process is the use of boilerplate objections to discovery requests.”); cf. *Resendez v. Smith’s Food & Drug Ctrs., Inc.*, No. 2:15-cv-00061-PAL, 2015 WL 1186684, at \*2 (D. Nev. Mar. 16, 2015) (“Federal courts have routinely held that boilerplate objections are improper.” (citing *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 512 (N.D. Iowa 2000))); *Heller v. City of Dallas*, 303 F.R.D. 466, 483 (N.D. Tex. 2014) (“So-called boilerplate or unsupported objections—even when asserted in response to a specific discovery request and not as part of a general list of generic objections preceding any responses to specific discovery requests—are likewise improper and ineffective and may rise (or fall) to the level of what the Fifth Circuit has described as ‘an all-too-common example of the sort of “Rambo tactics” that have brought disrepute upon attorneys and the legal system.’” (first quoting *McLeod, Alexander, Powel & Apfel, P.C. v. Quarles*, 894 F.2d 1482, 1484–86 (5th Cir. 1990); then citing *Anderson v. Caldwell Cty. Sheriff’s Office*, No. 1:09cv423, 2011 WL 2414140, at \*3 (W.D.N.C. June 10, 2011); *Mancia v. Mayflower Textile Servs.*

Some practitioners engage in obstructionist discovery practice “to grandstand for their client[s], to intentionally obstruct the flow of clearly discoverable information, to try and win a war of attrition, or to intimidate and harass the opposing party.”<sup>11</sup> Others do it simply because it is how they were taught,<sup>12</sup> or because they have a warped view of zealous advocacy.<sup>13</sup> Irrespective of the reason, obstructionist discovery practice

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Co., 253 F.R.D. 354, 358 (D. Md. 2008)); *Russell v. Daiichi-Sankyo, Inc.*, No. CV 11-34-BLG-CSO, 2012 WL 1161435, at \*1 (D. Mont. Apr. 6, 2012) (“The recitation of ‘boilerplate, shotgun-style objections’ are not consistent with the requirements of discovery rules.” (citing *Covington v. Sailormen, Inc.*, 274 F.R.D. 692, 693 (N.D. Fla. 2011); *Lurensky v. Wellinghoff*, 258 F.R.D. 27, 30 (D.D.C. 2009)); *Mancia*, 253 F.R.D. at 358 (“[B]oilerplate objections that a request for discovery is ‘overboard and unduly burdensome, and not reasonably calculated to lead to the discovery of material admissible in evidence,’ persist despite a litany of decisions from courts, including this one, that such objections are improper unless based on particularized facts.” (citation omitted) (citing *A. Farber & Partners, Inc. v. Garber*, 234 F.R.D. 186, 188 (C.D. Cal. 2006); *Hall v. Sullivan*, 231 F.R.D. 468, 470 (D. Md. 2005); *Wagner v. Dryvit Sys. Inc.*, 208 F.R.D. 606, 610 (D. Neb. 2001); *Thompson v. HUD*, 199 F.R.D. 168, 173 (D. Md. 2001); *Marens v. Carrabba’s Italian Grill, Inc.*, 196 F.R.D. 35, 38 (D. Md. 2000); *Kelling v. Bridgestone/Firestone, Inc.*, 157 F.R.D. 496, 497 (D. Kan. 1994); *Eureka Fin. Corp. v. Hartford Accident & Indem. Co.*, 136 F.R.D. 179, 182–83 (E.D. Cal. 1991); *Willemijn Houdstermaatschaap BV v. Apollo Comput., Inc.*, 707 F. Supp. 1429, 1439–40 (D. Del. 1989); *Momah v. Albert Einstein Med. Ctr.*, 164 F.R.D. 412, 417 (E.D. Pa. 1996); *Obiajulu v. City of Rochester, Dept. of Law*, 166 F.R.D. 293, 295 (W.D.N.Y. 1996); *Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084, 1102 (D. N.J. 1996)); *St. Paul Reinsurance Co.*, 198 F.R.D. at 517 (collecting cases and sanctioning a lawyer for using boilerplate objections in response to requests for production of documents); *see also De Anda v. Webster*, No. 14-17-00020-CV, 2018 WL 3580579, at \*7 (Tex. App.—Houston [14th Dist.] July 26, 2018, pet. denied) (mem. op.) (holding a defendant who interposed boilerplate objections had waived them under Texas Rule 193.2(e), which provides “[a]n objection . . . that is obscured by numerous unfounded objections[ ] is waived unless the court excuses the waiver for good cause shown” (quoting TEX. R. CIV. P. 193.2(e))).

11. *Sec. Nat’l Bank of Sioux City v. Abbott Labs.*, 299 F.R.D. 595, 596 (N.D. Iowa 2014), *rev’d on other grounds*, 800 F.3d 936 (8th Cir. 2015).

12. *See Liguria Foods, Inc. v. Griffith Labs., Inc.*, 320 F.R.D. 168, 181 (N.D. Iowa 2017) (“As to the question of why counsel for both sides had resorted to ‘boilerplate’ objections, counsel admitted that it had a lot to do with the way they were trained, the kinds of responses that they had received from opposing parties, and the ‘culture’ that routinely involved the use of such ‘standardized’ responses.”).

13. As explained by leading commentators on discovery:

The truth is that lawyers and clients avoid cooperating with their adversary during discovery—despite the fact that it is in their clear interest to do so—for a variety of inadequate and unconvincing reasons. They do not cooperate because they want to make the discovery process as expensive and punitive as possible for their adversary, in order to force a settlement to end the costs rather than having the case decided on the merits. They do not cooperate because they wrongly assume that cooperation requires them to compromise the legitimate legal positions that they have a good faith basis to hold. Lawyers do not cooperate because they have a misguided sense that they have an ethical duty to be oppositional during the discovery process—to “protect” their client’s interests—often even at the substantial economic expense of the client. Clients do

results in astronomically costly litigation and disregards the Texas Supreme Court's directive to use the Texas Rules of Civil Procedure "to obtain a just, fair, equitable[,] and impartial adjudication of the rights of litigants . . . at the least expense both to the litigants and to the state as may be practicable[.]"<sup>14</sup>

Since 2013, with the publication of an article entitled *Ending Evasive Responses to Written Discovery: A Guide for Properly Responding (and Objecting) to Interrogatories and Document Requests Under the Texas Discovery Rules*,<sup>15</sup> the authors collectively have published two books and three articles on Texas discovery practice<sup>16</sup> with the goal of providing Texas practitioners with comprehensive guides about discovery under the Texas discovery rules and the hope of ending, or at least ameliorating, obstructionist discovery practice. This article relates to one of the most common types of written discovery that is often included in the plaintiff's original petition and the defendant's original answer, and whose answers are often incomplete and inadequate—requests for disclosure under Texas Rule of Civil Procedure 194.<sup>17</sup>

## II. TEXT OF TEXAS RULE 194

### RULE 194. REQUESTS FOR DISCLOSURE<sup>18</sup>

**194.1 Request.** A party may obtain disclosure from another party of the information or material listed in Rule 194.2 by serving the other

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not cooperate during discovery because they want to retaliate against their adversary, or "get back" at them for the events that led to the litigation. But the least persuasive of the reasons for not cooperating during the discovery process is the entirely misplaced notion that the "adversary system" somehow prohibits it.

Grimm & Yellin, *supra* note 4, at 525–26 (footnotes omitted); see *Liguria Foods, Inc.*, 320 F.R.D. at 182 ("Unfortunately, experience has taught me that attorneys do not know or pay little attention to the discovery rules in the Federal Rules of Civil Procedure.").

14. TEX. R. CIV. P. 1 (emphasis added).

15. Wise, *supra* note 6, at 510.

16. See generally ROBERT K. WISE & KENNON L. WOOTEN, TEXAS DISCOVERY: A GUIDE TO TAKING AND RESISTING DISCOVERY UNDER THE TEXAS RULES OF CIVIL PROCEDURE (2d ed. 2019); ROBERT K. WISE, TEXAS WRITTEN DISCOVERY: DRAFTING AND RESPONDING UNDER THE TEXAS DISCOVERY RULES (2015); Robert K. Wise & Kennon L. Wooten, *The Practitioner's Guide to Properly Taking and Defending Depositions Under the Texas Discovery Rules*, 68 BAYLOR L. REV. 399 (2016); Robert K. Wise & Katherine Hendler Fayne, *A Guide to Properly Using and Responding to Requests for Admission Under the Texas Discovery Rules*, 45 ST. MARY'S L.J. 655 (2014).

17. In this article, individual Texas and Federal Rules of Civil Procedure are referred to as "Texas Rule \_\_\_\_" and "Federal Rule \_\_\_\_," respectively.

18. TEX. R. CIV. P. 194.1–6.

party—no later than 30 days before the end of any applicable discovery period—the following request: “Pursuant to Rule 194, you are requested to disclose, within 30 days of service of this request, the information or material described in Rule [state rule, e.g., 194.2, or 194.2(a), (c), and (f), or 194.2(d)–(g)].”

**194.2 *Content.*** A party may request disclosure of any or all of the following:

- (a) the correct names of the parties to the lawsuit;
- (b) the name, address, and telephone number of any potential parties;
- (c) the legal theories and, in general, the factual bases of the responding party’s claims or defenses (the responding party need not marshal all evidence that may be offered at trial);
- (d) the amount and any method of calculating economic damages;
- (e) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person’s connection with the case;
- (f) for any testifying expert:
  - (1) the expert’s name, address, and telephone number;
  - (2) the subject matter on which the expert will testify;
  - (3) the general substance of the expert’s mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;
  - (4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:
    - (A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert’s testimony; and
    - (B) the expert’s current resume and bibliography;
- (g) any indemnity and insuring agreements described in Rule 192.3(f);
- (h) any settlement agreements described in Rule 192.3(g);



- (i) any witness statements described in Rule 192.3(h);
- (j) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;
- (k) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party;
- (l) the name, address, and telephone number of any person who may be designated as a responsible third party.

**194.3 Response.** The responding party must serve a written response on the requesting party within 30 days after service of the request, except that:

- (a) a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request, and
- (b) a response to a request under Rule 194.2(f) is governed by Rule 195.

**194.4 Production.** Copies of documents and other tangible items ordinarily must be served with the response. But if the responsive documents are voluminous, the response must state a reasonable time and place for the production of documents. The responding party must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them.

**194.5 No Objection or Assertion of Work Product.** No objection or assertion of work product is permitted to a request under this rule.

**194.6 Certain Responses Not Admissible.** A response to requests under Rule 194.2(c) and (d) that has been changed by an amended or supplemental response is not admissible and may not be used for impeachment.

**Notes and Comments**<sup>19</sup>

Comments to 1999 change:

1. Disclosure is designed to afford parties basic discovery of specific categories of information, not automatically in every case, but upon request, without preparation of a lengthy inquiry, and without objection or assertion of work product. In those extremely rare cases when information ordinarily discoverable should be protected, such as when revealing a person's residence might result in harm to the person, a party may move for protection. A party may assert any applicable privileges other than work product using the procedures of Rule 193.3 applicable to other written discovery. Otherwise, to fail to respond fully to a request for disclosure would be an abuse of the discovery process.
2. Rule 194.2(c) and (d) permit a party further inquiry into another's legal theories and factual claims than is often provided in notice pleadings. So-called "contention interrogatories" are used for the same purpose. Such interrogatories are not properly used to require a party to marshal evidence or brief legal issues. Paragraphs (c) and (d) are intended to require disclosure of a party's basic assertions, whether in prosecution of claims or in defense. Thus, for example, a plaintiff would be required to disclose that he or she claimed damages suffered in a car wreck caused by defendant's negligence in speeding, and would be required to state how loss of past earnings and future earning capacity was calculated, but would not be required to state the speed at which defendant was allegedly driving. Paragraph (d) does not require a party, either a plaintiff or a defendant, to state a method of calculating non-economic damages, such as for mental anguish. In the same example, defendant would be required to disclose his or her denial of the speeding allegation and any basis for contesting the damage calculations.
3. Responses under Rule 194.2(c) and (d) that have been amended or supplemented are inadmissible and cannot be used for impeachment, but other evidence of changes in position is not likewise barred.

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19. *Id.* R. 194 cmts. 1–3.

## III. REQUESTS FOR DISCLOSURE IN GENERAL

Texas Rule 194 generally governs requests for disclosure<sup>20</sup>—written requests to obtain one or more of a laundry list of twelve categories of basic information set forth in Texas Rule 194.2.<sup>21</sup> Disclosure requests provide inexpensive, basic discovery without the delay relating to objections or work-product assertions.<sup>22</sup> Although the discovery device is borrowed from Federal Rule 26(a),<sup>23</sup> Texas Rule 194 is different from the federal rule

20. An interesting question is: What is the proper plural form of “request for disclosure?” Among the variations are: requests for disclosure, request for disclosures, and requests for disclosures. *See id.* R. 194 (“requests for disclosure”); *In re Garza*, 544 S.W.3d 836, 838 (Tex. 2018) (orig. proceeding) (“requests for disclosure”); *In re Guaranty Ins. Servs., Inc.*, 343 S.W.3d 130, 132 (Tex. 2011) (orig. proceeding) (per curiam) (“request for disclosures”); *Goldman v. Olmstead*, 414 S.W.3d 346, 364 (Tex. App.—Dallas 2013, pet. denied) (“requests for disclosure” and “requests for disclosures”). The first—“requests for disclosure”—is the proper plural form of the discovery device. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 19.2, at 25a (Phillip Babcock Gove et al. eds., 2002) (“Three-word compounds consisting of an initial noun plus prepositional phrase hyphenated or open customarily pluralize the initial noun: . . . coat of mail → coats of mail[.]”); GARNER, *supra* note 1, at 669–70 (describing the proper plural form of a compound noun).

21. TEX. R. CIV. P. 194.2. Texas Rule 190.2 (b)(6) sets forth a category of documents subject to disclosure in “expedited actions” governed by Texas Rule 169 and in divorce cases “not involving children in which a party pleads that the value of the marital estate is more than zero but not more than \$50,000.” *Id.* R. 190.2; *see* discussion *infra* Section III.B.12. In addition to Texas Rules 190.2(b)(6) and 194, Texas Rules 190, 191, 192, 193, 195, and 215 relate to disclosure requests. *Cf.* TEX. R. CIV. P. 190.2(b)(6) (identifying the items a party may request for disclosure); *id.* R. 191.3(d) (explaining the consequences of failure to sign a disclosure request); *id.* R. 192.1 (identifying requests for disclosure as “permissible forms of discovery”); *id.* R. 193.1 (stating the time in which written discovery must be answered and to what extent); *id.* R. 195.1 (requiring information about “testifying expert witnesses” be requested “through a request for disclosure under Rule 194”); *id.* R. 215.3 (warning of the possibility of sanctions “[i]f the court finds a party is abusing the discovery process”). Disclosure requests cannot be served on nonparties. *See id.* R. 194.1 (“A party may obtain disclosure from another party of the information or material listed in Rule 194.2 by serving the other party[.]” (emphasis added)); *In re I.E.Z.*, No. 09-09-00499-CV, 2010 WL 3261145, at \*4 (Tex. App.—Beaumont Aug. 19, 2010, no pet.) (mem. op.) (holding disclosure requests can be served only on parties). They, however, can be served on parties whose interests are not adverse. *See* TEX. R. CIV. P. 194.1; *cf.* *Ferrara v. United States*, No. 90 Civ. 0972 (DNE), 1992 WL 18836, at \*1 (S.D.N.Y. Jan. 27, 1992) (“The [Federal] Rule does not limit discovery only to parties that have a hostile stance toward each other in the litigation.” (citing *Andrulonis v. United States*, 96 F.R.D. 43, 45 (N.D.N.Y. 1982); *United States v. Burczyk*, 68 F.R.D. 465, 466 (E.D. Wis. 1975)); *Andrulonis*, 96 F.R.D. at 45 (“[N]o degree of adversity between the parties is required . . . to serve interrogatories.”).

22. TEX. R. CIV. P. 194 cmt. 1 (“Disclosure is designed to afford parties basic discovery of specific categories of information, not automatically in every case, but upon request, without preparation of a lengthy inquiry, and without objection or assertion of work product.”).

23. Federal Rule 26(a) provides for: (1) initial disclosures, which require the disclosing party to identify the persons with “discoverable information” that it may use to support its claims or defenses, identify or produce documents that it may use to support its claims or defenses, provide a damage computation, and produce relevant insurance agreements; (2) disclosure of expert testimony, which requires

in two important respects. *First*, unlike the federal rule, Texas Rule 194 disclosures are not mandatory;<sup>24</sup> rather, they are request driven.<sup>25</sup> *Second*, the information that must be disclosed is different under the two rules.<sup>26</sup>

#### A. Procedure

##### 1. Form of Disclosure Requests

Texas Rule 194.1 specifies the disclosure request's form. It provides, in relevant part:

A party may obtain disclosure from another party of the information or material listed in [Texas] Rule 194.2 *by serving the other party . . . the following request*: “Pursuant to [Texas] Rule 194, you are requested to disclose, within 30 days of service of this request, the information or material described in Rule [state rule, e.g., 194.2, or 194.2(a), (c), and (f), or 194.2(d)–(g)].”<sup>27</sup>

Accordingly, a disclosure request should contain the rule's exact language except that it may provide more than thirty days to respond<sup>28</sup> and must provide at least fifty days to respond if the request is served on the defendant

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the disclosing party to identify and provide a report or information about its experts; and (3) pretrial disclosures, which require the disclosing party to disclose its trial witnesses and exhibits. FED. R. CIV. P. 26(a)(1)–(3).

24. Compare TEX. R. CIV. P. 190.2(b)(6) (“[A] party may request disclosure . . .”), *id.* R. 194.1 (“A party may obtain disclosure from another party . . . by serving the other party . . . the following request . . .”), and *id.* R. 194 cmt. 1 (explaining that disclosures must be requested), *with* FED. R. CIV. P. 26(a) (providing that a party “must” disclose).

25. Disclosures are not mandatory under the Texas discovery rules because research shows that many Texas state-court actions settle without discovery. See Alex Wilson Albright, *New Discovery Rules: The Texas Supreme Court Advisory Committee's Proposal*, 15 REV. OF LITIG. 275, 277 (1996). Accordingly, it was believed that making disclosures mandatory would increase litigation costs. *Id.* at 286.

26. Compare TEX. R. CIV. P. 194.2 (identifying the twelve disclosures a party must make if served with a Texas Rule 194.2 request for disclosures), *with* FED. R. CIV. P. 26(a) (requiring a party to disclose the names of persons with “discoverable information,” documents, a computation of damages, and “any insurance agreement”). The information and materials that are subject to disclosure are discussed *infra* Section III.B.12.

27. TEX. R. CIV. P. 194.1 (emphasis added).

28. A disclosure request can provide more than thirty days for a response. It cannot, however, require less than thirty days. See *id.*; see also *id.* R. 194.3.

before the defendant's answer date.<sup>29</sup> A disclosure request should also refer to Texas Rule 190.2(b)(6) in an action under Level 1.<sup>30</sup>

Texas Rules 190.2(b)(6) and 194 do not require disclosure requests to be made in any particular type of document or at any particular time.<sup>31</sup> Thus, they can be made in the requesting party's initial pleading,<sup>32</sup> in a formal discovery request entitled "Request(s) for Disclosure,"<sup>33</sup> in a formal discovery request that combines disclosure requests with other written-discovery requests (e.g., interrogatories, production requests, or requests for admission),<sup>34</sup> or even in a letter to the responding party's attorney that is signed and served pursuant to Texas Rule 21a.<sup>35</sup>

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29. *See id.* R. 194.3 ("[A] defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request[.]"). As discussed in Section III.B.6 *infra*, the time to respond to a Texas Rule 194.2(f) request for disclosure regarding testifying experts is governed by Texas Rule 195.

30. *See id.* R. 190.2(b)(6) (allowing a party to request a disclosure in Level 1 actions).

31. *See generally id.* (omitting any requirement for a particular document type in disclosure requests under Level 1 discovery); *id.* R. 194 (lacking any document-type requirement for requests for disclosure).

32. If the request is made in a pleading, the pleading's style should mention it (e.g., "Plaintiff's Original Petition and Request for Disclosure" or "Defendant's Special Exceptions, Answer, Counterclaim, and Request for Disclosure").

33. *E.g.*, TEX. R. CIV. P. 190.2(b)(6) (discussing requests for disclosure under Level 1 discovery).

34. *See id.* R. 192.2 ("The permissible forms of discovery may be combined in the same document . . ."). If the same discovery request contains disclosure requests and other types of written-discovery requests, the document's title should refer to each type of discovery (e.g., "Plaintiff's Request for Disclosure, First Interrogatories, and First Production Requests").

35. Under Texas Rule 21a, service is made by:

[D]elivering a copy to the party to be served, or the party's duly authorized agent or attorney of record in the manner specified below:

- (1) Documents Filed Electronically. A document filed electronically under [Texas] Rule 21 must be served electronically through the electronic filing manager if the email address of the party or attorney to be served is on file with the electronic filing manager. If the email address of the party or attorney to be served is not on file with the electronic filing manager, the document may be served on that party or attorney under subparagraph (2).
- (2) Documents Not Filed Electronically. A document not filed electronically may be served in person, mail, by commercial delivery service, by fax, by email, or by such other manner as the court in its discretion may direct.

*Id.* R. 21a(a)(1)–(2).

## 2. Time for Serving Disclosure Requests

Like other written-discovery requests, disclosure requests can be served any time after the action's filing,<sup>36</sup> and generally must be served no later than thirty days (and in some cases thirty-one or thirty-three days) before the discovery period ends.<sup>37</sup> Thus, a disclosure request can be served with the party's initial pleading and, as discussed in Section III.A.1 above, it can even be included in the pleading. The request should set forth when the response is due, usually thirty days after service, if the request is served after the defendant answers, but at least fifty days after service, if served before the defendant answers.<sup>38</sup> As with other written-discovery requests, a party served with an unsigned disclosure request need not respond or take any action with respect to it.<sup>39</sup> In addition, a disclosure request that is not properly served need not be answered.<sup>40</sup>

### B. *Contents of a Disclosure Request*

Texas Rule 194.2 generally sets forth the information and material that can be obtained by disclosure requests in Level 2 and 3 actions. It allows a party to request disclosure “of any or all of the following:”

36. See *id.* R. 190.2(b)(1) (“All discovery must be conducted during the discovery period, which begins when the suit is filed . . . .”); *id.* R. 190.3(b)(1) (“All discovery must be conducted during the discovery period, which begins when the suit is filed . . . .”).

37. *Id.* R. 194.1. If the requests are served by mail, they must be served at least thirty-three days before the discovery period ends. *Id.* R. 21a(c). If they are served by fax “after 5:00 p.m. local time of the recipient[.]” the requests must be served at least thirty-one days before the discovery period ends. *Id.* R. 21a(b)(2).

38. *Id.* R. 194.3. As discussed in Section III.B.6 *infra*, the time to respond to a [Texas] Rule 194.2(f) disclosure regarding testifying experts is governed by Texas Rule 195.

39. See *id.* R. 191.3(d) (“A party is not required to take any action with respect to a request or notice that is not signed.”).

40. See *In re De La Cerda*, No. 12-12-00149-CV, 2013 WL 451830, at \*2 (Tex. App.—Tyler Feb. 6, 2013, orig. proceeding) (mem. op.) (holding a trial court did not abuse its discretion in denying the plaintiff's motion to compel disclosures when the request was served on the court's clerk rather than on the defendant); *cf.* *Holmes v. Graham Mortg. Corp.*, 449 S.W.3d 257, 261–62 (Tex. App.—Dallas 2014, pet. denied) (holding the trial court did not err in refusing to consider allegedly deemed admissions in connection with the defendant's summary judgment motion because the requests for admission were not properly served on the defendant); *Approximately \$14,980.00 v. State*, 261 S.W.3d 182, 186 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (“A party's duty to respond is dependent upon receipt of the requests. Where service is not perfected, the receiving party cannot be made to suffer the consequences of not answering or untimely answering.” (citations omitted) (first citing *TEX. R. CIV. P. 21a*; then citing *Payton v. Ashton*, 29 S.W.3d 896, 898 (Tex. App.—Amarillo 2000, no pet.)); *Payton*, 29 S.W.3d at 898 (affirming the trial court's refusal to consider alleged deemed admissions because the requests were not properly served on the defendant).

- (a) the correct names of the parties to the lawsuit;
- (b) the name, address, and telephone number of any potential parties;
- (c) the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial);
- (d) the amount and any method of calculating economic damages;
- (e) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case;
- (f) for any testifying expert:
  - (1) the expert's name, address, and telephone number;
  - (2) the subject matter on which the expert will testify;
  - (3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;
  - (4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:
    - (A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and
    - (B) the expert's current resume and bibliography;
- (g) any indemnity and insuring agreements described in [Texas] Rule 192.3(f);
- (h) any settlement agreements described in [Texas] Rule 192.3(g);
- (i) any witness statements described in [Texas] Rule 192.3(h);
- (j) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;
- (k) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills

obtained by the responding party by virtue of an authorization furnished by the requesting party;

- (l) the name, address, and telephone number of any person who may be designated as a responsible third party.<sup>41</sup>

In addition to the foregoing, in Level 1 actions (i.e., “expedited actions” governed by Texas Rule 169 and divorce cases “not involving children in which a party pleads that the value of the marital estate is more than zero but not more than \$50,000”<sup>42</sup>), “[A] party may request disclosure of all documents, electronic information, and tangible items that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses.”<sup>43</sup>

Except for certain information about testifying experts, which can only be obtained by use of a disclosure request and depositions and reports as permitted by Texas Rule 195,<sup>44</sup> the information and materials discoverable pursuant to Texas Rules 190.2(b)(6) and 194.2 can also be obtained through depositions, interrogatories, and production requests. Because the number of deposition hours, interrogatories, and production requests are limited in

41. TEX. R. CIV. P. 194.2.

42. *Id.* R. 190.2(a).

43. *Id.* R. 190.2(b)(6). “A request for disclosure made pursuant to [Texas Rule 190.2(b)(6)] is not considered a request for production.” *Id.* Therefore, a request for disclosure made under Texas Rule 190.2(b)(6) does not count against the fifteen-production-request limit of Texas Rule 190.2(b)(4) in a Level 1 action.

44. *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794, 814 (Tex. 2017) (“[Texas] Rule 195 addresses the methods for obtaining such information, limiting testifying-expert discovery to that acquired through disclosures, expert reports, and oral depositions of expert witnesses.’ To minimize undue expense and curb discovery abuse, [Texas] Rule 195 does not provide for interrogatories or requests for production like the discovery requests at issue here.” (footnotes omitted) (first quoting *In re Ford Motor Co.*, 427 S.W.3d 396, 397 (Tex. 2014) (orig. proceeding) (per curiam); then citing *id.*; and then citing TEX. R. CIV. P. 195.1); *see* TEX. R. CIV. P. 195.1 (“A party may request another party to designate and disclose information concerning testifying expert witnesses only through a request for disclosure under [Texas] Rule 194 and through depositions and reports as permitted by this rule.”). Production requests under Texas Rules 176 or 205 can be used to obtain documents from non-retained testifying experts. *Id.* R. 195 cmt. 2 (“This rule and [Texas] Rule 194 do not address . . . the production of the materials identified in Rule 192.3(e)(5) and (6) relating to [non-retained testifying] experts. Parties may obtain this discovery, however, through Rules 176 and 205.”). Interrogatories, productions requests, and requests for admission can be used to obtain information about discoverable consulting-expert witnesses. *See id.* R. 195 cmt. 1 (“This rule does not limit the permissible methods of discovery concerning consulting experts whose mental impressions or opinions have been reviewed by a testifying expert.”). Expert disclosures are discussed in Section III.B.6 *infra*.



Level 1 actions,<sup>45</sup> the number of deposition hours and interrogatories are limited in Level 2 actions,<sup>46</sup> and even in Level 3 actions, the number of deposition hours and interrogatories will likely be limited,<sup>47</sup> disclosure requests should always be used to obtain the information permitted by Texas Rule 190.2(b)(6) as well as Texas Rules 194.2(a)–(e) and (g)–(k) in Level 1 actions and Texas Rules 194.2(a)–(e) and (l) in Level 2 and 3 actions. Because a disclosure request is the only type of written discovery that can be used to obtain certain information about another party's testifying experts,<sup>48</sup> a Texas Rule 194.2(f) disclosure request should always be used to obtain information about such experts irrespective of the action's discovery level.

Many of Texas Rule 194.2's categories call for information and materials specifically discoverable under Texas Rule 192.3, which governs discovery scope. For example:

- Texas Rule 194.2(b) requires disclosure of “the name, address, and telephone number of any potential parties[.]”<sup>49</sup> which is also discoverable under Texas Rule 192.3(i).<sup>50</sup>
- Texas Rule 194.2(c) requires disclosure of “the legal theories and, in general, the factual bases of the responding party's claims or defenses[.]”<sup>51</sup> which is also discoverable under Texas Rule 192.3(j).<sup>52</sup>
- Texas Rule 194.2(e) requires disclosure of “the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case[.]”<sup>53</sup> which is also discoverable under Texas Rule 192.3(c).<sup>54</sup>

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45. See TEX. R. CIV. P. 190.2(b)(2)–(5) (limiting each “party” to six deposition hours and fifteen interrogatories, production requests, and requests for admission in Level 1 actions).

46. See *id.* R. 190.3(b)(2)–(3) (limiting each “side” to fifty deposition hours and each “party” to twenty-five interrogatories in Level 2 actions).

47. See *id.* R. 190.4(b) (“The discovery limitations of Rule 190.2, if applicable, or otherwise of Rule 190.3 apply unless specifically changed in the discovery control plan ordered by the court.”).

48. See *infra* Section III.B.6.

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

50. See *infra* Section III.B.5.

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

52. See *infra* Section III.B.3.

53. TEX. R. CIV. P. 194.2(e).

54. See *infra* Section III.B.5.

- Texas Rule 194.2(f) requires the disclosure of certain information about testifying experts,<sup>55</sup> which is discoverable under Texas Rule 192.3(e).<sup>56</sup>
- Texas Rule 194.2(g) requires disclosure of “any indemnity and insuring agreements described in Rule 192.3(f).”<sup>57</sup>
- Texas Rule 194.2(h) requires disclosure of “any settlement agreements described in Rule 192.3(g).”<sup>58</sup>
- Texas Rule 194.2(i) requires disclosure of “any witness statements described in Rule 192.3(h).”<sup>59</sup>

Each of Texas Rules 190.2(b)(6)’s and 194.2’s discoverable categories of information and material is discussed below.

#### 1. The Parties’ Correct Names

Texas Rule 194.2(a) requires the disclosure of the parties’ “correct names[.]”<sup>60</sup> This information allows the requesting party to determine whether the correct party has sued or been sued, whether a party has sued or been sued in the correct capacity, and whether a party has sued or been sued in the correct name.

#### 2. Potential Parties

Texas Rule 194.2(b) requires the disclosure of “the name, address, and telephone number of any potential parties[.]”<sup>61</sup> Nothing in that Rule or in Texas Rule 192.3(i), which generally provides for such discovery, defines

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

56. See *infra* Section III.B.6.

57. TEX. R. CIV. P. 194.2(g); see *infra* Section III.B.7.

58. TEX. R. CIV. P. 194.2(h); see *infra* Section III.B.8.

59. TEX. R. CIV. P. 194.2(i); see *infra* Section III.B.9.

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

61. *Id.* R. 194.2(b); accord *In re Morse*, 153 S.W.3d 578, 582 (Tex. App.—Amarillo 2004, orig. proceeding) (“Considering that relators were entitled to the disclosure of the names and addresses of the shareholders or former shareholders as potential parties and based on the above standard of review, we conclude the trial court abused its discretion in denying the motion to compel the requested disclosures.” (footnote omitted)); *Helfand v. Coane*, 12 S.W.3d 152, 157 n.3 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (“We reject Coane’s argument that Helfand was not entitled to discovery for the mere purpose of determining who another defendant is or may be. Under our discovery rules, past and present, a party is entitled to obtain discovery regarding potential parties to a lawsuit.” (citing TEX. R. CIV. P. 192.3(i), 192.5(c)(3), 194.2(b); then citing *Fepco, LTDA v. Coussons*, 835 S.W.2d 251, 253 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding))).

“potential party,” and there are no cases defining the term. The word “potential” means “[c]apable of coming into being; possible[.]”<sup>62</sup> Because undefined words in procedural rules are typically given their plain or ordinary meaning,<sup>63</sup> under Texas Rule 194.2(b), a responding party is required to identify any person or entity that possibly could be a party (e.g., a plaintiff, defendant, or third-party defendant). Thus, for example: (1) in a premises-liability action, a defendant should disclose the names of other individuals or entities with an ownership interest in the property at issue; (2) in a medical malpractice case, the defendant should disclose the names of other attending healthcare providers for the plaintiff; and (3) in a suit against a general or limited partnership, the partnership should identify the names of its general partners.

Another issue regarding “potential-party” disclosures relates to the address and telephone number that must be disclosed for the potential party. For example, it is unclear whether the responding party should disclose an individual’s home or work address and telephone number. Similarly, for an entity that has multiple offices, it is unclear which address and telephone number should be disclosed.

Because Texas Rules 192.3(i) and 194.2(b) are in the singular—they only require the disclosure of the potential party’s “address[ ] and telephone number[.]”<sup>64</sup> Additionally, because Texas Rule 192.3(i)’s purpose is to allow

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62. *Potential*, BLACK’S LAW DICTIONARY (9th ed. 2009); accord THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1374 (4th ed. 2000) (defining “potential” as, among other things, “[h]aving possibility, capability, or power”).

63. *In re Silver*, 540 S.W.3d 530, 534 (Tex. 2018) (orig. proceeding) (“[W]hen determining a rule’s meaning we typically rely on the ordinary meaning of the words used, unless the text or relevant definitions indicate a different meaning. When determining the ordinary meaning of a word, we frequently consult dictionaries.” (citations omitted) (first citing *Melden & Hunt, Inc. v. E. Rio Hondo Water Supply Corp.*, 520 S.W.3d 887, 893 (Tex. 2017); then citing *In re Christus Santa Rosa Health Sys.*, 492 S.W.3d 276, 283 (Tex. 2016)); *In re Bridgestone Americas Tire Operations, LLC*, 459 S.W.3d 565, 569 (Tex. 2015) (orig. proceeding) (“When we analyze Texas’s procedural rules, we apply the same rules of construction that govern the interpretation of statutes. That is, we look first to the rule’s language and construe it according to its plain meaning.” (citation omitted) (first citing *Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 579 (Tex. 2012); then citing *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 437 (Tex. 2007)); *Assignees of Best Buy v. Combs*, 395 S.W.3d 847, 864 (Tex. App.—Austin 2013, pet. denied) (“When construing rules of civil procedure, we apply the same rules of construction that we use when interpreting statutes. . . . If the rule’s language is unambiguous, we must interpret it according to its plain meaning, giving meaning to the language consistent with other provisions in the rule. We typically give undefined terms in a statute their ordinary meaning. . . .” (first citing *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d at 437; then citing *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439, 441 (Tex. 2011))).

64. TEX. R. CIV. P. 192.3(i), 194.2(b).

the opposing party to easily locate the potential party,<sup>65</sup> for an individual, the responding party can designate the individual's home address and telephone number, work address and telephone number, another address and telephone number, or any combination of the foregoing at which the party normally can be found and served with process.<sup>66</sup> However, if the requesting party claims that the home address and telephone number of a potential party are needed for a proper investigation of the party, a court should order the responding party to provide them.<sup>67</sup>

In contrast, for an entity, the responding party should provide the address and telephone number of either the entity's principal office in Texas or the business location with the most significant relationship to the facts in the action. It is clear, however, that a responding party should not provide the potential party's attorney's address and telephone number.<sup>68</sup>

### 3. Legal Theories and Factual Bases for Claims and Defenses

Texas Rule 194.2(c) requires disclosure of the responding party's "legal theories and, in general, the factual bases of [its] claims or defenses[.]"<sup>69</sup> This corresponds to Texas Rule 192.3(j), which allows contention discovery.<sup>70</sup>

As with a contention interrogatory answer, the responding party, in a contention disclosure, "need not marshal all evidence that may be offered at trial"<sup>71</sup> or "brief legal issues."<sup>72</sup> Rather, Texas Rule 194.2(c)'s purpose is to provide the responding "party's basic assertions, whether in prosecution of claims or in defense."<sup>73</sup>

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65. See discussion *infra* note 120 and accompanying text.

66. See discussion *infra* note 121 and accompanying text.

67. See discussion *infra* note 122 and accompanying text.

68. See discussion *infra* notes 120–22 and accompanying text.

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

70. See *id.* R. 192.3(j) ("A party may obtain discovery of any other party's legal contentions and the factual bases for those contentions.").

71. *Id.* R. 194.2(c).

72. *Id.* R. 194 cmt. 2 ("Rule 194.2(c) and (d) permit a party further inquiry into another's legal theories and factual claims than is often provided in notice pleadings. So-called 'contention interrogatories' are used for the same purpose. Such interrogatories are not properly used to require a party to marshal evidence or brief legal issues. Paragraphs (c) and (d) are intended to require disclosure of a party's basic assertions, whether in prosecution of claims or in defense."); see *id.* R. 192 cmt. 5 ("Rule 192.3(j) . . . does not require a marshaling of evidence.").

73. *Id.* R. 194 cmt. 2. Texas Rules 194 and 197 prohibit interrogatories from "requir[ing] the responding party to marshal all of its available proof or the proof it intends to offer at trial." *Id.* R. 197.1; *id.* R. 194 cmt. 2 (stating that contention interrogatories "are not properly used to require a

Unfortunately, there is no precise answer regarding the level of detail needed for a proper contention disclosure. Rather, this depends on the action's nature and complexity. Because the principal purpose of contention disclosures is to provide basic information about legal and factual contentions early in the action so that the requesting party can plan and focus its discovery or determine that additional discovery is unnecessary, two things are clear.

*First*, a proper disclosure cannot merely reference the responding party's pleadings. Thus, for example, a plaintiff's disclosure should not refer the requesting party to the plaintiff's petition no matter how detailed,<sup>74</sup> and a

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party to marshal evidence or brief legal issues"); *id.* R. 197 cmt. 1 ("[I]nterrogatories that ask a party to state all legal and factual assertions are improper. . . . [I]nterrogatories may be used to ascertain basic legal and factual claims and defenses but may not be used to force a party to marshal evidence."). But neither Rule explains what constitutes evidence marshaling. Cases, however, make clear that "[m]arshaling means '[a]rranging all of a party's evidence in the order that it will be presented at trial.'" *Sheffield Dev. Co. v. Carter & Burgess, Inc.*, No. 02-11-00204-CV, 2012 WL 6632500, at \*6 (Tex. App.—Fort Worth Dec. 21, 2012, pet. dismissed) (mem. op.) (quoting *Marshaling*, BLACK'S LAW DICTIONARY (9th ed. 2009)); *accord In re Sting Soccer Grp., LP*, No. 05-17-00317-CV, 2017 WL 5897454, at \*7 (Tex. App.—Dallas Nov. 30, 2017, orig. proceeding) (mem. op.).

74. *Cf. Anderson v. UPS, Inc.*, No. 09-2526-KHV-DJW, 2010 WL 4822564, at \*6 (D. Kan. Nov. 22, 2010) ("[C]ourts typically hold that referring the propounding party to other pleadings, or incorporating by reference portions of other pleadings such as the complaint, is insufficient to answer an interrogatory." (first citing *Lipari v. U.S. Bancorp, N.A.*, No. 07-2146-CM, 2008 WL 2704473, at \*1 (D. Kan. July 8, 2008); *Turner v. Chrysler Motors Corp.*, No. 87-3423, 1987 WL 26535, at \*2 (E.D. Pa. Dec. 2, 1987); then citing 8B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2177, at 80 (3d ed. 2010)); *Hawn v. Shoreline Towers Phase I Condo. Ass'n*, No. 3:07cv97/RV/EMT, 2007 WL 2298009, at \*2 (N.D. Fla. Aug. 9, 2007) ("[I]t is insufficient to answer an interrogatory by merely referencing allegations of a pleading." (first citing *Davidson v. Goord*, 215 F.R.D. 73, 77 (W.D.N.Y. 2003); then citing *King v. E.F. Hutton, Inc.*, 117 F.R.D. 2, 6 (D.D.C. 1987)); *Davidson*, 215 F.R.D. at 77 ("Nor [is it] permissible to refuse to provide answers to interrogatories . . . on the ground that information sought can be gleaned from the requested party's pleading . . . . As answers to interrogatories . . . must be in a form suitable for use at trial, it is insufficient to answer by merely referencing allegations of a pleading." (citing *Farran v. Johnston Equip., Inc.*, No. 93-6148, 1995 WL 549005, at \*5 (E.D. Pa. Sept. 12, 1995); *King*, 117 F.R.D. at 6; *United States v. W. Va. Pulp & Paper Co.*, 36 F.R.D. 250 (S.D.N.Y. 1964); 4A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 33.25[1] (2d ed. 1994)); *DiPietro v. Jefferson Bank*, 144 F.R.D. 279, 282 (E.D. Pa. 1992) ("[T]he fact that plaintiff's complaint is sworn does not make it any more acceptable to answer an interrogatory solely by referencing paragraphs of that sworn complaint."); *Stabilus v. Haynsworth, Baldwin, Johnson & Greaves, P.A.*, 144 F.R.D. 258, 263–64 (E.D. Pa. 1992) ("[P]laintiff's [interrogatory] response is to 'See plaintiff's Complaint.' . . . Plaintiff cannot avoid answering interrogatories by referring the defendant to the complaint, no matter how detailed." (citations omitted) (citing *King*, 117 F.R.D. at 6)).

defendant's disclosure should neither refer the requesting party to the defendant's answer nor re-urge a general denial.<sup>75</sup>

*Second*, although a contention disclosure need not contain exacting detail, a plaintiff's disclosure should identify each cause of action and state the basic facts underlying it. A defendant's disclosure should (1) deny the factual allegations underlying each cause of action and state the basic facts underlying the denial, and (2) identify each affirmative defense and the basic facts underlying it. This conclusion is supported by Texas Rule 194's commentary, which provides the following example of a proper Texas Rule 194.2(c) disclosure:

[F]or example, a plaintiff would be required to disclose that he or she claimed damages suffered in a car wreck caused by defendant's negligence in speeding . . . , but would not be required to state the speed at which defendant was allegedly driving. . . . In the same example, defendant would be required to disclose his or her denial of the speeding allegation . . . .<sup>76</sup>

A more detailed inquiry into the responding party's contentions should be made through depositions and interrogatories. Accordingly, Texas Rule 194.2(c) should be used to obtain basic information concerning the responding party's contentions, and depositions and interrogatories should be used to obtain any additional needed detail about them.

Oftentimes, a contention disclosure served early in an action will claim that the responding party needs further discovery to make a proper disclosure. Such a response is improper because a plaintiff asserting a cause of action must have some factual basis for asserting it before filing suit, and a defendant must have some basis for contesting it when answering.<sup>77</sup>

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75. See *LaBeth v. Pasadena Bayshore Hosp., Inc.*, No. 14-10-01237-CV, 2012 WL 113050, at \*5 (Tex. App.—Houston [14th Dist.] Jan. 12, 2012, pet. denied) (mem. op.) (suggesting the defendant's reference to its general denial was improper); cf. *Morock v. Chautauqua Airlines, Inc.*, No. 8:07-cv-210-T-17-MAP, 2007 WL 4247767, at \*2 (M.D. Fla. Dec. 3, 2007) (holding that answering an interrogatory by referring the requesting party to the responding answer is "deficient").

76. TEX. R. CIV. P. 194 cmt. 2. A disclosure in a simple breach-of-contract case would be similar. The plaintiff should (1) identify the specific contract allegedly breached; (2) identify the contractual obligation or provision breached; and (3) describe generally how the obligation or provision was breached. Conversely, the defendant should (a) state whether it is denying the breach and, if so, the basic facts supporting its denial, such as why the obligation or provision at issue was not breached; and (b) disclose each affirmative defense and the basic facts underlying it.

77. TEX. CIV. PRAC. & REM. CODE § 10.001(3) ("The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry: . . . each allegation

Thus, the responding party has an obligation, when it makes a contention disclosure, to disclose the best information then available concerning each of its causes of action or defenses, however limited and susceptible to change it may be.<sup>78</sup>

Unlike most other written discovery responses, a contention disclosure “that has been changed by an amended or supplemental response is not admissible and may not be used for impeachment.”<sup>79</sup> The obvious purpose of this prohibition is to encourage parties to be transparent and describe their contentions early in the action without fear of having an early, candid disclosure come back to haunt them.

Although a failure to disclose a cause of action or defense set forth in the responding party's pleadings does not waive the cause of action or defense,<sup>80</sup> the responding party, under Texas Rule 193.6, should be

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or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery[.]”); see TEX. R. CIV. P. 13 (“The signatures of attorneys or parties constitute a certificate by them that they have read the pleading[, and] . . . that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment.”); cf. *Firetrace USA, LLC v. Jesclard*, No. CV-07-2001-PHX-ROS, 2009 WL 73671, at \*2 (D. Ariz. Jan. 9, 2009) (“Defendants, who asserted affirmative defenses in their [a]nswer, must have contemplated a [Federal] Rule 11 basis in law or fact when they asserted these defenses and should be required to reveal this [Federal] Rule 11 basis, as well as other presently-known facts on the matter, when responding to Plaintiffs’ contention interrogatory, regardless of how much discovery has transpired.” (citing *United States ex rel. O’Connell v. Chapman Univ.*, 245 F.R.D. 646, 649 (C.D. Cal. 2007))); *Chapman Univ.*, 245 F.R.D. at 649 (“Requiring a party to answer contention interrogatories is ‘consistent with Rule 11 of the Federal Rules of Civil Procedure, [which requires that] plaintiffs must have some factual basis for the allegations in their complaint.’” (quoting *In re One Bancorp Sec. Litigation*, 134 F.R.D. 4, 8 (D. Me. 1991))).

78. See discussion *infra* notes 96–97 and accompanying text.

79. TEX. R. CIV. P. 194.6.

80. See *In re J.N. & M.N.*, No. 02-17-00179-CV, 2017 WL 3910910, at \*3 (Tex. App.—Fort Worth Sept. 7, 2017, no pet.) (mem. op.) (“[P]roperly pled claims for affirmative relief, as opposed to withheld evidence, are not abandoned or waived by a party’s failure to expressly identify those claims in a response to a request for disclosure.” (quoting *Concept Gen. Contracting, Inc. v. Asbestos Maint. Servs., Inc.*, 346 S.W.3d 172, 180 (Tex. App.—Amarillo 2011, pet. denied))); *Bundren v. Holly Oaks Townhomes Ass’n*, 347 S.W.3d 421, 431 (Tex. App.—Dallas 2011, pet. denied) (“While, absent proof of good cause or lack of unfair surprise or prejudice, the failure to completely respond to discovery requests results in the automatic exclusion of non-disclosed evidence, ‘properly pled claims for affirmative relief, as opposed to withheld evidence, are not abandoned or waived by a party’s failure to expressly identify those claims’ in response to a discovery request.” (quoting *Concept Gen. Contracting, Inc.*, 346 S.W.3d at 180)); *Killam Ranch Props., Ltd. v. Webb Cty.*, No. 04-08-00105-CV, 2008 WL 4958452, at \*2 (Tex. App.—San Antonio Nov. 19, 2008, no pet.) (mem. op.) (“A request for recovery of attorney’s fees, stated in an answer, is a claim for affirmative relief. Killam Ranch has not provided this court with any authority suggesting that the County abandoned its claim for attorney’s fees by

precluded from offering evidence about the cause of action or defense at trial or in response to a summary judgment motion if it failed to disclose the general factual bases for the cause of action or defense absent a showing of good cause for the failure or a lack of unfair surprise or unfair prejudice from it.<sup>81</sup>

#### 4. Damages

Texas Rule 194.2(d) requires disclosure of “the amount and any method of calculating economic damages[.]”<sup>82</sup> Thus, by its express terms, the rule

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failing to respond, or fully respond, to Killam Ranch’s discovery requests under [Texas R]ules 194.2(c) and (d). The only authorities cited by Killam Ranch involved situations where the appellate courts held the trial court did not err in excluding evidence based on failures to comply with discovery. These cases in no way suggest a party *abandons* a claim by failing to respond to a [Texas R]ule 194.2(c) discovery request. There is nothing in the case law linking a failure to respond to discovery to an abandonment of a claim.” (citations omitted) (first citing *In re C.A.S.*, 128 S.W.3d 681, 686 (Tex. App.—Dallas 2003); then citing *Grimes v. State*, No. 03-04-00154-CV, 2005 WL 2043842 (Tex. App.—Austin Aug. 26, 2005, no pet.); *Jackson v. Maul*, No. 04-02-00873-CV, 2003 WL 22295332 (Tex. App.—San Antonio Oct. 8, 2003, no pet.)).

81. *See Hardin v. Lella*, No. 03-14-00607-CV, 2015 WL 6830598, at \*3 (Tex. App.—Austin Nov. 4, 2015, pet. denied) (mem. op.) (holding the trial court did not abuse its discretion in allowing the defendant to amend his petition on the day of the summary judgment hearing to assert novation as a defense, but precluding him from adducing any summary judgment evidence in support of the defense because it was not disclosed in his Texas Rule 194.2(c) disclosure); *Holland v. Friedman & Feiger*, No. 05-12-01714-CV, 2014 WL 6778394, at \*7 (Tex. App.—Dallas Dec. 2, 2014, pet. denied) (mem. op.) (“Under [Texas R]ule 194.2(c), appellees were entitled to disclosure of the Hollands’ legal theories and the factual basis of their claims. We conclude the Hollands’ failure to disclose they either suffered or were seeking mental anguish damages did not comply with [Texas R]ule 194.2(c).” (citing *Dalon v. City of DeSoto*, 852 S.W.2d 530, 538 (Tex. App.—Dallas 1992, writ denied)); *Grimes*, 2005 WL 2043842, at \*5 (“Last, Grimes asserts that the Railroad Commission erred because it failed to consider whether Endeavor still had a good faith claim to the Hill ‘30–A’ Lease. In Grimes’s response to the [Texas] Rule 194 discovery request for disclosure, he failed to identify this ground as a legal basis for his opposition to the permit. The discovery request for disclosure required Grimes to disclose all of his legal theories and underlying factual bases. A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed. It was therefore proper for the Railroad Commission to exclude evidence related to this legal theory at trial because Grimes failed to supplement his disclosure to include this theory in a timely manner.” (citations omitted) (first citing 16 TEX. ADMIN. CODE § 1.81(a)(3), (b) (2005); TEX. R. CIV. P. 194.2(c); then citing *id.* R. 193.6(a)); *Maul*, 2003 WL 22295332, at \*1–2 (affirming the trial court’s order precluding the plaintiff from presenting evidence about the defendant’s negligence because the plaintiff’s Texas Rule 194.2(c) response only identified the categories of damages sustained by the plaintiff and failed to provide the general factual bases for the defendant’s alleged negligence).

82. TEX. R. CIV. P. 194.2(d).



does not relate to non-economic or exemplary damages.<sup>83</sup> Nothing in the rule defines “economic damages.”<sup>84</sup> In other contexts, however, “economic damages” have been defined as “compensatory damages intended to compensate a claimant for actual economic or pecuniary loss”<sup>85</sup> other than exemplary damages,<sup>86</sup> whereas, “non[-]economic damages” have

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83. *Levine v. Steve Scharn Custom Homes, Inc.*, 448 S.W.3d 637, 653 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (“The Levines argue that SSCHI was ‘legally precluded’ from recovering on its defamation claim because SSCHI failed to disclose their method and amount of damages pursuant the Levines’ request for disclosure. [Texas] Rule 194.2(d) requires a plaintiff to disclose to a defendant who requests it ‘the amount and any method of calculating economic damages.’ This rule only concerns economic damages. It is undisputed that SSCHI sought and obtained only non-economic damages.” (citations omitted) (first quoting TEX. R. CIV. P. 194.2(d); then citing *id.*; and then citing *id.* R. 194.2 cmt. 2)). “Exemplary damages’ means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages are neither economic nor noneconomic damages. ‘Exemplary damages’ includes punitive damages.” TEX. CIV. PRAC. & REM. CODE § 41.001(5).

84. Comment 2 to the 1999 change to Texas Rule 194 identifies “mental anguish” as an example of non-economic damages. TEX. R. CIV. P. 194 cmt. 2.

85. TEX. CIV. PRAC. & REM. CODE § 41.001(4).

86. *Acord* TEX. BUS. & COM. CODE § 17.45(11) (defining “economic damages” for DTPA purposes as “compensatory damages for pecuniary loss, including costs of repair and replacement” but “not includ[ing] exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society”); TEX. PROP. CODE § 27.001(6) (defining “economic damages” for purposes of the Residential Construction Liability Act as “compensatory damages for pecuniary loss proximately caused by a construction defect” but “not includ[ing] exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society”); *see also* Robert K. Wise & Heather E. Poole, *Negligent Misrepresentation in Texas: The Misunderstood Tort*, 40 TEX. TECH. L. REV. 845, 901 (2008) (“Pecuniary, or economic loss, ‘has been broadly defined by Texas courts.’ Generally, the term has been defined to include money and everything that can be valued in money. *Black’s Law Dictionary* defines pecuniary loss as a ‘loss of money or of something having monetary value.’ In other words, a loss that affects a plaintiff’s pocketbook, as opposed to a personal injury or a physical injury to property.” (footnotes omitted) (quoting *Pecuniary Loss*, BLACK’S LAW DICTIONARY (8th ed. 2004))).

Examples of pecuniary or economic losses include the difference between the value paid and the value received in a transaction, the cost of settling a lawsuit, the value of a lost cause of action against a third party, damages incurred in preparation for the use of an article, and lost profits and other types of consequential damages. Pecuniary or economic loss does not include damages for physical injury, physical pain and suffering, mental or emotional pain or anguish, loss of consortium, injury to reputation, or physical injury to property.

Wise & Poole, *supra*, *acord* *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 763 (Tex. 2003) (“When someone suffers personal injuries, the damages fall within two broad categories—economic and non-economic damages. Traditionally, economic damages are those that compensate an injured party for lost wages, lost earning capacity, and medical expenses. Non-economic damages include compensation for pain, suffering, mental anguish, and disfigurement. ‘Hedonic’ damages are another type of non-economic damages and compensate for loss of enjoyment of life.” (first citing *Peek v.*

been defined as “damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages.”<sup>87</sup> The foregoing definition of “economic damages” should apply to Texas Rule 194.2(d).<sup>88</sup>

Because attorney’s fees awarded pursuant to a contractual provision, fee-shifting statute, or common-law exception to the “American Rule” about attorney’s fees (e.g., the “common-fund” or “bad-faith” exceptions) are not economic damages, they need not be disclosed in a damage disclosure.<sup>89</sup> However, if the fees are part of the plaintiff’s damages (e.g., in a case in which an insurer or indemnitor breaches its duty to defend), they must be disclosed.<sup>90</sup>

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Equip. Serv. Co. of San Antonio, 779 S.W.2d 802, 303 (Tex. 1989); then citing *Mo. Pac. R.R. Co. v. Handley*, 341 S.W.2d 203, 205 (Tex. App.—San Antonio 1960, no writ)); *see also* *Cotton Patch Café, Inc. v. Micros Sys., Inc.*, No. MJG-09-3242, 2012 WL 5986773, at \*5 (D. Md. Nov. 27, 2012) (“In Texas, ‘economic loss’ has been defined as ‘damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property . . . as well as the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold.’” (quoting *Entergy Gulf States, Inc. v. Akrotex, Inc.*, 40 S.W.3d 201, 204 (Tex. App.—Beaumont 2001, no pet.)); *City of Alton v. Sharyland Water Supply Corp.*, 277 S.W.3d 132, 152 (Tex. App.—Corpus Christi 2009) (same), *aff’d and rev’d in part on other grounds*, 354 S.W.2d 407 (Tex. 2011).

87. *See* TEX. CIV. PRAC. & REM. CODE § 41.001(12) (defining “non[-]economic damages” for purposes of exemplary damages); *see also* TEX. BUS. & COM. CODE § 17.45(11) (defining “economic damages” for DTPA purposes); TEX. PROP. CODE § 27.001(6) (defining “economic damages” for purposes of the Residential Construction Liability Act).

88. *See* *Grant v. Sw. Elec. Power Co.*, 20 S.W.3d 764, 770 (Tex. App.—Texarkana 2000) *aff’d and rev’d in part on other grounds*, 73 S.W.3d 211 (Tex. 2002) (noting “[t]he term economic damages is a term of art with a specific legal meaning” and then applying the definition of such damages in Section 41.001(4) of the Texas Civil Practice and Remedies Code to the determination of whether an electric utility’s damages limitation reasonably limited the recovery).

89. *Goldman v. Olmstead*, 414 S.W.3d 346, 365 n.5 (Tex. App.—Dallas Oct. 24, 2013, no pet.) (“[T]he calculation of the amount of attorney’s fees incurred by a party is not an economic damage that is required to be disclosed in response to a request for disclosure” (citing *Jespersen v. Sweetwater Ranch Apartments*, 390 S.W.3d 644, 660–61 (Tex. App.—Dallas 2012, no pet.)); *Jespersen*, 390 S.W.3d at 660–61 (same); *Carter v. Flowers*, No. 02-10-00226-CV, 2011 WL 4502203, at \*4 (Tex. App.—Fort Worth Sept. 29, 2011, no pet.) (mem. op.) (same); *Shafer v. Gulliver*, No. 14-09-00646-CV, 2010 WL 4545164, at \*10–11 (Tex. App.—Houston [14th Dist.] Nov. 12, 2010, no pet.) (mem. op.) (same).

90. *See* *C.A. Walker Constr. Co. v. J.P. Sw. Concrete, Inc.*, No. 01-07-00904-CV, 2009 WL 884754, at \*7–8 (Tex. App.—Houston [1st Dist.] Apr. 2, 2009, no pet.) (mem. op.) (reversing a damage award because the plaintiff’s damage disclosure, among other things, did not disclose that it was seeking to recover attorney’s fees paid to a third party in another lawsuit); *Shafer*, 2010 WL 4545164, at \*10–11

Under Texas Rule 194.2(d), it is improper for a responding party, who is seeking damages, simply to provide a “lump-sum statement” of the damages it allegedly sustained. Rather, the responding party must disclose each category or type of damages for each cause of action, its amount, and how the amount was calculated.<sup>91</sup> As explained by the commentary to Texas

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n.12 (distinguishing between a situation in which a party claims attorney’s fees as damages and one in which it claims them under a fee-shifting statute).

91. Cf. *Silicon Knights, Inc. v. Epic Games, Inc.*, No. 5:07-CV-275-D, 2012 WL 1596722, at \*4 (E.D.N.C. May 7, 2012) (“Not surprisingly, SK argues that, independent of the Lloyd Report, it complied with [Federal] Rules 26(a)(1)(A)(iii) and 26(e). First, SK notes that it stated in its initial and first supplemental initial disclosures that it expected its damages for the various claims in its complaint to be ‘several million dollars. . . .’ SK then argues that these statements were adequate damages computations. However, a [Federal] Rule 26(a)(1)(A)(iii) disclosure must include ‘more than a lump sum statement of the damages allegedly sustained.’ Instead, the rule ‘contemplates some analysis,’ including an analysis of the damages sought as to each claim. SK’s statements that it expected its damages to be ‘several million dollars’ lack precision and analysis. Accordingly, SK did not satisfy its [Federal] Rule 26(a)(1)(A)(iii) obligation with these statements.” (citations omitted) (quoting *City & Cty. of S.F. v. Tutor-Saliba Corp.*, 218 F.R.D. 219, 221–22 (N.D. 2003)); *Frontline Med. Assocs., Inc. v. Coventry Health Care*, 263 F.R.D. 567, 569 (C.D. Cal. 2009) (“Plaintiff’s complaint alleged damages under three causes of action for breach of contract, violation of fair procedure, and interference with prospective economic advantage. Plaintiff’s initial disclosure, therefore, should disclose a computation of each category of damages attributable to each cause of action.” (citations omitted) (citing *City & Cty. of S.F.*, 218 F.R.D. at 222)); *City & Cty. of S.F.*, 218 F.R.D. at 221–22 (“[I]he plaintiff should provide more than a lump sum statement of the damages allegedly sustained. As one treatise explained: ‘The meaning of “category” of damages is not clear. Presumably, however, it requires more than merely the broad types of damages (“wrongful death,” or “property damage,” “bodily injury,” etc.). To make the disclosure obligation meaningful, a more detailed specification of damages is apparently required: For example, in a personal injury case, the nature and extent of any injuries suffered must be disclosed, including amounts claimed for “general” damages (pain, suffering or disfigurement) as well as “special” damages (medical bills, lost wages, cost of repairing damaged property, etc.).’ Moreover, the ‘computation’ of damages required by [Federal] Rule 26(a)(1)(C) contemplates some analysis . . . . On the other hand, disclosing a precise figure for damages without a method of calculation may be sufficient in cases where other evidence is developed *e.g.* in the context of a preliminary hearing, and it is appropriate to defer further specification to *e.g.* development of expert testimony. The Court concludes that Plaintiff should provide its assessment of damages in light of the information currently available to it in sufficient detail so as to enable each of the multiple Defendants in this case to understand the contours of its potential exposure and make informed decisions as to settlement and discovery. More specifically, in this case, Plaintiffs’ aggregation of *e.g.* compensatory damages for all claims, all contracts, and all defendants does not permit each Defendant to know the extent of its liability since the SAC alleges breaches and fraud with respect to six different contracts, each of them involving some defendants but not others. Nor are the Defendants able to discern how the compensatory damages claimed are distributed among the contracts. It would be useful to know, for instance, for both discovery organization as well as for settlement discussions, whether the bulk of damages are attributable to one or two contracts. Nor are Defendants able to discern from Plaintiffs’ initial disclosure which portion of the compensatory damages are attributable to breach of contract, fraud, and RICO claims. Because the merits analysis and assessment of likelihood of success may vary among the claims, knowing what portion of the damages are attributed to each claim would assist the

Rule 194, “a plaintiff would be required to disclose that he or she claimed damages suffered in a car wreck caused by defendant’s negligence in speeding, and would be required to state how loss of past earnings and

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parties in putting a settlement value on the case. Providing this information, even if based as tentative early information, would advance the litigation without imposing a significant burden on the Plaintiffs. The Court notes the fact that Plaintiffs disclose a very specific dollar amount (\$42,284,757.00) for compensatory and other damages indicates that they have already engaged in a detailed calculation of damages. While the Court does not yet mandate disclosure of precise calculations given that many of the documents which are likely to inform the calculation remain in Defendants’ hands and some level of expert analysis may be required, the Court contemplates that Plaintiffs will update its disclosure and provide greater detail as to its calculations as discovery progresses.” (footnote omitted) (citations omitted) (first quoting *RUTTER GROUP, FEDERAL CIVIL PROCEDURE BEFORE TRIAL* § 11:166 (2001); then citing *Bullard v. Roadway Exp.*, 3 F. App’x 418, 420 (6th Cir. 2001) (per curiam); then citing *United States v. Rempel*, No. A00-00690-CV (HRH), 2001 WL 1572190, at \*2 (D. Ala. 2001); then citing *First Nat’l Bank of Chi. v. Ackerley Commc’n, Inc.*, No. 94 Civ. 7539(KTD), 2001 WL 15693, at \*6 n.6 (S.D.N.Y. Jan. 8, 2001); then citing *Kleiner v. Burns*, No. 00-2160-JWL, 2000 WL 1909470, at \*2 (D. Kan. Dec. 22, 2000); and then citing *Pine Ridge Recycling v. Butts Cty.*, 889 F. Supp. 1526, 1527 (M.D. Ga. 1995)); see *Bullard*, 3 F. App’x at 420 (holding, in a claim for lost wages, there should be some information relating to hours worked and pay rate); *Fabick, Inc. v. FABCO Equip., Inc.*, No. 16-cv-172-wmc, 2017 WL 6001869, at \*5 (W.D. Wis. Dec. 4, 2017) (“[P]laintiff does not attempt to argue that its initial disclosure, dated November 30, 2016, was adequate, nor could it since the disclosure only lists categories of damages without any attempt at a ‘computation.’”); *Easton v. Asplundh Tree Experts Co.*, No. C16-1694RSM, 2017 WL 5483769, at \*4 (W.D. Wash. Nov. 15, 2017) (precluding the plaintiff from offering evidence of actual damages because, “[a]t no point in this litigation did plaintiff quantify—even roughly—the amount of actual damages she suffered as a result of her layoff. . . . However, making certain documents available and promising that someone (in this case Plaintiff) will testify regarding damages is not a ‘computation’ and fails to apprise Defendant of the extent of its exposure in this case.”); *Silvagni v. Wal-Mart Stores, Inc.*, No. 2:16-cv-00039-JCM-NJK, 2017 WL 5100162, at \*2–3 (D. Nev. Nov. 2, 2017) (“As the word ‘computation’ contemplates, a proper damages disclosure must provide ‘some analysis beyond merely setting forth a lump sum amount for a claimed element of damages.’ . . . In this case, Plaintiff has disclosed a claim for future lumbar surgery in the amount of \$213,000. . . . [H]owever, Plaintiff never disclosed how she arrived at that figure and is merely relying on that lump sum as her disclosure. That lump sum is not a computation, as required by [Federal] Rule 26. As a result, Defendant has shown that Plaintiff failed to comply with her disclosure obligations with respect to her damages claim for future lumbar surgery.” (footnote omitted) (citations omitted) (quoting *Allstate Ins. Co. v. Nassiri*, No. 2:08-cv-00369-JCM-GWF, 2011 WL 2977127, at \*4 (D. Nev. July 21, 2011)); *Sulaiman v. Biehl & Biehl, Inc.*, No. 15 C 04518, 2016 WL 5720476, at \*8 (N.D. Ill. Sept. 30, 2016) (“If Sulaiman was claiming actual damages, he was required by [Federal] Rule 26(a)(1)(A)(iii) to disclose, and compute, those damages. Sulaiman does not contest that actual damages are an element of an ICFA claim and fails to identify any evidence of actual damages that he suffered as a result of the conduct he claims violated the ICFA. Accordingly, he failed to meet the disclosure requirements of [Federal] Rule 26(a)(1)(A)(iii).”); *United States v. Rempel*, 202 F. Supp. 2d 1051, 1053–54 (D. Alaska 2001) (requiring the government to disclose the computation of tax liability, the functional equivalent of a damages calculation in a tort case); *First Nat’l Bank of Chi.*, 2001 WL 15693, at \*6 n.6 (holding the calculation of damages requires more than merely setting forth the figure demanded).

future earning capacity was calculated[.]”<sup>92</sup>

Oftentimes, a damage disclosure, like a contention disclosure, served early in an action will claim that the responding party needs further discovery to make a proper disclosure. Such a response is improper because a party claiming damages must have some evidence that an injury occurred and some basis for calculating its alleged damages before filing suit.<sup>93</sup> Thus, the responding party has an obligation when making its damage disclosure to disclose the best information then available concerning its damages, however limited and susceptible to change it may be. As noted by one federal court in compelling the plaintiffs to disclose the amount and method of calculation of their damages under the comparable federal disclosure rule, Federal Rule 26(a)(1)(A)(iii):

Plaintiff's computation of damages is nothing more than a regurgitation of its prayer for relief in its complaint. Such a computation does not, even at this early stage of the case, comply with the requirements of [Federal] Rule 26(a)(1)(A)(iii).

. . . A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures. . . .

In *City and County of San Francisco v. Tutor-Saliba Corporation*,<sup>[94]</sup> the court . . . stated that a plaintiff should provide its computation of damages in light of the information currently available to it in sufficient detail so as to enable the defendants to understand the contours of their potential exposure and make informed decisions regarding settlement and discovery. The court further stated that the word “computation” contemplates some analysis beyond merely setting forth a lump sum amount for a claimed element of damages. A computation of damages may not need to be detailed early in the case before all relevant documents or evidence has been obtained by the plaintiff. As

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92. TEX. R. CIV. P. 194 cmt. 2; *see also* cases cited *infra* note 94.

93. TEX. CIV. PRAC. & REM. CODE § 10.001(3) (“The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory’s best knowledge, information, and belief, formed after reasonable inquiry: . . . each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery[.]”); TEX. R. CIV. P. 13 (“The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment.”).

94. *City & Cty. Of S.F. v. Tutor-Saliba Corp.*, 218 F.R.D. 219 (N.D. 2003).

discovery proceeds, however, the plaintiff is required to supplement its initial damages computation to reflect the information obtained through discovery. . . .

Plaintiff argues that it cannot provide a more specific damages computation at this time because its damages will substantially be based on recovery of the profits that Defendant has obtained through its interference with Plaintiff's current or prospective contractual and business relations. Plaintiff states that once it has obtained all the necessary information through discovery, its damages expert(s) will evaluate the data and prepare a damages computation. The Court understands that precise calculation of Plaintiff's alleged damages may need to await future expert analysis. Plaintiff alleges, however, that Defendant has interfered with its current or prospective contractual and business relations. Unless this allegation is wholly speculative, Plaintiff must have some knowledge of the contractual or business relationships that have been interrupted, and should be able to provide some estimates of value of those contracts or relationships in order to provide a preliminary computation of its damages. If Plaintiff does not presently have information that its contractual or business relationships have, in fact, been damaged by Defendant's alleged conduct, then it should so state.<sup>95</sup>

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95. *LT Game Int'l Ltd. v. Shuffle Master, Inc.*, No. 2:12-cv-01216-GMN, 2013 WL 321659, at \*5–6 (D. Nev. Jan. 28, 2013) (citations omitted) (first citing FED. R. CIV. P. 26(e)(1)(A); then citing *City & Cty. of S.F.*, 218 F.R.D. at 221; and then citing *Frontline Med. Assocs.*, 263 F.R.D. at 569); accord *Johnstech Int'l Corp. v. JF Microtechnology SDN BHD*, No. 14-cv-02864-JD, 2016 WL 4182402, at \*1–2 (N.D. Cal. Aug. 8, 2016) (“While the courts have declined to take a rigid approach to the specificity required for initial disclosures about damages, it has been abundantly clear for some time that at least some facts and figures, however tentative, need to be provided; simply saying ‘you owe me’ is not enough. And yet, all JFM said in its initial disclosures for damages was just that. Even as late as its final supplemental disclosures, which it served just before the close of discovery, JFM’s ‘computations’ of special damages consisted of nothing more than cursory and unadorned statements like ‘[a]ll monies lost . . . as a result of business lost by JF Microtechnology as the result of the false letter’ and ‘[a]ll profits earned as a result of the unlawful diversion of business’ from JFM to Johnstech. The ‘computation’ for general damages managed to be even less informative: ‘[m]onies to compensate’ for ‘shame, mortification and hurt feelings resulting from the false letter.’ Needless to say, JFM did not provide or even identify any evidence or documentation in support of these hazy generalizations. In effect, JFM never disclosed at any time in the litigation a useful valuation of its counterclaim damages as [Federal] Rule 26(a) requires. That is an unacceptable default.” (citations omitted) (citing *City & Cty. of S.F.*, 218 F.R.D. at 221)); *Stemrich v. Zabayaka*, No. 1:12-CV-1409, 2013 WL 4080310, at \*2 (M.D. Pa. Aug. 13, 2013) (“[T]he timing requirements of [Federal] Rule 26(a)(1)(C) cannot be avoided if the receiving party insists on compliance. Here, Defendants so insist. As such, Plaintiffs must disclose the ‘best information available related to the damages claim,’ even if that information is subject to change.” (citations omitted) (citing FED. R. CIV. P. 26(a)(1)(C))); *Dunstan v. Wal-Mart Stores E., L.P.*, No. 3:07-cv-713-J-32TEM, 2008 WL 2025313, at \*1 (M.D. Fla. 2008) (“Plaintiffs should be able to make a good faith estimate of damages and methods of calculations based on the information

A defendant must disclose “any basis for contesting the damage calculation.”<sup>96</sup> Thus, if it believes that the plaintiff's damages are overstated or improperly calculated, it should disclose that fact and the bases for it. And, if the defendant intends to provide its own damage calculation at trial, it should disclose both the damages amount and its calculation.

A failure to make a proper damage disclosure timely (e.g., by failing to clearly identify each category or type of economic damages, its dollar amount, or how the dollar amount was calculated) will generally result in the exclusion of any evidence offered by the party regarding that damages category or type irrespective of whether the responding party is seeking or contesting damages at trial or in response to a summary judgment motion, unless the disclosing party can show there was good cause for the failure or it will not unfairly surprise or unfairly prejudice the other parties.<sup>97</sup>

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available at this stage of the litigation, while reserving the right to amend their calculations.’ Moreover, [Federal] Rule 26(e) provides a duty to supplement prior disclosures and amend discovery responses as appropriate during the course of litigation. If estimates are made which might be subject to revision after the deposition of Dr. Hatten, as Plaintiffs contend, that is entirely permissible, but the requirements of [Federal] Rule 26 cannot be avoided. Defendant is entitled to such information in order to prepare for any settlement discussions, mediation and trial of this cause.” (citations omitted) (first quoting *Leblanc v. Unifund CCR Partners, G.P.*, No. 8:06-cv-1216-T-TBM, 2007 WL 2446900, at \*1 (M.D. Fla. Aug. 23, 2007); then citing *FED. R. CIV. P. 26(e)*; and then citing *Dixon v. Bankhead*, No. 4:00CV344-WS, 2000 WL 33175440 (N.D. Fla. Dec. 20, 2000)); see *In re Staff Care, Inc.*, 422 S.W.3d 876, 881 (Tex. App.—Dallas 2014, no pet.) (mem. op.) (“[Texas] Rule 194.3 required Staff Care to initially respond to the request for disclosures within thirty days and Staff Care had no reason to delay providing in its response economic damages because Staff Care could not be impeached if it later amended its economic damages disclosures as the case progressed.” (citing *TEX. R. CIV. P. 194.6*)).

96. *TEX. R. CIV. P. 194 cmt. 2.*

97. *Id. R. 193.6*; *Mintz v. Carew*, No. 05-16-00997-CV, 2018 WL 833371, at \*6–7 (Tex. App.—Dallas Feb. 13, 2018, pet. filed) (mem. op.) (affirming the trial court's exclusion of the plaintiff's “fraud damages” because neither his disclosure nor any other discovery response calculated them); *Veal v. CBREI/USA Hollister DST*, No. 14-16-00051-CV, 2017 WL 4080249, at \*3 (Tex. App.—Houston [14th Dist.] Sept. 14, 2017, no pet.) (mem. op.) (“Because Veal did not show good cause for failing to timely supplement his disclosure of damages during discovery, we hold that the trial court did not abuse its discretion in excluding Veal's evidence regarding damages.”); *Heat Shrink Innovations, LLC v. Med. Extrusion Techs.-Tex., Inc.*, No. 02-12-00512-CV, 2014 WL 5307191, at \*6 (Tex. App.—Fort Worth Oct. 16, 2014, pet. denied) (mem. op.) (reversing an award of lost profits because the plaintiff did not disclose how they were calculated); *In re Staff Care, Inc.*, 422 S.W.3d at 881 (affirming the exclusion of the plaintiff's damage calculation because an amended damage disclosure was untimely); *Harris Cty. v. Inter Nos, Ltd.*, 199 S.W.3d 363, 368 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (affirming the exclusion of the county's calculation of condemned property's value because it failed to supplement its damage disclosure to reflect a change in the calculation's underlying assumptions); *Robinson v. Lubbering*, No. 03-09-00655-CV, 2011 WL 749197, at \*4 (Tex. App.—Austin Mar. 2, 2011, no pet.) (mem. op.) (holding insufficient a damage disclosure that read: “Plaintiff seeks his damages proximately caused by [defendant's] breach of contract, together with reasonable attorney's fees, economic and exemplary damages. The exact amount of these damages is unknown at this

A damage disclosure, like a Texas Rule 194.2(c) contention disclosure, that has been amended or supplemented is inadmissible and cannot be used for impeachment.<sup>98</sup> Again, the obvious purpose of this prohibition is to encourage parties to be transparent and provide information about damages and their calculation early in the action without fear of having an early, candid disclosure coming back to haunt them.

#### 5. Persons Having Knowledge of Relevant Facts

Texas Rule 194.2(e) requires the disclosure of “the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person’s connection with the case[.]”<sup>99</sup>

##### a. Identifying Knowledgeable Persons

Although Texas Rule 194.2(e) does not define “persons having knowledge of relevant facts,” Texas Rule 192.3(c), which permits such discovery generally,<sup>100</sup> provides that “[a] person has knowledge of relevant facts when that person has or may have knowledge of any discoverable matter. The person need not have admissible information or personal knowledge of the facts.”<sup>101</sup> Thus, even when the responding party has little or no use for a person’s testimony because, for example, the responding party believes that the testimony will be adverse to its position or that the person lacks

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time.”); *Elkins v. Capital One Bank*, No. 05-06-01539-CV, 2008 WL 223849, at \*6 (Tex. App.—Dallas Jan. 29, 2008, pet. denied) (mem. op.) (affirming the exclusion of statutory damages because they were not disclosed); *Keystone Architects v. Lanai Dev., L.L.C.*, No. 13-05-542-CV, 2008 WL 523272, at \*6 (Tex. App.—Corpus Christi Feb. 28, 2008, no pet.) (mem. op.) (holding insufficient a damage disclosure that read: “Plaintiffs are still in the process of calculating damages and will supplement this response as required by the rules.”).

98. TEX. R. CIV. P. 194.6; see *In re Staff Care, Inc.*, 422 S.W.3d at 881 (“[Texas] Rule 194.3 required Staff Care to initially respond to the request for disclosures within thirty days and Staff Care had no reason to delay providing in its response economic damages because Staff Care could not be impeached if it later amended its economic damages disclosures as the case progressed.” (citing TEX. R. CIV. P. 194.6)).

99. TEX. R. CIV. P. 194.2(e).

100. *Id.* R. 192.3(c) (“A party may obtain discovery of the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person’s connection with the case.”).

101. *Id.*; see *In re Team Transp., Inc.*, 996 S.W.2d 256, 259 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding) (“A person with knowledge of relevant facts need not have personal knowledge of the facts.” (citing TEX. R. CIV. P. 192.3(c))).



credibility—the person must be disclosed.<sup>102</sup> “Persons having knowledge of relevant facts” include, among others, parties<sup>103</sup> and their spouses and other relatives, eyewitnesses, employers, co-workers, treating physicians and other healthcare providers, the party’s attorney for attorney’s fees, and non-retained experts (e.g., police officers, firemen, and other first responders).

Texas Rule 192.3(c) specifically provides that a testifying or consulting expert is “a person having knowledge of relevant facts” if the expert’s “knowledge was obtained first-hand or if it was not obtained in preparation for trial or in anticipation of litigation.”<sup>104</sup> Neither the rule nor the case on which it is based, *Axelson, Inc. v. McIlhany*,<sup>105</sup> defines “first-hand” knowledge. Nonetheless, it is clear that the Texas Supreme Court in *Axelson* was referring to personal knowledge (i.e., facts the expert learned through the expert’s personal involvement in the incident or transaction underlying the action) and not to “second-hand” knowledge (i.e., facts the expert learned through oral or written communications from others or from the expert’s engagement with respect to the action).<sup>106</sup> For example, an expert who was consulted before litigation was anticipated is not a consulting-only expert<sup>107</sup>

102. *Ashmore v. JMS Constr., Inc.*, No. 05-15-00537-CV, 2016 WL 7217256, at \*8 (Tex. App.—Dallas Dec. 13, 2016, no pet.) (mem. op.) (“[Texas Rule 194.2(e) requires the disclosure of potential witnesses, not just favorable witnesses.”).

103. Under former Texas Rule 166b(2)(d), which governed discovery of the identity of persons having knowledge of relevant facts who might testify at trial, parties were not exempt from the disclosure requirement in response to an appropriate discovery request. *See Caesar v. Rodriguez*, No. 01-02-0027-CV, 2003 WL 164463, at \*4 (Tex. App.—Houston [1st Dist.] Jan. 23, 2003, no pet.) (mem. op.) (“Parties were not exempt from the disclosure requirement in response to an appropriate discovery request.” (first citing *Henry S. Miller Co. v. Bynum*, 836 S.W.2d 160, 162 (Tex. 1992); then citing *Smith v. Sw. Feed Yards*, 835 S.W.2d 89, 90 (Tex. 1992))). This no longer is the case because Texas Rule 193.6 specifically exempts named parties from the requirement that witnesses be identified in discovery as a prerequisite to testifying at trial. *See TEX. R. CIV. P. 193.6(a)* (“A party who fails to make, amend, or supplement a discovery response in a timely manner may not . . . offer the testimony of a witness (other than a named party) who was not timely identified . . .”). Nonetheless, the better practice is to identify parties as persons having knowledge of relevant facts and trial witnesses.

104. TEX. R. CIV. P. 192.3(c). This portion of Texas Rule 192.3(c) “is intended to be consistent with *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550 (Tex. 1990).” *Id.* R. 192 cmt. 3. In *Axelson*, the Texas Supreme Court held that the “factual knowledge and opinions acquired by an individual who is an expert and an active participant in the events material to the lawsuit are discoverable.” *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990) (orig. proceeding).

105. *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550 (Tex. 1990) (orig. proceeding).

106. *Id.* at 554.

107. *See Lindsey v. O’Neill*, 689 S.W.2d 400, 402 (Tex. 1985) (orig. proceeding) (explaining that non-testifying experts are not exempted if their opinions were not made “in the course and scope of the ‘prosecution, investigation or defense’ of a claim” or “in anticipation of litigation or preparation for trial”).

and must be disclosed as a person having knowledge of relevant facts. Similarly, a person who otherwise qualifies as an expert but who acquired relevant information as “an active participant in the events material to the lawsuit[,]” such as an employee involved in the incident or transaction underlying the action, is not a consulting-only expert<sup>108</sup> and must be disclosed as a person having knowledge of relevant facts.

In contrast, when an expert examines a photograph of the accident scene or interviews witnesses to the accident, the expert is not discoverable as a person with knowledge of relevant facts.<sup>109</sup> Also not discoverable is an expert who visits, inspects, or photographs the accident scene or examines, inspects, or conducts tests or experiments on the product, soil, water, or other thing at issue in the action, if the activity was done solely in preparation for trial or in anticipation of litigation.<sup>110</sup>

Several questions arise with respect to Texas Rule 194.2(e) disclosures. *First*, is a rebuttal or impeachment witness a “person having knowledge of relevant facts”? Such a witness is such a person unless his or her testimony could not reasonably have been anticipated before trial.<sup>111</sup>

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108. *Axelson*, 798 S.W.2d at 554.

109. *Id.* at 554–55.

110. *See In re Commitment of Terry*, No. 09-15-00053-CV, 2015 WL 5262186, at \*4 (Tex. App.—Beaumont Sept. 10, 2015, no pet.) (mem. op.) (holding that the defendant was not entitled to discovery from a psychiatrist for the state who examined the defendant because “the record [did not] suggest that Dr. Self participated in the events giving rise to the initiation of civil commitment proceedings” and that “[b]ecause Dr. Self did not gain factual information by virtue of any involvement relating to the events giving rise to the litigation[,]” he “was not a dual capacity witness and the trial court did not abuse its discretion by refusing to order disclosure” (first citing *Axelson*, 798 S.W.2d at 554; then citing *In re McDaniel*, No. 14-13-00127-CV, 2013 WL 1279454, at \*3–4 (Tex. App.—Houston [14th Dist.] Mar. 28, 2013, no pet.) (mem. op.)); *In re McDaniel*, 2013 WL 1279454, at \*4 (holding tests conducted by a consulting expert on the product at issue were not discoverable); *In re Fast-Track Constr., Inc.*, 307 S.W.3d 526, 527–28 (Tex. App.—Dallas 2010, orig. proceeding) (holding “destructive” soil tests by a consulting expert were not discoverable). *But see In re Energy Transfer Partners, L.P.*, No. 12-08-00422, 2009 WL 1028056, at \*4 n.3 (Tex. App.—Tyler Apr. 15, 2009, orig. proceeding) (mem. op.) (holding raw data from sound tests conducted by a consulting expert were discoverable).

111. *In re Commitment of Sells*, No. 09-15-00172-CV, 2016 WL 1469059, at \*9 (Tex. App.—Beaumont Apr. 14, 2016, pet. denied) (mem. op.) (“The mere fact that a witness is called ‘in rebuttal’ does not mean that the witness does not have to be disclosed. A rebuttal witness should be disclosed if the need to call that witness reasonably should have been anticipated.” (citations omitted) (first citing *Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 916 (Tex. 1992); *Melendez v. Exxon Corp.*, 998 S.W.2d 266, 276 (Tex. App.—Houston [14th Dist.] 1999, no pet.); then citing *Moore v. Mem’l Hermann Hosp. Sys., Inc.*, 140 S.W.3d 870, 875 (Tex. App.—Houston [14th Dist.] 2004, no pet.)); *Schlein v. Griffin*, No. 01-14-00799-CV, 2016 WL 1456193, at \*10 (Tex. App.—Houston [1st Dist.] Apr. 12, 2016, no pet.) (mem. op.) (“A rebuttal witness still has to be disclosed if the need to call the witness reasonably should have been anticipated.” (citing *Moore*, 140 S.W.3d at 875)); *Homeyer v. Farmer*,

*Second*, is it proper to identify persons by use of a collective description, such as “employees,” “insureds,” “adjusters,” “clients,” or “customers” of a party or other person or to simply identify an entity, such as a corporation or partnership? Even though the word “[p]erson” includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity[,]”<sup>112</sup> it is generally improper to do either because the clear purpose of Texas Rule 194.2(e) is to allow the requesting party to identify potential deponents and trial witnesses.<sup>113</sup> The exception to this rule is when the responding party does not know the names of the entity’s officers, directors, employees,

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No. 10-11-00009-CV, 2011 WL 6004338, at \*9 (Tex. App.—Waco Nov. 23, 2011, no pet.) (mem. op.) (“If the rebuttal witness’s testimony reasonably could have been anticipated, then the witness is not exempt from the scope of the written discovery rules.” (citing *Moore*, 140 S.W.3d at 875)); *In re Commitment of Marks*, 230 S.W.3d 241, 245–46 (Tex. App.—Beaumont 2007, no pet) (same); *Moore*, 140 S.W.3d at 875 (same).

112. TEX. GOV’T CODE ANN. § 311.005(2).

113. *W. Atlas Int’l, Inc. v. Randolph*, No. 13-02-0244-CV, 2005 WL 673483, at \*8 (Tex. App.—Corpus Christi Mar. 24, 2005, no pet.) (mem. op.) (“[Texas] Rules 193.1 and 194.2(e) . . . require that parties provide complete responses to written discovery and disclose ‘the name, address and telephone number of persons having knowledge of relevant facts,’ with a brief statement of their connection to the case. Identifying a general category of people, without naming individuals or providing specific contact information, is insufficient to satisfy this requirement.” (citations omitted) (first quoting TEX. R. CIV. P. 193.1, 194.2; then citing *VingCard A.S. v. Merrimac Hospitality Sys.*, 59 S.W.3d 847, 856 (Tex. App.—Fort Worth 2001, pet. denied)); *cf. Hernandez-Torres v. Intercontinental Trading, Inc.*, 158 F.3d 43, 49 (1st Cir. 1998) (holding the trial court did not abuse its discretion in excluding two of the defendants’ former employees as witnesses for the plaintiff because the plaintiff’s disclosure only identified “employees or representatives of the defendants” and not specific employees’ names); *Bibolotti v. Am. Home Mortg. Servicing, Inc.*, No. 4:11-CV-472, 2013 WL 2147949, at \*2 (E.D. Tex. May 15, 2013) (“In their initial disclosures, Defendants designated only the ‘Custodian of Records and/or Corporate Representatives’ of AHMSI. The plain language of the rule clearly requires a party to disclose the names of individuals with discoverable information. Thus, Defendants’ initial disclosures did not comply with the requirements of [Federal] Rule 26.”); *Smith v. Pfizer, Inc.*, 265 F.R.D. 278, 283 (M.D. Tenn. 2010) (ruling the plaintiff did not comply with Federal Rule 26(a)(1)(A)(i) by listing as witnesses “friends and family of the deceased” and “defendants’ employees” and “representatives”); *Labadie v. Dennis*, No. 1:07-cv-480, 2008 WL 5411901, at \*2 (W.D. Mich. Dec. 23, 2008) (mem. op.) (“Plaintiff lists generic categories of persons, such as ‘all members of plaintiff’s family,’ or ‘all investigating persons.’ This is patently insufficient and amounts to a non-disclosure.”); *In re Sambrano*, 440 B.R. 702, 706 (Bankr. W.D. Tex. 2010) (“The contested witnesses were not listed by name in Hartford’s initial disclosures; the initial disclosures merely listed ‘employees and agents of Hartford’ as persons likely to have discoverable information relevant to the case. The plain language of the rule requires the disclosing party to list the names of these individuals.”). In the same vein, a disclosure that merely references all persons disclosed by the other party or parties is similarly improper. *Cf. Andrews v. CBOCS W., Inc.*, No. 09-cv-1025-WDS-SCW, 2011 WL 722606, at \*2 (S.D. Ill. Feb. 23, 2011) (holding the defendant’s disclosure identifying “[a]ll persons identified by Plaintiff” was insufficient).

or agents that have knowledge of relevant facts or when the responding party intends to use a representative of the entity to testify on its behalf.<sup>114</sup> Of course, if the responding party learns during discovery which officers, directors, employees, or agents of the entity have knowledge of relevant facts or which will be the entity's representative at trial or a deposition, it should timely supplement its disclosure.<sup>115</sup>

*Third*, as Texas Rules 192.3(c) and 194.2(e) only require disclosure of the person's "address and telephone number," a question exists regarding whether the responding party should disclose an individual's home or work address and telephone number. Although federal courts in interpreting the comparable federal disclosure rule, Federal Rule 26(a)(1)(A)(i),<sup>116</sup> have held that the person's home address and telephone number should be disclosed, if they are available,<sup>117</sup> this does not appear to be required under the Texas discovery rules. Because Texas Rules 192.3(c)'s and 194.2(e)'s purpose is "to allow the opposing party to easily locate, interview, and depose the proposed witness[.]"<sup>118</sup> the responding party should be able to designate the individual's home address and telephone number, work address and telephone number, another address or telephone number, or a combination of the foregoing as long as the address and telephone number disclosed are ones at which the person can easily be found, contacted, and served with a

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114. *Keystone Architects v. Lanai Dev., L.L.C.*, No. 13-05-542-CV, 2008 WL 523272, at \*5 (Tex. App.—Corpus Christi Feb. 28, 2008, no pet.) (mem. op.) (providing a good cause exception when complying with discovery is difficult or impossible).

115. *Cf. Bibolotti*, 2013 WL 2147949, at \*6 (holding the defendants "had a duty to supplement their disclosures once" they were aware a witness would testify).

116. *See* FED. R. CIV. P. 26(a)(1)(A)(i) (establishing required disclosures under the Federal Rules of Civil Procedure).

117. *See* *Rodriguez v. Christus Spohn Health Sys. Corp.*, No. C-09-95, 2011 U.S. Dist. LEXIS 114062, at \*4 (S.D. Tex. Oct. 3, 2011) ("The decisions interpreting [Federal] Rule 26 make it clear that the home addresses and telephone numbers, if known, are required to be produced." (first citing *Dixon v. CertainTeed Corp.*, 164 F.R.D. 685, 689 (D. Kan. 1996); *Fausto v. Credigy Servs. Corp.*, 251 F.R.D. 427, 429 (N.D. Cal. 2008); *Thurby v. Encore Receivable Mgmt., Inc.*, 251 F.R.D. 620, 621 (D. Colo. 2008); *Viveros v. Nationwide Janitorial Ass'n, Inc.*, 200 F.R.D. 681, 684 (N.D. Ga. 2000); then citing *Hartman v. Am. Red Cross*, No. 09-1302, 2010 WL 1882002, at \*1 (C.D. Ill. May 11, 2010)); *Hartman*, 2010 WL 1882002, at \*1 (same); *Fausto*, 251 F.R.D. at 429 (same); *Thurby*, 251 F.R.D. at 621 (same); *Viveros*, 200 F.R.D. at 684 (same); *Dixon*, 164 F.R.D. at 689 (same)).

118. *In re C.S. & D.S.*, 977 S.W.2d 729, 732 (Tex. App.—Fort Worth 1998, no writ) (construing former Texas Rule 166b(2)(d), which allowed discovery of persons having knowledge of relevant facts); *accord* *\$23,900 v. State*, 899 S.W.2d 314, 316 (Tex. App.—Fort Worth 1995, no writ) (same); *Varner v. Howe*, 860 S.W.2d 458, 464 (Tex. App.—El Paso 1993, no writ) (same).

subpoena.<sup>119</sup> A court, however, should order the responding party to provide the disclosed person's home address and telephone number if the requesting party claims that they are needed for a proper background check of the person because a person's home address and telephone number are generally not private or confidential information.<sup>120</sup> It is clear, however, that a responding party cannot properly disclose its attorney's address and telephone number for itself or its employees,<sup>121</sup> and federal courts uniformly have rejected the argument that the use of such an address and telephone number is justified by a concern that the requesting party may contact the

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119. Cf. *In re C.S. & D.S.*, 977 S.W.2d at 732–33 (holding, under former Texas Rule 166b(2)(d), even though a complete street address for a witness was not disclosed, under the facts of the case, the trial court could reasonably have concluded that the witness could have been easily located with the information provided, and therefore the witness had been sufficiently identified); *\$23,900.00*, 899 S.W.2d at 316 (holding, under former Texas Rule 166b(2)(d), a police officer was properly identified in an interrogatory answer because he could be contacted through the information provided even though it was not the officer's correct station); *Varner*, 860 S.W.2d at 464 (holding, under former Texas Rule 166b(2)(d), a witness was sufficiently identified in an interrogatory answer because her nickname and employer's address and telephone number were provided); *Amsav Grp., Inc. v. Am. Sav. & Loan Ass'n of Brazoria Cty.*, 796 S.W.2d 482, 486 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (holding, under former Texas Rule 166b(2)(d), a witness was sufficiently identified in an interrogatory answer that merely referred the requesting party to deposition testimony in which the witness was identified); see also *Gibbons v. Luby's Inc.*, No. 02-12-00202-CV, 2015 WL 5116146, at \*24 (Tex. App.—Fort Worth Aug. 31, 2015, pet. denied) (mem. op.) (holding the trial court did not err in allowing two defense witnesses to testify even though the defendant provided its attorney's address and telephone number for them in its disclosure because “[b]oth witnesses were deposed, and [the plaintiff's] attorney attended the depositions. And [the plaintiff] introduced excerpts of [one of the witness's] deposition in her case in chief”).

120. Cf. *Thurby*, 251 F.R.D. at 622 (holding that (1) under Federal Rule 26(a)(1)(A)(i), the responding party had to provide the disclosed persons' home addresses and telephone numbers because “personal contact information, such as ‘birth dates, home addresses or telephone numbers, e-mail addresses, or driver's license numbers’ are not usually held as private, and instead are ‘regularly disclosed to friends, relatives, vendors, credit card companies, schools, children's’ sports teams, [on hotel registers,] and the like[.]” and (2) “the personal identifying information at issue here is necessary to allow the plaintiffs to conduct thorough background investigations . . . and that such investigations may lead to the discovery of admissible evidence” (citations omitted) (quoting *Estate of Rice ex rel. Garber v. City & Cty. of Denver, Colo.*, No. 07-cv-01571-MSK-BNB, 2008 WL 2228702, at \*4–5 (D. Colo. May 27, 2008))).

121. Cf. *Tamas v. Family Video Movie Club, Inc.*, 304 F.R.D. 543, 545 (N.D. Ill. 2015) (“[Federal] Rule 26(a) requires a party to voluntarily disclose to other parties ‘the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses.’ Numerous courts have held that this obligation is satisfied only by producing individual addresses for individual witnesses; disclosure of an attorney's address or an employer's address is not sufficient.” (citations omitted) (first quoting FED. R. CIV. P. 26(a)(1); then citing *Hartman*, 2010 WL 1882002, at \*1); *Viveros*, 200 F.R.D. at 684 (same); *Dixon*, 164 F.R.D. at 689 (same).

responding party or its employees in violation of the ethical rules,<sup>122</sup> or because there is an inordinately large number of persons with knowledge of relevant facts.<sup>123</sup>

Finally, Texas Rule 192.3(d) provides for the “discovery of the name, address, and telephone number of any person who is expected to be called to testify at trial.”<sup>124</sup> The Texas discovery rules distinguish between persons having knowledge of relevant facts and trial witnesses, and the disclosure of a person as one with knowledge of relevant facts is insufficient to constitute a disclosure of the person as a trial witness.<sup>125</sup> Consequently, a person who is not disclosed as a trial witness in response to an interrogatory asking the sponsoring party to identify such witnesses should be excluded even if the person was disclosed as a person having knowledge of relevant facts, absent the party’s showing of good cause for the failure to disclose the witness or

122. *Hartman*, 2010 WL 1882002, at \*1 (“It may very well be the case that current supervisors and managers are represented by defense counsel and may not be contacted directly by Plaintiff’s counsel. That question is not before the Court at this time. The apparent basis for Defendant’s position on this question is an unspoken concern that Plaintiff’s counsel will contact represented employees. That hypothetical concern, however, does not justify unilateral disregard for the disclosures mandated by [Federal] Rule 26(a). The Court will not engage in speculation that counsel might not act in accord with legal ethics. If the time comes that a concrete ethical issue arises, counsel for both parties shall bring the matter to the Court’s attention.”); *Dixon*, 164 F.R.D. at 689 (“CertainTeed expresses concern that counsel for plaintiff will contact its employees outside its presence. It may not pose its concern as cause to unilaterally disregard its duties of disclosure under [Federal] Rule 26(a). Nor will the court indulge in speculation that counsel will unethically use the disclosed information. The court expects counsel to abide by the canons of legal ethics. It assumes attorneys will be ethical, absent some evidence to show otherwise.”). If the responding party is concerned that the requesting party will violate the ethical rules and improperly contact its employees or other persons, it should ask the requesting party not to engage in such contact and, as appropriate, move for a protective order, sanctions, or disqualification.

123. *Tamas*, 304 F.R.D. at 545 (rejecting an argument that the requirement does not apply if a large number of persons are identified: “It is true that the cases cited apply to smaller numbers of individuals, but Defendant does not cite any case law to support its argument that when the number of individuals disclosed is numerous, the rule on providing known addresses and telephone numbers no longer applies. Moreover, it was Defendant that made the decision to identify 3,300 individuals, averaging 50 people for each opt-in discovery plaintiff, as ‘likely to have discoverable information.’” (citing *Robinson v. Champaign Unit 4 Sch. Dist.*, 412 Fed. Appx. 873, 877 (7th Cir. 2011))).

124. TEX. R. CIV. P. 192.3(d).

125. *Carlton v. Stewart*, No. 05-05-00888-CV, 2006 WL 894879, at \*2 n.1 (Tex. App.—Dallas Apr. 7, 2006, pet. denied) (mem. op.) (“In *Daredia* . . . this Court recognized that the rules of civil procedure clearly distinguish between persons with knowledge of relevant facts and intended trial witnesses, and we concluded that the two categories could not be interchanged for discovery purposes.” (citing *Daredia v. Nat’l Distributions*, No. 05-04-00307-CV, 2005 WL 977828, at \*9 (Tex. App.—Dallas Apr. 28, 2005, pet. denied) (mem. op.))).

lack of unfair surprise or prejudice to the other parties.<sup>126</sup> And the identification of a person on a pretrial witness list is not a substitute for a timely Texas Rule 194.2(e) disclosure because it comes after the close of fact discovery and shortly before trial.<sup>127</sup> Again, such a witness should be excluded from testifying at trial absent the party's showing of good cause for the failure to disclose the witness as a person with knowledge of relevant facts or lack of unfair surprise or prejudice to the other parties.

b. Disclosing the Person's Connection to the Case

As noted above, Texas Rule 194.2(e) also requires the responding party to provide a brief description of each disclosed person's "connection with the case[.]"<sup>128</sup> Although the rule does not describe what constitutes a sufficient description of the person's "connection with the case," Comment 3 to the 1999 change to Texas Rule 193.2, which allows such discovery generally, explains that "[t]his provision does not contemplate a narrative statement of the facts the person knows, but at most a few words describing the person's identity as relevant to the lawsuit" and gives the following examples: "treating physician, eyewitness, chief financial officer,

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126. *Daredia*, 2005 WL 977828, at \*3-4 (holding a witness who was identified as a person having knowledge of relevant facts, but not as a trial witness, should not have been allowed to testify because the sponsoring party failed to establish good cause or lack of unfair prejudice or surprise). Because the identity of trial witnesses is not subject to disclosure under Texas Rule 194.2, a party should obtain this information by means of an interrogatory.

127. *Cf.* Phillip M. Adams & Assocs. v. Winbond Elecs. Corp., No. 1:05-CV-64 TS, 2010 WL 3447818, at \*2 (D. Utah Aug. 30, 2010) ("Turning to Plaintiff's argument that there was no undue delay in bringing its Motion to Amend because it was not until the 2009 depositions of MSI employees that it had sufficient information, the Court finds no error in the Magistrate Judge's findings."); *see* Quesenberry v. Volvo Grp. N. Am., Inc., 267 F.R.D. 475, 479-80 (W.D. Va. 2010) ("The plaintiffs argued that requiring the disclosure of these nineteen class members at anytime prior to February 23, 2010, would be tantamount to requiring that they disclose witnesses before the court-ordered date. This argument confuses two separate requirements under [Federal] Rule 26. The witness list, indeed, was submitted to the defendants on the date set by the court for pretrial disclosures, in accord with [Federal] Rule 26(a)(3). However, the plaintiffs still had an obligation to disclose these individuals as persons likely to have discoverable information under [Federal] Rule 26(a)(1). Performance of one of these rules cannot be substituted for the other because they serve different purposes. The objective of [Federal] Rule 26(a)(3) is to list, after all the information has been gathered and discovery is closed, the witnesses who will be called by a party at trial and allow the opposing party to properly prepare to examine those witness[es]. The aim of [Federal] Rule 26(a)(1), on the other hand, is to identify at the outset those persons that may have any information relevant to the case in order to allow for a complete investigation by all parties, thus allowing parties to depose, interview, or subpoena documents of such individuals during the period of time set aside for discovery.").

128. TEX. R. CIV. P. 194.2(e).

director, plaintiff's mother and eyewitness to accident."<sup>129</sup> Consistent with the comment, Texas courts have held that, in a divorce and child-custody action, the descriptions "Petitioner's father" and "Petitioner's sister" were sufficient,<sup>130</sup> and that in an action to terminate parental rights, the description "social worker" was sufficient.<sup>131</sup>

If a party fails to disclose any of the information required by Texas Rule 194.2(e), the person's testimony will generally be excluded at trial or in connection with a summary judgment motion under Texas Rule 193.6's automatic-exclusion rule unless the disclosing party can show there was good cause for the failure or it will not unfairly surprise or unfairly prejudice the other parties.<sup>132</sup>

129. *Id.* R. 192 cmt. 3.

130. *Van Heerden v. Van Heerden*, 321 S.W.3d 869, 876 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

131. *L.B. v. Tex. Dep't of Family & Protective Servs.*, No. 03-09-00429-CV, 2010 WL 1404608, at \*6 n.16 (Tex. App.—Austin Apr. 9, 2010, no pet.) (mem. op.).

132. *See* *Hunters Mill Ass'n, Inc. v. Beres*, No. 04-17-00044-CV, 2017 WL 4014619, at \*3 (Tex. App.—San Antonio Sept. 13, 2017, no pet.) (mem. op.) (holding the trial court did not abuse its discretion in allowing a witness who was not disclosed as a person with knowledge of relevant facts from testifying and that "the fact that a party needs a particular witness to establish its cause of action does not establish the other party will not be unfairly surprised by the late designation of the witness" (citing *PopCap Games, Inc. v. MumboJumbo, LLC*, 350 S.W.3d 699, 718 (Tex. App.—Dallas 2011, pet. denied); *Ersek v. Davis & Davis, P.C.*, 69 S.W.3d 268, 272 (Tex. App.—Austin 2002, pet. denied)); *Dunne v. Brinker Tex., Inc.*, No. 05-16-00496-CV, 2017 WL 3431465, at \*3-4 (Tex. App.—Dallas Aug. 10, 2017, pet. filed) (mem. op.) (affirming the trial court's striking of the plaintiff's pleadings after he failed to comply with an order compelling him to disclose persons with knowledge of relevant facts); *Ashmore v. JMS Constr., Inc.*, No. 05-15-00537-CV, 2016 WL 7217256, at \*8-9 (Tex. App.—Dallas Dec. 13, 2016, no pet.) (mem. op.) (holding the trial court did not abuse its discretion in excluding a witness who was not timely disclosed as a person with knowledge of relevant facts); *Gibbs v. Bureaus Inv. Grp. Portfolio No. 14, LLC*, 441 S.W.3d 764, 767 (Tex. App.—El Paso 2014, no pet.) ("Bureaus' failure to disclose Verhines as a fact witness during pretrial discovery, absent a showing of good cause or lack of surprise or prejudice, triggers the automatic exclusion sanctions of [Texas] Rule 193.6."); *Fertic v. Spencer*, 247 S.W.3d 242, 246-47 (Tex. App.—El Paso 2007, pet. denied) (excluding fact and expert witnesses who were not timely disclosed); *Perez v. Embree Constr. Grp., Inc.*, 228 S.W.3d 875, 884 (Tex. App.—Austin 2007, pet. denied) ("Failure to include a witness's address in discovery responses may be considered grounds for exclusion of the witness's testimony." (citing *Boothe v. Hausler*, 766 S.W.2d 788, 789 (Tex. 1989))); *W. Atlas Int'l, Inc. v. Randolph*, No. 13-02-00244-CV, 2005 WL 673483, at \*6-8 (Tex. App.—Corpus Christi Mar. 24, 2005, no pet.) (mem. op.) (holding the trial court did not abuse its discretion in excluding two witnesses because the plaintiffs failed to provide the proper contact information for one and failed to disclose the name of the other); *Beam v. A.H. Chaney, Inc.*, 56 S.W.3d 920, 922-23 (Tex. App.—Fort Worth 2001, pet. denied) (excluding a fact witness's testimony because his address and connection to the case were not disclosed); *cf. Boothe*, 766 S.W.2d at 788 (holding, under former Texas Rule 215(5), the trial court erred in allowing a witness to testify, absent a showing of good cause, because the defendant's interrogatory response failed to provide the witness's address).



## 6. Testifying Experts

For litigation purposes, an “expert” is a person who, through education, training, or experience, has developed skill or knowledge in a subject sufficient to allow the person to render an opinion that will assist the fact finder.<sup>133</sup> The Texas discovery rules recognize two general types of experts: “testifying expert[s]” and “consulting expert[s].”<sup>134</sup>

A “testifying expert” is an expert “who may be called to testify as an expert witness at trial.”<sup>135</sup> There are two types of testifying experts: testifying experts who are retained by, employed by, or otherwise in the control of the party (retained-testifying experts) and testifying experts who are not retained by, employed by, or otherwise in the control of the party (non-retained-testifying experts),<sup>136</sup> which typically are treating or emergency-room physicians or nurses, police officers, firemen, and other first responders.

A “consulting expert is an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert.”<sup>137</sup> There are also two types of consulting experts: (1) consulting experts whose mental impressions and opinions have not been reviewed by a testifying expert (a consulting-only expert); and (2) consulting experts whose mental impressions and opinions have been reviewed by a testifying expert.<sup>138</sup>

133. TEX. R. EVID. 702 (“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.”); *see In re Nat’l Lloyds Ins. Co.*, 532 S.W.3d 794, 815 (Tex. 2017) (orig. proceeding) (“The line between who is a [Texas] Rule [of Evidence] 702 expert witness and who is a [Texas] Rule [of Evidence] 701 [fact] witness is not always bright.’ But when a witness is properly disclosed and designated as an expert and the main substance of the witness’s testimony is based on specialized knowledge, skill, experience, training, and education, ‘the testimony will generally be expert testimony within the scope of Rule 702.’” (footnotes omitted) (quoting *Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 850–52 (Tex. 2011))).

134. TEX. R. CIV. P. 192.7(c)–(d).

135. *Id.* R. 192.7(c).

136. *See id.* R. 194.2(f) (setting forth the disclosure requirements for the two types of testifying experts).

137. *Id.* R. 192.7(d).

138. Testifying or consulting experts can also be fact witnesses (i.e., dual-capacity witnesses) if they have knowledge of relevant facts that “was obtained first-hand or [that] . . . was not obtained in preparation for trial or in anticipation of litigation.” *Id.* R. 192.3(c). Such experts must be disclosed as persons with knowledge of relevant facts under Texas Rule of Civil Procedure 194.2(c) and can be deposed about their knowledge that either is first-hand or that was not obtained in their role as a consulting expert.

Often the identity of a person who otherwise would qualify as an expert because of the person's knowledge, skill, experience, training, or education must be disclosed as a person having knowledge of relevant facts and cannot be shielded from discovery as a consulting-only expert.<sup>139</sup> This is because to be a consulting-only expert, the person must have been consulted, retained, or specially employed *solely* in anticipation of litigation or in preparation for trial.<sup>140</sup> For example, an expert who was consulted before litigation was anticipated is not a consulting-only expert and the expert's identity, impressions, and opinions are discoverable if they are relevant to the action.<sup>141</sup>

Additionally, a person who otherwise qualifies as an expert, but who acquired relevant information as "an active participant in the events material to the lawsuit" is not a consulting-only expert.<sup>142</sup> For example, a person who gains factual information due to the person's involvement in the incident or transaction underlying the action cannot qualify as consulting-only expert—even if the person acquired some information through consulting—because the consultation is not the sole basis of the person's information. Accordingly, a party's employee whose duties involve the action's subject matter *never* qualifies as a consulting-only expert because the employee was not employed as an expert solely in anticipation of litigation or in preparation for trial.<sup>143</sup> However, an employee who lacks personal knowledge of the facts relevant to the action and who is assigned to assist the employer or its attorneys in connection with the action can qualify as a consulting-only expert.<sup>144</sup>

Texas Rule 194.2(f) *only* requires disclosures about *testifying* experts.<sup>145</sup> The rule replaces and eliminates interrogatories concerning such experts.

139. *Id.* R. 194.2(e).

140. *Id.* R. 192.7(d); *see also supra* notes 107–11 and accompanying text.

141. *Lindsey v. O'Neill*, 689 S.W.2d 400, 402 (Tex. 1985).

142. *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990) (orig. proceeding); *see also supra* note 111 and accompanying text.

143. *See Axelson*, 798 S.W.2d at 554 (“[P]ersons who gain factual information by virtue of their involvement relating to the incident or transaction giving rise to the litigation do not qualify as consulting-only experts because the consultation is not their only source of information.”).

144. *Id.*

145. TEX. R. CIV. P. 194.2(f). Absent a provision in a pretrial order requiring the disclosure of experts on or before a set date, the Texas discovery rules “do not impose a duty on a party not seeking affirmative relief to designate expert witnesses in the absence of a request.” *Oyoque v. Henning*, No. 09-17-00018-CV, 2018 WL 1527892, at \*4 (Tex. App.—Beaumont Mar. 29, 2018, no pet.); *see In re C.C., M.C., L.O. & H.P.*, 476 S.W.3d 632, 639 (Tex. App.—Amarillo 2015, no pet.) (“[T]he obligation to disclose the identity of a testifying expert arises when the information was requested under [Texas]

The identity and mental impressions of a consulting-only expert are not discoverable,<sup>146</sup> whereas the identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have been reviewed by a testifying expert are discoverable.<sup>147</sup> Unlike with respect to testifying experts, interrogatories can, and should, be used with respect to the latter type of consulting experts.<sup>148</sup>

The purpose of expert disclosures is “to give the opposing party sufficient information about the expert’s opinions to prepare to cross-examine the expert and to prepare expert rebuttal evidence.”<sup>149</sup> Texas Rule 194.2(f) requires disclosure of the following information about each testifying expert:

- (1) the expert’s name, address, and telephone number;
- (2) the subject matter on which the expert will testify;
- (3) the general substance of the expert’s mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;
- (4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:

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Rule 194.2(f).”)

146. TEX. R. CIV. P. 192.3(e) (“The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable.”); *Aguilar v. Trujillo*, 162 S.W.3d 839, 847 n.5 (Tex. App.—El Paso 2005, pet. denied) (same).

147. TEX. R. CIV. P. 192.3(e) (“A party may discover the following information regarding a . . . consulting expert whose mental impressions or opinions have been reviewed by a testifying expert[.]”). The same information that is discoverable from testifying experts is discoverable from non-consulting-only experts. *Id.*

148. *Id.* R. 195 cmt. 1 (“This rule does not limit the permissible methods of discovery concerning consulting experts whose mental impressions or opinions have been reviewed by a testifying expert.”).

149. *Bexar Cty. Appraisal Dist. v. Abdo*, 399 S.W.3d 248, 256 (Tex. App.—San Antonio 2012, no pet.) (quoting *Miller v. Kennedy & Minshew, P.C.*, 142 S.W.3d 325, 348 (Tex. App.—Fort Worth 2003, pet. denied)); *accord Pro Plus, Inc. v. Crosstex Energy Servs., L.P.*, 388 S.W.3d 689, 706 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (also noting expert “disclosures and expert reports not only prevent trial by ambush, but affect the opposing party’s preparation for trial” (citing *Baker v. Energy Transfer Co.*, No. 10-09-00214-CV, 2011 WL 4978287, at \*1 (Tex. App.—Waco Oct. 19, 2011, no pet.) (mem. op.))).

- (A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and
- (B) the expert's current resume and bibliography[.]<sup>150</sup>

Texas Rule 194.2(f)(1) does not specify whether the expert's home or business address should be disclosed. As with potential parties and persons having knowledge of relevant facts, either can be properly disclosed.<sup>151</sup> Moreover, the documents required by Texas Rule 194.2(f)(4) "must be served with the response, but if the responsive documents are voluminous, the response must state a reasonable time and place for their production."<sup>152</sup>

With respect to a non-retained testifying expert (e.g., an emergency-room physician or fireman, police officer, or other first responder), the responding party need not produce the documents specified in Texas Rule 194.2(f)(4), and the requesting party must resort to other discovery devices to obtain them (e.g., a Texas Rule 205 production request or a deposition notice with a production request under Texas Rule 176).<sup>153</sup> Also with respect to such an expert, the responding party need not provide the information specified by Texas Rule 194.2(f)(3). Instead, it can produce "documents reflecting such information[.]"<sup>154</sup> For example, the responding party can produce a treating doctor's records or a police officer's accident or other report setting forth the doctor's or officer's mental impressions and opinions and the

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

151. See *supra* notes 119–22 and accompanying text.

152. RDJRLW, Inc. v. Miller, No. 02-16-00132-CV, 2017 WL 2590568, at \*7–8 (Tex. App.—Fort Worth June 15, 2017, no pet.) (mem. op.) (citing TEX. R. CIV. P. 194.4); *accord id.* ("Copies of documents and other tangible items ordinarily must be served with the response. But if the responsive documents are voluminous, the response must state a reasonable time and place for the production of documents."); Liles v. Contreras, 547 S.W.3d 280, 288 (Tex. App.—San Antonio 2018, pet. filed) ("[Texas] Rule 192.3(g) requires a party responding to a request for disclosure to disclose not just the existence of a settlement agreement, but the contents of it." (citing TEX. R. CIV. P. 192.3(g))); *In re GreCon, Inc.*, 542 S.W.3d 774, 779 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding) ("Under [Texas] Rule 194.4, the responding party 'ordinarily must' serve documents and other tangible items with the response, and 'must produce the documents at the time and place stated, unless otherwise agreed by the parties ordered by the court[.]'" (quoting TEX. R. CIV. P. 194.4)).

153. TEX. R. CIV. P. 195 cmt. 2 ("This rule and Rule 194 do not address depositions of testifying experts who are not retained by, employed by, or otherwise subject to the control of the responding party, nor the production of the materials identified in Rule 192.3(e)(5) and (6) relating to such experts. Parties may obtain this discovery, however, through Rules 176 and 205.>").

154. *Id.* R. 194.2(f)(3).

bases for them in lieu of a description of them in the disclosure. Thus, for non-retained testifying experts, Texas Rule 194.2(f) assumes that the party is relying on the opinions in the expert's documents and the party may produce them. If there are no such documents, if the responding party does not have copies of them, or if the expert's documents do not set forth the expert's mental impressions and opinions and the bases for them, the responding party should set forth the expert's mental impressions and opinions in the disclosure.

It is important to remember that Texas Rule 194.2(f)'s disclosure requirement applies to rebuttal experts<sup>155</sup> and that the information required to be disclosed under the rule is narrower than the information discoverable from testifying experts generally under Texas Rule 192.3(e).<sup>156</sup> For example, Texas Rule 192.3(e) permits discovery of "any bias of the

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155. *City of Brownsville v. Ahumada*, No. 13-14-00265-CV, 2015 WL 4116731, at \*6 (Tex. App.—Corpus Christi July 2, 2015, no pet.) (mem. op) (holding rebuttal expert testimony that reasonably can be anticipated is not exempt from Texas Rule 193.2(f)'s disclosure requirement); *Prevallet v. Prevallet*, No. 02-12-00260-CV, 2014 WL 92793, at \*12 (Tex. App.—Fort Worth Jan. 9, 2014, no pet.) (mem. op.) (same); *In re Commitment of Marks*, 230 S.W.3d 241, 245–46 (Tex. App.—Beaumont 2007, no pet) (affirming the trial court's exclusion of an undisclosed rebuttal expert); *Moore v. Mem'l Hermann Hosp. Sys., Inc.*, 140 S.W.3d 870, 875 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (same).

156. Texas Rule 192.3(e) provides, in relevant part:

A party may discover the following information regarding a testifying expert or regarding a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert:

- (1) the expert's name, address, and telephone number;
- (2) the subject matter on which a testifying expert will testify;
- (3) the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was acquired;
- (4) the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them;
- (5) any bias of the witness;
- (6) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony;
- (7) the expert's current resume and bibliography.

TEX. R. CIV. P. 192.3(e). Texas Rule 195.2 does not provide for the designation of rebuttal experts. Consequently, if the parties anticipate using them, the better and most prudent practice is to provide a deadline for their designation in a scheduling order or other order or a Texas Rule 11 agreement.

witness[.]”<sup>157</sup> whereas Texas Rule 194.2(f) does not require disclosure of this.<sup>158</sup> Similarly, whereas Texas Rules 192.3(e)(3) and (4) respectively allow discovery of “the facts known by the expert that relate to or form the basis of the expert’s mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was acquired” and “the expert’s mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them[.]”<sup>159</sup> Texas Rule 194.2(f)(3) only requires the disclosure of “the general substance of the [testifying] expert’s mental impressions and opinions and a brief summary of the basis for them[.]”<sup>160</sup> Thus, a requesting party normally should depose a testifying expert and obtain a report setting forth in more detail the expert’s mental impressions and opinions and the bases for them. And if a party wants to explore a testifying expert’s bias, it must generally do so by depositing the expert.<sup>161</sup>

Because Texas Rule 194.2(f)(4)(A) requires the responding party to produce “all documents . . . that have been provided to . . . the expert in anticipation of the expert’s testimony[.]”<sup>162</sup> privileged documents inadvertently given to a testifying expert must generally be produced.<sup>163</sup> “If

157. *Id.* R. 192.3(e)(5).

158. *Id.* R. 194.2(f).

159. *Id.* R. 192.3(e)(3)–(4).

160. *Id.* R. 194.2(f)(3).

161. *In re Ford Motor Co.*, 427 S.W.3d 396, 397–98 (Tex. 2014) (per curiam) (orig. proceeding) (directing the trial court to vacate an order requiring depositions of the defendant’s retained testifying expert witnesses’ employers to show the experts’ bias in favor of the defendant and other car manufactures); *In re Interinsurance Exch. of the Auto. Club*, No. 01-14-00979-CV, 2016 WL 144784, at \*3 (Tex. App.—Houston [1st Dist.] Jan. 12, 2016, orig. proceeding) (mem. op.) (holding the trial court abused its discretion in ordering defendant insurer’s retained-testifying expert to produce every report for the defendant for a twelve-year period because the expert had already testified about his work for the defendant in his deposition); *In re Cent. N. Constr., LLC*, No. 05-14-00178-CV, 2014 WL 1410548, at \*3 (Tex. App.—Dallas Apr. 10, 2014, orig. proceeding) (mem. op.) (“Generally, although an expert witness may be questioned regarding payment received for his work as an expert witness, pre-trial discovery sought only to establish financial interest for impeachment purposes is not allowed.” (citing *Russell v. Young*, 452 S.W.2d 434, 436–37 (Tex. 1970))); *In re Weir*, 166 S.W.3d 861, 864 (Tex. App.—Beaumont 2005, orig. proceeding) (per curiam) (“Proof of bias may be offered to impeach the credibility of a witness. . . . Generally, an expert witness may be questioned regarding payment received for his work as an expert witness. However, pretrial discovery of all of a witness’s accounting and financial records, solely for the purpose of impeachment, may be denied.” (citations omitted) (first citing TEX. R. EVID. 613(b); then citing *Young*, 452 S.W.2d at 436–37)).

162. TEX. R. CIV. P. 194.2(f)(4)(A).

163. *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 440–41 (Tex. 2007) (“[W]e conclude that [Texas] Rules 192.3(e)(6) and 192.5(c)(1) prevail over [Texas] Rule 193.3(d)’s snap-back provision

a party is concerned about the discovery of its privileged information through expert discovery, the party [should] designate another expert . . . or, . . . withdraw a currently designated expert and name another.”<sup>164</sup>

If a party fails to disclose the information required by Texas Rule 194.2(f), the expert's testimony will generally be excluded at trial under Texas Rule 193.6's automatic-exclusion rule unless the disclosing party can show there was good cause for the failure or it will not unfairly surprise or unfairly prejudice the other parties.<sup>165</sup>

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so long as the expert intends to testify at trial despite the inadvertent document production. That is, once privileged documents are disclosed to a testifying expert, and the party who designated the expert continues to rely upon that designation for trial, the documents may not be retrieved even if they were inadvertently produced.”). Nonetheless, a party may snap back such documents if they could not by their nature have influenced the expert's opinion or if the expert is de-designated. *See id.* at 441 (“Of course, inadvertently produced material that could not by its nature have influenced the expert's opinion does not evoke the concerns the expert-disclosure rule was designed to prevent and the policy concerns underlying the rule's disclosure requirement would presumably never arise. In that event, there would be nothing to prevent the snap-back rule's application, although we note that a party seeking snap-back under such circumstances would bear a heavy burden in light of the disclosure rule's underlying purpose.”).

164. *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794, 814 n.89 (Tex. 2017) (citing *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d at 445); *see In re Jourdan Hosp. Corp.*, No. 04-14-00356-CV, 2014 WL 3745447, at \*5 (Tex. App.—San Antonio July 30, 2014 orig. proceeding) (mem. Op.) (“Here, the Hospital de-designated Castillo promptly . . . . In addition to providing an affidavit testifying that the Report was not provided to her in anticipation of any expert testimony she might give, Castillo is no longer a testifying expert witness. Therefore, the Investigation Report remains privileged.” (citing *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d at 445; *In re State Farm Mut. Auto. Ins. Co.*, 100 S.W.3d 338, 343 (Tex. App.—San Antonio 2002, no pet.))).

165. TEX. R. CIV. P. 193.6; *Lawson v. Collins*, No. 03-17-00003-CV, 2017 WL 4228728, at \*8 (Tex. App.—Austin Sept. 20, 2017, no pet.) (mem. op.) (holding the trial court did not abuse its discretion in excluding an affidavit of an undisclosed expert in connection with a no-evidence summary judgment motion); *RDJRLW, Inc. v. Miller*, No. 02-16-00132-CV, 2017 WL 2590568, at \*9 (Tex. App.—Fort Worth June 15, 2017, no pet.) (mem. op.) (“We conclude that the trial court was within its discretion to exclude RDJ's expert based solely on RDJ's failure to produce or make available the expert's working file . . . .”); *Red Ball Oxygen Co. v. Sw. R.R. Car Parts Co.*, 523 S.W.3d 288, 298 (Tex. App.—Tyler 2017, no pet.) (affirming judgment denying the plaintiff an award of attorney's fees because it did not timely designate an expert to testify about their reasonableness); *Bailey v. Respirationics, Inc.*, No. 05-11-01057-CV, 2014 WL 3698828, at \*8 (Tex. App.—Dallas July 23, 2014, no pet.) (mem. op.) (“Bailey disclosed that Reese was ‘expected to testify generally about the ventilator and its role in the incident made the basis of this lawsuit.’ Bailey did not disclose, as requested by Respirationics and as required by [Texas Rule] 194.2(f), the subject matter on which Reese would testify; the general substance of Reese's mental impressions and opinions and a brief summary of the basis for them; and all documents, tangible things, reports, models or data compilations that had been provided to, reviewed by, or prepared by Reese in anticipation of his testimony. The purpose of [Texas Rule] 194.2(f) is to give the opposing party sufficient information about the expert's opinions to prepare to cross examine the expert and to prepare expert rebuttal evidence. Bailey's vague disclosure of the substance of Reese's testimony did not comply with the requisites of [Texas Rule] 194.2(f). . . .

Because Bailey missed the deadline for designating Reese as an expert and failed to meet the requirements of [Texas] Rule 194.2(f), we conclude the trial court did not abuse its discretion in excluding Reese's affidavit." (citations omitted) (first citing TEX. R. CIV. P. 194.2(f); then citing *Miller v. Kennedy & Minshew, P.C.*, 142 S.W.3d 325, 348 (Tex. App.—Fort Worth 2003, pet. denied); then citing *Bexar Cty. Appraisal Dist. v. Abdo*, 399 S.W.3d 248, 256–57 (Tex. App.—San Antonio 2012, no pet.); then citing TEX. R. CIV. P. 193.6(a); and then citing *Dolenz v. State Bar of Tex.*, 72 S.W.3d 385, 387 (Tex. App.—Dallas 2001, no pet.); *In re T.K.D-H*, 439 S.W.3d 473, 477 (Tex. App.—San Antonio 2014, no pet.) (“Here, Jose provided Ries’s name and contact information, but he did not provide any of the other information required by [Texas] Rule 194.2(f). Therefore, even if his disclosure was filed on or before the discovery deadline, the disclosure did not comply with the requisites of [Texas] Rule 194.2(f).” (citing *Abdo*, 399 S.W.3d at 256–57)); *In re B.L.B., P.M.B., & C.K.B.*, No. 13-13-00594-CV, 2014 WL 2158132, at \*5–6 (Tex. App.—Corpus Christi May 22, 2014, no pet.) (mem. op.) (“In this case, it is undisputed that S.B. failed to properly identify her counsel (or anyone else) as an expert on attorney’s fees in response to M.B.’s request for disclosure. Furthermore, at trial, S.B. failed to establish, and in fact, did not even attempt to establish, good cause or lack of unfair surprise or prejudice to M.B. . . . Instead, the trial court expressly stated that its reason for allowing S.B.’s attorney to testify over M.B.’s objection was that there was no case law that S.B.’s attorney was ‘considered an expert for his own attorney’s fees’ and thus he did not need to be designated. We believe this was incorrect.” (citations omitted) (first quoting TEX. R. CIV. P. 194; then citing *id.* R. 193.6(b)); *Abdo*, 399 S.W.3d at 256–57 (excluding the District’s expert because its expert disclosure only vaguely stated expert may testify “about what is and what is not useable land and/or what is or is not in the floodplain and/or matters associated therewith”); *Baker v. Energy Transfer Co.*, No. 10-09-00214-CV, 2011 WL 4978287, at \*1 (Tex. App.—Waco Oct. 19, 2011, pet. denied) (mem. op.) (“A failure to properly designate expert witnesses results in the automatic exclusion of the expert testimony unless the offering party demonstrates good cause for the failure or a lack of unfair surprise.” (citing TEX. R. CIV. P. 193.6(a); *Perez v. Embree Constr. Grp., Inc.*, 228 S.W.3d 875, 884 (Tex. App.—Austin 2007, pet. denied)); *In re M.H., S.H., & G.H.*, 319 S.W.3d 137, 146 (Tex. App.—Waco 2010, no pet.) (concluding an expert should not have been permitted to testify because the Department’s expert disclosure did “not in any manner identify or disclose: (1) ‘the general substance of the expert’s mental impressions and opinions’; (2) ‘a brief summary of the basis for them’ (with regard to [a retained expert]); or (3) documents reflecting such a summary with regard to the non-retained experts” (citing *Llanes v. Davila*, 133 S.W.3d 635, 638–39 (Tex. App.—Corpus Christi 2003, pet. denied)); 27,877.00 *Current Money of the U.S. v. State*, 331 S.W.3d 110, 120 (Tex. App.—Fort Worth 2010, pet. denied) (“We have said before that failure to respond to a request for the mental impressions and opinions of the expert is a complete failure to respond, triggering the automatic exclusion under [Texas] Rule 193.6, not just an incomplete answer, which the Texas Supreme Court has held requires a pretrial objection or a pretrial motion to compel or for sanctions[.]” (citations omitted) (first citing *VingCard A.S. v. Merrimac Hosp. Sys., Inc.*, 59 S.W.3d 847, 856 (Tex. App.—Fort Worth 2001, pet. denied); then citing *State Farm Fire & Casualty Co. v. Morua*, 979 S.W.2d 616, 619–20 (Tex. 1998)); *Carlton v. Stewart*, No. 05-05-00888-CV, 2006 WL 894879, at \*4 (Tex. App.—Dallas Apr. 7, 2006, pet. denied) (mem. op.) (affirming the exclusion of the plaintiff’s treating physician because the plaintiff never disclosed that he would testify on causation). *But see* *Kim v. Sanchez*, No. 02-12-00465-CV, 2014 WL 4364170, at \*4 (Tex. App.—Fort Worth Sept. 4, 2014, pet. denied) (mem. op.) (“In response to Kim’s request for disclosure of any expert witness, Sanchez stated the following: ‘Mr. Moore is expected to testify regarding the reasonable and necessary attorney fees that were necessary in prosecuting this case and in rebuttal to any attorney fee testimony offered by an expert on behalf of Defendant.’ A disclosure identifying an attorney’s fees expert that states that the expert will be testifying about the reasonableness and necessity of attorney’s fees sought is sufficient to give the ‘general substance’ of



## 7. Insuring and Indemnity Agreements

Texas Rule 194.2(g) requires the disclosure of “any indemnity and insuring agreements described in Rule 192.3(f).”<sup>166</sup> Texas Rule 192.3(f), in turn, provides, in relevant part:

Except as otherwise provided by law, a party may obtain discovery of the existence and contents of any indemnity or insurance agreement under which any person may be liable to satisfy part or all of a judgment rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment.<sup>167</sup>

The key phrase in Texas Rule 192.3(f) is “may be liable.” This phrase requires the production of an insurance or indemnity agreement whenever it is possible, however remote, that the agreement either could satisfy all or part of the action’s judgment or indemnify or reimburse any payments made to satisfy the judgment.<sup>168</sup>

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that expert’s anticipated testimony, especially when, as here, the responding party is seeking fees for representation during the entire litigation, which are not determinable at the time of disclosure. Accordingly, we conclude and hold that the trial court did not abuse its discretion by allowing Sanchez’s counsel to testify regarding his attorney’s fees. We overrule Kim’s fourth issue.” (citations omitted) (citing *Goldman v. Olmstead*, 414 S.W.3d 346, 365 (Tex. App.—Dallas 2013, pet denied); *Reynolds v. Nagely*, 262 S.W.3d 521, 531 (Tex. App.—Dallas 2008, pet. denied)).

166. TEX. R. CIV. P. 194.2(g).

167. *Id.* R. 192.3(f). This rule is substantially the same as the federal disclosure rule about insurance and indemnity agreements—Federal Rule 26(a)(1)(A)(iv). FED. R. CIV. P. 26(a)(1)(A)(iv) (requiring “for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment”).

168. *Cf.* *Pape v. Law Offices of Frank N. Peluso, P.C.*, No. 3:13 CV 63 (JGM), 2015 WL 5842474, at \*2 (D. Conn. Oct. 7, 2015) (“As U.S. Magistrate Judge Marilyn D. Go held eleven years ago, in light of the mandatory language of [Federal] Rule 26(a)(1)(A)(iv), when a defense attorney asserts that the claims at issue fall within an exclusion in a defendant’s insurance policy, a ‘plaintiff is not limited to counsel’s say-so in making this determination.’” (quoting *Calabro v. Stone*, 224 F.R.D. 532, 533 (E.D.N.Y. 2004))); *Jo Ann Howard & Assocs., P.C. v. Cassity*, No. 4:09CV01252 ERW, 2015 U.S. Dist. LEXIS 95322, at \*8 (E.D. Mo. July 22, 2015) (rejecting the defendant’s claim that it properly failed to produce insurance policies “because the insurance carriers had not acknowledged coverage, and even if they had, [the defendant] had incurred a \$107 million loss on an unrelated claim against the same polic[ie]s so there would be no insurance left for Plaintiffs’ claims” before declaring that “[Federal] Rule 26(a)(1)(A)(iv) is clear; a party is required to disclose any insurance policy which *may* cover the claims at issue” as the basis for its finding that “[the defendant] made its own determination as to whether it believed the insurance policies would apply[,]” which “suggests the policies *may* cover the claims at issue even if [the defendant] believed they ultimately would not[,]” and its ultimate conclusion that “[the defendant] should have disclosed the policies”); *Pellegrin v. Montco Oilfield Contractors, LLC*, No. 14-2161, 2015 WL 3651159, at \*217–18 (E.D. La. June 11, 2015)

Under Texas Rules 192.3(f) and 194.2(g), the responding party must produce a complete copy of the relevant insurance or indemnity agreement; producing only the insurance agreement's declarations page, "relevant" portions of the indemnity or insurance agreement, or a description of the agreement's coverage is insufficient.<sup>169</sup> Although no Texas case has

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(holding the magistrate judge did not err in ordering the defendant to produce its excess policy because the plaintiff's claim conceivably could exceed the limits of the primary policy); *Garcia v. Techtronic Indus. N. Am.*, No. 2:13-cv-05884 (MCA) (JAD), 2015 WL 1880544, at \*3 (D.N.J. Apr. 22, 2015) ("Although there is no indication that the claims would be in excess of Defendants' self-insured retention, there is likewise no indication that a judgment would not be in excess of Defendants' self-insured retention. The phrase 'may be liable' indicates that regardless of whether there is actual liability, the mere potential of satisfying a judgment requires the production of the insurance agreement under [Federal] Rule 26. . . . Defendants have not provided the Court with any evidence that the damages Plaintiffs seek are in any way capped and, therefore, the Court will not issue a ruling as if it were."); *Regalado v. Techtronic Indus. N. Am., Inc.*, No. 3:13-cv-4267-L, 2015 WL 10818616, at \*2 (N.D. Tex. Feb. 24, 2015) (rejecting the defendants' argument that they properly withheld from production their excess insurance policy because Federal Rule 26(a)(1)(A)(iv) requires production of "any insurance agreement that could possibly apply to require the insurance business—however unlikely it may be—to satisfy all or part of a possible judgment in a case"); *Gov't Benefits Analysts, Inc. v. Gradient Insur. Brokerage, Inc.*, No. 10-C2558-KHV-DJW, 2012 WL 3292850, at \*2–3 (D. Kan. Aug. 13, 2012) (rejecting the defendants' argument that they did not have to produce their insurance policies because they had conducted their own review and determined that none of them provided coverage for the plaintiffs' claims and that the policies should be produced so that the plaintiffs' could make their own determinations regarding coverage).

169. Compare TEX. R. CIV. P. 192.3(f) (providing for the discovery of the "contents of any indemnity or insurance agreement"), with *id.* R. 192.3(g) (providing for the discovery of the "contents of any relevant portions of a settlement agreement" (emphasis added)). Cf. *Robin v. Weeks Marine, Inc.*, No. 17-1539, 2017 WL 3311243, at \*2–3 (E.D. La. Aug. 3, 2017) ("The primary issue at this time is the production of unredacted insurance policies requested by Mr. Robin. . . . The text of [Federal Rule 26(a)(1)(iv)] does not suggest that disclosure of such agreements may be limited in any way. . . . While there may still be some truth to the Wood court's observation that '[b]y allowing discovery of insurance limits, the court would be shifting the emphasis of the litigation from how much the plaintiff was damaged to how much the defendant can pay,' the amendment of the Federal Rules of Civil Procedure to require production of insurance liability policies makes clear that such agreements are discoverable. The Court finds that the unredacted insurance policies must be disclosed."); *Meredith v. United Collection Bureau, Inc.*, No. 1:16 CV 1102, 2016 WL 6649279, at \*6 (N.D. Ohio Nov. 10, 2016) ("Federal Rule of Civil Procedure 26(a)(1)(A)(iv) requires a party to produce any insurance agreement that might afford coverage in a particular case. Defendant produced only three pages of its \$10,000,000 insurance policy and argues that these are sufficient to allow plaintiff to determine whether insurance coverage is available in this case. Defendant has cited no legal authority that would allow it to produce only those portions of its policy that it deems relevant. Plaintiff's motion to compel is granted with respect to defendant's insurance policy."); *Capozzi v. Atwood Oceanics, Inc.*, No. 08-776, 2009 WL 3055321, at \*2 (W.D. La. Sept. 20, 2009) (Federal Rule 26(a)(1)(A)(iv) "does not allow a party to designate which parts of an insurance agreement are relevant or not. The rule is very clear that 'any insurance agreement under which an insurance business may be liable' is to be produced, without awaiting any discovery request. Aramark has cited no authority for its position that it need only disclose the portions of its insurance policies it deems relevant"); *Wolk v. Green*, No. C06-5025 BZ, 2008 WL

considered the question, “Most federal courts across the country that have examined this issue . . . determined that the reference in [Federal] Rule 26(a)(1)(A)(iv) to ‘any insurance agreement’ includes reinsurance agreements[.]”<sup>170</sup> that is, “a contract by which one insurer insures the risks of another insurer.”<sup>171</sup>

Insurance and indemnity agreements are discoverable because they assist the complaining party in determining the action’s settlement value.<sup>172</sup> The fact that they are discoverable, however, does not make them admissible.<sup>173</sup> In this regard, such agreements are inadmissible to prove liability at trial.<sup>174</sup>

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298757, at \*2 (N.D. Cal. Feb. 1, 2008) (“Defendant has repeatedly refused to disclose a complete copy of his liability insurance policy, and insists that the declarations page is sufficient to satisfy Federal Rule of Civil Procedure 26(a)(1)(A)(iv) (formerly [Federal] Rule 26(1)(D)). However, the plain language of the rule requires a party to disclose, and to provide for inspection, ‘any insurance agreement’, not just the declarations page of the policy.” (first citing FED. R. CIV. P. 26(a)(1)(A)(iv); then citing *Morock v. Chautaugua Airlines, Inc.*, No. 8:07-cv-210-T17-MAP, 2007 WL 2875223, at \*1 (M.D. Fla. Dec. 3, 2007); *Boyer v. Riverhead Cent. Sch. Dist.*, No. CV 05-4955 (SJF) (AKT), 2006 WL 3833040, at \*2–3 (E.D.N.Y. Dec. 29, 2006)); *Boyer*, 2006 WL 3833040, at 2–3 (holding summaries of insurance coverage were insufficient under former Federal Rule 26(a)(1)(D)); *Gaines-Hanna v. Farmington Pub. Sch. Dist.*, No. 04-CV-74910-DT, 2006 WL 891434, at \*2, (E.D. Mich. Mar. 31, 2006) (holding the defendant’s disclosure of its insurance carriers’ names, the policy numbers, and an assurance that the coverage was adequate to cover any judgment was insufficient to satisfy the requirements of former Federal Rule 26(a)(1)(D)); *Henderson v. Zurn Indus., Inc.*, 131 F.R.D. 560, 563 (S.D. Ind. 1990) (“[D]efendant’s attempt to limit discovery to the policy limits is contrary to the express mandate of [former Federal] Rule [26(b)(2)].”).

170. *Certain Underwriters at Lloyd’s v. National Railroad Passenger Corporation*, No. 14-CV-4717 (FB), 2016 WL 2858815, at \*15 (E.D.N.Y. May 16, 2016) (citing *Suffolk Fed. Credit Union v. Cumis Ins. Soc’y*, 270 F.R.D. 141, 142 (E.D.N.Y. 2010)). See generally *Century Sur. Co. v. Smith*, No. 14-cv-00947-RM-MJW, 2014 WL 7666061, at \*3 (D. Colo. Jan. 21, 2015); *First Horizon Nat’l Corp. v. Certain Underwriters at Lloyd’s*, No. 2:11-cv-02608-SHM-dkv, 2013 WL 11090763, at \*8 (W.D. Tenn. Feb. 27, 2013); *Isilon Sys., Inc. v. Twin City Ins. Co.*, No. C10-1392MJP, 2012 WL 503852, at \*3 (W.D. Wash. Feb. 15, 2012); *U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, 244 F.R.D. 638, 642 (D. Kan. 2007); *Country Life Ins. Co. v. St. Paul Surplus Lines Ins. Co.*, No. 03-1224, 2005 WL 3690565, at \*10 (C.D. Ill. Jan. 31, 2005); *Great Lakes Dredge & Dock Co. v. Commercial Union Assurance Co.*, 159 F.R.D. 502, 504 (N.D. Ill. 1995); *Stonewall Ins. Co. v. Int’l Ins. Co.*, No. 86 Civ. 9671 (JSM), 1992 WL 163180, at \*5 (S.D.N.Y. 1988).

171. *Certain Underwriters at Lloyd’s*, 2016 WL 2858815, at \*4 (quoting *N. River Ins. Co. v. Ace Am. Reins. Co.*, 361 F.3d 134, 137 (2d Cir. 2004)).

172. See *In re Dana Corp.*, 138 S.W.3d 298, 303 (Tex. 2004) (per curiam) (“The federal rule’s drafters recognized the value of making insurance information available to facilitate settlement.” (citing FED. R. CIV. P. 26(b)(2))); *Carroll Cable Co. v. Miller*, 501 S.W.2d 299, 299 (Tex. 1973) (per curiam) (“It is sufficient showing of good cause that an insurance agreement is not available to the moving party and that the information is needed to determine settlement and litigation strategy.”).

173. See TEX. R. CIV. P. 192.3(f) (“Information concerning the indemnity or insurance agreement is not by reason of disclosure admissible in evidence at trial.”).

174. See TEX. R. EVID. 411 (“Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court

Texas Rule 192.3(f) only requires the production of the relevant insurance or indemnity agreements and not the production of other related insurance documents.<sup>175</sup> The rule, however, does not preclude such other discovery if it is otherwise relevant or reasonably calculated to lead to the discovery of admissible information.<sup>176</sup> Reservation-of-rights letters, however, are generally not discoverable.<sup>177</sup> Likewise, information about the remaining

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may admit this evidence for another purpose, such as proving a witness's bias or prejudice or, if disputed, proving agency, ownership, or control.”); *see also In re Foremost Ins. Co.*, 966 S.W.2d 770, 772 (Tex. App.—Corpus Christi 1998, no pet.) (holding a defendant has a “substantial right to have her liability decided without mention of insurance”).

175. TEX. R. CIV. P. 192.3(f); *cf. In re Dana Corp.*, 138 S.W.3d at 303 (“Interpretation and application of the analogous federal rule supports our conclusion that [Texas] Rule 192.3(f) neither prohibits nor requires the discovery of more than an insurance agreement’s existence and contents.”); *Jump v. Montgomery Cty.*, No. 13-cv-3084, 2015 WL 4530522, at \*2 (C.D. Ill. July 27, 2015) (“The requirement to produce any insurance agreement is limited to the agreement. [Federal Rule 26(a)(1)(A)(iv)] does not require the production of any other document related to insurance.” (citing *Resolution Trust Corp. v. Thornton*, 41 F.3d 1539, 1547 (D.C. Cir. 1994); *Excelsior College v. Frye*, 233 F.R.D. 583, 585–86 (S.D. Cal. 2006)); *Excelsior College*, 233 F.R.D. at 586 (“[Former Federal] Rule 26(a)(1)(D), merely requires the disclosure of an insurance policy or other agreement that gives rise to an insurer’s obligation to indemnify or hold its insured harmless for a judgment, and does not require the production of all agreements relating to insurance, as Plaintiff posits.”); *Honeywell Int’l Inc. v. ICM Controls Corp.*, No. 11-cv-569 (JNE/TNL), 2013 WL 6169671, at \*12 (D. Minn. Nov. 22, 2013) (“Where the requested insurance-related discovery is ‘not relevant or reasonably calculated to lead to the discovery of admissible evidence,’ a party need only produce what is required under Fed. R. Civ. P. 26(a)(1)(A)(iv).” (citing *Gulf Ins. Co. v. Skyline Displays Inc.*, No. 02-cv-3503 (DSD/SRN), at \*9–10 (D. Minn. Oct. 20, 2003))).

176. *In re Dana Corp.*, 138 S.W.3d at 302 (“[Texas] Rule 192.3(f) does not foreclose discovery of insurance information beyond that identified in the rule; however, we also conclude that the plain language of [Texas] Rule 192.3(f), by itself, does not provide a sufficient basis to order discovery beyond the production of the ‘existence and contents’ of the policies. . . . [A] party may discover information beyond an insurance agreement’s existence and contents only if the information is otherwise discoverable under our scope-of-discovery rule[s].” (citing TEX. R. CIV. P. 192.3(a)); *cf. Phillips v. Clark Cty. Sch. Dist.*, No. 2:10-cv-02068-GMN-GWF, 2012 WL 135705, at \*5 (D. Nev. Jan. 18, 2012) (holding an insurance policy’s drafting history was discoverable and relevant to the interpretation of an ambiguous insurance-policy provision); *Henns v. Mony Life Ins. Co. of Am.*, No. 5:11-cv-55-J-37TBS, 2011 WL 6010416, at \*5 (M.D. Fla. Dec. 1, 2011) (ordering production of insurance applications); *Bartlett v. Allstate Life Ins. Co.*, No. 92-101-FR, 1992 WL 252119, at \*2–3 (D. Or. Sept. 28, 1992) (ordering production of the applications of all Louisiana residents who had applied for life insurance within the past year and who represented on the application that he or she had been charged with driving while intoxicated within the three months before the application’s filing).

177. *In re Madrid*, 242 S.W.3d 563, 567–69 (Tex. App.—El Paso 2007, orig. proceeding) (holding a reservation-of-rights letter was not discoverable under (1) Texas Rule 192.3(f) because it was not part of the insurance policy, or (2) Texas Rule 192.3(a) because it was not relevant to any claim or defense); *cf. Midwest Feeders, Inc. v. Bank of Franklin*, No. 5:14cv78-DCB-MTP, 2016 WL 7422561, at \*5 (S.D. Miss. June 28, 2016) (holding a reservation-of-rights letter was undiscoverable work

amount of insurance is generally not discoverable.<sup>178</sup>

#### 8. Settlement Agreements

Texas Rule 194.2(h) requires the disclosure of “any settlement agreements described in Rule 192.3(g)[.]”<sup>179</sup> Texas Rule 192.3(g), in turn, permits the discovery of the “existence and contents of *any relevant portions* of a settlement agreement.”<sup>180</sup>

Generally, the relevant portions of a settlement agreement in a pending action are (1) those containing the consideration paid by the settling party because they are relevant to the determination of any non-settling defendant's settlement credit after trial and to the question of a settlement demand's reasonableness,<sup>181</sup> and (2) those requiring the settling party either to provide testimony or other cooperation to the other party or not to

product).

178. *In re Dana Corp.*, 138 S.W.3d at 302–03.

179. TEX. R. CIV. P. 194.2(h).

180. *Id.* R. 192.3(g) (emphasis added); *accord In re DCP Midstream, L.P.*, No. 13-14-00502-CV, 2014 WL 5019947, at \*6 (Tex. App.—Corpus Christi Oct. 7, 2014, orig. proceeding) (mem. op.).

181. *See In re GreCon, Inc.*, 542 S.W.3d 774, 783–84, 786 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding) (holding (1) settlement agreements with other defendants are relevant to establish non-settling defendant's settlement credit and rejecting argument that the plaintiff did not have to produce them until after he prevailed at trial, and (2) “[a] nonsettling defendant should be entitled to make its own independent assessment of its settlement credits to evaluate a settlement offer to avoid trial”); *In re DCP Midstream, L.P.*, 2014 WL 5019947, at \*6 (“Courts ‘routinely’ order production of settlement agreements that are relevant to a claim or defense of a party. Settlement agreements are relevant and necessary to determine the amount of settlement credits to which a defendant is entitled under the common law’s ‘one satisfaction’ rule that a plaintiff should not be compensated twice for the same injury. Settlement agreements are also relevant under the Texas Civil Practice and Remedies Code in determining settlement credits.” (citations omitted) (first citing *In re Enron Corp. Sec., Derivative & “ERISA” Litigation*, 623 F. Supp. 2d 798, 836–39 (S.D. Tex. 2009); then citing *In re Frank A. Smith Sales*, 32 S.W.3d 871, 874–76 (Tex. App.—Corpus Christi 2000, orig. proceeding); and then citing TEX. CIV. PRAC. & REM. CODE § 33.012(b)); *In re Frank A. Smith Sales, Inc.*, 32 S.W.3d at 874–76 (granting mandamus where the trial court's preventing discovery of the settlement agreement prevent plaintiff from “present[ing] its ‘one satisfaction’ claim and its entitlement to a settlement credit”); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(b) (“If the claimant has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by the sum of the dollar amounts of all settlements.”); *In re Univar USA, Inc.*, 311 S.W.3d 175, 179 (Tex. App.—Beaumont 2010, orig. proceeding) (“[T]he settlement agreements containing the dollar amounts of a claimant's settlements are relevant to a remaining nonsettling defendant in at least two ways; first, to determine the amount of its settlement credit after a trial is completed, and second, before trial, to determine whether any settlement demand being made is reasonable when compared to the likely outcome of a trial.”); *see* TEX. R. EVID. 408(b) (noting a settlement agreement need not be excluded from evidence when it is offered to prove bias or prejudice or interest of a witness).

cooperate with a non-settling party because they are relevant to bias.<sup>182</sup> As with an indemnity or insurance agreement, the responding party should produce the actual settlement agreement, redacted to remove the non-relevant provisions.<sup>183</sup>

A settlement agreement in another action is discoverable if it is relevant to issues in the pending action.<sup>184</sup> The dollar amount of a settlement in another action, however, is generally neither relevant nor discoverable,<sup>185</sup>

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182. See *Liles v. Contreras*, 547 S.W.3d 280, 289–90 (Tex. App.—San Antonio 2018, pet. filed) (mem. op.) (“Settlement agreements are discoverable for many reasons, including demonstrating bias or prejudice of a party or potential witness. . . . Although Rule 408 of the Texas Rules of Evidence generally precludes the admission of settlement agreements, such agreements may be admissible to prove a party’s or witness’s bias or prejudice.” (citations omitted) (first citing *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801, 805 (Tex. 1978); *In re GreCon, Inc.*, 542 S.W.3d at 784–85; then citing TEX. R. EVID. 408)); *In re GreCon, Inc.*, 542 S.W.3d at 785 (holding settlement agreements were relevant to show bias and that a non-settling defendant “should have the opportunity to examine the [s]ettlement [a]greements to determine whether they contain anything that would raise issues of witness bias or prejudice” (citing *Burlington N., Inc. v. Hyde*, 799 S.W.2d 477, 480–81 (Tex. App.—El Paso 1990, orig. proceeding); then citing *Nermyr v. Hyde*, 799 S.W.2d 472, 476 (Tex. App.—El Paso 1990, orig. proceeding); and then citing *In re DCP Midstream, L.P.*, 2014 WL 5019947, at \*12)); *In re DCP Midstream, L.P.*, 2014 WL 5019947, at \*6 (“[S]ettlement agreements and offers may be discoverable to demonstrate bias or prejudice of a party or witness or to establish the existence of a promise or agreement made by nonparties to the settled lawsuit.” (citing *In re Enron*, 623 F. Supp. 2d at 836–39; *Bristol-Myers Co.*, 561 S.W.2d at 805; *In re Univar USA, Inc.*, 311 S.W.3d at 182; *In re Frank A. Smith Sales, Inc.*, 32 S.W.3d at 874–76)); *In re Univar USA, Inc.*, 311 S.W.3d at 182 (“[F]airness should allow a nonsettling party to evaluate whether a given settlement agreement potentially affects the prospective testimony of witnesses at a trial, an argument Univar advanced in the trial court and in its petition seeking a writ of mandamus. With respect to witness bias, we note that settlement agreements and offers may be discoverable for purposes other than to establish liability, such as to demonstrate bias or prejudice of a party or witness, or, to establish the existence of a promise or agreement made by nonparties to the settled lawsuit.” (citing *Bristol-Myers Co.*, 561 S.W.2d at 805)); see also TEX. R. EVID. 408 (providing both prohibited and permissible uses of settlement agreements).

183. *Liles*, 547 S.W.3d at 289–90 (“[Texas] Rule 192.3(g) requires a party responding to a request for disclosure to disclose not just the existence of a settlement agreement, but the contents of it. . . . Merely disclosing the names of the parties to the settlement, the amount, and that court approval was pending did not disclose ‘the contents’ of the settlement agreement so as to allow Contreras’s counsel, among other things, to determine whether there might be bias or prejudice by the settling parties based on the agreement.” (citing TEX. R. CIV. P. 192.3(g)).

184. *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 649 (Tex. 1995); *In re Frank A. Smith Sales, Inc.*, 32 S.W.3d at 874.

185. *Leggat*, 904 S.W.2d at 649; *Palo Duro Pipeline Co. v. Cochran*, 785 S.W.2d 455, 457 (Tex. App.—Houston [14th Dist.] 1990, orig. proceeding); see TEX. R. EVID. 408 (“Evidence of . . . furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim[.]”); see also *Collier Servs. Corp. v. Salinas*, 812 S.W.2d 372, 376–77 (Tex. App.—Corpus Christi 1991, orig. proceeding) (allowing discovery of a settlement amount because it was relevant to the plaintiff’s post-judgment efforts to uncover assets on which to execute).

and even though a settlement agreement may be discoverable, it is not admissible to prove or disprove liability at trial.<sup>186</sup>

#### 9. Witness Statements

Texas Rule 194.2(i) requires the disclosure of “any witness statements described in Rule 192.3(h)[.]”<sup>187</sup> Texas Rule 192.3(h), in turn, permits “discovery of the statement of any person with knowledge of relevant facts—a ‘witness statement’—regardless of when the statement was made.”<sup>188</sup>

Texas Rule 192.3(h) defines a witness statement as “(1) a written statement signed or otherwise adopted or approved in writing by the person making it, or (2) a stenographic, mechanical, electrical, or other type of recording of a witness’s oral statement, or any substantially verbatim transcription of such a recording[.]”<sup>189</sup> but makes clear that “[n]otes taken during a conversation or interview with a witness are not a witness statement.”<sup>190</sup>

Generally, witness statements, irrespective of when they were made, must be produced and are not shielded from discovery by the work-product privilege.<sup>191</sup> For example, a letter written by an employee who witnessed the accident to the party’s insurer describing how the accident occurred is a discoverable “witness statement,”<sup>192</sup> as is an insurance company’s recording of a telephone call with its insured about the accident.<sup>193</sup> In fact, one court properly held that edited and unedited versions of videotaped witness statements used during mediation were discoverable.<sup>194</sup> A witness

186. See TEX. R. CIV. P. 192.3(g) (“Information concerning a settlement agreement is not by reason of disclosure admissible in evidence at trial.”); TEX. R. EVID. 408(a) (providing settlement agreements are not admissible to prove or disprove liability); see also *Leggat*, 904 S.W.2d at 649 (holding settlement agreements are not admissible to prove liability).

187. TEX. R. CIV. P. 194.2(i).

188. *Id.* R. 192.3(h).

189. *Id.*

190. *Id.*

191. See *id.* R. 192.5(c)(1) (providing witness statements are not work product); see also *Spohn Hosp. v. Mayer*, 72 S.W.3d 52, 62 (Tex. App.—Corpus Christi 2001) *rev’d on other grounds*, 104 S.W.3d 878 (Tex. 2003) (“Information discoverable under [Texas Rule] 192.3, including witness statements, is not work-product protected from discovery, even if prepared in anticipation of litigation.” (citing TEX. R. CIV. P. 192.5(c)(1))).

192. *In re Team Transp., Inc.*, 996 S.W.2d 256, 259 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding).

193. *In re Jimenez*, 4 S.W.3d 894, 896 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding).

194. *In re Learjet Inc.*, 59 S.W.3d 842, 846 (Tex. App.—Texarkana 2001, orig. proceeding).

statement, however, is protected from discovery if it falls within a privilege other than the work-product privilege, such as the attorney-client privilege or the Fifth Amendment privilege against self-incrimination.<sup>195</sup>

#### 10. Medical Records and Bills

Texas Rules 194.2(j) and (k) are mirror-image provisions applicable in actions “alleging physical or mental injury and damages from the occurrence that is the subject of the case[.]”<sup>196</sup> The former rule requires the injured party to produce “all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills[.]”<sup>197</sup> The latter rule requires the non-injured party to produce “all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party[.]”<sup>198</sup> Under Texas Rule 194.2(j), it is the requesting, non-injured party who has the option of requesting either the medical authorization or the injured, responding party’s documents.<sup>199</sup>

#### 11. Responsible Third Parties

Texas Rule 194.2(l) requires the disclosure of “the name, address, and telephone number of any person who may be designated as a responsible third party.”<sup>200</sup> A responsible third party is:

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195. See TEX. R. CIV. P. 192 cmt. 9 (“Elimination of the ‘witness statement’ exemption does not render all witness statements automatically discoverable but subjects them to the same rules concerning the scope of discovery and privileges applicable to other documents or tangible things.”); see also *In re ExxonMobil Corp.*, 97 S.W.3d 353, 356 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (holding a witness statement in a document protected by the attorney-client privilege is not discoverable); *In re Fontenot*, 13 S.W.3d 111, 113–14 (Tex. App.—Fort Worth 2000, orig. proceeding) (ruling the plaintiff’s written narrative and claim questionnaire given to his attorney was not discoverable because it was protected by the attorney-client privilege).

196. TEX. R. CIV. P. 194.2(j)–(k).

197. *Id.* R. 194.2(j).

198. *Id.* R. 194.2(k).

199. See *In re Soto*, 270 S.W.3d 732, 734 (Tex. App.—Amarillo 2008, orig. proceeding) (“[T]he option belongs to the party requesting disclosure, not the one responding to it. If a legitimate authorization is sought, then the respondent cannot unilaterally comply with the request by simply delivering selected medical records.”); see *Navarrete v. Williams*, 342 S.W.3d 116, 121 (Tex. App.—El Paso 2011, no pet.) (“Ms. Navarrete cites to [Texas] Rule 194.2(j), for the proposition that a request for disclosure of medical information or records may be answered with such a release, and, in essence, concludes that no further response or supplementation is necessary. We disagree with Ms. Navarrete’s interpretation of this provision.”).

200. TEX. R. CIV. P. 194.2(l).



[A]ny person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these. The term “responsible third party” does not include a seller eligible for indemnity under Section 82.002 [of the Texas Civil Practice and Remedies Code].<sup>201</sup>

For a number of years, Section 33.004 of the Texas Civil Practice and Remedies Code allowed a plaintiff to assert a claim against a person designated as a responsible third party by a defendant even if the claim would otherwise have been barred by limitations, as long as the plaintiff brought the claim within sixty days after the responsible third party's designation.<sup>202</sup> The Texas Legislature closed this perceived loophole by repealing this provision.<sup>203</sup> Additionally, Texas Rule 194.2 was amended to provide for the disclosure of responsible third parties<sup>204</sup> and Section 33.004 was amended to provide that “a defendant may not designate . . . a responsible third party . . . after the [statute of limitations] . . . has expired” on the plaintiff's claim unless the defendant has “timely” disclosed that person in its discovery responses.<sup>205</sup> A designation after the statute of

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201. TEX. CIV. PRAC. & REM. CODE § 33.011(6). *But see In re CVR Energy, Inc.*, 500 S.W.3d 67, 73 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding) (“[A] defendant may be precluded from designating a responsible third party if it had an obligation to disclose the person earlier but did not do so and the statute of limitations has run on the plaintiff's claim against the late-disclosed party . . .”).

202. Act of May 18, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, *repealed by* Act of May 30, 2011, 82d Leg., R.S., ch. 203, § 5.02, 2011 Tex. Gen. Laws 757.

203. Act of May 30, 2011, 82d Leg., R.S., ch. 203, § 5.02, 2011 Tex. Gen. Laws 757; *accord* TEX. R. CIV. P. 194 cmts. 1–3.

204. *See* Tex. R. Civ. P. 194.2, Historical Notes (“[Texas] Rule 194.2(l) is added as required by changes in Chapter 33 of the Texas Civil Practice and Remedies Code.”).

205. TEX. CIV. PRAC. & REM. CODE § 33.004(d); TEX. R. CIV. P. 194.2(l); *see also* *Magna Equities II, LLC v. Heartland Bank*, No. H-17-1479, 2018 WL 1135482, at \*5 (S.D. Tex. Feb. 28, 2018) (noting the limitation in Section 33.004(d) of the Texas Civil Practice & Remedies Code “seeks to address a defendant's interest in identifying nonparties who may have some culpability while recognizing that a plaintiff has time limitations on pursuing its claims against parties not already included in its suit” (quoting *Vasquez v. Tristar Prods., Inc.*, No. B:15-108, 2017 WL 7038196, at \*2 (S.D. Tex. May 22, 2017))).

Two interesting questions are whether the responsible third party statute, Section 33.004 of the Civil Practices and Remedies Code, applies in a federal diversity action governed by Texas law, and if so, whether a defendant can designate a responsible third party after limitations has run, on the plaintiff's claim, against that party if the defendant had not previously disclosed the responsible third party's existence. The second question arises because, under Section 33.004(d), a defendant generally cannot designate a responsible third party after limitations has run, unless it has timely disclosed that

limitations has expired, however, is timely if (1) the plaintiff sues immediately before the limitations period runs and the defendant's disclosure is not due until after the period expired,<sup>206</sup> or (2) the responsible third party is a former defendant in the action who was dismissed by the

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person "under the Texas Rules of Civil Procedure." TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(d). There is no federal discovery rule comparable to Texas Rule 194.2(l) requiring the disclosure of responsible third parties. *Morris v. AirCon Corp.*, No. 9:16-cv-35, 2017, 2017 WL 2927478, at \*3 (E.D. Tex. June 15, 2017) ("GreCon is correct that the Federal Rules of Civil Procedure, either under Rule 26 or otherwise, do not require a party to disclose who it believes may be a responsible third party."). Although the Fifth Circuit has not answered either question, with respect to the first question, "the prevailing view among district courts is that the procedure for designation of responsible third parties is Texas state substantive law." *Id.* at \*2; *accord Ramos v. Beltran*, No. 5:15-CV-1042-RP, 2016 WL 8234983, at \*1 (W.D. Tex. Dec. 20, 2016) ("Federal district courts sitting in Texas have repeatedly held that § 33.004 of the Texas Civil Practice and Remedies Code is substantive law." (citing *Withers v. Schneider Nat'l Carriers, Inc.*, 13 F. Supp. 3d 686 (E.D. Tex. 2014); *Viceroy Petroleum, LP v. Tadlock Pipe & Rentals, Inc.*, No. 5:15-CV-6-DAE, 2014 WL 5488422, at \*3 (W.D. Tex. 2014))).

There is, however, no consensus with respect to the answer to the second question. Some district courts hold that a responsible third party can be named after limitations has run even though the defendant had not previously disclosed the party's existence. *See Spencer v. BMW of N. Am., LLC*, No. 5:14-CV-869-DAE, 2015 WL 1529773, at \*2 n.3 (W.D. Tex. Apr. 2, 2015) ("Since there is no federal counterpart for responsible third parties, there would be no disclosure requirement under federal law, in which case Defendants had no timely disclosure obligations with which they would have had to comply under § 33.004(d)." (citing *Webber, LLC v. Symons Corp.*, No. 4:12-CV-181-A, 2013 WL 3356291, at \*2 (N.D. Tex. July 3, 2013))); *Webber*, 2013 WL 3356291, at \*2 ("A plausible argument can be made that the Texas rules of procedure mentioned above are not applicable in this federal court litigation, with the consequence that Dayton cannot be deemed to have failed to comply with any obligation of disclosure under the Texas Rules of Civil Procedure because it had no such obligation."). Other courts, however, have held that the defendant must have timely disclosed the responsible third party before limitations ran. *See e.g., Magna Equities II, LLC*, 2018 WL 1135482, at \*8 ("The court agrees with other courts in this District that [Section] 33.004(d) contains a general timeliness requirement as outlined in *Withers v. Schneider Nat'l Carriers, Inc.*, 13 F. Supp. 3d 686, 690 (E.D. Tex. 2014)]." (first citing *Vasquez*, 2017 WL 7038196, at \*2; then citing *Armstrong v. Nat'l Shipping Co. of Saudi Arabia*, No. 4:15-868, 2017 WL 2156358, at \*1-3 (S.D. Tex. May 17, 2017))).

Accordingly, until the Fifth Circuit decides the issue, a plaintiff in a federal diversity case governed by federal law should serve an interrogatory asking the defendant to identify any responsible third parties, and a defendant, who anticipates designating one, should disclose the responsible third party's identity to the plaintiff at the earliest possible time, even if no responsible third party interrogatory has been served.

206. *In re Bustamante*, 510 S.W.3d 732, 736-37 (Tex. App.—San Antonio 2016, orig. proceeding) (holding a defendant's designation of a responsible third party was "timely" because its response to the disclosure was not due until after limitations expired). The *Bustamante* court stated: "[W]e read section 33.004(d) to require a defendant to disclose a potential responsible third party before the expiration of the statute of limitations, if that is possible. In this case, Bustamante did not fail to comply with his obligation to timely disclose Riojas and CBE as potential responsible third parties because it was impossible for Bustamante to make a disclosure before the statute of limitations ran. The statute of limitations ran one day after this suit was filed." *Id.*

plaintiff after the limitations period expired.<sup>207</sup>

The amended statute and rule eliminate the possibility of a plaintiff colluding with a defendant to have it designate a responsible third party to allow the plaintiff to revive a time-barred claim. Although the statute tries to prevent defendants from delaying the designation of responsible third parties to prejudice the plaintiff (e.g., where the limitations period expires during the defendant's delay), there will undoubtedly be instances in which plaintiffs will file suit shortly before limitations runs, and any claim against responsible third parties will be too late, even if the latter are designated promptly. In these situations, plaintiffs will simply have to face a trial in which the defendant points to the "empty chair" that previously would have been occupied by the responsible third party.

#### 12. Materials that May be Used to Support the Disclosing Party's Claims or Defenses in a Level 1 Action

Texas Rule 190.2(b)(6), which applies only to Level 1 actions, requires disclosure of "all documents, electronic information, and tangible items that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses."<sup>208</sup> Under this Rule, the focus is on documents, electronic information, or tangible items that the responding party "may" use. Thus, a responding party need not disclose damaging or unfavorable documents, electronic information, or tangible items that it does *not* intend to use merely because such material may be relevant to the action's subject matter, claims, or defenses. The responding party, however, does not have to be "one-hundred percent sure" that it will use the material before it must disclose the material.<sup>209</sup>

"Use" should be construed broadly to include use during pretrial proceedings as well as trial. Accordingly, the responding party should disclose documents, electronic information, and tangible items that it may

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207. *In re* CVR Energy, Inc., 500 S.W.3d 67, 79 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding).

208. TEX. R. CIV. P. 190.2(b)(6). Texas Rule 190.2(b)(6) is based on Federal Rule 26(a)(1)(A)(iv), which requires the provision of "a copy—or a description by category and location—of all documents, electrically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment[.]" FED. R. CIV. P. 26(a)(1)(A)(ii).

209. *Cf.* *Baldus v. Members of the Wis. Gov't Accountability Bd.*, No. 11-CV-562-JPS-DPW-RMD, 2011 WL 6003185, at \*1 (E.D. Wis. Nov. 30, 2011) (quoting *Frazier v. Layne Christensen Co.*, 370 F. Supp. 2d 823, 828 (W.D. Wis.), *vacated in part on other grounds*, 380 F. Supp. 2d 989 (W.D. Wis. 2005)) (construing Federal Rule 26(a)(1)(A)(i)).

use at any stage of the action, even material that is limited solely to uncontroverted or background facts. Because the potential penalty for failing to produce the documents, electronic information, or tangible items is generally the material's exclusion at trial,<sup>210</sup> the prudent course is to disclose all documents, electronic information, or tangible items that the responding party anticipates it might: (1) use to support its allegations, claims, or defenses; (2) use to support a denial or rebuttal of another party's allegations, claims, or defenses; (3) use in depositions and other aspects of discovery (other than to frame a written-discovery response); or (4) use in connection with motions bearing on the action's merits (e.g., summary judgment motions or temporary-injunction applications).

Several questions arise with respect to Texas Rule 190.2(b)(6) disclosures. *First*, must the responding party produce the disclosed documents, electronic information, and tangible items or can it merely describe the material in its disclosure?<sup>211</sup> It is clear that the responding party must produce the material unless it is voluminous or unless it is impractical to produce a tangible item (e.g., it cannot be copied). In such situations, (1) the disclosure must state a reasonable time and place for the production of the material and the responding party must produce it at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and (2) the disclosure must provide the requesting party a reasonable opportunity to inspect the material. Three factors support this conclusion.

Initially, the general disclosure rule, Texas Rule 194, requires this with respect to documents disclosed in response to Texas Rules 194.2(f)(4) and (g)–(k), respectively, a testifying expert's reviewed documents and resume and bibliography, indemnity and insuring agreements, settlement agreements, and witness statements.<sup>212</sup> Moreover, Texas Rule 190.2(b)(6)

210. TEX. R. CIV. P. 193.6(a).

211. Texas Rule 190.2(b)(6) simply requires "disclosure" of the specified "documents, electronic information, and tangible items[.]" *Id.* R. 190.2(b)(6).

212. *Id.* R. 194.4 ("Copies of documents and other tangible items ordinarily must be served with the response. But if the responsive documents are voluminous, the response must state a reasonable time and place for the production of documents. The responding party must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them."); see *Liles v. Contreras*, 547 S.W.3d 280, 289 (Tex. App.—San Antonio 2018, pet. filed) ("[Texas] Rule 192.3(g) requires a party responding to a request for disclosure to disclose not just the existence of a settlement agreement, but the contents of it." (citing TEX. R. CIV. P. 192.3(g)); *In re GreCon, Inc.*, 542 S.W.3d 774, 779 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding) ("Under [Texas] Rule 194.4, the responding party 'ordinarily must' serve documents and other tangible items with the response, and 'must produce the documents at the time and place stated, unless otherwise agreed by the parties ordered by the

specifically provides that the disclosure does not count as a production request.<sup>213</sup> If the responding party had the option of describing the documents, electronic information, and tangible items, the rule would not so provide because the best and principal method for obtaining the described material would be through a production request. Finally, the federal rule on which Texas Rule 190.2(b)(6) was modeled specifically allows the disclosing party to either produce or describe the material.<sup>214</sup> If a responding party had the option of merely describing the documents, electronic information, and tangible items, Texas Rule 190.2(b)(6) would have expressly so provided.

*Second*, should documents, electronic information, or tangible items that might be used solely for rebuttal or impeachment be disclosed? Because rebuttal witnesses whose testimony can be anticipated must be disclosed as persons having knowledge of relevant facts under Texas Rule 194.2(e),<sup>215</sup> such material, as a matter of prudence, should be disclosed. This conclusion is buttressed by the fact that the federal rule on which Texas Rule 190.2(b)(6) is based specifically excludes from disclosure material whose “use would be solely for impeachment[.]”<sup>216</sup> If a responding party did not have to disclose documents, electronic material, or tangible things that it might use only in rebuttal or for impeachment, Texas Rule 190.2(b)(6) would have expressly so provided.

*Third*, when are documents, electronic information, and tangible items within the responding party’s “possession, custody, and control”? “Possession, custody, or control” of an item is defined by Texas Rule 192.7 to “mean[ ] that the person either has physical possession of the item or has a right to possession of the item that is equal or superior to the person who has physical possession of the item.”<sup>217</sup>

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court[.]” (quoting TEX. R. CIV. P. 194.4); *RDJRLW, Inc. v. Miller*, No. 02-16-00132-CV, 2017 WL 2590568, at \*7 (Tex. App.—Fort Worth June 15, 2017, no pet.) (mem. op.) (“Copies of [the testifying expert’s] documents and other tangible items must be served with the response, but if the responsive documents are voluminous, the response must state a reasonable time and place for their production.” (citing TEX. R. CIV. P. 194.4)).

213. TEX. R. CIV. P. 190.2(b)(6).

214. FED. R. CIV. P. 26(a)(1)(A)(ii) (requiring the disclosing party to “provide to the other parties . . . a copy—or a description by category and location—of all documents, electrically stored information, and tangible things”).

215. See discussion *supra* note 111 and accompanying text.

216. FED. R. CIV. P. 26(a)(1)(A)(ii).

217. TEX. R. CIV. P. 192.7(b); accord *In re Summersett*, 438 S.W.3d 74, 81 (Tex. App.—Corpus Christi 2013, orig. proceeding). For a discussion of when documents are within a responding party’s possessions, custody, or control, see Wise, *supra* note 6, at 547–55; WISE & WOOTEN, *supra* note 16,

### C. Responding to Disclosure Requests

A party must respond to a disclosure request within thirty days after its service<sup>218</sup> unless the time is extended due to the manner of service, by the parties' agreement, or by court order,<sup>219</sup> except that (1) "a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request," and (2) a response to a Texas Rule 194.2(f) request for an expert disclosure is due within the time provided by Texas Rule 195.<sup>220</sup> Under Texas Rule 195.2, an expert disclosure is due, unless otherwise ordered by the court, ninety days before the end of the discovery period with regard to all experts testifying for a party seeking affirmative relief and sixty days before the end of that period with respect to all other testifying experts.<sup>221</sup>

The response to a disclosure request must be in writing<sup>222</sup> and preceded by the request.<sup>223</sup> The party's attorney or a pro se party must sign the response.<sup>224</sup> Unlike interrogatory answers, however, the responses need

§ 8-4:3.1.

218. TEX. R. CIV. P. 194.3; *accord In re GreCon, Inc.*, 542 S.W.3d 774, 779 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding) ("As to the response to the request for disclosure, [Texas] Rule 194.3 provides that "[t]he responding party must serve a written response on the requesting party within 30 days after service of the request[.]" (quoting TEX. R. CIV. P. 194.3)).

219. *See* TEX. R. CIV. P. 193.1 ("A party must respond to written discovery in writing within the time provided by court order or these rules."). Three days are added to the response date if the production request is served by mail. *Id.* R. 21a(c). One day is added if it is received by fax after 5:00 p.m. local time of the recipient. *Id.* R. 21a(b)(2).

220. *Id.* R. 194.3(a)–(b).

221. *Id.* R. 195.2(a)–(b) ("Unless otherwise ordered by the court, a party must designate experts—that is, furnish information requested under [Texas] Rule 194.2(f)—by the later of the following two dates: 30 days after the request is served, or—(a) with regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery period; (b) with regard to all other experts, 60 days before the end of the discovery period.").

222. *Id.* R. 194.3; *VingCard A.S. v. Merrimac Hosp. Sys., Inc.*, 59 S.W.3d 847, 855 (Tex. App.—Fort Worth 2001, pet. denied) ("[Texas] Rule 194.3 requires the responding party to serve a written response on the requesting party." (citing TEX. R. CIV. P. 194.3)). Oral information is not a substitute for written answers. *See, e.g., Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669, 671 (Tex. 1990) (*per curiam*) (holding oral identification of witnesses was insufficient).

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

224. *Id.* R. 191.3(a)(1)–(2) ("Every disclosure, discovery request, notice, response, and objection must be signed: (1) by an attorney, if the party is represented by an attorney, and must show the attorney's State Bar of Texas identification number, address, telephone number, and fax number, if any; or (2) by the party, if the party is not represented by an attorney, and must show the party's address, telephone number, and fax number, if any.").

not be verified.<sup>225</sup> If the response is not properly signed, it “must be stricken unless it is signed promptly after the omission is called to the attention of the [requesting or responding] party[.]”<sup>226</sup> Disclosures can only be used against the responding party at trial or a hearing.<sup>227</sup>

Copies of documents and other tangible things (i.e., a testifying expert’s reviewed and relied-upon documents, resume, and bibliography, relevant insurance policies and indemnity agreements, relevant portions of settlement agreements, the medical authorization or medical records and bills, statements of witnesses, and the documents the responding party may use to support its claims or defenses) must be served with the response unless they are voluminous, in which case the response must state a reasonable time and place for their production and the responding party must provide the requesting party a reasonable opportunity to inspect them.<sup>228</sup>

225. Compare *id.* R. 197.2(d)(1)–(2) (requiring verification of interrogatories), with *id.* R. 194.3 (omitting any requirement for verification of disclosures).

226. *Id.* R. 191.3(d).

227. Cf. *Vodicka v. Lahr*, No. 03-10-00126-CV, 2012 WL 2075713, at \*8 n.10 (Tex. App.—Austin June 6, 2012, no pet.) (mem. op.) (holding one defendant’s interrogatory answer was not proper summary judgment evidence against another defendant); *Buck v. Blum*, 130 S.W.3d 285, 290 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (“[A] party’s answers to interrogatories can only be used against that party and not against another party, including a codefendant.” (citing TEX. R. CIV. P. 197.3)). Nor can a party rely on its own disclosures as evidence. Cf. *Maxwell v. Willis*, 316 S.W.3d 680, 685–86 (Tex. App.—Eastland 2010, no pet.) (holding the trial court erred in relying on the moving party’s own interrogatory answer in granting the party summary judgment); *Zarzosa v. Flynn*, 266 S.W.3d 614, 619 (Tex. App.—El Paso 2008, no pet.) (“A party may not rely on its own interrogatory responses to raise a fact issue in order to defeat summary judgment, even if the [opposing] party puts them into evidence.” (first citing *Garcia v. Nat’l Eligibility Express, Inc.*, 4 S.W.3d 887, 891 (Tex. App.—Houston [1st Dist.] 1999, no pet.); *Hanssen v. Our Redeemer Lutheran Church*, 938 S.W.2d 85, 94–95 (Tex. App.—Dallas 1996, writ denied); then citing *Yates v. Fisher*, 988 S.W.2d 730, 731 (Tex. 1998))); *Garvia*, 4 S.W.3d at 890–91 (holding a party’s own interrogatory answers are incompetent summary judgment evidence). However, in a multi-party case, any party may use the responding party’s disclosures against the responding party, thereby obviating the need for redundant disclosure requests. Cf. *Ticor Title Ins. Co. v. Lacy*, 803 S.W.2d 265, 266 (Tex. 1991) (per curiam) (interrogatories).

228. TEX. R. CIV. P. 194.4; *accord* *Liles v. Contreras*, 547 S.W.3d 280, 289 (Tex. App.—San Antonio Mar. 21, 2018, pet. filed) (“[Texas] Rule 192.3(g) requires a party responding to a request for disclosure to disclose not just the existence of a settlement agreement, but the contents of it.” (citing TEX. R. CIV. P. 192.3(g))); *In re GreCon, Inc.*, 542 S.W.3d 774, 779 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding) (“Under [Texas] Rule 194.4, the responding party ‘ordinarily must’ serve documents and other tangible items with the response, and ‘must produce the documents at the time and place stated, unless otherwise agreed by the parties ordered by the court[.]’” (quoting TEX. R. CIV. P. 194.4)); *RDJRLW, Inc. v. Miller*, No. 02-16-00132-CV, 2017 WL 2590568, at \*7 (Tex. App.—Fort Worth June 15, 2017, no pet.) (mem. op.) (“Copies of [the testifying expert’s] documents and other tangible items must be served with the response, but if the responsive documents are voluminous, the response must state a reasonable time and place for their production.” (citing TEX. R. CIV. P. 194.4)).

Perhaps most importantly, under Texas Rule 193.1, the responding party “must make a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made.”<sup>229</sup> Nothing in Texas Rule 193 or the other discovery rules explains when “information” is “reasonably available.” What information and material is reasonably available depends in large measure on the responding party’s obligation of reasonable inquiry (i.e., how extensive a search the responding party must make to respond to the discovery request). This, of course, depends on the facts of each action.

Even though what constitutes a reasonable inquiry is action-specific,<sup>230</sup> some general principles exist. For example, federal courts have held that “a reasonable inquiry is limited to inquiry of documents and persons readily available and within the responding party’s control.”<sup>231</sup> This requires the

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229. TEX. R. CIV. P. 193.1.

230. As held by one court in discussing what constitutes a reasonable inquiry with respect to a response to a request for admission: “What constitutes ‘reasonable inquiry’ and what material is ‘readily obtainable’ is a relative matter that depends upon the facts of each case.” *T. Rowe Price Small-Cap Fund, Inc. v. Oppenheimer & Co.*, 174 F.R.D. 38, 43 (S.D.N.Y. 1997) (citing *Dubin v. E.F. Hutton Grp., Inc.*, 125 F.R.D. 372, 374 (S.D.N.Y. 1989); *Al-Jundi v. Rockefeller*, 91 F.R.D. 590, 593–94 (W.D.N.Y. 1981); *Kendrick v. Sullivan*, No. 83-3175 (CRR), 1992 WL 119125, at \*3 (D.D.C. May 15, 1992)); *accord Jones v. Zimmer*, No. 2:12-cv-01578-JAD-NJK, 2014 WL 6772916, at \*5 (D. Nev. Dec. 2, 2014) (“[B]efore making such a response, the responding party must undertake a reasonable inquiry into readily obtainable information from persons and/or documents within the responding party’s relative control. . . . What constitutes a ‘reasonable’ inquiry depends on the circumstances of each particular case.” (first citing *F.D.I.C. v. Halpern*, 271 F.R.D. 191, 194 (D. Nev. 2010); then citing *Asea, Inc. v. S. Pac. Transp. Co.*, 669 F.2d 1242, 1245–46 (9th Cir. 2014)); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, No. 82 Civ. 5253 (MBM), 1990 WL 657537, at \*2 (S.D.N.Y. May 2, 1990) (“The extent of [the] obligation of ‘reasonable inquiry’ turns on the practicalities of the case.”); *Dubin*, 125 F.R.D. at 374 (“However, the standard of ‘reasonable inquiry’ under [Federal] Rule 36 is a relative standard depending on the particular facts of each case. [Federal] Rule 36 makes clear that determination of what constitutes ‘reasonable inquiry’ in a given case is committed to the sound discretion of the motion court, in this instance, the Magistrate.” (citing *Davis v. City of New York*, No. 86 CIV. 6345 (SWK), 1988 WL 42189, at \*3 (S.D.N.Y. Apr. 28, 1988))).

231. *See JZ Buckingham Invests. LLC v. United States*, 77 Fed. Cl. 37, 47 (Fed. Cl. 2007) (citing *T. Rowe Price Small-Cap Fund*, 174 F.R.D. at 43; *United States v. Taylor*, 166 F.R.D. 356, 363–64 (M.D.N.C. 1996)) (discussing responses to requests for admission); *accord ABKCO Music, Inc. v. Sagan*, No. 15 Civ. 4025 (ER) (HBP), 2017 WL 3236443, at \*3 (S.D.N.Y. July 31, 2017) (“Generally, a ‘reasonable inquiry’ is limited to review and inquiry of those persons and documents that are within the responding party’s control.” (quoting *T. Rowe Price Small-Cap Fund*, 174 F.R.D. at 43–44)); *Twentieth Century Fox Film Corp. v. Marvel Enters., Inc.*, No. 01 CIV. 3016 (AGS) (HBP), 2002 WL 1835439, at \*3 (S.D.N.Y. Aug. 8, 2002) (“A corporation responding to interrogatories must provide not only the information contained in its own files and possessed by its own employees, it must also provide all information under its control. ‘A party served with interrogatories is obliged to respond by “furnish[ing] such information as is available to the party.” [Defendant] therefore is obliged to respond to the interrogatories not only by providing the information it has, but also the information within its



responding party to review its readily available documents and inquire of its officers, employees, agents, attorneys, and other others subject to its control “who conceivably, but in realistic terms, may have information which may lead to or furnish the necessary and appropriate response.”<sup>232</sup>

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control or otherwise obtainable by it.” (alteration in original) (citations omitted) (first citing *Am. Rockwool, Inc. v. Owens-Corning Fiberglas Corp.*, 109 F.R.D. 263, 266 (E.D.N.C. 1985); then quoting *In re Auction Houses Antitrust Litig.*, 196 F.R.D. 444, 445 (S.D.N.Y. 2000); and then citing *Cullins v. Heckler*, 108 F.R.D. 172, 176–77 (S.D.N.Y. 1985); 8A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2264, at 571–72 (2d ed., 1994)); see also *Costa v. Kerzner Int'l Resorts, Inc.*, 277 F.R.D. 468, 471 (S.D. Fla. 2011) (“Furthermore, as with [Federal] Rule 34, a party must provide information in response to a [Federal] Rule 33 interrogatory if such information is under its control.” (citing *Ferber v. Sharp Elects. Corp.*, No. 84 CIV 3105(RO), 1984 WL 912479, at \*1 (S.D.N.Y. Nov. 28, 1984)); *Goodrich Corp. v. Emhart Indus., Inc.*, No. EDCV 04-00759-VAP (SSx), 2005 WL 6440828, at \*3 (C.D. Cal. June 10, 2005) (“A corporation responding to interrogatories must provide not only the information contained in its own files and possessed by its own employees, but also all information under its control.” (citing *Am. Rockwool*, 109 F.R.D. at 266)); *Taylor*, 166 F.R.D. at 363–64 (holding the “reasonable inquiry” standard requires the responding party to check its own files for documents sent by or to the responding party to determine their authenticity); WISE, *supra* note 16, § 5.2 (discussing the reasonable inquiry requirement with respect to written discovery); *id.* § 8–4:3.1, (discussing the meaning of “control” (citing *Am. Rockwool*, 109 F.R.D. at 266)).

232. *Noble v. Gonzalez*, No. 1:07-cv-01111-LJO-GSA-PC, 2013 WL 4517774, at \*20 (E.D. Cal. Aug. 26, 2013) (quoting *Farber & Partners, Inc. v. Garber*, 237 F.R.D. 250, 254 (C.D. Cal. 2006)); *accord Iron Workers Local No. 60 Annuity Pension Fund v. Solvay Iron Works, Inc.*, No. 5:15-CV-0054 (BKS/DEP), 2017 WL 1458772, at \*4 (N.D.N.Y. Apr. 24, 2017) (“[Federal] Rule 36 requires the responding party to make a reasonable inquiry, a reasonable effort, to secure information that is readily obtainable from persons and documents within the responding party’s relative control to state fully those efforts.’ This includes undertaking ‘an investigation and inquiry of employees, agents, and others, who conceivably, but in realistic terms, may have information which may lead to or furnish the necessary and appropriate response.’” (citation omitted) (quoting *Henry v. Champlain Enters., Inc.*, 212 F.R.D. 73, 78 (N.D.N.Y. 2003)); *BNSF Ry. v. Gilster-Mary Lee Corp.*, No. 15-cv-250-JPG-SCW, 2017 WL 9531979, at \*2 (S.D. Ill. Jan. 18, 2017) (“A reasonable inquiry may require ‘investigation and inquiry of any of defendant’s officers, administrators, agents, employees, servants, enlisted or other personnel, who conceivably, but in realistic terms, may have information which may lead to or furnish the necessary and appropriate response.’” (quoting *Hanley v. Como Inn Inc.*, No. 99 C 1486, 2003 WL 1989607, at \*2 (N.D. Ill. Apr. 28, 2003)); *Montes v. Pinnacle Propane, L.L.C.*, No. 16-cv-0126 JCH/SMV, 2016 WL 9819527, at \*1 (D.N.M. Oct. 18, 2016) (“In responding to a request for admission, a party must make ‘reasonable inquiry and secure such knowledge and information as are readily obtainable by him[.]’ Generally, a party is only required to review and inquire of persons and documents that are within the responding party’s control.” (alteration in original) (citation omitted) (first quoting *Vinton v. Adam Aircraft Indus., Inc.*, 232 F.R.D. 650, 665 (D. Colo. 2005); then citing *Uniden Am. Corp. v. Ericsson Inc.*, 181 F.R.D. 302, 303–04 (M.D.N.C. 1998)); *Flint v. City of Milwaukee*, No. 14-CV-333-JPS, 2014 WL 5431153, at \*4 (E.D. Wis. Oct. 24, 2014) (“A reasonable inquiry ‘includes an investigation and inquiry of employees, agents, and others, ‘who conceivably, but in realistic terms, may have information which may lead to or furnish the necessary and appropriate response’ . . . . The operative words then are ‘reasonable’ and ‘due diligence.’” (quoting *A. Farber & Partners, Inc.*, 237 F.R.D. at 254)); *Newill v. Campbell Transp. Co.*, No. 2:12-cv-1344, 2013 WL 6002349, at \*5 (W.D. Pa. Nov. 12, 2013) (“[P]rior to responding to a request

Disclosures, like other responses to written-discovery requests, are not filed with the trial court,<sup>233</sup> but must be served on all parties to the action.<sup>234</sup> In addition, the parties “must retain the original or exact copy of [the disclosures] during the pendency of the case and any related appellate proceedings begun within six months after judgment is signed, unless otherwise provided by the trial court.”<sup>235</sup>

### 1. Privilege Objections and Assertions

“No objection or assertion of work product is permitted to a request [for disclosure under Texas Rule 194].”<sup>236</sup> However, “[i]n those extremely rare

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for production of documents under [Federal] Rule 34, a party must undertake a reasonable search to determine whether it has any responsive documents in its possession, custody, or control. Consistent with these requirements, after a litigation hold is issued, a party must identify potentially ‘key players’ in the litigation ‘who [are] likely to have relevant information’ and then ensure that these key players turn over all of the relevant material in their possession.” (second alteration in original) (citations omitted) (first citing *Robinson v. City of Arkansas City*, No. 10-1431-JAR-GLR, 2012 WL 603576, at \*4 (D. Kan. Feb. 24, 2012); then quoting *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 433–34 (S.D.N.Y. 2004)); *Robinson*, 2012 WL 603576, at \*4 (“To adequately respond to a request for production, the respondent must ‘conduct a reasonable search for responsive documents.’ Parties, along with their employees and attorneys, have a duty to act ‘competently, diligently, and ethically’ with respect to discharging discovery obligations. This requires a joint effort ‘to identify all employees likely to have been authors, recipients or custodians of documents’ responsive to the requests for production. . . . A party does not ‘meet its discovery obligations by sticking its head in the sand and refusing to look for [documents].” (alteration in original) (footnotes omitted) (first quoting *F.T.C. v. Affiliate Strategies, Inc.*, No. 09-4104-JAR, 2011 WL 251449, at \*3 (D. Kan. Jan. 26, 2011); then citing *Hock Foods, Inc. v. William Blair & Co., L.L.C.*, No. 09-2588-KHV, 2011 WL 884446, at \*8 (D. Kan. Mar. 11, 2011); then quoting *Cardenas v. Dorel Juvenile Grp., Inc.*, No. 04-2478-KHV-DJW, 2006 WL 1537394, at \*6–7 (D. Kan. June 1, 2006); and then quoting *In re Indep. Serv. Orgs. Antitrust Litig.*, 168 F.R.D. 651, 653 (D. Kan. 1996)); *Cardenas*, 2006 WL 1537394, at \*7; *In re Indep. Serv. Orgs. Antitrust Litig.*, 168 F.R.D. at 653.

233. TEX. R. CIV. P. 191.4(a) (providing disclosure requests and responses are not filed); *Nat'l Family Care Life Ins. v. Fletcher*, 57 S.W.3d 662, 667 n.6 (Tex. App.—Beaumont 2001, pet. denied) (noting disclosures are not to be filed).

234. TEX. R. CIV. P. 191.5.

235. *Id.* R. 191.4(d).

236. *Id.* R. 194.5; *accord* *De Anda v. Webster*, No. 14-17-00020-CV, 2018 WL 3580579, at \*7 (Tex. App.—Houston [14th Dist.] July 26, 2018, pet. denied) (holding a party “may not object” to disclosure requests); *In re GreCon, Inc.*, 542 S.W.3d 774, 779 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding) (“No objection is permitted to a request for disclosure. . . . This method is intended to streamline the discovery process as to the matters covered by requests for disclosure.” (citations omitted) (first citing TEX. R. CIV. P. 194.5; then citing *In re Univar USA, Inc.*, 311 S.W.3d 175, 180 (Tex. App.—Beaumont 2010, orig. proceeding) (per curiam))); *In re Fed. Corp.*, No. 13-16-00219-CV, 2016 WL 6519110, at \*8 (Tex. App.—Corpus Christi Nov. 1, 2016, orig. proceeding) (mem. op.) (holding objections to requests for disclosures are impermissible); *In re DCP Midstream, L.P.*, No. 13-14-00502-CV, 2014 WL 5019947, at \*8 (Tex. App.—Corpus Christi Oct. 7, 2014, orig. proceeding) (mem. op.) (“The Texas Rules of Civil Procedure expressly prohibit objections to requests

cases when information ordinarily discoverable should be protected, such as when revealing a person's residence might result in harm to the person, a party may move for protection. A party may assert any applicable privileges other than work product using the procedures of [Texas] Rule 193.3 applicable to other written discovery."<sup>237</sup> Thus, if the disclosure will require the responding party to reveal information protected by a privilege other than the work-product privilege, such as the attorney-client or Fifth Amendment privilege against self-incrimination, a privilege assertion is proper.<sup>238</sup>

## 2. Amending and Supplementing Disclosures

As with other written discovery responses, disclosures must be timely amended or supplemented.<sup>239</sup> The duty to amend or supplement disclosures arises when the responding party "learns that the party's response . . . was incomplete or incorrect when made, or, although complete and correct when made, is no longer complete and correct[.]"<sup>240</sup> The

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for disclosure. Instead, in 'those extremely rare cases when information ordinarily discoverable should be protected,' a party is allowed to file a motion for a protective order pursuant to [Texas] Rule 192.6." (citations omitted) (citing TEX. R. CIV. P. 194; then citing *In re Univar USA, Inc.*, 311 S.W.3d at 180; then quoting TEX. R. CIV. P. 194 cmt. 1; and then citing *id.* R. 192.6)); *In re Univar USA, Inc.*, 311 S.W.3d at 180 n.5 (same).

237. TEX. R. CIV. P. 194 cmt. 1; accord *In re GreCon, Inc.*, 542 S.W.3d at 779 ("In those 'extremely rare cases' when settlement agreements ordinarily covered by the mandatory disclosure rule ought to be withheld, the responding party may file a motion for protection." (first quoting TEX. R. CIV. P. 194 cmt. 1); then citing TEX. R. CIV. P. 192.6)); *In re Fed. Corp.*, 2016 WL 6519110, at \*8 ("Even though we acknowledge that requests for disclosure B-L would require responses that would arguably be overbroad at this stage of the case, the rules provide that the proper remedy is to seek a protective order pursuant to Texas Rule of Civil Procedure 192.6." (first citing TEX. R. CIV. P. 194 cmt. 1; *In re Univar USA, Inc.*, 311 S.W.3d at 180; then citing *In re DCP Midstream, L.P.*, 2014 WL 5019947, at \*8)); *In re DCP Midstream, L.P.*, 2014 WL 5019947, at \*8 ("[I]n 'those extremely rare cases when information ordinarily discoverable should be protected,' a party is allowed to file a motion for a protective order pursuant to [Texas] Rule 192.6." (first quoting TEX. R. CIV. P. 194 cmt. 1; then citing *id.* R. 192.6)); *In re Univar USA, Inc.*, 311 S.W.3d at 180 n.5.

238. See *In re Does 1-10*, 242 S.W.3d 805, 819–23 (Tex. App.—Texarkana 2007, orig. proceeding) (suggesting the First Amendment may apply to Texas Rule 194.2(a) and (e) disclosures of potential parties and persons having knowledge of relevant facts); *In re Hinterlong*, 109 S.W.3d 611, 624 (Tex. App.—Fort Worth 2003, orig. proceeding) ("While the identity of a potential party or witness's identity is generally discoverable, section 414.009 of the crime stoppers statute [TEX. GOV'T CODE ANN. § 414.009] specifically prohibits disclosure of the identity of a crime stoppers tipster. Consequently, the identity of a crime stoppers tipster is privileged and beyond the scope of relevant, nonprivileged discovery authorized by [Texas Rule] 192.3[(e)]." (citation omitted) (first citing TEX. GOV'T CODE § 414.009; then citing TEX. R. CIV. P. 192.3(a))).

239. TEX. R. CIV. P. 193.5.

240. *Id.* R. 193.5(a); accord *Estate of Toarmina*, No. 05-15-00073-CV, 2016 WL 3267253, at \*2

amendment or supplementation must occur “reasonably promptly after the party discovers the necessity for such a response.”<sup>241</sup> Thus, Texas Rule 193.5(b) requires a responding party to supplement continuously, rather than waiting until thirty days before trial, as under former Texas Rule 166b(6).

The thirty-day requirement remains the final deadline for amendment or supplementation because Texas Rule 193.5(b) “presume[s] that an amended or supplemental response made less than 30 days before trial was not made reasonably promptly.”<sup>242</sup> But the opposite presumption does *not* apply—amending or supplementing written discovery more than thirty days before trial is not presumed to be timely.<sup>243</sup> Thus, a supplemental or amended written-discovery response made within thirty days of the discovery deadline can be found not to have been made reasonably promptly so that the evidence or witness is properly excluded.<sup>244</sup>

(Tex. App.—Dallas June 13, 2016, pet. denied) (mem. op.) (“If a party learns that his response to written discovery is no longer complete and correct, the party must amend or supplement the response.” (citing TEX. R. CIV. P. 193.5(a))).

241. TEX. R. CIV. P. 193.5(b); *accord Estate of Toarmina*, 2016 WL 3267253, at \*2 (“An amended or supplemental response must be made reasonably promptly after the party discovers the necessity for such a response.” (citing TEX. R. CIV. P. 193.5(b))).

242. TEX. R. CIV. P. 193.5(b); *accord Yarbrough v. ELC Energy, LLC*, No. 12-15-00303-CV, 2017 WL 2351357, at \*9 (Tex. App.—Tyler May 31, 2017, no pet.) (mem. op.) (“[I]t is presumed that an amended or supplemental response made less than thirty days before trial was not made reasonably promptly . . .”).

243. See *In re Staff Care, Inc.*, 422 S.W.3d 876, 881 (Tex. App.—Dallas Jan. 31, 2014, orig. proceeding (mem. op.)) (“Staff Care argues that its amended and supplemental disclosures were timely because they were made within the discovery period and more than thirty days prior to the date for trial. But there is no presumption that an amended disclosure made more than thirty days prior to trial is timely.” (citing *Snider v. Stanley*, 44 S.W.3d 713, 715 (Tex. App.—Beaumont 2001, pet. denied))); *Navarrete v. Williams*, 342 S.W.3d 116, 122 (Tex. App.—El Paso 2011, no pet.) (“Ms. Navarrete contends that because a discovery supplement made less than thirty days before trial is presumed to be untimely, that the opposite presumption must also apply. We disagree. If the opposite presumption had been intended, it would have been included in the language of the provision. Because no such language appears in the provision, we conclude the trial court did not abuse its discretion by excluding Plaintiff’s Exhibits 10, 15, 16, and 17.” (citing *Snider*, 44 S.W.3d at 715)); *Snider*, 44 S.W.3d at 715 (noting that, although Texas Rule 193.5(b) includes a presumption that a supplement made less than thirty days before trial is untimely, there is no opposite presumption that supplement made more than thirty days before trial is timely).

244. E.g., *In re Seas*, No. 13-17-00685-CV, 2018 WL 740306, at \*2 (Tex. App.—Corpus Christi Feb. 6, 2018, orig. proceeding) (mem. op.) (“While there is a presumption that a supplement made less than thirty days before trial is untimely, there is no opposite presumption that a supplement made more than thirty days before trial is timely.” (citing *In re Staff Care, Inc.*, 422 S.W.3d at 881; *Snider*, 44 S.W.3d at 715)); see *In re Staff Care, Inc.*, 422 S.W.3d at 880–81 (holding because the defendant’s Texas Rule 194.2(d) damage disclosure request had been pending for more than two years, the trial court did

Additionally, information supplied in an amended or supplemental disclosure can itself give rise to the duty to amend or supplement. Thus, for example, a case decided under former Texas Rule 166b(6) held that a defendant whose supplemented fact-witnesses list, which was served ten days before trial and which included an incorrect address for a new witness, had to show good cause not only for the late supplementation but also for the failure to correct the faulty supplemental response.<sup>245</sup>

However, any contention or damages disclosure that has been amended is inadmissible and cannot be used for impeachment.<sup>246</sup>

### 3. Failing to Respond, Partial Responses, and Late Responses

A failure to respond fully or timely to a disclosure request is “an abuse of the discovery process”<sup>247</sup> and may result in sanctions under Texas Rule 215.3.<sup>248</sup> In addition, under Texas Rule 193.6, a failure to timely or fully respond to a disclosure request will prevent the responding party from introducing the undisclosed evidence or using the testimony of an undisclosed witness at trial unless it shows “good cause” for the failure to disclose or the failure “will not unfairly surprise or unfairly prejudice the

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not abuse its discretion in holding that an amended damage disclosure disclosing for the first time the plaintiff's damage theory and calculations a few days before the discovery cutoff was not made “reasonably promptly” as required by Texas Rule 193.5(b)); *Hatch v. Tex. Prop. & Cas. Ins. Guar. Ass'n*, No. 01-06-00631-CV, 2007 WL 2011041, at \*4–5 (Tex. App.—Houston [1st Dist.] July 12, 2007, no pet.) (mem. op.) (holding a supplementation of an expert disclosure made two business days before trial was not made “reasonably promptly”); *Ersek v. Davis & Davis, P.C.*, 69 S.W.3d 268, 271 n.2 (Tex. App.—Austin 2002, pet. denied) (holding plaintiff's supplementation of his expert disclosure made eight months after the original response and two months after his expert-designation deadline was not made reasonably promptly).

245. See *Ramos v. Champlin Petroleum Co.*, 750 S.W.2d 873, 875, 877 (Tex. App.—Corpus Christi 1988, writ denied), *abrogated on other grounds by Reagan v. Vaughn*, 804 S.W.2d 463 (Tex. 1990).

246. TEX. R. CIV. P. 194.6.

247. *Id.* R. 194 cmt. 1; *accord In re GreCon, Inc.*, 542 S.W.3d 774, 779 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding) (“If a party does not move for protection or assert any applicable privileges by the thirty-day deadline for responding to the request, a failure to ‘respond fully’ to a request for disclosure is considered an ‘abuse of the discovery process.’” (quoting TEX. R. CIV. P. 194, cmt. 1)); *In re Morse*, 153 S.W.3d 578, 581 (Tex. App.—Amarillo 2004, orig. proceeding) (“Under [Texas] Rule 194.3, the responding party must serve a written response within 30 days, and according to comment 1, if a party does not move for protection or assert any applicable privileges, failure to ‘respond fully to a request for disclosure would be an abuse of the discovery process.’”).

248. TEX. R. CIV. P. 215.3 (“If the court finds a party is abusing the discovery process in seeking, making or resisting discovery . . . or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after notice and hearing, impose any appropriate sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of Rule 215.2(b).”).

other parties.”<sup>249</sup> The exclusion of witnesses or other evidence under Texas Rule 193.6 is not a “death-penalty sanction.”<sup>250</sup>

249. *Id.* R. 193.6; *accord* Fort Brown Villas III Condo. Ass’n v. Gillenwater, 285 S.W.3d 879, 881 (Tex. 2009) (per curiam) (“Under [Texas] Rule 193.6, discovery that is not timely disclosed and witnesses that are not timely identified are inadmissible as evidence.” (citing TEX. R. CIV. P. 193.6(a))); Miller v. Carter, No. 05-11-00193-CV, 2012 WL 3679200, at \*2 (Tex. App.—Dallas Aug. 28, 2012, pet. denied) (mem. op.) (“A party may not offer the testimony of a person who was not timely identified unless the trial court finds there was good cause for the failure to timely identify the person or the failure to identify the witness will not cause unfair surprise or prejudice to the other party.” (citing TEX. R. CIV. P. 193.6(a))). “[Texas Rule 193.6(a)] is mandatory, and the penalty—exclusion of evidence—is automatic, absent a showing of: (1) good cause or (2) lack of unfair surprise or (3) unfair prejudice.” Lopez v. La Madeleine of Tex., Inc., 200 S.W.3d 854, 860 (Tex. App.—Dallas 2006, no pet.) (citing Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 914 (Tex. 1992); Pilgrim’s Pride Corp. v. Smoak, 134 S.W.3d 880, 902 (Tex. App.—Texarkana 2004, pet. denied)); Harris Cty. v. Inter Nos, Ltd., 199 S.W.3d 363, 368 (Tex. App.—Houston [1st Dist.] 2006, no pet.). The purpose behind the rule and its accompanying sanction “is to prevent trial by ambush.” Harris, 199 S.W.3d at 367; *cf.* Aetna Cas. & Sur. Co. v. Specia, 849 S.W.2d 805, 807 (Tex. 1993) (orig. proceeding) (applying former Texas Rule 215(5)).

250. *E.g.* Ashmore v. JMS Constr., Inc., No. 05-15-00537-CV, 2016 WL 7217256, at \*7 (Tex. App.—Dallas Dec. 13, 2016, no pet.) (mem. op.) (“Ashmore characterizes the trial court’s decision to strike the disclosure responses as an imposition of death penalty sanctions. Once again, Ashmore confuses a consequence for his failure to file timely disclosure responses with a discovery sanction. As stated above, the sixth (last) scheduling order had a March 7, 2013 deadline for serving amended or supplemented discovery responses. Ashmore had the burden to establish good cause for the untimely response or lack of unfair surprise or unfair prejudice. If Ashmore failed to meet this burden, then under [Texas] Rule 193.6, the trial court’s decision to strike the responses should be affirmed.” (citations omitted) (first citing TEX. R. CIV. P. 193.6(b); then citing Cunningham v. Columbia/St. David’s Healthcare Sys., L.P., 185 S.W.3d 7, 13 (Tex. App.—Austin 2005, no pet.)); *see* Lee v. Wal-Mart, No. 11-14-00078-CV, 2016 WL 1072644, at \*3 (Tex. App.—Eastland Mar. 17, 2016) (mem. op.) (holding the striking of the plaintiff’s expert’s summary judgment affidavit because the expert had not been timely disclosed was not a death-penalty sanction); *In re* Staff Care, Inc., 422 S.W.3d 876, 882 (Tex. App.—Dallas 2014, orig. proceeding) (“Staff Care also argues that the striking of its amended disclosure responses constituted a ‘death penalty’ discovery sanction, and that therefore, the trial court was required to consider lesser sanctions before granting defendants’ motion to strike. We disagree.”). *But see* *In re* G.N.H., No. 11-05-00405-CV, 2006 WL 3094354, at \*3 (Tex. App.—Eastland Nov. 2, 2006, no pet.) (mem. op.) (“To the extent that the trial court’s ruling [under Texas Rule 193.6] constituted an exclusion of evidence, it was comparable to a death penalty or dismissal because it destroyed Rossler’s opportunity for a decision on the merits of the bill of review.” (citing Best Indus. Unif. Supply Co. v. Gulf Coast Alloy Welding, Inc., 41 S.W.3d 145, 147–48 (Tex. App.—Amarillo 2000, pet. denied))). “Among the sanctions available under [Texas] Rule 215.2 are orders ‘striking out pleadings or parts thereof,’ ‘dismissing with or without prejudice the actions or proceedings or any part thereof,’ and ‘rendering a judgment by default against the disobedient party.’ These sanctions . . . are often referred to as ‘death penalty’ sanctions.” Shops at Legacy (Inland) Ltd. P’ship v. Fine Autographs & Memorabilia Retailers Stores, Inc., 418 S.W.3d 229, 232 (Tex. App.—Dallas 2013, no pet.) (citations omitted) (first quoting TEX. R. CIV. P. 215.2(b)(5); then quoting Gunn v. Fuqua, 397 S.W.3d 358, 366 (Tex. App.—Dallas 2013, no pet.); then citing Cire v. Cummings, 134 S.W.3d 835, 840–41 (Tex. 2004); and then citing TransAmerican Nat. Gas Corp. v. Powell, 811 S.W.2d 913, 918 (Tex. 1991); Perez v. Murff, 972 S.W.2d 78, 81 (Tex. App.—Texarkana 1998, pet.

D. *Use of Disclosures*

Disclosures, like interrogatory answers, can only be used against the responding party at trial, during a hearing, or in connection with a summary judgment motion.<sup>251</sup> Like interrogatories, to constitute evidence, they must be introduced into evidence at the trial or hearing or properly included in the summary judgment record.

## IV. CONCLUSION

Discovery's importance in civil litigation cannot be underestimated. Because complete and full responses to Texas Rule 194 disclosures can greatly lessen the cost and delay inherent in civil litigation, and can even foster the cooperation often absent from it generally and from discovery specifically, it is imperative that Texas practitioners understand what information and documents must be disclosed and then to do so fully and completely.

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denied)).

251. *Cf.* *Vodicka v. Lahr*, No. 03-10-00126-CV, 2012 WL 2075713, at \*8 (Tex. App.—Austin June 6, 2012, no pet.) (mem. op.) (holding one defendant's interrogatory answer was not proper summary judgment evidence against another defendant); *Maxwell v. Willis*, 316 S.W.3d 680, 685–86 (Tex. App.—Eastland 2010, no pet.) (holding the trial court erred in relying on the moving party's own interrogatory answer in granting the party summary judgment); *Zarzosa v. Flynn*, 266 S.W.3d 614, 619 (Tex. App.—El Paso 2008, no pet.) (holding a party's interrogatory answers did not raise a fact issue in response to a summary judgment motion even though the opposing party put them into evidence); *Buck v. Blum*, 130 S.W.3d 285, 290 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (“[A] party's answers to interrogatories can only be used against that party and not against another party, including a codefendant.” (citing TEX. R. CIV. P. 197.3)). Nor can a party rely on its own disclosures as evidence. *Cf.* *Walsh v. McCain Foods, Inc.*, 81 F.3d 722, 726 (7th Cir. 1996) (“It is only when the admission is offered against the party who made it that it comes within the exception to the hearsay rule for admissions of a party opponent.” (quoting *WRIGHT ET AL.*, *supra* note 231, at 571–72)); *Gilmore v. Macy's Retail Holdings*, No. 06-3020 (JBS), 2009 WL 140518, at \*9 (D.N.J. Jan. 20, 2009) (“More fundamentally, a litigant ‘may not introduce statements from its own answers to interrogatories or requests for admission as evidence because such answers typically constitute hearsay when used in this manner.’” (first quoting *Underberg v. United States*, 362 F. Supp. 2d 1278, 1283 (D. N.M. 2005); then citing *Duff v. Lobdell-Emerly Mfg. Co.*, 926 F. Supp. 799, 803 (N.D. Ind. 1996)); *Sympson v. MorWin Prods., Inc.*, 501 S.W.2d 362, 364 (Tex. App.—Fort Worth 1973, no writ) (“[S]elf-serving answers to the adversary's requests for admissions can be used only against him.” (citing *Sprouse v. Tex. Emp'rs Ins. Ass'n*, 459 S.W.2d 216, 220 (Tex. App.—Beaumont 1970, writ ref. n.r.e.))).