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**ADVANCED CIVIL DISCOVERY UNDER THE NEW RULES**

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**ASSERTING, CONTESTING, AND PRESERVING  
PRIVILEGES UNDER THE NEW RULES OF  
DISCOVERY**

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## **I. SCOPE OF ARTICLE**

This article focuses on the procedure for asserting, contesting, and preserving privileges under the new rules of civil discovery, and will also address relevant portions of the Texas Rules of Evidence, as necessary, to fully develop the discussion.

## **II. RULE 193—AN OVERVIEW**

The procedure for responding to written discovery requests, including objecting to requests and asserting privileges, is set forth in Rule 193 of the Texas Rules of Civil Procedure.

### **A. Duty to Make Complete Response**

The underlying duty under Rule 193 is to make a complete response to all discovery requests. Rule 193.1.

#### **1. Response based upon all available information**

Responses to discovery requests are to be “based on all information reasonably available to the responding party or its attorney at the time the response is made.” Rule 193.1.

#### **2. Duty to supplement**

Under Rule 193, once a party learns that the party’s response to written discovery was incomplete or incorrect when made, or no longer complete and correct, that party has a duty to either amend or supplement the response. Rule 193.5(a).

##### **a) Party must supplement promptly**

An amended or supplemental response must be made reasonably promptly after the necessity for such a response is discovered. Rule 193.5(b). An amended or supplemental response made fewer than 30 days before trial is presumed to have not been made reasonably promptly.

##### **b) Effect of failure to supplement discovery**

A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce into evidence the material or information that was not disclosed, or offer the testimony of a witness who was not timely identified, unless the court finds that there was either good cause for the failure to supplement the discovery response, or that the other parties will not be unfairly surprised or prejudiced. Rule 193.6(a). The burden of establishing good cause, or lack of surprise

and/or prejudice is on the party offering the evidence. Rule 193.6(b).

In determining what constitutes good cause under Rule 193.6, the courts will use cases interpreting good cause under former rule 215(5) to guide their analysis. *See, e.g., De La Rosa v. St. John*, 2000 Tex.App. LEXIS 1371 (Austin, March 2, 2000) (unpublished opinion). In *De La Rosa v. St. John*, the court held that good cause existed to permit a witness to testify who was designated fewer than 30 days before trial when the attorney calling the witness had learned of the witness only 25 days prior to trial, could not have reasonably discovered the identity of the witness prior to this time, and promptly supplemented the witness list upon learning the identity of the newly discovered witness.

In addressing the “unfair surprise” exception, the court of appeals recently held that it was not unfair surprise to the defendant for an unlisted witness to testify when the defendant had listed the same witness as a potential witness with knowledge of relevant facts in his discovery responses. *Rutledge v. Staner*, 9 S.W.3d 469 (Tex.App.–Tyler 1999). In *Northwestern Nat’l County Mut. Ins. Co. v. Rodriguez*, 2000 Tex. App. LEXIS 903 (San Antonio, February 9, 2000), the court of appeals held that it was not “unfair surprise” for an attorney to testify as an expert on attorney’s fees when the attorney had been listed by plaintiff as a fact witness, the purpose of the hearing was to determine attorney’s fees, and the attorney was the “most obvious witness” who might be called at the hearing.

### **3. Prophylactic objections not permitted**

Prior to the new discovery rules, objections and privileges had to be asserted to a discovery request within the initial time for responding to the request, or they were waived. This is no longer the case. Under the new rules, a privilege or objection may be asserted by amending the response to the discovery request if, at the time the objection or response was initially made, the objection or privilege was inapplicable or was unknown after reasonable inquiry. Rule 193.2(d); Rule 193, cmt. 3. Moreover, a valid objection that is obscured by numerous unfounded objections is now automatically waived, unless the court excuses the waiver for good cause shown. Rule 193.2(e).

### **4. An objection does not waive the duty to respond**

In accordance with the duty to make a complete response, if the responding party lodges any objection to a discovery request, the party must still comply with as much of the request to which the party has made no objection unless it is unreasonable under the circumstances to do so before obtaining a ruling on the objection. Rule 193.2(b). For example, if a party asserts an objection based upon remoteness in time, the party must produce documents from a more recent period unless that production would be burdensome and duplicative should the objection be overruled. Rule 193, cmt. 2.

## **5. Overly broad requests are still objectionable**

However, a party may still object to a request for “all documents relevant to the lawsuit” as overly broad and not in compliance with the rule requiring specific request for documents and may thus refuse to comply with the request in its entirety. Rule 193, cmt. 2 (*citing Loftin v. Martin*, 776 S.W.2d 145 (Tex. 1989)). Also, a responding party may object to a request for a litigation file on the ground that it is overly broad and may assert that on its face the request seeks only materials protected by privilege. Rule 193, cmt. 2 (*citing National Union Fire Ins. Co., v. Valdez*, 863 S.W.2d 458 (Tex. 1993)).

### **III. ASSERTING, CONTESTING, AND PRESERVING PRIVILEGES**

#### **A. Asserting a privilege**

Rule 193.3 sets forth the procedure for asserting a privilege in responding to a discovery request. Rule 193 governs the presentation of all privileges, including work product. Rule 193.3, cmt. 3.

#### **1. Objection no longer necessary to preserve a privilege**

An objection is no longer proper to preserve a privilege. Specifically, “a party should not object to a request for written discovery on the grounds that it calls for production of material or information that is privileged but should instead comply with Rule 193.3.” Rule 193.2(f). Under Rule 193.3, rather than lodging an objection, a party who claims that material or information responsive to a discovery request is privileged should withhold the privileged material or information from the response. Rule 193.3(a). After withholding the privileged material, the party must state in the response, or in a separate document, the following:

- (1) information or material responsive to the request has been withheld,
- (2) the request to which the information or material relates, and
- (3) the privilege or privileges asserted.

Rule 193.3(a). This is all that is required to initially assert a privilege.

#### **2. Protective order is not appropriate**

A person should not move for a protective order when an objection to written discovery or an assertion of privilege is appropriate. Rule 192.6(a).

### **3. Objection does not waive the privilege**

However, a party who objects to production of privileged material or information does not waive the privilege. Rule 193.2(f). Similarly, a party who improperly moves for a protective order also does not waive the privilege. Rule 192.6(a). Rather, once the deficiency in the response is pointed out, the party must then comply with Rule 193.3 in asserting the privilege. Rule 193.2(f); Rule 193, cmt. 3. However, once the deficiency is pointed out, failure to comply with the requirements of Rule 193 may waive the privilege. *See In re Lavernia Nursing Facility, Inc.*, 12 S.W.3d 566, 571 (Tex. App.–San Antonio 1999, orig. proceeding).

### **4. Exempt material**

The duty to disclose and identify the information or materials withheld on the basis of a privilege does not apply to attorney-client communications that concern the litigation in which the discovery is requested. Rule 193.3(c).

#### **B. Protecting the privilege**

Once a privilege is initially asserted, the responding party must comply with the additional requirements under the rule to protect the privilege.

#### **1. Nature of the information and the privilege asserted**

Once a party seeking discovery receives a discovery response indicating that information or material has been withheld on the basis of a privilege, the party seeking discovery is then entitled to discover the nature of the information or materials that have been withheld, in addition to the basis for withholding this material. In order to obtain this information, the party seeking discovery must “serve a written request that the withholding party identify the information and material withheld.” Rule 193.3(b).

In response to this request, the withholding party must serve a response, commonly referred to as a “privilege log,” within 15 days of the request setting forth the following:

- (1) a description of the information or materials withheld that, without revealing the privileged information itself or otherwise waiving the privilege, enables other parties to assess the applicability of the privilege, and
- (2) an assertion of a specific privilege for each item or group of items withheld.

Rule 193.3(b).

## C. Contesting the Privilege

After reviewing the mandatory description of information or material withheld along with the specific privilege for each item that is asserted, the party seeking discovery has a right to contest any of the privileges that are claimed.

### 1. Request a hearing

Any party may at any reasonable time request a hearing on an objection or a claim of privilege asserted under Rule 193. Rule 193.4(a). At this hearing, the burden of production is on the party making the objection or asserting the privilege. Similarly, a party withholding a witness statement on the basis of attorney-client privilege has the burden of demonstrating the privilege. *See In re Fontenot*, 13 S.W.3d 111 (Tex. App.—Fort Worth 2000, orig. proceeding). The party asserting the privilege must present any evidence necessary to support the objection or privilege. Rule 193.4(a). This evidence may consist of testimony presented at the hearing or affidavits, if they are served at least 7 days before the hearing or at such other reasonable time as the court permits. Rule 193.4(a). Affidavits not served within 7 days of the hearing may be disregarded by the court. *See In re Monsanto Co.*, 998 S.W.2d 917, 933, n. 24 (Tex. App. – Waco 1999, orig. proceeding).

### 2. *In camera* review

If the court determines that an *in camera* review of some or all of the requested discovery is necessary, then the party asserting the privilege must segregate and produce the material or information to the court in a sealed wrapper within a reasonable time following the hearing. Rule 193.4(a). If, after the hearing, the court sustains the objection or claim of privilege, then the responding party has no further duty to respond to that request. If, however, the court overrules the objection or claim of privilege, then the responding party must produce the requested material or information within the time period prescribed by the court or within 30 days after the court's ruling if no time period is set forth. Rule 193.4(b). Under the rule, a party need not request a ruling on the party's own objection or assertion of privilege to preserve the objection or privilege.

#### a) *In camera* review not always required

A trial court does not abuse its discretion by failing to review documents *in camera* if there is sufficient evidence about the privileged nature of the documents upon which the trial court could reasonably base its order, such that a review of the documents themselves is unnecessary. *Enron Oil & Gas Co. v. Flores*, 810 S.W.2d 408 (Tex. App.—San Antonio 1991, orig. proceeding).

## **IV. WAIVER OF PRIVILEGES**

### **A. Voluntary Disclosure**

Under Rule 511 of the Texas Rules of Evidence, a privilege is waived if:

(1) the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged; or

(2) the person or representative of the person calls a person to whom privileged communications have been made to testify as to the person's character or character trait insofar as such communications are relevant to such character or character trait.

If there has been a partial disclosure of the materials sought, and a fact issue is raised as to whether the entire privilege has been waived, the party asserting the privilege has the additional burden of disproving the waiver or establishing its limited scope. *State ex rel. Simmons v. Peca*, 799 S.W.2d 426, 431 (Tex. App.—El Paso 1990) (citing *Jordan v. Court of Appeals for the Fourth Supreme Judicial District*, 701 S.W.2d 644, 649 (Tex. 1985)).

### **B. Non-Voluntary Disclosure Waiving the Privilege**

Under the rules of evidence and civil procedure, a non-voluntary disclosure may result in the privilege being waived.

#### **1. Offensive use**

Under the offensive use doctrine, a party seeking affirmative relief may not refuse to produce evidence that would refute the claim under a claim a privilege. When a party uses a privilege as both a shield and a sword, a court may deem that the party has waived the privilege. *Bristol-Myers Squibb Co. v. Hancock*, 921 S.W.2d 917 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1996, no writ) (A party who asserts a privilege offensively must waive the privilege or face sanctions by the court).

Moreover, under Rule 193.4(c), a party may not use at either a hearing or trial any material or information that the party withheld from discovery under a claim of privilege, including a claim sustained by the court, without timely amending or supplementing that party's response to the discovery request. Rule 193.4(c).

**a) Elements of offensive use**

In order to demonstrate a waiver of privilege through offensive use, the party seeking discovery must show the following:

- 1) the party asserting the privilege is seeking affirmative relief;
- 2) the privileged information sought is outcome determinative of the asserted cause of action; and
- 3) disclosure of the confidential communication is the only means by which the aggrieved party can obtain the evidence.

*Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993).

**2. Material provided to expert witnesses**

If a party seeking to assert a privilege as to information that was provided to an expert witness, the new rules make clear that the privilege has been waived if the expert is either a testifying expert or a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert. Specifically, with respect to these experts, a party is entitled to 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. Rule 192.3(e)(6).

**3. Writing used to refresh memory for the purpose of testifying**

Under Rule 612 of the Texas Rules of Evidence, a party is entitled to inspect all documents used by a witness to refresh memory for the purpose of testifying either:

- 1) while testifying; or
- 2) before testifying, in civil cases, if the court in its discretion determines it is necessary in the interests of justice.

If a party objects on the grounds that the writing contains matters not related to the subject matter of the testimony, then the court is to examine the document *in camera*, and redact the appropriate portions. Note that under Rule 612, privilege **is not** a valid basis to object.

**4. Discovery abuses**

A court may also deem a privilege waived for a party's discovery abuses. If the court determines that discovery abuse has invalidated the privilege, then the court may order the production of the privileged documents as a sanction for such discovery abuse. *In re Lavernia Nursing Facility, Inc.*, 12 S.W.3d 566, 571 (Tex. App.—San Antonio 1999, orig. proceeding); *TransAmerican Natural Gas Corp. v. Powell*, 811

S.W.2d 913 (Tex. 1991). However, the sanction should be no more severe than is necessary to correct the discovery abuse that has occurred. *Id.*

### **C. Protection of Non-Voluntary Disclosures**

In both the Texas Rules of Evidence, and the new discovery rules, there are provisions to protect certain non-voluntary disclosures of privileged information.

#### **1. Compelled disclosure**

A claim of privilege is not defeated by a disclosure if the disclosure was either compelled erroneously, or made without opportunity to claim the privilege. TEX. R. EVID. 512.

#### **2. Inadvertent disclosure**

Rule 193 provides protection for a responding party who inadvertently discloses privileged material or information without intending to waive the claim of privilege. Under the rule, a party who produces privileged material or information without intending to waive a claim of privilege does not waive that claim under either the Rules of Civil Procedure or the Rules of Evidence if – within 10 days *after the producing party actually discovers that such production was made* – the producing party amends the response, identifying the material or information produced and stating the privilege asserted. Rule 193.3(d) (emphasis added). The 10 day period may be shortened by the court. Rule 193.3(d).

##### **a) Material must be promptly returned**

If the producing party amends the response to assert a privilege within the 10-day period, the requesting party must promptly return the specified material or information, along with any copies that had been made, to the responding party. This is a new provision of the Rules of Civil Procedure. The focus of this provision is on the intent to waive the privilege, not the intent to produce the material or information. Therefore, a party who fails to diligently screen documents before producing them does not waive a claim of privilege. Rule 193, cmt. 4.

##### **b) Triggering the 10-day period.**

In many cases, there is likely to be a dispute over when the 10 day period began to run. In an effort to avoid complications at trial, a party may identify prior to trial the documents intended to be offered, thereby triggering the obligation to assert any overlooked privilege under the rule. Rule 193, cmt. 4. A trial court may also order this procedure. Rule 193, cmt. 4.

## V. JUDICIAL INTERPRETATION OF RULE 193

At the time this paper was written, the 1999 revisions to the Rules of Civil Procedure had only been in effect for 15 months. Consequently, there have been few cases applying Rule 193 in their decisions. The most significant appellate decision interpreting Rule 193 to date is *In re Monsanto, Co.*, 998 S.W.2d 917 (Tex. App. – Waco 1999, orig. proceeding), which thoroughly discusses the procedures outlined in Rule 193.

### A. *In re Monsanto, Co.*, 998 S.W.2d 917 (Tex. App. – Waco 1999, orig. proceeding).

#### 1. Facts

In *In re Monsanto, Co.*, defendant Monsanto was served with requests for production. In response, Monsanto produced numerous documents, but withheld certain documents asserting numerous privileges, including attorney-client, work product, and trade secrets. In addition, Monsanto filed a motion for a protective order, which was supported with affidavits. The plaintiffs, on the other hand, filed a motion to compel production of the documents. Monsanto provided privilege logs to the plaintiffs identifying the privilege asserted to each document and describing the documents to which the privileges were claimed to. The privilege logs grouped the disputed documents into four sets.

The court conducted a hearing on the motion to compel, pursuant to Rule 193.4 of the Texas Rules of Civil Procedure. At the time of the hearing, Monsanto had trimmed the number of documents to which it asserted a privilege to approximately 400. After an *in camera* review of the documents, the court ordered that all but 2 of the documents be immediately turned over to the plaintiffs, who then took possession of the documents, and made copies thereof. Monsanto then petitioned the court of appeals for *mandamus* relief.

#### 2. Application of Rule 193

##### a) Asserting a privilege

At the outset, the court of appeals discussed the procedure for properly asserting and contesting a privilege under Rule 193. *In re Monsanto, Co.*, 998 S.W.2d at 924-25. The court noted that upon a hearing involving a dispute over an alleged privilege, “[w]hen the party asserting a privilege has made a prima facie case for its claim, the requesting party has the burden to point out to the court which specific documents or groups of documents it believes require inspection.” *Id.* at 925. “Otherwise, trial judges will be required to inspect untold numbers of documents.” *Id.* The court further explained that under the procedures for asserting and contesting privileges in Rule 193, the requesting party should be in a position to identify these groups of documents. *Id.*

## **b) The party asserting the privilege has the burden**

The *Monsanto* court also noted that at a hearing brought pursuant to Rule 193.4(a), the party asserting the privilege has the burden of proving the privilege they have asserted to each document by testimony or affidavit. *Id.* at 925. In *Monsanto*, the party submitted a total of 15 affidavits to support their claim of privilege. Moreover, the court found that Monsanto served privilege logs which complied with Rule 193. In addressing whether Monsanto's affidavits supported their claims of privilege, the court noted that "the mere listing of a specific privilege in a response or a privilege log does not prove that privilege." *Id.* at 926. Rather, the response and privilege log "are the vehicles by which the privilege is claimed." *Id.* "Proof of the facts that justify the claim of privilege is necessary." *Id.* (citing TEX. R. CIV. P. 193.4(a)).

In considering the evidence supporting Monsanto's claim of privilege, the court explained that because the district court inspected the documents *in camera*, "we have exercised our discretion to also review them." *Id.* at 929. In reviewing the documents, the court determined that there were a few documents that should be disclosed because the evidence did not support Monsanto's claim of privilege. *Id.* at 933. Moreover, the court disclosed several documents in spite of Monsanto's claim of privilege because the affidavits establishing the identity of the authors of those documents had not been timely served. Specifically, the court held that "because these affidavits were not filed 7 days before the hearing and were filed after the court had issued its ruling, we have not considered them." *Id.* at 933, n. 24 (citing TEX. R. CIV. P. 193.4(a)).

## **VI. PRACTICE TIPS**

### **A. Immediately request the Withholding Party to Identify the Information and Material Withheld**

As noted above, under Rule 193.3(b), once a withholding party indicates in its discovery response, or in a separate document, that it has withheld information on the basis of a privilege, the party seeking discovery has the right to obtain the identity of the information withheld, and the specific privilege asserted. As a general practice, it is useful to have a form letter ready to send out immediately upon receipt of a discovery response indicating that documents have been withheld due to a privilege asserted.

### **B. Create A Privilege Log Immediately**

Conversely, anticipating that a requesting party will want to obtain the information concerning documents that have been withheld under a claim of privilege, be prepared to serve a privilege log on the requesting party within 15 days of serving the discovery response. To this end, it is useful to simply prepare the privilege log as you are preparing the discovery response. Of course, you should keep in mind that under Rule 193.3(c), a party is under no obligation to indicate that documents have

been withheld that are protected by the attorney-client privilege.

**C. Watch for Authentication Notice Letters and Pretrial Exhibit Lists**

Under Rule 193.3(d), a party who produces privileged material or information without intending to waive the claim of privilege does not waive that claim if within 10 days after the producing party discovers that such production was made, the producing party amends the response to set forth the privilege asserted. As comment 4 to Rule 193 makes clear, the 10-day period allowed for in amended response begins to run from the party's first awareness of the mistake. The 10-day period can start to run after the party is served with a pretrial exhibit lists that lists a privileged document as an exhibit or a notice seeking to authenticate a privileged document. Therefore, whenever you are served with a pretrial exhibit list or a authentication notice letter, carefully inspect the documents on these lists to ensure that a privileged document was not inadvertently produced and has now been set forth on one of these lists.