ARTICLE

A GUIDE TO PROPERLY USING AND RESPONDING TO REQUESTS FOR ADMISSION UNDER THE TEXAS DISCOVERY RULES

ROBERT K. WISE
KATHERINE HENDLER FAYNE*

*Mr. Wise is a member of and Ms. Fayne is a senior associate of Lillard Wise Szygenda PLLC, a Dallas, Texas boutique litigation firm. They thank their firm's paralegals, Emily Diebitsch and Lindsay Walton, for their assistance in preparing this article. Mr. Wise also thanks his wife, Kelly, and daughters, Reagan and Riley, without whose support the article could never have been written. Ms. Fayne thanks her husband, Todd, for his love, patience, and support. The opinions and conclusions in this article are solely those of Mr. Wise and Ms. Fayne and not those of their firm.

I. INTRODUCTION

Requests for admission[1] are effective, but misunderstood[2] and are perhaps the least used of the major discovery devices: disclosure requests,

1. Among the many misconceptions about requests for admission is the proper plural form of "request for admission." Among the variations used are: requests for admission, request for admissions, and requests for admissions. *See* New Jersey v. Delaware, 552 U.S. 597, 612–13 (2008) ("request for admissions"); Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 524, 544 n.29, 547 (1987) ("requests for admission" and "requests for admissions"); El Apple I, Ltd. v. Olivas, 370 S.W.3d 757, 765 (Tex. 2012) ("request for admissions"); Marino v. King, 355 S.W.3d 629, 632–33 (Tex. 2011) (per curiam) ("requests for admission" and "requests for admissions"); *see also* TEX. R. CIV. P. 198.1 ("request for admissions"); *Id.* R. 198.2 ("requests for admissions"). The first "requests for admission" is the proper plural form of the discovery device. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 25a (Philip Babcock Gove et al. eds., 3d ed. 2002) ("Three-word compounds consisting of an initial noun plus prepositional phrase hyphened or open customarily pluralize the initial noun: . . . coat of mail → coats of mail . . . ."); *see also* BRYAN A. GARNER, GARNER'S DICTIONARY OF MODERN LEGAL USAGE 684–85 (Jeff Newman et al. eds., 3d ed. 2011)

production requests, interrogatories, requests for admission, and depositions. Even though requests for admission have the potential to eliminate unnecessary proof at trial, streamline discovery and motion practice, and reduce pretrial and trial expenses, they are used much less frequently than other discovery devices because of a perceived inability to obtain substantive concessions through their use.[3] Moreover, many practitioners abuse requests for admission by serving too many or by asking the responding party to admit clearly disputed facts underlying its claims or defenses.

This article's purpose is to provide a guide for properly using and responding to requests for admission under the Texas discovery rules.[4] In doing so, it will demonstrate that requests for admission are a double-edged sword. On one hand, they can streamline the action and reduce its costs, whereas, on the other hand, they can result in virtual ruin when a party fails to timely or properly respond to them.

II. REQUESTS FOR ADMISSION IN GENERAL

Texas Rule 198 provides for requests for admission[5]—a written request, propounded by one party to another, asking the other to admit or deny the

(describing the proper plural form of a compound noun); BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE 135–37 (West 3d ed. 2013) (providing an explanation for the proper use of plurals and possessives).

2. *See* 8B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2252, at 320 (3d ed. 2010) ("[Federal] Rule 36 has not been resorted to as much as some of the *other discovery rules* . . . ." (emphasis added)); Helen H. Stern Cutner, *Discovery—Civil Litigation's Fading Light: A Lawyer Looks at the Federal Discovery Rules after Forty Years of Use*, 52 TEMP. L.Q. 933, 981 (1979) ("Because of its vagueness, . . . [Federal] [R]ule 36 . . . is little-used and much-abused."); David L. Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055, 1078 (1979) ("The request for admission is among the least used of the principal discovery devices.").

3. The Commercial and Federal Litigation Section of the New York State Bar Association, *Report on Practice Under Rule 36: Requests for Admission*, 53 ALB. L. REV. 33, 42 (1989) ("The great majority of respondents to the questionnaire expressed frustration in obtaining substantive concessions through the use of requests for admission. Several stated that as to any important matters, the request procedure degenerated into a semantic battle. As a result, most view the usefulness of the procedure largely in the authentication of documents and clearing away evidentiary objections . . . .").

4. The Texas discovery rules are Texas Rules of Civil Procedure 190–215. Hereinafter, individual Texas Rules of Civil Procedure and Federal Rules of Civil Procedure will be referred to respectively as "Texas Rule __" and "Federal Rule ___."

5. In addition to Texas Rule 198, Texas Rules 190, 191, 192, 193, 195, and 215 relate to requests for admission. Texas Rule 198 and its predecessor, former Texas Rule 169, are based on Federal Rule 36. *See* Fireman's Fund Ins. Co. v. Comm. Standard Ins. Co., 490 S.W.2d 818, 825 (Tex. 1972) (noting that former Texas Rule 169 "was taken with minor textual changes from Federal Civil Rule 36 as it existed in 1941"), *overruled by* Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705

truth of a specific matter "within the scope of discovery, including statements of opinion[,] or of fact[,] or of the application of law to fact, or the genuineness of any documents served with the request or otherwise made available for inspection and copying."[6] Like other written discovery requests, requests for admission must be served no later than thirty days (and in some cases, thirty-one or thirty-three days) before the discovery period ends.[7]

Although Texas Rule 198 is included in the division of the civil procedure rules regarding discovery, requests for admission are different from other discovery devices. Unlike depositions, disclosure requests, interrogatories, and production requests, whose primary purpose is to discover facts or to obtain information and documents, requests for admission were *not* designed for these purposes. Rather, their purpose is "to simplify trials by eliminating matters about which there is not real controversy, but which may be difficult or expensive to prove."[8] Because

(Tex. 1987); Masten v. Masten, 165 S.W.2d 225, 227 (Tex. Civ. App.—Fort Worth 1942, writ ref'd) ("[Former Texas] Rule 169 . . . is based upon and is in substantially the same language of Rule 36 of Federal Rules of Civil Procedure . . . ."). Accordingly, federal cases discussing the federal rule are persuasive authority in construing Texas Rule 198. *See* Riemer v. State, 392 S.W.3d 635, 639 (Tex. 2012) ("Because [Texas] Rule 42 is patterned after Federal Rule of Civil Procedure 23, federal decisions and authorities interpreting current federal class action requirements are instructive."); *In re* Weekley Homes, LP, 295 S.W.3d 309 (Tex. 2009) (orig. proceeding) (conceding that state discovery rules are not identical to federal rules, but "are not inconsistent" and "therefore we look to the federal rules for guidance"); Farmers Grp., Inc. v. Lubin, 222 S.W.3d 417, 425 (Tex. 2007) (looking to cases interpreting federal rules where Texas rules incorporate the identical language); *In re* Kimberly-Clark Co. v. Tex. Co. Bldg., LP, 228 S.W.3d 480, 486–87 (Tex. App.—Dallas 2007, pet. denied) (relying on federal cases in interpreting Texas Rule 196.7 regarding entry and inspection onto land of another party); Texaco, Inc. v. Dominguez, 812 S.W.2d 451, 455 (Tex. App.—San Antonio 1991, no writ) (noting that former Texas Rule 167, relating to production requests, was based on Federal Rule 34 and relying on federal cases in interpreting the Texas Rules); Indep. Insulating Glass/Sw., Inc. v. State, 722 S.W.2d 798, 802 (Tex. App.—Fort Worth 1987, writ dism'd) (relying on federal cases in interpreting former Texas Rules 167 and 168 regarding waiver of objections to production requests and interrogatories, respectively).

6. TEX. R. CIV. P. 198.1. Requests for admission cannot be served on nonparties. *See id.* ("A *party* may serve on *another party* . . . written requests . . . ." (emphasis added)). However, requests for admission can be served on parties whose interests are not adverse. *Id.*; *cf.* Ferrara v. United States, No. 90 CIV. 0972 (DNE), 1992 U.S. Dist. LEXIS 601, at *3 (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."); Andrulonis v. United States, 96 F.R.D. 43, 45 (N.D.N.Y. 1982) ("[N]o degree of adversity between the parties is required . . . to serve interrogatories.").

7. TEX. R. CIV. P. 198.1. If the requests are served by mail, they must be served at least thirty-three days before the discovery period's end. *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).

8. Stelly v. Papania, 927 S.W.2d 620, 622 (Tex. 1996) (quoting Sanders v. Hader, 227 S.W.2d 206, 208 (Tex. 1950)); *accord* Marino v. King, 355 S.W.3d 629, 630 (Tex. 2011) (per curiam)

requests for admission were not designed to obtain facts or information, they should not be used for those purposes.[9] For example, they should not be used to circumvent procedural rules or discovery-control plans limiting the number of interrogatories.[10]

("Requests for admission are intended to simplify trials. They are useful when 'addressing uncontroverted matters or evidentiary ones like the authenticity or admissibility of documents.'" (quoting Wheeler v. Green, 157 S.W.3d 439, 443 (Tex. 2005))); *see also* Esparza v. Diaz, 802 S.W.2d 772, 774 (Tex. App.—Houston [14th Dist.] 1990, no writ) ("It is well settled that the policy which underlies [former Texas] Rule 169 is to provide a method for simplification of uncontested matters.").

9. *Marino*, 355 S.W.3d at 630 ("King's requests here, however, asked essentially that Marino admit to the validity of his claims and concede her defenses—matters King knew to be in dispute. Requests for admission were never intended for this purpose."); *Papania*, 927 S.W.2d at 622 (noting that former Texas Rule 169 "was never intended to be used as a demand upon a plaintiff or defendant to admit that he had no cause of action or ground of defense" (quoting Sanders v. Hader, 227 S.W.2d 206, 208 (Tex. 1950))), *cf.* Erie Ins. Prop. & Cas. Co. v. Johnson, 272 F.R.D. 177, 183 (S.D. W. Va. 2010) ("[R]equests for admission differ from interrogatories, as the latter are intended 'to obtain simple facts, to narrow the issues by securing admissions from the other party, and to obtain information needed in order to make use of the other discovery procedures . . . .'" (quoting WRIGHT, MILLER, & MARCUS, FEDERAL PRACTICE & PROCEDURE: CIVIL 3D § 2163)); Martin Marietta Materials, Inc. v. Bedford Reinforced Plastics, Inc., No. 3:2003-57, 2007 U.S. Dist. LEXIS 32228, at *5 (W.D. Pa. May 2, 2007) (mem. op.) ("The purpose of requests for admission . . . 'is not necessarily to obtain information, but to narrow the issues for trial.'" (quoting Webb v. Westinghouse Elec. Corp., 81 F.R.D. 431, 436 (E.D. Pa. 1978))); Henry v. Champlain Enters., Inc., 212 F.R.D. 73, 77 (N.D.N.Y. 2003) ("Requests for admission are not a discovery device much like interrogatories, demand for documents, or depositions, nor are they considered substitutes for them . . . . Discovery pleadings are expected to elicit and expound upon the facts of the matters, whereas, the Requests for Admission essentially, and hopefully, limit the factual issues in the case. Considering that one purpose for such Requests is to narrow the issues of the case, a 'weeding out of the facts' if you will, they are designed to reduce trial effort and promote litigation efficiency."); Russo v. Baxter Healthcare Corp., 51 F. Supp. 2d 70, 79 (D.R.I. 1999) ("Requests for admission[] are not intended for factual discovery that should be done through interrogatories and depositions."); Safeco of Am. v. Rawstron, 181 F.R.D. 441, 445 (C.D. Cal. 1998) ("[R]equests for admission are not principally discovery devices . . . and they 'are not to be treated as a substitute for discovery process to uncover evidence . . . .'" (citation omitted) (quoting Cal. v. S.S. Jules Fribourg, 19 F.R.D. 432, 436 (N.D. Cal. 1955))); Lakehead Pipe Line Co. v. Am. Home Assur. Co., 177 F.R.D. 454, 458 (D. Minn. 1997) ("[R]equests for admission are not to be employed as a means 'to establish facts which are obviously in dispute . . . .'" (quoting Kosta v. Connolly, 709 F. Supp. 592, 594 (E.D. Pa. 1989))); Amergen Energy Co. *ex rel.* Exelon Generation Co. v. United States, 94 Fed. Cl. 413, 416 (Fed. Cl. 2010) ("[T]he purpose of requests for admission is to eliminate issues over facts that are not in dispute, and to narrow issues to be tried before the court . . . . [R]equests for admission are not designed to obtain discovery of the existence of facts, but rather are intended to establish the admission of facts about which there is no real dispute." (citations and quotations omitted)); JZ Buckingham Invs., LLC v. United States, 77 Fed. Cl. 37, 44 (Fed. Cl. 2007) ("The purpose served by requests for admission is to establish facts about which there is no real dispute in order to expedite litigation and save the time and money that would otherwise be spent on unnecessary discovery and proof of facts at trial.").

10. *See* Misco, Inc. v. U.S. Steel Corp., 784 F.2d 198, 206 (6th Cir. 1986) ("Misco's filing of 2,028 'requests for admission[]' was both an abuse of the discovery process and an improper attempt to circumvent the local district court rule which limited the number of interrogatories."); *Martin*

A. *Form of Requests for Admission*

Requests for admission, like disclosure requests, interrogatories, and production requests, must be in writing[11] and must specify the time to answer:[12] generally thirty days after service, if the requests are served after the defendant has appeared, or fifty days after service, if they are served with the original petition. A typical request begins with the statement: "Admit that _____" or "Admit the truth of the following statement: _____."

"Each matter for which an admission is requested must be stated separately."[13] For example, a request for admission cannot ask the responding party to admit every allegation in a pleading.[14] Requests for admission should be drafted so that they are simple, concise, and can be answered readily by the responding party with a simple admit, deny, or statement that, after reasonable inquiry, the information known or easily obtainable is insufficient to enable the responding party to admit or deny the request.[15]

Marietta Materials, 2007 U.S. Dist. LEXIS 32228, at *9 (ordering the plaintiff to respond to certain requests for admission because they were "not an attempt by [defendant] to put forth interrogatories in the disguise of a request for admission without being subject to the limits in Federal Rule of Civil Procedure 33"); Phillips Petrol. Co. v. N. Petrol. Co., No. 84 C 2028, 1986 U.S. Dist. LEXIS 19750, at *1 (N.D. Ill. Sept. 29, 1986) ("The court agrees with the magistrate that Phillips' service on defendant . . . of 2068 separate requests for admission appears to be an attempt to circumvent the limits that Local Rule 9(g) places on the number of interrogatories."); *In re* Olympia Holding Corp., 189 B.R. 846, 853 (Bankr. M.D. Fla. 1995) ("Requests for admission[] and interrogatories are not interchangeable procedures . . . . Utilizing interrogatories disguised as requests for admission[] in an attempt to circumvent a local rule limiting the number of interrogatories is an abuse of the discovery process." (citation omitted)).

11. TEX. R. CIV. P. 198.1.

12. *Id.* R. 198.2(a).

13. *Id.* R. 198.1; *see* Hendler v. N. Shore Boat Works, Inc., No. 13-03-00273-CV, 2004 Tex. App. LEXIS 6617, at *3 (Tex. App.—Corpus Christi July 22, 2004, no pet.) (mem. op.) (emphasizing that Texas Rule 198.1 "does not specify the precise form the admissions shall take, other than that each matter for which an admission is requested should be stated separately"); *see also* United States *ex. rel.* Englund v. L.A. Cnty., 235 F.R.D. 675, 684 (E.D. Cal. 2006) ("Requests for admission[] may not contain compound, conjunctive, or disjunctive (e.g., 'and/or') statements."); Herrera v. Scully, 143 F.R.D. 545, 549 (S.D.N.Y. 1992) (stating that requests for admission should be direct, simple, and restricted to separate relevant facts); SEC v. Micro-Moisture Controls Inc., 21 F.R.D. 164, 166 (S.D.N.Y. 1957) (same).

14. *See* LRT Record Servs., Inc. v. Archer, No. 05-00-00328, 2001 Tex. App. LEXIS 1447, at *3–4 (Tex. App.—Dallas Mar. 7, 2001, no pet.) (mem. op., not designated for publication) (holding that a request to "admit that you were negligent and thereby caused the Plaintiff damages, as alleged in his live pleading" was "improper because it is 'sweepingly broad'"); Birdo v. Hammers, 842 S.W.2d 700, 701 (Tex. App.—Tyler 1992, writ denied) (holding that a request for admission asking the defendant to admit that "each allegation made in the Amended Original Petition filed in this case is true" was improper).

15. *Cf. Martin Marietta Materials*, 2007 U.S. Dist. LEXIS 32228, at *6 ("Requests for admission

Ordinarily, the facts to be admitted should be set forth in the request for admission.[16] Accordingly, except when the request relates to establishing the authenticity or admissibility of a document, incorporation by reference is not usually permitted.[17] This limitation, however, is flexible, and incorporation by reference may be permitted depending on the request's complexity. For example, if the request asks a single, straightforward question about an attached document or one readily available to the responding party, the request likely will be found to be proper.[18]

should be phrased in such a manner that the responding party need only respond with 'yes' or 'no,' 'denied' or 'admitted' or otherwise claim a privilege with minimal explanation."); Henry v. Champlain Enters., Inc., 212 F.R.D. 73, 77 (N.D.N.Y. 2003) ("[T]he requesting party bears the burden of setting forth its requests simply, directly, not vaguely or ambiguously, and in such a manner that they can be answered with a simple admit or deny without an explanation, and in certain instances, permit a qualification or explanation . . . . To facilitate clear and succinct responses, the facts stated within the request must be singularly, specifically, and carefully detailed."); T. Rowe Price Small-Cap Fund, Inc. v. Oppenheimer & Co., 174 F.R.D. 38, 46 (S.D.N.Y. 1997) (holding that requests for admission should be "simple and concise and state facts singly, so that they can easily and coherently be admitted or denied").

16. *Cf.* Layne Christensen Co. v. Purolite Co., No. CIV.A. 09-2381-JWL-GLR, 2011 U.S. Dist. LEXIS 6737, at *29 (D. Kan. Jan. 25, 2011) (discussing the different views regarding incorporations by reference).

17. *Cf. id.* at *29–30 ("Even given this general disfavor of the use of incorporation by reference in requests for admission, courts have allowed a certain amount of incorporation by reference in exceptional circumstances."); Vergara v. City of Waukegan, No. 04 C 6586, 2007 U.S. Dist. LEXIS 82562, at *5 (N.D. Ill. Nov. 6, 2007) ("The Court agrees requests that require reliance on documentation of facts outside the requests themselves are generally considered improper. Usually facts admitted in an answer to a request for admission should be ascertainable by examination of the request and only a certain amount of incorporation by reference, in exceptional circumstances, is allowed." (footnote omitted)); *Martin Marietta Materials*, 2007 U.S. Dist. LEXIS 32228, at *7 ("The Court finds that . . . the . . . requests . . . shall be subject to a protective order as . . . [they] . . . do not comply with [Federal] Rule 36 because of their form which references outside matters that must be reviewed prior to answering each request."); United States v. Watchmakers of Switz. Info. Ctr., Inc., 25 F.R.D. 197, 200 (S.D.N.Y. 1959) ("[T]he facts admitted in an answer to a request for admission[] should be ascertainable merely by examination of the request and of the answer."). Another criticism of the practice of incorporating documents by reference in a request for admission is that it generates needless confusion and "unjustly casts upon the [responding parties] the burden of determining at their peril what portions of the incorporated material contain relevant matters of fact which must either be admitted or denied." *Layne Christensen*, 2011 U.S. Dist. LEXIS 6737, at *29 (quoting *Micro-Moisture Controls*, 21 F.R.D. at 166); *accord* United States v. Consolidated Edison Co., No. CV-88-0049 (RJD), 1988 U.S. Dist. LEXIS 14547, at *4–5 (E.D.N.Y. Dec. 15, 1988) ("An attempt to seek admissions to the contents of documents incorporated by reference is improper, except when warranted by exceptional circumstances.").

18. *Compare Layne Christensen*, 2011 U.S. Dist. LEXIS 6737, at *29–33 (ordering the plaintiffs to answer a few requests for admission regarding the subject matter of other patents and an article written by one of the plaintiffs), *and* United States v. Gwinn, Civ. A. No. 5:06-00267, 2008 U.S. Dist. LEXIS 27974, at *29–30 (S.D. W. Va. Mar. 31, 2008) (ordering the defendant to respond to requests for admission related to medical records incorporated by reference because they were not

Requests for admission may contain definitions and instructions, including an instruction (or warning) that "a failure to timely respond to the requests shall result in each matter being admitted by you and not subject to further dispute." Nonetheless, no definitions, instructions, or warnings are required. For example, in *Hendler v. North Shore Boat Works, Inc.*,[19] the plaintiff argued that the trial court improperly granted the defendant summary judgment based on deemed admissions because the requests did not have instructions or warn him about the consequences of not timely answering them.[20] In affirming the judgment, the Corpus Christi Court of Appeals held, among other things, that no instructions or warning were needed because Texas Rule 198.1 "does not specify the precise form the [request for] admission[] shall take, other than that each matter for which an admission is requested should be stated separately."[21]

B. *Scope of Requests for Admission*

Requests for admission may inquire about any discoverable matter other

voluminous and because the requests were not ambiguous), *with Martin Marietta Materials*, 2007 U.S. Dist. LEXIS 32228, at *7 ("The majority of Bedford's requests seek to have Martin admit or deny that a reference 'teaches and/or describes' specific claims of the patents-in-suit in light of this Court's claim construction. This goes beyond the permissible parameters of a request for admission . . . . Not only does this drafting of requests require Martin to reference at least two documents outside of a request to answer it, but the requests of such a character number over five hundred . . . . [Such requests] shall be subject to a protective order as these requests do not comply with [Federal] Rule 36 because of their form which references outside matters that must be reviewed prior to answering each request." (footnote omitted)), *Micro-Moisture Controls*, 21 F.R.D. at 165–66 (S.D.N.Y. 1957) (explaining the court's desire for "[s]imple, direct and concise" admissions and why the plaintiff's drafted requests made this impossible), *and* Sparton Corp. v. United States, 77 Fed. Cl. 10, 19 (Fed. Cl. 2007) ("The Court agrees with Defendant that Plaintiff's requests for admission are much too complicated to answer with a simple admit or deny. Plaintiff incorporates by reference its voluminous Pretrial Submission and asks Defendant to admit to large sections of the document. Because the referenced sections of the document contain numerous different facts, Defendant cannot possibly be expected to respond with a simple admit or deny, without explanation or qualification.").

19. Hendler v. N. Shore Boat Works, Inc., No. 13-03-00273-CV, 2004 Tex. App. LEXIS 6617 (Tex. App.—Corpus Christi July 22, 2004, no pet.) (mem. op.).

20. *Id.* at *2.

21. *Id.* at *3. Some courts "have concluded that the inclusion of . . . [such a warning] strengthens the case for deemed admissions" in connection with a motion to amend or withdraw the requests. Abdul-Waali v. Restart, Inc., No. 10-0567-CV-W-JTM, 2011 U.S. Dist. LEXIS 132582, at *5 (W.D. Mo. Nov. 17, 2011); *see also* United States v. One Sony Wega 42" Plasma TV, No. 06-2843, 2008 U.S. Dist. LEXIS 20192, at *7–8 n.1 (W.D. Tenn. Mar. 7, 2008) ("Taking into consideration that the Claimants are *pro se*, the Court finds that they had sufficient notice of the consequences of not responding to the requests for admission, in light of the government's warning, in bold, on the front page of its requests, that the matters covered by the requests would be deemed admitted if the Claimants failed to respond.").

than matters covered by Texas Rule 195, which relates to testifying experts.[22] Thus, they are an inexpensive method of discovery when properly worded, and they can be an effective way to narrow the issues, establish undisputed facts, and both authenticate documents and establish the evidentiary foundation for their admissibility.

1. Statements of Fact or Opinion or the Application of Law to Fact

The express language of Texas Rule 198.1 states that requests can properly seek admissions including: (1) fact statements, (2) opinion statements, or (3) statements applying law to fact.[23] However, requests regarding pure questions or conclusions of law are improper.[24]

22. *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 Rule 194 and through depositions and reports permitted by this rule."); *Id.* R. 198.1 ("A party may serve on another party . . . written requests that the other party admit the truth of any matter within the scope of discovery, including statements of opinion or of fact or of the application of law to fact, or the genuineness of any documents served with the request or otherwise made available for inspection and copying.").

Requests for admission, however, in theory, 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.").

23. *Id.* R. 198.1. Examples of these are:

Statement of fact: "Defendant is a lawyer practicing in Dallas, Texas;" "John Smith was Defendant's Chief Executive Officer when the contract at issue was signed;" and "ABC Corporation is a Texas corporation."

Statement of opinion: "Plaintiff believes that its employee, Smith, can enter into contracts on its behalf" and "Defendant electric utility believes that the wires on its transmissions poles must comply with applicable provisions of the National Electric Safety Code."

Application of law to fact: "Smith acted as Plaintiff's agent in negotiating the contract at issue with Defendant;" "Defendant was negligent when she ran the red light;" and "After Defendant former employee left Plaintiff's employ, he violated his covenant not to compete by soliciting business from ABC Corporation for his new business."

24. *See* Maswoswe v. Nelson, 327 S.W.3d 889, 896–97 (Tex. App.—Beaumont 2010, no pet.) ("[A] request for admission asking a party to admit or deny a purely legal issue is improper, and a deemed admission involving a pure legal issue is of no effect."); Elliot v. Newsome, No. 01-07-00692-CV, 2009 Tex. App. LEXIS 569, at *1, *4–6 (Tex. App.—Houston [1st Dist.] Jan. 20, 2009, no pet.) (mem. op.) ("Unambiguous contracts are enforced as written. The meaning of an unambiguous contract is a question of law. Here the contract agreement plainly states that the builder must pay the . . . commission. The deemed admissions that purport to interpret the agreement in a different way cannot be given effect because they are contrary to the express terms of the agreement." (citations omitted)); Cedyco Corp. v. Whitehead, 253 S.W.3d 877, 881 (Tex. App.—Houston [1st Dist.] 2008, no pet.) ("The deemed admissions Numbers 8 and 9 . . . are purely questions of law and, therefore, are improper summary judgment evidence."); Boulet v. State, 189 S.W.3d 833, 838 (Tex. App.—Houston [1st Dist.] 2006, no pet.) ("The rule regarding requests for admission does not contemplate or authorize admissions to questions involving points of law. Furthermore this court has previously held that requests for admission merely constituting

Nonetheless, because Texas Rule 197.1 specifically permits a party to ask another party if it is making a "specific legal or factual contention," it is proper to ask a party about its legal contentions or the factual bases for them.[25] For example, the requesting party can request the responding party to admit that it is, or is not, asserting a particular cause of action or affirmative defense or to admit that its cause of action or defense is, or is not, based on specified facts.[26]

Admissions of law are not binding on the court and have no legal effect or evidentiary value.[27] The distinction between a request for an admission of law and one for the application of law to fact often is not obvious.[28]

admissions of law are not binding on the court and a party is not precluded from proving a fact necessary to a cause or defense." (citation omitted)); Neal v. Wis. Hard Chrome, Inc., 173 S.W.3d 891, 894 (Tex. App.—Texarkana 2005, no pet.) ("Answers merely constituting admissions of law are not binding on the court.").

25. *See* TEX. R. CIV. P. 192.3(j) ("A party may obtain discovery of any other party's legal contentions and the factual bases for those contentions."); *Id.* R. 198.1 (stating the scope of inquiries that the parties are permitted to make).

26. *See id.* ("A party may serve on another party . . . written requests that the other party admit the truth of any matter within the scope of discovery, including statements of opinion or of fact or of the application of law to fact, or the genuineness of any documents served with the request or otherwise made available for inspection and copying.").

27. *See* Williams v. Am. First Lloyds Ins., No. 02-12-00318-CV, 2013 Tex. App. LEXIS 7293, at *1, *8–9 (Tex. App.—Fort Worth June 13, 2013, pet. denied) (mem. op.) ("While answers constituting admissions of law are not binding on a court, requests for admission may properly ask a party to apply the law to a set of facts. Answers to these types of requests are competent summary judgment evidence." (citations omitted)); *see also* Stephenson v. Perata, No. 2-08-375-CV, 2009 Tex. App. LEXIS 3172, at *1, *4 (Tex. App.—Fort Worth May 7, 2009, no pet.) (mem. op.) (stating "admissions of law are not binding on a court" and admissions applying law to facts are proper); Luke v. Unifund CCR Partners, No. 2-06-444-CV, 2007 Tex. App. LEXIS 7096, at *1, *5 (Tex. App.—Fort Worth Aug. 3, 2007, no pet.) (mem. op.) (confirming that "answers constituting admissions of law are not binding on a court," and that "a request for admission may properly ask a party to apply law to a set of facts").

Requests for admission based on the application of law to hypothetical facts are improper. *Cf.* Friedman v. Godiva Chocolatier, Inc., No. 09cv977-L (BLM), 2010 U.S. Dist. LEXIS 108861, at *4 (S.D. Cal. Oct. 13, 2010) ("[T]hese requests are not tied to the facts at issue in this case. In these requests, Defendant asks Plaintiff to make admissions regarding a hypothetical retailer and a hypothetical customer. As such, these requests are incomplete hypotheticals and not appropriate requests in this case."); Parsons v. Best Buy Stores, LP, No. 3:09CV771, 2010 U.S. Dist. LEXIS 49274, at *4–5 (S.D. W. Va. May 19, 2010) (holding that it is impermissible to pose "improper hypothetical factual scenarios unrelated to the facts . . . to ascertain answers to pure questions of law" (quoting Abbott v. United States, 177 F.R.D. 92, 93 (N.D.N.Y. 1997))).

28. *Compare* FED. R. CIV. P. 36(a) note (Advisory Comm. 1970 Amend.) (providing as an example of a proper request for admission: "an admission that an employee acted in the scope of his employment"), Brown v. Montoya, No. CIV 10-0081 JB/ACT, 2013 U.S. Dist. LEXIS 35625, at *72 (D.N.M. Mar. 8, 2013) ("The Plaintiffs' requests whether an individual Defendant's duty or authority includes implementing certain tasks or policies at issue in the case, like the [requests for admission] asking if the Defendant is charged with ensuring his or her department's compliance with law, are not asking a pure question of law without regard to the facts."), Stark-Romero v. Nat'l R.R.

One way to determine if the request asks for the application of law to fact is to review the pertinent Texas pattern jury charge on the issue. If it is one that the jury would decide, it clearly is not a pure question of law.

Because requests for admission can ask questions regarding the application of law to fact, they can seek admissions about the ultimate factual issue(s) in the action, such as whether the responding party breached the contract at issue, misappropriated the trade secrets or confidential information at issue, violated the covenant not to compete at issue, or was negligent.[29] There is generally little to be gained from asking such requests because they invariably will be denied.[30]

Passenger Co., 275 F.R.D. 551, 557 (D.N.M. 2011) (holding that a request for admission that the New Mexico Department of Transportation was responsible for administering the federal grade-crossing improvement involved an application of law to fact), Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc., No. 05-2164-MLB-DWB, 2007 U.S. Dist. LEXIS 80182, at *17–18 (D. Kan. Oct. 29, 2007) ("Here, the requests identified by Heartland appear to require no more than the application of law to the facts of the case. HCA Midwest requests 7, 10, and 11 merely seek to establish HCA Midwest's succession to contracts and whether Heartland meets certain requirements under federal laws, which are inquiries more of a factual than legal nature. Saint Luke's requests ask Heartland to admit that no state law required an identified Defendant to contract with Heartland and therefore directly relate to the facts of the case. Requests for admission[] seeking the application of law to the facts of the case are proper under [Federal] Rule 36."), Hoffman v. Tex. Comm. Bank, N.A., 846 S.W.2d 336, 337 (Tex. App.—Houston [14th Dist.] Dec. 31, 1992, writ denied) (holding that requests for admission that the testator was of sound mind and not under undue influence were proper applications of law to fact), *and* Laycox v. Jaroma, 709 S.W.2d 2, 4 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.) (holding that a Jones Act defendant's requests for admission that the ship at issue was seaworthy and that the ship's owner, operator, and captain were not negligent were applications of law to fact), *with* United States v. Block 44, Lots 3, 6, Plus W. 80 Feet of Lots 2 and 5, 177 F.R.D. 695, 696 (M.D. Fla. 1997) (holding that a request for admission that the plaintiff had the burden of proof was an improper question of law), Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 130 F.R.D. 92, 96 (N.D. Ind. 1990) (holding that a request for admission that certain patent claims were invalid was an improper question of law), Currie v. United States, 111 F.R.D. 56, 59 (M.D.N.C. 1986) (holding that a request for admission that the defendant owed a legal duty to the plaintiff was an improper question of law), Morris v. Marshall Cnty. Bd. of Educ., 560 F. Supp. 43, 45–46 (N.D. W. Va. 1983) (holding that a request for admission that the removal of the action to federal court was proper was an improper question of law), *Elliot*, 2009 Tex. App. LEXIS 569, at *4–6 (holding that requests for admission regarding an unambiguous contract's interpretation were improper questions of law), *Neal*, 173 S.W.3d at 894 (holding that a request for admission that plaintiff was an employee of defendant was an improper question of law), *and* Fort Bend Cent. Appraisal Dist. v. Narserus, 844 S.W.2d 857, 858–59 (Tex. App.—Texarkana 1992, writ denied) (holding a request for admission that a tax-appraisal result was a clerical error was a question of law).

29. *See* TEX. R. CIV. P. 198.1 (providing that a request for admission can ask another party to "admit the truth of any matter within the scope of discovery, including statements of opinion or of fact or of the application of law to fact"); *Id.* R. 198.2(b) ("An assertion that the request presents an issue for trial is not a proper response."); *see also* Peralta v. Durkham, 133 S.W.3d 339, 341 (Tex. App.—Dallas 2004, no pet.) (awarding expenses under Texas Rule 215.4(b) because the responding party improperly denied a request asking her to admit that an automobile accident was caused by her failure to keep a proper lookout); *cf.* Casey v. Albertson's Inc., 362 F.3d 1254, 1256 (9th Cir. 2004) (enforcing deemed admissions that the defendant did not discriminate against the plaintiff on the

In reality, requests for admission are most effectively used to confirm incidental, but important facts in the action, such as: the parties' relationship (e.g., employer–employee, employer–independent contractor, agent–principal, manufacturer–distributor); the identity of a property's owner, lessor, or lessee; whether a relevant contract was entered into; the validity of signatures on a contract or other documents; whether a required demand or notice has been made, or whether it was timely; whether a relevant meeting or conversation occurred at all, or on a specific date or at a particular place; or the participants or subject matter of meetings or

basis of gender, her marital status, or her pregnancy); 999 Corp. v. C.I.T. Corp., 776 F.2d 866, 868–69 (9th Cir. 1985) (enforcing admission that there was "an agreement" even though its existence was ultimate issue in the case); United States v. Gwinn, Civ. A. No. 5:06-00267, 2008 U.S. Dist. LEXIS 27974 at *10, *19 (S.D. W. Va. Mar. 31, 2008) ("Admissions going to the ultimate issue of the case are proper under [Federal] Rule 36."); Tillamook Country Smoker, Inc. v. Tillamook Cnty. Creamery Ass'n, 333 F. Supp. 2d 975, 984 (D. Ore. 2004) ("[Federal] Rule 36 allows litigants to request admissions as to a broad range of matters, including ultimate facts . . . ." (quoting *In re* Carney, 258 F.3d 415, 419 (5th Cir. 2001))); Hart v. Dow Chem., No. 95C1811, 1997 U.S. Dist. LEXIS 15681, at *22 (N.D. Ill. Oct. 17, 1997) ("There is nothing improper about a request simply because it goes to an ultimate fact that may be dispositive of the case . . . ."); Branch Bank & Trust Co. v. Deutz-Allis Corp., 120 F.R.D. 655, 658 (E.D.N.C. 1988) ("Clearly, a request for admission is not improper merely because it relates to an 'ultimate fact' or to an issue of fact that is dispositive of one aspect of the case."); Blakeney v. Jasper County Cnty. (*In re* Blakeney), No. 09-51102-NPO, 2010 Bankr. LEXIS 3842, at *7 (Bankr. S.D. Miss. Oct. 29, 2010) ("An admission of the ultimate fact issue in the case by failing to reply to requests for admission[] is sufficient to support summary judgment."); Cereghino v. Boeing Co., 873 F. Supp. 398, 401–02 (D. Or. 1994) (enforcing admission that contamination was not caused by defendant even though determining causation in contamination cases "is simply impossible").

30. *See In re* Hodge, No. 12-02000314-CV, 2002 Tex. App. LEXIS 8776, at *11 (Tex. App.—Tyler Dec. 11, 2002, orig. proceeding) (not designated for publication) ("The requests in the case at hand comprise the factual basis for Fitts and Gill's claims in the underlying proceeding. Hodge contests his liability on these claims as evidenced by his general denial. Consequently, Hodge was entitled to deny the requests, thereby identifying each as a disputed issue." (citation omitted)); *cf.* Coleman v. So. Bank (*In re* Sportsman Link), Adv. No. 09-1058, 2011 Bank. LEXIS 5344, at *11 (Bankr. S.D.N.Y. Sept. 28, 2011) ("Defendant's Requests for Admission sought to secure an admission from Trustee regarding the ultimate issue of insolvency. Where a request for admission asks the responding party to concede the ultimate issue of its case, rather than merely an undisputed fact or assertion, the Court finds that the responding party is within its rights to refuse to admit such a request."). Notwithstanding this rule, many Texas decisions have stated that requests for admission were "never intended to be used as a demand upon a plaintiff or defendant to admit that he had no cause of action or ground of defense." Stelly v. Papania, 927 S.W.2d 620, 622 (Tex. 1996) (per curiam) (quoting Sanders v. Harder, 148 Tex. 593, 227 S.W.2d 206, 208 (1950)); Lucas v. Clark, 347 S.W.3d 800, 803 (Tex. App.—Austin 2011, pet. denied); Boulet v. State, 189 S.W.3d 833, 838 (Tex. App.—Houston [1st Dist.] 2006, no pet.). This statement, however, should not be read as holding that requests for admission regarding the ultimate issue in an action are improper. Rather, it is the principal justification for allowing a responding party to withdraw deemed merits-preclusive admissions under Texas Rule 198.3. *See* Motor Car Classics, LLC v. Abbott, 316 S.W.3d 223, 234 (Tex. App.—Texarkana 2010, no pet.) (discussing the withdrawal or amendment of merits-preclusive admissions).

conversations. Requests for admission also can ask for admissions about facts bearing on the court's jurisdiction.[31]

2. Mirror-Image (or Converse) Requests for Admission

Oftentimes, a requesting party will pair a request for admission with its opposite. For example, one request might ask the responding party to admit that "Smith was your employee when the accident occurred"; whereas another request might ask it to admit the converse, "Smith was not your employee when the accident occurred." Although there is nothing inherently improper about such "mirror-image" or "converse" requests,[32] mirror-image admissions, which result if the responding party fails to respond to the requests[33] or admits both requests, are useless because they create a fact issue. As explained by the Houston (Fourteenth) Court of Appeals in *CEBI Metal Sanayi Ve Ticaret A.S. v. Garcia*:[34]

> Summary judgment is appropriate only if no fact questions exist after resolving all doubts in the nonmovant's favor. Normally, admissions (whether admitted or deemed) serve this purpose, as they conclusively establish the facts stated therein. But because each of Garcia's requests was paired with its opposite, they conclusively established every proposition *and*

31. *See Motor Car Classics*, 316 S.W.3d at 231–33 (holding that deemed admissions established minimum contacts for personal jurisdiction); Sw. Aviation Specialties, LLC v. Wilmington Air Ventures IV, Inc., No. 02-08-062-CV, 2008 Tex. App. LEXIS 8707, at *13–14 (Tex. App—Fort Worth Nov. 20, 2008, pet. denied) (mem. op.) (holding minimal contacts for personal jurisdiction were established through admissions); *cf.* Fields v. Household Bank, 280 F. Supp. 2d 530, 532 (N.D. Miss. 2003) (holding that a request for admission asking the plaintiff to admit that its claim exceeded the jurisdictional limit was proper in connection with the determination of whether diversity jurisdiction existed); Oroco Mar., Inc. v. Nat'l Mar. Serv., Inc., 71 F.R.D. 220, 221–22 (S.D. Tex. 1976) ("On March 18, 1976, the third-party plaintiff submitted a written request for admission[] of fact by the third-party defendant which would establish that the corporate litigants to the third-party action are of diverse citizenship as defined in 28 U.S.C. § 1332(c). Because a period in excess of 30 days has elapsed since service of the request without reply from the third-party defendant, these jurisdictional facts are deemed admitted. Therefore, the Court finds that jurisdiction based on diversity of citizenship exists over the third-party action." (citations omitted)).

32. *Cf.* Layne Christensen Co. v. Purolite Co., No. 09-2381-JWL-GLR, 2011 U.S. Dist. LEXIS 6737, at *23 (D. Kan. Jan. 25, 2011) ("The Court finds nothing *per se* objectionable about 'converse' requests for admission that ask a party to admit one set of facts and then to admit the negative. . . . A party may admit one request and deny the other, moreover, or respond that it has insufficient information to admit or deny either request."); Interland, Inc. v. Bunting, No. 1:04-CV-444-ODE, 2005 U.S. Dist. LEXIS 36112, at *31, (N.D. Ga. Mar. 31, 2005) (suggesting that mirror-image requests are proper).

33. *See* TEX. R. CIV. P. 198.2(c) ("If a response is not timely served, the request is considered admitted without the necessity of a court order.").

34. CEBI Metal Sanayi Ve Ticaret A.S. v. Garcia, 108 S.W.3d 464 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

> *its opposite as well.* When all were deemed admitted, they *created* fact questions rather than resolving them.
>
> Garcia cannot avoid this conflict by relying on half of his requests. We cannot pick and choose among controverted facts in a summary judgment record, and these admissions become part of that record when they were filed. Nor could Garcia have arranged for half the requests to be deemed admitted and the other half quietly ignored, as deeming occurs automatically without either motion or order.[35]

3. Genuineness of Documents

Requests for admission can expedite the trial process by establishing evidentiary foundations for documents that would otherwise consume considerable trial time.[36] It is not, however, enough to ask the responding party to admit that a document is genuine (i.e., authentic);[37] rather, the requesting party also should ensure that all foundational questions needed for the document's admission into evidence are included in the requests.[38] For example, if the party intends to establish that documents are "business records" under Texas Rule of Evidence 803(6), the requests for admission should establish not only the document's genuineness or authenticity, but also each of the hearsay exception's elements. Moreover, requests for admission can properly ask the responding party to admit the genuineness

35. *Id.* at 466–67 (citations omitted); *accord* Triple R. Auto Sales v. Fort Worth Transp. Auth., No. 2-08-173-CV, 2009 Tex. App. LEXIS 437, at *2–5 (Tex. App.—Fort Worth Jan. 22, 2009, no pet.) (mem. op.) ("Although deemed admissions often are sufficient evidence to support summary judgment, when they create fact issues rather than resolve them, they cannot be the basis for summary judgment."); Luke v. Unifund CCR Partners, No. 2-06-444-CV, 2007 Tex. App. LEXIS 7096, at *14–15 (Tex. App.—Fort Worth Aug. 3, 2007, no pet.) (mem. op.) ("[W]hen all of the requests for admission[] [are] deemed admitted, they [create] fact questions rather than resolving them, . . . and that summary judgment [can] not be sustained . . . .").

36. *See* TEX. R. CIV. P. 198.1 (providing that requests for admission may inquire about "the genuineness of any documents").

37. Caruso v. Coleman Co., No. 93-CV-6733, 1995 U.S. Dist. LEXIS 7934, at *21 (E.D. Pa. June 7, 1995) ("In the English Language authenticity and genuineness mean the same."); *see* Inventio AG v. ThyssenKrupp Elevator Ams. Corp., No 08-874-RGA, 2013 U.S. Dist. LEXIS 116680, at *3 (D. Del. July 29, 2013) ("A document is genuine or authentic when it is what it claims to be."); BLACK'S LAW DICTIONARY 151 (9th ed. 2009) (defining "authenticate" as "[t]o prove the genuineness of (a thing)" and "authentication" as "the act of proving that something (as a document) is true or genuine, esp. so that it may be admitted into evidence"). "An admission as to the genuineness of a document is made subject to all pertinent objections to admissibility that could be made at trial." *Inventio AG*, 2013 U.S. Dist. LEXIS 116680, at *3–4; *accord Caruso*, 1995 U.S. Dist. LEXIS 7934, at *24 (stating that genuineness of documents is still subject to all relevant objections).

38. *See* Berry v. Federated Mut. Ins. Co., 110 F.R.D. 441, 443 (N.D. Ind. 1986) ("Therefore, [Federal] Rule 36 is an appropriate procedure to determine which documents will have foundational problems and which will not.").

or authenticity, or establish the foundation for the admission, of documents belonging to an opposing party or a non-party.[39]

Under Texas Rule 198.1, the relevant document can be "served with the request or otherwise made available for inspection and copying."[40] In other words, the Rule does not require that the referenced document be attached to the requests for admission as an exhibit.[41] Rather, if the document has already been identified in the action (e.g., as an exhibit to a pleading or deposition transcript or has been produced by the parties in discovery), it need not be attached to the set of requests for admission as long as the reference to it is clear. For example, a request asking the requesting party to admit that the "Lease attached as Exhibit A to Plaintiff's Original Petition [or marked as Exhibit 1 to John Smith's deposition, or produced by Plaintiff with the Bates Nos. 1-10] is a true and correct copy of the parties' lease" is proper.

The self-authentication provision of Texas Rule 193.7 for documents

39. *Cf. Inventio AG*, 2013 U.S. Dist. LEXIS 116680, at *9–12 (holding that "[t]here is nothing in [Federal] Rule 36 that suggests a responding party does not have to respond to a request for admission simply because it did not create the documents" and ordering the plaintiff to admit or deny the authenticity of documents of its former agents); Pasternak v. Kim, No. 10-cv-5045 (LTS) (JLC), 2011 U.S. Dist. LEXIS 113990, at *16–17 (S.D.N.Y., Sept. 28, 2011) ("Kim has not cited to any authority for the proposition that a party need not respond to [requests for admission] that certain documents are authentic because the party did not produce them. That is not surprising. [Requests for admission] are intended to narrow issues for trial, and if parties were constrained to use [requests for admission] to authenticate only documents that had been produced by an opponent, the intent behind the Rule would be largely defeated."); Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc., No. 05-2164-MLB-DWB, 2007 U.S. Dist. LEXIS 80182, at *19 (D. Kan. Oct. 29, 2007) (overruling objections to requests for admission requiring the plaintiff to admit the authenticity of documents produced by the defendants); Doe v. Mercy Health Corp., No. 92-6712, 1993 U.S. Dist. LEXIS 13347, at *33 (E.D. Pa. Sept. 15, 1993) ("[Federal] Rule 36(a) is not limited in scope only to documents produced or authored by a party . . . ."); *In re* Gulf Oil/Cities Serv. Tender Offer Litig., Nos. 82 Civ. 5253 (MBM), 87 Civ. 8982 (MBM), 1990 U.S. Dist. LEXIS 5009, at *8–15 (S.D.N.Y. May 2, 1990) (ordering the plaintiff to respond to requests for admission whose answers required it to review documents of a non-party because the plaintiff and non-party had parallel interests and had been closely cooperating in discovery in two related cases); *Berry*, 110 F.R.D. at 443 (denying protection from requests for admission seeking to establish the authenticity of 244 exhibits because the trial would be document intensive and [Federal] Rule 36 was an appropriate tool for establishing genuineness and authenticity of documents before trial). Whether the responding party can authenticate the documents of the requesting party or a non-party depends on the extent of the responding party's obligation to make a reasonable inquiry in connection with answers and the timing of the request. *Cf. Inventio AG*, 2013 U.S. Dist. LEXIS 116680, at *9–10 (explaining the reasonable inquiry standard); *Gulf Oil*, 1990 U.S. Dist. LEXIS 5009, at *8–13 (outlining the responding party's obligation to make a reasonable inquiry). If the requests are served early in discovery, the responding party can move the trial court to defer answers to the requests until sufficient discovery has been taken.

40. TEX. R. CIV. P. 198.1.

41. *Id.*

produced by a party in response to written discovery[42] reduces somewhat the need to use admissions to establish the genuineness of documents. Because the Rule only applies to the party producing the documents, in a multi-party action, requests for admission are still useful to anticipate and perhaps avoid objections by parties who have not produced the documents.

III. TYPES OF ADMISSIONS

There are two types of admissions: "express" and "deemed." An express admission is one in which the responding party expressly admits the request, in whole or in part, in its answer. A "deemed" admission occurs when the responding party fails to timely respond to the request or when a trial court, in ruling on a motion regarding the sufficiency of a response to a request for admission, deems the request admitted because the response does not comply with Texas Rule 198's requirements.[43]

IV. NUMBER OF REQUESTS FOR ADMISSION

The action's discovery control plan, rather than Texas Rule 198, governs the number of requests for admission.[44] Level 1 actions are limited to fifteen requests for admission, including "discrete subparts."[45] In contrast, the Texas discovery rules do not limit either the number of

42. Texas Rule 193.7 provides, in full:

> A party's production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial unless—within ten days or a longer or shorter time ordered by the court, after the producing party has actual notice that the document will be used—the party objects to the authenticity of the document, or any part of it, stating the specific basis for objection. An objection must be either on the record or in writing and must have a good faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity.

Id. R. 193.7.

43. *See infra* section V.I., entitled "Do Nothing" (explaining that requests for admission are automatically admitted if a response is not served).

44. *See* TEX. R. CIV. P. 190.1 (providing three levels of discovery: Levels 1, 2 and 3).

45. *Id.* R. 190.2(b)(5). Texas Rule 190.2(b)(5)'s "discrete subpart" provision appears to conflict with the requirement in Texas Rule 198.1 that "[e]ach matter for which an admission is requested must be stated separately." *Id.* The rules can be reconciled by interpreting the former as giving the responding party the option of answering a compound request and counting it as multiple requests against the 15-request limit rather than objecting to it.

requests for admission or the number of sets of requests for admission in Level 2 and 3 actions.[46]

As pointed out above, under Texas Rules 190.2, the limit on the number of requests for admission in a Level 1 action includes "all discrete subparts."[47] Although nothing in Texas Rule 190 or its comments explains what constitutes a discrete subpart for a request for admission, Comment 3 to Rule 190 explains what constitutes a discrete subpart for an interrogatory: "a 'discrete subpart' is, in general, one that calls for information that is not logically or factually related to the primary interrogatory."[48] The test should be same as that with respect to requests for admission.[49]

Although the Texas discovery rules do not limit the number of requests for admission in Level 2 and 3 actions, Texas Rules 192.4 and 192.6 allow a court to limit their number for the following reasons: (1) the requests are "unreasonably cumulative or duplicative" of other discovery requests,[50] harassing, "or invasive of personal, constitutional, or property rights;"[51] (2) when the information sought "is obtainable from some other source that is more convenient, less burdensome, or less expensive;"[52] or (3) when "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."[53] Whether a party has served too many requests for admission depends on the action's facts.[54] The following footnote sets forth cases considering the issue.[55]

46. *Id.* R. 190.3–.4. A Level 3 discovery control order can limit the number of requests for admission. *See id.* R. 190.4(b)(3) (allowing the court to place "appropriate limits on the amount of discovery").

47. *Id.* R. 190.2(b)(5).

48. 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, 523–24 (2013).

49. *See id.* at 523–29 (discussing what constitutes a discrete subpart in an interrogatory).

50. TEX. R. CIV. P. 192.4(a).

51. *Id.* R. 192.6(b).

52. *Id.* R. 192.4(a).

53. *Id.* R. 192.4(b); *see id.* R. 192.6(b) (allowing a protective order "[t]o protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights").

54. *Cf.* BP Amoco Chem. Co. v. Flint Hills Res., LLC, No. 05C5661, 2008 U.S. Dist. LEXIS 85966, at *4–5 (N.D. Ill. June 11, 2008) ("No presumptive limit has ever been set on the number of requests a party can propound. However, lines have been drawn on a case-by-case basis, depending on the complexity of the case and whether or not the propounding party is truly seeking admissions

V. RESPONSES TO REQUESTS FOR ADMISSION

A party must respond to a request for admission in writing within thirty days after its service[56] unless the time is extended due to the manner of

or seeking to circumvent the Federal Rules regarding discovery." (citations omitted)). Because the request for admission's purpose is "to simplify trials by eliminating matters about which there is no real controversy, but which may be difficult or expensive to prove," Stelly v. Papania, 927 S.W.2d 620, 622 (Tex. 1996) (quoting Sanders v. Hader, 227 S.W.2d 206, 208 (Tex. 1950)), rather than to discover facts and information, *cf.* Erie Ins. Prop. & Cas. Co. v. Johnson, 272 F.R.D. 177, 183 (S.D. W. Va. 2010), a court in evaluating whether a party has served too many requests should, besides considering the action's complexity, review the requests to determine if they improperly seek admissions about obviously disputed matters or if they are interrogatories in disguise because they seek substantive discovery.

55. *Compare* Escobedo v. Ram Shirdi, Inc., No. 10C6598, 2011 U.S. Dist. LEXIS 27124, at *5 (N.D. Ill. Mar. 16, 2011) (ruling that 145 requests for admission were neither excessive nor burdensome because the defendants failed to explain why responding to them would be unduly burdensome), Layne Christensen Co. v. Purolite Co., No. 09-2381-JWL-GLR, 2011 U.S. Dist. LEXIS 6737, at *13–20 (D. Kan. Jan. 25, 2011) (ruling that 277 requests for admission served on one defendant and another 329 requests served the other defendant were not excessive given the number of claims and counterclaims in the action), *and* Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc., No. 05-2164-MLB-DWB, 2007 U.S. Dist. LEXIS 80182, at *11–12 (D. Kan. Oct. 29, 2007) (ruling that 1,351 requests for admission served by multiple defendants, including 751 by a single defendant, were not excessive given that there were eighteen defendants, multiple conspiracy allegations, and $121 million in alleged damages), *with* Misco, Inc. v. U.S. Steel Corp., 784 F.2d 198, 206 (6th Cir. 1986) ("Misco's filing of 2,028 'requests for admission[]' was both an abuse of the discovery process and an improper attempt to circumvent the local district court rule which limited the number of interrogatories . . . ."), Fleming v. Escort, Inc., No. CV 09-105-S-BLW, 2011 U.S. Dist. LEXIS 14254, at *6–7 (D. Idaho Feb. 13, 2011) (ruling that 216 requests for admission were "excessive" because they were redundant of deposition testimony), Murray v. U.S. Dep't of Treasury, No. 08-cv-15147, 2010 U.S. Dist. LEXIS 90512, at *4 (E.D. Mich. Sept. 1, 2010) ("The Court finds that 182 requests for admission is oppressive and unduly burdensome. There are only two named Defendants in this action and one Plaintiff and the issues, while notably important, are fairly succinct."), Taylor v. Great Lakes Waste Servs., No. 06-CV-12312-DT, 2007 U.S. Dist. LEXIS 97966, at *5–6 (E.D. Mich. Feb. 2, 2007) (ruling that 297 requests for admission were unduly burdensome in an "uncomplicated" employment discrimination case), Gannon v. United States, No. 03-6626, 2006 U.S. Dist. LEXIS 74308, at *3–4 (E.D. Pa. Oct. 6, 2006) (ruling that 1,407 requests for admission were "grossly excessive" and "abusive, burdensome, and oppressive"), Leonard v. Univ. of Del., No. 96-360 MMS, 1997 U.S. Dist. LEXIS 4196, at *26 (D. Del. Mar. 20, 1997) (ruling that 800-plus requests for admission were oppressive in an action alleging wrongful termination and breach of a settlement agreement and that "an objective attorney would be hard-pressed to quibble with the conclusion that a reasonable inquiry would reveal the requests are 'unreasonable and unduly burdensome'"), *and* Wigler v. Elec. Data Sys. Corp., 108 F.R.D. 204, 206 (D. Md. 1985) ("Where a case is particularly complex, a large number of requests for admission may be justifiable. In contrast, the case *sub judice* is relatively straightforward. This litigation involves a single plaintiff and two affiliated corporate defendants, posing issues which are customary in employment discrimination actions." (citations omitted)).

56. TEX. R. CIV. P. 196.2(a); *accord* Marino v. King, 355 S.W.3d 629, 633 (Tex. 2011) (per curiam) ("Generally, a party responding to requests for admission must serve a written response on the requesting party within 30 days after service. The response time may be modified by agreement or court order."). Three days are added to the response date if the requests for admission are served

service,[57] by the parties' agreement,[58] or by court order,[59] "except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request."[60] Each response must be preceded by the request[61] and may include objections and assertions of privilege as allowed by Texas Rule 193.[62] Unlike interrogatory answers, the response to a request for admission need not be verified, but rather only signed by the responding party's attorney or a *pro se* party.[63]

A responding party has a variety of responses to a request for admission: (1) admit the entire request; (2) deny the entire request; (3) admit the request in part, and deny the request in part; (4) state that, despite a reasonable inquiry, the information known or easily obtainable is insufficient to enable an admission or denial; (5) move for a protective order; (6) move for (or request) an extension of time to respond; (7) assert a privilege; (8) object; or (9) do nothing. Each response is discussed below.

A. *Admissions*

The responding party can answer a request for admission by admitting it. To do so, it need only respond, "Admitted." No further elaboration is

by mail, TEX. R. CIV. P. 21a(c), and one day is added if they are served by fax after 5:00 p.m. local time of the recipient. *Id.* R. 21a(b)(2).

57. TEX. R. CIV. P. 21a(b)(2), (c).

58. *Marino*, 355 S.W.3d at 633.

59. *See* TEX. R. CIV. P. 193.1 ("A party must respond to written discovery within the time provided by court order or these rules.").

60. *Id.* R. 198.2(a); *accord In re* Estate of Herring, 970 S.W.2d 583, 587–88 (Tex. App.—Corpus Christi 1998, pet. denied) (noting that a responding party has thirty days to respond to requests for admission, but fifty days if they are served with the original petition); Elder v. Calvary Credit Corp., No. 14-94-01175-CV, 1996 Tex. App. LEXIS 1528, at *5 (Tex. App.—Houston [14th Dist.] Apr. 18, 1996, no pet.) (not designated for publication) (noting that a responding party has fifty days to respond to requests for admission served with the original petition).

61. *See* 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.").

62. *Id.* Privilege assertions are discussed *infra* section V.G.

63. *Id.*; *accord* Pinal v. Carnevale, 964 S.W.2d 311, 313 (Tex. App.—Corpus Christi 1998, no pet.) (holding that requests for admission do not have to be verified). A failure to sign the responses may result in the requests being deemed admitted. *See Herring*, 970 S.W.2d at 588–89 ("[U]nder [former Texas] Rule 169, the requests are deemed admitted automatically unless the responding party timely complies with the specific requirements of [former Texas] Rule 169(1), including the signature of his answer. Rather than being a mere formality, the signature on a response to a request[s] for admission is some indication that the responding party has adopted and stands behind the answers he has provided in the same manner and with the same general consequences as the prior requirement for verification of the answers." (citation omitted)).

required.[64] If the party, in "good faith," cannot admit without some explanation or qualification, it can admit with a qualification, an explanation, or a denial of part of the request.[65] As explained by one federal court:

> There will be times, however, when the answer cannot be a succinct yes or no, and a qualification of the response is indeed necessary. Under these circumstances, the answering party is obligated to specify so much of its answer as true and qualify or deny the remainder of the request. "Generally, qualification is permitted if the statement, although containing some truth, . . . standing alone out of context of the whole truth . . . convey[s] unwarranted unfair references." These qualifications are to provide clarity and lucidity to the genuineness of the issue and not to obfuscate, frustrate, or compound the references.[66]

For example, a qualification is appropriate if the request uses a vague or ambiguous term[67] or "if the request is sweeping, multi-part, involves

64. *Cf.* Cont'l Cas. Co. v. Brummel, 112 F.R.D. 77, 81 (D. Colo. 1986) ("Defendant's answers to the questions either admit, deny[,] or qualify the denial which is in compliance with the rule. Therefore, the answers are sufficient." (footnote omitted)). The admission's use at trial still is subject to pertinent objections, such as hearsay, relevance, or that it involves an impermissible admission of law.

65. *See* TEX. R. CIV. P. 198.2(b) ("The responding party may qualify an answer, or deny a request in part only when *good faith* requires." (emphasis added)).

66. Henry v. Champlain Enters., Inc., 212 F.R.D. 73, 77–78 (N.D.N.Y. 2003) (citations omitted) (quoting Diederich v. Dep't of Army, 132 F.R.D. 614, 619 (S.D.N.Y. 1990)); *see* Foley v. Orange Cnty., No. 6:12-cv-269-Orl-37KRS, 2013 U.S. Dist. LEXIS 81163, at *5–6 (M.D. Fla. June 10, 2013) ("On rare occasions, a party may qualify or explain an admission when the request for admission, if taken out of context, could convey unfair references."); Duchesneau v. Cornell Univ., No. 08-4856, 2010 U.S. Dist. LEXIS 111546, at *4 (E.D. Pa. Oct. 19, 2010) ("Courts should not tolerate objections or denials based upon 'hair-splitting distinctions that frustrate the purpose of the Request.' A party may not object merely because of an unwarranted inference created by a request for admission taken out of context. Instead, the proper response is an admission or denial with sufficient qualification." (citation omitted) (quoting Anthony v. Cabot Corp., No. 06-4419, 2008 U.S. Dist. LEXIS 51144, at *6 (E.D. Pa. July 3, 2008))); Tequila Centinela S.A. de C.V. v. Bacardi & Co., 242 F.R.D. 1, 14 (D.D.C. 2007) ("While it is permissible under [Federal Rule 36] to qualify answers which are only partly correct, hair-splitting disingenuous distinctions are inappropriate.").

67. *See* Lewis v. Michaels Stores, Inc., No. 3:05-cv-1323-J-33HTS, 2007 U.S. Dist. LEXIS 50506, at *3–4 (M.D. Fla. July 12, 2007) ("Yet, some circumstances call for a qualified response. Here, Defendant's use of the word *found,* while in one sense conveying merely that Plaintiff was encountered or located, could be interpreted as suggesting Mr. Lewis was hiding in the break room when discovered. Thus, it would be permissible for Plaintiff to qualify his response in order to dispel any impression he admits to the latter, such as by clarifying 'that Plaintiff . . . was[, prior to clocking out,] in the break room awaiting further instructions from Mr. Zimmerman, per the custom and practice in the store he worked in.'" (citations omitted)); Audiotext Commc'ns Network, Inc. v. U.S. Telecom, Inc., No. 94-2395- GTV, 1995 U.S. Dist. LEXIS 15395, at *8 (D. Kan. Oct. 5, 1995) ("A compound request (seeking admission of multiple facts) or an ambiguous one should be answered as far as possible with appropriate qualification or explanation, rather than objected to

sharply contested issues, or goes to the heart of a defendant's liability."[68] The responding party must make certain that its qualified admission "fairly meet[s] the substance of the request"[69] because, under Texas Rules 215.1(c) and 215.4(a), an evasive or incomplete answer can be treated as a failure to answer and a court, in connection with a motion to determine the sufficiency of an answer, can deem the request admitted.[70]

Because the response must "fairly meet the [request's] substance,"[71] it cannot incorporate by reference other discovery responses, deposition testimony, or the responding party's business records.[72] Moreover, a party cannot admit a request "on information and belief."[73] If such a

entirely."); Harris v. Oil Reclaiming Co., 190 F.R.D. 674, 676–77 (D. Kan. 1994) (holding, in an action alleging that the defendant's actions made him individually liable for a partnership's obligations, that a response to a request asking the defendant "to admit that a certain document is a list of checks 'that you signed as Bill E. Harrison,'" that the checks were signed "'in his capacity' as an agent or officer of Inc., is appropriate as a good faith qualification of the answer in order to 'fairly meet the substance of the requested admission'" and that a response to another request seeking an admission that "certain phone calls were 'made on behalf of' Ltd. . . . that the calls were made not as an agent of Ltd., but 'in his capacity as an agent of' Inc. is also a good faith qualification to 'fairly meet the substance of the requested admission'" (quoting FED. R. CIV. P. 36(a))).

68. Wiwa v. Royal Dutch Petrol. Co., No. 01CIV1909, 2009 U.S. Dist. LEXIS 45621, at *17 (S.D.N.Y. May 26, 2009).

69. *See* TEX. R. CIV. P. 198.2(b) ("A response must fairly meet the substance of the request.").

70. *See id.* R. 215.4(a) ("If the court determines that an answer does not comply with the requirements of [Texas] Rule 198, it may order either that the matter is admitted or that an amended answer be served.").

71. *Id.* R. 198.2(b).

72. *Cf. In re* Heritage Bond Litig., 220 F.R.D. 624, 626–27 (C.D. Cal. 2004) ("Here, defendant responded to requests for admission[] nos. 2, 3, 4, 6 and 9 by (creatively) citing [Federal] Rule 33(d) and stating its answers are to be found in 'previously produced business records' or 'business records previously produced.' This is improper. Unfortunately for defendant, [Federal] Rule 33(d) is responsive only to interrogatories . . . . Further, by referring to 'previously produced business records,' defendant is inferentially admitting that had it conducted a reasonable inquiry, it would have found the information to respond to the requests for admission[]; however, it chose not to do so. Since defendant has inferentially admitted it could have obtained the information to respond to these requests for admission[], and it chose not to do so, the Court would have had no difficulty deeming requests for admission[] nos. 2, 3, 4, 6 and 9 admitted—even if defendant's responses had been timely." (citations omitted)).

73. *See* McIntire v. Sawicki, 353 S.W.2d 952, 953 (Tex. Civ. App.—Eastland 1962, writ ref'd n.r.e.) ("A reply to a request for admission made on information and belief, or to the best of the knowledge and belief of the affiant, is not sufficient under [former Texas] Rule 169, T.R.C.P."), *superseded on other grounds by* amendment of former TEX. R. CIV. P. 169; Taylor v. Owen, 209 S.W.2d 771, 776 (Tex. Civ. App.—San Antonio 1956, writ ref'd n.r.e.) (holding a response to the best of one's knowledge is not sufficient under former Texas Rule 169), *superseded on other grounds by* amendment of former TEX. R. CIV. P. 169; *cf. In re* K-Dur Antitrust Litig., No. 01-1652 (JAG), 2007 U.S. Dist. LEXIS 96066, at *40 (D.N.J. Jan. 2, 2007) (holding that such a qualification is improper because it violates the reasonable-inquiry requirement); Interland, Inc. v. Bunting, No. 1:04-CV-444-ODE, 2005 U.S. Dist. LEXIS 36112, at *36 (N.D. Ga. Mar. 31, 2005) ("In response to several

response is challenged, the court should strike the qualification and (1) generally order the responding party to properly respond to the request by either admitting or denying the request or stating that it cannot admit or deny it after reasonable inquiry, and (2) on the rare occasion, deem the request admitted.[74]

B. *Denials*

The responding party can answer a request for admission by denying it. To do so, it need only respond, "Denied." No further elaboration is required.[75]

As with admissions, the responding party can explain or qualify its denial, or deny the request in part when "good faith requires"[76] so long as the qualified or partial denial "fairly meet[s] the substance of the request."[77] Accordingly, "[w]hen the purpose and significance of a request are reasonably clear, courts do not permit denials based on an overly-technical reading of the request."[78] As with admissions, the responding party cannot deny a request "on information and belief."[79]

---

requests Bunting responded, '[a]dmitted (or denied), based on information and belief.' Interland claims the latter phrase is an invalid qualification. This Court agrees.").

74. *Cf. K-Dur*, 2007 U.S. Dist. LEXIS 96066, at *40 (deeming admitted requests founded on information and belief); *Bunting*, 2005 U.S. Dist. LEXIS 36112, at *36 (stating requests are admitted if done so "based on information and belief").

75. *Cf.* United Coal Cos. v. Powell Constr. Co., 839 F.2d 958, 967 (3d Cir. 1988) ("[T]he use of only the word 'denied' is often sufficient under the rule."); Point Blank Solutions, Inc. v. Toyobo Am., Inc., No 09-61166, 2011 U.S. Dist. LEXIS 25046, at *20 (S.D. Fla. Feb. 24, 2011) ("Because Toyobo denied the contested requests for admission, it provided a *procedurally sufficient* answer under Rule 36(a)."); Caruso v. Coleman Co., No. 93-CV-6733, 1995 U.S. Dist. LEXIS 7934, at *7 (E.D. Pa. June 7, 1995) ("[T]he use of only the word 'denied' is often sufficient under the rule."); Wanke v. Lynn Transp. Co., 836 F. Supp. 587, 598 (N.D. Ind. 1993) (holding that the one-word response, "denied," was a sufficient response to a request for admission); Cont'l Cas. Co. v. Brummel, 112 F.R.D. 77, 81 (D. Colo. 1986) (ruling that a qualification, admission, or denial is a sufficient response to requests for admission).

76. TEX. R. CIV. P. 198.2(b).

77. *Id.*; *cf.* Thalheim v. Eberheim, 124 F.R.D. 34, 38 (D. Conn. 1988) ("Defendant's response to Request No. 16 admits that the Stardust Too was *moored* in Greenwich Cove on September 28, 1985. Defendant's cute pre-motion response to Request No. 17, however, denies that the boat was afloat. Since it is entirely possible for a boat to sink while it is moored, defendant's inappropriate response left plaintiff no alternative but to file the pending motion. After the plaintiff incurred the expense associated with his motion—to say nothing of the costs associated with plaintiff's repeated attempts since November of 1987 to obtain forthright answers—the defendant filed an 'Amended Response' which finally admits 'that the boat was moored and afloat.' Obviously, this should have been admitted in defendant's initial pre-motion response. Defendant's pre-motion response was not in good faith.").

78. United States *ex. rel.* Englund v. L.A. Cnty., 235 F.R.D. 675, 684 (E.D. Cal. 2006); *accord* Holmgren v. State Farm Mut. Auto. Ins. Co., 976 F.2d 573, 580 (9th Cir. 1992) ("[E]pistemological

The fact that the responding party previously has denied the substance of a request for admission in a pleading or in response to other discovery—such as in disclosures, interrogatory answers, or deposition testimony—does not constitute a denial of a request for admission.[80]

C. *Admitting or Denying in Part*

When good faith requires, the responding party may admit part and deny part of a request for admission.[81] In fact, under Texas Rule 198.2, the responding party must admit those portions of the request that it knows are true, while denying the remaining matters.[82] Nonetheless, when "a request contains interdependent, compound issues, a party may deny the entire statement if it is premised upon a fact which is denied."[83]

D. *Lack of Information*

In many instances, the responding party will not know whether the matter it has been asked to admit is true. Texas Rule 198.2(b) deals with this situation, providing, in full:

> Unless the responding party states an objection or asserts a privilege, the responding party must specifically admit or deny the request *or explain in detail the reasons that the responding party cannot admit or deny the request*. A response must fairly meet the substance of the request. The responding party may qualify an answer, or deny a request in part, only when good faith

doubts speak highly of its [party's] philosophical sophistication, but poorly of its respect for [Federal] Rule 36(a)."); Tequila Centinela S.A. de C.V. v. Bacardi & Co., 242 F.R.D. 1, 14 (D.D.C. 2007) ("While it is permissible under [Federal Rule 36] to qualify answers which are only partly correct, hair-splitting disingenuous distinctions are improper.").

79. *See* cases cited *supra* note 73.

80. *See* Lee v. Unifund CCR Partners, No. 03-07-00286-CV, 2008 Tex. App. LEXIS 6226, at *6 (Tex. App.—Austin Aug. 15, 2008, no pet.) (mem. op.) ("Accordingly, we hold that Lee's general and verified denials were insufficient to constitute either objections or responses to Unifund's requests for admission[] pursuant to [former Texas] Rule 198.2(b) . . . .").

81. *Cf.* Sayler v. Gilbert, No. 2:08-cv-516, 2009 U.S. Dist. LEXIS 98141, at *7 (S.D. Ohio Oct. 8, 2009) ("Defendants are entitled to admit in part or deny in part the request 'but the answer must specify the part admitted and qualify or deny the rest.'"); Martin v. El Paso Natural Gas Co., No. EP-79-CA-23, 1981 U.S. Dist. LEXIS 17053, at *4 (W.D. Tex. Oct. 19, 1981) ("[Federal Rule 36(a)] allows a party to object to a request for admission, or to deny part of it, if he acts in good faith.").

82. TEX. R. CIV. P. 198.2.

83. Harris v. Oil Reclaiming Co., 190 F.R.D. 674, 678 (D. Kan. 1999); *accord* Audiotext Commc'ns Network, Inc. v. U.S. Telecom, Inc., No. 94-2395-GTV, 1995 U.S. Dist. LEXIS 15395, at *5–6 (D. Kan. Oct. 5, 1995) ("A compound request (seeking admission of multiple facts) or an ambiguous one should be answered as far as possible with appropriate qualification or explanation . . . ."); Diederich v. Dep't of Army, 132 F.R.D. 614, 621 (S.D.N.Y. 1990) (explaining that if a complex issue with interdependent parts relies on a fact that is denied, the entire issue may also be denied).

> requires. *Lack of information or knowledge is not a proper response unless the responding party states that a reasonable inquiry was made but that the information known or easily obtainable is insufficient to enable the responding party to admit or deny.* An assertion that the request presents an issue for trial is not a proper response.[84]

Tension exists between the Rule's first and fourth sentences. The first suggests that the answer must describe in detail what efforts have been made to answer the request, whereas the fourth sentence suggests that such detail is unnecessary and that the answer need only track its language.

No Texas court has recognized this conflict, much less decided how to resolve it. Federal courts, however, have split on the issue in interpreting Federal Rule 36(a)(4)'s similar language.[85] Although some have held that the responding party must detail its inquiry,[86] most have held that a simple statement that the party has made a reasonable inquiry and lacks adequate information to admit or to deny the request is sufficient.[87]

---

84. TEX. R. CIV. P. 198.2(b) (emphasis added).

85. Federal Rule 36(a)(4) provides, in full:

> If a matter is not admitted, the answer must specifically deny it or state *in detail why the answering party cannot truthfully admit or deny it.* A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. *The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.*

FED. R. CIV. P. 36(a)(4) (emphasis added).

86. *See, e.g.*, Jacobs v. Sullivan, No. 1:05-CV-01625-LJO-GSA-PC, 2012 U.S. Dist. LEXIS 102161, at *24–26, *66, *78–79 (E.D. Cal. July 20, 2012) (requiring amended responses "explaining in detail [defendant's] efforts to search for information, with a listing of the documents she reviewed and the persons she contacted to refresh her memory"); A. Farber & Partners, Inc. v. Garber, 237 F.R.D. 250, 254 (C.D. Cal. 2006) (same); Henry v. Champlain Enters., Inc., 212 F.R.D. 73, 78 (N.D.N.Y. 2003) ("This requires the responding party to 'set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.'" (quoting Herrera v. Scully, 143 F.R.D. 545, 548 (S.D.N.Y. 1992))).

87. *See, e.g.*, Asea, Inc. v. S. Pac. Transp. Co., 669 F.2d 1242, 1245–46 (9th Cir. 1981) (permitting a response that simply states "[s]aid party has made reasonable inquiry" if the party has "in fact, made 'reasonable inquiry'"); Stark-Romero v. Nat'l R.R. Passenger Co., 275 F.R.D. 551, 555–57 (D.N.M. 2011) (same); Wildearth Guardians v. Pub. Serv. Co., No. 09-CV-01862-ZLW-MEH, 2010 U.S. Dist. LEXIS 138972, at *9 (D. Colo. Dec. 29, 2010) ("Moreover, the rule allows a party who cannot admit or deny a request to state it has made a reasonable inquiry and information known or readily obtainable is insufficient to enable an admission or denial."); Radian Asset Assur., Inc. v. Coll. of Christian Bros. of N.M., No. Civ. 09-0885 JB/DJS, 2010 U.S. Dist. LEXIS 127396, at *47–58 (D.N.M. Nov. 11, 2010) (same); Tequila Centinela S.A. v. Bacardi & Co., 242 F.R.D. 1, 15 (D.D.C. 2007) (same); Interland, Inc. v. Bunting, No. 1:04-CV-444-ODE, 2005 U.S. Dist. LEXIS 36112, at *34 (N.D. Ga. Mar. 31, 2005) (same); Adley Express Co. v. Highway Truck Drivers & Helpers, Local No. 107, 349 F. Supp. 436, 451–52 (E.D. Pa. 1972) ("Under the amended Rule 36, it

The latter construction is not only the majority one, it also is the better one. As explained by one federal court:

> One common situation is where the respondent lacks adequate knowledge to answer. The third sentence [of Federal Rule 36(a)(4), which is substantially the same as the fourth sentence of Texas Rule 198.2(b)] tells the respondent what he or she must do to answer "in detail." In other words, the sentence sets forth what "in detail" means for the common situation when the answering party lacks information or knowledge. There may be other situations where a respondent cannot admit or deny; in such a situation, the respondent must use the more general directions in the first sentence. If the Court were to interpret [Federal R]ule 36(a)(4) as requiring a person who lacked knowledge to make the statements in the third sentence and describe in detail the inquiry, there would be little need to even have the third sentence—rendering it effectively surplusage, a disfavored result. "In detail" would require at least setting forth what the third sentence requires. The Court is reluctant to give [Federal R]ule 36(a)(4) a construction that gives the third sentence little, if any, effect. Further, the plain language of the first sentence of [Federal R]ule 36(a)(4) does not state that the answer must describe "in detail" the inquiry made; the first sentence states that the respondent must "state in detail why the answering party cannot truthfully admit or deny it"—not what the answering party has done. To add the requirement that the answering party must describe in detail what the party has done to reasonably inquire is to write into the rule language that is not there. The Court is reluctant to read into the rule a requirement that the drafters did not write, and which Congress and the Supreme Court of the United States did not approve.
>
> There is also a policy rationale for not reading the "in detail" requirement into the subject that the third sentence covers. [Federal] Rule 36 deals with requests for admission[] and not with interrogatories. To require the answering party to describe in detail the efforts it has made to inquire would be to turn the request[s] for admission[] into an open-ended interrogatory. Moreover, an in-detail description of the inquiry does not advance the discovery ball much; such an answer still does not produce an admission or denial. The detail is not much use for discovery. The detail is more useful for after trial to determine whether [Federal R]ule 37(a)(5) expenses should be awarded for failure to admit, but requiring that information now pushes to an early part of the case a lot of work and squabbles that may never need to be addressed if the case settles or the issue proves to be irrelevant down the road . . . . The third sentence is made under [Federal R]ule 11, which is

would appear that a mere statement in the answer that the answering party has made reasonable inquiry and that the information solicited was insufficient to enable him to admit or deny the requested matter will suffice.").

> probably the best end to request-for-admission disputes; to read a requirement that the answering party describe in detail the reasonable inquiry only promotes satellite litigation with little benefit.[88]

Accordingly, when a responding party, having made a reasonable inquiry, lacks the information needed to admit or deny a request for admission, its answer need not detail the inquiry, but merely can track Texas Rule 198.2(b)'s fourth sentence. That is, the responding party can state, "After reasonable inquiry, the information known or easily obtainable is insufficient to enable an admission or denial."[89] However, if the requesting party challenges the response's sufficiency under Texas Rule 215.4, the responding party bears the burden of proving that it made a reasonable inquiry and that the information known or easily obtainable was insufficient to allow it to admit or deny the request. As explained by the San Antonio Court of Appeals:

> The crux of the State's argument is that the trial court had no authority to deem the admissions because its refusal to either admit or deny tracked the language in the rules. We disagree. The State's responses were an attempt to avoid the operation of [former Texas Rule] 169 and [Texas Rule] 215.
>
> [Former Texas] Rule 169 requires that where a party has insufficient information to admit or deny, he must state that he has made reasonable inquiry to discover the information. The State argues that simply reciting the language in the statute is enough. However, [former Texas] Rule 169 also requires that parties['] responses to requests for admission[] must be made in good faith. It seems implicit in the rule that one must actually make a reasonable inquiry and that as a result of that reasonable inquiry the party answering the request still did not have sufficient knowledge to either admit or deny. The State's answer that it had made a reasonable inquiry and that it had insufficient knowledge to ascertain whether the $10,057 dollars seized

88. *Stark-Romero*, 275 F.R.D. at 556–57 (citations omitted); *accord Radian Asset Assur.*, 2010 U.S. Dist. LEXIS 127396, at *47–58 (same).

89. Although no Texas case has expressly considered the issue, several cases suggest that a response that tracks Texas Rule 198.2(b)'s fourth sentence is sufficient. *See* Larrison v. Catalina Design, 02-10-00167-CV, 2011 Tex. App. LEXIS 1196, at *12 (Tex. App.—Fort Worth Feb. 17, 2011, no pet.) (mem. op.) ("A response to a request for admission based on lack of information or knowledge is insufficient 'unless the responding party states that a reasonable inquiry was made but that the information known or easily obtainable is insufficient to enable the responding party to admit or deny.' Larrison's response does not state that a reasonable inquiry was made, as required by the rules of civil procedure. The trial court was correct in ruling that the answer was insufficient." (quoting TEX. R. CIV. P. 198.2(b))); CherCo Props., Inc. v. Law, Snakard & Gambill, PC, 985 S.W.2d 262, 267 (Tex. App.—Fort Worth 1999, no pet.) ("[A] party may not give lack of information or knowledge as a reason for failure to admit or deny unless it states it has made reasonable inquiry into the facts and still has inadequate information to admit or deny the request for admission." (citations omitted)).

> from Carrillo was derived from the distribution of a controlled substance is not adequate. The State presented no evidence to support its claim that it had made a reasonable inquiry before answering the requests for admissions.[90]

A lack-of-information response is inadequate if the responding party, when challenged, fails to prove that there was in fact insufficient information to admit or deny the request or that it failed to make a reasonable inquiry.[91]

90. State v. Carrillo, 885 S.W.2d 212, 215 (Tex. App.—San Antonio 1994, no writ); *see CherCo Props.*, 985 S.W.2d at 267–68 ("CherCo had an affirmative duty to make a reasonable inquiry into the facts—including questioning Ralph Ayers[its sole shareholder], if necessary—before answering the requests." (citation omitted)); U.S. Fire Ins. Co. v. Maness, 775 S.W.2d 748, 749, 751 (Tex. App.—Houston [1st Dist.] 1989, writ ref'd) (holding that the defendant's lack-of-information response was improper because it "sought to avoid the duty to make reasonable inquiry by simply saying, in effect, 'we deny these requests, even though we have no factual basis to deny them.' [Former Texas] Rule 169's requirement to make a reasonable inquiry should not be so easily defeated. . . . A party may not guarantee its ignorance by foregoing reasonable inquiry into relevant facts and then refuse to admit the facts due to 'insufficient information.'"); Trevino v. Cent. Freight Lines, Inc., 613 S.W.2d 356, 360 (Tex. App.—Waco 1981, no writ) ("[I]f defendant did not have personal knowledge of the matters in question, he should have ascertained their accuracy if that could have been done without cost or considerable burden."); *cf. Asea*, 669 F.2d at 1247 ("We hold, therefore, that a response which fails to admit or deny a proper request for admission does not comply with the requirements of [Federal] Rule 36(a) if the answering party has not, in fact, made 'reasonable inquiry,' or if information 'readily obtainable' is sufficient to enable him to admit or deny the matter."); United States *ex. rel.* Englund v. L.A. Cnty, 235 F.R.D. 675, 685 (E.D. Cal. 2006) ("The responding party's simple statement that he or she has made a 'reasonable' inquiry and is unable to admit or deny the request because insufficient information is available may not suffice as an answer to the request for admission. Moreover, the fact that the party has not done so may be asserted as a basis for challenging the response."); Harris v. Oil Reclaiming Co., 190 F.R.D. 674, 679 (D. Kan. 1999) ("Intonation of the words of [Federal] Rule [36(a)(4)] that the party has made a 'reasonable inquiry' is not determinative whether the answer is sufficient. The party must in some way show that he has, in fact, made a 'reasonable inquiry' and that information 'readily available' to him is insufficient to enable him to admit or deny the statement.").

91. *Compare* T. Rowe Price Small-Cap Fund, Inc. v. Oppenheimer & Co., 174 F.R.D. 38, 44 (S.D.N.Y. 1997) (holding that the defendant was not required to subpoena FDIC records needed to admit or deny requests for admission because such a requirement would "far exceed" the reasonable-inquiry provision of Federal Rule 36), Kendrick v. Sullivan, No. 83-3175 (CRR), 1992 U.S. Dist. LEXIS 6715, at *9 (D.D.C. May 15, 1992) ("The Court finds that the review of the documentary evidence in plaintiffs' possession was sufficient to constitute a reasonable inquiry. Therefore their claim that they had inadequate information to respond was proper. Although they are unable to contradict various factual assertions, the information they seek is in the hands of the defendant or adverse third parties. . . . The plaintiffs have exhaustively reviewed the information under their control. This effort constitutes compliance with the rule."), Morreale v. Willcox & Gibbs DN, Inc., No. 89 Civ. 5531 (MJL), 1991 U.S. Dist. LEXIS 7741, at *1–2 (S.D.N.Y. June 6, 1991) ("Schwarz'[s] suggestion that defendants had a obligation to take the additional action of interviewing former employees of Peat Marwick, a third party, is unprecedented, and indeed there is some authority to the contrary."), *and* Gaynier v. Ginsberg, 715 S.W.2d 749, 758–59 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) ("As to the requests that Gaynier admit that certain records were those of Dr.

"What constitutes 'reasonable inquiry' and what material is 'readily obtainable' is a relative matter that depends upon the facts of each case."[92] Nonetheless, some rules exist. Initially, "a reasonable inquiry is limited to inquiry of documents and persons readily available and within the responding party's control."[93] This requires the responding party to

Harrington, deceased, Gaynier replied that she did not have sufficient knowledge to answer those requests. Dr. Harrington was deceased and, after reasonable inquiry, Gaynier stated that she had no knowledge of whether those particular documents were prepared and maintained by Dr. Harrington and whether they related to her. A party is not required to admit or deny facts of which he has no personal knowledge and has no reasonable means of obtaining such knowledge." (citation omitted)), *with* Erie Ins. Prop. & Cas. Co. v. Johnson, 272 F.R.D. 177, 184 (S.D. W. Va. 2010) (holding that the reasonable-inquiry requirement required an insurer to ask its insured about the information needed to answer a request for admission), Adkins Energy, LLC v. Farmland Mut. Ins. Co., No. 4 C 50482, 2009 U.S. Dist. LEXIS 38099, at *17–18 (N.D. Ill. May 6, 2007) (holding that the plaintiff's lack-of-information response to a request asking it to admit the name of its former law firm was "improper because . . . [t]he information sought may be attainable through reasonable inquiry . . . ."), Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co., 490 S.W.2d 818, 825 (Tex. 1972) ("[Former Texas] Rule 169 . . . extend[s] to matters of fact within the knowledge of or readily ascertainable by the litigant of whom the request is made. In the spirit of cooperation required by this Rule, [defendants] should have ascertained the accuracy of [the deposition transcript attached to the requests for admission] if [it] could have been done without cost or considerable burden.") *overruled on other grounds by* Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705 (Tex. 1987), *and CherCo Props.*, 985 S.W.2d at 267–68 (holding that a reasonable inquiry required the plaintiff corporation to ask its sole shareholder for information needed to answer requests for admission).

92. *Oppenheimer & Co.*, 174 F.R.D. at 43; *accord* Haggie v. Coldwell Banker Real Est. Corp., No. 4:04CV111-M-A, 2007 U.S. Dist. LEXIS 35666, at *9–10 (N.D. Miss. May 15, 2007) ("Review of the cases cited by the parties as well as other relevant case law makes clear that there is no bright line rule defining the limits of a 'reasonable inquiry.' Instead, a court must examine each case in light of its specific facts and circumstances to determine whether a responding party made a reasonable inquiry to determine whether the request should be admitted or denied or if there is insufficient information to permit a definitive response." (citations omitted)); *In re* Gulf Oil/Cities Serv. Tender Offer Litig., Nos. 82 Civ. 5253 (MBM), 87 Civ. 8982 (MBM), 1990 U.S. Dist. LEXIS 5009, at *5 (S.D.N.Y. May 2, 1990) ("The extent of the obligation of 'reasonable inquiry' turns on the practicalities of the case."); Dubin v. E.F. Hutton Grp. Inc., 125 F.R.D. 372, 374 (S.D.N.Y. 1989) ("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." (citations omitted)).

93. JZ Buckingham Invs., LLC v. United States, 77 Fed. Cl. 37, 47 (Fed. Cl. 2007); *accord* Inventio AG v. ThyssenKrupp Elevator Ams. Corp., No 08-874-RGA, 2013 U.S. Dist. LEXIS 116680, at *9–12 (D. Del. July 29, 2013) ("[Federal] Rule 36 makes clear that a 'reasonable inquiry' includes an examination of not only what the responding party already 'knows,' but also what is 'readily obtainable' by the responding party." (quoting FED. R. CIV. P. 36(a))); *Oppenheimer & Co.*, 174 F.R.D. at 43 ("Generally, a 'reasonable inquiry' is limited to review and inquiry of those persons and documents that are within the responding party's control."); United States v. Taylor, 166 F.R.D. 356, 363–64 (M.D.N.C. 1996) (holding that the "reasonable-inquiry" requirement required the responding party to check its own files for documents sent by or to the responding party to determine their authenticity), *aff'd*, 166 F.R.D. 367 (M.D.N.C. 1996); *Fireman's Fund Ins.*, 490 S.W.2d at 825 ("[Former Texas Rule 169] extend[s] to matters of fact . . . readily ascertainable by the litigant of whom the

review its readily available documents and inquire of its officers, directors, employees, agents, and attorneys "who conceivably, but in realistic terms, may have information which may lead to or furnish the necessary and appropriate response."[94]

It also requires the responding party to make a good-faith effort to refresh its recollection of matters about which it previously had knowledge.[95]

Although the responding party generally is not required "to interview or subpoena records from independent third parties in order to admit or deny a Request for Admission":[96]

request is made. In the spirit of cooperation required by this Rule, [defendants] should have ascertained the accuracy of [the deposition transcript attached to the requests for admission] if [it] could have been done without cost or considerable burden." (citations omitted)), *overruled on other grounds by* Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705 (Tex. 1987); *see also* TEX. R. CIV. P. 198.2(b) (referring to "information known or easily obtainable").

94. Noble v. Gonzalez, No. 1:07-CV-01111-LJO-GSA-PC, 2013 U.S. Dist. LEXIS 121252, at *52 (E.D. Cal. Aug. 26, 2013) (quoting A. Farber & Partners, Inc. v. Garber, 237 F.R.D. 250, 254 (C.D.Cal. 2006)); *accord* Stark-Romero v. Nat'l R.R. Passenger Co., 275 F.R.D. 551, 558 (D.N.M. 2011) ("A reasonable inquiry means that a party has to ask their counsel, and if their counsel knows the answer, they need to use that information to admit or deny." (citations omitted)); *Englund*, 235 F.R.D. at 685 (holding that the duty of a responding party to make a "[r]easonable inquiry is limited to persons and documents within the responding party's control (e.g., its employees, partners, corporate affiliates, etc."); Herrera v. Scully, 143 F.R.D. 545, 548 (S.D.N.Y. 1992) ("[R]easonable inquiry includes 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. In this connection, relevant documents and regulations must be reviewed as well." (quoting Diederich v. Dep't of Army, 132 F.R.D. 614, 619 (S.D.N.Y. 1990))); *see CherCo Props.*, 985 S.W.2d at 267–68 (holding that a reasonable inquiry required the plaintiff corporation to ask its sole shareholder for information needed to answer requests for admission); Sanchez v. Caroland, 274 S.W.2d 114, 117 (Tex. Civ. App.—Fort Worth 1954, no writ) (affirming the trial court's ruling deeming requests admitted because the defendant through reasonable inquiry could have determined whether the driver of a truck involved in an accident was his employee); *see also* Montgomery v. Gibbons, 245 S.W.2d 311, 315 (Tex. Civ. App.—Eastland 1951, no writ) (same).

95. *See* McPeak v. Tex. Dep't of Pub. Safety, 346 S.W.2d 138, 140–41 (Tex. Civ. App.—Dallas 1961, no writ) (holding that, in an appeal from the revocation of his driver's license, the plaintiff's answer that "I don't remember" to requests for admission regarding his prior traffic offenses was evasive because "by the exercise of ordinary diligence, [plaintiff could] have inspected the records of the . . . [city] of Dallas . . . or made other inquiry which would have revealed his conviction [of the] offense inquired about. . . . The facts . . . indicate clearly that appellant made no effort to ascertain the facts requested to be admitted, nor did he give any reasons for not doing so, and, therefore, his answers are clearly waived."); *see also* A. Farber & Partners, Inc. v. Garber, 237 F.R.D. 250, 256 (C.D. Cal. 2006) (holding that the defendants' failure "to make a reasonable inquiry to obtain information is especially galling when they claim they do 'not recall'—since that response clearly implies that, at one time, they possessed the necessary information to respond to the requests for admission[] and have now chosen not to refresh their recollections").

96. *Englund*, 235 F.R.D. at 685; *accord Haggie*, 2007 U.S. Dist. LEXIS 35666, at *15–16 ("Under [Federal] Rule 36, a defendant's duty to make a 'reasonable inquiry' should not require the defendant

> A ["]reasonable inquiry["] may encompass inquiry of a third party if there is an "identity of interest" between the responding party and the third party—i.e., when they are both parties to, or actively cooperating, in the litigation, or when they have a present or prior relationship of mutual concern—not if there is a manifest or potential conflict between the responding party and the third party.[97]

to make judgments or put itself in the shoes of another unrelated defendant. In other words, a real estate company is not required to expend time, energy, and money to inquire as to the veracity of a request for admission regarding information that the bank, its employees, a mortgage lender, its employees, or an appraiser may have had or what those individuals may have thought or done in the course of closing a loan for the sale of a specific property. Instead, the court concludes that the defendant, Coldwell Banker, is responsible for responding only to requests for admission that relate directly to its corporate entity, its agents or employees and their acts, omissions, or impressions and not those of third parties or individuals or information outside its control. This does not mean that the defendant should not make every effort to respond to requests for admission completely and truthfully, but simply that the defendant is not under a duty to conclusively establish facts that it or its agents, partners, employees, corporate affiliates, etc., are without knowledge or evidence to determine."); *Oppenheimer & Co.*, 174 F.R.D. at 44 ("[I]t . . . far exceed[s] the 'reasonable inquiry' provision of [Federal] Rule 36 to require defendant to subpoena FDIC documents in Chicago, perhaps litigat[ing] the . . . subpoena, travel to Chicago to review large volumes of documents, and incur whatever additional expense may be involved in their production. Thus, to the extent various admissions called for admission[] as to matters at the Bank of which Oppenheimer had no knowledge, . . . as to which there may have been relevant information in the FDIC documents, it was appropriate to respond that it has made reasonable inquiry and it was unable to admit or deny the requests."); *Diederich*, 132 F.R.D. at 620 ("The requirement of 'reasonable inquiry' does not generally extend to third parties . . . ."); *Morreale*, 1991 U.S. Dist. LEXIS 7741, at *1–2 ("Schwarz'[s] suggestion that defendants had a[n] obligation to take the additional action of interviewing former employees of Peat Marwick, a third party, is unprecedented, and indeed there is some authority to the contrary.").

97. *JZ Buckingham Invs.*, 77 Fed. Cl. at 47; *accord Inventio AG*, 2013 U.S. Dist. LEXIS 116680, at *10 ("[A] plain reading of the [Federal] Rule [36] indicates that a responding party has a duty to inquire as to all documents and information readily available, whether in the party's possession or not. At a minimum, this would include a reasonable inquiry of Inventio's agents and other third parties within the party's control who have (or had in the past) identical interests to Inventio."); Erie Ins. Prop. & Cas. Co. v. Johnson, 272 F.R.D. 177, 183–84 (S.D. W. Va. 2010) (holding that the defendant insurer should have asked its insurance agent about answers and the failure to do so did not constitute reasonable inquiry); *A. Farber & Partners*, 237 F.R.D. at 256 (holding that duty of reasonable inquiry "includes, at a minimum, an inquiry of the other defendants represented by the same counsel"); Uniden Am. Corp. v. Ericsson Inc., 181 F.R.D. 302, 304 (M.D.N.C. 1998) ("The Court finds that a party must make inquiry of a third party when there is some identity of interest manifested, such as by both being parties to the litigation, a present or prior relationship of mutual concerns, or their active cooperation in the litigation . . . ."); *Oppenheimer & Co.*, 174 F.R.D. at 44 (suggesting that a reasonable inquiry may require inquiry of information readily available from a non-hostile third party); *Gulf Oil*, 1990 U.S. Dist. LEXIS 5009, at *8–13 (holding that the plaintiff must consult non-party's counsel to confirm data derived from figures produced by the non-party because the plaintiff and a non-party had parallel interests and had been closely cooperating in discovery in two related cases); Al-Jundi v. Rockefeller, 91 F.R.D. 590, 594–95 (W.D.N.Y. 1981) (holding that, when "without extraordinary expense or effort," a defendant may be able to respond based on information secured from co-defendants and their counsel, such efforts must be made).

A reasonable inquiry also requires the responding party to review deposition testimony, witness statements, and interviews in responding to requests for admission.[98] A responding party, however, is not bound by a third party's testimony or statements when the third party is hostile or when the responding party has evidence that is contrary to the third party's testimony. As explained by one federal court:

> [Federal] Rule 36 responses become, in effect, sworn evidence that is binding upon the respondent at trial. Oppenheimer is not compelled to be bound by a version of events presented by third parties, particularly where it has asserted that it has reason to believe that those individuals may have interests hostile or adverse to the Bank and Oppenheimer, and there remains a possibility that other Bank employees with relevant information, who are not under Oppenheimer's control, may choose to testify at trial.
>
> In the absence of an admission, the trial judge will be required to determine what weight to give the deponents' testimony with respect to several discrete factual issues. There is very little burden on plaintiff in having to submit the relevant deposition testimony at trial and, if it is uncontroverted, the burden on the court in deciding whether to credit the testimony is insignificant. Thus, the goal of efficiency underlying Rule 36 is not frustrated in any meaningful way by defendant's responses. Indeed, far more time appears to have been spent litigating this dispute than will be required to put before the court the relevant deposition testimony.[99]

98. *See* Brown v. Arlen Mgmt. Corp., 663 F.2d 575, 580 n.8 (5th Cir. 1981) (holding that the trial court properly deemed the request admitted because the defendant, after interviewing its former employees, refused to amend its responses); Asea, Inc. v. S. Pac. Transp. Co., 669 F.2d 1242, 1244–45 (9th Cir. 1981) (holding that the trial court properly deemed the requests admitted because, as a result of the depositions of their employees, it was clear that the defendants had not made reasonable inquiry in admitting or denying the requests); *cf.* Caruso v. Coleman Co., No. 93-CV-6733, 1995 U.S. Dist. LEXIS 7934, at *4 (E.D. Pa. June 7, 1995) ("However, Rule 36(a)'s requirement of 'reasonable inquiry' does extend to third parties, if there exists sworn deposition testimony of such third party."); *Diederich*, 132 F.R.D. at 620 (explaining that under Rule 36, "[t]he requirement of 'reasonable inquiry' does not generally extend to third parties, absent sworn deposition testimony of such third party").

99. *Oppenheimer & Co.*, 174 F.R.D. at 44–45 (citations and footnote omitted); *see Uniden Am. Corp.*, 181 F.R.D. at 304 (holding that, if a nonparty has given deposition testimony regarding the matter, responding party "can be compelled via [Federal] Rule 36 to admit or deny, that is to indicate whether it will introduce contrary evidence"); Kendrick v. Sullivan, No. 83-3175 (CRR), 1992 U.S. Dist. LEXIS 18270, at *6 (D.D.C. May 5, 1992) ("The court agrees that to assume that the deposition testimony or declarations of hostile witnesses are conclusive would be to unfairly limit plaintiff's case and the court's ability to make credibility determinations at trial."); *Gulf Oil*, 1990 U.S. Dist. LEXIS 5009, at *14 ("If anything, a party to litigation is likely to be less reliable as a source of information since it necessarily has an interest in the outcome of the lawsuit, and hence it makes little sense to make the 'reasonable inquiry' obligation under Rule 36 more substantial when the source of the facts is a party."); Dulansky v. Iowa-Ill. Gas & Elec. Co., 92 F. Supp. 118, 123 (S.D. Iowa 1950) (holding that the defendant was only obligated to notice the sworn testimony of its former employee

Finally, if the responding party necessarily would have to obtain the information needed to admit or deny a request for admission to prepare for trial, it should obtain the information in connection with its response to the request.[100]

E. *Motion for Protective Order*

In appropriate situations, the responding party, rather than responding to a set of requests for admission, can move for a protective order pursuant to Texas Rule 192.6 if the requests subject the answering party to "undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights . . . ."[101] Such a motion is proper when the requests are (1) so voluminous that responding to them will be unduly burdensome or unnecessarily expensive, (2) or unreasonably cumulative or duplicative of other discovery.[102] In such a case, the court should balance the legitimate needs of the requesting party with the burden or expense on the responding party by considering the factors in Texas Rule 192.4.

F. *Move for (or Request) an Extension of Time to Respond*

If the responding party cannot in good faith respond to requests for admission within the time allowed by Texas Rule 198.2, it should move for an extension of time to do so. An example of this is when the request relates to a matter requiring additional or expert discovery. The motion should be made well in advance of the response period's expiration. The trial court has authority to lengthen the time for response.[103] Moreover,

in responding to a request for admission and specifically concluding that the defendant was not obligated to inquire any further of that employee).

100. *Cf. Gulf Oil*, 1990 U.S. Dist. LEXIS 5009, at *8–9 ("[P]laintiffs will obviously be required to obtain this information as part of their trial preparation if they are to meet Gulf's assertion at trial that Cities misrepresented its oil reserves during the tender offer period. It necessarily follows that it would not be unreasonable to require plaintiffs to obtain such data at this stage in order to serve the purpose embodied in [Federal] Rule 36 of narrowing the scope of contested issues and proof at trial.").

101. TEX. R. CIV. P. 192.6; *see* Reynolds v. Murphy, 188 S.W.3d 252, 261 (Tex. App.—Fort Worth 2006, pet. denied) (explaining that the filing of the motion will prevent the requests from being deemed admitted even if the responding party never obtains a ruling on it).

102. *See* cases cited *supra* note 55.

103. *See* TEX. R. CIV. P. 191.1 ("Except where specifically prohibited, the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit by the agreement of the parties or by court order for good cause. An agreement of the parties is enforceable if it complies with [Texas] Rule 11 . . . ."); *see also* Marino v. King, 355 S.W.3d 629, 633 (Tex. 2011) (per curiam) ("Generally, a party responding to requests for admission must serve a written response on

the parties can agree to extend the time to respond pursuant to an enforceable agreement under Texas Rule 11.[104]

After the time to respond expires, it is too late to petition the court for an extension of time to respond to requests for admission because, as discussed in section V.I. below, the requests are automatically deemed admitted the day after the answers are due.

G. *Assert a Privilege*

Privilege is no longer a proper objection to a request for admission. Texas Rule 193.2(f) provides that "[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."[105] Texas Rule 193.3, in turn, requires a responding party who withholds privileged information to make a withholding statement (1) advising the requesting party that responsive material is being withheld as privileged; (2) identifying the specific privilege(s) asserted; and (3) identifying the individual requests to which the withheld material relates. Nonetheless, a failure to follow the procedure of Texas Rule 199.3 does not waive privilege.[106] A privilege objection is sufficient to preserve the privilege "claim if the 'error' is not pointed out."[107] After the error is

the requesting party within 30 days after service. The response time may be modified by agreement or by the court for good cause.").

104. *See* TEX. R. CIV. P. 191.1 (noting that the parties may modify discovery procedures and limitations by agreement); *Marino*, 355 S.W.3d at 633 ("The response time [for requests for admission] may be modified by agreement or by the court for good cause.").

105. TEX. R. CIV. P. 193.2(f) (emphasis added); *see In re* Graco Children's Prods., Inc., 173 S.W.3d 600, 605 (Tex. App.—Corpus Christi 2005, orig. proceeding) ("[N]o objection needs to be made to preserve a privilege . . . ."); *In re* Christus Health Se. Tex., 167 S.W.3d 596, 600 (Tex. App.—Beaumont 2005, orig. proceeding.) (holding that no objection is required to preserve a privilege); *see also* 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, 572 (2013) (same).

106. TEX. R. CIV. P. 193.3(a); *see* 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, 573 (2013) (discussing the requirements to assert a privilege).

107. *See* TEX. R. CIV. P. 193.3(a) ("The party must state—in the response (or an amended or supplemental request) or in a separate document that information or material responsive to the request has been withheld."); *see also In re* Monsanto, 998 S.W.2d 917, 924 n.5 (Tex. App.—Waco 1999, orig. proceeding) ("[A]n objection is apparently sufficient to preserve the claim of privilege if the "error" is not pointed out."); 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, 573 (2013) (same).

pointed out, however, the responding party must assert privilege in accordance with Rule 193.3 or waive it.[108]

A failure to assert a privilege in response to a request for admission in the first instance should result in the privilege's waiver unless the responding party either establishes that there was good cause for the failure to assert it, as permitted by Texas Rule 193.2(e), or that the objection was either inapplicable or unknown after reasonable inquiry when the response was filed, as permitted by Texas Rule 193.2(d).[109]

Generally, a party must assert its privileges in its withholding statement.[110] If, however, the request for admission specifically inquires about a privileged matter, such as the responding party's trial strategy or attorney-client communications, it is appropriate to state that the request cannot be admitted or denied because to do so would result in the disclosure of privileged information.

108. *See* TEX. R. CIV. P. 193.3(a) (noting that privilege must either be asserted or waived); *Id.* R. 193.3(b) (explaining that if the requesting party desires to pursue information or documents to which a privilege has been claimed, it can "serve a written request that the withholding party identify the information and material withheld," and that the responding party, within fifteen days after receiving the request, must serve a response—commonly called a privilege log—that (1) "asserts a specific privilege for each item or group of items," and (2) describes the information or material in such a way that the requesting party can assess the privilege's applicability "without revealing the privileged information or otherwise waiving the privilege"); *see also In re* Univ. of Tex. Health Ctr. at Tyler, 33 S.W.3d 822, 826 (Tex. 2000) (per curiam) ("A party who objects to production of privileged material or information does not waive the privilege but must comply with Rule 193.3 when the error is pointed out."); *Monsanto*, 998 S.W.2d at 924 n.5 ("[A]n objection is apparently sufficient to preserve the claim of privilege if the 'error' is not pointed out."); 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, 573 n.240 (2013) (providing a guide once the error is pointed out).

109. *See In re* Soto, 270 S.W.3d 732, 733–34 (Tex. App.—Amarillo 2008, orig. proceeding) (holding that the responding parties waived their privilege objection because it was not timely asserted); *In re* Anderson, 163 S.W.3d 136, 142 (Tex. App.—San Antonio 2005, orig. proceeding) ("Because the City failed to assert its privilege in accordance with rule 193.3(a), the trial court erred in denying Anderson's motion to compel . . . ."); *see also* TEX. R. CIV. P. 198.2(b) ("Unless the responding party states an objection or asserts a privilege, the responding party must specifically admit or deny the request or explain in detail the reasons that the responding party cannot admit or deny the request."); *Graco Children's Prods.*, 173 S.W.3d at 605 ("[T]he rules specify that an objection to written discovery based on privilege will not waive a privilege[] as long as the party complies with Rule 193.3(a)."); 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, 573 (2013) (discussing privilege assertions in general).

110. See *supra* section V.G., which discusses privilege assertions in general. *See generally* 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, 572 (2013) (discussing privilege assertions in connection with interrogatories and requests for admission).

H. *Objections*

1. Objections in General

Texas Rule 193.2 sets forth the obligations and procedures for objecting to written discovery requests, such as requests for admission. An objection must be made in writing within the time allowed for the response to the requests for admission[111]—usually thirty days after the service of the discovery request and fifty days if the requests were served before the responding party's answer date.[112] The failure to object timely to a request for admission, no matter how improper, generally waives the objection.[113]

The responding party must have "a good faith factual and legal basis" for each objection to a request for admission "at the time the objection is made."[114] An objection's legal or factual basis must be stated specifically.[115] "Thus, a responding party who objects to a request for

111. *See id.* R. 193.2(a) ("A party must make any objection to written discovery in writing—either in the response or in a separate document—within the time for the response.").

112. *See id.* R. 198.2(a) ("The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a defendant served with a request before the defendant's answer is due need no respond until 50 days after service of the request.").

113. *See id.* R. 193.2(e) ("An objection that is not made within the time required . . . is waived unless the court excuses the waiver for good cause shown."); Hendler v. N. Shore Boat Works, Inc., No. 13-03-00273-CV, 2004 Tex. App. LEXIS 6617, at *4 (Tex. App.—Corpus Christi July 22, 2004, no pet.) (mem. op.) ("Because Hendler failed to object to the form of the requests to the trial court, we conclude he has waived his objection"); *cf.* Inventio AG v. ThyssenKrupp Ams. Corp., No 08-874-RGA, 2013 U.S. Dist. LEXIS 116680, at *7–8 (D. Del. July 29, 2013) (holding that the responding party waived its timeliness objection to requests for admission by not asserting it in the response to the requests); Liafail, Inc. v. Learning 2000, Inc., No. 01-678 G, 2003 U.S. Dist. LEXIS 3545, at *14 (D. Del. Mar. 3, 2003) ("At the time of its response, however, [the responding party] did not object to the request as vague, ambiguous, or calling for a legal conclusion. Accordingly it cannot do so now."). *See generally* 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, 560 (2013) (discussing waivers of objections to interrogatories and production requests).

An objection to a request for admission also may be waived by an answer that purports to answer the objected-to portion of the request fully or by not asserting the objection in response to a motion to test the objection's sufficiency. *See* 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, 560 n.191 (2013) 560 (discussing waivers of objections to interrogatories and production requests).

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

115. *See id.* R. 193.2(a) ("The party must state specifically the legal or factual basis for the objection . . . ."); *In re* Park Cities Bank, 409 S.W.3d 859, 876 (Tex. App.—Tyler 2013, orig. proceeding) ("An objection to written discovery must be in writing and must state specifically the legal or factual basis for the objection."); *see also* Robert K. Wise, *Ending Evasive Responses to Written Discovery: A Guide for Properly Responding (and Objecting) to Interrogatories and Document Requests Under the*

[admission] because is it overbroad, vague, ambiguous, or unreasonably cumulative or duplicative should explain why the discovery request suffers from each asserted deficiency."[116] Moreover, an objection "that is obscured by numerous unfounded objections . . . is waived unless the court excuses the waiver for good cause shown."[117] The obvious purpose of these provisions is to eliminate the practice of interposing numerous hypothetical or prophylactic objections to obfuscate which information is being withheld or provided or to prevent a waiver of objections.[118]

In addition, when interposing an objection, the responding party, under Texas Rule 192.3(e), must state the extent to which it is refusing to comply with the request for admission.[119] The responding party must also comply with the part of the request to which there is no objection.[120] In other words, if a request for admission is objectionable only in part, the responding party must respond to as much of the request as it deems proper.[121] That is, the responding party should "blue-pencil" or rewrite the request so that is not objectionable.

Although the purpose of Texas Rule 193.2(e) is to allow discovery to

Texas Discovery Rules, 65 BAYLOR L. REV. 510, 562 (2013) (same); *cf.* Hager v. Graham, 267 F.R.D. 486, 498 (N.D. W. Va. 2010) ("Defendant's objection that the Request is vague, ambiguous, and overly broad is a general objection . . . . The objection is only a general statement that does not specify how the Request is vague, ambiguous, and overly broad. Therefore, the objection is improper."); Carnes v. Crete Carrier Corp., 244 F.R.D. 694, 698 (N.D. Ga. 2007) ("Merely stating that a discovery request is vague or ambiguous, without specifically stating how it is so, is not a legitimate objection to discovery.").

116. *Park Cities Bank*, 409 S.W.3d at 876; *see* 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, 562 (2013) (discussing waivers of objections to interrogatories and production requests).

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

118. *See Park Cities Bank*, 409 S.W.3d at 877 ("As a result, Rule 193 requires a good faith legal and factual basis at the time the objection is made. Additionally, an objection that is obscured by numerous unfounded objections is waived unless the court excuses the waiver for good cause shown. These two provisions eliminate the perceived need for, and the practice of making, prophylactic objections to prevent a waiver of discovery objections."); 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, 562 (2013) (discussing proper and improper objections to interrogatories and production requests).

119. *See* TEX. R. CIV. P. 193.2(a) ("The party must state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request.").

120. *See id.* R. 193.2(b) ("A party must 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.").

121. *See id.* R. 193.2, cmt. 2 ("A party who objects to a production of documents from a remote time period should produce documents from a more recent period unless that production would be burdensome and duplicative should the objection be overruled.").

proceed despite objections, it does not prohibit a responding party from objecting to a request for admission in its entirety. To the contrary, as Comment 2 to Texas Rule 193 suggests, a request for admission may be wholly objectionable.[122] Either the requesting or responding party can request a hearing on a discovery objection or privilege assertion.[123] "If neither party requests a hearing, the requesting party waives the objected-to discovery."[124] Thus, the requesting party has the burden of securing a hearing to resolve any disputes regarding any objections or privilege assertions.[125]

The responding party generally has the burden of proving the applicability of an objection or a privilege.[126] And, it must present any

122. *See id.* ("But a party may object to a request for 'all documents relevant to the lawsuit' as overly broad and not in compliance with the rule requiring specific requests for documents and refuse to comply with it entirely. A party may also object to a request for a litigation file on the ground that it is overly broad and seeks only materials protected by privilege.").

123. *See id.* R. 193.4(a) ("Any party may at any reasonable time request a hearing on an objection or claim of privilege asserted under [Texas Rule 193.4]."); *In re* Born, 2002 Tex. App. LEXIS 3279, at *6 (Tex. App.—Houston [1st Dist.] Jun. 16, 2011, orig. proceeding) (not designated for publication) ("[Texas] Rule 193.4(a) authorizes either the requesting or objecting party to request a hearing on objections to discovery."); *In re* AEP Tex. Cent. Co., 128 S.W.3d 687, 690 (Tex. App.—San Antonio 2003, no pet.) ("[Texas] Rule 193.4(a) authorizes either the requesting or objecting party to request a hearing on objections to discovery.").

124. 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, 563–64 (2013); *see* TEX. R. CIV. P. 193.4(b) ("A party need not request a ruling on that party's own objection or assertion of privilege to preserve the objection or privilege."); Balay v. Gamble, 2011 Tex. App. LEXIS 4576, at *19 (Tex. App.—Houston [1st Dist.] June, 16 2011, no pet.) (mem. op.) (holding that the party waived its objection to discovery by not obtaining a hearing on it); *In re* Kinefik, No. 14-08-00203-CV, 2008 Tex. App. LEXIS 6302, at *14 (Tex. App.—Houston [14th Dist.] Aug. 19, 2008, orig. proceeding) (mem. op.) (holding that the party did not waive its "discovery requests by failing to request a hearing"); Roberts v. Whitfill, 191 S.W.3d 348, 361 n.3 (Tex. App.—Waco 2006, no pet.) ("If neither party asks for a hearing [on the objections] the party who sent the request for discovery waives the requested discovery.").

125. *See* Klein & Assocs. Political Relations v. Port Arthur Indep. Sch. Dist., 92 S.W.3d 889, 894 (Tex. App.—Beaumont 2002, pet. denied) ("The Texas Supreme Court has explained that 'because the party requesting discovery is in the best position to evaluate its need for information . . . the orderly administration of justice will be better served by placing responsibility for obtaining a hearing on discovery matters on the party requesting discovery.'" (quoting McKinney v. Nat'l Union Fire Ins. Co., 772 S.W.2d 72, 75 (Tex. 1989))); Trahan v. Lone Star Title Co. of El Paso Inc., 247 S.W.3d 269, 282–83 (Tex. App.—El Paso 2007, pet. denied) ("To the contrary, the case law indicates that as a general rule, only failure to obtain a pretrial ruling on discovery disputes constitutes a waiver of a claim for sanctions based on that conduct.").

126. *See* State v. Lowry, 802 S.W.2d 669, 671 (Tex. 1991) ("The burden is on the party seeking to avoid discovery to plead the basis for exemption or immunity and to produce evidence supporting that claim."); *In re* Univar USA, Inc., 311 S.W.3d 175, 180 (Tex. App.—Beaumont 2010, orig. proceeding) ("[T]he general rule is that a party resisting discovery has the burden to plead and prove the basis for its objections."); *In re* Rogers, 200 S.W.3d 318, 321–22 (Tex. App.—Dallas 2006, orig.

evidence necessary to support the objection or privilege.[127] "The evidence may be testimony presented at the hearing or affidavits served at least seven days before the hearing or at such other reasonable time as the court permits."[128]

"To the extent the court sustains the objection or claim of privilege, the responding party has no further duty to respond to [the request for admission]."[129] If, however, the objection or privilege claim is overruled, within thirty days the responding party must admit, deny, or state that, after reasonable inquiry, the information known or easily obtainable is insufficient to enable an admission or denial.[130]

proceeding) ("In the trial court, the party resisting discovery bears the burden of proving the request lies outside the guidelines described by the rules and the supreme court."); *AEP Tex. Cent.*, 128 S.W.3d at 690 ("If a hearing is held, the party who has objected or asserted a privilege must present any evidence necessary to support the objection or privilege.").

127. *See In re* Waste Mgmt. of Tex., Inc., 2011 Tex. App. LEXIS 7192, at *14 n.5 (Tex. App.—Corpus Christi Aug. 31, 2011, orig. proceeding) (mem. op.) ("[T]his court and others have placed the burden regarding relevance, or lack thereof, on the party seeking to avoid discovery."); *In re* Exmark Mfg. Co., 299 S.W.3d 519, 524 (Tex. App.—Corpus Christi 2009, orig. proceeding) ("The party objecting to discovery must present any evidence necessary to support its objections. Evidence is not always required to support an objection or claim of privilege. For example, when a request is overbroad as a matter of law, evidence is unnecessary to decide the matter. Accordingly, there are circumstances where a discovery order may be so overbroad that an objection to the overbreadth is self-evident from the order itself when considered in light of the issues raised in the pleadings. However, this is not always the case and is not the case in the matter now before us. When it is not self-evident that the discovery order is overly broad, the party resisting discovery bears the burden of offering evidence to provide its objections . . . . This burden has been applied to objections that discovery requests are overbroad or unduly burdensome." (citations omitted)); *In re* GE Railcar Servs. Corp., 2004 Tex. App. LEXIS 630, at *6 (Tex. App.—Beaumont Dec. 1, 2003, orig. proceeding) (mem. op.) ("If, in responding to the discovery request, it becomes apparent that the discovery is unduly burdensome, the party responding should present information concerning the burden to the trial court."); *In re* John Crane, Inc., 2003 Tex. App. LEXIS 9684, at *5 (Tex. App.—Houston [1st Dist.] Nov. 13, 2003, orig. proceeding) (mem. op.) ("A party resisting discovery, however, cannot simply make conclusory allegations that the requested discovery is unduly burdensome or unnecessarily harassing. The party must produce some evidence support its request for a protective order."); Tjernagil v. Roberts, 928 S.W.2d 297, 302 (Tex. App.—Amarillo 1994, orig. proceeding) ("[A] party who seeks to exclude matters from discovery on the ground the request is unduly burdensome or overly broad has the burden to plead and prove the work necessary to comply with the discovery."); Valley Forge Ins. Co. v. Jones, 733 S.W.2d 319, 321 (Tex. App.—Texarkana 1987, no writ) (holding that, as a general rule, the burden of pleading and proving the requested evidence is not relevant falls upon the party seeking to prevent discovery).

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

129. *Id.* R. 193.4(b).

130. *See id.* R. 215.4(a) ("Unless the court determines that an objection is justified, it shall order that an answer be served.").

2. Proper and Improper Objections to Requests for Admission

a. "General" and "Subject-to" Objections

Practitioners generally use one of two evasive methods in responding to requests for admissions and other written discovery:[131]

> The first is to have a section at the beginning of the responses entitled "general objections," which contains every imaginable objection, such as overbreadth, undue burden, relevance, vagueness, ambiguity, harassment, cumulativeness, duplicativeness, and privilege,[132] followed by a separate section with . . . [responses to the requests for admission] that incorporate the "general objections" by reference "to the extent" they apply to the pertinent request.[133]

"The second method is to set forth in the response to each" request for admission "a litany of prophylactic, boilerplate objections, such as those set forth above, and then 'subject to and without waiving' the objections," admit or deny the request, or even worse state that after reasonable

131. 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, 567 (2013) (discussing "general" and "subject-to" objections to interrogatories and production requests). "General" and "subject-to" objections are most commonly used in responses to interrogatories and production requests.

132. *Id.* at 567–68 n.223. The objections in the "General Objection" section typically read as follows:

> General Objections
>
> 1. [Responding party] objects to each . . . request for admission *to the extent* that it is overly broad."
> 2. [Responding party] objects to each . . . request for admission *to the extent* that it is unduly burdensome.
> 3. [Responding party] objects to each . . . request for admission *to the extent* that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.
> 4. [Responding party] objects to each . . . request for admission *to the extent* it is vague and ambiguous.
> 5. [Responding party] objects to each . . . request for admission *to the extent* it is harassing, cumulative, or duplicative.
> 6. [Responding party] objects to each . . . request for admission *to the extent* it seeks information within the attorney-client, work-product, or other privilege.

Id.

133. For example, the response to each request for admission may be: "[Responding party] incorporates each General Objection *to the extent* it applies. Subject to and without waiving the general objections, [denied]." *Id.* at 568 n.223–24. Worse, the discovery response, after incorporating the general objections by reference, may contain specific objections, many of which repeat one or more of the general objections. *Id.* at 567–68 n.223.

inquiry, the information known or easily obtainable is insufficient to enable admission or denial.[134]

Both methods "violate Texas Rule 192.3(c) because they are hypothetical, and hypothetical objections are impermissible under the Rule, which limits objections to those for which 'a good faith factual and legal basis exists . . . *at the time* the objection is made.'"[135]

> "[G]eneral" and "subject-to" objections [also] violate Texas Rule [of Civil Procedure] 193.2(a), which requires the responding party to "state . . . the extent to which the party is refusing to comply with the request" and to "state specifically the legal and factual basis for the objection," because [such] objections are nonspecific and "hide the ball" with respect to what information or material is being provided and what information or material is being withheld and why.[136]

Third, such objections violate the requirement of Texas Rule of Civil Procedure 191.3(c) that "[t]he signature of an attorney or a party on a" response to written discovery:

> constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, notice, response, or objection:
>
> (1) is consistent with the rules of civil procedure and these discovery rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
>
> (2) has a good faith factual basis;
>
> (3) is not interposed for any improper purpose . . . .[137]

Hence, general and subject-to objections like those addressed above are improper:

134. An example of this type of response is: "Objection, this . . . request for admission is vague, ambiguous, overly broad, unduly burdensome, harassing, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. *Subject to and without waiving* these objections, [denied]." *Id.* at 568 n.225.

135. *Id.* at 568 (quoting TEX. R. CIV. P. 193.2(c)) (emphasis added); *see In re* Park Cities Bank, 409 S.W.3d 859, 876 (Tex. App.—Tyler Aug. 15, 2013, orig. proceeding) (explaining that "general" objections are improper under Texas Rule 193.2).

136. 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, 568–69 (2013) (citing TEX. R. CIV. P. 193.2(a)).

137. *See id.* at 570–71 (quoting TEX. R. CIV. P. 191.3(c)) (discussing "general" and "subject-to" objections to interrogatories and production requests); *cf.* High Point SARL v. Sprint Nextel Corp., No. 09-2269-CM-DJW, 2011 U.S. Dist. LEXIS 103118, at *34 (D. Kan. Sept. 12, 2011) (sanctioning the responding party for interposing "general objections" because they violate Federal Rule 26(g)).

> [T]rial courts should strike them, ruling that each general or subject-to objection has been waived.[138] On the other hand, a general objection stated in a clear and discernible manner—[such as an objection to a term used in all or many of the requests]—may be acceptable because repeating the objection in multiple responses is pointless[,] and there is no uncertainty regarding what information . . . is being withheld and why.[139]

b. Privilege

As discussed in section V.G. above, privilege is generally no longer a proper objection to requests for admission. Nonetheless, if the request specifically seeks privileged information, it is appropriate to state that the request cannot be admitted or denied because to do so would result in the disclosure of privileged information. For example, if a request asks a party to admit that a certain document will or will not be offered as evidence, it

138. *See Park Cities Bank*, 409 S.W.3d at 878 ("Relators contend that their objections are not waived because they filed general objections and reserved the right to assert specific objections if the trial court denied their motion for protective order and required them to respond to Anderton's RFPs. However, prophylactic [general] objections are now prohibited by the rules of procedure"); 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, 567–72 (2013) (concluding that general and subject-to objections violate Texas Rules of Procedure 193.2(a) and (e), among others, and that trial courts should strike then, ruling that each such objection has been waived); *cf. In re* K-Dur Antitrust Litig., No. 01-1652 (JAG), 2007 U.S. Dist. LEXIS 96066, at *88–89 (D.N.J. Jan. 2, 2007) ("In addition, Schering's reliance on generalized objections is misplaced. Indeed, Schering's responses to a number of the Requests begin with the statement that 'Schering objects to this request for the reasons set forth in its General Objections . . . .' In the context of responding to requests for admission, 'General Objections' are completely improper, wholly inconsistent with the intent of [Federal] Rule 36 and are without merit. Thus, Schering's use of, or reliance upon 'general objections' is improper and will not be given any consideration. As a consequence, such objections must be removed from any amended answers that Schering serves upon Plaintiffs." (citations omitted)); Fisher v. Balt. Life Ins. Co., 235 F.R.D. 617, 630 (N.D. W. Va. 2006) ("General objections to requests for admission are prohibited."); Interland, Inc. v. Bunting, No. 1:04-CV-444-ODE, 2005 U.S. Dist. LEXIS 36112, at *29 (N.D. Ga. Mar. 31, 2005) ("Defendant prefaced its supplemental responses with five general objections. [Federal] Rule 36 is clear that objections to requests should be addressed to the specific matter. This 'global general tactic' is improper and the court will ignore the objections unless they specifically asserted in a response to a request."); Henry v. Champlain Enters., Inc., 212 F.R.D. 73, 78 (N.D.N.Y. 2003) ("General objections without any reference to a specific request [for admission] are meritless.").

139. *Cf.* Berlinger v. Wells Fargo, N.A., No. 2:11-cv-459-FtM-99SPC, 2012 U.S. Dist. LEXIS 26650, at *3 (M.D. Fla. Feb. 28, 2012) ("General or blanket objections should be used only when they apply to every discovery request at issue. Otherwise, 'specific objections should be matched to specific' interrogatories or requests for production." (quoting Desoto Health & Rehab, LLC v. Philadelphia Indem. Ins. Co., No. 2:09-cv-599-FtM-99SPC, 2010 U.S. Dist. LEXIS 61503 (M.D. Fla. June 10, 2010)).

is appropriate to state that the request cannot be admitted or denied because it seeks protected work product.[140]

The Fifth Amendment privilege against self-incrimination ordinarily is available in civil litigation due to the fear that information elicited in a civil proceeding can be used in a criminal prosecution.[141] However, because Texas Rule 198.3 expressly provides that an admission may not be used in another proceeding, a question exists regarding whether the Fifth Amendment privilege applies to requests for admission. Although no Texas case has directly considered the issue,[142] the privilege should apply to requests for admission because the rule neither provides immunity from criminal prosecution nor provides the responding party with adequate protection if a criminal proceeding involving the same facts is pending or

140. *See, e.g.*, United States v. One Tract of Real Property, 95 F.3d 422, 428 n.10 (6th Cir. 1996) ("Although courts most commonly apply the work-product privilege to documents and things, the Supreme Court in *Hickman* [*v. Taylor,* 329 U.S. 495 (1947)] made clear that disclosure of the opinions or mental processes of counsel may occur when nontangible work product is sought through depositions, interrogatories, and requests for admission[]."); *cf.* Howell v. Maytag, 168 F.R.D. 502, 504 (M.D. Pa. 1996) (ruling that the defendant's requests for admission seeking to uncover plaintiff's trial plan violated the work-product privilege).

141. *E.g.*, Tex. Dep't of Pub. Safety Officers Ass'n v. Denton, 897 S.W.2d 757, 760 (Tex. 1995) ("Denton had the right to assert his Fifth Amendment privilege to avoid civil discovery if he reasonably feared the answers would tend to incriminate him."); *see In re* Lowe, 151 S.W.3d 739, 745 (Tex. App.—Beaumont 2004, pet. denied) (same).

142. A few Texas cases, however, can be read as suggesting the privilege does not apply to requests for admission. *See, e.g.*, *In re* Ferguson, No. 01-12-00607-CV, 2013 Tex. App. LEXIS 2421, at *14 (Tex. App.—Houston [1st Dist.] Mar. 12, 2013, orig. proceeding) (mem. op.) (discussing cases and holding that "[f]rom the record before us, it cannot be determined whether Ferguson established to the trial court how her answers may tend to incriminate her in the criminal proceedings despite the provision in rule 198.3 that her answers could 'not be used against [her] in any other proceeding'"); *In re* Speer, 965 S.W.2d 41, 46 (Tex. App.—Fort Worth 1998, orig. proceeding) (dictum); Katin v. City of Lubbock, 655 S.W.2d 360, 363 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.) (rejecting privilege because the action was a civil injunctive one seeking only civil, and not criminal, penalties). Federal courts and most other state courts, however, hold that the privilege applies to requests for admission. *See generally* Davis-Lynch, Inc. v. Moreno, 667 F.3d 539, 547 (5th Cir. 2012) ("[A] party may invoke the Fifth Amendment privilege during the discovery process to avoid answering questions at a deposition, responding to interrogatories or requests for admission[], or to produce documents."); Gordon v. Fed. Deposit Ins. Corp., 427 F.2d 578, 581 (D.C. Cir. 1970) (recognizing that the privilege applied because admissions could be used by a criminal prosecutor "as a confirmation that facilitates preparation of the criminal case, or perhaps as a lead to other evidence, which is part of the protection of the constitutional privilege"); Helena Chem. Co. v. Skinner, No. 4:11CV00691 SWW, 2012 U.S. Dist. LEXIS 125736, at *5 (E.D. Ark. Sept. 5, 2012) (upholding a Fifth Amendment objection to requests for admission); First Fed. Savs. & Loan Ass'n v. Schamanek, 684 P.2d 1257, 1262 (Utah 1984) ("Full and complete protection of that right can be afforded only if a party may decline to answer by interposing an objection to requests for admission[]."); State v. Ott, 808 P.2d 305, 311 (Ariz. Ct. App. 1990) ("[T]he better rule is that a civil litigant may invoke the privilege against self-incrimination to justify his refusal to respond to requests for admission.").

possible.[143] For example, an admission can be used by a "criminal prosecutor as a confirmation that facilitates preparation of the criminal case, [and] also as a lead to other evidence, which is part of the protection of the constitutional privilege."[144]

No compelling reason, however, exists for treating a timely, properly asserted Fifth Amendment privilege to a request for admission any differently than a response to a question on examination or an interrogatory would be treated. That is, the requesting party can have the requests read into evidence, followed immediately by the responding party's Fifth Amendment objection, followed then by an explanation of the adverse legal inference that can be drawn from that objection.[145]

c. Scope Objections: Relevance and Not "[R]easonably [C]alculated to [L]ead to the [D]iscovery of [A]dmissible [E]vidence"[146]

The purpose of discovery is to allow the parties to obtain full knowledge of the issues and facts before trial, the goal being "to seek the truth so that disputes are decided by what the facts reveal, not by what is concealed."[147] Although the scope of discovery is largely in the trial

143. *See* Fed. Deposit. Ins. Corp. v. Logsdon, 18 F.R.D. 57, 58 (W.D. Ky. 1955) ("Neither [Federal] Rule [36] nor any other statute, however, guarantees this defendant absolute immunity from federal criminal prosecution. Consequently to require the defendant in this case to give self-incriminating testimony would be a violation of his constitutional rights."); *Schamanek*, 684 P.2d at 1262 ("In our view, the interests that the privilege against self-incrimination were designed to safeguard cannot be adequately protected by compelling a person to trade that right for the attenuated protection of [Utah] Rule 36(b).").

144. *Gordon*, 427 F.2d at 581; *accord Ott*, 808 P.2d at 311 ("Significantly, the rule does not address the use of the fruits of the admission or protect against an admission that may furnish one tiny link in the chain of evidence establishing criminal liability. Because [Arizona R]ule 36 does not protect against derivative use of information obtained through admissions, its protection is not coextensive with the scope of the privilege against self-incrimination.").

145. *See* Wilson v. Misko, 508 N.W.2d 238, 253 (Neb. 1993) ("[T]he appellant objected to answering by relying on his constitutional privilege against self-incrimination and that the jury could, but need not, draw an adverse inference from the appellant's assertion of the privilege"); Kramer v. Levitt, 558 A.2d 760, 766–67 (Md. Ct. Spec. App. 1989) ("[A]ppellant objected to answering these requests relying on his constitutional privilege against self incrimination and that they may, but need not, draw an adverse inference from appellant's assertion of his privilege that his answers to the requests would have been adverse to his interests.").

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

147. *In re* Colonial Pipeline Co., 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding) (quoting Jampole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984)); *accord* Able Supply Co. v. Moye, 898 S.W.2d 766, 773 (Tex. 1995) (orig. proceeding) (holding that parties are "entitled to full, fair discovery" and to have their cases decided on the merits); State v. Lowry, 802 S.W.2d 669, 671 (Tex. 1991) ("Affording parties full discovery promotes the fair resolution of disputes by the judiciary. This court has vigorously sought to ensure that lawsuits are 'decided by what the facts reveal, not by what

court's discretion,[148] that discretion is limited by Texas Rule 192.3(a), which provides:

> In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[149]

The general provision of Texas Rule 192.3(a) relating to the scope of discovery is virtually identical to that in former Texas Rule 166b.2.a, which, in turn, was modeled on former Federal Rule 26. The key phrase in the definition—"relevant to the subject matter involved in the pending action"—has been construed broadly. For example, the United States Supreme Court has interpreted it:

> "[T]o encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. Consistently with the notice-pleading system established by the [Federal] Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. Nor is discovery limited to the merits of the case, for a variety of fact-oriented issues may arise during the litigation that are not related to the merits."[150]

Texas courts have similarly interpreted the crucial phrase.[151] As such,

---

facts are concealed.' Discovery is thus the linchpin of the search for truth, as it makes 'a trial less of a game of blind man's bluff and more a fair contest with the issues and facts disclosed to the fullest practicable extent.'" (quoting *Jampole*, 673 S.W.2d at 573; United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958))).

148. *See In re* CSX Corp., 124 S.W.3d 149, 152 (Tex. 2003) (orig. proceeding) ("Generally, the scope of discovery is within the trial court's discretion."); *Colonial Pipeline*, 968 S.W.2d at 941 (describing the scope of discovery); *In re* Harris, 315 S.W.3d 685, 696 (Tex. App.—Houston [1st Dist.] 2010, orig. proceeding) ("Determinations regarding the scope of discovery are largely within the trial court's discretion."); *In re* Rogers, 200 S.W.3d 318, 321 (Tex. App.—Dallas 2006, orig. proceeding) (noting the typical scope of discovery).

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

150. 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, 574–75 (2013) (quoting Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978)).

151. *See CSX Corp.*, 124 S.W.3d at 152 ("Our procedural rules define the general scope of discovery as any unprivileged information that is relevant to the subject of the action, even if it would be inadmissible at trial, as long as the information sought is 'reasonably calculated to lead to the discovery of admissible evidence.'" (quoting TEX. R. CIV. P. 192.3(a))); Eli Lilly & Co. v. Marshall, 850 S.W.2d 155, 160 (Tex. 1993) ("To effectuate the truth-finding function of the legal system, discovery is not limited to what may be admissible at trial, but includes any information

the reach of discovery extends to any matter that has a bearing on any issue in the action, or that reasonably could lead to other peripheral issues. It appears, however, that, under the Texas rules, discovery is limited to the issues identified in the pleadings and cannot be used to develop new causes of action.[152]

To a large extent, what is discoverable is set forth in Texas Rule 192.3, which first defines the scope of discovery generally and then sets forth specific matters that are within its scope: (1) "the existence, description, nature, custody, condition, location and contents of documents and tangible things"; (2) "the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection to the case"; (3) "the name, address, and telephone number of any person who is expected to testify at trial" other than "rebuttal or impeaching witnesses . . . whose testimony cannot be reasonably anticipated . . ."; (4) information regarding testifying experts and consulting experts whose mental impressions and opinions have been reviewed by a testifying expert; (5) "the existence and contents of any indemnity or insurance agreements 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"; (6) "relevant portions of a settlement agreement[;]" (7) "witness statement"; (8) "the name, address, and telephone number of any potential party"; and (9) "any other party's legal contentions and the factual bases for those contentions."[153]

If a request for admission seeks material that is neither relevant to the action's subject matter nor "reasonably calculated to lead to the discovery

relevant to the pending subject matter that is reasonably calculated to lead to the discovery of admissible evidence.").

152. *E.g.*, Dillard Dep't Stores, Inc. v. Hall, 909 S.W.2d 491, 492 (Tex. 1995) (orig. proceeding) (per curiam) (holding that, in an action involving an alleged false arrest, discovery geared "to explor[ing] whether [the plaintiff] can in good faith allege racial discrimination" was an improper fishing expedition); *see In re* Sears Roebuck & Co., 123 S.W.3d 573, 578 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (defining an improper "fishing expedition" as "one aimed not as supporting existing claims but finding new ones"); *In re* Am. Home Assurance Co., 88 S.W.3d 370, 376 (Tex. App.—Texarkana 2002, orig. proceeding) ("[D]iscovery undertaken with the purpose of finding an issue, rather than in support of an issue already raised by the pleadings, would constitute an impermissible fishing expedition.").

153. TEX. R. CIV. P. 192.3(b)–(j) (noting that many of the items are subject to disclosure under Texas Rule 192).

of admissible evidence,"[154] a responding party can properly object to it on those grounds.[155]

d. Overbreadth

Overbreadth is a proper objection to a request for admission.[156] A request for admission suffers from this malady when it encompasses time periods, activities, locations, or products that are not relevant to the action's subject matter. It also suffers from this malady when it seeks sweeping admissions regarding liability or damages that are not tied to any facts. For example, a request asking a plaintiff "to admit that [it] no longer wish[es] to pursue [its] cause of action . . . [,]"[157] admit "that [it] ha[s] not been injured in any manner as a result of the alleged acts of [the defendant] as set forth in . . . Plaintiff's Original Petition[,]"[158] "[a]dmit or deny that each allegation made in the Amended Original Petition filed in this case is true[,]"[159] "admit that you were negligent and thereby caused the Plaintiff damages, as alleged in his live pleading[,]"[160] or admit "[a]s a proximate result of your breaching the contract made the basis of this suit, the Plaintiffs have suffered consequential damages in an amount not less than ten million dollars"[161] are so sweeping and nonspecific that they are overbroad.[162] A central consideration in determining overbreadth is whether the request "could have been more narrowly tailored."[163]

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

155. *See In re* Young, 410 S.W.3d 542, 551 (Tex. App.—Beaumont 2013, no pet.) (affirming the trial court's ruling that requests for admission were improper because they did not seek admissions regarding relevant matters); *cf.* Bridgewater v. Sweeny, No. 2:11-cv-1216-CMK-P, 2012 U.S. Dist. LEXIS 157188, at *7–10 (E.D. Cal. Nov. 1, 2012) (sustaining relevance objections to requests for admission); Jacobs v. Sullivan, No. 1:05-cv-01625-LJO-GSA-PC, 2012 U.S. Dist. LEXIS 102161, at *45 (E.D. Cal. July 20, 2012) (same); McCormick v. Allmond, 773 N.W.2d 409, 414–15 (Neb. Ct. App. 2009) (same).

156. *See* Illes v. Beavan, No. 1:12-CV-0395, 2013 U.S. Dist. LEXIS 20826, at *11 (M.D. Pa. Feb. 11, 2013) (sustaining an overbreadth objection to a request for admission); *see also* Hageman v. Accenture, LLP, No. 10-1759(RHR/TNL), 2012 U.S. Dist. LEXIS 6192, at *4–5 (D. Minn. Jan. 18, 2012) (same).

157. Powell v. City of McKinney, 711 S.W.2d 69, 70 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

158. *In re* Estate of Herring, 970 S.W.2d 583, 589 (Tex. App.—Corpus Christi 1998, no pet.).

159. Birdo v. Hammers, 842 S.W.2d 700, 701 (Tex. App.—Tyler 1992, writ denied).

160. LRT Record Servs., Inc. v. Archer, No. 05-00-00324-CV, 2001 Tex. App. LEXIS 1447, at *2 (Tex. App.—Dallas Mar. 7, 2001, no pet.) (not designated for publication).

161. Lucas v. Clark, 347 S.W.3d 800, 802 (Tex. App.—Austin 2011, pet. denied).

162. *See id.* at 804 ("[O]verly broad, merits-preclusive requests for admission[] are improper and may not result in deemed admissions."); *Archer*, 2001 Tex. App. LEXIS 1447, at *2–3 (noting that broad requests for documents can preclude summary judgment); *Herring*, 970 S.W.2d at 589 (explaining that broad requests will likely be denied); *Birdo*, 842 S.W.2d at 701 ("Litigants should not be allowed to use the rule as a tool to trap their opposition, especially when, as here, the party has

e. Undue Burden or Expense

An undue burden or expense objection to a request for admission is generally improper,[164] because (1) a proper request for admission should relate to a single, discrete matter,[165] and (2) the responding party is only required to make a "reasonable inquiry" into "information known or easily obtainable."[166] Thus, rather than posing such an objection, the responding party, if an answer to the request really would impose an undue burden or expense, can answer that the information known or easily obtainable is insufficient to enable the responding party to admit or deny the request.[167] If, however, responding to a *set* of requests for admission would be unduly burdensome or expensive because, for example, it contains an excessive number of requests or is unreasonably cumulative or duplicative of other discovery, the responding party should move for protection under Texas Rule 192.6.

f. Vagueness and Ambiguity

An objection to a request for admission as vague or ambiguous is proper.[168] To properly object to a request in its entirety as vague or

repeatedly denied the plaintiff's broad allegations in pleading and other discovery requests."); *Powell*, 711 S.W.2d at 71 (holding "that this kind of sweepingly broad request for an admission is improper").

163. *See In re* Allstate Cnty. Mut. Ins. Co., 227 S.W.3d 667, 669 (Tex. 2007) (orig. proceeding) (per curiam) ("[T]he plaintiffs' requests here are overbroad as to time, location, and scope, and could easily have been more narrowly tailored to the dispute at hand."); *In re* CSX Corp., 124 S.W.3d 149, 153 (Tex. 2003) (orig. proceeding) (per curiam) (explaining the importance of narrowly tailoring a discovery request); *In re* Am. Optical Corp., 988 S.W.2d 711, 713 (Tex. 1998) (orig. proceeding) (per curiam) ("[R]equests must be reasonably tailored to include only matters relevant to the case."); *see also In re* Waste Mgmt. of Tex., Inc., No. 13-11-00197-CV, 2011 Tex. App. LEXIS 7192, at *23 (Tex. App.—Corpus Christi Aug. 31, 2011, orig. proceeding) (mem. op.) ("A central consideration in determining overbreadth is whether the request could have been more narrowly tailored to avoid including tenuous information and still obtain necessary, pertinent information.").

164. *See* Interland, Inc. v. Bunting, No. 1:04-CV-444-ODE, 2005 U.S. Dist. LEXIS 36112, at *28 (N.D. Ga. Mar. 31, 2005) ("Objections that claim the requests are burdensome . . . are not proper"); Henry v. Champlain Enters., Inc., 212 F.R.D. 73, 78 n.2 (N.D.N.Y. 2003) (holding that burdensome objections to requests for admission are improper); *see also* Diederich v. Dep't of Army, 132 F.R.D. 614, 617 (S.D.N.Y. 1990) (same).

165. *See* TEX. R. CIV. P. 198.1 ("Each matter for which an admission is requested must be stated separately").

166. *Id.* R. 198.2(b).

167. *See* FED. R. CIV. P. 36(a)(4) ("The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.").

168. *Cf.* Bowers v. Mortg. Elec. Registration Sys., No. 10-4141-JTM-DJW, 2012 U.S. Dist. LEXIS 93864, at *9 (D. Kan. July 9, 2012) ("Here, the Court agrees with Defendant MERS that the

ambiguous, the responding party should explain why it is vague or ambiguous.[169] Not only should the responding party identify the words or phrases in the request that are vague or ambiguous, but it should also explain why they are vague or ambiguous. That is, why they are reasonably susceptible to more than one meaning and why the responding party cannot use the ordinary meaning of the word or phrase in responding to the request.

The mere fact that a word or phrase in a request for admission is undefined or unclear does not necessarily make the entire request objectionable. Rather, the responding party should use common sense when interpreting words and phrases used in the request by: (1) giving the word or phrase its ordinary meaning, (2) giving the word or phrase its specialized meaning used in the industry at issue, (3) defining the word or phrase as the opposing party has defined or used it in its pleadings or discovery responses, or (4) providing its own definition of the term or phrase.[170]

Request's use of the vague and ambiguous phrase 'fix problems' makes the request too speculative to be admitted or denied."); Erie Ins. Prop. & Cas. Co. v. Johnson, 272 F.R.D. 177, 185 (S.D. W. Va. 2010) (ruling that the word "insurer" was ambiguous); Vlasich v. Fishback, No. 1:05-cv-01615-LJO-GSA-PC, 2009 U.S. Dist. LEXIS 43098, at *11, 14–15 (E.D. Cal. May 11, 2009) (sustaining two out of three of the defendant's vagueness and ambiguity objections); Cunningham v. Standard Fire Ins. Co., No. 07-cv-02538, 2008 U.S. Dist. LEXIS 52518, at *6–7 (D. Colo. May 29, 2008) (sustaining vagueness and ambiguity objections to requests for admission).

169. *Cf. In re* K-Dur Antitrust Litig., No. 01-1652 (JAG), 2007 U.S. Dist. LEXIS 96066, at *104–05 (D.N.J. Jan. 2, 2007) ("Objections based on the vagueness or ambiguity of a particular Request are legitimate. . . . An objection that does not quantify the nature of the vagueness or ambiguity is worthless. . . . With respect to Request Nos. 54 and 119, it is not clear what about the respective Requests is 'vague' or 'ambiguous' and Schering makes no attempt to articulate the same. Absent this specificity, this objection, as stated, is improper." (citations omitted)); Caruso v. Coleman Co., No. 93-CV-6733, 1995 U.S. Dist. LEXIS 7934, at *10 (E.D. Pa. June 7, 1995) ("Answers that appear to be nonspecific, evasive [and] ambiguous . . . are impermissible and must be amended.").

170. *See* Ice Corp. v. Hamilton Sundstrand Inc., No. 05-4135-JAR, 2007 U.S. Dist. LEXIS 32078, at *12 (D. Kan. Apr. 30, 2007) (overruling vague and ambiguous objections to a requests for admission because the responding party could easily have used reason and common sense to interpret the phrases used in the requests); *see also* Johnson v. Mission Support, No. 2:08-CV-0877-DN-EJF, 2013 U.S. Dist. LEXIS 11314, at *18 (D. Utah Jan. 28, 2013) ("The phrases 'policies and procedures' and 'the contract' are not so ambiguous, at this late stage in the litigation, so as to prevent a response. Federal Rule of Civil Procedure 36 requires the responding party to admit, qualify, or deny as necessary to provide a fair response to the substance of the request. Mission Support can qualify its response by providing its own definitions of 'policies and procedures' and 'contract' and respond as completely as it can."); United States *ex. rel.* Englund v. L.A. Cnty., 235 F.R.D. 675, 685 (E.D. Cal. 2006) ("It is not ground for objection that the request is 'ambiguous' unless so ambiguous that the responding party cannot, in good faith, frame an intelligent reply. Parties should 'admit to the fullest extent possible, and explain in detail why other portions of a request may not be admitted.' Failure to do so may result in sanctions." (quoting Marchand v. Mercy Med. Ctr., 22 F.3d 933, 938 (9th Cir. 1994))); A. Farber & Partners, Inc. v. Garber, 237 F.R.D. 250,

g. Unreasonably Cumulative or Duplicative

An objection that a request for admission is unreasonably duplicative or cumulative of another request or other discovery, such as a disclosure, an interrogatory answer, or deposition testimony, is proper.[171] To establish that a request for admission is unreasonably cumulative or duplicative, the responding party should specifically identify the other discovery to which the objected-to request is unreasonably cumulative or duplicative of and explain why it is so.[172]

h. Expert Opinion

An objection to a request for admission that improperly seeks "expert opinion" is proper only if the request specifically seeks an admission regarding the identity of the responding party's testifying experts, the

255 n.4 (C.D. Cal. 2006) ("At oral argument, plaintiff noted defendant . . . had set forth his own definition of a phrase set forth in the request (and other requests), and then admitted the request; thus, plaintiff argued, the motion was not moot as to request no. 123 (and others). However, since plaintiff had not defined the phrase in the request, the Court finds defendant . . . could properly give it a common and reasonable meaning and then respond to the request."); Audiotext Commc'ns Network, Inc. v. U.S. Telecom, Inc., No. 94-2395-GTV, 1995 U.S. Dist. LEXIS 15395, at *16 (D. Kan. Oct. 5, 1995) ("Plaintiffs quibble about the meaning of certain undefined phrases and other alleged ambiguity. If necessary, plaintiffs can admit or deny requests which contain undefined phrases by defining the phrase themselves.").

171. Moreover, requests for admission and interrogatories generally are not duplicative or cumulative of production requests. *See* Becker v. Dahl, No. CIV S-10-0519 FCD EFB P, 2011 U.S. Dist. LEXIS 5724, at *4 (E.D. Cal. Jan. 12, 2011) ("Plaintiff's objection on the ground that these requests are duplicative lacks merit. As defendants note, a request for production of documents seeks documents, while an interrogatory is a question seeking a written response. While the nature of the information sought may in some respect be 'duplicative,' the responses sought take different forms, and defendants are entitled to use both vehicles for conducting discovery."); *cf.* Barnett v. Norman, No. 1:05-cv-01022-SKO PC, 2010 U.S. Dist. LEXIS 92077, at *2 (E.D. Cal. Aug. 10, 2010) ("[W]ritten interrogatories and requests for admission are not adequate substitutes for conducting a deposition."); *accord* N.J. v. Spring Corp., No. 03-20710JWL, 2010 U.S. Dist. LEXIS 14890, at *8–11 (D. Kan. Feb. 19, 2010) (discussing how a deposition is not a duplicative form of discovery); Vergara v. City of Waukegan, No 04C6586, 2007 U.S. Dist. LEXIS 82562, at *7–10 (N.D. Ill. Nov. 6, 2007) (ruling a request for admission unreasonably duplicative of deposition testimony); *Caruso*, 1995 U.S. Dist. LEXIS 7934, at *5–6 ("However, when the requests for admission[] are 'unreasonably cumulative' and 'duplicative' of other discovery taken in the case, the requests do not serve the purpose of [Federal] Rule 36(a). In the present case, there is no expectation that these requests would narrow or eliminate the issues for trial, since the defendant's positions on each of the requests is explicitly stated in clear and unambiguous terms at the many depositions taken in this case. A request for admission as to whether or not a particular witness testified to certain information at a deposition is duplicative of the deposition itself. The plaintiff can use the statements made at the deposition at trial.").

172. *Cf.* Alexander v. FBI, 194 F.R.D. 299, 302 (D.D.C. 2000) (rejecting an unreasonably cumulative and duplicative objection because the responding party failed to identify the duplicative discovery).

subject matters on which they will testify, the experts' mental impressions or opinions, the identity of their reviewed and relied upon documents, and other matters specifically relating to their mental impressions or opinions.[173] This conclusion is supported by Texas Rule 193.1, which

173. *See* Baugh v. Bayer Corp., No. 4:11-cv-525-RBH, 2012 U.S. Dist. LEXIS 131867, at *6–9 (D.S.C. Sept. 17, 2012) (citing cases and rejecting expert-opinion objection to a request for admission); Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc., No. 05-2164-MLB-DWB, 2007 U.S. Dist. LEXIS 80182, at *18–19 (D. Kan. Oct. 29, 2007) ("Heartland objects to Saint Luke's requests 531–42 on the basis that the requests seek to elicit expert testimony in advance of the expert disclosure deadline. It is insufficient, however, for a responding party to refuse to respond to a request for admission or simply state that its expert will provide the requested information in accordance with the expert disclosure deadlines; notwithstanding any expert disclosure deadlines, the responding party is required to respond with whatever discoverable information it presently has."); Drutis v. Rand McNally & Co., 236 F.R.D. 325, 330 (E.D. Ky. 2006) (overruling the plaintiffs' objection to requests for admission and directing them to supplement their responses even though they had to consult with their expert to do so); House v. Giant of Md., LLC, 232 F.R.D. 257, 262 (E.D. Va. 2005) ("Defendants' answers reflect folklore within the bar which holds that requests for admission need not be answered if the subject matter of the request . . . 'addresses a subject for expert testimony.'"); *see also* 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, 595–97 (2013) (discussing expert-objection opinion to interrogatories and production requests). *But see* Emerson v. Lab. Corp. of Am., No. 1:11-CV-01709-RWS, 2012 U.S. Dist. LEXIS 60636, at *9–10 (N.D. Ga. May 1, 2012) (sustaining objections to requests for admission because the requests for admission could only be answered by an expert). In *In re Young*, 410 S.W.3d 542 (Tex. App.—Beaumont, 2013, no pet.), the State, in a civil-commitment action against an allegedly violent sexual predator, moved for a protective order with respect to certain requests for admission because they "are all things that are best answered by the psychological and/or psychiatric experts who have been designated by Petitioner in this case, which Respondent will have the opportunity to do at the time of the expert's deposition" and apparently because they also sought information protected by the work-product privilege. The Beaumont Court of Appeals, without either quoting or describing in any detail the specific requests at issue, held that the trial court did not abuse its discretion in granting the protective order:

> With respect to these thirty-six requests, Young suggested in the trial court that "[o]ne party cannot limit the method or methods by which the other party chooses to conduct discovery." However, the reasonable inquiry required of a party in formulating responses to requests for admission[] does not require that the attorneys ask its designated experts for the information that may be needed to answer requests for admission. Instead, discovery from experts is permitted "only through a request for disclosure under [Texas] Rule 194 and through depositions and reports as permitted by this rule."
>
> Based on the arguments that Young presented to the trial court, the trial court could reasonably conclude that Young improperly used [the] requests . . . in an effort to conduct discovery against the State's designated experts. We conclude the trial court did not abuse its discretion by granting the State's motion with respect to [the] requests . . . .

Id. at 549. Although *Young* can be read as supporting the proposition that an expert-opinion objection is proper in Texas, the opinion does not quote or clearly describe the requests for admission at issue. Thus, it is unclear whether the requests sought admissions specifically about the State's experts (e.g., their identities, the subject matters about which they would testify, or their mental impressions or conclusions) or simply sought admissions about matters that required some

requires a responding party, in responding to written discovery, to make "a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made."[174] Information in the possession of a party's testifying expert is "reasonably available to the party and his attorney" after the expert's designation.

If a proper response to a request for admission requires the input of an expert and the answer date is before the responding party is required to designate experts, the appropriate action is to either reach an agreement with the requesting party to defer the answer until a reasonable time after the responding party's expert designations are due, move for an extension of time to respond to the request, or respond to the request by stating that the responding party cannot admit or deny the request because, after reasonable inquiry was made, the information known or easily obtainable is insufficient to enable the responding party to admit or deny it and then amend the response after the party's experts are designated.[175]

i. The Requests Are Mirror-Image or Converse Requests

As pointed out in section II.B.2. above, the fact that two requests for admission are the mirror-image or converse of each other does not make the requests objectionable. Nonetheless, as also pointed out in section II.B.2. above, such requests for admission have limited utility if the responding party either fails to answer them or expressly admits both requests because mirror-image admissions merely create a fact issue with respect to the request's subject matter.

j. Compound

Because Texas Rule 198.1 requires that "[e]ach matter for which an admission is requested must be stated separately," a responding party can object that the request for admission is compound.[176] A compound

expert input. Moreover, the defendant in *Young*, in response to the motion for protective order, did not make the arguments set forth in this section or cite any of the case law set forth above. Accordingly, *Young* should be limited to cases in which the requests for admission seek information specifically about the responding party's experts.

174. TEX. R. CIV. P. 193.1.

175. *See, e.g.*, *Baugh*, 2012 U.S. Dist. LEXIS 131867, at *9 n.3 (deferring the answer date for requests for admission until after the responding party's expert designation date).

176. *Cf.* Bridgewater v. Sweeny, No. 2:11-cv-1216-CMK-P, 2012 U.S. Dist. LEXIS 157188, at *6–7 (E.D. Cal. Nov. 1, 2012) (sustaining compound objection to requests for admission); James v. Maguire Corr. Facility, No. C10-1795-SI (pr), 2012 U.S. Dist. LEXIS 128534, at *10 (N.D. Cal. Sept. 10, 2012) ("Moreover, requests for admission[] should not contain ['compound, conjunctive, or disjunctive . . . statements.'" (quoting United States *ex. rel.* Englund v. L.A. Cnty., 234 F.R.D. 675, 684 (E.D. Cal. 2006))); Bovarie v. Schwarzenegger, No. 08cv1661 LAB (NLS), 2011 U.S. Dist.

request for admission is one that asks the responding party to admit multiple discrete facts and often uses the words "and," "or," or "and/or."[177] The mere fact, however, that the request contains interdependent facts does not make it compound. For example, a request asking a party to admit that "Smith, as defendant's president, had authority to sign the contract" is not compound even though it involves two facts: Smith was the defendant's president, and he had authority to sign the contract.[178]

Although a compound objection is proper, to avoid a motion testing the response's sufficiency, a responding party may be better served by answering the request if each part can be readily admitted or denied and, if the action is a Level 1 action, counting the request as one request for each discrete subpart.[179]

LEXIS 17006, at *19 (S.D. Cal. Feb. 22, 2011) (sustaining a compound objection to a request for admission); McCormick v. Allmond, 773 N.W.2d 409, 414–15 (Neb. Ct. App. 2009) ("A request for admission should necessitate only a simple response—not one where the entire request must be dissected into separate, unrelated parts and answered as such. Because McCormick's requests were compound and unnecessarily complicated, we conclude that '[t]here was other good reason for the failure to admit' . . . ."). *But see* Plascencia v. BNC Mortg., Inc. (*In re* Plascencia), No. 08-56305, 2012 LEXIS 2855, at *36–37 (Bankr. N.D. Cal. Jun. 12, 2012) ("However, to the extent that the requests are compound, the requests are easily broken down into component parts, and 'should be denied or admitted in sequence with appropriate designation or qualification.'" (quoting Tequila Centinela, S.A. de C.V. v. Bacardi & Co. Ltd., 247 F.R.D. 198, 203 (D.D.C. 2008))); Akins v. State Farm Mut. Auto. Ins. Co., No. 10-CV-12755, 2011 U.S. Dist. LEXIS 82806, at *5 (E.D. Mich. July 25, 2011) ("To the extent the request covers more than one topic, Defendant still has an obligation to admit any portion that it can and deny the remainder."); Audiotext Commc'ns Network, Inc. v. U.S. Telecom, Inc., No. 94-2395-GTV, 1995 U.S. Dist. LEXIS 15395, at *8 (D. Kan. Oct. 5, 1995) (discussing how a party should answer a compound request where an opposing party seeks the admission of many facts or an ambiguous request). Texas Rule 198.1's separate-matter requirement arguably conflicts with language in Texas Rule 190.2(b)(5), which limits the number of requests for admission in a Level 1 action to fifteen, plus "discrete subparts." The latter rule should not be read as negating compound objections to requests for admission but rather merely as giving the responding party the option of answering a compound request and counting it as multiple requests against the 15-request limit.

177. For example, a request for admission asking the responding party to admit that it is a Texas corporation and has its principal place of business in Dallas, Texas, is compound, because it requests an admission of two discrete topics: the locations of the responding party's state of incorporation and its principal place of business.

178. If one of the facts is wrong, the responding party can deny the request or, even better, deny the wrong one and admit the other. For example, Defendant denies that Smith was its president, but admits that, as its vice president, he had authority to sign the contract.

179. *See* TEX. R. CIV. P. 190.2(b)(5) (providing for a maximum of fifteen requests for admission, including discrete subparts, in a Level 1 action).

k. Genuine Issue for Trial or the Requesting Party Has the Burden of Proof

Objections to requests for admission on the ground that they relate to a matter in dispute, raise a genuine issue for trial, or relate to a matter on which the requesting party has the burden of proof are all improper.[180] Rather than objecting on these grounds, the responding party should deny the request if the matter is truly in dispute.

l. The Matter Is Within the Requesting Party's Knowledge, Is Equally Available to the Parties, or Is Unknown to the Responding Party

A request for admission is not objectionable merely because the requesting party already knows the information sought by it or because the information is equally available to the parties. As explained by one federal court: "An objection based on a claim that a party already has all of the relevant information at their disposal is never a proper objection to a request for admission."[181] This is because "[t]he [p]urpose of [the] rule pertaining to requests for admissions is to expedite trial by removing

180. *See id.* R. 198.2 ("An assertion that the request presents an issue for trial is not a proper response."); *cf.* Guinan v. A.I. duPont Hosp. for Children, No. 88-228, 2008 U.S. Dist. LEXIS 27798, at *5 (E.D. Pa. Apr. 7, 2008) ("The Advisory Committee Notes to the 1970 Amendments to [Federal] Rule 36 made it clear that it is not proper grounds for objection that the subject matter of the Request for Admission is 'in dispute.' The very purpose of the Request is to ascertain whether the answering party is prepared to admit the matter, or whether the party regards the matter as presenting a genuine issue for trial."); House v. Giant of Md., LLC, 232 F.R.D. 257, 260–62 (E.D. Va. 2005) ("Defendants' answers reflect folklore within the bar which holds that requests for admission need not be answered if the subject matter of the request 'is within plaintiff's own knowledge,' 'invades the province of the jury,' 'addresses a subject for expert testimony,' or 'presents a genuine issue for trial.' . . . As the authorities set forth in this Opinion demonstrate, the folklore is wrong."); *In re* M & L Bus. Mach. Co., 184 B.R. 366, 368 (D. Colo. 1995) (same); Dulansky v. Iowa.-Ill. Gas & Elec. Co., 92 F. Supp. 118, 124 (S.D. Iowa 1950) (same); *cf.* Layne Christensen Co. v. Purolite Co., No. 09-2381-JWL-GLR, 2011 U.S. Dist. LEXIS 6737, at *26–27 (D. Kan. Jan. 25, 2011) (holding that an objection that a request relates to "issues obviously in dispute" is improper).

181. *In re* K-Dur Antitrust Litig., No. 01-1652 (JAG), 2007 U.S. Dist. LEXIS 96066, at *49 (D.N.J. Jan. 2, 2007); *accord* Kutner Buick, Inc. v. Crum & Foster Corp., No. 95-CV-1268, 1995 U.S. Dist. LEXIS 12524, at *9 (E.D. Pa. Aug. 24, 1995) (holding that an objection to a request with information known by a requesting party is not a proper objection); Interland, Inc. v. Bunting, No. 1:04-CV-444-ODF444-ODE, 2005 U.S. Dist. LEXIS 36112, at *28 (N.D. Ga. Mar. 31, 2005) (same); *see* Henry v. Champlain Enters., Inc., 212 F.R.D. 73, 78 n.2 (N.D.N.Y. 2003) (same); *see also* 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, 601 (2013) (discussing "information-in-the-requesting-party's-knowledge" objections to interrogatories and production requests).

essentially undisputed issues, thereby avoiding time, trouble and expense which otherwise would be required to prove issues."[182]

Similarly, a response that the responding party lacks personal knowledge is improper if the information is obtainable by reasonable inquiry.[183]

m. Supernumerary Objections

The Texas discovery rules only limit the number of requests for admission in Level 1 actions.[184] Thus, there is no express limit on the number of requests for admission in Level 2 and 3 actions.[185] A responding party in a Level 2 or 3 action faced with an excessive number of requests for admission, however, is not without remedy. If it believes that the requesting party is abusing discovery by serving too many requests for admission, the responding party can move for a protective order that either limits the number of requests or orders that it need not respond to requests already served.[186] In ruling on such a motion, the court is to be guided by the proportionality considerations contained in Texas Rule 192.4.

A responding party that is faced with too many requests for admission in a Level 1 action or a Level 3 action whose discovery-control plan limits the number of requests for admission is in much better position. It cannot, however, simply refuse to answer the entire set of requests for admission—it should answer the first fifteen (or the number set forth in

182. Diederich v. Dep't of the Army, 132 F.R.D. 614, 616 (S.D.N.Y. 1990) (quoting Burns v. Phillips, 50 F.R.D. 187, 188 (N.D. Ga. 1970)); *see* Concerned Citizens v. Belle Haven Club, 223 F.R.D. 39, 45 (D. Conn. 2004) (stating that an objection that information is "'equally available' . . . misses the point of requests for admission, which is to narrow the scope of contested issues at trial"); Cent. Transp. Int'l, Inc. v. Global Advantage Distrib., Inc., No. 2:06-cv-401-FtM-29SPC, 2007 U.S. Dist. LEXIS 81664, at *7 (M.D. Fla. Sept. 7, 2007) ("[M]erely because an item may be available from another source is not a proper objection [to a request for admission]."). *See generally* 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, 601 (2013) (discussing "equally-available" objections to interrogatories and production requests).

183. *See* Herrara v. Scully, 143 F.R.D. 545, 548 (S.D.N.Y. 1992) ("Additionally, 'a party may not refuse to admit or deny a request for admission based upon a lack of personal knowledge if the information relevant to the request is reasonably available to him.'" (quoting Asea, Inc. v. Southern Pac. Transp. Co., 669 F.2d 1242, 1245 (9th Cir. 1981))).

184. *See* TEX. R. CIV. P. 190.2(b)(5) (allowing each party to serve on each other party no more than fifteen requests for admission in Level 1 actions).

185. *See id.* R. 190.3–.4 (providing for no limitation on the number of requests for admission in Level 2 and Level 3 actions); *see also id.* R. 190.4(b)(3) (noting that a Level 3 discovery control order can limit the number of requests for admission).

186. *See id.* R. 192.6(b) (allowing court to limit discovery "[t]o protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights . . .").

the discovery-control plan) and interpose a supernumerary objection to the rest.[187] "Of course, answering a supernumerary [request] waives the objection."[188]

"Just as the responding party is not allowed to pick and choose which supernumerary . . . [requests] for admission to answer, the requesting party cannot circumvent its violation by voluntarily withdrawing selected supernumerary . . . [requests]. The operative word in Texas Rule 190 is 'serve' and every [request] served counts against the numerical limit."[189] Requests "to which objections have been interposed also count against the numerical limit, and a requesting party cannot withdraw them."[190]

n. The "[D]ocument [S]peaks for [I]tself"

Requests for admission often ask the responding party to admit that contracts, statutes, or regulations impose a particular obligation, to admit that contractual provisions, statutes, regulations, or documents have a particular meaning, or to admit the accuracy of quoted or textual material from a contract, statute, regulation, or document. Rather than admitting or denying such requests, responding parties often object to them on the ground that "the document[, statute, or regulation] speaks for itself." This is not a proper objection. As explained by one federal court:

> As a statement of a document's text is a matter of fact, a request calling upon a party to admit or deny that such quoted material is the actual text of an identified document, relevant to the case, may not be ignored on the ground that the request seeks an interpretation of the text or that the document in question "speaks for itself." Documents do not speak, rather, they represent factual information from which legal consequences may follow. The existence of a referenced document and whether it contains a particular provision may well present factual issues of importance to the case. Thus, just as a [Federal] Rule 36 request may seek to remove the issue of a document's "genuineness" or authenticity, whether a particular document contains textual material as described in a request equally seeks to eliminate

187. *See id.* R. 193.2(b) ("A party must 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."); *see also* 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, 599–600 (2013) (discussing supernumerary objections to interrogatories and offering suggestions for how to best handle such requests).

188. 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, 600 (2013) (discussing supernumerary objections to interrogatories).

189. *Id.*

190. *Id.*

> an unnecessary issue of fact for trial. It is therefore permissible to request that a party admit or deny a [Federal] Rule 36 request as to the accuracy of quoted textual material from a particular document relevant to the case.
>
> [Also,] it is generally held that questions of contractual meaning or intent are questions of fact at trial. A statement of a party's understanding of the meaning or intent of a document is therefore a statement of fact, and where the question of the meaning of the document is at issue in the case, a request directed to another party seeking an admission or denial of a document's meaning or intent by that party as stated in the request relates to a statement fact, and is authorized by [Federal] Rule 36. Nor are such requests objectionable because the request may call for an admission as to an interpretation of a contractual provision which could otherwise require a judicial determination. "[Federal] Rule 36 would cover an admission by [a party] as to what its obligations were as a matter of law, because the text of the [Federal] Rule specifically authorizes requests for admissions of propositions of law as applied to fact. Moreover, the fact that an admission, provided in response to a request, may prove decisive to the case is no ground for refusal to respond.
>
> Even if the meaning of a document or the intent of the parties as to a contractual provision is the issue ultimately to be decided, such questions do not raise a valid objection to a request to admit a party's understanding of a document's meaning or the intent of the parties as otherwise a party that does not intend to dispute such matters could refuse to answer thus requiring needless proof. Such a result is contrary to the purpose of [Federal] Rule 36 which is "to eliminate from controversy matters that will not be disputed." Conversely, if both sides agree as to the meaning and intent of particular contractual provisions, there will be no issue as to their meaning on summary judgment or at trial and the purpose of [Federal] Rule 36 will have been served. In this case, if Defendants do not admit to a proffered interpretation, Plaintiff will be on notice as to which provisions remain at issue thereby facilitating the orderly preparation of the case for submission to the court and furthering the purposes of [Federal] Rule 36.
>
> Moreover, in this case, the Requests at issue do not relate to material which, like a line of lyrical poetry, may be subject to multiple interpretations. Rather, they are directed to business agreements, involving the parties to the instant litigation, using standard acquisition clauses applied to the particulars of the transactions, and routine business correspondence. As such, the range of interpretative possibilities is fairly limited thus constituting straightforward requests within the purview of [Federal] Rule 36.[191]

191. Booth Oil Site Admin. Grp. v. Safety-Kleen Corp., 194 F.R.D. 76, 80–81 (W.D.N.Y. 2000) (quoting Langer v. Monarch Life Ins. Co., 966 F.2d 786, 805 (3d Cir. 1992)); *accord* Lewis v.

In response to such a request for admission, the responding party should either admit or deny it or interpose one of the form or substantive objections discussed in this Section. For example, if the request for admission asks the party to interpret a statute, rule, regulation or an unambiguous contractual provision, an objection on the ground that the request seeks a legal conclusion is proper, because the interpretation of such items is a question of law for the court.[192]

o. The Responding Party's Failure to Provide Discovery

It is improper to refuse to respond to requests for admission simply because the requesting party has withheld discovery.[193]

p. Harassment

Although a "harassment" objection is clearly a proper one,[194] it is difficult to envision a situation in which such an objection is a proper one

Michaels Stores, Inc., No. 3:05-cv-1323-J-33HTS, 2007 U.S. Dist. LEXIS 50506, at *7 n.1 (M.D. Fla. July 12, 2007) ("As a statement of a document's text is a matter of fact, a request calling upon a party to admit or deny that such quoted material is the actual text of an identified document . . . may not be ignored on the ground . . . that the document 'speaks for itself.'"); House v. Giant of Md., LLC, 232 F.R.D. 257, 262 (E.D. Va. 2005) (noting that the "favorite excuse for not answering requests for admission in a contract case that 'the document speaks for itself . . .'" is "folklore"); Miller v. Holzmann, 240 F.R.D. 1, 4 (D.D.C. 2006) ("It is astonishing that the objection that a document speaks for itself, repeated every day in courtrooms across America, has no support whatsoever in the law of evidence."); Diederich v. Dep't of Army, 132 F.R.D. 614, 617 (S.D.N.Y. 1990) (holding that an "objection that documents . . . 'speak for themselves' . . . [is] improper").

192. *See* Elliot v. Newsom, No. 01-07-00692-CV, 2009 Tex. App. LEXIS 569, at *4–6 (Tex. App.—Houston [1st Dist.] Jan. 29, 2009, no pet.) (mem. op) (reversing summary judgment based on deemed admissions regarding the interpretation of an unambiguous contract that was "contrary to the express terms of the agreement"); *see also* Entergy Gulf States, Inc. v. Summers, 282 S.W. 3d 433, 437 (Tex. 2009) ("The meaning of a statute is a legal question . . . ."); Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983) ("If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law."); Travis Cent. Appraisal Dist. v. Signature Flight Support Corp., 140 S.W.3d 833, 838 (Tex. App.—Austin 2004, no pet.) (same).

193. *See* 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, 603 (2013) (pointing out that failure-to-provide-discovery objections are improper with respect to interrogatories and production requests); *cf.* Covad Commc'ns Co. v. Revonet, Inc., 258 F.R.D. 17, 23–24 (D.D.C. 2009) (holding that a failure-to-provide discovery objection is improper); Estate of Broccolino v. McKesson Corp., No. WDQ-05-0438, 2006 U.S. Dist. LEXIS 97220, at *5 (D. Md. Feb. 23, 2006) (same); Jayne H. Lee, Inc. v. Flagstaff Indus. Corp., 173 F.R.D. 651, 657 (D. Md. 1997) (same).

194. *See* TEX. R. CIV. P. 191.3(c)(3) (by signing written discovery requests, the attorney certifies that the discovery was not sought for the purpose of harassment); *Id.* R. 192.6(b) (allowing party to ask for protection from harassing discovery); *Id.* R. 215.3 (providing that harassing discovery is a ground for sanctions); Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 553 (Tex. 1990) (orig. proceeding)

to a request for admission. First, the definition of harassment does not readily lend itself to requests for admission. Harassment is defined as "[w]ords, conduct, or action ([usually] repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose."[195] Thus, what constitutes harassment is generally subjective because what annoys or alarms one person may not annoy or alarm another.[196]

Second, a request that seeks an admission about a matter or document that is relevant or "reasonably calculated to lead to the discovery of admissible evidence" generally cannot be harassing.[197] Conversely, a request for admission that is interposed solely for harassment purposes clearly cannot seek the discovery of information that is either relevant or "reasonably calculated to lead to the discovery of admissible evidence."[198]

q. Invasion of Protected Rights

A request for admission that improperly invades a party's personal, constitutional, or property rights is objectionable.[199]

r. A Claim's or Defense's Invalidity

A responding party cannot properly object to a request for admission on the ground that the cause of action or defense to which it relates is

(noting that the scope of discovery is also "limited by the legitimate interest of the opposing party to avoid overbroad requests, harassment, or the disclosure of privileged information"); *In re* State Farm Lloyds, No. 04-98-00018-CV, 1998 Tex. App. LEXIS 2072, at *11 (Tex. App.—San Antonio Apr. 8, 1998, orig. proceeding) (not designated for publication) ("The right to broad discovery is limited by the opposing party's right to be free from harassment and the burden of overly broad requests.").

195. BLACK'S LAW DICTIONARY 784 (9th ed. 2009); *accord* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 529 (10th ed. 2006) (defining "harass" as "to annoy persistently").

196. *See* 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, 604 (2013) (discussing harassment objections to interrogatories and production requests).

197. TEX. R. CIV. P. 192.3(a); *see* ISK Biotech Corp. v. Lindsay, 933 S.W.2d 565, 568 (Tex. App.—Houston [1st Dist.] 1996, orig. proceeding) ("We have already concluded, however, that these discovery requests were reasonably calculated to lead to the discovery of admissible evidence; a request that meets that criterion is manifestly not . . . 'sought *solely* for the purposes of harassment.'").

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

199. *See* TEX. R. CIV. P. 192.6(b) (authorizing protection from a discovery request that invades a "personal, constitutional, or property right."); 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, 605 (2013) (discussing protected-rights objections to interrogatories and production requests); *cf.* Soto v. City of Concord, 162 F.R.D. 603, 616 (N.D. Cal. 1995) (citations omitted) ("Federal Courts ordinarily recognize a constitutionally-based right of privacy that can be raised in response to discovery requests.").

invalid, unless the cause of action or defense has been dismissed pursuant to a dismissal motion, special exception, or summary judgment motion.[200]

s. Confidentiality

An objection to a request for admission because "it seeks 'confidential' or 'proprietary' information generally is improper. . . . Rather, the proper way for a responding party to deal with contractual and other 'confidentiality' obligations is to . . . [answer the request] pursuant to the terms of a protective order."[201]

t. Calls for a Legal Conclusion or the Application of Law to Fact

As discussed in section II.B.1. above, a request asking for the admission of a pure question of law is improper, whereas one asking for an admission of law applied to fact is proper.[202] Accordingly, an objection that the request seeks a legal conclusion is proper,[203] whereas an objection that a request seeks the application of law to fact is improper.[204]

Because Texas Rule 197.1 specifically permits a party to ask its opponent if it makes a "specific legal . . . assertion[],"[205] it is not improper to ask a party whether it is making a specific legal contention or the factual basis for it.

200. *See In re* Citizens Supporting Metro Solutions, Inc., No. 14-07-00190-CV, 2007 Tex. App. LEXIS 8550, at *8–9 (Tex. App.—Houston [14th Dist.] Oct. 18, 2007, orig. proceeding) (mem. op.) ("The scope of discovery is measured by the live pleadings regarding the pending claims[,]" and, as here, where the trial court has not ruled on the merits of any of the claims, then "the scope of discovery in the mandamus proceeding will be based on the pleadings."); *In re* Rogers, 200 S.W.3d 318, 324 (Tex. App.—Dallas 2006, orig. proceeding) (holding that when a petition was "broadly pleaded" and had not been "challenged or narrowed through special exceptions or any other pleading vehicle," the responding party "cannot attempt to limit the scope of discovery through objection.").

201. 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, 606 (2013) (discussing confidentiality objections to interrogatories and production requests).

202. See cases cited *supra* notes 24, 27 and section II.B.1., entitled "Statements of Fact or Opinion or the Application of Law to Fact."

203. *See* TEX. R. CIV. P. 198.1 (detailing the significance of "written requests . . . including statements of opinion or fact or of the application of law to fact"); *see also* Laycox v. Jaroma, Inc., 709 S.W.2d 2, 4 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.) (determining whether the requests for admission called for "ultimate conclusions and opinion, both of fact and law").

204. See *supra* Section II.B.1., entitled "Statements of Fact or Opinion or the Application of Law to Fact."

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

u. Hearsay

Hearsay is not a proper objection to a request for admission.[206] However, the fact that a request involving hearsay is admitted does not mean that it is admissible.[207]

v. Improper Incorporation of Reference to Documents

As discussed in section V.H. above, an objection that a request for admission incorporates or references a document generally is a proper objection, unless the request is seeking an admission regarding the genuineness or authenticity of a document.

I. *Do Nothing*

Unlike Texas Rules of Civil Procedure 194, 196, and 197, which respectively relate to disclosures, production requests, and interrogatories, Texas Rule 198 is self-executing. That is, requests for admission are automatically deemed admitted without the need for a court order on the day after they are due if no response is served.[208] Thus, a party can choose not to respond at all, and the request will automatically be admitted without the necessity of a motion or court order, rather than expressly admitting a request.

As discussed in more detail in section VI.D. below, unless the trial court allows the admissions to be withdrawn or amended, matters admitted generally are conclusively established for all purposes, including summary judgment and trial.[209] The exception to this rule is that admissions, like other evidence, are subject to pertinent objections at trial and may be

206. *Cf.* Booth Oil Site Admin. Grp. v. Safety-Kleen Corp., 194 F.R.D. 76, 81 (W.D.N.Y. 2000) ("[T]hat a requested admission may involve hearsay is not disqualifying as a statement of fact," because hearsay objections are waiveable).

207. *Cf.* Walsh v. McCain Foods, Ltd., 81 F.3d 722, 726 (7th Cir. 1996) (holding that a deemed admission is "subject to the limitations on hearsay evidence and must fit within an exception to the rule to be properly admitted").

208. *See* TEX. R. CIV. P. 198.2(c) ("If a response is not timely served, the request is considered admitted without the necessity of a court order."); Marino v. King, 355 S.W.3d 629, 630 (Tex. 2011) (per curiam) ("By rule, a request for admission is considered admitted if a response is not timely served."); Hartman v. Trio Transp., Inc., 937 S.W.2d 575, 578 (Tex. App.—Texarkana 1996, writ denied) ("After the expiration of thirty days from the date of service the admissions are automatically deemed admitted without any order by the court, or any exercise of discretion.").

209. *See* TEX. R. CIV. P. 198.3 ("A matter admitted under this rule is conclusively established as to the party making the admission unless the court permits the party to withdraw or amend the admission.").

excluded if the subject matter of the admission is inadmissible or constitutes an admission of law.[210]

VI. USE AND EFFECT OF ADMISSIONS

A. *Persons Bound by Admissions*

An admission is binding only on the party making it.[211] Thus, the requesting party is not bound by an admission merely because it served the request. Rather, the requesting party may disregard an admission even it offers other admissions from the same set into evidence or introduces evidence consistent with the admission.[212] Nor is an admission generally binding on other opposing parties, third parties, or co-parties.[213] As to a non-admitting party, the admission is hearsay evidence to which a hearsay objection should be made if the admission is offered as evidence against the party.[214]

210. *See supra* notes 24, 27, 37, 204 and *infra* notes 213, 218, 233.

211. *See* Thalman v. Martin, 635 S.W.2d 411, 414 (Tex. 1982) (holding that a grantor's admission was binding on the decedent's heirs, but not on his grantee); Bleeker v. Villarreal, 941 S.W.2d 163, 168 (Tex. App.—Corpus Christi 1996, writ dism'd by agr.) ("[M]atters admitted in response to requests for admission[] are conclusively established only against the party making the admission.").

212. *Cf.* Brook Vill. N. Assocs. v. Gen. Elec. Co., 686 F.2d 66, 75 (1st Cir. 1982) (holding that a trial court could not properly force the requesting party to elect between relying on admissions and introducing evidence relevant to them and, because the testimony indicated damages were greater than the amount established by the admission, "the admission should be viewed as setting the minimum amount of damages"). If the requesting party introduces evidence that directly contradicts the admission, it waives its right to rely on the admission's conclusiveness. *See, e.g.*, Wertz v. Mass Mut. Life Ins. Co., 898 S.W.2d 414, 422 (Tex. App.—Amarillo 1995, no writ) ("We conclude that by introducing evidence that Willis piloted the TD2, Spearman waived his reliance on Charles Duff's deemed admission that David Duff had piloted the TD2. To the extent there is an implied finding that Spearman did not waive his right to rely on the admission, such an implied finding is contrary to the great weight and preponderance of the evidence." (citations omitted)).

213. *See Hartman*, 937 S.W.2d at 578 ("Numerous cases hold that in a suit against multiple defendants, evidence as to a request for admissions made by only one defendant is not admissible against the others."); *see also* USX Corp. v. Salinas, 818 S.W.2d 473, 479 (Tex. App.—San Antonio 1991, writ denied) (same); Tex. Supply Ctr., Inc. v. Daon Corp., 641 S.W.2d 335, 337–38 (Tex. App.—Dallas 1982, writ ref'd n.r.e.) (same); *cf.* Becerra v. Asher, 105 F.3d 1042, 1048 (5th Cir. 1997) ("Deemed admissions by a party opponent cannot be used against a co-party."); Riberglass, Inc. v. Techni-Glass Indus., Inc., 811 F.2d 565, 566 (11th Cir. 1987) ("Clearly, the deemed admissions of his codefendants cannot bind Morris where he actually responded to plaintiff's requests in a timely and legally sufficient manner."); Allen v. Destiny's Child, No. 06C6606, 2009 U.S. Dist. LEXIS 63001, at *8 (N.D. Ill. July 21, 2009) ("This court joins in holding that a plaintiff cannot use one defendant's deemed admissions as evidence against a codefendant.").

214. *See* Tex. Workforce Comm'n v. Antonini & Assocs., No. 01-96-01459-CV, 1998 Tex. App. LEXIS 4865, at *4 (Tex. App.—Houston [1st Dist.] Aug. 6, 1998, no pet.) (not designated for publication) ("Generally, admissions are not effective against a co-party. The rationale for this rule is

There are two exceptions to this rule. The first is when the admission falls within one of the hearsay exceptions to Texas Rule of Evidence 801(e)(2). That is, when it is:

> . . . .
> (B) a statement of which the party has manifested an adoption or belief in its truth;
> (C) a statement by a person authorized by the party to make a statement concerning the subject;
> (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or
> (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.[215]

The second exception is when there is there is privity or a joint interest between the admitting and other party.[216]

B. *Who Can Use Admissions*

Any party to an action, even those joined after the admissions were made, can use an admission against the admitting party.[217] However,

---

that the admissions are hearsay to co-parties."); *see also Hartman,* 937 S.W.2d at 578 (same); *Tex. Supply Ctr.*, 641 S.W.2d at 338 (same).

215. TEX. R. EVID. 801(2)(B)–(E); *see* Mnyufo v. Bd. of Educ., No. 3C8717, 2007 U.S. Dist. LEXIS 31589, at *5–6 (N.D. Ill. Apr. 27, 2007) ("Admissions of a party-opponent are not hearsay, and thus may be considered in ruling on a motion for summary judgment. But co-defendant Taylor is not the District 227 defendants' party opponent. Her admissions are hearsay and defendants make no argument that they fall within any exception to the hearsay rule." (citations omitted)); *Hartman*, 937 S.W.2d at 578 (holding that deemed admissions by a truck driver were not binding on the driver's *former* employer).

216. *See Antonini*, 1998 Tex. App. LEXIS 4865, at *4 ("[A]dmissions are binding on co-parties where there is privity or a joint interest between them."); Gen. Fin. Servs. Inc. v. Practice Place, Inc., 897 S.W.2d 516, 521 (Tex. App.—Fort Worth 1995, no writ) ("Admissions are equally binding on co-parties where there is privity or a joint interest between them, they are represented by the same counsel and assert the same rights and defenses."); *see also Thalman*, 635 S.W.2d at 414 (holding that a grantor's admissions were binding on his heirs); *cf.* Diamond State Ins. Co. v. Deardorff, No. 1:10-cv-00004 AWI JLT, 2011 U.S. Dist. LEXIS 60834, at *11–12 (E.D. Cal. June 8, 2011) ("Plaintiffs, as subrogees, 'stand in the shoes of their insureds and are bound by certain admissions of their insureds. Because the Plaintiffs are bound by certain admissions, any arguments by the Plaintiffs that are contrary to . . . admissions [made] by their insureds are proscribed.'" (citations omitted)).

217. *See* Jolet v. Garcia, No. 05-97-0146-CV, 2000 Tex. App. LEXIS 1680, at *11 (Tex. App.—Dallas Mar. 15, 2000, pet. denied) (not designated for publication) ("Admissions may be used by all parties to an action, including parties joined after the admissions were made."); Grimes v. Jalco, Inc., 630 S.W.2d 282, 284 (Tex. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.) (allowing all parties to use admissions), *overruled on other grounds*, Medina v. Herrara, 927 S.W.2d 597 (Tex. 1996).

when a party appears in two capacities, an admission by the party in one capacity cannot be used against the party in the other capacity.[218]

A party cannot use its own admission at trial or for summary judgment. Only when the admission is offered against the responding party does it come within the hearsay exception for an admission of a party-opponent.[219]

C. *Limitations on Use of Requests for Admission Against the State of Texas*

Sections 41.003 and 402.004 of the Texas Government Code provide that, in any action to which the state is a party, an admission by the attorney general, a district attorney, or a county attorney "does not prejudice the rights of the state."[220] However, as a general rule, the State of Texas is bound by the same rules as any other litigant and must respond to discovery requests.[221] Thus, if the State fails to timely object to the requests for admissions on the statutory bar, it waives any protection it provides.[222]

Moreover, to the extent the request for admission merely clarifies or

218. *See* U.S. Fid. Guar. Co. v. Gourdeau, 272 S.W.3d 603, 608–09 (Tex. 2008) (holding that an admission by an insurer in its capacity as an intervenor could not be used against the insurer in its capacity as a defendant because the admissions were served on the insurer in its capacity as an intervenor); Krasa v. Derrico, 193 S.W.2d 891, 892–93 (Tex. Civ. App.—San Antonio 1946, no writ) (declaring that an admission by a widow individually could not be used against her in her capacity as the executor of her husband's estate because the requests were served on her individually).

219. *See* Sympson v. Mor-Win Prods., 501 S.W.2d 362, 364 (Tex. Civ. App.—Fort Worth 1973, no writ) ("[S]elf-serving answers to the adversary's requests for admission[] can be used only against him."); *cf.* Walsh v. McCain, 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 admission[] of a party opponent." (quoting 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2264, at 571–72 (2d ed. 1994)); Gilmore v. Macy's Retail Holdings, No. 06-3020 (JBS), 2009 U.S. Dist. LEXIS 4937, at *31 (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.'" (citations omitted and quoting Underberg v. United States, 362 F. Supp. 2d 1278, 1283 (D.N.M. 2005))); *In re* Air Crash at Charlotte, N.C., 982 F. Supp. 1060, 1067–68 (D.S.C. 1996) ("Because the admission was apparently obtained by USAir under circumstances that suggest a cooperative arrangement, USAir should not be allowed to use the admission as that of a 'party opponent' simply because the parties were not truly adverse.").

220. TEX. GOV'T CODE § 41.003 (West 2004).

221. *See* Carrasco v. Tex. Transp. Instit., 908 S.W.2d 575, 578 (Tex. App.—Waco 1995, no writ) ("The Texas Supreme Court has made clear that, when the state becomes a litigant in the courts, it is bound by the same rules of procedure that bind all other litigants, except where special provision is made to the contrary.").

222. *See id.* at 579 ("Because the attorney general did not object to the requests for admission[] under section 402.004 in accordance with [former Texas] Rule 169, TTI waived any objection it may have had to the requests, and all facts contained in TTI's admissions are conclusively established.").

elicits facts and does not prejudice the State, sections 41.003 and 402.004 do not apply, and the State must respond to the request.[223] If, however, the request for admission calls for a response that will prejudice the State, the attorney general (or a district or county attorney) has a valid objection based on those statutes.[224]

D. *Effect of Admissions and Denials*

A matter admitted in accordance with Texas Rule 198, whether express or deemed, is conclusively established in the pending action unless the court on motion permits withdrawal or amendment of the admission or it is a legal conclusion.[225] An admission made in response to a request for admission is comparable to an admission in a pleading or a stipulation, as opposed to evidentiary admissions of a party for use at trial.[226] A matter admitted does not require further proof, and, as long as the admission stands, the admitting party will not be allowed to introduce directly contradicting evidence, whether in the form of live testimony at trial or summary judgment affidavits, over the requesting party's objection.[227]

223. *See* Lowe v. Texas Tech Univ., 540 S.W.2d 297, 301 (Tex. 1976) ("[T[he procedural rules operate[] to clarify facts; that the State will not be prejudiced by a revelation of the facts involved in a case; and that the Attorney General in responding to interrogatories seeking to elicit such facts will not be called upon to make admissions, agreements or waivers . . . .").

224. *See id.* ("[T]he Attorney General may raise for ruling the further objection that any called for admission, if made, would prejudice the rights of the State . . . .").

225. TEX. R. CIV. P. 198.3 ("A matter admitted under this rule is conclusively established as to the party making the admission unless the court permits the party to withdraw or amend the admission."); *see* Cleveland v. Taylor, 397 S.W.3d 683, 695 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) ("[T]hey failed to take action until after the trial court's judgment. Thus, we conclude that the Cleveland parties waived their right to challenge the deemed admissions."); Boulet v. State, 189 S.W.3d 833, 836 (Tex. App.—Houston [1st Dist.] 2006, no pet.) ("Any matter admitted is conclusively established unless the court, on motion, permits withdrawal or amendment of the admission.").

226. *See* Marshall v. Vise, 767 S.W.2d 699, 700 (Tex. 1989) ("An admission once admitted, deemed or otherwise, is a judicial admission, and a party may not then introduce testimony to controvert it."); Lucas v. Clark, 347 S.W.3d 800, 803 (Tex. App.—Amarillo 2011, pet. denied) ("Admissions, once deemed admitted, are judicial admissions and may not be contradicted."); USAA Cnty. Mut. Ins. Co. v. Cool, 241 S.W.3d 93, 102 (Tex. App.—Houston [1st Dist.] 2007, no pet.) ("An admission once admitted, deemed or otherwise, is a judicial admission, and a party may not then introduce testimony to controvert it.").

227. *See* Stephenson v. Perata, No. 2-08-375-CV, 2009 Tex. App. LEXIS 3172, at *3–4 (Tex. App.— Fort Worth May 7, 2009, no pet.) (mem. op.) ("[A]dmissions, once made or deemed by the court, may not be contradicted by any evidence, whether in the form of live testimony or summary judgment affidavits."); *Cool*, 241 S.W.3d at 102 ("An admission once admitted, deemed or otherwise, is a judicial admission, and a party may not then introduce testimony to controvert it."); Luke v. Unifund CCR Partners, No. 2-06-444-CV, 2007 Tex. App. LEXIS 7096, at *6 (Tex. App.—Fort Worth Aug. 3, 2007, no pet.) (mem. op.) ("We have held that admissions, once made, or deemed by

An ambiguous admission, however, is not conclusive of anything. For example, in *Sedillo v. Valtierra*,[228] the San Antonio Court of Appeals reversed a summary judgment because the use of the term "and/or" in a request for admission asking the plaintiff to admit that the defendant's "negligence and/or negligence *per se* was not a proximate cause of the accident in question," made the admission ambiguous.

> The term "and/or" is "used to imply that either or both of the things mentioned may be affected or involved." We agree that the use of the term "and/or" raises a genuine issue of material fact regarding . . . whether the deemed admission addresses both negligence claims or only one of the negligence claims.[229]

Before admissions can be used, they must be filed with the trial court.[230] And, if the party is relying on deemed admissions, it also must show that they were properly served.[231]

Unlike other discovery, such as disclosures, interrogatories, and deposition testimony, which must be admitted into evidence to have probative value or to be considered as evidence in support of a judgment, admissions do *not* have to be introduced as evidence to be before a trial or appellate court.[232] Nonetheless, admissions should be introduced into

---

the court, may not be contradicted by any evidence, whether in the form of live testimony or summary judgment affidavits.").

228. Sedillo v. Valtierra, 115 S.W.3d 52 (Tex. App.—San Antonio 2003, pet. denied).

229. *Id.* at 53 (quoting WEBSTER'S COLLEGE DICTIONARY 49 (2d ed. 1999)); *cf.* Driscoll v. Dennis, 513 F. App'x 702, 705 (10th Cir. 2013) ("[B]ecause these requests for admission[] were compound and ambiguous, we 'regard the admission as limited in practical effect.' Under these circumstances, we cannot conclude that the district court was required to treat the admissions as conclusively establishing Mrs. Driscoll's ownership." (citation omitted and quoting Dixon v. Kirkpatrick, 553 F.3d 1294, 1303 (10th Cir. 2009))); Rolscreen Co. v. Pella Prods. of St. Louis, Inc., 64 F.3d 1202, 1210 (8th Cir. 1995) ("The conclusive effect envisioned by [Federal Rule 36] may not be appropriate where requests for admission[] or the responses to them are subject to more than one interpretation.").

230. TEX. R. CIV. P 191.4(c) ("[A] person may file discovery materials in support of or in opposition to a motion or for other use in a court proceeding . . . .").

231. Approximately $14,900.00 v. State, 261 S.W.3d 182, 186 (Tex. App.—Houston [14th Dist.] 2005, 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." (citation omitted)); Payton v. Ashton, 29 S.W.3d 896, 898 (Tex. App.—Amarillo 2000, no pet.) (affirming the trial court's refusal to consider alleged deemed admissions because the requests were not properly served on the defendant); City of Houston v. Rener, 896 S.W.2d 317, 319–20 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (reversing a summary judgment based on deemed admissions because the requests were left with a building guard who was not the defendant's attorney's representative and who never delivered them to the attorney).

232. *See* Clark v. Porter, No. 04-08-0052-CV, 2009 Tex. App. LEXIS 6680, at *6 (Tex. App.—San Antonio Aug. 26, 2008, pet. denied) (mem. op.) ("Deemed admissions filed with the trial

evidence to avoid confusion.[233] Before an admission can be admitted into evidence or otherwise used at trial, or in connection with a summary judgment motion, it is subject to all pertinent objections to its use.[234] And, if the trier of fact finds facts contrary to an admission, the admission controls.[235]

Admissions, both express and deemed, are competent summary judgment evidence, and they may establish that there is no genuine issue of material fact, thereby justifying a summary judgment's entry.[236] A trial court has no discretion to ignore admissions, express or deemed, in ruling on a summary judgment motion unless the admission is a legal conclusion

court clerk and part of the record at the time of trial need not be introduced in evidence to be properly before the court."); Red Ball Motor Freight, Inc. v. Dean, 549 S.W.2d 41, 43 (Tex. App.—Tyler 1977, writ dism'd w.o.j.) ("Admissions made by parties to a suit . . . need not be introduced in evidence to be properly before the trial court and this court for our consideration."); Richards v. Boettcher, 518 S.W.2d 286, 288 (Tex. Civ. App.—Texarkana 1974, writ ref'd n.r.e.) (explaining that interrogatory answers, unlike admissions, must be introduced into evidence to be considered by the trial or appellate court).

233. Ordinarily, this is done in the requesting party's case-in-chief. Alternatively, if the trial court reads factual stipulations to the jury before receiving evidence, the requesting party can ask the Court to include key admissions. Because many studies indicate that the first information heard by jurors has the greatest impact and because jurors consider communications from the court with great respect and creditability, using this methodology may give the admission more credibility and importance in the jurors' minds. LARRY S. KAPLAN, COMPLEX FEDERAL LITIGATION § 17.25 (1993).

234. *Cf.* Palmetto State Med. Ctr., Inc. v. Op. Lifeline, 117 F.3d 142, 146 (4th Cir. 1997) (holding that admissions were properly excluded by the trial court because they were hearsay as to a non-admitting party); Walsh v. McCain Foods Ltd., 81 F.3d 722, 727 (7th Cir. 1996) ("Admissions obtained under [Federal] Rule 36 may be offered in evidence at the trial of the action, but they are subject to all pertinent objections to admissibility that may be interposed at the trial." (quoting 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE CIVIL § 2264, at 571–72 (2d ed. 1994))); Simien v. Chem. Waste Mgmt., Inc., 30 F. Supp. 2d 939, 942 n.3 (W.D. La. 1998) (same); *Sedillo*, 115 S.W.3d at 53 (reversing summary judgment because it was based on admissions of law).

235. *See, e.g.*, Beutel v. City of Dall. Cnty. Flood Control, 916 S.W.2d 685, 695 (Tex. App.—Waco 1996, writ denied) ("An admission, once admitted, deemed or otherwise, is a judicial admission, and a party may not then introduce testimony to controvert it. Accordingly, when findings by the trier of fact contradict properly admitted judicial admissions, the judicial admissions must be accepted as superior." (citations omitted)).

236. *See* Maswoswe v. Nelson, 327 S.W.3d 889, 896 (Tex. App.—Beaumont 2010, no pet.) ("'Admissions of *fact* on file at the time of a summary judgment hearing are proper summary judgment [evidence] and will, therefore, support a motion for summary judgment.'" (quoting Cedyco Corp. v Whitehead, 253 S.W.3d 877, 879–80 (Tex. App.—Beaumont 2008, pet. denied))); Acevedo v. Comm'n For Law. Discipline, 131 S.W.3d 99, 105 (Tex. App.—San Antonio 2004, pet. denied) (stating that filed admission of fact are proper proof "and thus will support a motion for partial summary judgment."); *Sedillo*, 115 S.W.2d at 53 ("Summary judgment is properly granted if a party's deemed admissions defeats the elements of the party's cause of action.").

or otherwise inadmissible.[237] And, as pointed out above, they cannot be contradicted by other summary judgment evidence.

A party, however, can waive its right to rely on an admission's conclusiveness. Waiver occurs when either the party relying on the admission or the admitting party without objection introduces evidence directly contradicting the admitted matter.[238] Evidence that merely explains the admission and that is consistent with it will not result in waiver.[239]

A denial or other refusal to admit a fact in response to a request for admission is not evidence and, therefore, is inadmissible.[240] As explained

237. *See* Rowlands v. Unifund CCR, No. 14-5-01122-CV, 2007 Tex. App. LEXIS 2336, at *10 (Tex. App.—Houston [14th Dist.], Mar. 27, 2007, pet ref'd) (mem. op., not designated for publication) ("Indeed, the trial court had no discretion to ignore the deemed admissions."); Hendler v. N. Shore Boat Works, Inc., No. 13-03-00273-CV, 2004 Tex. App. LEXIS 6617, at *7 (Tex. App.—Corpus Christi July 22, 2004, no pet.) (mem. op.) ("Not only should the trial court have considered the deemed admission in ruling on the motion for summary judgment, the trial court had no discretion to ignore the deemed admissions."); Pathfinders Personnel Serv., Inc. v. Worsham, 619 S.W.2d 475, 476 (Tex. App.—Houston [14th Dist.] 1981, no writ) ("[T]he trial court may not at the close of the case ignore such judicial admissions on its own motion.").

238. *See* Marshall v. Vise, 767 S.W.2d 699, 700 (Tex. 1989) ("We hold that a party waives the right to rely on an opponent's deemed admissions unless objection is made to the introduction of evidence [contradicting] those admissions."); Duff v. Spearman, 322 S.W.3d 869, 884 (Tex. App.—Beaumont 2010, pet. denied) ("A party that, without objection, allows the trial court to admit evidence controverting a matter deemed admitted may waive his right to rely upon the matter."); Wirtz v. Mass Mut. Life Ins. Co., 898 S.W.2d 414, 422 (Tex. App.—Amarillo 1995, no writ) ("[A] party relying upon the admission must protect the record by objecting to the introduction of controverting evidence and to the submission of any issue bearing on the fact admitted, or else waive the right to rely upon the admission.").

239. *See* Resolution Trust Corp. v. Thurlow, 820 S.W.2d 51, 53 (Tex. App.—San Antonio 1991, no writ) ("[T]he evidence elicited merely attempted to clarify the deemed admissions by including the accrued interest to date of the trial. Accordingly, we find that the appellant did not waive its right to rely upon the appellee's deemed admissions."); Collision Ctr. Paint & Body, Inc. v. Campbell, 773 S.W.2d 354, 356 (Tex. App.—Dallas 1989, no writ) ("A party waives the right to rely upon an opponent's deemed admissions unless objection is made to the introduction of evidence contrary to those admissions."); *see* also Willowbrook Foods, Inc. v. Grinnell Corp., 147 S.W.3d 492, 503 (Tex. App.—San Antonio 2004, pet. denied) ("However, an objection is required only when the offered evidence clearly contradicts the admissions.").

240. *See* Mack Boring & Parts Co. v. Novis Mar., Ltd., Civ. Action No. 06-2692 (HAA), 2008 U.S. Dist. LEXIS 71239, at *12–13 (D.N.J. Sept. 18, 2008) (holding that "admission denials '[are] not legal and competent evidence' under Texas law" (quoting Newman v. Utica Nat'l Ins. Cor., 868 S.W.2d 5, 7 (Tex. App.—Houston [1st Dist] 1993, writ denied))); Americana Motel, Inc. v. Johnson, 610 S.W.2d 143, 143 (Tex. 1980) (per curiam) (holding that an admission denial is "not summary judgment evidence in Texas"); Hill v. Trinci, No. 14-10-00862-CV, 2012 Tex. App. LEXIS 5934, at *15 (Tex. App.—Houston [14th Dist] July 24, 2012, no pet.) (mem. op.) ("Under Texas law, denials or refusals to admit are not admissible evidence."); Am. Commc'ns Telecomms, Inc., v. Comerica Nat'l Bank, 691 S.W.2d 44, 48 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) ("Admitting [a] denial [to a request for an admissions] into evidence is error.").

by the San Antonio Court of Appeals: "When an answering party denies or refuses to make an admission of fact, such refusal is nothing more than a refusal to admit a fact. It is not evidence of any fact except the fact of refusal. Admitting such denial into evidence is error."[241] In other words, a "denial of a request for admission does not 'admit the opposite, but rather is simply to establish that the matter is in dispute.'"[242]

E. *Use of Admissions or Denials in Other Proceedings*

Under Texas Rule 198.3, "[a]ny admission made by a party under these rules can be used solely in the pending action and not in any other proceeding."[243] This rule prevents the use of an admission in other civil or criminal actions as well as in administrative proceedings or arbitrations.[244] Thus, one way for a party to avoid the effect of damning

241. *Am. Commc'ns Telecomms*, 691 S.W.2d at 48; *accord* Luke v. Unifund CCR Partners, No. 02-06-00444-CV, 2007 Tex. App. LEXIS 7096, at *8 (Tex. App.—Fort Worth Aug. 31, 2007, no pet.) (mem. op.) ("When an answering party denies or refuses to make an admission of fact, such refusal is nothing more than a refusal to admit a fact; it is not evidence of any fact except the fact of refusal."); *Newman*, 868 S.W.2d at 8 ("We determine that when an answering party denies or refuses to make an admission of fact, such refusal is nothing more than a refusal to admit a fact. It is not evidence of any fact except the fact of refusal. Thus, Utica's answer of 'denied' to request for admission number 21 is not legal and competent evidence." (citations omitted)); Carbonet Hous., Inc. v. Exchange Bank, 628 S.W.2d 826, 829 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.) ("It is important to note that when an answering party denies or refuses to make an admission of fact, such refusal is not evidence of any fact except the fact of such refusal."); *cf.* Langer v. Monarch Life Ins. Co., 966 F.2d 786, 805 (3d Cir. 1992) ("[A] denial of a [Federal] Rule 36 request for admission simply leaves the denied proposition in dispute for trial."); Stockdale v. Stockdale, No. 4:08-CV-1773, 2009 U.S. Dist. LEXIS 121346, at *5 (E.D. Mo. Dec. 30, 2009) ("Further, a party cannot read into evidence the other party's denial or refusal to admit a fact, as a denial or refusal to answer is not evidence of any fact."); Sarachek v. Jaffe (*In re* Agriprocessors, Inc.), Adv. No. 10-09170, 2013 Bankr. LEXIS 1279, at *18–19 (Bankr. N.D. Iowa Mar. 28, 2013) ("Unlike admissions, denials of requests for admission[] do not have *conclusive* effect. Rather than establishing a conclusive proposition, a denial creates a factual dispute." (emphasis added) (citation omitted)).

242. Barker v. Dollar Gen., 778 F. Supp. 2d 1267, 1269–70 (M.D. Ala. 2011) (quoting Harmon v. Wal-Mart Stores, Inc., No. 3:08-cv-309, 2009 U.S. Dist. LEXIS 21040, at *10 (M.D. Ala. Mar. 16, 2009)); *accord* Schoeps v. MOMA, 594 F. Supp. 2d 461, 465 (S.D.N.Y. 2009) ("[A] refusal to admit is not the equivalent of an affirmative admission of the opposite.").

243. TEX. R. CIV. P. 198.3.

244. *See* Crowson v. Wakeman, No. 05-93-01552-CV, 1996 Tex. App. LEXIS 2158, at *12–13 (Tex. App.—Dallas May 29, 1996, no writ) (not designated for publication) ("We conclude that because the application to probate the will and will contest was a separate proceeding, the deemed admissions could not be used against Crowson in the heirship proceeding."); Osteen v. Glynn Dodson, Inc., 875 S.W.2d 429, 431 (Tex. App.—Waco 1994, writ denied) (explaining that admissions are admissions only in the same suit.); *cf.* Kohler v. Leslie, Hindeman, Inc., 80 F.3d 1181, 1185 (7th Cir. 1996) ("[A] statement made in one lawsuit cannot be a judicial admission in another."); ConnectU, LLC v. Zuckerberg, 240 F.R.D. 34, 36 (D. Mass. 2006) ("Under California law, a party's admission in state court cannot be used in separate federal action."), *rev'd on other grounds*, 522 F.3d 82 (1st Cir. 2008); Maxwell v. Arkansas, 41 S.W.3d 402, 408 (Ark. Ct. App. 2001) (holding that a

admissions in an action is to dismiss it and re-file another action, if the statute of limitations has not run.[245]

Texas Rule 198.3 also should prevent the use of a judgment in a later proceeding for collateral purposes where the judgment was based solely on an admission because such a judgment should no collateral estoppel effect under the Rule.[246]

However, some questions remain. First, can the responding party's admission be used to impeach its testimony in another proceeding? Although no case has considered this question, read literally, Texas Rule 198.3's prohibition on an admission's use in other proceedings appears to prevent this.

Second, can a denial, as opposed to an admission, be used in another proceeding, for example, to show that the admitting party's position or testimony is inconsistent with his denial of a request for admission in an earlier proceeding? Even though Texas Rule 198.3 only provides that "[a]ny admission" made by a party cannot be used "in any other proceedings," the answer is "no" because, under Texas law, admission denials are neither evidence nor admissible.

This principle is illustrated by *Mack Boring & Parts Co. v. Novis Marine, Ltd.*[247] In that case, Mack Boring, a boat-parts manufacturer sued Novis in a New Jersey federal district court for amounts due and owing for parts—Yanmar saildrives—sold to Novis.[248] Novis counterclaimed, alleging that Mack Boring had breached the parties' contract and express and implied warranties because the saildrives were defective.[249]

criminal defendant's admission in a civil action could not be used against him in a criminal prosecution).

245. *See, e.g.*, *Osteen*, 875 S.W.2d at 431 (holding that the plaintiff was entitled to non-suit to avoid summary judgment based on deemed admissions).

246. *Cf. In re* Cassidy, 892 F.2d 637, 640 (7th Cir. 1990) ("[T]he judgment of the tax court on that factual issue, which is based solely on the admissions, cannot be a bar in this later proceeding" (footnote omitted)), *cert. denied*, 498 U.S. 812 (1990); Cozzone v. Ingui, No. 06-1541, 2006 U.S. Dist. LEXIS 80752, at *6–8 (E.D. Pa. Oct. 25, 2006) ("The Bankruptcy Court correctly held that Appellee's state court admissions were inadmissible under both Fed. R. Civ. P. 36 and Pa. R. Civ. P. 4014. . . . The meaning of the rules is clear; admissions shall not be used in a proceeding beyond the action for which they are offered. It necessarily follows that a verdict or judicial finding predicated exclusively on those admissions is likewise inadmissible."); Hildebrand v. Kugler (*In re* Kugler), 170 B.R. 291, 301, 301 n.14 (Bankr. E.D. Va. 1994) (holding that where issues are deemed admitted due to a party's failure to respond to requests for admission, the "actually litigated . . . element of collateral estoppel is unsatisfied").

247. Mack Boring & Parts Co. v. Novis Marine, Ltd., No. 06-2692 (HAA), 2008 U.S. Dist. LEXIS 71239 (D.N.J. Sept. 18, 2008).

248. *Id.* at *2.

249. *Id.* at *3.

While the action was pending, one of Novis's customers sued Novis in a Texas state court, claiming that the boat and Yanmar saildrive Novis sold him were defective. During discovery in that action, Novis denied requests for admission regarding: "(i) whether the Yanmar saildrives it purchased from Mack Boring (and subsequently sold to [the customer]) were defective; (ii) whether Mack Boring breached an express warranty; (iii) whether Mack Boring breached the implied warranty of merchantability; and (iv) whether Mack Boring breached the implied warranty of fitness for a particular purpose."[250]

Mack Boring moved for summary judgment in its federal action, arguing, among other things, that Novis's admission denials in the Texas state court proceeding judicially estopped it from asserting its counterclaims.[251] The United States District Court for the District of New Jersey, relying on the fact that, under Texas law, admission denials are neither evidence nor admissible, rejected the argument:

> Applying the first part of the estoppel test, the January 25, 2008 admission responses might seem clearly inconsistent with Novis's present counterclaims. . . . At first blush, it would seem the inconsistency requirement [of judicial estoppel] has been met.
>
> Yet when considered in the context of Texas civil procedure, Novis's statements of denial do not contradict its present counterclaims as a matter of law. Mack Boring contends that Novis's admission responses satisfy the judicial adoption requirement because Texas courts automatically adopt Rule 198 admissions by operation of law. Although Plaintiff is correct that a Rule 198 admission is conclusive and binding on the presiding Texas court, a denial of a request for admission does not have the same legal effect. In *Newman v. Utica Nat'l Ins. Co. of Texas*, a Texas appeals court held that "when an answering party denies or refuses to make an admission of fact, such refusal is nothing more than a refusal to admit a fact. It is not evidence of any fact except the fact of refusal." 868 S.W.2d 5, 8 (Tex. App.—Houston [1st Dist.] 1993). Because admission denials "[are] not legal and competent evidence," *Newman*, 868 S.W.2d at 8, it cannot be gainsaid that Novis truly contradicted itself in denying the requests, nor that a court or agency accepted Novis's answers. Rather, Novis merely put the Texas plaintiff to his proof, and any sanctions for bad faith false admissions answers, if necessary, will lie in the Texas court.
>
> Because Defendant has not made clearly inconsistent statements in separate proceedings and, in any event, no court or agency has adopted the

250. *Id.* at *4.
251. *Id.*

> challenged statements, the judicial estoppel inquiry must end. The Court will deny summary judgment on the basis of judicial estoppel.[252]

VII. WITHDRAWAL, SUPPLEMENTATION, OR AMENDMENT OF RESPONSES TO REQUESTS FOR ADMISSION

According to Texas Rule 193.5, a responding party is under a duty to amend or supplement a response to written discovery if it learns that it "was incomplete or incorrect when made, or, although complete and correct when made, is no longer complete and correct[.]"[253] This obligation seemingly is inconsistent with Texas Rule 198.3, which requires court permission to withdraw or amend an admission:

> A matter admitted under this rule is conclusively established as to the party making the admission unless the court permits the party to withdraw or amend the admission. The court may permit the party to withdraw or amend the admission if:
>
> (a) the party shows good cause for the withdrawal or amendment; and
>
> (b) the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved by permitting the party to amend or withdraw the admission.[254]

Although Texas Rule 198.3's specific limitation controls Texas Rule 193.5's general rule, the two rules can be reconciled by interpreting them so that a responding party has a duty to promptly seek to file a motion to amend a response to a request for admission when Rule 193.5 imposes such a duty, but it may not do so unilaterally and must satisfy the court that Rule 198.3's requirements are met.

Because Texas Rule 198.3 only applies to admissions, there is no problem applying Rule 193.5's requirement to a denial or an inability to admit or deny. Accordingly, if the responding party obtains new information creating a duty to amend or supplement with respect to such a response, it must do so reasonably promptly after it discovers the need for the amendment or supplement and need not obtain leave of court before doing so.[255]

Texas Rule 198.3 sets forth three requirements for the withdrawal or

252. *Id.* at *11–13 (citation omitted).

253. TEX. R. CIV. P. 193.5(a).

254. *Id.* R. 198.3.

255. *See id.* R. 193.5 ("An amended or supplemental response must be made reasonably promptly after the party discovers the necessity for such a response.").

amendment of an admission: (1) good cause for the withdrawal or amendment; (2) no undue prejudice to the requesting party from the withdrawal or amendment; and (3) the presentation of the action's merits will be subserved by the withdrawal or amendment. The responding party has the burden of proof on all three elements.[256] Moreover, the test applies to both express and deemed admissions.[257]

"A trial court has broad discretion to permit or deny the withdrawal of deemed admissions."[258] Accordingly, on appeal, its ruling is reviewed for an abuse of discretion.[259] A trial court, however, cannot order the withdrawal or amendment of deemed admissions on its own motion.[260] Moreover, a responding party may not seek withdrawal of deemed admissions after judgment in a motion for new trial, if the party realized its mistake before judgment and, therefore, had other avenues for relief available.[261]

256. *See* Morgan v. Timmers Chevrolet, Inc., 1 S.W.3d 803, 807 (Tex. App.—Houston [1st Dist] 1999, pet. denied) (holding that the responding party has the burden of proof on all three Texas Rule 198.3 requirements); Luna v. State, No. 03-96-0055-CV, 1997 Tex. App. LEXIS 3150, at *6 (Tex. App.—Amarillo June 19, 1997, no writ) (per curiam) (not designated for publication) (same); Tinney v. Team Bank, 819 S.W.2d 560, 562 (Tex. App.—Fort Worth 1991, writ denied) (same).

257. *See* Wal-Mart Stores, Inc. v. Deggs, 968 S.W.2d 354, 356–57 (Tex. 1998) (per curiam) (deemed admissions); Stelly v. Papania, 927 S.W.2d 620, 622 (Tex. 1996) (express admissions); Boulet v. State, 189 S.W.3d 833, 836 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (deemed admissions); Duong v. Bank One, N.A., 169 S.W.3d 246, 252 (Tex. App.—Fort Worth 2005, no pet.) (express admissions).

258. *Papania*, 927 S.W.2d at 622; *accord* Tommy Gio, Inc. v. Dunlop, 348 S.W.3d 503, 509 (Tex. App.—Dallas 2011, pet. denied) ("An appellate court should set aside a trial court's ruling only if, after reviewing the entire record, it is clear that the trial court abused its discretion."); Arango v. Davila, No. 13-09-00470-CV, 2011 Tex. App. LEXIS 3806, at *8 (Tex. App.—Corpus Christi May 19, 2011, pet. denied) (mem. op.) ("Although a trial court has broad discretion to permit or *deny* the withdrawal of deemed admissions, it cannot do so arbitrarily, unreasonably, or without reference to guiding rules or principles." (emphasis added)).

259. *Papania*, 927 S.W.2d at 622; *Tommy Gio*, 348 S.W.3d at 509; *Arango*, 2011 Tex. App. LEXIS 3806, at *8.

260. *See* Standard Fire Ins. Co. v. Magan, 745 S.W.2d 310, 312 (Tex. 1987) ("[B]ecause Standard never requested the trial court to withdraw or amend the admission, the admitted facts were conclusively established.").

261. Unifund CCR Partners v. Weaver, 262 S.W.3d 796, 798 (Tex. 2008) (per curiam) (holding that the appellee's summary judgment motion put the appellant "on notice of the insufficiency of his answer" to requests for admission, and, thus, he knew about his mistake before judgment but failed to respond, thereby waiving "his right to dispute deemed admissions"); Hewitt v. Roberts, No. 13-11-00449-CV, 2013 Tex. App. LEXIS 873, at *15 (Tex. App.—Corpus Christi Jan. 31, 2013, no pet.) (mem. op.) ("Hewitt, by his own admission, knew of his 'mistake' in early January 2011, well before the February 18 hearing, and could have responded to the Roberts' motion, or sought leave to file late responses, but because he did not, he waived his right to raise the issue thereafter."); Cleveland v. Taylor, 397 S.W.3d 683, 695 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) ("The notice of deemed admissions, two motions for summary judgment, trial exhibit list, and discussion on the

A. *Good Cause*

"Good cause is established by showing the failure [to timely respond or the incorrect admission] was an accident or mistake, not intentional or the result of conscious indifference."[262] As one court explained:

> In deciding whether a failure to timely answer was the result of accident or mistake, the controlling issue is the absence of purposeful or bad faith failure to answer which reflects a conscious indifference. Consequently, even a slight excuse will suffice, especially where delay or prejudice will not result against the opposing party. An accident or mistake upon the part of counsel may constitute negligence . . . but it will not necessarily constitute conscious indifference.[263]

The following have been found to constitute good cause for the withdrawal or amendment of deemed admissions: (1) a mistake in calculating the time to serve the response;[264] (2) an inadvertent failure to

record in the presence of two of the Cleveland parties and their attorney demonstrate that the Cleveland parties had notice of their mistake before the trial court rendered judgment and that they had other avenues of relief available, but that they failed to take action until after the trial court's judgment. Thus, we conclude that the Cleveland parties waived their right to challenge the deemed admissions."). If, however, the responding party first realizes that it needed to move to withdraw its deemed admission after judgment was entered, it may raise the issue for the first time in a motion for new trial. *See* Wheeler v. Green, 157 S.W.3d 439, 442 (Tex. 2005) (per curiam) ("[N]othing in this record suggests that before summary judgment was granted, Sandra realized her responses were late [or] that she needed to move to withdraw deemed admissions . . . . Accordingly, we hold she was entitled to raise them in her motion for new trial.").

262. *Wheeler*, 157 S.W.3d at 442; *accord Papania*, 927 S.W.2d at 622 ("A party may withdraw a deemed admission 'upon a showing of good cause for such withdrawal . . . if the court finds that the parties relying upon the responses . . . will not be unduly prejudiced and that the presentation of the merits of the action will be subserved thereby.'" (quoting TEX.R.CIV.P. 169(2))); *Tommy Gio*, 348 S.W.3d at 510 ("Testimony that Stephens had been ill did not conclusively establish accident or mistake for purpose of good cause to set aside deemed admissions or that the trial court in *Baker* would have abused its discretion by denying a motion to undeem admissions."). This is essentially the same standard applied to a defaulting party's conduct in ruling on an equitable motion for new trial. Cudd v. Hydrostatic Trans., Inc., 867 S.W.2d 101, 104 (Tex. App.—Corpus Christi 1993, no writ); Esparza v. Diaz, 802 S.W.2d 772, 776 (Tex. App.—Houston [14th Dist.] 1990, no writ).

263. N. River Ins. Co. v. Greene, 824 S.W.2d 697, 700 (Tex. App.—El Paso 1992, writ denied); *accord* Boulet v. State, 189 S.W.3d 833, 836 (Tex. App.—Houston [1st Dist.] 2006, no pet.) ("Even a slight excuse will suffice, especially when delay or prejudice to the opposing party will not result." (quoting Spiecker v. Petroff, 971 S.W.2d 536, 538 (Tex. App.—Dallas 1997, no pet.))); Matelski v. Matelski, 840 S.W.2d 124, 128 (Tex. App.—Fort Worth 1992, no writ) ("[W]here the plaintiff is not injured and the trial not delayed, even a slight excuse for the original failure to answer a request for admission[] will suffice.").

264. *Wheeler*, 157 S.W.3d at 442; *In re* Seizure of Gambling Proceeds, 388 S.W.3d 874, 879–80 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Boulet*, 189 S.W.3d at 837; TNT Bestway Transp., Inc. v. Whitworth, No. 05-96-01900-CV, 1999 Tex. App. LEXIS 4311, at *13 (Tex. App.—Dallas June 10, 1999, pet. denied) (not designated for publication).

docket the response date;[265] (3) an inadvertent failure to serve responses after they were timely prepared;[266] (4) an inadvertent failure to respond because the client was ill and the attorney was out-of-state;[267] (5) one co-party's inadvertent failure to respond to requests for admission served on multiple co-parties represented by the same attorney;[268] and (6) an inadvertent failure to respond to admission because of a substitution of counsel.[269]

Neither a busy schedule nor reliance on an oral agreement to extend the time to respond, however, constitutes good cause for the withdrawal of a deemed admission.[270] Moreover, good cause does not exist when the responding party does not act promptly to move to withdraw or amend the admission after it discovers the need to do so.[271]

B. *Undue Prejudice*

"Undue prejudice" depends 'on whether withdrawing an admission or filing a late response will delay trial or significantly hamper the opposing

265. A mistake in the docket date is sufficient to show good cause: Brewer v. Harris, No. 01-01-00151-CV, 2001 Tex. App. LEXIS 7708, at *6 (Tex. App.—Houston [1st Dist.] Nov. 15, 2001, no pet.) (not designated for publication); *Greene*, 824 S.W.2d at 698–701.

266. Ramsey v. Criswell, 850 S.W.2d 258, 259 (Tex. App.—Texarkana 1993, no writ).

267. Emp'rs Ins. v. Halton, 792 S.W.2d 462, 466–67 (Tex. App.—Dallas 1990, writ denied).

268. Watson v. Dall. Indep. Sch. Dist., 135 S.W.3d 208, 218 (Tex. App.—Waco 2004, no pet.); Credit-Car Ctrs., Inc. v. Chambers, 969 S.W.2d 459, 461–63 (Tex. App.—El Paso 1998, no pet.)

269. Taylor Made Homes, Inc. v. Gianotti, No. 04-00-00818-CV, 2001 Tex. App. LEXIS 7776, at *7–8 (Tex. App.—San Antonio Nov. 21, 2001, no pet.) (mem op., not designated for publication).

270. *See* London Market Co. v. Schattman, 811 S.W.2d 550, 552 (Tex. 1991) (per curiam) (holding that an oral agreement to extend response time is not sufficient for a good faith defense); Gordon v. Brunig, No. 02-09-040-CV, 2010 Tex. App. LEXIS 3774, at *12–13 (Tex. App.—Fort Worth May 20, 2010, pet. denied) (mem. op.) (holding that a failure to timely respond due to a busy schedule does not establish good faith); Hoffman v. Tex. Cmty. Bank Nat'l Ass'n, 246 S.W.2d 336, 339–40 (Tex. App.—Houston 1992, writ denied) (same); Eshmen v. Centennial Sav. Bank, 757 S.W.2d 392, 396 (Tex. App.—Dallas 1988, writ denied) (same). *See generally* Van Hoose v. Vanderbilt Mortg. & Fin., Inc., No. 03-08-00573-CV, 2009 Tex. App. LEXIS 3136, at *7 (Tex. App.—Austin May 8, 2009, pet. denied) (mem. op.) (holding that a failure to timely respond to requests for admission because of the responding party's "medical condition, which required her to avoid the stress of court proceedings" did not constitute good cause).

271. *See* Hewitt v. Roberts, No. 13-11-0044-CV, 2013 Tex. App. LEXIS 873, at *15 (Tex. App.—Corpus Christi Jan. 31, 2013, no pet.) (mem. op.) (holding that there was no good cause because the responding party "by his own admission, knew of his 'mistake' in early January 2011, well before the February 18 hearing, and could have responded to the Roberts' motion, or sought leave to file late responses," but did not); Darr v. Humble Auto., 20 S.W.3d 802, 808 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (holding that the responding party's failure to move to withdraw deemed admissions until three months after a summary judgment motion's service was not good cause).

party's ability to prepare for it.'"[272] As explained by one court, undue prejudice "contemplates not whether the admitting party will have to persuade the factfinder of the truth, but rather that it is connected to a party's difficulty in proving its case, for example, by the unavailability of key witnesses in light of the delay."[273]

Accordingly, the mere fact that the requesting party will have to prove the matters previously admitted or even that it will incur significant expense in conducting the additional discovery needed to replace the withdrawn or amended admission does not constitute prejudice.[274] Similarly, the requesting party's reliance on an admission in moving for summary judgment motion generally does not constitute undue prejudice.[275]

A requesting party, however, cannot "lie behind the log" and create undue prejudice. Thus, for example, if responses to requests for admissions were served late, but while there was adequate time to conduct

272. Marino v. King, 355 S.W.3d 629, 633 (Tex. 2011) (per curiam) (quoting Wheeler v. Green, 157 S.W.3d 439, 443 (Tex. 2005) (per curiam)); *see* Wal-Mart Stores, Inc. v. Deggs, 968 S.W.2d 354, 356–57 (Tex. 1998) (per curiam) (holding that there was no undue prejudice because the responding party had been deposed); Rodriguez v. Kapilivsky, No. 13-11-00976-CV, 2012 Tex. App. LEXIS 370, at *7 (Tex. App.—Corpus Christi Dec. 12, 2102, no pet.) (mem. op.) (holding that there was no undue prejudice because the action had not yet been set for trial); Cudd v. Hydrostatic Trans., Inc., 867 S.W.2d 101, 105 (Tex. App.—Corpus Christi 1993, no writ) (concluding that there was no undue prejudice because the deemed admissions' withdrawal would not delay the trial); *see also* Esparza v. Diaz, 802 S.W.2d 772, 776 (Tex. App.—Houston [14th Dist.] 1990, no writ) (same).

273. Sonoda v. Cabrera, 255 F.3d 1035, 1039 (9th Cir. 2001).

274. *Boulet*, 189 S.W.3d at 837–38 ("The mere fact that a trial on the merits is necessary does not constitute undue prejudice." (quoting City of Hous. v. Riner, 896 S.W.2d 317, 320 (Tex. App.—Houston [1st Dist.] 1995, writ denied))); *cf.* Le v. Cheesecake Factory Rests., Inc., No. 06-20006, 2007 U.S. App. LEXIS 5232, at *9 (5th Cir. Mar. 6, 2007) (per curiam) ("The Eighth Circuit has interpreted this standard to not encompass the increased expenses caused by the need for additional discovery to replace withdrawn admissions, and other courts contemplating the standard have concluded that merely having to prove the matters admitted does not constitute prejudice." (citations omitted)).

275. *See* Conlon v. United States, 474 F.3d 616, 624 (9th Cir. 2007) ("We agree with the other courts that have addressed the issue and conclude that reliance on a deemed admission in preparing a summary judgment motion does not constitute prejudice. Although the United States relied on the deemed admissions in choosing not to engage in any other discovery, we are reluctant to conclude that a lack of discovery, without more, constitutes prejudice. The district court could have reopened the discovery period and prejudice must relate to the difficulty a party may face in proving its case at trial." (citations omitted)); *see also* Watson v. Dall. Indep. Sch. Dist., 135 S.W.3d 208, 218 (Tex. App.—Waco 2004, no pet.) (holding that there no was no undue prejudice even though the plaintiff relied on deemed admissions in moving for summary judgment because there was ample time to conduct discovery before the trial date); *cf.* TNT Bestway Transp., Inc. v. Whitworth, No. 05-96-01900-CV, 1999 Tex. App. LEXIS 4311, at *15 (Tex. App.—Dallas June 10, 1999, pet. denied) (not designated for publication) (same).

discovery, the requesting party cannot simply decline to take discovery and then claim that it has been unduly prejudiced.[276]

C. *Merits Would Be "Subserved"*

The withdrawal of an admission "subserves" the presentation of the action's merits when upholding the admission would practically or effectively eliminate presentation of the action's merits.[277]

276. *See Marino*, 355 S.W.3d at 633–34 (holding that there was no undue prejudice when the defendant's responses were two days late and the plaintiff immediately moved for summary judgment based on deemed admissions); Wheeler v. Green, 157 S.W.3d 439, 443 (Tex. 2005) (per curiam) ("As Sandra's proof attached to her motion for new trial showed, Darrin's attorney received her responses two days late but six months *before* the summary judgment motion was heard. The lower courts could not have concluded on this record that Darrin would suffer any undue prejudice if the admissions were withdrawn."); *In re* Seizure of Gambling Proceeds, 388 S.W.3d 874, 880 (Tex. App.—Houston [14th Dist.] 2012, no pet.) ("[I]n the present case, assuming Worldwide's responses were late by five days, they were filed more than *one year before* the submission of the State's motion for summary judgment; no undue prejudice would have been suffered by the State if the deemed admissions were withdrawn."); Wells v. Best Ins. Servs., Inc., No. 13-09-00236-CV, 2010 Tex. App. LEXIS 8652, at *12–13 (Tex. App.—Corpus Christi Oct. 28, 2010, no pet.) (mem. op.) (holding that there was no undue prejudice because, among other reasons, "the first trial setting in this case was set for sixty days after Wells's responses to the requests for admission[] were finally filed. This was ample time for Best to continue discovery and request additional time from the trial court"); *In re* Kellogg-Brown & Root, Inc., 45 S.W.3d 772, 776 (Tex. App.—Tyler 2001, orig. proceeding) ("Concerning prejudice to the opposing party, we note that the responses to the requests for admission were delivered eight weeks prior to trial. In light of the time Fambrough had to assess the responses and to take any appropriate action, we hold that she would not be unduly prejudiced by the amendment of the deemed admissions."); Hourani v. Winn, No. 14-92-0331-CV, 1992 Tex. App. LEXIS 2991, at *4–5 (Tex. App.—Houston [14th Dist.] Nov. 25, 1992, writ denied) (not designated for publication) ("We reject [the defendant's] argument that he relied on the deemed admissions while preparing for trial. The argument suggests that [he] knew the answers were one day late, yet he failed to inform [the plaintiff] by a motion to compel, a motion for sanctions, or a motion for summary judgment. Instead, [the defendant] waited until trial and used [former Texas] Rule 169 to avoid a decision on the merits. As many courts have stated, [former Texas] Rule 169 should be used to simplify trials by eliminating uncontested matters. [Former Texas] Rule 169 was not designed as a trap for the unwary and should not be used to prevent a litigant from presenting his case.").

277. *See Wheeler*, 157 S.W.3d at 443 n.2 (holding that the "subserve" requirement is met if the action will be "decided on deemed (but perhaps untrue) facts"); Rodriguez v. Kapilivsky, No. 13-11-00976-CV, 2012 Tex. App. LEXIS 370, at *8 (Tex. App.—Corpus Christi Dec. 12, 2102, no pet.) (mem. op.) (holding the "subserve" requirement was met because upholding the deemed admissions would result in summary judgment); *Wells*, 2010 Tex. App. LEXIS 8652, at *12–13 (same); *see also Kellogg-Brown & Root*, 45 S.W.3d at 777 (holding that the "subserve" requirement was met because upholding the deemed admissions would have "eliminated [the defendant's] ability to present any viable defense at trial and acted as a death penalty sanction"); *cf. Conlon*, 474 F.3d at 622 (holding that the "subserved" requirement was met because "upholding the deemed admissions eliminated any need for a presentation on the merits"); Dynasty Apparel Indus., Inc. v. Rentz, 206 F.R.D. 596, 602 (S.D. Ohio 2001) (same); Baker v. Potter, 212 F.R.D. 8, 13 (D.D.C. 2002) ("Courts in this district have interpreted this prong as satisfied if the admission effectively would bar the party from presenting its case on its merits.").

D. *Withdrawal of Merits-Preclusive Deemed Admissions*

Although Texas Rule 198.3 does not distinguish between merits-preclusive and non-merits-preclusive deemed admissions, recent decisions of the Texas Supreme Court do so. Because Texas Rule 198.2(c) automatically deems a request admitted if the responding party fails to respond timely,[278] the Rule essentially imposes an automatic sanction.[279] Accordingly, the Texas Supreme Court has held that when deemed admissions are merits-preclusive, they are subject to the long-standing due-process principles applicable to other judicially-imposed, death-penalty sanctions and must be set aside absent "flagrant bad faith or callous disregard" for the rules, provided the requesting party is not unduly prejudiced by the withdrawal.[280]

Texas courts have not defined what constitutes "undue prejudice" in the context of a motion to withdraw merits-preclusive deemed admissions. Unlike with respect to the withdrawal of an express admission or a non-merits-preclusive deemed admission, undue prejudice with respect to a merits-preclusive deemed admission should not be found if its withdrawal will merely delay the trial. Rather, undue prejudice in such circumstances should exist only if the withdrawal will significantly hinder the requesting party's ability to fully present a claim or defense.

E. *Use of Withdrawn or Amended Admissions*

The general rule regarding a withdrawn pleading is that it is no longer a conclusive judicial admission,[281] but rather is admissible in evidence as an

The Texas Supreme Court has noted that the "subserve" requirement is the other side of the "no-undue-prejudice" requirement because presentation of the merits will suffer if the requesting party is prejudiced because the withdrawal prevents it from adequately preparing for trial or if the action "is decided on deemed (but perhaps untrue) facts anyway." *Wheeler*, 157 S.W.3d at 443 n.2.

278. *See* TEX. R. CIV. P. 198.2(c) ("If a response is not timely served, the request is considered admitted without the necessity of a court order.").

279. *See In re* Am. Gunite Mgmt. Co., No. 02-11-00349-CV, 2011 Tex. App. LEXIS 7913, at *1 (Tex. App.—Fort Worth Oct. 3, 2011, no pet.) (mem. op.) ("The rules of civil procedure authorize deemed admissions when a party fails to respond to requests for admission[], essentially authorizing an automatic sanction without the necessity for filing a motion of sanctions.").

280. *Marino*, 355 S.W.3d at 634; *Wheeler*, 157 S.W.3d at 443. *See Am. Gunite Mgmt.*, 2009 Tex. App. LEXIS 7913, at *2 ("[T]hey are nonetheless subject to the long-standing due-process principles applicable to other judicially imposed death penalty sanctions and must be set aside absent flagrant bad faith or callous disregard for the rules."); Thomas v. Select Portfolio Serv., Inc., 293 S.W.3d 316, 320 (Tex. App.—Beaumont 2009, no pet.) (same).

281. *See* Sosa v. Cent. Power & Light, 909 S.W.2d 893, 895 (Tex. 1995) (per curiam) ("Contrary to statements in live pleadings, [statements] contained in superseded pleadings are not conclusive and indisputable judicial admissions."); *see also* Nguyen v. Nguyen, 355 S.W.3d 82, 92 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (same); Quick v. Plastic Solutions of Tex., Inc., 270

evidentiary admission with the party free to explain why it was withdrawn.[282] No Texas case has focused on this question as it applies to a withdrawn or amended admission. Nonetheless, an express admission, later withdrawn or amended, should be treated in the same fashion as a pleading,[283] but a withdrawn deemed admission should be inadmissible.[284]

VIII. TESTING THE SUFFICIENCY OF ANSWERS, OBJECTIONS, AND PRIVILEGE ASSERTIONS TO REQUESTS FOR ADMISSION

Under Texas Rule 215.4, a requesting party "may move to determine the sufficiency of the answer or objection" to a request for admission.[285] A requesting party can challenge a qualified admission or denial, an admission or denial that does not "fairly meet the substance of the request,"[286] a statement of inability to admit or deny, an objection, or a privilege assertion.[287] This does not mean, however, that the requesting party can litigate the accuracy of a request's unqualified denial.

Neither Texas Rule 198 nor Texas Rule 215.4 authorizes a trial court to determine the accuracy of denials before trial.[288] Accordingly, a trial court

S.W.3d 173, 185 (Tex. App.—El Paso 2008, no pet.) (same).

282. *See* Bay Area Healthcare Grp., Ltd. v. McShane, 239 S.W.3d 231, 235 (Tex. 2007) (per curiam) (holding that superseded pleadings are admissible in evidence as an admission of a party opponent); *see also Nguyen*, 355 S.W.3d at 92 (same); *Quick*, 270 S.W.3d at 185 (same).

283. *Cf.* Tuomey Reg'l Med. Ctr., Inc. v. McIntosh, 432 S.E.2d 485, 487 (S.C. 1993) ("Once an answer to a Request for Admission[] is amended under [South Carolina] Rule 36, both the initial answer and the amended answer may be published to the jury. The jury may consider the initial answers as evidence, while the party who made such answers 'is free to explain why it was made and [amended].'").

284. *Cf.* Collins Entm't, Inc. v. White, 611 S.E.2d 262, 268 (S.C. 2005) ("We find where an admission is made solely by the failure to make a timely response, such admission being later withdrawn, the party is not allowed to publish the admission to the jury. The party may publish the late-filed response, but may not assert before the jury that the requests were previously admitted. Accordingly, we conclude the trial court properly refused to allow Appellants to publish to the jury the fact that Collins admitted the requests by failing to make a timely response.").

285. TEX. R. CIV. P. 215.4(a); *accord In re* RLS Legal Solutions, LLC, 156 S.W.3d 160, 165 (Tex. App.—Beaumont 2005, orig. proceeding) ("The party who has requested admissions may move to determine the sufficiency of an answer or objection."); *In re* Hodge, No. 12-02-000314-CV, 2002 Tex. App. LEXIS 8776, at *8 (Tex. App.—Tyler Dec. 11, 2002, orig. proceeding) (not designated for publication) ("[Texas] Rule 215.4 provides that a party who has requested an admission under [Texas] Rule 198 may move to determine the sufficiency of the answer.").

286. TEX. R. CIV. P. 198.2(b).

287. The requesting party's motion technically is not a motion to compel and should be styled "motion to test sufficiency of responses and/or objections to requests for admission."

288. *See Hodge*, 2002 Tex. App. LEXIS 8776, at *11 ("[Plaintiffs] cite no case law, and we are not aware of any, supporting their contention that, as here, a party may file a motion to deem admissions requesting that a trial court determine whether such a denial has merit. Therefore, we

cannot order that a request be admitted because the responding party's denial is unsupported by evidence or even because it was made in bad faith.[289] An incorrect or even a bad faith denial does *not* constitute an insufficient response for purposes of Texas Rule 215.4(a).[290] Rather, the requesting party's sole recourse is to prove the denial's incorrectness at trial and then move for expenses under Texas Rule 215.4(b).[291]

The requesting party has the burden of challenging the sufficiency of an answer, an objection, or a privilege assertion to a request for admission in the first instance.[292] If no challenge to the answer, objection, or privilege assertion is made or if no ruling on a motion to test its sufficiency is

conclude that such action by the trial court is not permitted by the rules of procedure or the interpretive case law."); *cf.* SEC v. Nutmeg Grp., LLC, 285 F.R.D. 403, 406 (N.D. Ill. 2012) (mem. op.) ("If a party believes that a response for admission is incorrect . . . then the appropriate remedy is to prove the disputed matter at trial and seek an award of reasonable expenses."); Nat'l Semiconductor Corp. v. Ramtron Int'l Corp., 265 F. Supp. 2d 71, 74–75 (D.D.C. 2003) (mem. op.) ("[T]he validity, or *bona fides,* of a qualified answer to a request for admission must await the trial to see if the party forced to prove what was not admitted can meet the requirements of that rule."); United States v. Op. Rescue Nat'l, 111 F. Supp. 2d 948, 968 (S.D. Ohio 2000) ("Courts have concluded that the ability to move to determine the sufficiency of answers and objections does not entitle one to request that a court determine the accuracy of a denial."); Lakehead Pipe Line Co. v. Am. Home Assur. Co., 177 F.R.D. 454, 458 (D. Minn. 1997) ("[Federal Rule 36] does not authorize a Court to prospectively render determinations concerning the accuracy of a denial to a Request for Admission, or to order that the subject matter of the request be admitted because the opposing party's unequivocal denial is asserted to be unsupported by the evidence.").

289. See *infra* note 317 for supporting cases.

290. *Cf.* Interland, Inc. v. Bunting, No. 9:04-CV-444-ODE, 2005 U.S. Dist. LEXIS 36112, at *31 (N.D. Ga. Mar. 31, 2005) ("Most of Interland's requests for admission[] were mirror-image requests. . . . Bunting denied both requests. While Interland claims Defendant's responses were improper, [Federal] Rule 36 only requires an admission, denial, or objection. Defendant has complied. The accuracy of its responses will be determined at trial. 'The implicit meaning of [Federal] Rule 37 is . . . that issues obviously subject to dispute should be resolved at trial, not in a discovery motion.' Those responses where Defendant simply admitted or denied a request are sufficient . . . ." (quoting Perez. v. Miami-Dale Cnty., 297 F.3d 1255, 1264 (11th Cir. 2002))); Foretich v. Chung, 151 F.R.D. 3, 5 (D.D.C. 1993) (holding that an answer to a request for admission is "insufficient where it is not specific or . . . the explanation for failure to admit or to deny" is improper, and not because a denial may be contrary to the evidence).

291. See *infra* section IX., which discusses expenses for failure to admit under Texas Rule 215.4(b).

292. *See* State v. Carillo, 885 S.W.2d 212, 216 (Tex. App.—San Antonio 1994, no writ) ("The party propounding the request may challenge the sufficiency of the answers, and if the court finds the answer insufficient under [former Texas] Rule 169, the court may deem the matter admitted."); Taylor v. Taylor, 747 S.W.2d 940, 945 (Tex. App.—Amarillo 1988, writ denied) (holding that, in light of the trial court's finding that "there was no proper response to the requests and that the answers and objections to the requests did not satisfy the requirements of the rule, the court was authorized, if not required, by the rules to deem the matters admitted").

obtained from the trial court, then the requesting party waives any complaint about the answer, objection, or privilege assertion.[293]

When an answer, objection, or privilege assertion is challenged, the responding party has the burden to establish (1) the answer's sufficiency, including whether it made reasonable inquiry and whether the information—known or readily available—was insufficient to enable an admission or denial; or (2) the objection's or privilege assertion's propriety.[294] Unless the trial court finds that the objection or privilege assertion was justified, it must order the responding party to answer the request for admission.[295] In contrast, on finding that an answer was insufficient because it was evasive, incomplete, or otherwise did not comply with Texas Rule 198's requirements, the trial court can either deem the request admitted or order that an answer be served.[296] The first time the sufficiency of an answer to a request for admission is challenged, a court generally should order the responding party to serve a supplemental answer to the request, rather than deem it admitted.[297] This is particularly

293. See *supra* note 126 for supporting cases.

294. See *supra* note 127 for supporting cases.

295. *See* TEX. R. CIV. P. 215.4(a) ("Unless the court determines that an objection is justified, it shall order that an answer be served."). If a privilege assertion is overruled, the responding party in its new response to the request can interpose appropriate objections to the request if they were not interposed initially.

296. *See id.* R. 215.4(a) ("If the court determines that an answer does not comply with the requirements of Rule 198, it may order either that the matter is admitted or that an amended answer be served."); *accord In re* RLS Legal Solutions, LLC, 156 S.W.3d 160, 165–66 (Tex. App.—Beaumont 2005, orig. proceeding) (holding that a trial court can deem requests for admission admitted in ruling on a motion to test the sufficiency of answers); *In re* Hodge, No. 12-02000314-CV, 2002 Tex. App. LEXIS 8776, at *8 (Tex. App.—Tyler Dec. 11, 2002, orig. proceeding) (not designated for publication) (applying Texas Rule 215.4(a)); *Carillo*, 885 S.W.2d at 216 ("Pursuant to [Texas] Rule 215(4), an evasive or incomplete answer may be treated by the trial court as a deemed admission. The party propounding the request may challenge the sufficiency of the answers, and if the court finds the answer insufficient under [former Texas] Rule 169, the court may deem the matter admitted." (citation omitted)); *Taylor*, 747 S.W.2d at 945 (holding that, once the trial court found that the answers did not comply with former Texas Rule 169, "the court was authorized, if not required, by the rules to deem the matters admitted").

297. *Cf.* Asea, Inc. v. S. Pac. Transp. Co., 669 F.2d 1242, 1247 (9th Cir. 1981) ("Although the [trial] court should ordinarily first order an amended answer, and deem the matter admitted only if a sufficient answer is not timely filed, this determination, like most involved in the oversight of discovery, is left to the sound discretion of the [trial] judge. The general power of the [trial] court to control the discovery process allows for the severe sanction of ordering a matter admitted when it has been demonstrated that a party has intentionally disregarded the obligations imposed by [Federal] Rule 36(a)." (citation omitted)); JZ Buckingham Invests., LLC v. United States, 77 Fed. Cl. 37, 45 (Fed. Cl. 2007) (discussing cases and noting "[m]ore typically, when the responding party's answer to requests for admission is deemed to be noncompliant with Rule 36, federal courts order the responding party to serve a supplemental answer").

true with merits-preclusive requests.[298] Nevertheless, a trial court may deem the request admitted if it finds the responding party acted in bad faith or where the evidence clearly indicates that the request should have been admitted.[299] Moreover, it is clearly appropriate to deem a request for admission admitted if the responding party fails to properly respond after being ordered to do so.[300]

The losing party in connection with a motion to test the sufficiency of an answer, objection, or privilege assertion to a request for admission may be required to pay the other party's expenses, including reasonable attorneys' fees under Texas Rule 215.1(d).[301]

IX. EXPENSES FOR FAILURE TO ADMIT: THE "ADMIT OR PAY" RULE

A requesting party may invoke the "admit or pay" rule of Texas Rule 215.4(b) for an unjustified refusal to admit a request for admission. That is, a responding party who fails to admit a matter or the genuineness (or authenticity) of a document can be ordered to pay the requesting party's reasonable expenses, including attorneys' fees, incurred in proving the

298. In such a case, the court, instead of deeming the requests admitted, can order the responding party to pay the requesting party's expenses, including reasonable attorneys' fees, in connection with the motion. TEX. R. CIV. P. 215.4(b); *cf.* Thalheim v. Eberheim, 124 F.R.D. 34, 38 (D. Conn. 1988) (declining to deem requests admitted even though answers by the responding party were disingenuous, insufficient, and lacking in good faith, but awarding expenses for the motion's filing).

299. *Cf. Asea*, 669 F.2d at 1247 (concluding that the trial court could properly deem requests admitted if the evidence revealed that the responding party had knowledge sufficient to admit them and had failed to make reasonable inquiry—but remanding for factual determination on these issues); *JZ Buckingham Invests.*, 77 Fed. Cl. at 45 ("Nevertheless, where a federal court finds a lack of good faith on the part of the responding party, it may deem the matter admitted. Typically, courts have ordered matters admitted either when the evidence shows that it should have been admitted . . . or when the court finds the responding party's conduct in answering the requests for admission to be reprehensible." (citations omitted)); Uniden Am. Corp. v. Ericsson Inc., 181 F.R.D. 302, 304–05 (M.D.N.C. 1998) (deeming admitted a request regarding a document's authenticity because deposition testimony confirmed its authenticity); Caruso v. Coleman Co., No. 93-CV-6733, 1995 U.S. Dist. LEXIS 7934, at *8 (E.D. Pa. June 7, 1995) (deeming a request admitted because the qualified answer to it clearly implied that it should have been admitted).

300. *See* A. Farber & Partners, Inc. v. Garber, 237 F.R.D. 250, 256–58 (C.D. Cal. 2006) (deeming requests admitted when the responding party gave evasive answers after the court had sanctioned it for failing to make a reasonable inquiry); Cochrane v. IRS, 107 T.C. 18, 26 (T.C. 1996) (deeming requests admitted when responses were evasive, incomplete, and not in good faith despite prior court order).

301. *See* TEX. R. CIV. P. 215.4(a) ("The provisions of Rule 215.1(d) apply to the award of expenses incurred in relation to the motion."); *Id.* R. 215.1(d) ("If the motion is granted, the court shall, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay . . . the moving party the reasonable expenses incurred in obtaining the order, including attorney fees . . . .").

matter or document's authenticity. Texas Rule 215.4(b) provides, in full:

> If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 198 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 193, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.[302]

The obvious purpose of the "admit or pay" rule is to increase the parties' incentive to respond properly and in good faith to appropriate requests for admission because such requests eliminate unnecessary proof at trial, streamline discovery and motion practice, and reduce pretrial expenses.[303] Texas Rule 215.4(b), however, does not apply if the responding party fails to respond to a request for admission because such a failure results in the *automatic sanction* of the request being deemed admitted.[304]

Expenses under Texas Rule 215.4(b) may be awarded only if the requesting party actually proves the genuineness of the document or the truth of the matter asked about in the request for admission.[305] Because

302. *Id.* R. 215.4(b). There are very few Texas cases applying Texas Rule 215.4(b). The Rule, however, is virtually identical to Federal Rule 37(c)(2), which provides:

> If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:
>
> (A) the request was held objectionable under Rule 36(a);
>
> (B) the admission sought was of no substantial importance;
>
> (C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or
>
> (D) there was other good reason for the failure to admit.

FED. R. CIV. P. 37(c)(2). Because the Texas Rule is based on the Federal Rule, cases construing the Federal Rule are instructive with respect to Rule 215.4(b)'s construction. *See* cases cited *supra* note 5.

303. *Cf.* Marchand v. Mercy Med. Ctr., 22 F.3d 933, 936 (9th Cir. 1994) ("Enforcement encourages attorneys and parties to identify undisputed issues early to avoid unnecessary costs. Failure to identify those issues wastes the resources of parties and courts.").

304. TEX. R. CIV. P. 198.2(c).

305. *See id.* R. 215.4(b) ("[I]f the party requesting the admissions thereafter proves the genuineness of a document or the truth of the matter . . . ."); *cf.* Reynolds v. Univ. of Pa., No. 06-1237, 2010 U.S. Dist. LEXIS 113206, at *6 (E.D. Pa. Oct. 25, 2010) (mem. op.) ("To qualify for [Federal] Rule 37(c)(2) costs and fees, the requesting party must later prove the matter true."); Joseph

the Rule uses the word "shall," an expense award is mandatory unless the court finds one of its four exceptions apply.[306]

The first exception—the request was held objectionable under Texas Rule 193—is self-evident. No adverse consequences can stem from an objection or privilege assertion to a request for admission that was either sustained by the trial court or not challenged by the requesting party.[307]

v. Fratar, 197 F.R.D. 20, 22 (D. Mass. 2000) ("Plaintiff's application has to overcome a more fundamental hurdle, namely, whether Plaintiff, in accord with [Federal Rule 37(c)(2)], has in fact 'prove[n] . . . the truth of the matter[s] requested."); Bd. of Dirs., Water's Edge v. Anden Grp., 136 F.R.D. 100, 105 (E.D. Va. 1991) ("[Federal] Rule 37(c) applies only when the requesting party 'proves the . . . truth of the matter.'"); *Marchand*, 22 F.3d at 937–38 (holding that the defendant was not liable for expenses for failing to admit that he removed a device from the plaintiff's spine because he was only asked to admit that the device had been removed); Apex Oil Co. v. Belcher Co., 855 F.2d 1009, 1017 (2d Cir. 1988) ("We do not believe that sanctions can be imposed on a party or on an attorney solely on the basis of composite paraphrases of several requests for admission.").

306. TEX. R. CIV. P. 215(5)(b); *accord* Peralta v. Durkham, 133 S.W.3d 339, 341 (Tex. App.—Dallas 2004, no pet.) (holding that an expense award "must" be made unless one of the exceptions applies); *cf.* United States v. Pecore, 664 F.3d 1125, 1136 (7th Cir. 2011) ("Federal Rule of Civil Procedure 37(c)(2) provides that a district court must impose reasonable expenses including attorney's fees on a party that fails to properly admit the genuineness of a document pursuant to a [Federal] Rule 36 request for admission."); Hicklin Eng'g, L.C. v. Bartell, 439 F.3d 346, 351 (7th Cir. 2006) ("[Federal] Rule 37(c) directs (and does not just permit) a district court to award attorneys' fees and other costs to the party put to such proof by refusal to admit."); *Marchand*, 22 F.3d at 936 ("[Federal Rule 37(c)] mandates an award of expenses unless an exception applies."). In *Peralta v. Durkham*, 133 S.W.3d 339 (Tex. App.—Dallas 2004, no pet.), the plaintiff sued the defendant for negligence arising out of an automobile collision. Although the defendant had denied requests asking her to admit that she failed to keep a proper lookout, maintain a safe distance, and properly apply the brakes, she admitted to liability immediately before trial and tried the case solely on damages. *Id.* at 340. In affirming an expense award under Texas Rule 215.4(b), the Dallas Court of Appeals rejected the defendant's argument that the plaintiff was not entitled to expenses because he never proved her wrongful conduct or negligence at trial because she admitted liability. *Id.* at 341–42. The court explained:

> We conclude [defendant's] reading of [Texas] [R]ule 215.4(b) is too limited and would defeat the purpose of the rule.
>
> [Defendant] focuses on the language of the rule . . . Although a judicial admission relieves the opposing party of his obligation to present evidence on the issue, the fact admitted is proved for the purposes of trial. . . . Because Peralta's conduct was proved for purposes of the trial against her, we conclude [Texas] [R]ule 215.4(b) is applicable . . . .
>
> . . . If a party could avoid [sanctions] by admitting the matter on the eve of trial, after discovery has been done and expenses incurred by the opposing party, the purpose of [Texas] [R]ule 215.4(b) would be thwarted. [Defendant] does not dispute she had no good reason to deny her wrongful conduct or reasonable ground to believe she would prevail on the issue of her liability.

Id. at 342.

307. Although federal courts applying Federal Rule 37(c)(2) are split on the issue, Texas law is clear that a requesting party's failure to challenge an objection or privilege assertion waives its right to the discovery. *See* Russo v. Baxter Healthcare Corp., 51 F. Supp. 2d 70, 78 (D.R.I. 1997) (citing cases). Accordingly, a party who fails to challenge an objection or privilege assertion to a request for

The responding party, however, cannot defend against an award of expenses on the basis that had it objected the objection would have been sustained.[308]

The second exception—the admission sought was of no substantial importance—also is self-evident. A matter is of "substantial importance" when it is material to the action's resolution.[309] Of course, this determination depends upon the action's facts. For example, if the requesting party was required by the controlling law to prove the matter to prevail on its claim or defense, the request relates to a matter of substantial importance. Conversely, if the matter was not essential to the requesting party's success, it was not of substantial importance.[310] A matter concerning a party's or a key witness's credibility is one of substantial importance.[311]

The third exception—the responding party had a reasonable ground to

admission cannot later seek expenses under Texas Rule 215.4(b) because the responding party failed to admit the request.

308. *Cf. Russo*, 51 F. Supp. 2d at 78 ("If the court finds the request objectionable, the requesting party will be barred from obtaining sanctions under [Federal] Rule 37(c)(2)(A). However, if the requesting party never seeks to test the validity of the objection, that party can later argue that since the request was never held objectionable pursuant to [Federal] Rule 36(a), sanctions should be imposed.").

309. *See* SEC v. Happ, 392 F.3d 12, 34 (1st Cir. 2004) ("[A]n issue is of substantial importance when it is material to the disposition of the case."); *see also Reynolds*, 2010 U.S. Dist. LEXIS 113206, at *6 (same).

310. *See* Wash. State Dep't of Transp. v. Natural Gas Co., 59 F.3d 793, 806 (9th Cir. 1995) (holding that a request for the plaintiff to admit that pollutants posed an immediate risk was of no substantial importance because the plaintiff was not required to make such a showing); Vantage Trailers, Inc. v. Beall Corp., No. H-06-3008, 2008 U.S. Dist. LEXIS 68402, at *6 (S.D. Tex. Aug. 28, 2008) ("[O]ther[] [requests], though false, are not directly relevant to the controlling issue and, hence, are not sanctionable under [Federal] Rule 37(c)(2)."); Howard Opera House Assocs. v. Urban Outfitters, Inc., No. 2:99-CV-140, 2002 U.S. Dist. LEXIS 26258, at *12 n.4 (D. Vt. Apr. 17, 2002) ("The fact that the requests to admit . . . did not involve matters that were bases for summary judgment also means that these requests to admit were not of substantial importance . . . ."), *aff'd*, 322 F.2d 125 (2d Cir. 2003); Read-Rite Corp. v. Burlington Air Express, Ltd., 183 F.R.D. 545, 547 (N.D. Cal. 1998) ("Since these requests [for admission] were based on the 'entire shipment' theory of liability and Judge Wilken found that that theory did not apply, these requested admissions were not substantially important to the litigation."), *aff'd*, 186 F.3d 1190 (9th Cir. 1999); *see also* Mane v. Tri-City Healthcare Dist., No. 05cv397-WQH (CAB), 2007 U.S. Dist. LEXIS 102633, at *9–11 (S.D. Cal. Mar. 21, 2007) (holding that wrongful admission denials were of no substantial import because the requests were denied after one of the plaintiffs was deposed and summary judgment was granted in defendant's favor based on that plaintiff's deposition testimony, thus, "had Plaintiffs admitted request Nos. 12 and 15 when they were served [after the deposition], the [defendant] would have gained nothing that it did not already have").

311. *See Happ*, 392 F.3d at 34–35 (holding that the requested matter was of substantial importance because it would allow defendant to challenge the SEC's key witness's credibility); *see also Reynolds*, 2010 U.S. Dist. LEXIS 113206, at *9 (same).

believe it might prevail on the matter—is the one most commonly invoked. The test is not whether the responding party prevailed, but whether it had a reasonable belief that it might prevail.[312] This exception preserves both the party's right to its day in court and the American rule that each party bears its own attorneys' fees.

As the word "reasonably" suggests, the test is objective, and a court should reject a responding party's attempt to invoke the exception if a rational fact-finder clearly did not possess enough evidence to resolve the matter in the responding party's favor. The exception has been invoked successfully in actions involving substantially conflicting evidence,[313] complicated legal or factual issues,[314] and cases in which the parties'

312. *See* United States v. Pecore, 664 F.3d 1125, 1137 (7th Cir. 2011) (noting that the test is based on a reasonable person standard rather than actual success at trial); *cf.* Marchand v. Mercy Med. Ctr., 22 F.3d 933, 937 (9th Cir. 1994) (same); *Wash. State Dep't of Transp.*, 59 F.3d at 806 (same).

313. *See* Shipley v. Holt Tex., Ltd., No. 2-09-122-CV, 2010 Tex. App. LEXIS 3773, at *24–25 (Tex. App.—Fort Worth May 20, 2010, no pet.) (mem. op.) (affirming denial of expenses because "[t]he jury could have believed that Sam jumped from the cab of his 930G Caterpillar or from its top ladder step and that, therefore, no other design 'would have prevented or significantly reduced the risk of the injury in question.' Accordingly, Appellees possessed a reasonable ground to believe that they might prevail on the issue of whether a safer alternative design existed in these circumstances, and in fact, they may have prevailed on that issue since the jury answered 'no' to Question One"); Duggan v. Northpark Cent. Vefii, LP, No. 05-98-00099-CV, 2001 Tex. App. LEXIS 5909, at *12 (Tex. App.—Dallas Aug. 29, 2001, no pet.) (mem op., not designated for publication) (affirming denial of expenses "[b]ecause the trial judge could have concluded Duggan had a reasonable ground to believe that he might prevail on the matter"); *cf.* ARB Inc. v. E-Sys., Inc., 663 F.2d 189, 200 (D.C. Cir. 1980) (holding that the losing party's failure to admit certain matters in a contract dispute "falls squarely" in the "reasonable-ground" exception); Escriba v. Foster Poultry Farms, No. 1:09-CV-1878 OWW MJS, 2011 U.S. Dist. LEXIS 112883, at *6 (E.D. Cal. Sept. 30, 2011) (holding that the "reasonable-ground" exception applied because the discrimination "case boiled down to a 'he said, she said' credibility issue").

314. *Compare Natural Gas Co.*, 59 F.3d at 806 (affirming denial of expenses in action involving environmental matters subject to complex regulations), Bd. of Dirs., Water's Edge v. Anden Grp., 136 F.R.D. 100, 107 (E.D. Va. 1991) ("[T]he admission sought here, namely that the FRT plywood used at Water's Edge was defectively manufactured and that such defect had caused the failure of the roofs at Water's Edge, involved numerous complex technical facts and legal conclusions."), Baird v. Consol. City of Indianapolis, 830 F. Supp. 1183, 1189–90 (S.D. Ind. 1993) (denying expenses when requests involved sophisticated statistical analyses regarding information not readily available), Dyer v. United States, 633 F. Supp. 750, 759 (D. Or. 1985) ("[T]he issue of the time it takes for wake turbulence from a helicopter to dissipate is a difficult factual question. The court finds that the government had reasonable ground to believe that it might prevail on the matter."), *aff'd on other grounds*, 832 F.2d 1062 (9th Cir. 1987), *and* United States v. Article of Drug, 428 F. Supp. 278, 281 (E.D. Tenn. 1976) (holding that the "reasonable-ground" exception applied because the issue of "[w]hether such articles of drugs were 'new animal drugs' involved complex issues of both fact and law."), *with* Foster Poultry Farms, Inc. v. SunTrust Bank, 377 F. App'x 665, 672 (9th Cir. 2010) (affirming award of expenses because the defendant conceded a key issue at trial and as such it could not have reasonably believed that it would prevail at trial), *Marchand*, 22 F.3d at 937 (affirming expense award because responding party's subsequent admission at trial directly contradicted his

credible experts disagreed.[315] It also applies when summary judgment or a directed verdict on the matter has been denied.[316]

earlier admission denial), Chem. Eng'g Corp. v. Essef Indus., Inc., 795 F.2d 1565, 1575 (Fed. Cir. 1986) (holding that the "reasonable-ground" exception was inapplicable), *Reynolds*, 2010 U.S. Dist. LEXIS 113206, at *9–10 ("Penn requested that Reynolds admit the truth of six straightforward and readily ascertainable facts. Penn supplemented its request with a press release from Adobe announcing May 2003 as the release date for the 6.0 software. Penn did not submit complex requests pertaining to facts crucial to Reynolds's success and on which reasonable minds could disagree. Based on the type of facts requested and the supplemental documents provided by Penn, Reynolds could not have reasonably believed he could prove Adobe 6.0 was publicly released at any time other than May 2003."), *and* Diamond State Ins. Co. v. Deardorff, No. 1:10-cv-00004 A WI JLT, 2011 U.S. Dist. LEXIS 60834, at *13–14 (E.D. Cal. June 8, 2011) (holding the "reasonable-ground" exception inapplicable because the defendant insurer failed to inquire of its insured and such inquiry would have established that the admission denial was wrong).

315. *See Howard Opera House*, 2002 U.S. Dist. LEXIS 26258, at *5 ("UO had reasonable grounds to believe that it might prevail on the nuisance claim at trial. . . . It also knew that in May 1999 the expert commissioned by Howard Opera House Associates . . . found, after requesting UO to play its music at the maximum level it desired, that the music did not alter background decibel levels in OCG's space. The report also noted that the distracting low frequency impulse noise produced by the music could be reduced through various methods. These methods included soundproofing that might be considered to be structural improvements and the responsibility of the landlord under the lease."); Rebman v. Perry, No. CV-04-5064-EFS, 2007 U.S. Dist. LEXIS 35054, at *4–5 (E.D. Wash. May 14, 2007) ("In this case, the Defendants did in fact have reasonable ground to believe they might prevail. There was contradiction between the experts as to whether there was a tibial plateau fracture or a knee dislocation, and the consequence that may have had on the popliteal artery. The experts testifying for the defense testified there was no dislocation, which led them to believe there was no popliteal artery injury. The fact that this was different from the diagnosis of Plaintiffs' experts, and that the jury found Plaintiffs' experts to be persuasive, does not make Defendants' reliance on the testimony unreasonable."); *Mane*, 2007 U.S. Dist. LEXIS 102633, at *12 (holding that the losing plaintiff had a reasonable ground to believe that she might prevail, in part, on the basis of her expert's report); Scheufler v. Gen. Host Corp., 915 F. Supp. 236, 239 (D. Kan. 1995) ("The requests dealing with whether salt pollution prevented the plaintiffs from irrigating appear simple at first look, but embrace a number of complicated technical issues, including the depth of the aquifer at a given location, the amount of water necessary for irrigation of crops, the level of pollution, the location of the irrigation well, the distance from which an irrigation well draws water, the concentration of salt which renders water unusable, and the movement and rate of recharge of the aquifer. Each of these matters was the subject of a great deal of conflicting expert testimony." (citations omitted)), *aff'd*, 126 F.3d 1261 (10th Cir. 1997); *see also Deardorff*, 2011 U.S. Dist. LEXIS 60834, at *16–18, *26–27 (applying the "reasonable-ground" exception because the admission denials were based on a police report). The mere fact, however, that the responding party's admission denial was supported by expert testimony does not "per se" mean that the requesting party satisfies the "reasonable-ground" exception. *See, e.g.*, Marchand v. Mercy Medical Center, 22 F.3d 933, 937 (9th Cir. 1994) (holding that, notwithstanding expert testimony supporting the defendant's admission denials, the trial court did not abuse its discretion in awarding sanctions under Federal Rule 37(c)(2), because the defendant "had ample evidence to discredit the expert testimony, as well as that of [the defendant] Farris"); *accord Foster Poultry Farms*, 377 F. App'x at 672–73 ("SunTrust had apparently relied on its lawyer to structure the monetization so as to make SunTrust a holder. However, such reliance at the time of the August 2002 transaction does not excuse SunTrust's independent duty as of the time of its January 2005 response to the RFA to try to determine the truth of the matter, and to establish whether its reliance on its former counsel's legal

The final exception—there was other good reason for the failure to admit—is undefined and left to the trial court's discretion. Perhaps the best example is when the responding party did not have, and could not have obtained through reasonable inquiry, sufficient information to admit the request for admission.[317] Such a party would not fall under the third exception because the party would not know if it could prevail; thus, the party could not have had a reasonable belief that it might prevail. Because such an inability-to-admit-or-deny response is expressly permitted by Texas Rule 198.3, it would be anomalous if a responding party were found liable for the requesting party's expenses if it so answered, and the requesting party never challenged the answer's sufficiency. The other-good-reason exception also applies where the request was improper because it related to a pure question of law even if the responding party failed to object to the request on this basis.

Although federal courts uniformly hold that a motion for expenses for failure to admit a request for admission is premature if it is made *before* the trial's completion or a summary judgment,[318] it is unclear whether this is

advice about its holder status was reasonable. There is no 'per se rule that reliance on an expert opinion provides a reasonable ground for a party to believe he would prevail at trial.' SunTrust could have determined, during the intervening years, that its former lawyer lacked a reasonable basis for his legal opinion, and that in fact, it was not the holder of the notes. It failed to do so, and Foster had to prove those facts at the September 2007 trial. [Federal] Rule 37(c)(2) requires the award of expenses incurred in developing that proof." (quoting *Marchand*, 22 F.3d at 937))).

316. *See Scheufler*, 915 F. Supp. at 239 (holding that the defendant had a reasonable belief that it might prevail because, among other reasons, "[t]he court denied plaintiffs' motions for summary judgment and directed verdict because there was sufficient evidence supporting the defendant's contentions to create a jury question"); *Howard Opera House*, 2002 U.S. Dist. LEXIS 26258, at *13–14 (also holding that a defendant had a reasonable belief it might prevail on the issues of inducement, damages, and abuse of process).

317. *See* Dallis v. Aetna Life Ins. Co., 100 F.R.D. 765, 767 (N.D. Ga. 1984) ("This [exception] applies to situations where the party does not have, or cannot get through reasonable inquiry, the information on whether the matter contained in the request is true or not."); *see also* Natural Gas Pipeline Co. of Am. v. Pool, 30 S.W.3d 639, 652 (Tex. App.—Amarillo 2000) (reversing an award of expenses against the defendants who failed to admit a request because of lack of information because "[w]e do not believe that the requests for admission imposed on [the defendants] the burden to incur cost by performing a title search outside of their own records to determine if the ownership percentages set forth in the requests for admission were currently accurate"), *rev'd on other grounds*, 120 S.W.3d 317 (Tex. 2002).

318. *See* Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc., No. C06-1750JLR, 2012 U.S. Dist. LEXIS 60894, at *23–25 (W.D. Wash. May 1, 2012) (holding that a request for Federal Rule 37(c)(2) expenses was premature before the completion of the trial); Point Blank Solutions, Inc. v. Toyobo Am., Inc., No 09-61166-CIV-SEITZ/GOODMAN, 2011 U.S. Dist. LEXIS 25046, at *8–15 (S.D. Fla. Feb. 24, 2011) (same and discussing cases); Keithley v. Home Store.com, Inc., No. C-03-04447 SI (EDL), 2008 U.S. Dist. LEXIS 120252, at *2–5 (N.D. Cal. May 8, 2008) (same); Morrison v. Greeson, No. 1:06-cv-24-SEB-JBG, 2007 U.S. Dist. LEXIS 56135, at *52–53 (S.D. Ind. July 31, 2007) (same and discussing cases). Federal courts have granted Federal Rule 37(c)(2)

the rule in Texas. The lack of clarity stems from the Texas Supreme Court's decision in *Meyer v. Cathey*.[319]

In that case, the plaintiff, during his pretrial deposition and in answers to requests for admission, maintained that a résumé previously given to the defendant was accurate.[320] Thereafter, the defendant deposed several individuals whose testimony contradicted the defendant's assertions on the resume.[321] At trial, the plaintiff "admitted not only that his r[é]sum[é] contained numerous inaccuracies, but also that he lied when questioned about the résum[é] during his deposition. Several weeks after the trial court rendered its final judgment, [the defendant] moved for sanctions pursuant to the Texas Rules of Civil Procedure 215.3," which provides for sanctions for discovery abuse, and under Texas Rule 215.4(b).[322] "The trial court granted the motion and awarded $25,978.73 as sanctions."[323]

On appeal, the Texas Supreme Court, without distinguishing between the two rules, held that the trial court abused its discretion in awarding the sanctions:

> Under our decision in *Remington Arms Co.* [*v. Caldwell*],[324] waiver bars a trial court from awarding posttrial sanctions based on pretrial conduct of which a party "was aware" before trial; lack of "conclusive evidence" is not an excuse. Here, [the plaintiff] was clearly aware of [the defendant's] discovery misconduct before trial: he obtained pretrial deposition testimony that directly contradicted [the defendant's] deposition testimony and other discovery responses. Accordingly, by not objecting prior to trial, [the plaintiff] waived his sanctions claim.[325]

expenses after summary judgment. *See* Jennings v. Moreland, No. 2:08-cv-01305 LKK CKD P, 2013 U.S. Dist. LEXIS 51891, at *6–7 (E.D. Cal. Apr. 10, 2013) ("[I]f a party later proves at trial or on summary judgment that certain matters improperly not admitted are true, the party may seek recourse in the form of reasonable expenses incurred in making that proof."); *Howard Opera House*, 2002 U.S. Dist. LEXIS 26258, at *9–10 ("Courts have granted attorneys' fees and expenses under Rule 37(c) after summary judgment when the factual issue involved in the request was in effect not in dispute, that is that the matter denied was known to be true by the respondent at the time of the response."); Joseph v. Fratar, 197 F.R.D. 20, 23 (D. Mass. 2000) (holding that Rule 37(c) expenses can be awarded after summary judgment, but refusing to award them because "the factual issues were never joined").

319. Meyer v. Cathey, 167 S.W.3d 327 (Tex. 2005) (per curiam).

320. *Id.* at 332.

321. *Id.*

322. *Id.*

323. *Id.*

324. Remington Arms Co., Inc. v. Caldwell, 850 S.W.2d 167 (Tex. 1993).

325. *Meyer*, 167 S.W.3d at 333 (citations omitted). One case following *Meyer* has held that a pretrial failure to challenge improper admission denials waived Texas Rule 215.4(b) expenses. In *McGowen v. Lewis*, No. 01-07-01095-CV, 2010 Tex. App. LEXIS 3204, at *1 (Tex. App.—Houston [1st Dist.] Apr. 29, 2010, no pet.) (mem. op.), the court held that, where the defendant, having

Significantly, the court in *Meyer* failed to consider Texas Rule 215.4(b)'s language or the adverse effect of its holding on trial practice. For example, the plain language of Texas Rule 215.4(b) suggests that an expense award is appropriate only *after* a trial is held or summary judgment is granted.[326]

Moreover, a trial court cannot always conclusively determine during an action's pretrial stage whether a refusal to admit falls within the "no-substantial-importance" exception to the otherwise mandatory-expense award.[327] For example, in both *Howard Opera House Associates v. Urban Outfitters, Inc.*[328] and *Read-Rite Corporation v. Burlington Air Express, Ltd.*,[329] the courts denied expenses under Federal Rule 37(c)(2), reasoning that the requests for admission were not of substantial importance because they were irrelevant to the grounds on which summary judgment was granted.[330]

Finally, *Meyer* effectively requires parties whose requests for admission

---

denied a request for admission that his negligence proximately caused the automobile collision at issue, stipulated to liability before trial, the plaintiff waived Texas Rule 215.4(b) expenses by moving for them after trial:

> The discovery conduct upon which Lewis based his sanctions motion occurred two years before trial. McGowen stipulated to liability for the collision before trial. Lewis first moved for sanctions only after trial. This is not a circumstance in which pretrial discovery abuse was not revealed until after the trial had begun, or even after trial. Under *Meyer* and *Remington Arms*, Lewis waived his right to seek sanctions based on pretrial discovery. We hold that the trial court abused its discretion by granting Lewis's motion for sanctions . . . .

McGowen, 2010 Tex. App. LEXIS 3204, at *9 (citations omitted).

326. *See* TEX. R. CIV. P. 215.4(b) ("[I]f the party requesting the admissions *thereafter proves* the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof . . . ." (emphasis added)). In fact, the 1970 Advisory Committee Note to Federal Rule 37, the rule on which Texas Rule 215.4(b) is based, points out: "Rule 37(c) is intended to provide posttrial relief in the form of a requirement that the party improperly refusing the admission pay the expenses of the other side in making the necessary proof at trial." FED. R. CIV. P. 37, Advisory Committee Notes (1970 Amend.).

327. *See* Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc., No. C06-1750JLR, 2012 U.S. Dist. LEXIS 60894, at *23–25 (W.D. Wash. May 1, 2012) (construing Federal Rule 38(c)(2)); *see also* Keithley v. Home Store.Com, Inc., No. C-03-04447 SI (EDL), 2008 U.S. Dist. LEXIS 120252, at *6–8 (N.D. Cal. May 8, 2008) (same).

328. Howard Opera House Assocs. v. Urban Outfitters, Inc., No. 2:99-CV-140, 2002 U.S. Dist. LEXIS 26258 (D. Vt. Apr. 17, 2002), *aff'd*, 186 F.3d 1190 (9th Cir. 1999).

329. Read-Rite Corp. v. Burlington Air Express, Inc., 183 F.R.D. 545 (N.D. Cal. 1998).

330. *See Howard Opera House*, 2002 U.S. Dist. LEXIS 26258, at *12 n.4 ("The fact that the requests to admit . . . did not involve matters that were the bases for summary judgment also means that these requests to admit were not of substantial import . . . ."); *Read-Rite*, 183 F.R.D. at 547 ("Since these requests [for admission] were based on the 'entire shipment' theory of liability and Judge Wilken found that that theory did not apply, these requested admissions were not substantially important to the litigation.").

were denied to try their action through discovery motions. As noted by one federal court, in holding that a pretrial motion for expenses for an improper refusal to admit was premature:

> There are, of course, significant, obvious, and practical disadvantages to disposing of this case piecemeal through discovery practice, not the least of which is that I would necessarily have to conduct an inefficient fact-finding exercise and resolve factual disputes ahead of trial. This procedural alternative would be extremely counterproductive and inefficient and is understandably contrary to the clear weight of authority. . . . The Federal Rules also clearly differentiate between pre-trial or discovery motions and fact-finding proceedings.[331]

In sum, *Meyer* was wrongly decided as it relates to Texas Rule 215.4(b) and should be limited to its facts, that is, where the responding party abused the discovery process in general and not when it improperly failed to make an admission. Accordingly, a requesting party seeking expenses under the Rule should file a motion for them after a summary judgment or trial, but before the trial court loses its plenary power.[332]

The only expenses that can be assessed under Texas Rule 215.4(b) are those that could have been avoided by the admission before and during trial. They can be the costs of the additional discovery, motions, or experts.[333] In determining the amount of expenses, a trial court should look for a causal connection between the claimed expenses and the failure to admit.[334] If the failure to admit did not cause the requesting party to

331. Point Blank Solutions, Inc. v. Toyobo Am., Inc., No 09-61166-CV-SEITZ/GOODMAN, 2011 U.S. Dist. LEXIS 25046, at *14–15 (S.D. Fla. Feb. 24, 2011).

332. *See In re* Bennett, 960 S.W.2d 35, 38 (Tex. 1997) (per curiam) ("It is only after plenary jurisdiction has expired that a trial court may not sanction counsel for pre-judgment conduct." (citation omitted)); Scott & White Mem'l Hosp. v. Schexnider, 940 S.W.2d 594, 596 (Tex. 1996) (per curiam) ("[A] trial court's plenary power to act in a case does not expire until thirty days after the court has signed the judgment. A trial court's power to decide a motion for sanctions pertaining to matters occurring before judgment is no different than its power to decide any other motion during its plenary jurisdiction. Thus, the time during which the trial court has authority to impose sanctions on such a motion is limited to when it retains plenary jurisdiction . . . .").

333. *See Deardorff*, 2011 U.S. Dist. LEXIS 60834, at *32–33 (awarding deposition and associated travel costs); House v. Giant of Md., LLC, 232 F.R.D. 257, 262–63 (E.D. Va. 2005) (awarding plaintiff expert costs, but not attorney fees).

334. *Cf. Deardorff*, 2011 U.S. Dist. LEXIS 60834, at *32–33 (awarding deposition and associated travel costs, but refusing to award expenses for a summary judgment motion because it would have had to have been filed even if the requests had been admitted, as "they were not *caused* by the failure to admit"(emphasis added)); JD Factors, LLC v. FreightCo, LLC, No. 1:09-CV-95, 2010 U.S. DIST. LEXIS 114352, at *11–12 (N.D. Ind. Oct. 25, 2010) ("In determining the amount of fees that should be awarded under [Federal] Rule 37(c)(2), a court looks 'for a sufficient causal nexus between the expenses claimed, and the failure to admit.' That is, a party is 'only entitled to those expenses incurred in obtaining and proffering the evidence necessary to prove those facts which they would

incur additional expense (for example, because it would have been required to introduce the same evidence, use the same experts, or take the same discovery to properly present its claims or defenses), no award is justified.[335] Similarly, expenses incurred before the denial's service are not recoverable.[336]

Texas Rule 215.4(b) contains limitations that do not exist with respect to most discovery-sanctions provisions: first, the requesting party is *not* entitled to recover attorneys' fees and expenses incurred in moving for the expenses because Texas Rule 215.4(b) is expressly limited to expenses "incurred in making that proof."[337] Second, only the responding party, and *not* its attorney, can be ordered to pay expenses because the rule expressly provides that the requesting party "may apply to the court for an order requiring the *other party* to pay him the reasonable expenses . . . ."[338] An expense award is reviewed for an abuse of discretion.[339]

not have had to prove if the [other party] had admitted the . . . requests for admission." (quoting Hicklin Eng'g, L.C. v. Bartell, No. 00-C-1516, 2005 U.S. Dist. LEXIS 41445, at *3–4 (E.D. Wis. Mar. 31, 2005), *aff'd*, 439 F.3d 346 (7th Cir. 2006))).

335. *Cf. Deardorff*, 2011 U.S. Dist. LEXIS 60834, at *32–33 (awarding deposition and associated travel costs, but not expenses for a summary judgment motion); *Hicklin Eng'g*, 2005 U.S. Dist. LEXIS 41445, at *8–9 ("[F]ees related to drafting the subpoenas for Duane Schultz, serving the subpoenas, as well as correspondence, research and conferences relating to the subpoenas are not recoverable. The defendants would have incurred those costs and fees regardless of the plaintiffs[']responses to the requests to admit. Amounts requested for working on a motion to compel Mr. Schultz to appear for the deposition and conferences on this issue have been excluded since these costs, likewise, would have been incurred in any event."), *aff'd*, 439 F.3d 346 (7th Cir. 2006); *Read-Rite*, 183 F.R.D. at 547–48 (holding that expenses were not recoverable because the plaintiff intended to take the depositions before the answers to the requests for admission were served); Lawrence v. Nw. Nat'l Life Ins. Co., 716 F. Supp. 883, 886 (D. Md. 1989) ("Even if Lawrence had made the requested admission, the depositions of the doctors still should have been taken . . . . Therefore, NWNL suffered no damage from the failure to admit.").

336. *Cf. Hicklin Eng'g*, 2005 U.S. Dist. LEXIS 41445, at *8–9 ("Attorneys' fees for work performed before the plaintiff submitted its response to the requests for admission[] are not included in the fees to be awarded since these expenses were incurred before any conduct occurred which fell within the scope of [Federal] Rule 37."), *aff'd*, 439 F.3d 346 (7th Cir. 2006).

337. TEX. R. CIV. P. 215.4(b); *cf. Giant of Md.*, 232 F.R.D. at 261 (construing Federal Rule 37(c)(2)'s similar language).

338. TEX. R. CIV. P. 215.4(b) (emphasis added); *see* Maynard v. Nygren, 332 F.3d 462, 470 (7th Cir. 2003) (construing Federal Rule 37(c)(2)'s similar language); *see also* Apex Oil Co. v. Belcher Co., 855 F.2d 1009, 1013–14 (2d Cir. 1982) (same).

A court that concludes that the party's attorney is culpable for his or her client's improper refusal to make an admission must look to other sources of authority to impose sanctions against the attorney, such as Texas Rule 13 and 215.3, which authorize sanctions respectively for a violation of the certification requirement and discovery abuse.

339. *See* Perez v. Perez, No. 13-11-00169-CV, 2013 Tex. App. LEXIS 962, at *40 (Tex. App.—Corpus Christi Jan. 31, 2012, no pet.) (mem.op.) (reviewing an expense award under an abuse of discretion standard); Peralta v. Durkham, 133 S.W.3d 339, 341 (Tex. App.—Dallas 2004, no pet.)

X. CONCLUSION

Requests for admission are an extremely effective discovery tool when used and responded to properly. Their use can save litigants considerable time and expense by eliminating and narrowing the issues involved in the action. A responding party, however, faces virtual ruin if it fails to timely or properly respond to requests for admission. An untimely or improper response may result in an adverse judgment or may expose the responding party to evidentiary or monetary sanctions.

(same); Duggan v. Northpark Cent. Vefii, LP, No. 05-98-00099-CV, 2001 Tex. App. LEXIS 5909, at *12 (Tex. App.—Dallas Aug. 29, 2001, no pet.) (mem. op., not designated for publication) (same); Natural Gas Pipeline Co. of Am. v. Pool, 30 S.W.3d 639, 652 (Tex. App.—Amarillo 2000) (same), *rev'd on other grounds*, 120 S.W.3d 317 (Tex. 2002).