DISCOVERY OBJECTIONS

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South Texas College of Law
FAMILY LAW CONFERENCE
TRIAL TACTICS AND MEDIATION TIPS FOR THE
GENERAL PRACTITIONER AND THE LEGAL ASSISTANT
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Papers, Publications and Speaking:

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- Co-Author: Economic Torts in the Family Law Context
  “The Somebody Done Somebody Wrong Song”
- Default Judgements in the Family Law Context
- Speaker: Surrogate Parents’ Rights
- Trial Demonstration: How To Prosecute and Defend a Visitation Contempt
- Child Support and Modification
- Speaker: Uniform Parentage Act, and Beyond
- Co-Author: Tips for Drafting Like A Pro: From Basic Claims to Exotic Causes of Action
- Co-Author: Dangerously Giving Up Rights: To Share or Not To Share
- Speaker: Pro Bono Seminar, Modifications in Texas
- Co-Author: “So You’ve Paid A Jury Fee – Now What Are You Going To Ask Them?”
- Co-Author: “Grandparents And Third Party Rights”
- Co-Author: “Drafting Mediation Forms That Will Make A Difference”
- Co-Author: “Presenting the Right to Establish Legal Residence to a Jury”

University of Houston Family Law Seminar (2003)
Family Law Conference for General Practitioners and Legal Assistants 2003
Advanced Family Law Drafting and Advocacy (2003)
Marriage Dissolution (2003)
State Bar of Texas Family Law Section (2001)
27TH Annual Advanced Family Law Course (2001)
Advanced Family Law Drafting Course (1999)
Table of Contents

I. Resisting Discovery................................. 1
   A. Making Objections To Discovery.............. 1
   B. Timely Objections Are Essential............ 1
      1. Amended Discovery Requests.............. 2
   C. Objections Must Be Specific............... 2
   D. Types Of Objections ....................... 2
      1. Not Within The Scope Of Discovery ....... 3
      2. Not A Permissible Form Of Discovery .... 3
      3. Information Is Not Reasonably Available 4
      4. The Request Lacks Specificity .......... 4
      5. Improper Request for Discovery .......... 4
      6. Duplicitous Information ................. 4
      7. A Discovery Request Is Unduly Burdensome, Harassing, Or 5
          Overly Broad................................
             a. Undue Burden.......................... 5
             b. Discovery Sought For The Purpose of Harassment .... 6
             c. Discovery Request That Are Overly Broad.............. 6
   II. Conclusion.................................... 6
# TABLE OF AUTHORITIES

<table>
<thead>
<tr>
<th>CASES</th>
<th>PAGE NO.</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Axelson Inc. v. McIlhany</em>, 798 S.W.2d 550, 553 (Tex. 1990)</td>
<td>3</td>
</tr>
<tr>
<td><em>Davis v. Pate</em>, 915 S.W.2d 76, 79 (Tex. App.-Corpus Christi 1996, orig. proceeding)</td>
<td>4</td>
</tr>
<tr>
<td><em>Forward v. Housing Auth.</em>, 864 S.W.2d 167, 169 (Tex. App.-Tyler 1993, no writ)</td>
<td>5</td>
</tr>
<tr>
<td><em>In Re Alford Chevrolet-Geo.</em>, 997 S.W.2d 173, 191 (Tex. 1999)</td>
<td>2, 3, 5</td>
</tr>
<tr>
<td><em>In Re American Optical Corp.</em>, 988 S.W.2d 711 (Tex. 1998)</td>
<td>2, 6</td>
</tr>
<tr>
<td><em>In Re Guzman</em>, 19 S.W.3d 522, 524 (Tex. App.-Corpus Christi 2000, orig. proceeding)</td>
<td>3</td>
</tr>
<tr>
<td><em>In Re Kuntz</em>, 124 S.W.3d 179, 194 (Tex. 2003)</td>
<td>3</td>
</tr>
<tr>
<td><em>In Re University of Tex. Health Ctr.</em>, 33 S.W.3d 822, 926 (Tex. 2000)</td>
<td>2</td>
</tr>
<tr>
<td><em>Loftin v. Martin</em>, 776 S.W.2d 145 (Tex. 1989)</td>
<td>4, 6</td>
</tr>
<tr>
<td><em>Remington Arms Co. v. Canales</em>, 837 S.W.2d 624, 625 (Tex. 1992)</td>
<td>2</td>
</tr>
<tr>
<td><em>State v. Lowry</em>, 802 S.W.2d 669, 671 (Tex. 1991)</td>
<td>1</td>
</tr>
</tbody>
</table>
Sears Roebuck & Co. v. Ramirez, 824 S.W.2d 558, 559 (Tex. 1992).............. 4

Texaco Inc. v. Dominguez, 812 S.W.2d 451, 455-56 (Tex. App.-San Antonio, orig. proceeding)................................................................. 6

Texaco Inc. v. Sanderson, 898 S.W.2d 813, 815 (Tex. 1995)...................... 6

Walker v. Packer, 827 S.W.2d 833, 843 (Tex. 1992)................................. 5

Young v. Ray, 916 S.W.2d 1, 3 (Tex. App.-Houston [1st Dist.] 1995, orig. proceeding)........................................................................ 1

STATUTES

Texas Rules of Civil Procedure Rule 190.2(e)(3)................................. 4

Texas Rules of Civil Procedure Rule 192.3(a).................................. 3

Texas Rules of Civil Procedure Rule 192.4(a).................................. 5

Texas Rules of Civil Procedure Rule 192.4(b).................................. 5

Texas Rules of Civil Procedure Rule 192.6....................................... 4

Texas Rules of Civil Procedure Rule 193......................................... 1

Texas Rules of Civil Procedure Rule 193.1.................................... 4, 6

Texas Rules of Civil Procedure Rule 193.2(a).................................. 2

Texas Rules of Civil Procedure Rule 193.2(d).................................. 2

Texas Rules of Civil Procedure Rule 193.2(e).................................. 2

Texas Rules of Civil Procedure Rule 193.2(f).................................. 1

Texas Rules of Civil Procedure Rule 193.3.................................... 1

Texas Rules of Civil Procedure Rule 195.1.................................... 3

Texas Rules of Civil Procedure Rule 196.2(b)................................. 1
Texas Rules of Civil Procedure Rule 197.1 ........................................... 3
Texas Rules of Civil Procedure Rule 205.1 ........................................... 3
Texas Rules of Civil Procedure Rule 205.3(b) ...................................... 2
Texas Rules of Civil Procedure Rule 215.3 ........................................... 6
# TABLE OF APPENDICES

<table>
<thead>
<tr>
<th>APPENDIX</th>
<th>CONTENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>“A”</td>
<td>Sample Guideline Objections and Assertions of Privilege</td>
</tr>
<tr>
<td>“B”</td>
<td>Rule 11 Agreement</td>
</tr>
</tbody>
</table>

v


DISCOVERY OBJECTIONS

I. Resisting Discovery

The discovery rules as contained in the Texas Rules of Civil Procedure and the case law that has been developed provide for two basic ways of resisting discovery. The procedures for resisting discovery consist of the procedure for making most discovery objections and the procedure for asserting claims of privilege. Per Rule 193.2(f) of the Texas Rules of Civil Procedure a party should not object to a request for written discovery on the ground that it calls for the production of material or information that is privileged but should instead comply with Rule 193.3 of the Texas Rules of Civil Procedure. Additionally, Rule 193.2(f) of the Texas Rules Of Civil Procedure provides that 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. Rule 196.2(b) of the Texas Rules of Civil Procedure indicates that a party responding to discovery should make its objections and assertions of privilege simultaneously; however, if the same information is subject to an objection and a privilege, the discovery rules permit a party to file its objection first and wait until after the court rules on its objection to file its assertion of privilege. In Re Lincoln Elec. Co., 91 S.W.3d 432, 437 (Tex.App.—Beaumont 2002, orig. proceeding).

Practice Tip: Assert your privilege and the reason for the assertion of your privilege and then follow it with your objection in your initial response to the discovery. It would be awful if you lost on your objection and then subsequently forgot to assert a valid privilege.

A. Making Objections To Discovery

The burden is on the party resisting discovery to plead its objection to discovery. State v. Lowry, 802 S.W.2d 669, 671 (Tex.1991). No matter how improper the discovery request, the party to whom it is addressed must object, or it waives its objections. Young v. Ray, 916 S.W.2d 1, 3 (Tex.App.—Houston [1st Dist.] 1995, orig. proceeding).

Practice Tip: The instant that discovery is received in your office calendar the discovery deadline for your response. Remember to add 3 days to your response time if you received the request via fax only. Additionally, if you have taken on a case filed by the Attorney General’s office, look very carefully at the initial pleading because it generally contains a discovery request for your client.

B. Timely Objections Are Essential

The party resisting discovery must object at or before the time to respond to discovery or the objection is waived, unless the party obtained
an extension of time by agreement or court order, or can show good cause for not timely objecting as provided for by Rule 193.2(e) of the Texas Rules Of Civil Procedure. Remington Arms Co. v. Canales, 837 S.W.2d 624, 625 (Tex. 1992). After the deadline to respond to discovery has passed, a party may amend its objection or response to include a ground that was initially inapplicable or was unknown after reasonable inquiry as contained in Rule 193.2(d) of the Texas Rules Of Civil Procedure.

Remember, if you are representing a non-party and documents are being sought from your client, you must file any objections before the time frame provided for the documents to be tendered. Rule 205.3(b) of the Texas Rules Of Civil Procedure provides that when a non-party is required to produce documents or things without appearing for a deposition, the notice of production must provide a reasonable time and place for production. This does not guarantee a non-party thirty days to comply with the discovery request.

1. Amended Discovery Requests
If a party receives an amended discovery request, the party is not required to restate its objections and reassert its privileges to the requests that are the same as those already objected to in response to the earlier discovery request. In Re University of Tex. Health Ctr., 33 S.W.3d 822, 826 (Tex. 2000).

Practice Tip: Take discovery deadlines and objections very seriously. If you do not, your malpractice carrier will have to do so for you. On a purely practical note, the last thing that you want cluttering up your office are 54 boxes of documents that you are having to provide to the other side because you or your predecessor failed to timely respond to a discovery request.

C. Objections Must Be Specific
The party resisting discovery must make a specific objection for each item it wishes to exclude from discovery which is contained in Rule 193.2(a) of the Texas Rules Of Civil Procedure. Your objection must be as specific as possible to the response. It is not acceptable to simply state that the response is objectionable by generally alleging undue burden and harassment. In re Alford Chevrolet-Geo, 997 S.W.2d 173, 181 (Tex. 1999).

Do not include everything but the kitchen sink in your objections. Rule 193.2(e) provides that valid objections obscured by unfounded objections are automatically waived unless the party resisting production shows good cause as to why their valid objection should not be waived.

D. Types of Objections
Discovery must be reasonably tailored to include only matters relevant to the case. In Re American Optical Corp., 988 S.W.2d 711 (Tex. 1998). Even under the “new rules” discovery cannot be used as a fishing expedition or to impose unreasonable discovery expenses on the opposing
party. *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 181 (Tex. 1999). The new rules of discovery explicitly encourage trial courts to limit discovery 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 *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 181 (Tex. 1999).

1. Not Within The Scope Of Discovery

An objection may be made to a discovery request that asks for information outside of the scope of discovery. The scope of discovery is any unprivileged information that is relevant to the subject matter of the lawsuit, 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. *Axelson, Inc. v. Melthany*, 798 S.W.2d 550, 553 (Tex. 1990). A discovery request is outside the scope of discovery when it asks for information that is not relevant and the information requested will not lead to admissible evidence as provided in Rule 192.3(a) of the Texas Rules Of Civil Procedure. For example, in a modification of possession and access case, the trial court may not consider a discovery request relevant that seeks information regarding the appraisals of real and personal property owned by a party and the Court may determine that this same request would not lead to admissible evidence if there are no claims for increased child support.

Rule 197.1 of the Texas Rules Of Civil Procedure does not permit an interrogatory to require the responding party to marshal all of its evidence, or all of its available proof, or the proof that the party intends to offer at trial.

2. Not A Permissible Form Of Discovery

A party may object when a discovery request asks for a type of discovery not permitted by the rules of discovery. Rule 195.1 of the Texas Rules Of Civil Procedure does not provide for the discovery of testifying expert witnesses through interrogatories.

The court cannot require a party to execute an authorization for a non-party to produce information as discovery obtained from a non-party must comply with Rule 205.1 of the Texas Rules Of Civil Procedure. *In Re Guzman*, 19 S.W.3d 522, 524 (Tex.App.—Corpus Christi 2000, orig. proceeding). An employee’s access to documents does not mean that the employee has “possession, custody, or control” of the documents and thus the employee cannot be compelled as an individual to produce the documents. *In Re Kuntz*, 124 S.W.3d 179, 184 (Tex. 2003).
3. Information Is Not Reasonably Available

Pursuant to Rule 193.1 of the Texas Rules Of Civil Procedure, a party is not required to produce information that is not reasonably available to the party or its attorney. “Not reasonably available” is a very broad term and has not been defined by the Courts. In the family law context, I can envision that information would not reasonably be available to a party if documents were requested that required the party to go to great expense to obtain the documents and the size of the estate of the parties did not warrant the cost of obtaining the documents.

4. The Request Lacks Specificity

A party may object when a request lacks specificity or is so vague and unclear that the party has no means to identify the information requested. Davis v. Pate, 915 S.W.2d 76, 79 (Tex.App.—Corpus Christi 1996, orig. proceeding). 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 the party can refuse to comply with the request entirely. Loflin v. Martin, 776 S.W.2d 145 (Tex. 1989).

5. Improper Request For Discovery

Pursuant to Rules 192.6 and 193.2 of the Texas Rules of Civil Procedure, when a party makes an improper request for discovery, the other party may file either an objection or a motion for protective order, whichever is appropriate, before the response to discovery is due, and stating why the request is not proper. For example, Rule 190.2(c)(3) of the Texas Rules of Civil Procedure limits a party in a Level I or Level II case from sending more than 25 written interrogatories on another party. Rule 193.2(b) and comment 2 provides that the appropriate procedure is for the responding party to answer the first twenty five interrogatories and object to the remaining interrogatories.

6. Duplicitous Information

A party may object if the information has already been provided in response to other discovery in another form. Sears Roebuck & Co. v. Ramirez, 824 S.W.2d 558, 559 (Tex. 1992). In this case, Sears was not required to produce its tax returns to prove its net worth because it had already produced its audited, certified annual report. This case could be used as a basis to object to the production of a prior year’s W-2s, 1099s, etc. if the tax returns for those years have already been produced.
Practice Tip: I have successfully used a duplicitious objection of this nature when an opposing party has requested pay-stubs from several previous tax years when I have already provided W-2s and 1099s for those tax years. Know your Judge, some will permit the discovery and others will sustain your objection.

7. A Discovery Request Is Unduly Burdensome, Harassing, Or Overly Broad

A person may object or seek protection from a discovery request that is unduly burdensome, annoying to produce, or unnecessarily expensive. *In Re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180-81 (Tex. 1999).

a. Undue Burden

The person resisting the discovery has the burden of pleading and proving that the request will impose and undue burden. *ISK Biotech Corp. v. Lindsay*, 933 S.W.2d 565, 568 (Tex.App. – Houston [1st Dist.] 1996, orig. proceeding). To prove an undue burden, the party resisting discovery cannot simply make conclusory allegations that the discovery requested is unduly burdensome. *In Re Alford Chevrolet-Geo*, 997 S.W.2d 173, 181 (Tex. 1999). The discovery request must be "unduly burdensome" not just burdensome. *In Re Energas Co.*, 63 S.W.3d 50, 55 (Tex.App.—Amarillo 2001, orig. proceeding).

The person resisting discovery cannot rely on problems in retrieving documents caused by the way that they filed them in their own records. *ISK Biotech Corp. v. Lindsay*, 933 S.W.2d 565, 569 (Tex.App. – Houston [1st Dist.] 1996, orig. proceeding). Once the person resisting discovery proves that the request for discovery is an undue burden, the person seeking the discovery must show that the request is not so burdensome. *Forward v. Housing Auth.*., 864 S.W.2d 167, 169 (Tex.App.—Tyler 1993, no writ).

Discovery that compels the production of patenty irrelevant or duplicative documents can constitute undue burden. *Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992). Pursuant to Rule 192.4(a) of the Texas Rules Of Civil Procedure, the scope of discovery is limited if the discovery sought is obtainable from some other source that is more convenient, less burdensome, or less expensive. Rule 192.4(b) of the Texas Rules of Civil Procedure, also, limits discovery if the burden or expense of the proposed discovery is outweighed by the likely benefit that the discovery would provide 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. One
example of an undue expense that I come across quite often in my practice is the request for cancelled checks on bank accounts where the party does not receive a copy of the cancelled checks. Many banks charge as much as $50.00 per hour and as much as $5.00 per check to locate and copy cancelled checks on their accounts. Depending upon the size of the marital estate or the issues in your case, this may absolutely be an undue expense.

**Practice Tip:** Prior to making your objection that obtaining the documents requested is unduly expensive; do the math. Actually, estimate the cost to produce the documents and put this in your objection. Offer in your response a release to the opposing party to obtain the documents at their cost.

b. **Discovery Sought For the Purpose Of Harassment**

Rule 215.3 of the Texas Rules of Civil Procedure provides that discovery sought for purposes of harassment may be grounds for sanctions.

c. **Discovery Requests That Are Overly Broad**

A request for all documents without limitation as to time, place, or subject matter is overbroad. *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995). A request of all documents that supported allegations asserted in a case was determined to be overbroad and vague. *Loftin v. Martin*, 776 S.W.2d 145, 148 (Tex. 1989). A request for “all documents” is generally a fishing expedition into another party’s files which is prohibited. *In Re American Optical*, 988 S.W.2d 711, 713 (Tex. 1998). A trial court cannot permit a party to search through another party’s records to make sure that the other party produced all documents requested. *Texaco, Inc. v. Dominguez*, 812 S.W.2d 451, 455-56 (Tex.App.—San Antonio, orig. proceeding). Pursuant to Rule 193.1 comment 2 of the Texas Rules of Civil Procedure, a party who objects to the production of documents from a remote time period should produce documents from a more recent time period unless the production would be burdensome and duplicative should the objection be overruled.

II. **Conclusion**

I admit it, I am a discovery nerd. The Texas Rules of Civil Procedure, even after the “new discovery rules” were enacted in 1999, abound with ways that an attorney can object to discovery sought by an opposing party. You can no longer just object without thinking about what you are being asked to produce. Discovery objections are very much like a puzzle, you just have to fit the right pieces together to see the whole picture.
Sample Guideline Objections And Assertions of Privilege

Remember, you must make them specific to your case for them to be effective.

1. Objection is made to the production request to the extent the proposed discovery is not relevant to the subject matter of the suit and will not lead to the discovery of admissible evidence. Tex. R. Civ. P. 192.3(a). The proposed discovery goes beyond the subject matter of the case and reasonable expectations of obtaining information that will aid resolution of the dispute. Tex. R. Civ. P. 192 cmt. 1

2. Objection is made to the production request to the extent the request would require the responding party to create a document not in existence. A party is not required to produce a document or tangible thing unless it is within the person's possession, custody, or control. A document that does not exist is not within a party's "possession, custody, or control." The only exception to the rule involves the factual observations, tests, or supporting data of a testifying expert. In re Colonial Pipeline Co., 968 S.W.2d 938, 942 (Tex. 1998); see also Tex. R. Civ. P 192.3(b).

3. Objection is made to the production request to the extent that it seeks the identity, mental impressions, opinions, and/or documents or tangible things containing such information of consulting experts either informally consulted or specially retained in anticipation of litigation or preparation for trial that were not reviewed by a testifying expert witness. Tex. R. Civ P. 192.3(e).

4. Objection is made to the production request to the extent that the discovery sought is unreasonable cumulative or duplicative. Tex R. Civ. P. 192.4(a).

5. Objection is made to the production request to the extent the discovery sought is obtainable from some other source that is more convenient, less burdensome, or less
expensive. Tex R. Civ P. 192.4(a).

6. Objection is made to the production request to the extent 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. Tex. R. Civ. P. 192.4(b).

7. Objection is made to the production request because it is overly broad and is not in compliance with rule 196.1(b), which requires the request to specify the items to be produced or inspected, either by individual item or category, and describe with reasonable particularity each item and category. See also Tex. R. Civ P. 193 cmt. 2. Information or material responsive to the request has been withheld. Respondent asserts the following privileges:

Work-product privilege

Husband-wife privilege

Privilege for communication to members of the clergy

Trade secret privilege

Physician-patient privilege, also HIPPA

Mental health information privilege

Peer review committee privileges (Texas Occupation Code §160.007(e))

Hospital committee privilege (Texas Health & Safety Code §161.032)

Blood donor privilege (Texas Health & Safety Code §162.010(e))

Privilege against self-incrimination

Disclosure of a Membership list
Health and safety audit privilege

8. Response: Objection. Petitioner objects on the basis and to the extent that the information requested is improperly requested as it would require the production of documents that are in the possession or control of a third party and are not in the possession of control of the Petitioner. Petitioner further objects to the production of documents that are already in the possession of Respondent or subject to her control as such production would be unduly burdensome to Petitioner. Subject to such objection and without waiving same, Petitioner responds as follows:

9. Response: Objection. Petitioner objects on the basis and to the extent that the information requested requires the creation of a document not presently in existence and is thus an improper request for production. Subject to such objection and without waiving same, Petitioner responds as follows:

10. Objection. Petitioner objects on the basis and to the extent that the information requested is overly broad and vague in that it requests ____________. Subject to such objection and without waiving same, Petitioner responds as follows:

11. Response: Assertion of privilege. Petitioner asserts his attorney-client privilege as to the production of any documents that would disclose the identity of his client’s or any information pertaining to any of their cases, as such Petitioner would offer redacted versions of client contracts and billing statements in response to this request.

12. Objection. Petitioner objects on the basis and to the extent that the request is overly broad and does not designate a document with reasonable particularity in it request for “any ____________” Subject to such objection and without waiving same, Petitioner responds as follows:

13. Objection. Petitioner objects on the basis and to the extent that the information requested is vague and ambiguous in its request for ____________. Petitioner further objects on the basis and to the extent that the information is repetitious. Subject to such objection and without waiving same, Petitioner responds as follows:

14. Objection. Petitioner objects on the basis and to the extent that the information requested is not reasonably calculated to lead to the discovery of relevant and/or admissible evidence. Subject to such objection and without waiving same, Petitioner responds as follows:

15. Response: Objection. Petitioner objects on the basis and to the extent that the information requested is ambiguous, vague, and is possibly already in the possession of Respondent, would thus be unduly burdensome for Petitioner to
have to produce same, and the benefit of obtaining such information would likely be outweighed by the cost to the community estate. Petitioner further objects on the basis and to the extent that the information as requested would require the production of documents that are within the possession, custody, or control of a third party and are not subject to the possession, custody, or control of Petitioner. Subject to such objection and without waiving same, Petitioner responds as follows:

16. **Response:** Assertion of privilege. Petitioner asserts his attorney-client privilege as this request calls for documents that are communications between Petitioner and his attorney and further would be protected attorney-work product. Subject to such assertion of privilege and without waiving same, Petitioner responds as follows:

17. **Response:** Objection. Petitioner objects on the basis and to the extent that the information requested is repetitious and unduly burdensome. Subject to such objection and without waiving same, Petitioner responds as follows:

18. **Response:** Objection. Such information is improperly requested pursuant to Rule 195.1 of the Texas Rules of Civil Procedure. Subject to such objection and without waiving same, Petitioner responds as follows: See Petitioner’s Response to Rule 194 Requests For Disclosure.

19. **Response:** Assertion of privilege. Petitioner asserts his attorney-client privilege and has provided documents that have been redacted to protect any privileged information, confidential information, and the identities of his clients. Petitioner further objects on the basis and to the extent that the information requested is voluminous and in part repetitious. Subject to such objection and without waiving same, Petitioner responds as follows:

20. **Objection.** Petitioner objects on the basis and to the extent that the information requested is voluminous in that it covers a period of over _______ years, and is unduly burdensome. See Rule 192.4, Tex.R.Civ.Pro.; Jampole v. Touchy, 673 S.W. 2d 569 (Tex. 1984). Subject to such objection and without waiving same, Petitioner responds as follows:

21. **Objection.** Respondent objects on the basis and to the extent that the information requested would require the Respondent to compel production from a third party and thus is not a proper request under the Texas Rules of Civil Procedure. Subject to such objection and without waiving same, Respondent responds as follows:

"A"
22. **Objection.** Petitioner objects on the basis and to the extent that the information requested has been previously tendered to the Respondent and it is unduly burdensome to require the Petitioner to produce documents that have already been provided. Subject to such objection and without waiving same, Petitioner responds as follows:

23. **ANSWER:** Assertion of privilege. Petitioner asserts that such information as is requested in regards to Petitioner is privileged between Petitioner and her health care provider under both state and federal law. Subject to such assertion of privilege and without waiving same, Petitioner responds as follows:

24. **ANSWER:** Objection. Petitioner objects on the basis and to the extent that the requesting party seeks by this Interrogatory to limit evidence which may be introduced or presented at trial, the answering party objects to being required to state “each incident” and being required to “describe each alleged incident” to “state the date of the alleged abuse” and to “describe what treatment was sought or received” as to each incident because to do so would be at her peril if she inadvertently omitted a fact, detail, or incident and this is an impossible request as such was an ongoing pattern throughout the parties’ twenty plus year marriage. Subject to such objection and without waiving same, Petitioner answers as follows:

25. **ANSWER:** Objection. Petitioner objects on the basis and to the extent that the information as requested by Respondent improperly requires Petitioner to marshal all of her evidence which is not a permissible enquiry in an interrogatory. See TRCP 197.1. Subject to such objection and without waiving same, Petitioner responds as follows:
CAUSE NO. IN THE MATTER OF THE MARRIAGE OF RICKY RICARDO AND LUCY RICARDO AND IN THE INTEREST OF LITTLE RICKY RICARDO, A MINOR CHILD

$ IN THE DISTRICT COURT

$ 007TH JUDICIAL DISTRICT

$ HARRIS COUNTY, TEXAS

RULE 11 AGREEMENT

Petitioner, Ricky Ricardo, and Respondent, Lucy Ricardo, by and through their attorneys of record, enter into this Rule 11 Agreement Regarding Discovery as follows:

Petitioner and Respondent agree and stipulate, as evidenced by the signatures of Petitioner’s and Respondent’s attorney that the discovery deadline to respond to Respondent’s discovery requests in the form of written objections and responses to Respondent’s Set of Written Interrogatories to Petitioner, Respondent’s Request for Production and Inspection, and Respondent’s Rule 194 Requests for Disclosure is extended from January 10, 2005 to January 21, 2005.

FRED MERTZ
State Bar No. __________
1234 Caroline
Houston, Texas 77004
Attorney for Respondent
Date: ________________, 2005

ETHEL MERTZ
State Bar No. __________
1234 Louisiana
Houston, Texas 77006
Attorney for Petitioner
Date: ________________, 2005

"B"