Chapter 1

Introduction

"Discovery" is the "[c]ompulsory disclosure, at a party's request, of information that relates to the litigation."[1] It allows the parties to "seek the truth, so that disputes may be decided by what the facts reveal, not by what facts are concealed."[2] Discovery's principal goals are to "provide[] notice of the evidence that the opposing party intends to present" and to "prevent trial by ambush."[3] Notwithstanding its laudatory purpose and goals, discovery is

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1. *Black's Law Dictionary* 533 (9th ed. 2009); *accord* Bryan A. Garner, *A Dictionary of Modern Legal Usage* 239–40 (2nd ed. 1995) (defining "discovery" as "disclosure by a party to an action, at the other party's instance, of facts or documents relevant to the lawsuit"); *see also Sec. Nat'l Bank v. Abbott Labs.*, 299 F.R.D. 595, 597 (N.D. Iowa 2014) (noting that "discovery" is "a process intended to facilitate the free flow of information between parties"), *rev'd on other grounds*, 800 F.3d 936 (8th Cir. 2015).

2. *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding) (quoting *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984)), *disapproved of on other grounds by Walker v. Parker*, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding); *accord In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 (Tex. 1999) (orig. proceeding); *In re Box*, No. 13-16-00016-CV, 2016 Tex. App. LEXIS 1782, at *5 (Tex. App.—Corpus Christi Feb. 19, 2016, orig. proceeding) (mem. op); *Nancarrow v. Whitmer*, 463 S.W.3d 243, 253 (Tex. App.—Waco 2015, no pet.); *In re VERP Inv., LLC*, 457 S.W.3d 255, 260 (Tex. App.—Dallas 2015, orig. proceeding); *In re Goodyear Tire & Rubber Co.*, 437 S.W.3d 923, 927 (Tex. App.—Dallas 2014, orig. proceeding); *Khan v. Valliani*, 439 S.W.3d 528, 535 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *In re Ten Hagen Excavating, Inc.*, 435 S.W.3d 859, 865 (Tex. App.—Dallas 2014, no pet.).

3. *Best Indus. Unif. Supply Co. v. Gulf Coast Alloy Welding, Inc.*, 41 S.W.3d 145, 147 (Tex. App.—Amarillo 2000, pet. denied); *accord Mid Continent Lift & Equip., LLC v. J. McNeill Pilot Car Serv.*, 537 S.W.3d 660, 672–73 (Tex. App.—Austin 2017, no pet.); *Ersek v. Davis & Davis, P.C.*, 69 S.W.3d 268, 271 (Tex. App.—Austin 2002, pet. denied) (same).

"the bane of modern litigation."[4] By its very nature, it is intrusive and invasive.[5]

Discovery also is the largest cost in most civil actions—as much as 90 percent in complex cases[6] and can be the most frustrating part of litigation because it often is mired in obstructionism.[7]

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[4] *Rossetto v. Pabst Brewing Co., Inc.*, 217 F.3d 539, 542 (7th Cir. 2000) (Posner, C.J.), *cert. denied*, 531 U.S. 1192 (2001); *see Liguria Foods, Inc. v. Griffith Labs., Inc.*, 320 F.R.D. 168, 182 (N.D. Iowa 2017) ("Few practicing attorneys would be surprised that discovery was singled out as 'the primary cause for cost and delay,' and often 'can become an end in itself.'" (quoting Hon. Paul W. Grimm and David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C. L. Rev. 495, 495–96 (2013))).

[5] *Bond v. Utreras*, 585 F.3d 1061, 1067 (7th Cir. 2009); *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998); *see also Flentye v. Kathrein*, No. 06 C 3492, 2007 U.S. Dist. LEXIS 74260, at *7 (N.D. Ill. Oct. 2, 2007) (mem. op.) ("[Discovery] is, like life itself, 'nasty [and] brutish. . . .' Unfortunately, it is not generally 'short.'" (quoting Hobbes, *Leviathan*, Ch. XIII)).

[6] Robert K. Wise, *Ending Evasive Responses to Written Discovery: A Guide for Properly Responding (and Objecting) to Interrogatories and Document Requests Under the Texas Discovery Rules*, 65 Baylor L. Rev. 510, 512 (2013); *see Liguria Foods, Inc. v. Griffith Labs., Inc.*, 320 F.R.D. 168, 182 (N.D. Iowa 2017) ("[B]y some estimates, discovery costs now comprise between 50 and 90 percent of the total litigation costs in a case" and "[d]iscovery abuse also represents one of the principal causes of delay and congestion in the judicial system[.]" (quoting John H. Beisner, *Discovering A Better Way*, 60 Duke L.J. 547, 549 (2010))); *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794, 813 (Tex. 2017) (orig. proceeding) ("'Discovery is often the most significant cost of litigation' and a potential 'weapon capable of imposing large and unjustifiable costs on one's adversary.' Especially in the context of multi-party litigation, costs are magnified by expanding the scope of discovery, and 'the costs of multi-party litigation can drive defendants to settle regardless of the merits.'" (footnotes omitted and quoting *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 (Tex. 1999))); *Steenbergen v. Ford Motor Co.*, 814 S.W.2d 755, 758 (Tex. App.—Dallas 1991, writ denied) ("It is well known that discovery costs are a major part of the overall expense of a trial."); Thomas E. Willging and Emery G. Lee III, *In Their Words: Attorney Views About Costs and Procedures in Federal Civil Litigation* 14 (Federal Judicial Center, Mar. 2010) (noting that discovery is the "number one cost-driver and there isn't a close second" and that discovery costs increase five percent for every non-expert deposition, another five percent for each additional type of discovery, and another 11 percent for every expert-witness deposition).

[7] *See In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 (Tex. 1999) (recognizing that "discovery is not only 'a tool for uncovering facts essential to accurate adjudication, but also 'a weapon capable of imposing large and unjustifiable costs on one's adversary.' Discovery is often the most significant cost of litigation. Because the costs of compliance are usually borne solely by the replying party, a requesting party improves its bargaining position by maximizing those costs." (citations omitted and quoting Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 636 (1989))); *Garcia v. Peeples*, 734 S.W.2d 343, 347 (Tex. 1987) (orig. proceeding) ("Unfortunately, this goal of the discovery process is often frustrated by the adversarial approach to discovery. The 'rules of the game' encourage parties to hinder opponents by forcing them to utilize repetitive and expensive methods to find out the facts. The truth about relevant matters is often kept submerged beneath the surface of glossy denials and formal challenges to requests until an opponent unknowingly utters some magic phrase to cause the facts to rise." (citation omitted)); *Explanatory Statement Accompanying the* 1999 Amendments *to the Rules of Civil Procedure Governing Discovery*, Order of Approval of the Revisions to the Texas Rules of Civil Procedure, Misc. Docket No. 98-9196 (Tex. Nov. 9, 1998) (recognizing that "discovery may be misused to

Many practitioners are quick to dispute discovery requests, slow to produce information, and all-too-eager to object at every stage of the process. For example, in responding to written discovery (i.e., "requests for disclosure, requests for production and inspection of documents and tangible things, requests for entry onto property, interrogatories, and requests for admission"),[8] many practitioners interpose every objection imaginable even though courts and commentators resoundingly disapprove of the use of boilerplate objections.[9]

Some practitioners engage in obstructionist discovery practice to grandstand for their clients, to intentionally obstruct the flow of clearly discoverable information, to try and win a war of attrition, or to intimidate and harass the opposing party. Others do it simply

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deny justice . . . by driving up the costs of litigation until it is unaffordable and stalling resolution of cases."), printed at 61 Tex. Bar J. 1140, 1140 (Dec. 1998); *cf. Liguria Foods, Inc. v. Griffith Labs., Inc.*, 320 F.R.D. 168, 185 (N.D. Iowa 2017) ("Improper discovery responses necessarily add to the contentiousness of litigation, because they start with non-disclosure as their premise."); Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 636 (1989) ("Litigants with weak cases have little use for bringing the facts to light and every reason to heap costs on the adverse party. . . . The prospect of these higher costs leads the other side to settle on favorable terms.").

8. Tex. R. Civ. P. 192.7(a) (defining "written discovery").

9. *See, e.g.*, 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) (discussing boilerplate objections and pointing out that they are improper under the Texas discovery rules); Matthew L. Jarvey, Note, *Boilerplate Discovery Objections: How They Are Used, Why They Are Wrong, and What We Can Do About Them*, 61 Drake L. Rev. 913, 915 (2013) ("One of the most rampant abuses of the discovery process is the use of boilerplate objections to discovery requests."); *cf. Resendez v. Smith's Food & Drug Ctrs., Inc.*, No. 2:15-cv-00061-JAD-PAL, 2015 U.S. Dist. LEXIS 34038, at *5–6 (D. Nev. Mar. 16, 2015) ("Federal courts have routinely held that boilerplate objections are improper."); *Heller v. City of Dallas*, 303 F.R.D. 466, 483–84 (N.D. Tex. 2014) ("So-called boilerplate or unsupported objections—even when asserted in response to a specific discovery request and not as part of a general list of generic objections preceding any responses to specific discovery requests—are likewise improper and ineffective and may rise (or fall) to the level of what the Fifth Circuit has described as 'an all-too-common example of the sort of "Rambo tactics" that have brought disrepute upon attorneys and the legal system.'" (quoting *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1484–86 (5th Cir. 1990))); *Russell v. Daiichi-Sankyo, Inc.*, No. CV 11-34-BLG-CSO, 2012 U.S. Dist. LEXIS 49161, at *3 (D. Mont. Apr. 6, 2012) ("The recitation of 'boilerplate, shotgun-style objections' are not consistent with the requirements of discovery rules."); *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 364 (D. Md. 2008) (noting that "boilerplate objections that a request for discovery is 'overboard and unduly burdensome, and not reasonably calculated to lead to the discovery of material admissible in evidence,' persist despite a litany of decisions from courts, including this one, that such objections are improper unless based on particularized facts" (citation omitted)); *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 512 (N.D. Iowa 2000) (collecting cases and sanctioning lawyers for using boilerplate objections in response to production requests).

because it is how they were taught[10] or because they have a warped view of zealous advocacy.[11] As one discovery expert has written: "It would appear that there is something in the DNA of the American civil justice system that resists cooperation during discovery."[12]

Irrespective of the reason, obstructionist discovery practice results in astronomically costly litigation and disregards the Texas Supreme Court's directive to use the Texas Rules of Civil Procedure "to obtain the just, fair, equitable, and impartial adjudication of the rights of litigants . . . *at the least expense* both to the litigants and to the state as may be practicable[.]"[13] As noted recently by one federal judge: "Although the federal discovery rules were intended to facilitate discovery and refocus cases on the legal merits, 'the discovery process has supplanted trial as the most contentious stage in litigation.' Improper discovery responses necessarily add

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

[11] As explained by leading commentators on discovery:

> The truth is that lawyers and clients avoid cooperating with their adversary during discovery—despite the fact that it is in their clear interest to do so—for a variety of inadequate and unconvincing reasons. They do not cooperate because they want to make the discovery process as expensive and punitive as possible for their adversary, in order to force a settlement to end the costs rather than having the case decided on the merits. They do not cooperate because they wrongly assume that cooperation requires them to compromise the legitimate legal positions that they have a good faith basis to hold. Lawyers do not cooperate because they have a misguided sense that they have an ethical duty to be oppositional during the discovery process—to "protect" their client's interests—often even at the substantial economic expense of the client. Clients do not cooperate during discovery because they want to retaliate against their adversary, or "get back" at them for the events that led to the litigation. [5] But the least persuasive of the reasons for not cooperating during the discovery process is the entirely misplaced notion that the "adversary system" somehow prohibits it.

Hon. Paul W. Grimm and David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C. L. Rev. 495, 525–26 (2013) (footnotes omitted); *see Liguria Foods, Inc. v. Griffith Labs., Inc.*, 320 F.R.D. 168, 182 (N.D. Iowa 2017) ("Unfortunately, experience has taught me that attorneys do not know or pay little attention to the discovery rules in the Federal Rules of Civil Procedure.").

[12] Hon. Paul W. Grimm and David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C. L. Rev. 495, 530 (2013).

[13] Tex. R. Civ. P. 1 (emphasis added).

to the contentiousness of litigation, because they start with non-disclosure as their premise."[14]

Obstructionist discovery practice persists because most practitioners simply accept it as inevitable and, more importantly, because courts often ignore it. By ignoring such practice, courts "reinforce—even incentivize—obstructionist tactics."[15]

This book's purpose is to provide a comprehensive guide to the Texas discovery, primarily by focusing on each Texas discovery rule: Texas Rules of Civil Procedure 176 and 190–215.[16] Its goal

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[14] *Liguria Foods, Inc. v. Griffith Labs., Inc.*, 320 F.R.D. 168, 185 (D. Iowa 2017) (Bennett, J.) (citation omitted and quoting Mitchell London, *Resolving the Civil Litigant's Discovery Dilemma*, 26 Geo. J. Legal Ethics 837 (2013)).

[15] *Sec. Nat'l Bank v. Abbott Labs.*, 299 F.R.D. 595, 597 (N.D. Iowa 2014) (Bennett J.), *rev'd on other grounds*, 800 F.3d 930 (8th Cir. 2015).

[16] The Texas discovery rules are Texas Rules of Civil Procedure 176 and 190–215.

The Texas discovery rules, for the most part, are based on the Federal discovery rules, Federal Rules 26–37 and 45. *E.g., Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 825 (Tex. 1972) (noting that former Texas Rule 169 governing requests for admission "was taken with minor textual changes from Federal Civil Rule 36 as it existed in 1941"); *Texaco, Inc. v. Dominguez*, 812 S.W.2d 451 (Tex. App.—San Antonio 1991, orig. proceeding) (noting that former Texas Rule 167 relating to production requests was based on Federal Rule 34); *In re Fina Oil & Chem. Co.*, No. 13-98-640-CV, 1999 Tex. App. LEXIS 1751, at *14–15 (Tex. App.—Corpus Christi Mar. 11, 1999, orig. proceeding) (not designated for publication) (noting that former Texas "Rule 201(4) is patterned after Federal Rule of Civil Procedure 30(b)(6)"); *Hosp. Corp. of Am. v. Farrar*, 733 S.W.2d 393, 394–95 (Tex. App.—Fort Worth 1987, orig. proceeding) (equating former Texas Rule 201(4) to Federal Rule 30(b)(6)). Accordingly, federal cases are persuasive authority in construing the Texas discovery rules patterned after the federal ones. *See, e.g., In re State Farm Lloyds*, 520 S.W.3d 595, 613 (Tex. 2017) ("To be sure, there are differences in language between the Texas rule and the federal rule. But as we affirmed in *In re Weekley Homes*, [295 S.W.3d 309, 316–17 (Tex. 2009) (orig. proceeding),] 'our rules as written are not inconsistent with the federal rules or the case law interpreting them,' even though they may not 'mirror the federal language.'" (footnote omitted)); *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 316–17 (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 identical language); *Kimberly-Clark Co. v. Tex. Co. Bldg., L.P.*, 228 S.W.3d 480, 486–88 (Tex. App.—Dallas 2007, orig. proceeding) (relying on federal cases in interpreting Texas Rule 196.7 regarding entry onto land); *In re Fina Oil & Chem. Co.*, No. 13-98-640-CV, 1999 Tex. App. LEXIS 1751, at *14–15 (Tex. App.—Corpus Christi Mar. 11, 1999, orig. proceeding) (not designated for publication) (relying on federal cases in interpreting former Texas Rule 201(4) because it was "patterned after Federal Rule of Civil Procedure 30(b)(6)"); *Hosp. Corp. of Am. v. Farrar*, 733 S.W.2d 393, 394–95 (Tex. App.—Fort Worth 1987, orig. proceeding) (same); *Indep. Insulating Glass/Sw., Inc. v. Street*, 722 S.W.2d 798, 802 (Tex. App.—Fort Worth 1987, orig. proceeding) (relying on federal cases in interpreting former Texas Rules 167 and 168 regarding waiver of objections to production requests and interrogatories, respectively); *see also Rimmer v. State*, 392 S.W.3d 635, 639 (Tex. 2002) ("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."); *cf. Tex. Dep't of Pub. Safety v. Caruana*, 363 S.W.3d 558, 566 n.1 (Tex. 2012) ("When the federal and Texas rules of evidence are similar,

is to ensure that its readers are never subject to the following admonishment:

> If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes.[17]

we look to federal case law and the Federal Advisory Committee Notes when interpreting the Texas rules.").

In this book, individual Texas and Federal Rules of Civil Procedure are referred to as "Texas Rule __" and "Federal Rule ___," respectively.

17. *Dahl v. City of Huntington Beach*, 84 F.3d 363, 364 (9th Cir. 1996) (quoting *Krueger v. Pelican Prod. Corp.*, No. CIV-87-2385-A (W.D. Okla. Feb. 24, 1989)).