PROTECTING AND PIERCING PRIVILEGE

DAVID E. KELTNER
JOSE, HENRY, BRANTLEY & KELTNER, L.L.P.
FORT WORTH, TEXAS
817.877.3303
keltner@jhbk.com

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Chapter 15
# TABLE OF CONTENTS

I. **INTRODUCTION** ............................................... 3  
   A. Scope ........................................................................ 3  
   B. Thanks ....................................................................... 3  

II. **PHILOSOPHY OF NEW RULES** ................................... 3  
   A. A Request Deserves an Answer ................................ 3  
   B. “Information Reasonably Available at Time of Response” ............. 4  

III. **WRITTEN DISCOVERY** .......................................... 4  
   A. Asserting a Privilege Under the 1999 Amendments .................. 4  
      1. Does an Objection Preserve Error? ........................ 5  
      2. Withhold and Inform (“The Privilege Statement”) .......... 5  
         a. Contents of Privilege Statement ...................... 5  
         b. Exception (“Lawyer Communications”) ............... 5  
      3. Request for Privilege Log ...................................... 6  
      4. Withholding Statement (“Privilege Log”) .................. 6  
      5. The Hearing (“Proofing the Privilege”) ..................... 7  
         a. Requesting the Hearing .................................. 7  
         b. Proving the Privilege .................................... 10  
         c. In Camera Inspection ................................. 10  
         d. Burden Shift .......................................... 10  
         e. Ruling ........................................... 11  
      6. Discovery Designed to Test Privilege ..................... 11  
      7. Use of Produced Materials .................................. 11  
      8. Use of Material Withheld from Discovery ............. 13  

IV. **DEPOSITIONS** ................................................ 13  
   A. Other Papers ............................................. 13  
   B. Claiming Privilege ........................................ 13  

V. **INADVERTENT PRODUCTION** .................................. 13  
   A. Deposition\Live Testimony .................................. 13  
   B. Inadvertent Production of Written Discovery ................ 13  
      1. New Rule ............................................ 13  
      2. Overrules *Granada* ................................... 14  
      3. Automatic Rule? ..................................... 14  

IV. **OFFENSE USE (“SWORD\SHIELD”)** ............................... 14  
   A. Elements of Offensive Use Doctrine .......................... 14  
   B. An Affirmative Defense is Not Affirmative Relief .......... 15  
   C. Claim for Attorney’s Fees for Defending Against a Claim Not  
      Request for Affirmative Relief .......................... 15
I. INTRODUCTION.

A. Scope:

The purpose of this paper is to introduce the reader to the procedure of asserting and piercing privileges in discovery. The paper deals primarily with the 1999 revisions to the Texas Rules of Civil Procedure relating to discovery and also discusses strategy considerations for both protecting and penetrating privileges.

Another paper, authored by Kim Askew discusses the substantive law of privilege. That paper appears at Tab 20 of these materials. Paul Gold’s article at Tab 14 discusses asserting and piercing privileges in depositions.

Throughout this paper, I have included practical pointers in an effort to anticipate problem area in your practice. I hope you find them helpful.

B. Thanks:

This paper contains information that was originally published by Kim Askew and Alex Albright in the 1999 Advanced Evidence and Discovery Course sponsored by the State Bar of Texas. Many thanks to Kim and Alex for letting me use their materials.

Additionally, the thanks of all Texas lawyers to should go to Alex Albright of the University of Texas, Bob Pemberton, rules attorney for the Texas Supreme Court, the members of the Texas Supreme Court Advisory Committee and the Justices of the Texas Supreme Court for their combined work on the 1999 revisions to the Texas Discovery Rules. These individuals took comments from practicing lawyers and revised the then proposed rules in a way to make them workable.

II. PHILOSOPHY OF NEW RULES.

A. A Request Deserves an Answer:

Under the pre-1999 discovery rules – there was no absolute duty to answer written discovery. Instead, there were sanctions for failure to answer. For example, if there was no answer within the time period for response – all objections to the requested information was waived. Likewise, if there was no answer by 30 days before trial – the responding party could not introduce undisclosed evidence.
These sanctions were only partially effective. In reality, these sanctions only punished parties who were shielding information that was favorable to their case. On the other hand, the sanctions had no impact on a party who was shielding information that was unfavorable to their case.

In stark contrast, the new rules impose an absolute duty to make a complete response “based on all information reasonably available . . . at the time the response is made.” TEX. R. CIV. P. 193.1 Even if a party interposes an objection – the party must comply with as much as the request “to which the party has made no objection unless it is unreasonable under the circumstances to do so before obtaining a ruling . . .” TEX. R. CIV. P. 193.2(b).

B. “Information Reasonably Available at Time of Response”:

Rule 193.1 limits the obligation of the responding party to answer to information that is reasonably available at the time the response is made. This new rule eliminates the need for prophylactic objections to protect material that might not yet have been created or discovered by the responding party. The Supreme Court recognized that its previous rulings caused an absolute waiver of objections on all information requested – even if the responding party did not know of the materials existence at the time of response.

III. WRITTEN DISCOVERY.

A. Asserting a Privilege Under the 1999 Amendments:

There is no longer any need to raise an objection to shield privileged information from discovery. TEX. R. CIV. P. 193.2(f). “A party should not object . . . on the grounds that . . . information . . . is privilege but should instead comply with Rule 193.3.” The Supreme Court, recognizing that this new procedure is foreign to the practice in most jurisdictions, also provided that a party who objects to a request for privileged material does not waive the privilege . . . but, must comply with the new procedure when the error is pointed out. Id.

At this point, the best case illustrating the use of the new procedure is Justice Vance’s opinion in In re Monsanto, 998 S.W.2d 917 (Tex. App.–Waco 1999, orig. proceeding). In his opinion, Judge Vance noted that he was writing on a “clean slate” in interpreting the new rules. Id. at 924. Inasmuch as Judge Vance’s opinion is the most complete review of the new procedures – it will be mentioned often in this paper.

1. Does an Objection Preserve Error?:
Pursuant to Rule 193.2(f), a party who objects does not waive the privilege. See infra, III. A.

However, a recent unpublished decision from the Amarillo Court of Appeals reaches a different conclusion. In re Williams, 2000 WL 369687 (Tex. App.–Amarillo, 4/11/2000, orig. proceeding). In that case, the court of appeals upheld the trial court’s order requiring production of an attorney’s medical research file – even though the file had not been reviewed or relied upon by a testifying expert on the rationale, in part, that the withholding procedure for Rule 193.3 had not been followed. This is an interesting opinion because the court was forced to admit the party had no obligation to object or even indicate that it was withholding information based on the attorney work product privilege for information prepared in connection with the lawsuit. Nonetheless, the case serves as a warning that failure to follow the new procedure has consequences. I believe the result of the case contradicts the non-waiver provisions of TEX. R. CIV. P. 193.2(f). However, the Dallas Court of Appeals recently reached the same conclusion as Amarillo in another unpublished opinion. In re Hardisty, 2000 WL 1160683 (Tex. App.–Dallas 8/17/2000, orig. proceeding).

2. Withhold and Inform (“The Privilege Statement”):

Rule 193 instructs that a party wishing to assert a privilege may merely withhold privilege information from the response and notify the underside that it is doing so.

a. Contents of Privilege Statement:

(1) A statement that information or material responsive to the request has been withheld.

(2) Identify the request to which the withheld information or material relates.

(3) The privilege(s) asserted.

b. Exception (“Lawyer Communications”):

A party may withhold a privileged communication “to or from a lawyer or lawyer’s representative or a privileged document of a lawyer or lawyer’s representative” concerning the litigation in which the discovery is requested and created or made from the point at which a party consults a lawyer with the view towards obtaining legal services regarding a specific claim in the litigation in which the discovery is requested.

Most importantly, there is no need to notify the opposing side of the withholding
This exception was the most debated part of the new rules. Many practitioners and scholars believed creating this exception did not allow the requesting parties to test bad faith assertions of the attorney-client and attorney-work product privileges. These lawyers believed that the rule serves as an incentive to unscrupulous parties to use attorneys and their representatives in a way to shield factual matters. On the otherhand, proponents of the new rule change believed that too many judicial resources are used in fighting good faith assertions of attorney-client and attorney-work product privileges.

Time will tell which side is correct. I favored a middle ground approach which would have provided that no request for discovery, in a deposition or written discovery, would be deemed to request attorney-client or work-product information unless worded specifically to do so. It was my feeling that a party who intentionally requests that type of information should be forced into an uphill battle and be prepared to offer proof of why such information should be discoverable. However, I did not believe that withholding without notice was appropriate.

3. Request for Privilege Log:

After receiving the response, the requesting party may serve a request that the withholding party identify the information and/or material withheld. Importantly, there is no time limit for the requesting party to make such a request.

4. Withholding Statement (“Privilege Log”):

After receiving a request, the party withholding information must identify the information and material withheld within 15 days. This document, commonly known as a “privilege log” must:

a. describe the information withheld in sufficient detail, without revealing the privilege information itself or otherwise waiving the privilege, so that the requesting party can assess the applicability of the privilege, and

b. assert a specific privilege for each item or group of items withheld.

Simply stated, the privilege log must describe the withheld information with sufficient specificity to allow the requesting parties to evaluate whether the privilege is fairly asserted. Likewise, the claims of privilege must be made to the specific item(s) of information or documents. In re Monsanto, 998 S.W.2d at 925.
Importantly, the court, upon motion of the parties, has the power to review the adequacy of a privilege log and to test whether the log fairly matches and describes the documents. Tex. R. Civ. P. 193.3(b)(1-2). In re Monsanto, 998 S.W.2d at 926, 929.

**PRACTICE POINTERS:**

1. **Timeliness:**

   15 days is not much time to prepare a privilege log. As a result, it is best to prepare a privilege log when originally responding to the discovery request.

2. **Privilege Law Doesn’t Establish:**

   The filing of a privilege log does not establish the privilege. This can only be done by proof. In re Monsanto, 998 S.W.2d at 930; In re Leviton Mfg. Co, 1 S.W.3d 898 (Tex. App.–Waco 1999, no pet.).

3. **Object to Log:**

   One of the best strategies of the party seeking discovery is to require the objecting party to be as specific as possible in the privilege log.

4. **The Hearing (“Proofing the Privilege”):**
   a. **Requesting the Hearing:**

      As under the previous rule, any party may request a hearing on the validity of the privileges. Tex. R. Civ. P. 193.4(a).

      In theory, it was believed that the party seeking to challenge the privilege would naturally be the party to seek the hearing. After all, the stated purpose of the privilege log is to provide the requesting party an opportunity to determine whether the privilege was validly claimed.

      In most instances, the requesting party might want to wait until other discovery is completed before requesting a hearing on the privileges. In many instances, discovery
will disclose information which might indicate waiver of the privilege or inapplicability of a privilege to certain information.

In some instances, it will be impossible to immediately request a hearing if the privilege is an attorney-client or work-product claim of information developed in the lawsuit. There is no requirement to notify the opposing side of withholding information protecting by those privileges. However, future discovery might indicate that information relating to those privileges was withheld. Consider the following examples:

Example One:
Upon being notified of a claim under fire insurance policy, the insurance company hires a lawyer to take a statement of a policy holder under oath.

The lawyer does so and also personally investigates the fire scene.

Thereafter, the lawyer makes a report to the insurance company regarding her observations of the insured and the fire scene. Later, the insured files a suit under the insurance policy, a claim for breach of duty of good faith and fair dealing and claims under the Texas Insurance Code. The insured seeks the investigation file from the insurance company. The insurance company turns over its formal investigation file but does not disclose or file a privilege statement relating to the attorney’s report and observations.

WHAT RESULT?

In re Texas Farmers Ins. Exch., 990 S.W.2d 337 (Tex. App.–Texarkana 1999, leave

**Example Two:**
A company refuses to accept delivery of goods delivered under contract on the basis that the goods are non-conforming. The supplier sues claiming that the goods met the contract specification. After suit is filed, the company hires a lawyer who, as a part of his investigation, takes a statement from the company employee who inspected the goods on delivery. At his deposition, the employee testifies that he can not remember whether the goods met the contract specifications. However, he does remember giving a statement about that matter to the company’s lawyer on the day the plaintiff filed suit. Naturally, the plaintiff requests a copy of the statement. **WHAT RESULT?**

_In re Texas Farmers Ins. Exch., 990 S.W.2d 337 (Tex. App.–Texarkana 1999, leave denied, 12 S.W.3d 807 (Tex. 2000)_

b. **Proving the Privilege:**

The party asserting privilege bears the burden of demonstrating that the privilege applies. **Tex. R. Civ. P. 193.4.** The rule recognizes that proof may be:

(1) live testimony
(2) affidavits

In recent years the use of affidavits to prove a privilege has increased. The advantages to using affidavits is that they are not subject to meaningful cross-examination of the affiant. However, the disadvantage is that the cases decided pursuant to Rule 166 relating to summary judgments apply. As a result, the affidavits, on their face, must show how the affiant had personal knowledge of the facts asserted and avoid legal conclusions. Objections to the affidavits may be made at the hearing and a ruling striking the affidavit may leave the objecting party without meaningful proof.

c. In Camera Inspection:

While Rule 193.4(a) provides that a trial court may conduct an in camera review “if the court determines that (it) . . . is necessary” the court must conduct an in camera review if requested by the objecting party. Marathon Oil Co. v. Moye, 93 S.W.2d 585, 590 (Tex. App. – Dallas 1994, no writ).

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<th>PRACTICE POINTER:</th>
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<td>In Camera Inspection:</td>
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<td>In many instances, the document itself may be the best evidence of the privilege. Weisel v. Curry, 718 S.W.2d 56 (1986). Furthermore, the document itself may create the best appellate review possible. For a good example of this principle see In re Monsanto, 998 S.W.2d at 931-933.</td>
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<th>Burden Shift:</th>
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<td>Some commentators insist that once the objecting party provides prima facie proof of a privilege, the burden shifts to the requesting party to refute the privilege. Askew, Survey of the Law of Privileges p. 44, 23rd Annual Advanced Civil Trial Course (SBOT 2000).</td>
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<td>I disagree. The cases cited to support this proposition do not reach that conclusion. For example, in the Valero Energy case, the court noted no burden shift. Instead, the controversy was whether the objecting party had presented prima facie proof, because no controverting proof had been introduced. Additionally, the Waco court did not reach that conclusion in In re Monsanto, 998 S.W.2d at 925. In that case, the court held that if a prima facie proof of a privilege was introduced by the objecting party – the requesting party had the burden to point out to the court which specific documents or</td>
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group of documents it wished the party to review in an in camera inspection.

In a discovery dispute – the court acts as a finder of fact if the evidence conflicts. As a result, the court is free to believe or disbelieve any witness if his or her testimony is controverted. However, the courts seldom indulge in this “credibility testing” because most testimony in support of privileges is not controverted.

e. Ruling:

Once the court sustains an objection or claim of privilege – the responding party has no further duty to respond to the request. On the other hand, if the court overrules the claim of privilege, the responding party must produce the requested material within 30 days or at such other time as the court orders. Tex. R. Civ. P. 193.4(b). For the most part, Texas courts have held that mandamus is generally available for the overruling of a claim of privilege because there is no adequate remedy at law. See Walker v. Packer, 827 S.W.2d 833, 843 (Tex. 1992).

6. Discovery Designed to Test Privilege:

For the last decade a battle had raged among lawyers about whether discovery could be conducted to test the claim of privilege. For better or worse, until recently, there was no case authority on point. However, in reviewing the new discovery procedure, the Waco Court of Appeals specifically indicated that such discovery is proper. In re Monsanto, 998 S.W.2d at 925.

7. Use of Produced Materials:

The party’s production of a document in response to written discovery authenticates the document for use against that party in any pre-trial proceeding or trial unless – within ten days or a 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 in writing or on the record. Tex. R. Civ. P. 193.7.

In otherwords, the production of a document authenticates that document against the producing party unless that party after learning that the document will be used by an opposing party – objects to the authenticity of the document. The purpose of this rule is to do away with the requirement to separately authenticate documents that come from an opposing party’s business records.

| PRACTICE POINTER: |
If you intend to use a document produced by an opposing party as an authenticated document either during trial or during a pre-trial hearing – it is best to alert the other side that you intend to use that document well before. This gives the other party an opportunity to claim or to make any objection and creates a waiver if they do not so within ten days of the notice.

Example Three:
In response to a request for production – the plaintiff produces several hundred business record which include several critical reviews of scholarly material in the area of the plaintiff’s business. One of these reviews attacks an article prepared by the plaintiff’s own independent expert witness. The defendant, wishing to demonstrate that the plaintiff has disagreed with its own hired expert, seeks to introduce this critical review at trial. After reviewing Rule 193.7, the defendant simply sends a letter saying “we intend to use one or more of the documents, produced by the defendant on July 19th, during the trial of the cause.” WHAT RESULT?

8. Use of Material Withheld from Discovery:

Contrary to prior practice, a party may not use at trial or at any pre-trial hearing material or any information with held from discovery without timely amending or supplementing party’s response. This 1999 amendment partially overrules McKinney v.

IV. DEPOSITIONS.

A. Other Papers:

The subject of conduct during depositions is covered in another paper in this course. Gold, Talking Heads, Potted Plants and Speaking Objections: Understanding the New Rules of Deposition Practice in Texas, 23rd Annual Advanced Civil Trial Course (SBOT 2000). As a result, I will not review that subject in detail.

B. Claiming Privilege:

In order to claim a privilege during a deposition, an attorney may instruct a witness not to answer a question. TEx. R.Civ. P. 199.5(f). If requested, the attorney instructing the witness not to answer must give a “concise non-argumentative, non-suggestive explanation of the grounds for the instruction.” Id. As under the previous practice, the testing of a claim of privilege is done in a hearing before the court. The same rules apply as to proving the privilege as was discussed in the written discovery section.

V. INADVERTENT PRODUCTION.

A. Deposition/Live Testimony:

A party who inadvertently reveals privileged information in live testimony either at trial or in an oral deposition waives the privilege and is subject to examination to the extent of the waiver. There is no procedure for retracting the testimony once given.

B. Inadvertent Production of Written Discovery:

1. New Rule:

A party who inadvertently produces privilege documents may now obtain the return of those privileged documents and continue to assert the privilege until a court rules that the documents are not privileged if:

a. the party produces the privilege materials without intending to raise the privilege

b. the party amends the response within ten days (or shorter time designated by the court) after discovering the inadvertent production.
TEX. R. CIV. P. 193.3(a).

2. Overrules Granada:

New Rule 193.3(a) effectively overrules the Texas Supreme Court’s earlier decision in *Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223 (Tex. 1992, orig. proceeding) (holding that production waived any privilege unless the producing party proved that the production was “involuntarily” pursuant to TEX. R. EVID. 511.)

3. Automatic Rule?:

The rule appears to be automatic and requires the requesting party to promptly return the alleged privileged material or information promptly without any hearing. In otherwords, claiming inadvertent production is an easy task.

IV. OFFENSE USE (“SWORD\SHIELD”).

Texas courts have long held that a privilege cannot be used offensively. In otherwords, a party cannot bring a claim and then prevent the opposing party from discovering the facts needed to defend themselves. *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105 (Tex. 1985). However, in recent years, the “offensive use doctrine” has been interpreted to apply only to claims made by parties seeking affirmative relief – making it a defense rather than a plaintiff’s tool. *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993).

A. Elements of Offensive Use Doctrine:

1. The party who asserts privilege seeks affirmative relief;

2. The privileged information, if believed by the fact finder, in all probability would be outcome determinative of the action asserted; and

3. the evidence is not otherwise available to the opposing party.
B. An Affirmative Defense is Not Affirmative Relief:

The Texas Supreme Court has ruled that an affirmative defense is not a request for affirmative relief. Therefore, a defendant can assert affirmative defense and assert a privilege to block discovery of the facts relating to the defense. Republic Ins Co., 856 S.W.2d at 164.

C. Claim for Attorney’s Fees for Defending Against a Claim Not Request for Affirmative Relief: