

You're Not From Texas...But a Texas Court Wants You Anyway!

Frequently Asked Questions About Litigating in Texas

By Scott A. Fredricks

We often collaborate on trial teams with lawyers from around the country. Here are some of the questions we are routinely asked as we move through the life-cycle of a lawsuit. Obviously, there are unique features to every case, or particular local rules, which may result in a different answer than is given here. However, we hope this is a helpful primer for out-of-state lawyers who find themselves representing a client in a Texas state court.

What is a “general denial”? Is that all that is required in my answer?

Texas Rule of Civil Procedure 92 allows a defendant to simply assert a general denial putting most non-jurisdictional matters in issue. Specific affirmations or denials of the factual assertions in a plaintiff's petition (as in federal court) are not necessary, although affirmative defenses should be specifically stated (TRCP 94) and some must be verified by the defendant (TRCP 93). As in most jurisdictions, challenges to jurisdiction must also be raised prior to filing an answer or making any other form of general appearance (TRCP 120a).

Can I protect my client's trade secrets and other proprietary information if they are filed in the public records?

Yes. Although it can be quite tedious, Texas case law and Texas Rule of Civil Procedure 76a permit such records to be sealed by a court upon motion and a proper showing.

Can I move to dismiss a suit for failure to state a claim? What are special exceptions?

Texas does not have a direct analogue to Federal Rule of Civil Procedure 12(b)(6). Texas Rule of Civil Procedure 91a does provide for the dismissal of an action “on the grounds that it has no basis in law or fact” but defines such circumstances pretty narrowly.

The rule also provides for the award of attorney fees to the prevailing party. However, this rule only became law in March 2013 so there is little guidance on how it will be interpreted.

Another procedural vehicle for challenging a claim at the outset of a case is a special exception under Texas Rule of Civil Procedure 91. This rule is generally used to challenge the adequacy of a party's claim or can be used to challenge a claim that is not permitted under Texas substantive law.

How long do I have to respond to a non-dispositive motion that has been filed against me?

There are exceptions, but most non-dispositive motions do not have a deadline for filing a written response. Filing a response prior to the scheduled hearing is sufficient. However, most non-dispositive motions can be set on three-day's notice, so you will not necessarily have a long time to prepare a written response.

Summary judgment motions do have a timeline for filing and response. First, a summary judgment motion must be on file at least 21 days before it can be heard. (TRCP 166a) Second, any opposing affidavits or written response should be on file no later than 7 days before the hearing. (*Id.*)



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How long can a motion or response be? Are there page limits?

Unless a local rule dictates otherwise, the Texas Rules of Civil Procedure do not have page limits for motion practice before trial courts. Page limits usually only come into play in appellate proceedings.

What objections can I lodge during a deposition?

Objections to questions during an oral deposition are limited to “Objection, leading” and “Objection, form.” Objections to testimony during an oral deposition are limited to “Objection, nonresponsive.” However, if asked when the objection is made, the objecting party must give a clear and concise explanation of the objection or the objection is waived. Otherwise, speaking objections are not permitted.

You may instruct a witness not to answer a question during an oral deposition if necessary to preserve a privilege, comply with a court order or the rules, protect a witness from an abusive question or one for which any answer would be misleading, or to obtain a ruling from the court. Again, if asked, the attorney instructing the witness not to answer must give a concise, nonargumentative, and nonsuggestive explanation of the grounds for the instruction.

Do I really have to produce all of my communications with a testifying expert? And drafts of the expert report?

Yes. Texas Rule of Civil Procedure 194.2 requires production of “all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert’s testimony.” Unlike the Federal Rules, this includes drafts of the expert’s report.

What needs to go on a Texas privilege log?

The withholding party must describe the information withheld that, without revealing the privileged information itself or otherwise waiving the privilege, enables the other parties to assess the applicability of the privilege and asserts a specific privilege for each item or group of items withheld. (TRCP 193.3(b)(1))

That said, a withholding party does not need to disclose that it is withholding a privileged document that (i) is created from the time when a party consults a lawyer regarding the prosecution or defense of a specific claim in the litigation in which discovery is requested, and (ii) concerns the litigation in which the discovery is requested. (TRCP 193.3(c)).

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