



The Supreme Court of Texas

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May 6, 2022

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
cbabcock@jw.com

Re: Referral of Rules Issues

Dear Chip:

The Supreme Court requests the Advisory Committee to study and make recommendations on the following matters.

Texas Rule of Appellate Procedure 39.7. In the attached memorandum, the State Bar Court Rules Committee proposes amending Texas Rule of Appellate Procedure 39.7 to clarify that all parties may participate in oral argument when it is granted, even if a party did not request oral argument on the cover of the party's brief. The Committee should review and make recommendations.

Texas Rule of Civil Procedure 193.7. In the attached memorandum, the State Bar Court Rules Committee proposes amending Texas Rule of Civil Procedure 193.7 to clarify that a party must specifically state that a particular document will be used against the producing party to trigger the 10-day period for the producing party to object to the document's authenticity. The Committee should review and make recommendations.

As always, the Court is grateful for the Committee's counsel and your leadership.

Sincerely,

A handwritten signature in black ink, appearing to read "Nathan L. Hecht".

Nathan L. Hecht
Chief Justice

Attachments

**STATE BAR OF TEXAS
COMMITTEE ON COURT RULES
REQUEST FOR AMENDMENT TO RULE 193.7
TEXAS RULE OF CIVIL PROCEDURE**

I. RELEVANT WORDING OF EXISTING RULE 193.7

193.7 Production of Documents Self-Authenticating

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.

[COMMENT]

7. The self-authenticating provision is new. Authentication is, of course, but a condition precedent to admissibility and does not establish admissibility. See Tex. R. Evid. 901(a). The ten-day period allowed for objection to authenticity (which period may be altered by the court in appropriate circumstances) does not run from the production of the material or information but from the party's actual awareness that the document will be used. To avoid complications at trial, a party may identify prior to trial the documents intended to be offered, thereby triggering the obligation to object to authenticity. A trial court may also order this procedure. An objection to authenticity must be made in good faith.

II. PROPOSED RULE MODIFICATION:

193.7 Production of Documents Self-Authenticating

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 **specific** 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.

[COMMENT]

7. The self-authenticating provision is new. Authentication is, of course, but a condition precedent to admissibility and does not establish admissibility. See Tex. R. Evid. 901(a). The ten-day period allowed for objection to authenticity (which period may be altered by the court in appropriate circumstances) does not run from the production of the material or information but from the party's actual awareness that the document will be used. To avoid complications at trial, **a the offering party may identify prior to trial the documents intended to be offered, by Bates numbers or other means**, thereby triggering the obligation to object to authenticity. **A general reference to all documents produced by a party is insufficient.** A trial court may also order this procedure. An objection to authenticity must be made in good faith.

III. BRIEF STATEMENT OF REASONS FOR REQUESTED CHANGES AND ADVANTAGES TO BE SERVED BY THE PROPOSED NEW RULE:

Neither the Rules nor Texas jurisprudence clearly state whether a party may trigger the 10-day response requirement by making general averments that it intends to use "all documents" that have been produced or will be produced. This type of "bulk" designation has caused confusion and dispute over what seems to be a Rule designed to streamline the discovery process. Practitioners have noted the vagueness of the rule and debated whether the rule has (or should have) a specificity requirement. *See e.g.* Tate Hemingson, *Pro-Tips: Authentication Letter*, (<https://www.mondaq.com/unitedstates/trials-appeals-compensation/402156/pro-tips-the-self-authentication-letter>) ("What if the other side has produced 20,000 documents? Are you really going to use all 20,000 documents? Can you really expect them to raise authenticity objections within a 10-day period? The Rule is not clear on this.").

Many parties abuse this Rule by placing in their initial pleadings or discovery requests a statement that all documents produced by the opposing party will be used. This is done specifically as an effort to trigger Rule 193.7's objection requirement. However, practitioners have noted that Rules do not make clear whether this is effective. *See e.g.* Dan Christensen, *Common Discovery Issues in Personal Injury Litigation*, Annual LAU Seminar (2005) ("Whether this tactic would effectively trigger the 10-day objection period or not has not been addressed by any case known to this author."). Practitioners report that this is a widespread problem.

The Texarkana court commented on, but did not determine, the "specificity" issue, by concluding that the respondent waived a complaint by failing to timely complain about the vague notice. *Merrell v. Wal-Mart Stores, Inc.*, 276 S.W.3d 117, 130-31 (Tex. App.—Texarkana 2008), *rev'd on other grounds*, *Wal-Mart Stores, Inc. v. Merrell*, 313 S.W.3d 837 (Tex. 2010) ("If Wal-Mart had any complaints concerning the notice, it should have raised those complaints in the trial court at a time when any deficiency could have been remedied.").

The Bar would benefit from clarity of the question whether this requirement can be triggered by either (i) a general reference to all documents or a category of documents or (ii) a statement in a pleading that all documents produced by the opposing party will be used. The Committee believes that the better approach would be to require a party to make specific reference

to a document in order for the 10-day period to be triggered. The proposed amendment makes a single-word change to Rule 193.7 with the intent spelled out clearly in proposed amendments to the Rule's comment.