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Protecting the Record for Appeal: A Reference Guide in Texas Civil Cases.

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ARTICLES

PROTECTING THE RECORD FOR APPEAL: A REFERENCE GUIDE IN TEXAS CIVIL CASES*

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I. Introduction 275
II. Pre-Trial Rulings 276
A. Jurisdiction 276
1. Motion to Quash Service of Process 276
2. Special Appearance 277
B. Venue 281
1. Plaintiff's Original Petition 284
2. Motion to Transfer Venue 285
3. Response to Motion to Transfer 286
4. Prima Facie Proof 286
5. Proof 287
a. Affidavits 287
b. Attachments to Affidavits 288
c. Rule 88 Discovery 288

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6. Erroneous Venue Ruling Cured by Trial Evidence 289
7. Res Judicata Rule 290
8. One Venue Determination Per Customer? 291
9. Appeal 292
a. No Interlocutory Appeal or Writ of Mandamus 292
b. Standard of Review 293
10. Motion to Transfer Because of Inability to Obtain Impartial Trial 293
11. Nonliability Declaratory Judgment Action 295
C. Pleadings 296
1. Standard 296
2. Prayer for General Relief 297
3. Special Exceptions 298
4. Verified Pleas 299
D. Plea in Abatement 300
E. Default Judgment 302
F. Separate Trials, Severance, and Consolidation 305
G. Intervention and Third Party Practice 306
1. Intervention 306
2. Third Party Claims 307
H. Motion for Continuance 308
1. Lack of Testimony 309
2. Absence of a Witness 310
3. Absence of Counsel 310
4. Attendance at Legislature 311
I. Discovery 312
1. Request for Admissions 313
2. Experts 315
3. Protecting Claims of Privilege and Other Exemptions from Discovery 317
4. Mandamus 318
J. Summary Judgment 319
1. Requisites of Motion 320
2. Affidavits and Summary Judgment Proof 321
3. Response to Motion 322
4. Time Periods 325
5. Appeal and Standard of Review 326
K. Right to Trial by Jury 327

L. Motion in Limine 329
III. Trial Rulings 329
A. Voir Dire 329
1. Peremptory Challenge 331
2. Challenge for Cause 332
B. Opening Statement 335
C. Exclusion and Admission of Evidence 336
1. Objections 336
a. Specific Objections 336
b. Partly Admissible Evidence 337
c. Limited Purpose Doctrine 338
d. Timeliness 338
e. Necessity of a Ruling 339
f. Offers of Proof 340
D. Directed (Instructed) Verdict 341
E. Special Issues, Instructions, and Requests (Findings of Fact and Conclusions of Law) 343
1. Non-Jury Trial 344
2. Jury Trial 346
a. Submission of the Charge 346
b. Requests for Special Issues, Instructions, and Definitions 346
c. Objections to the Court's Charge 349
d. Deemed Findings 351
e. Form of Submissions 352
f. Jury Argument 352
g. Jury Deliberations 355
IV. Post-Trial Motions 357
A. Judgment Notwithstanding the Verdict 357
B. Motion for New Trial 360
1. Purpose 360
2. Form 361
3. Time Periods 362
V. Conclusion 365

I. INTRODUCTION

An old adage maintains that "lawyers who try their cases with an appeal in mind generally have to." The wisdom of this saying has proved true through the years; however, the successful trial advocate

must not only be able to persuade at trial, but must present cases in such a manner that successes are defensible and losses are reversible.

Unfortunately, the constant duty to protect the record occurs during the heat of trial, when the niceties of appellate review are often forgotten. The purpose of this article is to point out appellate pitfalls that develop at the trial level, and to provide a quick reference guide to the most common dangers confronting the trial practitioner.[1]

The decision to appeal is a difficult one and a judgment call that is often made in anger and frustration, both by clients and by lawyers.[2] However, a recent law review article has accurately assessed the statistics in Texas on some appeals. As a result, any lawyer contemplating appeal should invest time in reviewing those figures before making the move toward appellate review.[3]

This article traces most of the procedural steps in a normal lawsuit, and will indicate the proper method by which to preserve appeal, protect the record, and protect trial successes. The article also concentrates on many of the common problems encountered by trial attorneys and some of the most recent cases involving protection of the record for appellate review. Finally, the standard of review on appeal from the various procedural rulings is also indicated. The subject matter of this article is limited to Texas civil practice with citations to Texas cases. As a result, reference to the supreme court or courts of appeal are to Texas state courts, unless otherwise indicated.

II. PRE-TRIAL RULINGS

A. *Jurisdiction*

1. Motion to Quash Service of Process

A motion to quash service of process is used when defects or irregularities occur in the actual service of process.[4] The motion must be filed before a general appearance since filing an answer waives the

1. Protecting the record is much like birth control. When adequate precautions are not taken, surprising things occur. Much like pregnancies, the surprises show up nine (9) months later in the form of an appellate opinion.

2. *See* Croft, *The Decision to Appeal: The Birth of The Blues,* FOR THE DEFENSE 14 (Feb. 1985).

3. *See* Gellis, *Reasons for Case Reversals in Texas: An Analysis,* 16 ST. MARY'S L.J. 299 (1985).

4. *See* Steve Tyrell Prod., Inc. v. Ray, 674 S.W.2d 430, 435 (Tex. App.—Austin 1984, no writ) (motion to quash is proper method to challenge defective service or process).

necessity for service and any defects in the actual citation.[5] There is no appeal from a ruling either way on this motion. If the motion to quash is overruled, the movant must answer immediately. On the other hand, if the motion is sustained, the movant is deemed to have appeared, and must answer on the Monday next after the expiration of twenty (20) days from the date of the order.[6] As a result, this motion is seldom used as the potential benefits are minimal.

2. Special Appearance

A special appearance motion objects to jurisdiction over the person or property of the defendant on grounds that such is not amenable to process.[7] Rule 120a does not authorize the filing of a special appearance for the purpose of raising lack of subject matter jurisdiction[8] since pleas to subject matter jurisdiction may be made at any stage of the proceedings, including appeal.[9] The special appearance motion

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5. *See* TEX. R. CIV. P. 121; *see also* Parr v. First State Bank of San Diego, 507 S.W.2d 579, 581 (Tex. Civ. App.—San Antonio 1974, no writ) (Parr by receiving notice, filing answer, and personally appearing at hearing waived necessity for service and could not challenge any defects in citation); Hickey v. Silby, 304 S.W.2d 165, 166 (Tex. Civ. App.—Waco 1957, no writ) (defendant filed answer subject to motion to quash citation but answer subjected him to jurisdiction of court and waived any defects).

6. *See* TEX. R. CIV. P. 122; *see also* Kawasaki Steel Corp. v. Middleton, 28 Tex. Sup. Ct. J. 607, 608 (Sept. 21, 1985) (if citation or service is quashed on motion of defendant, such defendant is deemed to have been duly served); Steve Tyrell Prod., Inc. v. Ray, 674 S.W.2d 430, 435 (Tex. App.—Austin 1984, no writ) (when service of citation is quashed by motion of defendant, defendant is deemed to have entered his appearance at statutorily specified date in future).

7. *See* TEX. R. CIV. P. 120a.

8. *See* Oliver v. Boutwell, 601 S.W.2d 393, 395 (Tex. Civ. App.—Dallas 1980, no writ). The language in Rule 120a does not entitle one to file a special appearance for lack of subject matter jurisdiction. *See id.* at 395; *see also* Steve Tyrell Prod., Inc. v. Ray, 674 S.W.2d 430, 435 (Tex. App.—Austin 1984, no writ) (Rule 120a is not used to complain about defective process or defective service); C. W. Brown Mach. Shop, Inc. v. Stanley Mach. Corp., 670 S.W.2d 791, 793 (Tex. App.—Fort Worth 1984, no writ) (purpose of Rule 120a to allow defendant to attack court's jurisdiction over his person without constituting an appearance); Cuellar v. Cuellar, 406 S.W.2d 510, 513 (Tex. Civ. App.—Corpus Christi 1966, no writ) (Rule 120a permits defendant to object only to court's jurisdiction over his person).

9. *See, e.g.,* Texas Employment Comm'n v. International Union of Electrical, Radio and Mach. Workers Local Union No. 782, 163 Tex. 135, 136, 352 S.W.2d 252, 253 (1961) (lack of subject matter jurisdiction is fundamental error and may be presented on appeal); Humble Exploration Co. v. Browning, 677 S.W.2d 111, 114 (Tex. App.—Dallas 1984, no writ) (complaint that judge was without authority to try case was not based on lack of subject matter jurisdiction and thus could not be raised on appeal); Long v. Fox, 625 S.W.2d 376, 379 (Tex. Civ. App.—San Antonio 1981, writ ref'd n.r.e.) (lack of subject matter jurisdiction may be raised for first time on appeal since it is fundamental error).

must be made in due order of pleading and filed before any answer or other conduct that would be inconsistent with the motion. Failure to observe these niceties results in a general appearance.[10] A recent supreme court case demonstrates this risk and the type of conduct that waives a special appearance. In *Liberty Enterprises, Inc. v. Moore Transportation Co., Inc.*,[11] the supreme court reviewed a typical fact situation involving a special appearance. Liberty appeared after a default judgment had been entered against it. Liberty filed a special appearance as well as a motion to set aside the default judgment and a motion for new trial.[12] In the motion for new trial, Liberty asserted, "Liberty is ready to try this case when it is properly set for trial."[13] Thereafter, the trial court entered an agreed order granting the new trial.[14] Moore later rejected the agreement, and requested a ruling that Liberty's appearance constituted a general appearance.[15] The supreme court agreed, specifically mentioning Liberty's conduct in agreeing to the entry of an agreed order, and also mentioning the statement that Liberty stood ready, "to try this case when it is properly set for trial."[16]

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10. *See, e.g.*, Abramowitz v. Miller, 649 S.W.2d 339, 342 (Tex. App.—Tyler 1983, no writ) (unsworn answer denying jurisdiction of court did not comply with Rule 120a and constituted a general appearance); Stewart v. Walton Enter., Inc., 496 S.W.2d 956, 959 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.) (unsworn written answer to contest jurisdiction and counsel's personal appearance before court regarding such plea constituted general appearance); Austin Rankin Corp. v. Cadillac Pool Corp., 421 S.W.2d 733, 734 (Tex. Civ. App.—Beaumont 1967, no writ) (defendant filed unsworn motion to dismiss, special appearance, and motion to quash service of process, therefore, filing of unsworn motion to dismiss constituted general appearance since not in proper order under Rule 120a). *But see* Carbonit Houston, Inc. v. Exchange Bank, 628 S.W.2d 826, 828 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.) (Rule 120a permits amendment of special appearance, so unverified special appearance may be cured and not treated as general appearance); Stegall & Stegall v. Cohn, 592 S.W.2d 427, 429 (Tex. Civ. App.—Fort Worth 1979, no writ) (defendants properly amended special appearance motion by verifying motion; therefore, general appearance not entered). *See generally* Thode, *In Personam Jurisdiction; Art. 2031b, The Texas "Long-Arm" Jurisdiction Statutes; and the Appearance to Challenge Jurisdiction in Texas And Elsewhere,* 42 TEXAS L. REV. 279, 317-18 (1964).

11. 690 S.W.2d 570 (Tex. 1985).

12. *See* Liberty Enters., Inc. v. Moore Transp. Co., Inc., 679 S.W.2d 779, 783 (Tex. App.—Fort Worth 1984), *aff'd in part & rev'd in part,* 690 S.W.2d 570 (Tex. 1985). While the supreme court opinion does not so indicate, the court of appeals' opinion makes it clear that the motion for new trial and the motion to set aside the default judgment were filed subsequent and subject to the special appearance motion. *See id.* at 783.

13. Liberty Enters., Inc. v. Moore Transp. Co., Inc., 690 S.W.2d 570, 571 (Tex. 1985).

14. *See id.* at 571.

15. *See id.* at 571.

16. *Id.* at 571. In this respect, Justice Robertson's opinion differs greatly from the opin-

It is obvious that Liberty violated two cardinal rules of special appearance practice. First, it went forward with its case without having the special appearance heard in due order. Second, Liberty's statement that it was ready to proceed with trial was certainly inconsistent with its claim of lack of jurisdiction. As a result, it is obvious that trial counsel must be cautious in taking any steps that might be inconsistent with its reliance on a special appearance.

Another recent supreme court case has redefined the purposes for which a special appearance motion may be used. In *Kawasaki Steel Corp. v. Middleton,*[17] Kawasaki filed a special appearance contesting not only jurisdiction, but defects in the jurisdictional allegations in the cross-petition, defects in the citation, and defects in service of process as well.[18] The supreme court ruled that a special appearance is not the appropriate motion in which to include complaints of defects in pleadings, defects in citation, and defects in service of process.[19] Instead, the court indicated that these complaints were appropriate in a motion to quash service of process.[20]

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ion of the Fort Worth Court of Appeals. The court of appeals held that an agreed order did not invoke the jurisdiction of the court because the sole purpose of the motion for new trial was to gain a hearing to test the jurisdiction. *See* Liberty Enters., Inc. v. Moore Transp. Co., Inc., 679 S.W.2d 779, 783 (Tex. App.—Fort Worth 1984), *aff'd in part & rev'd in part,* 690 S.W.2d 570 (Tex. 1985). The court of appeals' opinion stated, in a very commonsensical quote, "to hold as the appellee [Moore] contends would be to completely deny a defaulting party the right to challenge the jurisdiction of the court after judgment, except through a collateral attack. This would have the effect of deeming a default as a general appearance by a party, leaving that party no recourse but to invoke the court's jurisdiction before it could challenge that jurisdiction." *Id.* at 783. In addressing the problem of whether Liberty's consent in allowing the agreed order to be entered and conduct in filing the motion for new trial constituted a waiver of its special appearance, the Fort Worth Court of Appeals further held, "to hold that you must invoke jurisdiction to challenge the jurisdiction of the court, is to compel compliance with the infamous 'Catch 22' which Rule 120a was intended to prevent." *Id.* at 783. Obviously, the supreme court rejected these arguments in overturning the lower court's opinion. The result is to put the defaulting party in a dilemma. To overturn a default judgment, the defaulting party may risk its personal jurisdictional rights.

17. 28 Tex. Sup. Ct. J. 607, 608 (Sept. 21, 1985).

18. *See id.* at 608-609.

19. *See id.* at 609.

20. *See id.* at 609. It seems clear that a defendant may still file a Rule 120a special appearance, and subsequently attack service or process and defects in citation. However, the attack on jurisdictional allegations in the petition creates another problem. It would seem logical that the defendant is entitled to know on what grounds jurisdiction is being asserted by plaintiff. The supreme court opinion, however, indicates that this is not necessarily true, and cites the general proposition that the non-resident defendant has the burden of proof to negate all basis of personal jurisdiction. *See id.* at 609; *see also* Wheat v. Toone, 29 Tex. Sup. Ct. J.

The failure to file a special appearance waives any complaint of jurisdiction over the person or property on appeal.[21] Additionally, the special appearance motion must be verified.[22] In fact, an unverified motion may constitute a general appearance and waive the special appearance unless it is amended to cure the defect.[23] In at least one instance, a court has allowed an amendment, after the actual special appearance hearing, to cure the defect.[24] One of the most common errors in special appearance practice is the failure to document the record that a ruling was requested and an order entered. Failure to obtain a ruling waives any right to challenge the overruling of a special appearance.[25]

If the special appearance motion is sustained, the cause is dismissed, and a final and appealable judgment results.[26] However, in a case of multiple defendants, the order sustaining the special appearance of one party is interlocutory unless it is severed from the other portions of the suit and reduced to final judgment.[27] If the trial court's decision is for the plaintiff and the motion is overruled, the point of error can be carried forward on appeal only when a final

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101, 101 (Dec. 14, 1985) (special appearance cannot be used to challenge jurisdictional allegations in petition).

21. *See* TEX. R. CIV. P. 120a.

22. *See* Carbonit Houston, Inc. v. Exchange Bank, 628 S.W.2d 826, 828 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.) (Rule 120a requires special appearance be made by sworn motion); *see also* TEX. R. CIV. P. 120a ("special appearance shall be made by sworn motion").

23. *See, e.g.,* Carbonit Houston, Inc. v. Exchange Bank, 628 S.W.2d 826, 828 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.) (special appearance may be amended to cure defects); Stegall & Stegall v. Cohn, 592 S.W.2d 427, 429 (Tex. Civ. App.—Fort Worth 1979, no writ) (special appearance defects cured by amendment); Dennett v. First Continental Inv. Corp., 559 S.W.2d 384, 385-86 (Tex. Civ. App.—Dallas 1977, no writ) (unsworn special appearance, resulting in general appearance, may be amended to cure defects).

24. *See* Cessna Aircraft Co. v. Hotton Aviation Co., Inc., 620 S.W.2d 231, 233 (Tex. Civ. App.—Eastland 1981, writ ref'd n.r.e.).

25. *See* Harris v. Thompson Buick, 601 S.W.2d 757, 758 (Tex. Civ. App.—Tyler 1980, no writ) (record must reflect relief was requested); *see also* Commercial Credit Equip. Co. v. West, 677 S.W.2d 669, 673 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.) (general rule states record must disclose specific relief requested); *accord* Cogburn v. Harbour, 657 S.W.2d 432, 432 (Tex. 1983) (failure to express objection on record waives alleged error).

26. *See* Simonsen v. Simonsen, 414 S.W.2d 54, 58 (Tex. Civ. App.—Amarillo 1967, no writ) (if objection to jurisdiction is sustained, appropriate dismissal order will be entered); *see also* TEX. R. CIV. P. 120a (if court sustains objection, appropriate order will be entered).

27. *See* Sullivan v. Tab Sales Co., 576 S.W.2d 137, 138 (Tex. Civ. App.—Texarkana 1978, no writ). The same is true of the special appearance of a third-party defendant. *See* Cessna Aviation Co. v. Hotton Aviation Co., 620 S.W.2d 231, 233 (Tex. Civ. App.—Eastland 1981, writ ref'd n.r.e.).

judgment is entered. If the defendant is positive of its position, it can refuse to go forward by failing to file an answer, thus causing an order of dismissal and a final appealable judgment. In instances where the law and facts are clear, this refusal will create a quick appeal and not require the waste of a trial on the merits of the case.[28]

B. *Venue*

The 1983 changes to article 1995 have dramatically altered venue practice in Texas.[29] As this article goes to print, the courts have not written on most of the expected problems. However, revised article 1995, subsection 4(d)(2) provides that, "on appeal from the trial on the merits, if venue was improper it shall in no event be harmless error and shall be reversible error."[30] This new subsection which abolishes the harmless error rule in venue cases makes protection of the record for appeal crucial.[31]

A question may well arise as to whether the legislature had the power to abolish, in part, the harmless error rule as stated in Rule 434.[32] Previously, the legislature relinquished its rule making powers in civil judicial proceedings to the supreme court.[33] It is pursuant to this act that the supreme court promulgates the rules of civil procedure, including Rule 434 — the harmless error rule. There are pro and con arguments as to whether the legislature could repeal the harmless error rule in venue cases. However, practitioners would do

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28. Obviously, this type of tactic is risky and any defense counsel contemplating such a step should ensure that its malpractice coverage is in effect.

29. *See* TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon Supp. 1985). This article was completed while article 1995 was the effective provision on Texas venue law. In late December of 1985 the Texas Legislature implemented the Texas Civil Practice and Remedies Code. This new annotated Code includes most statutory provisions controlling civil trials, including venue. Article 1995 is now embodied, in total and without alteration, in sections 15.001 thru 15.065 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. §§ 15.001-.065 (Vernon Supp. 1986). The authors and editors have chosen not to change the citations in this article since no changes were made in article 1995's venue provisions. The practitioner should, however, note the codification change and adjust citations accordingly.

30. TEX. REV. CIV STAT. ANN. art. 1995, § 4(d)(2) (Vernon Supp. 1985).

31. For a review of the legislative history behind this particular provision, see generally Price, *New Texas Venue Statute: Legislative History,* 15 ST. MARY'S L.J. 878 (1984).

32. *See* TEX. R. CIV. P. 434. Rule 434 provides in the pertinent part "that no judgment shall be reversed on appeal . . . unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause the rendition of an improper judgment." *Id.* 434.

33. *See* TEX. REV. CIV. STAT. ANN. art. 1731a (Vernon 1962).

well to read the legislative history of revised article 1995 before taking either position.[34]

Revised article 1995 was a compromise bill negotiated between and drafted by the Texas Association of Defense Counsel (TADC) representing the defense bar, and the Texas Trial Lawyers Association (TTLA) representing the plaintiff bar.[35] The negotiations between the two, during the 68th Legislature, were carried on under the watchful eye of Jack Pope, former Chief Justice of the Supreme Court of Texas.[36] The language of section 4(d)(2) was the basis of the compromise between the TADC and the TTLA. The TADC agreed to language abolishing interlocutory appeals and evidentiary venue hearings, if subsection 4(d)(2) was included to prevent the possibility of fraud.[37] All parties, including the House and Senate drafters, the Chief Justice, and the TADC and TTLA were aware of the compromise and the intent of the bill.[38] As a result, it is obvious that the supreme court, although certainly not a party to the compromise, was heavily involved in the bill that eventually passed. This is certainly some evidence that the supreme court knew and perhaps approved of the compromise which included the abolition of the harmless error rule on venue issues.[39] One commentator states that former Chief Justice Pope was consulted as to whether the language of subsection 4(d)(2) was sufficient to avoid the harmless error rule in venue cases. Chief Justice Pope's response was that the language was sufficient.[40]

However, the court did not amend Rule 434 at the time Rules 86, 87, 88, and 89 were promulgated to reflect the new venue practice

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34. *See* Price, *New Texas Venue Statute: Legislative History,* 15 ST. MARY'S L.J. 855, 878 (1984); *see also* Caperton, Schoenbaum & Anderson, *Anatomy of The Venue Bill,* 47 TEX. B.J. 244, 244-45 (1984).

35. *See* Price, *New Texas Venue Statute: Legislative History,* 15 ST. MARY'S L.J. 855, 856-57 (1984).

36. *See id.* at 857, 863-64.

37. *See id.* at 878.

38. *See id.* at 879.

39. *See id.* at 878.

40. *See id.* at 879. The article states:

> The obvious purpose for this language [subsection 4(d)(2)] was to expressly prohibit appellate courts, in as unambiguous and strong a language as possible, from resorting to the 'harmless error' rule under traditional appellate-review standards when venue was improper. Chief Justice Pope was asked his opinion on the sufficiency of this language to accomplish its goal, and he agreed that the statute could be no stronger or clearer in its mandate.

Id. at 879.

under revised article 1995. The supreme court's failure to amend Rule 434 might be read as an intention to keep the harmless error rule in venue cases regardless of subsection 4(d)(2)'s mandate. On the other hand, the failure to make a change could indicate the court felt that the passage of the statute made the rule change unnecessary. Regardless, a supreme court case indicates that when a statute and rule of procedure conflict, the statute is controlling, even if it is partially procedural in nature. In *Exxon Corp. v. Brecheen,*[41] the supreme court was faced with an interesting statute which allowed evidence of a ceremonial remarriage of the surviving spouse in a suit brought under the wrongful death act.[42] The district court refused to admit evidence of the ceremonial remarriage, and while the court of appeals had found such exclusion error, it nonetheless found that the error was harmless.[43] The supreme court reversed the court of appeals, holding that the error was reversible.[44] The supreme court reasoned that when the legislature has enacted a statute deeming certain evidence admissible, courts cannot thereafter determine that the exclusion of that evidence was harmless error.[45] In other cases, courts have similarly held that the harmless error rule is inapplicable in situations where the legislature has enacted mandatory rules of procedure.[46]

Additionally, the Texas Constitution reserves to the legislature the right to promulgate venue laws.[47] Therefore, it is arguable that any attempts by the court to change the statute through the use of proce-

41. 526 S.W.2d 519 (Tex. 1975).

42. *See id.* at 525; *see also* TEX. REV. CIV. STAT. ANN. art. 4675a (Vernon Supp. 1985) (actual ceremonial remarriage of surviving spouse is admissible).

43. *See* Exxon Corp. v. Brecheen, 526 S.W.2d 519, 525 (Tex. 1975).

44. *See id.* at 525. The court went on to state:

> The legislature has decreed in clear and explicit terms that evidence of the actual ceremonial remarriage of a surviving spouse is admissible in the statutorily authorized wrongful death action. The legislative determination forecloses judicial inquiry into the effect upon the fact finder of evidence that the surviving spouse is ceremonially remarried. It is the duty of the courts to apply the law as declared by the legislature, and to give effect to its stated purpose or plan . . . article 4675(a) would be rendered ineffectual by an independent judicial determination that disregard of its terms in a given instance was harmless error.

Id. at 525.

45. *See id.* at 525.

46. *See* Few v. Charter Oaks Fire Ins. Co., 463 S.W.2d 424 (Tex. 1971); C. E. Duke's Wrecker Serv., Inc. v. Oakley, 526 S.W.2d 228, 232-33 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.) (Rule 434 is applicable where trial court failed to comply with supreme court rule, even though legislature has enacted mandatory rules).

47. *See* TEX. CONST. art. III, § 45.

dural rules would be unconstitutional.[48] As a result, any arguments that the legislature did not have the authority to repeal in part Rule 434 will have a difficult time succeeding.

1. Plaintiff's Original Petition

Under the new venue scheme, the plaintiff's original petition assumes a much greater importance for venue purposes than ever before. In fact, the petition is the vehicle by which the plaintiff pleads not only his cause of action, but also the venue facts which will sustain the plaintiff's chosen forum.[49] Furthermore, under the new statute, there is no necessity for the plaintiff to actually prove his cause of action in a separate evidentiary hearing.[50] As a result, the importance of the pleadings is crucial.

In instances where the defendant does not file a motion to transfer, the plaintiff's original petition will contain the only factual venue allegations the trial court can consider. If a motion to transfer does not contain "specific" denials of the plaintiff's venue facts, the court then determines whether the venue facts have been "properly plead."[51] Article 1995 does not include the definition of "proper pleading." The best definition is probably whether the pleading would support a default judgment.[52] In that regard, the only factual pleadings necessary to support a default judgment are factual allegations that support the elements of the cause of action.[53] However, if a motion to transfer is filed specifically denying the venue facts in the plaintiff's original petition, the plaintiff must make "prima facie" proof of venue facts in

48. *See id.* § 45. Also, the power to change venue was unknown at common law, therefore, the power must be a matter of statutory or constitutional law. *See* Buchanan v. Crow, 241 S.W. 563, 565-66 (Tex. Civ. App.—Austin 1922, no writ) (cited in interpretive commentary to section 45 of article 3 to the Texas Constitution).

49. *See* TEX. R. CIV. P. 87(2)(b).

50. *See* TEX. REV. CIV. STAT. ANN. art. 1995, § (4)(d)(1) (Vernon Supp. 1985).

51. *See* TEX. R. CIV. P. 87(3)(a).

52. *See* Hazel, *Venue Procedure in the Trial Court,* 47 TEX. B.J. 625, 626 (1984) (proper pleading for venue should support default judgment); *see also* Comment, *"Horse & Buggy" to "Horseless Carriage"—Texas Rolls Out Its New Venue Model: A Practitioner's Guide to Article 1995,* 15 TEX. TECH L. REV. 917, 934 (1984) (petition sufficient for default judgment is properly pled for venue purposes).

53. *See* Comment, *"Horse & Buggy" to "Horseless Carriage"—Texas Rolls Out Its New Venue Model: A Practitioner's Guide to Article 1995,* 15 TEX. TECH L. REV. 917, 934 (1984) (to support default judgment plaintiff must only plead facts supporting elements of cause of action).

either affidavits or venue discovery to sustain venue.[54]

2. Motion to Transfer Venue

Any venue rights of a defendant are waived if a motion to transfer venue is not filed, "prior to or concurrently" with any other pleading except a special appearance motion.[55] This requirement that venue be raised in the "due order of pleading" is carried forward from the old rules.[56] The other requisites of a motion to transfer under new Rule 86 are, however, radically different than the previous rules for pleas of privilege.[57] Rule 86 provides that the motion shall state:

> a. The action should be transferred to another *specified* county of proper venue.
>
> b. The county where the action is pending is not a proper county; or . . . mandatory venue of the action in another county is prescribed by one or more specific statutory provisions *which shall be clearly designated.*
>
> c. The legal and factual basis for the transfer of the action should be stated.[58]

The motion to transfer should also include a specific denial of all venue facts in the plaintiff's original petition that the defendant believes to be untrue.[59] The reason for the defendant's denial is that Rule 87(3)(a) provides that all venue facts are taken as true by the trial court unless specifically denied.[60] The rule requires a specific denial of the venue facts, and at this writing, no case has construed the term "specifically denied." Obviously, problems may arise with this term. For example, would a denial which stated, "The defendant denies each and every venue fact pled in the plaintiff's original peti-

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54. *See* TEX. R. CIV. P. 87(3)(a).

55. *See* TEX. REV. CIV. STAT. ANN. art. 1995, § (4)(c) (Vernon Supp. 1985).

56. *See* Texas Highway Dept. v. Jarrell, 418 S.W.2d 486, 489 (Tex. 1967). Although not a venue case, the supreme court decision in *Liberty Enters., Inc. v. Moore Transp. Co., Inc.*, 690 S.W.2d 570 (Tex. 1985), demonstrates a renewed interest by the supreme court in the concept of due order of pleadings.

57. *See* TEX. R. CIV. P. 86(1). Caution should be used as it appears that any pre-trial motions such as a motion to quash service, plea in abatement, or plea in bar, will waive any venue rights if filed prior to a motion to transfer. *See id.* 86(1). Additionally, Rule 93 has been revised eliminating any provisions requiring a denial, "that the suit is not commenced in the proper county." *Id.* 93(a).

58. TEX. R. CIV. P. 86(3).

59. *See* TEX. R. CIV. P. 87(3)(a).

60. *See id.* 87(3)(a).

tion," be adequate? Hopefully not over objection; however, the best solution is to require the same specificity that is required for response to motions for summary judgment under Rule 166-A,[61] or the specificity required for special exceptions under Rule 91.[62] In addition to denying venue facts alleged by the plaintiff, the defendant should plead venue facts to support its request to transfer venue. The same standard of "properly pled" also applies to the defendant's allegations.[63]

3. Response to Motion to Transfer

The rules do not require a response to the motion to transfer. However, failure to file a response can result in severe consequences. If the defendant has specifically denied any of the plaintiff's venue facts in accordance with Rule 87(3)(a), the plaintiff must proceed to make prima facie proof of the denied venue facts through the introduction of affidavits or venue discovery.[64] Additionally, the plaintiff may want to specifically deny the venue facts pled by the defendant to likewise prevent the defendant's pleaded facts from being taken as true. As a result, the plaintiff should almost always file a response either to provide prima facie proof, if necessary, to allege additional venue facts, or to dispute the defendant's venue allegations.

4. Prima Facie Proof

As mentioned above, Rule 87 was completely revised to include the concept of "prima facie proof." In this regard, Rule 87(3)(a) provides: "all venue facts, when properly pleaded, shall be taken as true unless specifically denied by the adverse party. When a venue fact is specifically denied, the party pleading the venue fact must make prima facie proof of that venue fact."[65] Prima facie proof is a phrase

61. *See* TEX. R. CIV. P. 161-A(c). This rule states in the pertinent part "the motion for summary judgment shall state the specific grounds therefore." *Id.* 161-A(c).

62. TEX. R. CIV. P. 91. This rule states "[a] special exception shall not only point out the particular pleading excepted to, but it shall also point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations in the pleading excepted to." *Id.* 91.

63. The test should be whether the allegations would either defeat a judgment for the plaintiff, if the plaintiff's cause of action is being questioned, or whether the defendant's allegations standing alone would support a transfer of venue, if the plaintiff's venue facts are being challenged.

64. *See* TEX. R. CIV. P. 87(3)(a).

65. *Id.* 87(3)(a).

with no fixed meaning[66], and no Texas court has yet defined its meaning in a venue context. It is the authors' opinion that prima facie proof should be nothing more than that degree of proof or measure of evidence which would ordinarily allow the issue to go to the fact-finder.

If no "specific denial" is filed in response to "properly pled" venue facts in any pleading, those facts will be taken as true. Once facts are specifically denied by either party, the party pleading the venue facts must make prima facie proof of those facts.

5. Proof

There is no longer an evidentiary hearing on any venue matter.[67] As a result, proof of venue facts is crucial, and errors in proof can wreck appeals. Proof of venue facts can now come from three sources: (a) affidavits,[68] (b) duly proved attachments to affidavits,[69] and (c) Rule 88 discovery.[70] In every instance, the pleadings will form not only the basic framework, but also will constitute the actual venue proof unless specifically denied.[71] As stated above, no additional proof is needed unless the venue facts are specifically denied by the opponent's pleadings. However, once a denial is presented, proof of the denied venue fact must be presented to overcome the denial.

a. Affidavits

Affidavits may be used as proof of proper venue in the same manner they are used in summary judgment procedure under Rule 166-A. Specifically, the affidavits must be made on personal knowledge, demonstrate that the affiant is competent to testify, and set forth specific facts that are admissible in evidence.[72] The same pitfalls exist in

66. *See* Valley Forge Life Ins. Co. v. Republic Nat'l Bank, 579 S.W.2d 271, 276 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).

67. *See* TEX. REV. CIV. STAT. ANN. art. 1995, § (4)(d)(1) (Vernon Supp. 1985). Rather, the court determines venue matters from pleadings and affidavits. *See id.* § (4)(d)(1).

68. *See* TEX. R. CIV. P. 87(3)(a).

69. *See id.* 87(3)(a).

70. *See id.* 88. Rule 88 provides that "reasonable discovery is permitted on any issues relevant to a determination of proper venue." *Id.* 88.

71. *See id.* 87(3)(a).

72. *See id.* 87(3)(a). The personal knowledge requirement is discussed definitively in a 1962 Texas Supreme Court case, *Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230, 234 (Tex. 1962).

this procedure as exist in summary judgment practice.[73] For example, legal conclusions in an affidavit are generally not admissible and will not sustain a venue ruling. However, the venue rules do not require that objections to the form of proof or the admissibility of proof need be made to the trial court in writing, as is the practice with summary judgment proceedings. As a result, some practitioners may attempt to raise evidentiary problems for the first time on appeal. This is a game that will probably end in tears.[74] Appellate courts, despite the "no harmless error rule," will be reluctant to allow litigants to raise evidentiary points for the first time on appeal. Additionally, the "no harmless error rule" only applies to the trial court's actual ruling and not to errors in the motion to transfer hearing.[75] The best practice is to raise any objections to venue proof at the hearing.

b. Attachments to Affidavits

Rule 87(3)(a) specifically declares "duly proved attachments" to affidavits are venue proof.[76] Practitioners should be aware that a whole body of law has developed around the use of attachments to affidavits in summary judgment practice.[77] These same procedures will likely apply to venue practice.

c. Rule 88 Discovery

Rule 88 provides that "reasonable discovery" may be sought and used only on those issues relating to venue.[78] Discovery may be had in the form of depositions, requests for admissions, interrogatories, or requests for discovery. Conducting such discovery does not waive the defendant's venue rights. Rule 88 discovery may be presented to the trial court to aid its determination.[79] However, the discovery must be

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73. *See infra* Section II J(2) of this article for problems with the use of affidavits.

74. The summary judgment practice rules deal with waiver of the right to object and are directed at the parties. However, article 1995, section (4)(d)(1) is directed at the courts. This rule creating the harshness of "no harmless error" does not deal with "how venue was *determined,* but, whether the actual decision was correct." As a result, the courts will probably look with a suspect eye towards practitioners who leave technical arguments for appeal. The real issue will always be whether the decision was actually correct.

75. *See* Price, *New Texas Venue Statute: Legislative History,* 15 ST. MARY'S L.J. 855, 878 (1984).

76. *See* TEX. R. CIV. P. 87(3)(a).

77. *See infra* discussion in Section II J(2) under summary judgment practice.

78. *See* TEX. R. CIV. P. 88.

79. *See id.* 88.

incorporated or attached to affidavits of "a witness or attorney who has knowledge of the discovery."[80] It is important to note that this procedure differs substantially from summary judgment practice. In summary judgment practice, it is permissible to simply file the discovery with the court rather than attach the discovery to an affidavit.[81] In this regard, an attorney having knowledge of discovery can be the attorney of record or a member of a law firm representing a party.[82] A witness who has knowledge of discovery would certainly include the deponent and might also include a court reporter or others present at the deposition.[83]

6. Erroneous Venue Ruling Cured by Trial Evidence

The provisions of article 1995, subsection (4)(d)(2), stating that a trial court's error in venue matters will not be harmless error, may lull many practitioners into a false sense of complacency. The same subsection of the article provides that when reviewing the venue ruling, "the appellate court shall consider the entire record, including trial on the merits."[84] As a result, a trial court's ruling which was incorrect at the time that it was rendered, may be corrected as evidence is introduced during the trial.[85] For example, if the trial court overruled a motion to transfer when the defendant specifically denied the venue facts of plaintiff's petition and the plaintiff presented no venue proof, error would be obvious. However, if the plaintiff then proceeds to trial and introduces evidence which would properly establish venue,

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80. *Id.* 88. *See generally* Statute Note, *Venue Procedure in Texas: An Analysis of the 1983 Amendments to The Rules of Civil Procedure Governing Venue Practice Under the New Venue Statute,* 36 BAYLOR L. REV. 241, 249-50 (1984) (discussion relating to discovery and venue under rule 88).

81. *See* TEX. R. CIV. P. 166-A(e).

82. *See* Hazel, *Venue Procedure in the Trial Court,* 47 TEX. B.J. 625, 626 (1984); Comment, *"Horse & Buggy" to "Horseless Carriage"—Texas Rolls Out Its New Venue Model: A Practitioner's Guide to Article 1995,* 15 TEX. TECH L. REV. 917, 938-40 (1984).

83. *See* Hazel, *Venue Procedure in the Trial Court,* 47 TEX. B.J. 625, 628 (1984). However, as Professor Hazel suggests in his article, the courts probably would be more strict with who may be a proper witness rather than which attorney may be a proper affiant. *See id.* at 628.

84. TEX. REV. CIV. STAT. ANN. art. 1995, § 4(d)(2) (Vernon Supp. 1985); *see also* Neidert v. Bronk Hawkins Dozers, 681 S.W.2d 847, 848 (Tex. App.—Eastland 1984, no writ) (in passing on venue, court of appeals reviews all evidence).

85. *See* Price, *New Texas Venue Statute: Legislative History,* 15 ST. MARY'S L.J. 855, 878-79 (1984); Comment, *"Horse & Buggy" to "Horseless Carriage"—Texas Rolls Out Its New Venue Model: A Practitioner's Guide to Article 1995,* 15 TEX. TECH L. REV. 917, 940-41 (1984).

the error is corrected.[86] The reverse is true as well. If the plaintiff's venue facts proved by prima facie proof at the venue level are proved at trial on the merits to be incorrect, the entire case must be reversed for a new trial in the proper county.[87] Although the statute does not address how to preserve error in these situations, the best practice is to renew the motion to transfer, based upon the trial evidence.[88]

7. Res Judicata Rule

Once venue has been determined in a suit, that determination is deemed to be conclusive in any subsequent refilings of the same suit.[89] In some cases, after a disappointing venue determination, innovative plaintiff's counsel have nonsuited their causes of action and subsequently refiled in another county in an attempt to avoid the judge's venue determination in the first suit. Under former article 1995, such practice was prohibited under the so called "res judicata rule."[90] The res judicata rule was adopted to prevent defendants from being subjected to the harrassment and expense of presenting their venue claims in a number of successive forums in response to the plaintiff's nonsuits and subsequent refilings of the exact same cause of action in different counties. The rule provided that once a plea of privilege was sustained and the cause transferred, the venue determination was res judicata to a later filing of the same cause of action.

Revised article 1995 does not contain similar language; however, at

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86. *See* Price, *New Texas Venue Statute: Legislative History,* 15 ST. MARY'S L.J. 855, 878-79 (1984); Comment, *"Horse & Buggy" to "Horseless Carriage"—Texas Rolls Out Its New Venue Model: A Practitioner's Guide to Article 1995,* 15 TEX. TECH L. REV. 917, 940-41 (1984).

87. *See* Price, *New Texas Venue Statute: Legislative History,* 15 ST. MARY'S L.J. 855, 878-79 (1984); Comment, *"Horse & Buggy" to "Horseless Carriage"—Texas Rolls Out Its New Venue Model: A Practitioner's Guide to Article 1995,* 15 TEX. TECH L. REV. 917, 940-41 (1984).

88. The alternative is to allow the defendant to raise the issue for the first time on appeal. This practice would require an additional trial with the attendant waste of time and increase in costs and frustrate the statute's intentions.

89. *See* Hendrick Medical Center v. Howell, 690 S.W.2d 42, 44 (Tex. App.—Dallas 1985, no writ); *see also* TEX. R. CIV. P. 87 (article 1995 allows only one venue determination in a cause).

90. *See, e.g.,* First Nat'l Bank in Dallas v. Hannay, 123 Tex. 203, 203, 67 S.W.2d 215, 215 (Tex. 1933) (question of venue is res judicata as to venue in subsequent suit on same cause of action); Joiner v. Stephens, 457 S.W.2d 351, 352 (Tex. Civ. App.—El Paso 1970, no writ) (venue claim is res judicata in successive actions); Southwestern Inv. Co. v. Gibson, 372 S.W.2d 754, 757 (Tex. Civ. App.—Fort Worth 1963, no writ) (venue claim in successive action is res judicata).

least one case has held that the res judicata rule still has effect due to other language in the new statute. In *Hendrick Medical Center v. Howell,*[91] the Dallas Court of Appeals indicated that if venue is raised in a motion to transfer and the court sustains the motion to transfer, a subsequent nonsuit by a plaintiff does not extinguish the venue ruling made by the prior court. The Dallas Court of Appeals rested its rationale on Rule 87 which provides that there is no rehearing after an initial determination of venue is made. To hold otherwise, argued the court, "would not only contravene legislative intent but would permit a plantiff to nonsuit-and-refile his way through Texas' 254 counties until he attained a venue determination to his liking."[92]

8. One Venue Determination Per Customer?

An oddity exists under the new venue practice which creates a trap for unwary counsel. Rule 87 provides that there is no rehearing after an initial venue determination is made by the court.[93] Thereafter, no party, including subsequent joined parties, can raise venue rights through a motion to transfer.[94] Even if the parties do raise such a right, the court is without power to determine that venue right.[95] This can result in an absurd situation. That situation is made clear by the case of *Hendrick Medical Center v. Howell.*[96] In *Hendrick,* the plaintiff filed suit against several defendants in Jefferson County.[97] The defendants moved for a motion to transfer the cause to Jones County.[98] After the motion was granted, but before the subsequent transfer, the plaintiff dismissed the cause of action without prejudice.[99] Thereafter, the plaintiff refiled in Dallas County alleging the same causes of action pled in the first suit.[100] The named defendants made a motion to transfer which was overruled.[101] After that venue

91. 690 S.W.2d 42 (Tex. App.—Dallas 1985, no writ).
92. *Id.* at 44.
93. *See* TEX. R. CIV. P. 87(5).
94. *See id.* 87(5).
95. *See id.* 87(5); *see also* Hendrick Medical Center v. Howell, 690 S.W.2d 42, 44 (Tex. App.—Dallas 1985, no writ) (once venue has been determined in cause, that determination is conclusive).
96. 690 S.W.2d 42 (Tex. App.—Dallas 1985, no writ).
97. *See id.* at 43.
98. *See id.* at 43.
99. *See id.* at 43.
100. *See id.* at 43.
101. *See id.* at 43.

determination was made in Dallas County, the plaintiff joined a second set of defendants who also made a motion to transfer which was denied because Rule 87 provides that only one venue determination can be made by the court.[102]

The second set of defendants in *Hendrick* were forced to make a motion to transfer to ensure that their venue rights were not waived on appeal. However, the Dallas Court of Appeals properly ruled that under article 1995, the trial court could not hear the actual motion to transfer. As a result, the lesson is clear; subsequently joined parties must make a motion to transfer to preserve their venue rights on appeal. However, trial courts are not permitted to hear any motion to transfer after an initial venue determination has been made.

Another practical problem exists with the language of Rule 87(5) which prohibits rehearing of a motion to transfer. Commentators have disagreed as to whether the trial court may vacate or rescind its venue ruling if, during the trial of the cause, it becomes obvious that venue is improper.[103] The better rule is that the trial court may vacate its order.[104] Rule 87(5) refers to filing of new motions to transfer rather than the renewing of a previously filed motion. Also, judicial economy would dictate that if the harmless error rule does not apply in venue matters and the trial on the merits demonstrates improper venue, the expense of an appeal and retrial should not be incurred by either party.

9. Appeal

a. No Interlocutory Appeal or Writ of Mandamus

New article 1995 expressly abolishes interlocutory appeals.[105] Additionally, at least one Texas court has now held that a writ of mandamus will not allow an appellate court to order a trial judge to transfer

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102. *See id.* at 43. The second set of defendants then brought a writ of mandamus which was denied. TEX. R. CIV. P. 87(5).

103. *See* Comment, *"Horse & Buggy" to "Horseless Carriage"—Texas Rolls Out Its New Venue Model: A Practitioner's Guide to Article 1995,* 15 TEX. TECH L. REV. 917, 939-940 (1984).

104. *See id.* at 940 n.186; *see also* TEX. R. CIV. P. 87(5) (referring to new motions to transfer rather than reviewing motion already filed).

105. *See* TEX. REV. CIV. STAT. ANN. art. 1995, § (4)(d)(1) (Vernon Supp. 1985); *see also* Wells v. Metro Fina Co., 677 S.W.2d 251, 252-53 (Tex. App.—El Paso 1984, no writ) (interlocutory appeal not permitted). The legislature also repealed that portion of article 2008 that included venue in the list of matters for interlocutory appeal. *See* TEX. REV. CIV. STAT. ANN. art. 2008 (Vernon Supp. 1985).

the cause even when venue is improper in the county where the suit is pending.[106] In *Hendrick,* the Dallas Court of Appeals considered a case that demonstrated the harshness of the rule prohibiting interlocutory appeals. Although the court found that venue was conclusively established in Jones County, Texas, and that the trial judge in Dallas County refused to transfer the case to Jones County, the court of appeals held it was without power to issue a writ of mandamus due to the language in the statute regarding interlocutory appeals.[107]

b. Standard of Review

Under revised article 1995, the standard of review in venue cases has changed from the traditional standards of appellate review in Texas. The standard is whether venue was proper in the county where the lawsuit was tried.[108] Under the old rule and in most other procedural matters, the standard is whether the court erred in establishing venue.[109] However, during the drafting of article 1995, this standard was considered and rejected.[110] Obviously, the new standard is less strict and will result in more venue reversals.

10. Motion to Transfer Because of Inability to Obtain Impartial Trial

Rules 257-259 control motions to tranfer venue in circumstances

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106. *See* Hendrick Medical Center v. Howell, 690 S.W.2d 42, 45 (Tex. App.—Dallas 1985, no writ). However, *Hendrick* must be read in connection with *Ramcon Corp. v. American Steel Bldg. Co.,* 668 S.W.2d 459 (Tex. App.—El Paso 1984, no writ). In *Ramcon,* the El Paso Court of Appeals strongly suggested that it had mandamus power to review a venue determination. *See id.* at 461. *But see* Ogburn v. Blackburn, No. 85-0254-CV (Tex. App.—Amarillo, Sept. 18, 1985, no writ) (not yet reported) (appellate court will not issue mandamus to correct trial court ruling on motion to transfer because creates interlocutory appeal of venue issues).

107. *See* Hendrick Medical Center v. Howell, 690 S.W.2d 42, 45-46 (Tex. App.—Dallas 1985, no writ); *see also* TEX. REV. CIV. STAT. ANN. art. 1995, § (4)(d)(1) (Vernon Supp. 1985). Article 1995, section (4)(d)(1) expressly provides that "[n]o interlocutory appeal shall lie." *Id.* 1995, § (4)(d)(1).

108. *See* TEX. REV. CIV. STAT. ANN. art. 1995, § (4)(d)(2) (Vernon Supp. 1985).

109. *See* Price, *New Texas Venue Statute: Legislative History,* 15 ST. MARY'S L.J. 855, 878 (1984). For example, the old standard considered abuse of discretion and insufficiency of the evidence. *See id.* at 878.

110. *See id.* at 878. In preparing the appellate complaint, the practitioner should be cautious. Although the standard under subsection (4)(d)(2) is obvious, the trial court may have committed other error in the venue proceeding regarding time limitations. Therefore, these errors should be drafted as traditional points of error.

where a party alleges that it cannot obtain a fair and impartial trial.[111] This type of transfer of venue is unique because it is available to any party, including the plaintiff, who originally picked the forum.[112] The procedure under Rule 257, unlike regular venue practice, specifies the types of affidavits that are required to accompany the motion to transfer.[113] Rule 258 provides that the movant's motion must be granted unless the respondent files an affidavit of a credible person attacking (a) the credibility of the movant's affiants, (b) the affiant's knowledge of the facts recited in the affidavits, or (c) the truth of the affiant's statements.[114] If the movant's motion is attacked under Rule 258, reasonable discovery may be conducted and presented to the court using the same affidavit procedure provided in Rule 88 discovery.[115] As with the regular venue practice, there is no evidentiary hearing and no interlocutory appeal.

There is a serious question, however, as to whether a Rule 257 motion to transfer must be made in the due order of pleading.[116] Revised article 1995, section (4)(c) provides that a motion to transfer on the grounds that an impartial trial cannot be had must be made in the due order of pleading.[117] The rules are silent on the issue. However, as a practical matter, the prejudice and resultant inability to obtain a fair trial (generally caused by pre-trial publicity) usually arise long after the answer is filed. In fact, Rule 87 recognizes the difference between ordinary motions to transfer and Rule 257 motions.[118]

Because old article 1995 made no reference to Rule 257 practice,

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111. *Compare* TEX. R. CIV. P. 257 (provides that either party may move for transfer of venue for any of the causes stated therein) *with id.* 86 (provides by implication that only defendant may move for transfer of venue).

112. *See* TEX. R. CIV. P. 257. Rule 257 requires that the movant and at least three credible residents of the county in which the suit is pending supply affidavits. *See id.* 257. These affidavits must state at least one of the four grounds supplied in the statute as to why the movant cannot obtain a fair and impartial trial in the county where the cause is pending. *See id.* 257.

113. *See id.* 257.

114. *See id.* 258.

115. *See id.* 258; *see also id.* 88 (rule regarding discovery and venue).

116. *See* Keltner, *Protecting the Record for Appeal,* ADVANCED CIVIL TRIAL COURSE, at U-8 (State Bar of Texas 1985).

117. *See* TEX. REV. CIV. STAT. ANN. art. 1995, § 4(c)(2) (Vernon Supp. 1985).

118. *See* TEX. R. CIV. P. 87(5). Subsection 5 states the general rule that no further motions to transfer may be heard after a venue determination has been made. *See id.* 87(5). However, Rule 257 motions to transfer are noted as an exception to Rule 87(5), giving rise to the argument that Rule 257 motions to transfer need not be made in the due order of pleading.

motions under Rule 257 were not required to be made in the due order of pleading.[119] Also, it is interesting to note that the supreme court has made minor modifications to conform Rule 257 with revised article 1995, but failed to address this potential problem.[120] Despite the language of article 1995,[121] common sense dictates that a Rule 257 motion need not be made in the due order of pleading, especially since a plaintiff is entitled to make the motion.

11. Nonliability Declaratory Judgment Actions

In a recent case involving a declaratory judgment action regarding the liability of a hospital, the supreme court indicated that the " 'real plaintiff' has a traditional right to choose the time and place of the suit."[122] In *Abor v. Black,*[123] the supreme court was faced with an interesting question and reached a curious result. The injured party in the medical malpractice case filed suit against a drug company in Harris County.[124] The drug company removed the case to federal court in the Eastern District of Texas. After the case was removed to federal court, the plaintiff joined Scott & White Hospital alleging malpractice. The hospital filed a motion to dismiss for want of diversity jurisdiction, which was granted. Thereafter, the hospital brought a declaratory judgment action in Bell County, where the hospital was located, asking for a declaration of nonliability. The plaintiff filed a plea in abatement, urging that the suit was an improper use of the Declaratory Judgment Act, which was denied by the trial court. The supreme court ruled that the Texas Declaratory Judgment Act, "appears to give the courts jurisdiction over declarations of non-liability of a potential defendant in a tort action. . . ."[125] The supreme court, however, further ruled that the plea in abatement should nonetheless have been sustained because the exercise of jurisdiction, "deprived the real plaintiff of the traditional right to choose the time and place of

119. *See* City of Abilene v. Downs, 367 S.W.2d 153, 156 (Tex. 1963) (motion could not be denied even if filed after movant announced ready for trial); *see also* Atchison, T. S. F. Ry. Co. v. Holloway, 479 S.W.2d 700, 706 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e) (motion under Rule 257 may be filed at any time).

120. *See* TEX. R. CIV. P. 257.

121. *See* TEX. REV. CIV. STAT. ANN. art. 1995, § 4(c)(2) (Vernon Supp. 1985).

122. Abor v. Black, 695 S.W.2d 564, 566 (Tex. 1985).

123. 695 S.W.2d 564 (Tex. 1985).

124. *See id.* at 566.

125. *Id.* at 566.

suit."[126] The court cited no authority for the "traditional right" proposition. However, it is evident that suits to declare non-liability of defendants should be abated so the plaintiff can choose the time of filing and the venue of the lawsuit.

C. *Pleadings*

The pleadings generally frame the parameters of the lawsuit.[127] Increasingly, pleadings also form the basis for appellate review, and as a result, should be drafted carefully to cover all the relief and all the defenses sought by the pleader. For example, the pleadings form the basis for venue determination.[128] Additionally, the relevancy of evidence is determined from the pleadings, as well as the court's submission of special issues. In forming a judgment, the court must finally ensure that the relief granted was sought in the pleadings and supported by the pleadings.

1. Standard

The purpose of the pleadings is to inform the court and the opposing party of the causes of action and defenses alleged so as to allow the preparation of a response.[129] As a result, the standard for reviewing pleadings is whether they conform with the directions of Rules 45-50 by giving "fair and adequate" notice of the facts upon which the pleader bases the claims as well as the legal theories advanced.[130] In

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126. *Id.* at 566.

127. *See* Sherrod v. Bailey, 580 S.W.2d 24, 26 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.); *see also* Murray v. O & A Express, Inc., 630 S.W.2d 633, 636 (Tex. 1982) (pleadings define issues at trial); Texas Dept. of Corrections v. Jackson, 661 S.W.2d 154, 156 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (pleadings' function is to define issues at trial). *See* generally Figari, Graves & Dwyer, *Texas Civil Procedure,* 39 Sw. L.J. 419 (1985) (recent survey of Texas civil procedure cases on pleadings).

128. *See* TEX. R. CIV. P. 87(2)(b).

129. *See, e.g.,* Roark v. Allen, 633 S.W.2d 804, 810 (Tex. 1982) (purpose of petition is to give opposing party facts upon which claim is based); Murray v. O & A Express, Inc., 630 S.W.2d 633, 636 (Tex. 1982) (petition must state facts so adverse party may properly prepare defense); Castleberry v. Goolsby Bldg. Corp., 617 S.W.2d 665, 666 (Tex. 1981) (pleadings which give fair notice of claim are sufficient). Rules 45 and 47 of the Texas Rules of Civil Procedure state what must be included in a petition. *See* TEX. R. CIV. P. 45, 47.

130. *See, e.g.,* Roark v. Allen, 633 S.W.2d 804, 810 (Tex. 1982) (pleadings sufficient if fair and adequate notice of facts upon which claim is based are given); Castleberry v. Goosby Bldg. Corp., 617 S.W.2d 665, 666 (Tex. 1981) (pleadings sufficient if opposing party given fair and adequate notice); Ghazali v. Southland Corp., 669 S.W.2d 770, 775 (Tex. App.—San Antonio 1984, no writ) (under Rules 45 and 47 pleadings are sufficient if opposing attorney furnished with fair notice of claim alleged).

turn, the test for determining whether a pleading gives fair notice to the opponent is whether an opposing attorney of reasonable competence can ascertain both the nature and basic issues of the controversy, and the testimony relevant to the alleged cause of action.[131] In reviewing the pleadings, the trial court is entitled to view the pleadings as a whole to determine whether adequate notice is given.[132]

2. Prayer for General Relief

In an effort not to waive any potential cause of action, many practitioners resort to the use of a prayer for general relief such as, "for all relief, both in law and in equity, to which plaintiff may show itself justly entitled." However, courts have repeatedly ruled that such prayers cannot create new or alternative causes of action.[133] A good example of the pitfalls of this type of pleading appear in the supreme court case of *Kissman v. Bendix Home Systems.*[134] In that deceptive trade practices case, the plaintiff pled for the recovery of the market value of a mobile home.[135] However, no testimony regarding the market value of the mobile home was introduced during trial.[136] Instead, the plaintiff introduced into evidence the cost of repair, which was not pleaded in the plaintiff's petition.[137] The supreme court affirmed the court of appeals' reversal of the trial court's judgment which had awarded the cost of repair damages.[138] The supreme court ruled that the prayer for general relief did not help the plaintiff's position because a "prayer must be consistent with the facts stated as a basis for relief."[139]

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131. *See* Schley v. Structural Metals, Inc., 595 S.W.2d 572, 587 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.); *see also* Rodriguez v. Yenawine, 556 S.W.2d 410, 414 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).

132. *See* TEX. R. CIV. P. 45.

133. *See, e.g.,* Kissman v. Bendix Home Sys., 587 S.W.2d 675, 677 (Tex. 1979) (prayer must be consistent with facts stated as basis for relief); Stoner v. Thompson, 578 S.W.2d 679, 684 (Tex. 1979) (prayer may not enlarge pleading to include entirely different cause of action); Westchester Fire Ins. Co. v. Nuckols, 666 S.W.2d 372, 375 (Tex. App.—Eastland 1984, writ ref'd n.r.e.) (inclusion of request for general relief will not enlarge pleading to include different cause of action).

134. 587 S.W.2d 675 (Tex. 1979).

135. *See id.* at 676.

136. *See id.* at 677.

137. *See id.* at 677.

138. *See id.* at 677-78.

139. *Id.* at 677.

3. Special Exceptions

If a party believes the opponent's pleadings do not meet the standards discussed above, special exceptions may be filed to force the pleader to bring the pleadings into order.[140] The special exception must direct the court's attention to the specific pleading excepted to, and address with particularity the fault in the pleading.[141] For example, a special exception which complained that the plaintiff's pleading was "vague and indefinite and that it did not state a cause of action" was held not to meet the requirements of Rule 90 since it did not state with particularity the defects in the pleadings.[142]

If a special exception is overruled, no appealable judgment results. However, if the special exception directed to a plaintiff's pleading is sustained, an appealable order may result. First, the plaintiff must be given, as a matter of right, an opportunity to amend his pleading to cure the complaint.[143] Yet the plaintiff may elect to stand on the pleading to test the validity of the ruling on appeal.[144] The standard on appeal is whether the trial court abused its discretion in either striking the pleading or dismissing the cause of action.[145] In review-

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140. *See* TEX. R. CIV. P. 90, 91.

141. *See id.* 91; *see also* Farrar v. Farrar, 620 S.W.2d 801, 802 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) (special exception must state defects in petition with particularity).

142. Farrar v. Farrar, 620 S.W.2d 801, 802 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

143. *See, e.g.,* State v. Houdville Indus., Inc., 632 S.W.2d 723, 724 (Tex. 1982) (pleading attacked by special exception should be allowed to amend); Steele v. City of Houston, 603 S.W.2d 786, 788 (Tex. 1980) (pleader has right to amend after special exception sustained); Texas Dept. of Corrections v. Herring, 513 S.W.2d 6, 10 (Tex. 1974) (pleader must be given opportunity to amend after special exception). The court must allow the pleader a reasonable time in which to amend. *See* McCamey v. Kinnear, 484 S.W.2d 150, 152 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.).

144. *See In re* Estate of Mahan, 653 S.W.2d 335, 337 (Tex. App.—San Antonio 1983, no writ) (plaintiff has option to stand on pleading); *see also* McCamey v. Kinnear, 484 S.W.2d 150, 152 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.) (plaintiff may stand on pleadings and test ruling on appeal).

145. *See, e.g.,* Portugal v. Jackson, 647 S.W.2d 393, 394 (Tex. App.—Waco 1983, writ ref'd n.r.e.) (trial court decision will not be disturbed on appeal unless abuse of discretion); Wray v. Lenderman, 640 S.W.2d 68, 70 (Tex. App.—Tyler 1982, no writ) (trial court's broad discretion will not be reversed on appeal unless showing of abuse of discretion); Farrar v. Farrar, 620 S.W.2d 801, 801 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) (trial court will not be overruled unless abuse of discretion). However, a study of the opinions on this point indicate that appellate courts are quick to reverse cases in which the trial court dismissed a cause of action for failure to amend. Most often, courts find that the special exceptions were either too vague or were merely a general demurrer. *See, e.g.,* Huff v. Fidelity Union Life Ins. Co., 158 Tex. 433, 437, 312 S.W.2d 493, 499 (Tex. 1958) (vague special exception nothing

ing the trial court's ruling, the appellate court must consider the facts alleged in the pleading as true, and consider all reasonable inferences that would tend to support the pleading.[146]

Special exceptions must be made before the cause of action is submitted to the jury, or in a non-jury case, before judgment is entered.[147] Otherwise, the exception is waived, and no appellate complaint may be raised.[148] Likewise, if no special exceptions are filed, no complaint may be heard on appeal.[149] Additionally, the pleadings will thereafter be construed in favor of the pleader and the judgment.[150]

4. Verified Pleas

Certain pleadings must be verified by an affidavit in order to be given force and effect.[151] The listing of those pleadings may be found in Rule 93 which contains the usual provision, "any other matter re-

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more than general demurrer); Farrar v. Farrar, 620 S.W.2d 801, 801-02 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) (defects in pleadings deemed waived when special exception is waived); McCamey v. Kinnear, 484 S.W.2d 150, 153 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.) (special exception without merit since defects in pleadings not pointed out with particularity).

146. *See, e.g.,* Wheeler v. White, 398 S.W.2d 93, 95 (Tex. 1965) (court must assume all alleged material facts are true); Benz-Stoddard v. Aluminum Co. of America, 368 S.W.2d 94, 95 (Tex. 1963) (court must accept allegations in special exception as true); Martine v. Board of Regents, State Senior Colleges of Texas, 578 S.W.2d 465, 469 (Tex. Civ. App.—Tyler 1979, no writ) (appellate court required to consider facts alleged by plaintiff as true).

147. *See* TEX. R. CIV. P. 90.

148. *See* Rio Grande Valley v. Campesi, 580 S.W.2d 850, 862 (Tex. Civ. App.—Corpus Christi 1979), *rev'd on other grounds,* 592 S.W.2d 340 (Tex. 1980). The record must demonstrate both a written special exception and the court's ruling thereon. The exception to this is in the case of a default judgment where the defendant would obviously have no opportunity to make such objections. *See* TEX. R. CIV. P. 90.

149. *See, e.g.,* Central Park Bank v. LeBlanc, 659 S.W.2d 872, 875 (Tex. App.—San Antonio 1983, no writ) (failure to point out defect in petition to court waives error); O'Shea v. Coronado Transmission Co., 656 S.W.2d 557, 564 (Tex. App.—Corpus Christi 1983, no writ) (predicate for complaint on appeal is proper exception filed in trial court); Frankfurt's Texas Inv. Corp. v. Trinity Sav. & Loan Ass'n, 414 S.W.2d 190, 193 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.) (when motion never presented to trial court for determination considered waived).

150. *See, e.g.,* Roark v. Allen, 633 S.W.2d 804, 809-10 (Tex. 1982) (petition liberally construed in favor of pleader when no special exceptions filed); Stone v. Lawyers Title Ins. Corp., 554 S.W.2d 183, 186 (Tex. 1977) (when no special exceptions filed, petition liberally construed in pleader's favor); Lowther v. Lowther, 578 S.W.2d 560, 562 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.) (petition liberally construed in pleader's favor and in support of judgment when special exceptions not filed).

151. *See* TEX. R. CIV. P. 93.

quired by statute to be pleaded under oath."[152] As a result, practitioners should frequently check the 16 listings in Rule 93, and also review any statutory causes of action to ensure pleadings are viable. A review of the listings in Rule 93 reveals that all the enumerated pleas are defensive.[153] Failure to verify causes the defensive plea to have no effect, and the subject matter of the plea is waived, both at trial and appeal.[154]

The verification may be by any person, including both the party or the attorney.[155] The sworn plea need not be contained in the original answer, instead, the defendant may amend to supply the verification.[156] By the same rule, if the defendant's first answer was verified and a superseding second amended petition is not, the first verification does not survive the amendment to preserve the defendant's rights.[157] In some instances, the verification may be upon information and belief rather than upon personal knowledge.[158] However, the best policy is to verify on personal knowledge if possible. Defects in the verification must be pointed out precisely by either a written motion or an exception.[159] Otherwise any complaints regarding verification are waived on appeal.

D. *Plea in Abatement*

The plea in abatement is used to allege facts not evident from the

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152. *Id.* 93(16).

153. *See id.* 93.

154. *See* Sunbelt Constr. Corp., Inc. v. S & D Mechanical Contractors, Inc., 668 S.W.2d 415, 418 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.).

155. However, attorneys should be wary of routinely signing verifications. First, the attorney may well become a witness. Second, if a client demands the attorney to sign and the attorney honors the request, knowing that the statements are false, the attorney is subject to professional discipline and contempt of court. *See* SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. XII, § 8 (Code of Professional Responsibility) DR 7-102(A)(4-7) (1984).

156. *See* Economy Furniture, Inc. v. Jirasek, 345 S.W.2d 951, 954 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e.).

157. *See* Butler v. Joseph's Wine Shop, Inc., 633 S.W.2d 926, 929-30 (Tex. App.—Houston [14th Dist.] 1982, no writ).

158. *Cf.* Burke v. Satterfield, 525 S.W.2d 950, 953 (Tex. 1975) (unless authorized by statute, affidavit insufficient unless allegations are direct and unequivocal); Huddlestone v. Western Nat'l Bank, 577 S.W.2d 778, 781 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.) (generally verification is insufficient if based only on information and belief).

159. *See* TEX. R. CIV. P. 90; *see also* Huddlestone v. Western Nat'l Bank, 577 S.W.2d 778, 781 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.) (defects in verified oath are waived if not pointed out to judge).

face of the pleadings which demonstrate reasons why the pleader should not recover or the case should not go forward.[160] If the plea is sustained, the action is abated until the impediment is removed.[161] The pleader, however, should be given a reasonable opportunity to amend the pleadings to remove the impediment.[162] Additionally, the court, on its own motion, has the power to abate a cause of action if it becomes aware of facts outside the record which warrant abatement.[163] The plea in abatement must clearly enunciate the reason the case should not proceed; it should also set forth the correct manner in which the suit should have been brought.[164] The plea in abatement must be sufficient within itself, and cannot be assisted by allegations in other pleadings, other than by reference to the cause of action.[165] Furthermore, the plea should state facts and not conclusions of law.[166] The burden of proof is upon the movant, and the facts alleged in the plea must be proved by a preponderance of the evidence.[167]

A plea in abatement must be filed, and a ruling obtained thereon prior to the trial on the merits of the case. Otherwise, the plea is waived and may not be presented on appeal.[168] Additionally, the trial

160. *See* R. McDONALD, TEXAS CIVIL PRACTICE § 708, at 159 (rev. ed. 1982).

161. *See* Augustine v. Nuson, 671 S.W.2d 112, 114 (Tex. App.—Houston [14th Dist.] 1984, no writ); Atkinson v. Reid, 625 S.W.2d 64, 66 (Tex. Civ. App.—San Antonio 1981, no writ).

162. *See* Augustine v. Nuson, 671 S.W.2d 112, 114 (Tex. App.—Houston [14th Dist.] 1984, no writ); Atkinson v. Reid, 625 S.W.2d 64, 66 (Tex. Civ. App.—San Antonio 1981, no writ)

163. *See* Wheeler v. Employers Mut. Liab. Co., 609 S.W.2d 826, 829 (Tex. Civ. App.—Tyler 1980, no writ).

164. *See* Atkinson v. Reid, 625 S.W.2d 64, 67 (Tex. Civ. App.—San Antonio 1981, no writ); *see also* Stanolind Oil & Gas Co. v. State, 136 Tex. 5, 10, 133 S.W.2d 767, 771 (1939).

165. *See* Bryce v. Corpus Christi Area Convention and Tourist Bureau, 569 S.W.2d 496, 499 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

166. *See* Atkinson v. Reid, 625 S.W.2d 64, 67 (Tex. Civ. App.—San Antonio 1981, no writ).

167. *See, e.g.,* Matador Pipelines, Inc. v. Thomas, 650 S.W.2d 945, 949 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.) (plaintiff has burden of proof by preponderance of evidence as to the truthfulness of facts alleged in plea); Atkinson v. Reid, 625 S.W.2d 64, 67 (Tex. Civ. App.—San Antonio 1981, no writ) (facts in plea to be proven by preponderance of evidence); Head v. Newton, 596 S.W.2d 209, 210 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (plea required to be proven by preponderance of evidence).

168. *See, e.g.,* Pullen v. Swanson, 667 S.W.2d 359, 363 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (plea in abatement not filed before trial on merits is waived); Garcia v. Texas Employer's Ins. Ass'n, 622 S.W.2d 626, 630 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.) (plea in abatement must be filed before trial on merits); Parkview Gen. Hosp., Inc. v. Waco, 531 S.W.2d 224, 226 (Tex. Civ. App.—Corpus Christi 1975, no writ) (when plea in abatement is filed it must be urged, or subject to waiver).

court and appellate court may apply equitable principles in deciding whether a plea in abatement is filed in a timely manner.[169] In this regard, courts have held that the purpose of the plea in abatement is to aid the speedy disposition of litigation on the merits. Therefore, if a party fails to raise a plea in abatement at an earlier time, the right to insist on the abatement may be waived.[170] An order overruling a plea in abatement is interlocutory and is not appealable.[171] However, unlike venue rulings, the improper refusal to sustain a plea in abatement may be challenged by a writ of mandamus.[172] The standard of review is that of abuse of discretion, and a ruling will not be disturbed on appeal unless an abuse of discretion is clearly shown.[173]

E. *Default Judgment*

A default judgment may be taken any time after the defendant is required to answer, provided, however, that the officer's return has been on file with the clerk of the court ten (10) days, exclusive of the day of filing and the day of the judgment.[174] It is imperative that the rules governing service of citation be strictly followed to avoid the overturning of a default judgment.

There are no presumptions regarding the validity of the issuance, service, or return of citation.[175] The record must affirmatively reflect strict compliance with the rules.[176] It should be noted that when serving an agent for a corporation or other entity, the citation must af-

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169. *See* Develo-Cepts, Inc. v. City of Galveston, 668 S.W.2d 790, 793 (Tex. App.—Houston [14th Dist.] 1984, no writ) (courts allowed to consider equities of situation in determination of whether plea timely filed); Bluebonnet Farms, Inc. v. Gibralter Sav. Ass'n, 618 S.W.2d 81, 84 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.) (equity can be considered when determining whether plea is timely filed).

170. *See* Bluebonnet Farms, Inc., v. Gibralter Sav. Ass'n, 618 S.W.2d 81, 84 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

171. *See* Bills v. Braswell, 534 S.W.2d 434, 435 (Tex. Civ. App.—Texarkana 1976, no writ).

172. *See* Curtis v. Gibbs, 511 S.W.2d 263, 267 (Tex. 1974).

173. *See* Dolenz v. Continental Nat'l Bank, 620 S.W.2d 572, 575 (Tex. 1981).

174. *See* TEX. R. CIV. P. 239; *see also* Gentry v. Gentry, 550 S.W.2d 167, 169-68 (Tex. Civ. App.—Austin 1977, no writ) (default judgment granted on day citation was returned and filed with clerk, was reversed for not allowing required ten days provided by Rules 107 and 239).

175. *See* Kem v. Krueger, 626 S.W.2d 143, 144 (Tex. Civ. App.—Fort Worth 1981, no writ).

176. *See* Encore Builders v. Wells, 636 S.W.2d 722, 723 (Tex. App.—Corpus Christi 1982, no writ).

firmatively show that the individual served is in fact the agent for service. Mere allegations of agency are not sufficient.[177] Also, when serving the secretary of state, the record must reflect not only service on the secretary of state, but must also show, by certificate or otherwise, that the secretary of state forwarded the petition to the intended party.[178] A defective or incomplete sheriff's return may be amended or corrected to show the true facts of service.[179] The practitioner should ensure proper service of citation of service so that default victories will not be overturned by an appellate court.

The plaintiff's pleadings must meet certain criteria to support a default judgment.[180] The pleading must inform the court what judgment to render without information from another source.[181] A petition is generally insufficient only if: (1) the cause of action asserted is not within the court's jurisdiction; (2) it fails to give fair notice of the asserted claim; or (3) it discloses the invalidity of the claim on its face.[182]

No evidence is necessary to support a default judgment when the claim is liquidated or supported and proved by an instrument in writing.[183] The failure to answer is taken as an admission of the petition.[184] In contrast, with unliquidated damage claims, evidence of damages must be presented for a default judgment to stand.[185] If no record is made of the evidentiary proceedings regarding damages, a new trial may be necessary to preserve the defendant's right to appel-

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177. *See id.* at 723.

178. *See* Roland Communications v. American Communications Corpus Christi, Inc., 662 S.W.2d 145, 146 (Tex. App.—Corpus Christi 1983, no writ); *see also* Cars & Concepts, Inc. v. Funston, 601 S.W.2d 801, 802-03 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).

179. *See* TEX. R. CIV. P. 118.

180. *See id.* 90. Rule 90 provides that defects in the petition which are not specifically objected to are waived; however, this rule does not apply as to any party against whom a default judgment is rendered. *See id.* 90.

181. *See* Roberts v. Roberts, 621 S.W.2d 835, 837-38 (Tex. Civ. App.—Waco 1981, no writ).

182. *See* Wall v. Wall, 630 S.W.2d 493, 496 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.); *see also* TEX. R. CIV. P. 47, 90; *accord* Village Square Ltd. v. Burton, 660 S.W.2d 556, 559 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

183. *See* TEX. R. CIV. P. 243.

184. *See* Village Square Ltd. v. Burton, 660 S.W.2d 556, 559 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.); Blumenthal v. Ameritex Computer Corp., 646 S.W.2d 283, 287 (Tex. App.—Dallas 1983, no writ); Southerland Mower Co. v. Jordan, 587 S.W.2d 215, 217 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.).

185. *E.g.* Johnson v. Gisondi, 627 S.W.2d 448, 449 (Tex. App.—Houston [1st Dist.] 1981, no writ).

late review.[186]

A default resulting from the failure to answer should not be confused with a post-answer default. A post-answer default occurs when the defendant has answered, but fails to make an appearance at trial.[187] A post-answer default is not considered an admission or abandonment of an answer — the plaintiff must still put on evidence to prove all elements of the cause of action as if the proceeding was a trial on the merits.[188]

In order to set aside a default judgment, the party against whom the default judgment was rendered must show: (1) that there was no negligence or conscious indifference in allowing the default to occur; (2) a meritorious defense to the cause of action exists; (3) he is willing to proceed immediately and reimburse the plaintiff for all reasonable expenses incurred in obtaining the default; and (4) that overturning the judgment will not result in delay or injury to the party taking the default judgment.[189]

Affidavits or other evidence may be used to demonstrate these four requirements. The affidavits should state facts showing the party's absence of negligence, meritorious defense, and how the overturning of the judgment will not injure the plaintiff. Mere conclusions to this effect are insufficient.[190] The standard of review on appeal from the ruling on a motion to set aside the default is whether an abuse of

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186. *See* Robinson v. Robinson, 487 S.W.2d 713, 715 (Tex. 1972); Houston Pipe Coating Co., Inc. v. Houston Freightways, Inc., 679 S.W.2d 42, 45 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Proctor v. Green, 673 S.W.2d 390, 393 (Tex. App.—Houston [1st Dist.] 1984, no writ); *see also* Goodman v. Goodman, 611 S.W.2d 738, 740 (Tex. Civ. App.—San Antonio 1981, no writ); Looney v. Cribbs, 588 S.W.2d 678, 680 (Tex. Civ. App.—Tyler 1979, no writ).

187. *See* Stoner v. Thompson, 578 S.W.2d 679, 682 (Tex. 1979).

188. *See* Karl & Kelly Co., Inc. v. Melerran, 646 S.W.2d 174, 175 (Tex. 1983); Stoner v. Thompson, 578 S.W.2d 679, 682 (Tex. 1979); Conrad v. Orellana, 661 S.W.2d 309, 312 (Tex. App.—Corpus Christi 1983, no writ).

189. *See* Butler v. Dal Tex Mach. & Tool Co., 627 S.W.2d 258, 259-60 (Tex. App.—Fort Worth 1982, no writ); Calhoun v. Calhoun, 617 S.W.2d 756, 758 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ). In *Butler,* the court held that the defendant was negligent and consciously indifferent when he testified that he did not understand the citation, put the papers on his desk, and did nothing further until he received notice of the default judgment. *See* Butler v. Dal Tex Mach. & Tool Co., 627 S.W.2d 258, 260 (Tex. App.—Fort Worth 1982, no writ).

190. *See* Guaranty Bank v. Thompson, 632 S.W.2d 338, 339 (Tex. 1982); *see also* Texas State Bd. of Pharmacy v. Martinez, 658 S.W.2d 277, 280 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.).

discretion has occurred.[191]

F. *Separate Trials, Severance, and Consolidation*

Naturally, the joinder and severance of lawsuits create similar problems, and the courts have developed similar ways in which to deal with those problems. At the outset, it is important for practitioners to understand the difference between severance and separate trials so that appropriate tactics may be taken to protect the record.

Severance is possible only in cases where a lawsuit involves two or more separate and distinct causes of action. In other words, each of the causes of action in the lawsuit must be such that it could be tried in a separate lawsuit as if it were the only claim in controversy.[192] In contrast, the court can order a separate trial of issues which would not necessarily create an independent cause of action.[193] The lesson is simple. Severance divides the lawsuit into two or more independent causes, each of which terminates in a separate and final enforceable judgment.[194] On the other hand, a separation of the cause of action for trial simply results in the trial of two issues in the same lawsuit, and results in one final judgment. An order granting or denying severance or separate trials is interlocutory and is, therefore, not appealable.[195] The standard on appeal is abuse of discretion, and an order granting or denying a separate trial or a severance will not be disturbed on appeal without a clear showing of abuse.[196]

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191. *See* HST Gathering Co. v. Motor Services, Inc., 683 S.W.2d 743, 745 (Tex. App. — Corpus Christi 1984, no writ); Loewer v. Flanagan Forms, 661 S.W.2d 751, 752-53 (Tex. App.—San Antonio 1983, no writ); Butler v. Dal Tex Mach. & Tool Co., 627 S.W.2d 258, 259 (Tex App.—Fort Worth 1982, no writ).

192. *See* Cherokee Water Co. v. Fouderhause, 641 S.W.2d 522, 525 (Tex. 1982); Kansas Univ. Endowment Ass'n v. King, 162 Tex. 599, 601, 350 S.W.2d 9, 11 (1961); Vautrain v. Vautrain, 646 S.W.2d 309, 314 (Tex. App.—Fort Worth 1983, writ dism'd); *see also* TEX. R. CIV. P. 41.

193. *See* Kansas Univ. Endowment Ass'n v. King, 162 Tex. 599, 601, 350 S.W.2d 9, 11 (1961); Vautrain v. Vautrain, 646 S.W.2d 309, 314 (Tex App.—Fort Worth 1983, writ dism'd).

194. *See* Kansas Univ. Endowment Ass'n v. King, 162 Tex. 599, 601, 350 S.W.2d 9,11 (1961); Vautrain v. Vautrain, 646 S.W.2d 309, 314 (Tex. App.—Fort Worth 1983, writ dism'd).

195. *See* Kansas Univ. Endowment Ass'n v. King, 162 Tex. 599, 601, 350 S.W.2d 9, 11 (1961); Vautrain v. Vautrain, 646 S.W.2d 309, 314 (Tex. App.—Fort Worth 1983, writ dism'd).

196. *See* Hall v. City of Austin, 450 S.W.2d 836, 837-38 (Tex. 1970); Barrows v. Ezer, 624 S.W.2d 613, 616 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); Nolan v. Bettis, 562 S.W.2d 520, 524 (Tex. Civ. App.—Austin 1978, no writ).

Commonly, severances are granted when cross-actions are filed. In many instances, the plaintiff on the cross-action makes a mistake in failing to have service of process issued to the cross-defendant after a severance occurs. Practitioners should remember that once a severance is accomplished, a new and independent cause of action exists, and may well necessitate service of process so that the court may obtain personal jurisdiction over the cross-defendant.[197] A failure to make adequate service of process will result in the court losing jurisdiction over the severed defendant.[198]

Consolidation operates much like a motion for separate trials. Consolidation is proper on cases involving a common question of law or fact pending before the court.[199] Orders denying consolidation are interlocutory and are within the sole discretion of the court.[200]

G. *Intervention and Third Party Practice*

1. Intervention

Rule 60 allows a party to intervene in an existing cause of action and assert legal or equitable claims, subject to being stricken by the court for sufficient cause on the motion of any party.[201] The obvious purpose of Rule 60 is to avoid the multiplicity of suits.[202] Once a motion to strike is filed, the burden of proof is upon the intervenor to show a legal or equitable interest in the lawsuit.[203] The motion to strike or motion to dismiss must not only be filed, but it also must be

197. *See* Morgan v. Compugraphic Corp., 675 S.W.2d 729, 734 (Tex. 1984); Allison v. Arkansas - Louisiana Gas Co., 624 S.W.2d 566, 568 (Tex. 1981); Van Dyke v. Van Dyke, 624 S.W.2d 800, 801 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

198. *See* McKanna v. Edgar, 388 S.W.2d 927, 929 (Tex. 1965); Lane Wood Indus., Inc. v. DeVloss, 489 S.W.2d 673, 675 (Tex. Civ. App.—Austin 1973, no writ); United States Leasing Corp. v. Centennial Liquor Stores, Inc., 368 S.W.2d 951, 952 (Tex. Civ. App.—Dallas 1963, no writ).

199. *See* TEX. R. CIV. P. 174.

200. *See* Allison v. Arkansas-Louisiana Gas Co., 624 S.W.2d 566, 568 (Tex. 1981); Stevenson v. Reese, 593 S.W.2d 828, 830 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.); Kemp v. Harrison, 431 S.W.2d 900, 904 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.).

201. *See* TEX. R. CIV. P. 60.

202. *See* St. Paul Ins. Co. v. Rohn, 586 S.W.2d 701, 703 (Tex. Civ. App.—Corpus Christi 1979, no writ); *see also* Mulcahy v. Houston Steel Drum Co., 402 S.W.2d 817, 819 (Tex. Civ. App.—Austin 1966, no writ).

203. *See* Mendez v. Bower, 626 S.W.2d 498, 499 (Tex. 1982); *see also* St. Paul Ins. Co. v. Rohn, 586 S.W.2d 701, 703 (Tex. Civ. App.—Corpus Christi 1979, no writ).

brought to the court's attention for a ruling.[204] If the record does not reflect both a motion and ruling, any error on appeal is waived.[205] Rule 60 does not establish a time limit for either an intervention or a motion to strike.[206] However, the court through its equitable power may consider the tardiness of either action and rule accordingly.[207] Nonetheless, an intervention may not be permitted after a judgment is rendered, even if the intervention is made within the thirty-day period after the judgment is entered when the court retains absolute plenary power over the judgment.[208]

An order granting intervention is interlocutory and is not appealable until a final judgment is rendered.[209] The decision to strike an intervention rests in the discretion of the trial court, and the standard on appeal is abuse of discretion.[210]

2. Third Party Claims

Rule 38 allows any party to file claims against third parties who may be liable for any or all parts of the claims asserted in the cause of action.[211] A defendant may bring third parties into the suit without leave of court if a third party petition is filed not later than thirty (30) days after the original answer. Otherwise, the defendant must obtain leave of court on motion with notice to all parties to the action.[212] The motion should contain sufficient proof to connect the cause of action against the third party to the original cause of action.[213] To

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204. *See* Helton v. Kimball, 621 S.W.2d 675, 678 (Tex. Civ. App.—Fort Worth 1981, no writ).

205. *See* Jones v. Springs Ranch, 642 S.W.2d 551, 554 (Tex. App.—Amarillo 1982, no writ); *see also* TEX. R. CIV. P. 60.

206. *See* TEX. R. CIV. P. 60.

207. *See* Armstrong v. Tidelands Life Ins. Co., 466 S.W.2d 407, 412 (Tex. Civ. App.—Corpus Christi 1971, no writ).

208. *See* First Allied Bank v. White, 682 S.W.2d 251, 252 (Tex. 1984); Camal Co. — Pural High School v. Nelson, 158 Tex. 564, 566, 314 S.W.2d 956, 957 (1958); Helton v. Kimball, 621 S.W.2d 675, 678 (Tex. Civ. App.—Fort Worth 1981, no writ).

209. Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas, 615 S.W.2d 947, 952 (Tex. Civ. App.—Austin), *writ ref'd per curiam,* 622 S.W.2d 82 (Tex. 1981).

210. *See* St. Paul Ins. Co. v. Rahn, 586 S.W.2d 701, 703 (Tex. Civ. App.—Corpus Christi 1979, no writ); Rogers v. Searle, 533 S.W.2d 440, 442 (Tex. Civ. App.—Corpus Christi 1976, no writ); Armstrong v. Tidelands Life Ins. Co., 466 S.W.2d 407, 412 (Tex. Civ. App.—Corpus Christi 1971, no writ).

211. *See* TEX. R. CIV. P. 38.

212. *See id.* 38.

213. *See* Keller v. Judd, 671 S.W.2d 604, 607 (Tex. App.—San Antonio 1984, no writ); *see also* TEX. R. CIV. P. 38.

protect the record, caution must be used to ensure that the record reflects not only that the motion is filed, but also, that the request is denied.[214] A factor considered by the court in allowing motions for leave to file third party complaints is the timeliness of the request.[215] As a result, the motion should disclose when the movant became aware that a third party complaint was necessary. The motion should also indicate the additional expense if the third party claim was pursued in a separate cause of action.

The decision to allow the joinder of a third party rests in the court's discretion, and reversible error will not result unless there is an abuse of discretion.[216] The decision to allow a joinder of a third party is interlocutory, and no appeal lies until a final judgment is entered.[217]

H. *Motion for Continuance*

The granting and denying of motions for continuance are seldom reversed on appeal. However, of those complaints which do see appellate review, most are decided on the grounds that the record was not adequately protected and that the rules of civil procedure relating to motions for continuance were not followed.[218] The general rule is that a court will not have abused its discretion if the motion for continuance does not conform to the rules.[219]

All motions for continuance must be verified or supported by an affidavit.[220] The burden of proof is on the party moving for the con-

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214. *See* Toombs v. Coates, 596 S.W.2d 295, 296 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

215. *See* Threeway Constructors, Inc. v. Aten, 659 S.W.2d 700, 701-02 (Tex. App.—El Paso 1983, no writ).

216. *See* Allison v. Arkansas-Louisiana Gas Co., 624 S.W.2d 566, 568 (Tex. 1981); Keller v. Judd, 671 S.W.2d 604, 607 (Tex. App.—San Antonio 1984, no writ); Threeway Constructors, Inc. v. Aten, 659 S.W.2d 700, 701 (Tex. App.—El Paso 1983, no writ).

217. *See* Williford v. Spies, 530 S.W.2d 127, 132 (Tex. Civ. App.—Waco 1975, no writ).

218. *See* TEX. R. CIV. P. 251, 252, 253, 254. For an example of a case which indicates problems with failing to follow the rules, see *City of Houston v. Blackbird,* 658 S.W.2d 269, 272 (Tex. App.—Houston [1st Dist.] 1983, no writ).

219. *See* Garcia v. Texas Employers' Ins. Ass'n, 622 S.W.2d 626, 630 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.); Lumbermen's Mut. Cas. Co. v. Commings, 618 S.W.2d 883, 885-86 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.); Watson v. Godwin, 425 S.W.2d 424, 430 (Tex. Civ. App.—Amarillo 1968, writ ref'd n.r.e.).

220. *See* TEX. R. CIV. P. 251; *see also* City of Houston v. Blackbird, 658 S.W.2d 269, 272 (Tex. App.—Houston [1st Dist.] 1983, no writ); Watkins v. Douglass, 614 S.W.2d 892, 896 (Tex. Civ. App.—Texarkana 1981, error dism'd).

tinuance.[221] The record must show that the motion for continuance was filed, and that it was formally presented to the court for a hearing.[222] In fact, the trial court has no duty to call a motion for continuance to hearing.[223] As a result, if the statement of facts and transcript do not reflect that the court ruled on the motion, the appellate court must presume that the motion was properly overruled.[224]

1. Lack of Testimony

If the grounds for a continuance is lack of testimony, the movant must file an affidavit stating that: the testimony is material, the due diligence in procuring the testimony, the reasons for failure to obtain the testimony, and a statement that the testimony cannot be procured from any other source.[225] The due diligence used must be fully explained, as mere conclusions to that effect are insufficient.[226] If the motion fails to itemize the specific efforts of counsel to obtain the testimony, the refusal to grant a continuance will not be considered an abuse of discretion.[227] Due diligence has proven to be a difficult term for the courts to define. Whether a party used due diligence is decided on a case-by-case basis. For example, due diligence in procuring testimony, has been defined as, "the issuance and service of the subpoena in a sufficiently reasonable time before trial to enable a witness to appear or by taking depositions under such circumstances."[228] Likewise, another court found failure to use due diligence when a party had made no effort to obtain testimony of a witness during a

221. *See* Hutt v. City of Roark Springs, 552 S.W.2d 583, 586 (Tex. Civ. App.—Tyler 1970, writ ref'd n.r.e.).

222. *See id.* at 586.

223. *See* Guidry v. Massey, 572 S.W.2d 47, 49 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

224. *See* Brown v. Crockett, 601 S.W.2d 188, 190 (Tex. Civ. App.—Austin 1980, no writ); *see also* Men's Warehouse v. Helms, 682 S.W.2d 429, 430-31 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

225. *See* TEX. R. CIV. P. 252. However, if the motion for continuance is the first filed in the case, it is not necessary to aver that the testimony could not be procured elsewhere. *See* Alexander v. Alexander, 540 S.W.2d 502, 503 (Tex. Civ. App.—Waco 1976, writ dism'd).

226. *See* TEX. R. CIV. P. 252; *see also* Ray v. Ray, 542 S.W.2d 209, 211-12 (Tex. Civ. App.—Tyler 1976, no writ).

227. *See* TEX. R. CIV. P. 252; *see also* Ray v. Ray, 542 S.W.2d 209, 212 (Tex. Civ. App.—Tyler 1976, no writ).

228. J. C. Penney & Co. v. Duran, 479 S.W.2d 374, 380 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.); *see also* Fritsch v. J. M. English Truck Line, 151 Tex. 168, 170, 246 S.W.2d 856, 858 (1952); A. C. Swift & Sons Concrete Contractors, Inc. v. Sam Sanders, Inc., 405 S.W.2d 402, 403-04 (Tex. Civ. App.—Amarillo 1966, no writ).

three-month period after the other party had amended his pleadings.[229] Finally, if the court finds that the absent testimony could be provided by other witnesses or from other means, it is not an abuse of discretion to overrule the motion for continuance.[230]

2. Absence of a Witness

If the ground for continuance is the absence of a witness, the movant must state the name and residence of the witness, what the testimony of the witness will provide, that the testimony cannot be procured from another source, and that the continuance is not sought for delay only, but so that justice will be done.[231] However, the mere absence of a material witness does not entitle the movant to a continuance. The party must show not only reasonable excuse for the absence, but that the testimony is material and would be admissible under the pleadings.[232] In many instances the trial court is reluctant to grant a continuance if no attempt has been made to take the witnesses' depositions, and denials of motions on these grounds are generally upheld.[233] Rule 252, however, provides that the failure to obtain a deposition of any witness residing within one hundred miles of the courthouse in the county in which the suit is pending shall not be regarded as a want of diligence when diligence has otherwise been used to secure personal attendance of the witness at trial.[234]

3. Absence of Counsel

As a general rule, absence of counsel is not good cause for a continuance or postponement of a trial.[235] The court, however, in its discretion, can allow a continuance upon cause shown or "upon matters

229. *See* First Nat'l Bank of Amarillo v. Bauert, 622 S.W.2d 464, 469 (Tex. Civ. App.—Amarillo 1981, no writ).

230. *See* Jones v. Johns Community Hosp., 624 S.W.2d 330, 333 (Tex. Civ. App.—Waco 1981, no writ).

231. *See* TEX. R. CIV. P. 252.

232. *See* Brown v. Brown, 599 S.W.2d 135, 137 (Tex. Civ. App.—Corpus Christi 1980, no writ); Middleton v. Vaughn, 530 S.W.2d 925, 926 (Tex. Civ. App.—Waco 1975, no writ); Erback v. Donald, 170 S.W.2d 289, 291-92 (Tex. Civ. App.—Fort Worth 1943, writ ref'd n.r.e.).

233. *See* Jones v. Johns Community Hosp., 624 S.W.2d 330, 332 (Tex. Civ. App.—Waco 1981, no writ); *see also* Green v. State, 589 S.W.2d 160, 163 (Tex. Civ. App.—Tyler 1979, no writ).

234. *See* TEX. R. CIV. P. 252.

235. *See id.* 253; *see also* Gendebien v. Gendebien, 668 S.W.2d 905, 907-08 (Tex. App.—Houston [14th Dist.] 1984, no writ).

within the knowledge or information of the judge," both of which must be documented on the record.[236] As a result, it is important that any motion for continuance based on absence of counsel contain adequate verification of why the attorney cannot attend the trial. Almost all the cases reported on absence of counsel are cases in which continuances were denied. For example, it has been held not to be an abuse of discretion to deny a motion for continuance where the primary attorney has prepared the case, but only another attorney is available to try the case.[237] Furthermore, it is not an abuse of discretion for a court to overrule a motion for continuance where the attorney of record is unavailable to attend, but the attorney who appeared for the motion for continuance has adequate time to prepare for trial.[238] In any event, in determining whether the court abused its discretion in overruling a continuance, the appellate court is entitled to view the entire record to determine whether the party was adequately represented at trial.[239]

4. Attendance at Legislature

A mandatory continuance must issue for any attorney or party who is a member of the legislature and who will be or is in actual attendance at a session of the legislature.[240] The continuance must be granted at any time within thirty (30) days of the date when the legislature is to be in session.[241] However, if the grounds for the continuance is that an attorney is a member of the legislature, that attorney must file an affidavit containing a declaration that, "it is his intention to participate actively in the preparation and/or presentation of the

236. *See* TEX. R. CIV. P. 253.

237. *See* Manufactured Hous. Mgt. Corp. v. Tubb, 643 S.W.2d 483, 485-86 (Tex. App.—Waco 1982, writ ref'd n.r.e.); Lumbermen's Mut. Cas. v. Cummings, 618 S.W.2d 883, 885 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.).

238. *See* Dover Corp. v. Perez, 587 S.W.2d 761, 766 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

239. *See id.* at 766. While this rule makes good common sense, it can lead to a ridiculous result. If the substituted counsel believes the denial of the motion was an abuse of discretion, the best tactic seems to be to provide ineffective counsel. No serious lawyer would consider such a course of action.

240. *See* TEX. R. CIV. P. 254; *see also* TEX. REV. CIV. STAT. ANN. art. 2168a (Vernon Supp. 1985).

241. *See* TEX. R. CIV. P. 254; *see also* TEX. REV. CIV. STAT. ANN. art. 2168a (Vernon Supp. 1985).

case."[242] Article 2168a provides that the affidavit need not be corroborated, and the affidavit cannot be contested.[243] The continuance shall last until thirty (30) days after the adjournment of the legislature and cannot be charged against the party receiving the continuance on any subsequent application for continuance.[244] However, there are two exceptions to this mandatory continuance. Article 2168a provides that a continuance will not issue as a matter of right if it is shown that the attorney was employed within ten days of the setting date.[245] In that event, the continuance shall be discretionary with the court.[246] Additionally, the continuance may not issue in hearings on temporary restraining orders.[247]

I. *Discovery*

The purpose of discovery is to obtain the fullest knowledge of the facts and issues prior to trial, and as a result, the rules pertaining to discovery are liberally construed.[248] The trial court has great latitude in discovery, and its rulings will not be disturbed absent an abuse of discretion.[249] The same standard applies when the court enters orders for discovery abuse or failure to answer discovery.[250] The harmless

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242. *See* TEX. R. CIV. P. 254; *see also* TEX. REV. CIV. STAT. ANN. art. 2168a (Vernon Supp. 1985).

243. *See* TEX. REV. CIV. STAT. ANN. art. 2168a (Vernon Supp. 1985).

244. *See* TEX. R. CIV. P. 254; *see also* TEX. REV. CIV. STAT. ANN. art. 2168a (Vernon Supp. 1985).

245. *See* TEX. R. CIV. P. 254; *see also* TEX. REV. CIV. STAT. ANN. art. 2168a (Vernon Supp. 1985).

246. *See* TEX. R. CIV. P. 254; *see also* TEX. REV. CIV. STAT. ANN. art. 2168a (Vernon Supp. 1985).

247. *See* TEX. R. CIV. P. 254; *see also* TEX. REV. CIV. STAT. ANN. art. 2168a (Vernon Supp. 1985); Waites v. Sondock, 561 S.W.2d 772, 775 (Tex. 1977); Condovest Corp. v. John Street Bldg., Inc., 662 S.W.2d 138, 141 (Tex. App.—Austin 1983, no writ).

248. *See* West v. Solito, 563 S.W.2d 240, 243 (Tex. 1978) (except for privileged material, discovery aimed at fully informing both sides); Martinez v. Rutledge, 592 S.W.2d 398, 399 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (discovery allows parties to obtain information on case before trial). *See generally* Barrow & Henderson, *1984 Amendments to the Texas Rules of Civil Procedure Affecting Discovery,* 15 ST. MARY'S L.J. 713 (1984) (identification and interpretation of changes in rules); Comment, *Recent Changes in the Federal Rules of Civil Procedure: Prescriptions to Ease the Pain,* 15 TEX. TECH L. REV. 887, 895 (1984) (amendments to federal discovery rules aimed at reducing abuse).

249. *See* Martinez v. Rutledge, 592 S.W.2d 398, 399 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.); The Young Companies, Inc. v. Bayou Corp., 545 S.W.2d 901, 903 (Tex. Civ. App.—Beaumont 1977, no writ). *See generally* Sales, *Pre-Trial Discovery in Texas,* 31 SW. L.J. 1017 (1977) (general discussion of discovery and confusion arising from some of the rules).

250. *See* Jarrett v. Warhola, 695 S.W.2d 8, 9-10 (Tex. Civ. App.—Houston [14th Dist.]

error rule applies to all appeals of discovery orders, and the complainant must demonstrate that the court's order was calculated to, and probably did, cause rendition of an improper judgment.[251] A slightly different standard applies for writs of mandamus. Instead, a pure abuse of discretion is for Admissions

Rule 169 provides that request for admissions will be deemed admitted unless an answer is filed within thirty (30) days.[253] The deemed admission occurs without the necessity of a court order.[254] If the respondent seeks to avoid the harshness of this rule, it must apply to the court and show legal or equitable excuses to avoid the deemed

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1985, no writ) (court authorized to dismiss case when discovery orders were violated); *see also* Smithson v. Cessna Aircraft Co., 665 S.W.2d 439, 443 (Tex. 1984) (failure to impose sanctions for discovery violation not abuse of discretion); Buchmeyer, *Discovery Abuse and The Time Out Rule,* TEX. B.J. 276 (Feb. 1983) (discretion exemplified when judge creates new discovery rule). For a comprehensive discussion of discovery rules and sanctions, see Kilgarlin & Jackson, *Sanctions for Discovery Abuse Under New Rule 215,* 15 ST. MARY'S L.J. 767 (1984).

251. *See, e.g.,* Liberty Mut. Ins. Co. v. Woody, 640 S.W.2d 718, 721 (Tex. App.—Houston [1st Dist.] 1982, no writ) (trial court quashed taking of deposition — did not cause improper judgment); Sneed v. H. E. Butt Grocery Co., 569 S.W.2d 555, 557 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (trial court's judgment proper even though discovery was somewhat restrictive); Bounds v. Caudle, 549 S.W.2d 438, 444 (Tex. Civ. App.—Corpus Christi), *rev'd on other grounds,* 560 S.W.2d 925 (Tex. 1977) (party's request to discover names of witnesses was denied); *see also* TEX. R. CIV. P. 434 (trial court's decision will not be reversed unless error caused improper judgment).

252. *See* Peeples v. Fourth Court of Appeals, 29 Tex. Sup. Ct. J. 13, 14 (Oct. 19, 1985) (judge did not abuse discretion, therefore, court of appeals had no jurisdiction to issue writ of mandamus).

253. *See* TEX. R. CIV. P. 169; *see also* Overstreet v. Home Indem. Co., 669 S.W.2d 825, 828 (Tex. App.—Dallas) (request for admissions admitted when no answers were filed within stated time), *rev'd on other grounds,* 678 S.W.2d 916 (Tex. 1984). *See generally* Bush, *Rule 169: An Overview,* 44 TEX. B.J. 1049 (1981).

254. *See* Texas Employers' Ins. Ass'n v. Bragg, 670 S.W.2d 712, 715-16 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (insurer's answers were late and worker's request for admissions deemed admitted without motion); Packer v. First Texas Sav. Ass'n of Dallas, 567 S.W.2d 574, 575 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.) (party who failed to answer may file motion to request that admissions not be admitted, but party seeking admissions under no obligation to file motion to have them admitted).

admissions.[255] A deemed admission is generally considered a judicial admission that is binding on the answering party. However, it is discretionary with the court whether to allow the withdrawal or amendment of answers to a request for admissions.[256] The ruling of the trial court on such a motion will not be disturbed absent an abuse of discretion.[257] In order to preserve error for appeal when the court fails to grant a leave to file late answers to request for admissions, the complainant must have filed a motion to request permission to file answers and obtain a ruling thereon.[258] The motion should recite the reasons that the responses were not timely filed, and a copy of the proposed responses should be attached. Generally, if answers to requests for admissions are filed, but there is a defect in or an omission of the verification, the court should allow amendments after a proper motion.[259] Additionally, Rule 169 provides that the court may permit the withdrawal or amendment of an admission when the presentation of the merits will be served thereby.[260] The party seeking the amend-

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255. *See* Texas Employers' Ins. Ass'n v. Bragg, 670 S.W.2d 712, 715 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.); Mathes v. Kelton, 565 S.W.2d 78, 81 (Tex. Civ. App.—Amarillo 1977), *aff'd,* 569 S.W.2d 876 (Tex. 1978); Burnett v. Cory Corp., 352 S.W.2d 502, 506-07 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.).

256. *See* Reyes v. International Metals Supply Co., 666 S.W.2d 622, 624 (Tex. App.—Houston [1st Dist.] 1984, no writ) (courts generally allow amendments to answers when only problem is verification defect); Durrett v. Boger, 234 S.W.2d 898, 901 (Tex. Civ. App.—Texarkana 1950, no writ) (courts may enlarge time periods if extension requested before original time period had expired and where party requesting extension has good cause); *see also* TEX. R. CIV. P. 169. Subsection 2 of Rule 169 states in part: "[t]he court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits." *Id.* 169(2).

257. *See* Reyes v. International Metals Supply Co., 666 S.W.2d 622, 625 (Tex. App.—Houston [1st Dist.] 1984, no writ); Firestone Photographs v. Lamaster, 567 S.W.2d 273, 277 (Tex. Civ. App.—Texarkana 1978, no writ); *see also* Kilgarlin & Jackson, *Sanctions for Discovery Abuse Under New Rule 215,* 15 ST. MARY'S L.J. 767, 768-69 (1984) (imposition of discovery sanctions within trial court discretion); Comment, *Imposition and Selection of Sanctions in Texas Pretrial Discovery Procedure,* 31 BAYLOR L. REV. 191, 193 (1979) (trial court's sanctions for discovery abuse not reversible unless discretion is abused).

258. *See* Texas Employers' Ins. Ass'n v. Bragg, 670 S.W.2d 712, 715 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.); Mathes v. Kelton, 565 S.W.2d 78, 81 (Tex. Civ. App.—Amarillo 1977), *aff'd,* 569 S.W.2d 876 (Tex. 1978); Hill v. Caparino, 370 S.W.2d 760, 761 (Tex. Civ. App.—Houston 1963, no writ) (request for admissions deemed admitted and plaintiff's failure to file motion to permit late filing prevents him from complaining on appeal).

259. *See* Reyes v. International Metals Supply Co., 666 S.W.2d 622, 624-25 (Tex. App.—Houston [1st Dist.] 1984, no writ); *see also* TEX. R. CIV. P. 169(2). Subsection 2 contains the phrase "[t]he court *may* permit withdrawal or amendment. . . ." *Id.* 169(2) (emphasis added).

260. *See* TEX. R. CIV. P. 169(2).

ment or withdrawal must demonstrate that the requested action will not prejudice the party who obtained the admission.[261]

2. Experts

Rule 166 provides that the identity of an expert may be obtained if the expert is one who may be called as a witness.[262] Also, the subject matter on which the expert may testify, the opinions held, and the facts known to the expert are also discoverable.[263] Likewise, the same information must be disclosed even if the expert is used for consultation, if the work product of such expert forms any basis of the opinion of an expert who is called to testify.[264] In other words, to shelter an expert from discovery, a party must aver that the expert will not be used for testimony and will also not be used in the furtherance of another expert's opinion.[265] If a party is unsure whether an expert will be called at trial, that expert must be disclosed.[266] Due to the harshness of this rule, the decision as to the specific time to require a party to state that an expert will not be a witness is left to the sound discretion of the trial judge.[267] However, case law makes it clear that a party must be given a reasonable time to investigate the case so that an intelligent designation of experts may be made.[268] In any event,

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261. *See id.* 169(2).

262. *See id.* 166b(2)(e)(1).

263. *See id.* 166b(2)(e)(1).

264. *See id.* 166b(2)(e)(1); *see also* Barker v. Dunham, 551 S.W.2d 41, 44 (Tex. 1977). In *Barker,* the supreme court held that: "Where a party does not positively aver that the expert in question will be 'used solely for consultation' and will not be called as a witness. . . the policy of allowing broad discovery in civil cases is furthered by permitting discovery of that expert's reports, factual observations, and opinions." *Id.* at 44; *see also* Crowe v. Smith, 679 S.W.2d 22, 23 (Tex. App.—Houston [14th Dist.] 1983, no writ) (expert's opinion discoverable if he is not used solely for consultation or if it is possible he might testify).

265. *See* TEX. R. CIV. P. 166b(e)(1).

266. *See* Crowe v. Smith, 679 S.W.2d 22, 23 (Tex. App.—Houston [14th Dist.] 1983, no writ) (must be clear that witness will be used solely for consultation to justify withholding him from other side); *see also* TEX. R. CIV. P. 166b(e).

267. *See* Werner v. Miller, 579 S.W.2d 455, 456 (Tex. 1979) (trial judges have discretion because they are "in the best position to supervise the progress of the case"); *see also* Jones & Laughlin Steel, Inc. v. Schattman, 667 S.W.2d 352, 355 (Tex. App.—Fort Worth 1984, no writ) (trial court best to determine when parties have had enough time to investigate the case and decide on experts).

268. *See* Werner v. Miller, 579 S.W.2d 455, 456 (Tex. 1979). If parties were forced to designate experts before they had time to thoroughly investigate, the chances of furnishing expert witnesses and adverse theories to the other side would greatly increase. *See id.* at 456. Further, it would not be fair to allow one side to benefit from the other side's thorough preparation. *See id.* at 456; *see also* Jones & Laughlin Steel, Inc. v. Schattman, 667 S.W.2d 352, 354-

the designation of the expert must occur not less than thirty (30) days prior to the beginning of the trial except on leave of the court.[269] Therefore, if a proper request for designation of experts has been made, and no response made as to a particular expert, the expert will not be permitted to testify unless the proponent obtains leave of the court and demonstrates good cause for allowing the testimony.[270] The term "good cause" is not defined in the rules and is decided on a case-by-case basis.[271]

In these expert disclosure situations, it is important that the respondent properly protect the record. If the basis for the objection to the undisclosed testimony is surprise, the respondent should move for a continuance.[272] In *Smithson v. Cessna Aircraft,*[273] the supreme court held, "the failure to present a motion to continue or postpone the trial severely undermines the assertion that the trial court abused its discretion [in allowing an undisclosed expert to testify]."[274] The current case law gives the trial court great discretion in whether to exclude or allow expert testimony when the Rule 166 designated rules have not been followed.[275] As a result, "an inconsistent body of law has developed as to when to permit such testimony [of the nondesignated ex-

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56 (Tex. App.—Fort Worth 1984, no writ). In *Schattman,* the defendant was not forced to designate an employee as a consultant or an expert until one year after defendant had plaintiff expert's report. *See id.* at 355. The court held this was a reasonable time to investigate the case and designate experts. *See id.* at 355.

269. *See* TEX. R. CIV. P. 166b(5).

270. *See id.* 166b(5), 215(5).

271. *See* Texas Employers Ins. Ass'n v. Garza, 675 S.W.2d 245, 249 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (court permitted expert to testify even though other side was not informed until five days before trial); *see also* National Sav. Corp. v. Rushing, 628 S.W.2d 90, 92-94 (Tex. App.—Beaumont 1981, no writ) (expert allowed to testify even though adverse party was not informed until voir dire). *See generally* Kilgarlin, *What To Do With The Unidentified Expert?* 48 TEX B.J. 1192, 1194-96 (1985) (discussing several cases finding good cause).

272. *See, e.g.,* Smithson v. Cessna Aircraft Co., 665 S.W.2d 439, 443 (Tex. 1984) (when expert's identity was revealed during trial, trial court did not abuse discretion by allowing expert to testify when appellant failed to ask for a continuance); Texas Employers Ins. Ass'n v. Garza, 675 S.W.2d 245, 249 (Tex. Civ. App.—Corpus Christi 1984, writ ref'd n.r.e.) (party claiming ambush or surprise because of newly identified expert can always ask for continuance); National Sur. Corp. v. Rushing, 628 S.W.2d 90, 91-92 (Tex. App.—Beaumont 1981, no writ) (appellant's refusal of court's offer to recess to depose new expert and failure to ask for continuance prevented him from complaining on appeal).

273. 665 S.W.2d 439, 443 (Tex. 1984).

274. *Id.* at 443.

275. *See* Kilgarlin, *What To Do With The Unidentified Expert?* 48 TEX. B.J. 1192 (1985).

pert]."[276] The best discussion of this dilemma is Justice Kilgarlin's recent Texas Bar Journal article entitled "What To Do With An Unidentified Expert."[277] Recently the supreme court had an opportunity to provide specific guidelines for allowing testimony by non-designated witnesses. The court however avoided any thorough analysis of disclosure requirements since the proponent of the witness failed to show good cause under Rule 168(7).[278]

3. Protecting Claims of Privilege and other Exemptions from Discovery

Rule 166d(3) provides the categories that are exempt from discovery.[279] The burden of justifying an exemption is on the party claiming that exemption.[280] In *Peeples v. Fourth Court of Appeals,*[281] the supreme court stated that when a party seeks to exclude documents or any other evidence in the discovery process, it has the affirmative duty to follow several specific guidelines. First, it must plead the particular privilege or immunity claimed.[282] Second, it must request a hearing on the motion.[283] Third, the trial court must determine whether an in camera inspection of the material is necessary.[284] If an in camera inspection is necessary, the party must segregate the materials for which the privilege or immunity is sought from the other non-privileged information.[285] Failure to follow any of these steps constitutes a waiver

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276. *Id.* at 1192.

277. *Id.* at 1192.

278. *See* Yeldell v. Holiday Hills Retirement and Nursing Center, Inc., 29 Tex. Sup. Ct. J. 103, 104 (Dec. 14, 1985). This case dealt with the failure to disclose a fact witness. The record indicated the proponent of the witness failed to list her in a response to timely filed interrogatories. Thereafter, the proponent learned of the witness' existence well before trial; but, still refused to designate her as a witness. The court found that the record lacked any evidence of good cause for this failure to designate the potential witness. As a result, she was not allowed to testify. *See id.* at 104-05.

279. *See* TEX. R. CIV. P. 166b(3). The categories exempt from discovery include: (1) an attorney's work product; (2) written statements of parties and potential witnesses; (3) experts' opinions when he will not testify; (4) experts' documents if they will not help form a basis for a testifying expert's opinion; (5) any communication after filing of suit between parties, representatives, agents, and employees when it pertains to the case; and (6) anything protected by privilege. *See id.* 166b(3).

280. *See* Peeples v. Fourth Court of Appeals, 29 Tex. Sup. Ct. J. 13 (Oct. 16, 1985).

281. 29 Tex. Sup. Ct. J. 13 (Oct. 16, 1985).

282. *See id.* at 14.

283. *See id.* at 14.

284. *See id.* at 14.

285. *See id.* at 14.

of any complaint of the trial court's action on appeal.[286]

4. Mandamus

Since the landmark case of *Crane v. Tunks,*[287] discovery matters have been reviewable by writ of mandamus rather than a regular appeal of a final judgment.[288] The reason for mandamus is clear. In many cases, awaiting a trial on the merits on appeal would render any discovery order academic.[289] As a result, the shorter mandamus procedure is preferable.[290]

The standard of review on mandamus is a confusing one. An order of mandamus will not issue to control the trial court's discretion;[291] however, a writ of mandamus will issue to correct an abuse of discretion.[292] Mandamus became a frequently used tool when in 1983, the legislature granted the courts of appeal full power to grant writs of mandamus.[293] This amendment radically changed mandamus prac-

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286. *See id.* at 14. However, this decision should be read with the original opinion in the case. *See* Peeples v. Fourth Court of Appeals, 28 Tex. Sup. Ct. J. 539 (July 3, 1985), *opinion withdrawn,* 29 Tex. Sup. Ct. J. 13 (Oct. 16, 1985). In that opinion, Justice Wallace included another procedural step which required the party requesting the discovery to produce all the material for which a privilege was claimed to the court and request an in camera inspection. The supreme court was wise to withdraw the original opinion. Under the first opinion, the trial court was required to review the alleged privileged documents in camera on each discovery dispute. The result would have been backlogged courts and the review of copied records. This author believes that the new procedure is workable and easy to follow.

287. 160 Tex. 182, 328 S.W.2d 434 (Tex. 1959).

288. *See id.* at 184, 328 S.W.2d at 437. Actually, another case, *Barker v. Dunham,* 515 S.W.2d 41 (Tex. 1977), allowed this practice in later years. In both cases, the supreme court ruled that while the district court's order was not appealable, delay would make the issue "academic," and any objections would be moot; therefore, mandamus would lie.

289. *See generally* Sales & Cliff, *Jurisdiction in the Texas Supreme Court and Courts of Civil Appeals,* 26 BAYLOR L. REV. 501, 523 (1974) (discussion of court's jurisdiction in reference to writ of mandamus); Comment, *The Expanding Use of Mandamus to Review Texas District Court Discovery Orders: An Immediate Appeal is Available,* 32 SW. L.J. 1283 (1978-79) (general discussion of mandamus and Texas supreme court expanded authority to issue writs).

290. *See* Barker v. Dunham, 551 S.W.2d 41 (Tex. 1977); *see also* Melton v. Lattimore, 667 S.W.2d 335, 338 (Tex. App.—Fort Worth 1984, no writ).

291. *See* TEX. GOVT. CODE ANN. §§ 22.002, 22.221 (Vernon 1986).

292. *See, e.g.,* Barker v. Dunham, 551 S.W.2d 41, 42-43 (Tex. 1977) (while general rule is recognized, question here was whether discretion was abused); Houdrille Indus., Inc. v. Cunningham, 502 S.W.2d 544, 546 (Tex. 1973) (supreme court can grant relief in writ of mandamus when trial judge went beyond authority); Maresca v. Marks, 362 S.W.2d 299, 301 (Tex. 1962) (discretion abused when complete income tax returns ordered discovered).

293. *See* TEX. GOVT. CODE ANN. § 22.221 (Vernon 1986) (courts of appeal have authority to issue writs of mandamus against any county or district court judge); *see also* Jones v. Laughlin Steel, Inc. v. Schattman, 667 S.W.2d 352, 354 (Tex. App.—Fort Worth 1984, no

tice in Texas, and although not required by the rules, the supreme court generally requires that any writs of mandamus on discovery matters be first directed to the courts of appeal.[294] In fact, motions for leave to file a writ of mandamus in the supreme court must state the date the motion was first presented to the court of appeals or a compelling reason why the motion was not first presented to the court of appeals.[295] Nonetheless, the supreme court maintains the right to grant a writ of mandamus without hearing or argument where the action or order of the respondent is contrary to the Texas Constitution, statutes, rules, or is in conflict with a previous opinion of the supreme court.[296]

J. *Summary Judgment*

The purpose of a motion for summary judgment is to permit either party to obtain a prompt disposition of a case involving "unmeritorious claims or untenable defenses," without the necessity of a complete trial.[297] Although the summary judgment procedure has been a part of the rules of procedure for years, it fell into disuse because of frequent reversals of summary judgments by appellate courts.[298] As a result, the supreme court amended Rule 166-A in 1978 to ensure that more cases were disposed of in a summary procedure.[299] Nevertheless, appellate courts still reverse summary judgments with alarming

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writ) (writ of mandamus proper for appellate court to issue when trial court clearly abuses discretion in discovery proceedings); Menton v. Lattimore, 667 S.W.2d 335, 338 (Tex. App.—Fort Worth 1984, no writ) (appellate courts have jurisdiction to issue writs of mandamus).

294. *See* Jones & Laughlin Steel, Inc. v. Schattman, 667 S.W.2d 352, 354 (Tex. App.—Fort Worth 1984, no writ); *see also* Menton v. Lattimore, 667 S.W.2d 335, 338 (Tex. App.—Fort Worth 1984, no writ).

295. *See* Zenith Radio Corp. v. Clark, 665 S.W.2d 804, 807 (Tex. App.—Austin 1983, no writ) (supreme court will generally not accept mandamus prior to appellate court); *see also* TEX. R. CIV. P. 474 (when an appellate court has concurrent jurisdiction with supreme court over original proceedings, motions should be filed with lower courts first).

296. *See* Lindsey v. O'Neill, 689 S.W.2d 400, 402-03 (Tex. 1985); Griffin v. Smith, 688 S.W.2d 112, 113 (Tex. 1985); *see also* TEX. R. CIV. P. 483.

297. *See, e.g., In re* Price's Estate, 375 S.W.2d 900, 904 (Tex. 1964); Gulberkian v. Penn, 151 Tex. 412, 415, 252 S.W.2d 929, 931 (Tex. 1952); Webb v. Eledge, 678 S.W.2d 259, 261 (Tex. App.—Amarillo 1984, no writ).

298. *See* Sheehan, *Summary Judgments: Let Movant Beware,* 8 ST. MARY'S L.J. 253, 254 (1976). According to Mr. Sheehan's research, during the eight year period from 1968-1976, the Texas Supreme Court granted writs of error in 97 cases where the trial court had entered a summary judgment. *See id.* at 254. Over seventy percent of these summary judgments were eventually overturned by the court as improperly granted. *See id.* at 254.

299. *See* TEX. R. CIV. P. 166-A. For a good discussion of the rule changes and their

frequency. Many of the reversals can be attributed to the fact that the records are not protected or the motions and evidence were badly handled.[300] A few precautions will increase the odds of successful motions for summary judgments.

1. Requisites of Motion

The motion for summary judgment must state the specific grounds upon which judgment is sought.[301] The grounds are sufficiently specific if the motion gives "fair notice" to the respondent.[302] The grounds relied upon must entitle the movant to judgment as a matter of law.[303] However, the mere fact that the motion is uncontrovered does not carry this burden; as even uncontroverted evidence may raise a fact issue.[304] Rule 166-A provides that a motion may be filed, "at any time after the adverse party has appeared or answered."[305] While most cases involve a formal answer, some actions that fall short may be deemed an appearance, and a motion for summary judgment is appropriate thereafter.[306] Furthermore, a defendant may move for a

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intended effect, see *City of Houston v. Clear Creek Basin Authority,* 589 S.W.2d 671 (Tex. 1979).

300. *Cf.* Gellis, *Reasons for Case Reversal in Texas: An Analysis,* 16 ST. MARY'S L.J. 299, 308-310 & Chart A (1985).

301. *See* TEX. R. CIV. P. 166-A; *see also* Rutherford v. Whataburger, 601 S.W.2d 441, 443 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.) (summary judgment not sustainable on ground not set forth in motion). *But see* Albritton v. Henry S. Miller Co., 608 S.W.2d 693, 695 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.) (issues "expressly presented" by all evidence presented to and considered by the court in summary judgment motion; issues need not be set forth specifically in motion).

302. *See* Thomas v. Cisneros, 596 S.W.2d 313, 316 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.). However, if the respondent does not complain of the lack of specificity in a written response, the ground is waived on appeal. *See* Westchester Fire Ins. Co. v. Alvarez, 576 S.W.2d 771, 773 (Tex. 1978); Silva v. Wilson, 617 S.W.2d 320, 321 (Tex. Civ. App.—Austin 1981, no writ); Jones v. McSpadden, 560 S.W.2d 177, 179 (Tex. Civ. App.—Dallas 1977, no writ).

303. *See* Gibbs v. General Motors Corp., 450 S.W.2d 827, 828 (Tex. 1970); Davis v. Houston Indep. School Dist., 654 S.W.2d 818, 820 (Tex. App.—Houston [14th Dist.] 1983, no writ); Texas Bank & Trust v. Lone Star Life Ins. Co., 565 S.W.2d 353, 357 (Tex. Civ. App.—Tyler 1978, no writ).

304. *See* TEX. R. CIV. P. 166-A.

305. *See* Troth v. City of Dallas, 667 S.W.2d 152, 155 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

306. *See supra* Section I.2. on special appearances for examples of what type of conduct can be considered an appearance. Coversely, the actual filing of a motion for summary judgment by the defendant personally constitutes an appearance. *See* 4 R. MCDONALD, TEXAS CIVIL PRACTICE § 17.26.4, at 169 (rev. ed. 1981).

summary judgment on a counterclaim at any time even when no answer or other formal reply has been filed, provided the plaintiff has appeared on the claim.[307] Other than the previously mentioned specificity requirement, Rule 166-A does not demand any additional requisites in the formal motion.[308] Indeed, the motion itself need not be verified.[309] Affidavits and other summary judgment proof, however, must survive strict scrutiny, and not only must be verified, but must contain averments that would be admissible into evidence.[310]

2. *Affidavits and Summary Judgment Proof*

A whole body of rules of procedure and common law have developed surrounding the use of affidavits and other summary judgment proof. Rule 166-A(e) provides that "the supporting and opposing affidavits shall be made on personal knowledge, and shall set forth such facts as would be admissible into evidence."[311] The affidavit should also show that the affiant is competent to testify.[312] In other words, the face of the affidavit should demonstrate that the affiant has no competency problems.[313] For example, if expert testimony is used, an adequate predicate of qualification should be included in the affidavit.

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307. *See* TEX. R. CIV. P. 166-A(a); Brown v. Owens, 663 S.W.2d 30, 34 (Tex. App.—Houston [14th Dist.] 1983), *aff'd in part & rev'd in part on other grounds*, 674 S.W.2d 748 (Tex. 1984); Perry v. Great S. Life Ins. Co., 492 S.W.2d 352, 354 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ).

308. *See* TEX. R. CIV. P. 166-A(b); 4 R. MCDONALD, TEXAS CIVIL PRACTICE § 17.26.4, at 169 (rev. ed. 1981).

309. *See* TEX. R. CIV. P. 166-A(e).

310. *See* Shead v. Grissett, 566 S.W.2d 318, 320 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ dism'd); Statford v. Smith, 458 S.W.2d 217, 221 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ); Perry v. Little, 377 S.W.2d 765, 768 (Tex. Civ. App.—Tyler 1964, writ ref'd n.r.e.). In fact, many motions for summary judgments cannot be verified (such as motions based on statutes of limitations, as they rely on allegations in the respondent's pleadings).

311. *See* TEX. R. CIV. P. 166-A(e); *see also* Jackson T. Fulgham Co., Inc. v. Stewart Title Guar. Co., 649 S.W.2d 128, 130 (Tex. App.—Dallas 1983, writ ref'd n.r.e.); A & S Elec. Contractors, Inc. v. Fischer, 622 S.W.2d 601, 603 (Tex. Civ. App.—Tyler 1981, no writ); Moya v. O'Brien, 618 S.W.2d 890, 893 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

312. *See* TEX. R. CIV. P. 166-A(e); *see also* Land Liquidators of Texas, Inc. v. Houston Post Co., 630 S.W.2d 713, 714-15 (Tex. App.—Houston [14th Dist.] 1982, no writ); Barnham v. Sugar Creek Nat'l Bank, 612 S.W.2d 78, 79-80 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); Tabor v. Medical Center Bank, 534 S.W.2d 199, 200 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ) (if affiant's credibility is in issue summary judgment improper).

313. *See* Box v. Bates, 162 Tex. 184, 188, 346 S.W.2d 317, 319 (Tex. 1961); Diggs v. Enterprise Life Ins. Co., 646 S.W.2d 573, 575 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.); West Coast Mining, Inc. v. National Bank of Lubbock, 442 S.W.2d 821, 822 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.).

Likewise, the face of the affidavit should demonstrate that testimony is given on personal knowledge.[314] It is not enough to merely allege that the affidavit is based on "personal knowledge."[315] Instead, the affidavit must state how the affiant came to have personal knowledge of the facts.[316] For example, in a suit over a promissory note, it is sufficient for the affidavit to reflect that the affiant is an officer of the plaintiff company and as a result knew the facts stated in the affidavit because of his position within the company.[317]

Affidavits should also include specific identifiable facts.[318] The best standard for the required specificity is whether the averments are direct and unequivocal and whether perjury could be assigned if the facts prove to be incorrect.[319] Legal conclusions are not competent evidence, and will not support a summary judgment even if no objection is raised.[320]

The facts stated must be recited in a manner which would be admissible at the trial of the cause.[321] In fact, the best way to prepare affidavits is in "substantially the same form as though the affiant were

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314. *See* Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex. 1984). Those affidavits which are based on other standards such as best knowledge and belief or upon information and belief are insufficient. *See* Wells Fargo Constr. v. Bank of Woodlake, 645 S.W.2d 913, 914 (Tex. App.—Tyler 1983, no writ); Land Liquidators of Texas, Inc. v. Houston Post Co., 630 S.W.2d 713, 714-15 (Tex. App.—Houston [14th Dist.] 1982, no writ); Hagar v. Texas Distribs., Inc., 560 S.W.2d 773, 775 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.); *see also* Schultz v. City of Houston, 551 S.W.2d 494, 496 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ).

315. *See* Sparks v. Cameron Employees Credit Union, 678 S.W.2d 600, 602-03 (Tex. App.—Houston [14th Dist.] 1984, no writ); Jackson T. Fulgham Co. v. Stewart Title Co., 649 S.W.2d 128, 130 (Tex. App.—Dallas 1983, no writ); A & S Elec. Cont., Inc. v. Fisher, 622 S.W.2d 601, 603 (Tex. App.—Tyler 1981, no writ).

316. *See* Jackson T. Fulgham Co. v. Stewart Title Co., 649 S.W.2d 128, 130 (Tex. App.—Dallas 1983, no writ).

317. *See id.* at 130.

318. *See* Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex. 1984); *see also* TEX. R. CIV. P. 166-A(e).

319. *See* Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex. 1984); Burke v. Satterfield, 525 S.W.2d 950, 954-55 (Tex. 1975); Dixon v. Mayfield Bldg. Supply Co., Inc., 543 S.W.2d 5, 7-8 (Tex. Civ. App.—Fort Worth 1976, no writ); *see also* TEX. R. CIV. P. 166-A(g).

320. *See* Mercer v. Daoron Corp., 676 S.W.2d 580, 583 (Tex. 1984); Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex. 1984); Swiderski v. Prudential Property and Cas. Ins. Co., 672 S.W.2d 264, 268 (Tex. App.—Corpus Christi 1984, no writ). In *Mercer,* the supreme court emphatically stated the rule, "[a] legal conclusion in an affidavit is insufficient to raise an issue of fact in response to a motion for summary judgment or to establish the existence of a fact in support of a motion for summary judgment." Mercer v. Daoron Corp., 676 S.W.2d 580, 583 (Tex. 1984).

321. *See* Clark v. Dedina, 658 S.W.2d 293, 297 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd); *see also* TEX. R. CIV. P. 166-A(e).

giving testimony in court."[322] As a result, evidence outside the affidavit must be introduced through the affidavit (generally by attachment and acknowledgment) or by other summary judgment proof. Likewise, affidavits attached to the pleadings are not summary judgment proof, and may not be considered by the court without other predicate.[323]

In 1984 the supreme court expanded Rule 166-A to allow not only the answers to discovery as summary judgment proof, but also to allow the consideration of stipulations of the parties and certified public records.[324] Therefore, it is increasingly important to remember that all summary judgment proof must be filed with the court and made part of the record so that it may be considered by both the trial court and the reviewing appellate court.[325] If the summary judgment proof is not filed and included in the record, it may not be considered by a court in either upholding or overruling the motion.

3. Response to Motion

In 1978, the supreme court radically changed Rule 166-A(c) and added important language which states in part, "[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal."[326] At the same time, the court amended section (e) of Rule 166-A to provide, "[d]efects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend."[327] A year later in 1979, the supreme court in the case of *City of Houston v. Clear*

322. *See* 4 R. McDONALD, TEXAS CIVIL PRACTICE § 17.26.5, at 173 (rev. ed. 1981).

323. *See* Hidalgo v. Surety Sav. and Loan Ass'n, 462 S.W.2d 540, 545 (Tex. 1971); Faour v. Koenig, 662 S.W.2d 751, 751 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.); Sugarland Bus. Center, Ltd. v. Norman, 624 S.W.2d 639, 642 (Tex. App.—Houston [14th Dist.] 1981, no writ). By the same token, the pleadings themselves are not summary judgment proof even when sworn. *See* Hidalgo v. Surety Sav. and Loan Ass'n, 462 S.W.2d 540, 545 (Tex. 1971); *see also* Menchaca v. Menchaca, 679 S.W.2d 176, 178 (Tex. App.—El Paso 1984, no writ).

324. *See* TEX. R. CIV. P. 166-A(c); *see also id.* comments.

325. *See* Clark v. Dedina, 658 S.W.2d 293, 297 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd); Khalaf v. United Bus. Inv., Inc., 615 S.W.2d 869, 871 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ); Texas Employers' Ins. Ass'n v. Second Injury Fund, 584 S.W.2d 526, 528 (Tex. Civ. App.—Beaumont 1979, no writ).

326. TEX. R. CIV. P. 166-A(c).

327. *Id.* 166-A(e).

Creek Basin Authority[328] was given an opportunity to explain the impact of these amendments on summary judgment practice and to emphasize the absolute necessity for a response to a motion for summary judgment. In *Clear Creek Basin,* the court, reviewing its amendments to Rule 166-A, held that if the respondent fails to make a written response to the motion for summary judgment, any grounds that could have been alleged by the respondent are waived on appeal.[329] As a result, if no response to the motion is filed, the only issue for appeal is whether the movant's grounds and proof are sufficient as a matter of law.[330] Any other grounds for avoidance of a summary judgment are waived, even grounds that the statute supporting the movant's claim is unconstitutional.[331] However, some caution must be used in interpreting *Clear Creek Basin.* It is still clear that the movant must carry the burden of proof to demonstrate that no fact issues exist.[332] In reviewing the legal sufficiency of the evidence, the courts are still free to eliminate evidence that is incompetent and which will not support a judgment.[333] For example, legal conclusions will not support a judgment, and any summary judgments based thereon are void.[334] Even so, the rules of evidence provide that hearsay, admitted without objection, will not be denied probative value.[335] As a result, hearsay admitted without objection will support a summary judgment.

The response must raise every reason the respondent wishes to set forth for the denial of the summary judgment; otherwise, those rea-

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328. 589 S.W.2d 671 (Tex. 1979).

329. *See id.* at 676; *see also* Borown v. Owens, 674 S.W.2d 748, 751 (Tex. 1984).

330. *See* Nutchey v. Three R's Trucking Co., 674 S.W.2d 928, 929-30 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.); *see also* Burnett v. Houston Nat'l Gas Co., 617 S.W.2d 305, 306 (Tex. Civ. App.—El Paso 1981, writ ref'd n.r.e.). *See generally* Hittner, *Summary Judgments in Texas,* 35 BAYLOR L. REV. 207, 229-30 (1983).

331. *See* Barrera v. Farmer's Texas County Mut. Ins. Co., 643 S.W.2d 444, 446-47 (Tex. App.—Corpus Christi 1982, no writ); *accord* City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979).

332. *See* Cotton v. Ratholes, Inc., 29 Tex. Sup. Ct. J. 15, 15 (Oct. 16, 1985); Fantastic Homes v. Combs, 596 S.W.2d 502, 502 (Tex. 1979); Fisher v. Capp, 597 S.W.2d 393, 396 (Tex. Civ. App.—Amarillo 1980, no writ).

333. *See* Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex. 1984).

334. *See* Mercer v. Daoran, 676 S.W.2d 580, 583 (Tex. 1984); Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex. 1984); Swiderski v. Prudential Property & Cas. Ins. Co., 672 S.W.2d 264, 268 (Tex. App.—Corpus Christi 1984, writ dism'd).

335. *See* TEX. R. EVID. 802.

sons may not be raised on appeal.[336] While the rule does not state the specificity required in the response, common sense would dictate that the "fair notice" standard required in the motion for summary judgment itself would be appropriate. Furthermore, objections must be made to any summary judgment proof which is not admissible and to the form of the proof itself.[337] It is clear that an amended answer, although alleging new facts and causes of action, will not suffice as a response to a motion for summary judgment.[338]

4. Time Periods

Rule 166-A includes its own time periods, the violation of which can result in the waiver of valuable rights. For example, the motion and affidavits of the movant must be filed and delivered at least twenty-one (21) days before the hearing.[339] This rule is absolute, and unless leave of court is obtained with notice given to other parties, its violation may void a motion for summary judgment.[340] However, if the respondent appears at the hearing and does not file a response or a Rule 166-A(f) affidavit, this complaint is waived on appeal.[341] The respondent must file its affidavits and written response not later than seven (7) days before the hearing.[342] The court, upon a proper motion, may, however, allow a late filing.[343] This is a discretionary ruling, and will not be disturbed on appeal absent a clear showing of an abuse of discretion.[344] Conversely, the trial court is not required to consider an untimely filed response or affidavit, regardless of whether

336. *See* TEX. R. CIV. P. 166-A(c).

337. *See id.* 166-A(e).

338. *See* Meineke Discount Muffler Shops, Inc. v. Caldwell Banker Property Mgt. Co., 635 S.W.2d 135, 137 (Tex. App.—Houston [1st Dist.] 1982, no writ); *see also* City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 677-78 (Tex. 1979).

339. *See* TEX. R. CIV. P. 166-A(c).

340. *See* Chandler v. Escobar, 604 S.W.2d 524, 526 (Tex. Civ. App.—El Paso 1980, no writ); *see also* TEX. R. CIV. P. 166-A(f).

341. *See* Delta Petroleum & Energy Corp. v. Houston Fishing Tools Co., 670 S.W.2d 295, 296 (Tex. App.—Houston [1st Dist.] 1983, no writ); Chandler v. Escobar, 604 S.W.2d 524, 526 (Tex. Civ. App.—El Paso 1980, no writ); Lofthus v. State, 572 S.W.2d 799, 800 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.).

342. *See* TEX. R. CIV. P. 166-A(c).

343. *See id.* 166-A(c).

344. *See* Yates v. Equitable Gen. Ins. Co. of Texas, 672 S.W.2d 822, 827 (Tex. App.—Houston [1st Dist.] 1984), *aff'd*, 684 S.W.2d 669 (Tex. 1985); Rhodes v. City of Austin, 584 S.W.2d 917, 921-22 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.); Ervin v. Gerber Life Ins. Co., 566 S.W.2d 45, 46 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.).

a motion to strike is made.[345]

5. Appeal and Standard of Review

An order granting a motion for summary judgment results in a final appealable judgment unless the judgment is a partial summary judgment.[346] Conversely, an order denying a motion for summary judgment is not appealable.[347] The only exception to this rule is when both parties have filed motions for summary judgment, and one is granted.[348] If this occurs, the losing party may appeal the denial of its motion as well as contesting the granting of the opponent's motion.[349]

In seeking the reversal of a summary judgment, the proper point of error is, "[t]he trial court erred in granting the motion for summary judgment."[350] Naturally, there may be several subparts to the point of error directing the court's attention to certain specific errors of concern. The classic questions on appeal are the same questions raised in the trial court — whether there is a disputed issue of material fact, and whether the movant is entitled to judgment as a matter of law.[351] In deciding these questions, the evidence and all inferences therefrom are viewed in a light favorable to the non-movant.[352] Additionally, any attempt of the trial court to file findings of fact to bolster the

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345. *See* Small v. Harper, 638 S.W.2d 24, 28 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.); *see also* Metze v. Eatman, 584 S.W.2d 512, 515 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

346. *See* Teer v. Duddlesten, 664 S.W.2d 702, 703-04 (Tex. 1984); Schlipf v. Exxon Corp., 644 S.W.2d 453, 454 (Tex. 1982); Novak v. Stevens, 596 S.W.2d 848, 849-50 (Tex. 1980).

347. *See* Teer v. Duddlesten, 664 S.W.2d 702, 703-04 (Tex. 1984); Schlipf v. Exxon Corp., 644 S.W.2d 453, 454 (Tex. 1982); Novak v. Stevens, 596 S.W.2d 848, 849-50 (Tex. 1980).

348. *See* TEX. R. CIV. P. 166-A.

349. *See* Teledyne Isotopes, Inc. v. Bravenec, 640 S.W.2d 387, 389 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.); Crystal City Indep. School Dist. v. Crawford, 612 S.W.2d 73, 74 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.); Texaco Inc. v. Great S. Life Ins. Co., 590 S.W.2d 522, 524 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

350. *See* Malooly Bros., Inc. v. Napier, 461 S.W.2d 119, 121 (Tex. 1970); *see also* Jackson T. Fulgham Co. v. Stewart Title Guar. Co., 649 S.W.2d 128, 129 (Tex. App.—Dallas 1983, no writ).

351. *See* Gibbs v. Gen. Motors Corp., 450 S.W.2d 827, 828 (Tex. 1970); Prestegord v. Glenn, 441 S.W.2d 185, 187 (Tex. 1969); General Specialties, Inc. v. Charter Nat'l Bank-Houston, 687 S.W.2d 772, 774 (Tex. App.—Houston [14th Dist.] 1985, no writ).

352. *See* Wilcox v. St. Mary's Univ. of San Antonio, 531 S.W.2d 589, 592-93 (Tex. 1975); *see also* General Specialties, Inc. v. Charter Nat'l Bank-Houston, 687 S.W.2d 772, 774 (Tex. App.—Houston [14th Dist.] 1985, no writ).

judgment is improper and should be ignored by the appellate court.[353] The practitioner should keep in mind that the courts of Texas continue to look upon summary judgments as a harsh remedy, and are reluctant to deny a party its day in court.[354] As a result, summary judgments are upheld only when the movant clearly establishes a right thereto as a matter of law.[355]

K. *Right to Trial by Jury*

The right to trial by jury is almost absolute in civil cases.[356] Even so, the right can be waived if the provisions of Rule 216 are not strictly followed.[357] Rule 216 provides that there shall be no trial by jury unless a jury is timely requested and a jury fee paid in advance of the trial date.[358]

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353. *See* Cotton v. Ratholes, Inc., 29 Tex. Sup. Ct. J. 15, 15 (Oct. 16, 1985).

354. *See, e.g.,* Wilcox v. St. Mary's Univ. of San Antonio, 531 S.W.2d 589, 593 (Tex. 1975); Gulbendien v. Penn, 252 S.W.2d 929, 931 (Tex. 1952); General Specialties, Inc. v. Charter Nat'l Bank-Houston, 687 S.W.2d 772, 774 (Tex. App.—Houston [14th Dist.] 1985, no writ).

355. *See* Wilcox v. St. Mary's Univ. of San Antonio, 531 S.W.2d 589, 592-93 (Tex. 1975); *see also* Gibbs v. General Motors Corp., 450 S.W.2d 827, 828 (Tex. 1970); TEX. R. CIV. P. 166-A(c).

356. *See, e.g.,* Harkless v. Sweeny Indep. School Dist., 278 F. Supp. 632, 635 (S.D. Tex. 1968) (should only deny trial before jury with great caution), *rev'd on other grounds,* 427 F.2d 319 (5th Cir. 1970), *cert. denied,* 400 U.S. 991 (1971); Jones v. Jones, 592 S.W.2d 19, 19 (Tex. Civ. App.—Beaumont 1979, no writ) (right of trial by jury is valuable right to be guarded jealously by state courts); Rayson v. Johns, 524 S.W.2d 380, 382 (Tex. Civ. App.—Texarkana 1975, writ ref'd n.r.e.) (right to jury trial is valuable and should be jealously guarded); *see also* TEX. CONST. art. 1, § 15; Silver v. Shefman, 287 S.W.2d 316, 319 (Tex. Civ. App.—Austin 1956, writ ref'd n.r.e.) (right to trial before jury is sacred right).

357. *See, e.g.,* Huddle v. Huddle, 696 S.W.2d 895, 895 (Tex. 1985) (request which is not timely can waive right to jury); Gaines v. Gaines, 677 S.W.2d 727, 729 (Tex. App.—Corpus Christi 1984, no writ) (although Texas Constitution states right to trial by jury to be inviolate, this right is not absolute in civil cases); Coleman v. Sadler, 608 S.W.2d 344, 346 (Tex. Civ. App.—Amarillo 1980, no writ) (even though state constitution maintains that right to trial by jury remains inviolate, in civil cases this right is not absolute); *see also* Henderson v. Youngblood, 512 S.W.2d 35, 36-37 (Tex. Civ. App.—El Paso 1974, no writ) (right to trial by jury depends on procedural requisites and is not absolute in civil cases); Mackay v. Charles W. Sexton Co., 469 S.W.2d 441, 445 (Tex. Civ. App.—Dallas 1971, no writ) (right to trial before jury is subject to procedural requirements and, thus, is not absolute in civil cases); TEX. R. CIV. P. 216.

358. *See* TEX. R. CIV. P. 216; *see also* Huddle v. Huddle, 696 S.W.2d 895, 895 (Tex. 1985) (time limitations of Rule 216 apply with equal force to application for jury trial and payment of jury fee); Texas Oil & Gas Corp. v. Vela, 429 S.W.2d 866, 876-77 (Tex. 1968) (demand for jury trial made ten days in advance of date set for trial of cause on non-jury docket is not necessarily timely as a matter of law); Young v. Young, 589 S.W.2d 520, 521

Rule 216 provides that the request for a jury shall be made on or before appearance day or a reasonable time before the date set for trial of the cause, but not less than ten (10) days in advance of the trial setting.[359] As a result, the cases interpreting Rule 216 have held that the court has no discretion to refuse a jury trial if the fee is paid and a request is made on or before the appearance or answer date.[360] Furthermore, a demand made more than ten (10) days in advance of a trial setting is presumed reasonable.[361] However, a demand for a jury trial made ten (10) days in advance of trial is not necessarily timely as a matter of law if the fee is not paid as well.[362] The recent supreme court case of *Huddle v. Huddle*[363] demonstrates the problem. The case was set for trial on the merits for the week of July 13, 1983. A jury fee had been paid on June 30, 1983, but a jury request was not made until July 12, 1983, the day before trial.[364] In interpreting Rule 216, the supreme court held that the ten (10) day time period applies with equal force to *both* the payment of the jury fee and the actual request for a jury trial.[365] As a result, the court held that the respondent's right to trial by jury was waived and the refusal of a jury trial could not be complained of on appeal.[366] Likewise, failure to appear at a scheduled trial date constitutes a waiver of the right to a jury trial, even though a fee was paid and a proper jury demand had previously been made.[367]

(Tex. Civ. App.—Austin 1979, writ dism'd) (jury demand made ten days before trial is not, as matter of law, timely).

359. *See* TEX. R. CIV. P. 216; *see also* Huddle v. Huddle, 696 S.W.2d 895, 895 (Tex. 1985); Walker v. Walker, 619 S.W.2d 196, 198 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.).

360. *See* Squires v. Squires, 673 S.W.2d 681, 684 (Tex. App.—Corpus Christi 1984, no writ); First Bankers Ins. Co. v. Lockwood, 417 S.W.2d 738, 739-40 (Tex. Civ. App.—Amarillo 1967, no writ); Union Producing Co. v. Allen, 297 S.W.2d 867, 872 (Tex. Civ. App.—Beaumont 1957, no writ).

361. *See* M-M-M v. Central St. Depository of Crim. Records, 681 S.W.2d 908, 908-09 (Tex. App.—Fort Worth 1984, no writ); Coleman v. Sadler, 608 S.W.2d 344, 346 (Tex. Civ. App.—Amarillo 1980, no writ); W. C. Moody & Co., Bankers v. Yarbrough, 510 S.W.2d 396, 399 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.).

362. *See* Texas Oil & Gas Corp. v. Bela, 429 S.W.2d 866, 876-77 (Tex. 1968); Gaines v. Gaines, 677 S.W.2d 727, 729 (Tex. App.—Corpus Christi 1984, no writ); Walker v. Walker, 619 S.W.2d 196, 198 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.).

363. 696 S.W.2d 895 (Tex. 1985).

364. *See id.* at 895.

365. *See id.* at 895.

366. *See id.* at 895.

367. *See* Lopez v. Soliz, 619 S.W.2d 12, 14 (Tex. Civ. App.—Corpus Christi 1981, no writ); Chandler v. Chandler, 536 S.W.2d 260, 262 (Tex. Civ. App.—Corpus Christi 1976, error

L. *Motion in Limine*

The purpose of a motion in limine is to obtain a prior ruling on evidentiary matters and to prevent the injection of irrelevant, inadmissible, and prejudicial matters into the trial.[368] The court's ruling, either granting or denying the motion, is not a final ruling, and does not constitute an appealable order, cause reversible error, or form the basis for an appeal.[369] The admission or suppression of evidence during the trial can, however, result in reversible error, and the practitioner must take care to preserve the error at that stage. In order to preserve error on appeal for the wrongful suppression of evidence, the record must reflect that the party opposing the motion in limine offered the suppressed evidence during the trial and obtained an adverse ruling from the court.[370] If error is claimed for the wrongful admission of evidence, the record must reflect that the party seeking to suppress the evidence made a proper objection when the evidence actually was offered during the trial on the merits.[371]

III. TRIAL RULINGS

A. *Voir Dire*

The voir dire procedure is a traditional part of jury trials in Texas.[372] However, there are no rules governing the latitude allowed in the examination of jurors, and only three rules of civil procedure refer directly to the voir dire examination.[373] While the right to con-

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dism'd); *see also* Crabbe v. Hord, 536 S.W.2d 409, 415 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.).

368. *See* Ford v. Carpenter, 147 Tex. 447, 450, 216 S.W.2d 558, 560 (1949); *see also* Bifano v. Young, 665 S.W.2d 536, 541 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.).

369. *See* Hartford Accident & Indem. Co. v. McCardell, 369 S.W.2d 331, 335 (Tex. 1963); Bifano v. Young, 665 S.W.2d 536, 541 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.); Union Carbide Corp. v. Burton, 618 S.W.2d 410, 415 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

370. *See* National Living Centers, Inc. v. Cities Realty Corp., 619 S.W.2d 422, 425 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.); Roberts v. Tatum, 575 S.W.2d 138, 144 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.); City of Corpus Christi v. Nemec, 404 S.W.2d 834, 837 (Tex. Civ. App.—Corpus Christi 1966, no writ).

371. *See* Wilkins v. Royal Indem. Co., 592 S.W.2d 64, 66-67 (Tex. Civ. App.—Tyler 1979, no writ); Biard Dil Co. v. St. Louis Southwestern Ry. Co., 522 S.W.2d 588, 590 (Tex. Civ. App.—Tyler 1975, no writ); K-Mart No. 4195 v. Judge, 515 S.W.2d 148, 152 (Tex. Civ. App.—Beaumont 1974, writ dism'd).

372. *See* Hazel, *Jury Voir Dire in Texas Civil Cases,* 1 REV. LIT. 147 (1981).

373. *See* TEX. R. CIV. P. 327, 372(1), 376(b). Several other rules do deal with the chal-

duct voir dire examination is firmly implanted in Texas practice, it has no constitutional or statutory support.[374] In conducting the voir dire examination, the trial court exercises broad discretion, with less scrutiny from an appellate court than in any other matter.[375] As a result of this broad discretion, there is wide variation among trial courts in the method of conducting voir dire examination. Many courts conduct the majority of the voir dire by questions from the bench.[376] In other cases, the voir dire examination is left solely to the lawyers.[377] In recent years legal authors, recognizing this variation in methods, have proposed uniform voir dire practices.[378] However, no uniform procedure has been adopted. Increasingly, trial courts have attempted to shorten the voir dire examination and to limit its scope. These efforts by the trial courts are generally upheld on appeal by opinions which indicate that the conduct of voir dire is within the exclusive control of trial courts.[379]

To adequately protect the record, the lawyer should direct specific questions to individual jury panel members.[380] General questions of the entire panel are generally not considered as an adequate basis for jury misconduct in a subsequent motion for new trial.[381] Additionally, all voir dire examination should be recorded, as courts are almost unanimous in the proposition that to properly preserve error

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lenging of jurors for cause and for peremptory challenges. *See id.* 227-223. Other rules deal with instructions and oaths to the jury panel. *See id.* 223-226a.

374. *See* Bush, *Limitation on Voir Dire in Civil Cases,* 45 TEX. B.J. 1043, 1043 (Oct. 1982).

375. *See* Gulf States Util. Co. v. Reed, 659 S.W.2d 849, 855 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.); Flores v. Texas Employers Ins. Ass'n, 515 S.W.2d 938, 939 (Tex. Civ. App.—El Paso 1974, writ dism'd); *see also* Texas Employers Ins. Ass'n v. Loesch, 538 S.W.2d 435, 440 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.).

376. *E.g.,* Leverman v. Cartall, 393 S.W.2d 931, 937 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.).

377. *See* Bush, *Limitation on Voir Dire in Civil Cases,* 45 TEX. B.J. 1043, 1044 (1982).

378. *See* Burleson, *Voir Dire, Trial Tactics, and Jury Arguments - Putting Flesh on the Bones of a Lawsuit,* 17 TRIAL LAW. F. 2, 15 (1983); Hunt, *Shortening the Voir Dire,* 25 TEX. B.J. 863, 864 (1962).

379. *See* Fenton v. Wade, 303 S.W.2d 816, 817 (Tex. Civ. App.—Fort Worth 1957, writ ref'd n.r.e.); New Orleans Ry. Co. v. Broadway, 345 S.W.2d 814, 820-21 (Tex. Civ. App.—Beaumont 1961, no writ).

380. *See* Coulson v. Clark, 319 S.W.2d 183, 193 (Tex. Civ. App.—Austin 1958, writ ref'd n.r.e.).

381. *See* Thompson v. Quarles, 297 S.W.2d 321, 325-26 (Tex. Civ. App.—Galveston 1956, writ ref'd n.r.e.); Roy L. Truck Line v. Johnson, 225 S.W.2d 888, 891 (Tex. Civ. App.—Galveston 1949, writ ref'd n.r.e.).

from the voir dire examination, it is necessary to have the voir dire questions and answers in the statement of facts.[382] In this regard, the court reporter has the duty to record voir dire examination if it is requested by the lawyers.[383] Likewise, any complaints about the conduct of the voir dire examination must be made by prompt objection or the error is waived.[384]

1. Peremptory Challenge

Peremptory challenges are made as a matter of right by a party who is not required to assign any reason for the challenge to jurors.[385] Generally, each party in district court is allowed six (6) challenges, and each party in county court is allowed three (3) challenges.[386]

While Rule 233 is generally applied without difficulty, appellate problems do arise when there are multiple parties and peremptory challenges are equalized.[387] Under amended Rule 233, the court is required to decide whether any of the parties aligned on the same side of the docket are antagonistic with respect to any issues that are likely to be submitted to the jury.[388] This inquiry must be made before the exercise of peremptory challenges, and the answer is determined in large amount from the pleadings, pre-trial discovery, and other information disclosed to the court.[389] The existence of antagonism is not a matter within the trial court's discretion. Instead, it is a question of law, "whether any of the litigants aligned on the same side of the docket are antagonistic with respect to any issue to be submitted to

382. *See* Lauderdale v. Insurance Co. of North America, 527 S.W.2d 841, 843 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.); Fenton v. Wade, 303 S.W.2d 816, 818 (Tex. Civ. App.—Fort Worth 1957, writ ref'd n.r.e.).

383. *See* TEX. R. CIV. P. 376b(a)(2).

384. *See* Gulf States Util. Co. v. Reed, 659 S.W.2d 849, 855 (Tex. App.—Houston [14th Dist.] 1983, no writ); Texas Employers' Ins. Ass'n v. Loesch, 538 S.W.2d 435, 441 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.).

385. *See* TEX. R. CIV. P. 232, 233; *see also* Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 919 (Tex. 1979). *See generally* Jones, *Peremptory Challenges--Should Rule 233 Be Changed?,* 45 TEXAS L. REV. 80 (1966).

386. *See* TEX. R. CIV. P. 233; *see also* 4 R. MCDONALD, TEXAS CIVIL PRACTICE § 11.12.1, at 130 (1984).

387. *See* Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 919 (Tex. 1979); Malone & Hyde, Inc. v. Hobrecht, 685 S.W.2d 739, 751-52 (Tex. App.—San Antonio 1985, writ withdrawn).

388. *See* TEX. R. CIV. P. 233; *see also* City of Amarillo v. Reid, 510 S.W.2d 624, 626 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.).

389. Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 919 (Tex. 1979); Perkins v. Freeman, 518 S.W.2d 532, 534 (Tex. 1974).

the jury."[390] Once the court has decided the issue of antagonism, the court is to dispense peremptory challenges to achieve the "ends of justice" so that no side will have an "unequal advantage."[391] Exact numerical equality between the sides is not necessary.[392] Instead, the court is free to proportionalize the strikes fairly.[393] In this regard, only vague guidelines have been given by the courts. In the landmark decision of *Patterson Dental Co. v. Dunn,*[394] the supreme court held that a disparity in peremptory challenges between sides of as much as four to one results in a materially unfair trial as a matter of law, and will not be condoned.[395] Another decision has upheld the allocation of nine strikes to the plaintiff and eleven to a group of four defendants.[396] The Houston Court of Appeals has ruled that a two to one ratio reaches the maximum disparity allowable.[397] Any objections to the allocation of strikes must be tendered before the actual strikes are made, and the record must reflect the ruling of the court.[398] Otherwise, any error will be waived.[399] One of the best practical steps to preserve error is to submit proposed issues to the court prior to trial, to demonstrate any antagonism between co-parties.

2. *Challenge for Cause*

A challenge for cause is, "an objection made to a juror, alleging some fact which by law disqualifies him to serve as a juror in the case

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390. Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 919 (Tex. 1979). For a discussion of the court's determination of these types of issues, see Sheehan & Hollingsworth, *Allocation of Peremptory Challenges Among Multiple Parties,* 10 ST. MARY'S L.J. 511, 512-23 (1979).

391. *See* TEX. R. CIV. P. 233.

392. *See* Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 920 (Tex. 1979); Malone & Hyde, Inc. v. Hobrecht, 685 S.W.2d 739, 751 (Tex. App.—San Antonio 1985, writ withdrawn).

393. *See* Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 920 (Tex. 1979); *see also* Sheehan & Hollingsworth, *Allocation of Peremptory Challenges Among Multiple Parties,* 10 ST. MARY'S L.J. 511, 514-18 (1979).

394. 592 S.W.2d 914 (Tex. 1979).

395. *See id.* at 921.

396. *See* Brown v. Tucker, 652 S.W.2d 492, 496 (Tex. App.—Houston [14th Dist.] 1983, no writ).

397. *See* Williams v. Texas City Ref., Inc., 617 S.W.2d 823, 826 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

398. *See* Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 921 (Tex. 1979); Longoria v. Atlantic Gulf Enter., Inc., 572 S.W.2d 71, 74 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.).

399. *See* H. P. Pouncy v. Garner, 626 S.W.2d 337, 340 (Tex. App.—Tyler 1981, writ ref'd n.r.e.); Aetna Cas. & Sur. v. Shiflett, 593 S.W.2d 768, 772 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.).

or in any case, or which in the opinion of the court renders him an unfit person to sit on the jury."[400] Actually, there are two categories of challenges for cause. First are the minimum requirements for jurors listed in article 2133.[401] In most counties, the judge or other court officers will briefly interrogate the jury for these qualifications before voir dire examination. However, challenges based on these minimum qualifications may be waived if objections are not made at the time of trial.[402] As a result, it is incumbent on the lawyer to determine that the jury panel has been purged of illegal jurors.[403]

The second category is statutory disqualifications that deal with bias and prejudice.[404] The bias and prejudice standards codified in article 2134 include not only bias or prejudice against a person or party, but also against the subject matter of the lawsuit as well.[405] The question of whether bias or prejudice exists is a fact question which will not be disturbed on appeal unless there is an abuse of discretion.[406] On the other hand, once the bias or prejudice is established, it is a legal disqualification, and reversible error results if the court overrules a motion to strike.[407] As a result, if bias or prejudice of a juror is established, the juror should be struck, and any attempt on behalf of the court or opposing counsel to rehabilitate the juror should not be allowed.[408] Occasionally, the court will be confronted with challenges which do not fall within articles 2133 or 2134. Challenges for cause based on those types of complaints are addressed to

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400. TEX. R. CIV. P. 228.

401. *See* TEX. REV. CIV. STAT. ANN. art. 2133 (Vernon Supp. 1985).

402. *See* Jenkins v. Chapman, 636 S.W.2d 238, 240 (Tex. App.—Texarkana 1982, writ ref'd n.r.e.); Bailey v. Tuck, 591 S.W.2d 605, 605 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

403. *See* Jenkins v. Chapman, 636 S.W.2d 238, 240 (Tex. App.—Texarkana 1982, writ ref'd n.r.e.); Mitchell v. Burleson, 466 S.W.2d 646, 658 (Tex. Civ. App.—Beaumont 1971, writ ref'd n.r.e.). The minimum qualifications of jurors, however, are generally checked by court personnel outside the presence of attorney.

404. *See* TEX. REV. CIV. STAT. ANN. art. 2134 (Vernon 1964); *see also* Bettis v. Bettis, 518 S.W.2d 396, 401 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

405. *See* TEX. REV. CIV. STAT. ANN. art. 2134, § 4 (Vernon 1964); *see also* Ramirez v. Wood, 577 S.W.2d 278, 284 (Tex. Civ. App.—Corpus Christi 1978, no writ).

406. *See* Swap Shop v. Fortune, 365 S.W.2d 151, 154 (Tex. 1963); Ramirez v. Wood, 577 S.W.2d 278, 285 (Tex. Civ. App.—Corpus Christi 1978, no writ).

407. *See* Comptron v. Henrie, 364 S.W.2d 179, 181-82 (Tex. 1963); State v. Burke, 434 S.W.2d 140, 142 (Tex. Civ. App.—Waco 1968, no writ).

408. *See* Erwin v. Consolvo, 521 S.W.2d 643, 646 (Tex. Civ. App.—Fort Worth 1975, no writ); Carpenter v. White Constr. Co., 501 S.W.2d 748, 750 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.).

the sound discretion of the trial court, and the court's ruling will not be disturbed unless it appears that a fair and impartial trial was thereby denied.[409]

A recent supreme court case explains the method to preserve error when a court overrules a challenge of a prospective juror for cause. In *Hallett v. Houston Northwest Medical Center,*[410] the supreme court was confronted with a medical malpractice case in which the court overruled a challenge for cause to a juror made by the plaintiff.[411] After the trial, the plaintiff moved for a judgment notwithstanding the verdict on the basis that the objectionable juror was permitted to serve and participated in the return of an unfavorable verdict.[412] The affidavit accompanying the motion stated that the plaintiff had exhausted her peremptory challenges, and that three of those challenges were used to strike three persons unsuccessfully challenged for cause.[413] The supreme court analyzed the issue presented as, "the proper method for preserving error when a litigant is compelled to accept an objectionable juror who has been challenged for cause."[414]

The supreme court rejected the plaintiff's argument that once a juror has been challenged for cause, the trial court is aware that the juror is objectionable, and it is unnecessary to require a party to advise the court a second time of the objection.[415] Instead, the supreme court noted that the real question is whether the harm complained of resulted in reversible error rather than harmless error.[416] The court ruled that a party who is forced to accept an objectionable juror challenged for cause must take the following steps to preserve the error for appeal: (1) make a challenge for cause, (2) exhaust all peremptory challenges, and (3) after exercising all peremptory challenges, make a specific objection to the jurors who remain on the jury list, and state why those individual jurors remain objectionable and would other-

409. *See* Speer v. Continental Oil Co., 586 S.W.2d 193, 195 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.); State v. Bryan, 518 S.W.2d 928, 930 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ); City of Hawkins v. E. B. Germany & Sons, 425 S.W.2d 23, 26 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).

410. 689 S.W.2d 888 (Tex. 1985).

411. *See id.* at 889.

412. *See id.* at 889.

413. *See id.* at 889.

414. *Id.* at 889.

415. *See id.* at 889.

416. *See id.* at 889.

wise be struck by that party.[417] The court further held, "absent such notice to the trial court [a party] waives any error committed by the court in its refusal to discharge those jurors who were challenged for cause."[418] Although the opinion does not specifically classify it as an additional requirement, it is obvious that those objections must be made before the jurors are struck, and not after the peremptory strikes are turned over to the judge.[419]

B. *Opening Statement*

Each party may make an opening statement to the jury; however, the statement must be limited in scope to what the party will prove during the course of the trial and the relief that is sought.[420] The trial court has broad discretion to limit the opening statements, subject to review on appeal for abuse of discretion.[421] The general rule is that all statements made in the opening statement must be admissible into evidence as if they were uttered from the witness stand.[422] Additionally, it is error to discuss evidence that is not eventually offered during the trial.[423] Not all error in the opening statement, however, results in reversible error. To cause the reversal of the judgment, the error must be such that it was calculated to cause, and probably did cause, rendition of an improper judgment.[424] Objections to opening statements must be made in a timely and specific manner for the error to be preserved.[425]

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417. *See id.* at 890. The court cited *Hamman v. Texas New Orleans Ry. Co.*, 382 S.W.2d 155 (Tex. Civ. App.—Tyler 1964, writ ref'd n.r.e.), *cert. denied*, 382 U.S. 832 (1965); *Yecker v. San Antonio Traction Co.*, 76 S.W. 780 (Tex. Civ. App.—San Antonio 1903, writ ref'd); and *Texas Gen. Indem. Co. v. Moreno*, 638 S.W.2d 908 (Tex. Civ. App.—Houston [1st Dist.] 1982, no writ), as support for its preservation of error rule.

418. Hallett v. Houston Northwest Medical Center, 689 S.W.2d 888, 890 (Tex. 1985).

419. *Cf. id.* at 890.

420. *See* TEX. R. CIV. P. 265.

421. *See* Ranger Ins. Co. v. Rogers, 530 S.W.2d 162, 170 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

422. *See* Sisk v. Glens Fall Ind. Co., 310 S.W.2d 118, 122 (Tex. Civ. App.—Houston 1958, writ ref'd n.r.e.).

423. *See* Ranger Ins. Co. v. Rogers, 530 S.W.2d 162, 170 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.); Vincent v. M K & T RR. Co., 200 S.W.2d 233, 239 (Tex. Civ. App.—Dallas 1946, writ ref'd n.r.e.), *cert. denied*, 332 U.S. 830 (1947).

424. *See* Texas Employers' Ins. Ass'n v. Garza, 675 S.W.2d 245, 249 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.); Rangers Ins. Co. v. Rogers, 530 S.W.2d 162, 170 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

425. *See* Ranger Ins. Co. v. Rogers, 530 S.W.2d 162, 170 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

C. *Exclusion and Admission of Evidence*

1. Objections

a. Specific Objections

The general rule is that an erroneous admission of evidence requires a timely and specific objection to preserve error for appeal.[426] As a result, an objection to evidence cannot be heard for the first time on appeal.[427]

The objection must clearly state the grounds upon which it is made and the evidence it seeks to exclude.[428] The test of whether an objection contains the required specificity is whether the objection can be clearly understood by the court and the opposing party.[429] A general objection, such as the famous Perry Mason objection of, "immaterial, incompetent, and irrelevant," generally preserves no error for appeal.[430] Trial practitioners must be careful in framing their objections as objections not made at the trial level cannot be argued on appeal as grounds for reversal.[431] For example, in *Douglas v. Winkle*[432] an ob-

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426. *See generally* Perry, *Practical Effects of Texas Rules of Evidence,* 18 TRIAL LAW. F. 12 (1983); Pope and Hampton, *Presenting and Excluding Evidence,* 9 TEX. TECH L. REV. 403 (1978).

427. *See* Wilfin, Inc. v. Williams, 615 S.W.2d 242, 244 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.); Southwestern Bell Tel. Co. v. Davis, 582 S.W.2d 191, 194 (Tex. Civ. App.—Waco 1979, no writ); TEX. R. EVID. 103(a)(1).

428. *See* Hill v. Baylor, 23 Tex. 261, 263 (1859); Cobb v. Thomas, 565 S.W.2d 281, 289 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.). Prior to 1984, there were some extremely limited exceptions to the necessity for an objection. Some evidence was considered to be so incompetent so as to not support a judgment, and as a result, no objection was necessary. *See* Aetna Ins. Co. v. Klein, 160 Tex. 61, 63, 325 S.W.2d 376, 379 (1959); International Ins. Co. v. Deatherage, 628 S.W.2d 209, 211 (Tex. App.—Austin, no writ). *But see* TEX. R. EVID. 802 (unobjected hearsay has probative value).

429. *See In re* Bates, 555 S.W.2d 420, 432 (Tex. 1977); Texas Mun. Power Agency v. Burger, 600 S.W.2d 850, 854 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ); *see also* Harry Brown, Inc. v. McBryde, 622 S.W.2d 596, 599 (Tex. App.—Tyler 1981, no writ); University of Texas Sys. v. Haywood, 546 S.W.2d 147, 149 (Tex. Civ. App.—Austin 1977, no writ). *See generally* Black, *Hearsay Evidence Admitted Without Objection—A Defense of Its Probative Value,* 17 S. TEX. L.J. 69 (1975).

430. *See* Brown & Root v. Haddad, 142 Tex. 624, 626, 180 S.W.2d 339, 341 (1941); Republic Ins. Co. v. Hope, 557 S.W.2d 603, 606 (Tex. Civ. App.—Waco 1977, no writ); Easley v. Brookline Trust Co., 256 S.W.2d 983, 986 (Tex. Civ. App.—Amarillo 1952, no writ). Some objections, however, by their very nature must be general. Objections to the relevancy of testimony are general in nature and seek to exclude evidence because it has no connection with the trial issues. *See* TEX. R. EVID. 401-03; *see also* Bridges v. City of Richardson, 354 S.W.2d 366, 370 (Tex. 1962).

431. *See* Del Monte Corp. v. Martin, 574 S.W.2d 597, 601 (Tex. Civ. App.—San

jection was made at trial on the basis of hearsay.[433] On appeal, other grounds were urged, and the appellate court held that they were not properly preserved and could not be argued as grounds for reversal.[434]

b. Partly Admissible Evidence

In recent years, courts have wrestled with the interesting problem of evidence which contains both admissible and inadmissible parts. The general rule of evidence is that the burden is on the offering party to remove inadmissible portions of evidence before the offer can be allowed.[435] The landmark case of *Hurtado v. Texas Employers' Insurance Ass'n*[436] demonstrates the problems when exhibits with numerous pages are introduced into evidence. In *Hurtado,* the insurance company offered into evidence in the form of four exhibits the complete medical records of the plaintiff which reflected a long history of previous health problems and prior injuries numbering over 280 pages of clinical reports, hospital records, nurses' notes, physicial examination reports, as well as other medical documents.[437] The plaintiff objected that the offer included matters of hearsay, inadmissible opinion evidence, and suggested that it was incumbent on the offeror to eliminate those items.[438] Counsel for the defendant stated that if the plaintiff thought anything was objectionable, he should point out the document and make a specific objection.[439] The trial court allowed the introduction of the evidence for all purposes.[440] The supreme court, in reviewing the evidence, found many of the entries in the medical records to be inadmissible, but also found a substantial amount of the information to be admissible. The court stated that the

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Antonio 1978, no writ); Eubanks v. Winn, 469 S.W.2d 191, 294 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.).

432. 623 S.W.2d 764 (Tex. App.—Texarkana 1981, no writ).

433. *See id.* at 768. The trial objection was that the testimony in a will contest was "hearsay . . . and unresponsive." *Id.* at 768.

434. *See id.* at 768. The additional grounds for objection which were not preserved were bolstering, irrelevancy, and prejudice. *See id.* at 768.

435. *See* Spier v. Webster College, 616 S.W.2d 612, 619 (Tex. 1981); Lister v. Employers Reins. Co., 590 S.W.2d 803, 807 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.); Zamora v. Romero, 581 S.W.2d 742, 747 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

436. 574 S.W.2d 536 (Tex. 1978).

437. *See id.* at 537.

438. *See id.* at 537-38.

439. *See id.* at 537.

440. *See id.* at 538.

records as a whole were inadmissible.[441] The opinion, however, without specifically stating, indicates that it is incumbent on the offeror to weed out inadmissible evidence. Otherwise, the entire offer may fail.[442]

c. Limited Purpose Doctrine

Generally, evidence which is admitted without objection or limitation is an offer for all purposes.[443] On the other hand, if evidence is admissible for one purpose and not for another, the evidence cannot be admitted without a limiting instruction.[444] If the offeror fails to limit the offer, no error is preserved for appeal.[445]

d. Timeliness

The general rule is that objections must be made at the earliest opportunity.[446] However, in vigorously contested trials, some complications can result. For example, when prior similar testimony is admitted without objection, a later objection to similar testimony will be unsuccessful.[447] By the same token, objections to testimony must

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441. *See id.* at 538-39.

442. *See id.* at 538. The court stated that once the inadmissible portions of the evidence had been brought to the trial judge's attention it was error to admit the entire mass of material without removing the objectionable parts. *See id.* at 538. The *Hurtado* opinion also ignores the most practical solution, which often occurs at trial. When an objection occurs, the objectionable parts of the exhibit are often removed and the remainder admitted into evidence. In *Hurtado,* however, this practical adaption might have undercut the purpose of the defendant's original offer—to show the worker's overall health condition.

443. *See* Ryan Mortg. Investors v. Fleming-Wood, 650 S.W.2d 928, 935 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.); Douglas v. Winkle, 623 S.W.2d 764, 768 (Tex. App.—Texarkana 1981, no writ); Scotchcraft Bldg. Materials, Inc. v. Parker, 618 S.W.2d 835, 837 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.). *See generally* 1 R. RAY, TEXAS LAW OF EVIDENCE § 774 (3rd ed. 1980).

444. *See In re* TLH, 630 S.W.2d 441, 445 (Tex. App.—Corpus Christi 1982, no writ); Bristol-Myers Co. v. Gonzales, 548 S.W.2d 416, 430-31 (Tex. Civ. App.—Corpus Christi 1976), *rev'd on other grounds,* 561 S.W.2d 801 (Tex. 1978).

445. *See* Hamilton v. Hamilton, 154 Tex. 511, 514, 180 S.W.2d 588, 591 (1955); *In re* TLH, 630 S.W.2d 441, 445 (Tex. App.—Corpus Christi, 1982, no writ); Miller v. Hardy, 564 S.W.2d 102, 105 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).

446. *See* Wolfe v. East Texas Seed Co., 583 S.W.2d 481, 482 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ dism'd); Zamora v. Romero, 581 S.W.2d 742, 747 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

447. *See* Winkel v. Hankins, 585 S.W.2d 889, 894 (Tex. Civ. App.—Eastland 1979, writ dism'd); Hundere v. Tracy & Cook, 494 S.W.2d 257, 264 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.); New Hampshire Fire Ins. Co. v. Plainsman Elevators, Inc., 371 S.W.2d 68, 72 (Tex. Civ. App.—Amarillo 1963, writ ref'd n.r.e.)

be made each time an attempt to introduce the evidence is made, and a prior objection will not preserve error of subsequently admitted evidence.[448] However, one exception is the well known "running objection." When a party has previously made a proper objection to immediately preceding testimony and the objection is overruled, a subsequent objection to the same testimony is not necessarily a predicate to complain on appeal if a running objection is made.[449] Running objections can present a very dangerous situation. While running objections do save time and obviate the necessity for counsel to repeat objections in front of a jury, the reason for the rule is based on the similarity of the objection to the continued line of questioning. As a result, all counsel and the court should be aware of the exact questions to which the running objections apply. Unfortunately, no appellate court in Texas has directly addressed the issue of running objections, and there can always be a question as to whether the evidence subsequently introduced is similar enough to preserve error by way of a running objection. As a result, the best practice is to have an agreement with the court that a running objection to a line of questions is acceptable. This small bit of precaution may preserve error.

e. Necessity of a Ruling

It is axiomatic that there must be a ruling expressly overruling the objection in order to preserve the point for appellate review.[450] However, some difficulty arises with this rule when judges are slow to rule on objections or ignore the problem in the hope that the witness will answer and the reason for the objection will disappear. It is the duty of each court to promptly rule on objections. Stated another way, "one making an objection is entitled to an immediate ruling omitting or excluding the evidence either absolutely or conditionally so that he

448. *See In re* Dahl, 590 S.W.2d 191, 199 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.); Poole v. State Highway Dept., 256 S.W.2d 168, 170 (Tex. Civ. App.—Fort Worth 1953, writ dism'd).

449. *See* Welch v. Texas Employers' Ins. Ass'n, 636 S.W.2d 450, 453 (Tex. App.—Eastland 1982, no writ); City of Baytown v. Bayshore Constructors, Inc., 615 S.W.2d 792, 794 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ); DLN v. State, 590 S.W.2d 820, 823 (Tex. Civ. App.—Dallas 1979, no writ).

450. *See* Winkel v. Hankins, 585 S.W.2d 889, 892 (Tex. Civ. App.—Eastland 1979, writ dism'd); Citizens of Texas Sav. & Loan Ass'n v. Lewis, 483 S.W.2d 359, 365 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.); *see also* Roberts v. Tatum, 575 S.W.2d 138, 144 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.) (before party can claim error on suppression of evidence by motion in limine, party must offer evidence and secure adverse ruling from court).

may know what evidence on his part will be needed in explanation or rebuttal."[451] Counsel should therefore always tactfully press the court for a ruling so that the error will be properly preserved.

f. Offers of Proof

In instances where evidence is suppressed by the trial court, an offer of proof is necessary to preserve error in the exclusion of evidence.[452] The obvious purpose of the offer of proof is to demonstrate to the appellate court the substance of the excluded testimony.[453] The only exception to this rule is when the excluded testimony is a properly marked and identified exhibit which requires no predicate for its admission.[454] However, almost every exhibit offered at trial does require some explanatory testimony as a predicate for its admission. As a result, every exhibit must be accompanied by an offer of proof.

Recent rules of evidence provide several methods for the offer of proof that differ from previous practice.[455] For example, it is appropriate to have an offer of proof that is not in the standard question and answer form.[456] Instead, a summary of evidence can be read into the record rather than lengthy question and answer testimony.[457] However, the court may request the making of an offer of proof in question and answer form, and the nonmovant can require that the offer of proof be made in question and answer form.[458] In some instances where a court reporter is unavailable, formal bills of exception may be used.[459] These bills of exception are cumbersome and have

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451. Citizens of Texas Sav. & Loan Ass'n v. Lewis, 483 S.W.2d 359, 365 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.).

452. *See* Hartford Accident & Indem. Co. v. McCardell, 369 S.W.2d 331, 335 (Tex. 1963); Roberts v. Tatum, 575 S.W.2d 138, 144 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.); Texas Employers' Ins. Ass'n v. Garza, 557 S.W.2d 843, 847 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

453. *See* Texas Employers' Ins. Ass'n v. Garza, 557 S.W.2d 843, 847 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.). The task of the appellate court is to review the excluded evidence with all other evidence in the record in order to apply the harmless error rule. As a result, it is important to have the precise testimony preserved in the record in order to urge error on appeal.

454. *See* Guynn v. Corpus Christi Bank & Trust, 589 S.W.2d 764, 772 (Tex. Civ. App.—Corpus Christi 1979, writ dism'd).

455. *See* TEX. R. EVID. 103(a)(2), 103(b).

456. *See* TEX. R. EVID. 103(b) (court may or at counsel's request shall direct making of an offer in question and answer form).

457. *See id.* 103(b).

458. *See id.* 103(b).

459. *See* TEX. R. CIV. P. 372.

fallen into disuse. Likewise, the bystanders bill is available if no agreement can be made on a formal bill of exception.[460] The bystanders bill may be made on the affidavit of three respected bystanders who are citizens of the state, and who can attest to the correctness of the actual averments. Lawyers who represent parties to the lawsuit cannot be witnesses for a bystander bill affidavits. The truth of the averments are determined by the court of appeals during the appellate process.[461]

D. *Directed (Instructed) Verdict*

The trial court may remove the case from the jury and direct or instruct a verdict for either party when reasonable minds cannot differ on the conclusions drawn from the evidence.[462] The motion for instructed verdict is mentioned directly only two times in the rules of civil procedure, with little direction on the required contents of the motion.[463] For example, Rule 268 merely provides, "a motion for directed verdict shall state the specific grounds therefor."[464] Even so, a large body of case law has developed around directed verdict practice.

As with other motions, the appellate record must reflect that the motion was made and a ruling of the court obtained as a prerequisite for appeal.[465] Additionally, the motion for directed verdict may be made two times during the trial. First, the motion may be made after

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460. *See id.* 372(j).

461. *See* Griffith v. Casteel, 313 S.W.2d 149, 153-54 (Tex. Civ. App.—Houston 1958, writ ref'd n.r.e.). In *Griffith,* the Houston Court of Appeals interestingly found that the eventual Chief Justice of the Texas Supreme Court and the Chief Justice of the Houston Court of Appeals were not eligible to make a controverting affidavit pursuant to a bystanders bill. *See id.* at 153-54.

462. *See* Jones v. Tarrant Util. Co., 638 S.W.2d 862, 865 (Tex. 1982); Collora v. Navarro, 574 S.W.2d 65, 68 (Tex. 1978); Henderson v. Travelers Ins. Co., 544 S.W.2d 649, 650 (Tex. 1976); *see also* TEX. R. CIV. P. 268.

463. *See* TEX. R. CIV. P. 268, 301.

464. *Id.* 268.

465. *See* Commercial Credit Equip. Corp. v. West, 677 S.W.2d 669, 673 (Tex. App.—Amarillo 1984, no writ); Superior Trucks, Inc. v. Allen, 664 S.W.2d 136, 145 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.). In *Allen,* the court of appeals stated, "[t]he overruling of a motion for instructed verdict will be reviewed on appeal *only if* it was recited in a formal order or in the judgment." *See id.* at 145 (emphasis in original). The appellant in *Allen* sought review of the trial court's action in overruling the motion for instructed verdict. *See id.* at 145. The appellate record did not reflect an order entered by the court, and the judgment did not contain any recitation of the overruling of the motion for instructed verdict. As a result, the court refused to consider any error in that regard. *See id.* at 145.

the conclusion of the nonmovant's case.[466] If the motion is overruled, any complaint on appeal for the denial of the first motion is waived if the movant proceeds with its own evidence.[467] Second, the motion can be reurged after the close of all the evidence.[468] Finally, if the defendant has made a motion for instructed verdict after the close of the plaintiff's evidence, the motion must be reurged after both sides have rested to properly preserve error for appeal.[469] It is important to note that a motion for instructed verdict after the evidence is closed must be made before the charge is read to the jury.[470] Appellate courts have ruled that a motion for instructed or directed verdict need not be in writing if the grounds for the motion are specifically stated.[471]

If a motion for instructed or directed verdict is granted, several appellate rules apply. First, the review of the directed verdict is limited to consideration of the evidence that had been presented when the motion was granted, and does not involve review of all the evidence in the case.[472] When an instructed or directed verdict is granted because

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466. *See* Meyers v. Ford Motor Credit Co., 619 S.W.2d 572, 573 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); Rhinetubes, Inc. v. Norddeutscher Lloyd, 335 S.W.2d 269, 274 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.). *See generally* 4 R. McDONALD, TEXAS CIVIL PRACTICE § 16.04, at 5 (1984).

467. *See* Hydro-Line Mfg. Co. v. Pulido, 674 S.W.2d 382, 386 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.); Wenk v. City Nat'l Bank, 613 S.W.2d 345, 348 (Tex. Civ. App.—Tyler 1981, no writ).

468. *See* Mitchell Resort Enter., Inc. v. C & F Builders, Inc., 570 S.W.2d 463, 465 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.); Conrey v. McGehee, 473 S.W.2d 617, 620 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.).

469. *See* Hydro-Line Mfg. Co. v. Pulido, 674 S.W.2d 382, 386 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.); Wenk v. City Nat'l Bank, 613 S.W.2d 345, 348 (Tex. Civ. App.—Tyler 1981, no writ); Texas Steel Co. v. Douglas, 533 S.W.2d 111, 113-14 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.).

470. *See* Mitchell Resort Enters., Inc. v. C & F Builders, Inc., 570 S.W.2d 463, 465 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.). *But see* Chasco v. Providence Memorial Hosp., 476 S.W.2d 385, 387 (Tex. Civ. App.—El Paso 1972, no writ) (after jury discharged, motion for instructed verdict may be tendered because of jury's inability to agree upon verdict).

471. *See* Dillard v. Broyles, 633 S.W.2d 636, 645 (Tex. App.—Corpus Christi 1982), *cert. denied,* 463 U.S. 1208 (1983); Castillo v. Euresti, 579 S.W.2d 581, 582 (Tex. Civ. App.—Corpus Christi 1979, no writ); *see also* TEX. R. CIV. P. 268 (Rule 268 does not require formal written motion to secure instructed verdict).

472. *See* Safeway Scaffold Co. v. Safeway Steel Prods., Inc., 570 S.W.2d 225, 229 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.); Holloway v. Har-Con Eng'g Co., 563 S.W.2d 695, 696-97 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.). In this regard, it is interesting to note that subsequent jury findings cannot be used to attack an instructed verdict granted in another part of the case. *See* Pope v. Clary, 161 S.W.2d 828, 832 (Tex. Civ. App.—Fort Worth 1942, writ ref'd w.o.m.).

there is lack of proof of damages, the appellate court must make a thorough examination of the statement of facts to determine if there is any evidence of probative value that might support a jury issue.[473] The standard of review for the granting of a motion for instructed or directed verdict on appeal is strict.[474] The court must consider all of the evidence in the light most favorable to the party against whom the verdict was instructed, discarding all contrary evidence and inferences.[475] However, the burden is upon the appellant to establish that evidence was presented on each and every element of the various causes of action alleged in the pleadings.[476]

E. *Special Issues, Instructions, and Requests (Findings of Fact and Conclusions of Law)*

One of the most difficult decisions for a trial practitioner is whether to try the case before a jury or the court. In some instances, court trials have considerable advantages.[477] However, in state court actions, a decision for a bench trial virtually guarantees that there will be no relief on appeal, unless substantive law errors are made.[478] Different appellate rules for reversible error apply to trials before the court and to trials before a jury.[479]

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473. *See* Xonu Intercontinental Indus. v. Staffer Chemical Co., 587 S.W.2d 757, 759 (Tex. Civ. App.—Corpus Christi 1979, no writ).

474. *See* Travenol Laboratories, Inc. v. Bandy Laboratories, Inc., 630 S.W.2d 484, 486 (Tex. App.—Waco 1982, writ ref'd n.r.e.).

475. *See* Travenol Laboratories, Inc. v. Bandy Laboratories, Inc., 630 S.W.2d 484, 486 (Tex. App.—Waco 1982, writ ref'd n.r.e.); *see also* Dabney v. Thomas, 593 S.W.2d 561, 562 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.).

476. *See* Brockette v. Sosa, 675 S.W.2d 807, 808 (Tex. App.—Corpus Christi 1984, no writ).

477. Some of the advantages that are traditionally noted are shortness of trials and the decision of difficult issues by judges rather than jurors who might not be familiar with the subject matter involved in the lawsuit. *See generally* Carlton, *From Verdict to Judgment,* 6 SW. L.J. 244 (1952); Cogburn, *Problems in Obtaining Appellate Review in Non-Jury Trials in Texas,* 11 S. TEX. L.J. 46 (1969); Pope, *The Jury,* 39 TEXAS L. REV. 426 (1961); Hewitt & Bright, *Finding of Fact: Crucial, Ignored, Often Fatal on Appeal,* 46 TEX. B.J. 937 (1983).

478. *See* Shintech, Inc. v. Group Constr., Inc., 688 S.W.2d 144, 152 (Tex. App.—Houston [14th Dist.] 1985, no writ); Johnson v. Buck, 540 S.W.2d 393, 395 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

479. *See* Johnson v. Buck, 540 S.W.2d 393, 395 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.); Cogburn, *Problems in Obtaining Appellate Review in Non-Jury Trials in Texas,* 11 S. TEX. L.J. 46, 48 (1969).

1. Non-Jury Trial

After the trial of a non-jury case, either party may request findings of fact and conclusions of law to support the judge's decision.[480] The findings of fact serve the same function as jury findings in a jury case. The request for findings of fact and conclusions of law must be filed within ten (10) days after the final judgment is signed, and notice of the filing of the request must be served on all parties.[481] Once demand is made for the findings of fact and conclusions of law, the court must file them within thirty (30) days after the judgment is signed.[482] However, if the court fails to file findings of fact and conclusions of law, the requesting party, in order to preserve the error for appeal, must notify the court in writing within five (5) days after the deadline has run.[483] Thereafter, the court has another five (5) days to make its filing.[484] Once the court has filed the original findings of fact and conclusions of law, either party may request additional or amended findings or conclusions.[485] Any additional filings must be made by the court within five (5) days.[486]

If findings of fact and conclusions of law are not requested and

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480. *See* TEX. R. CIV. P. 296; *see also* Ratcliff v. State Bar of Texas, 673 S.W.2d 339, 341 (Tex. App.—Houston [1st Dist.] 1984, no writ) (request for facts and conclusions of law available to both parties).

481. *See* TEX. R. CIV. P. 296; *see also* Wallace v. Wallace, 623 S.W.2d 723, 724 (Tex. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.). A premature request for findings of fact and conclusions of law is a nullity. *See* Williams v. Royal American Chinchilla, Inc., 560 S.W.2d 479, 482 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.). Until 1984, Rule 296 provided that the request for findings of fact and conclusions of law could be filed within ten (10) days of final judgment or an order overruling a motion for new trial. *See* TEX. R. CIV. P. 296 (1981). This provision was removed in 1984 by the Texas Supreme Court. *See* TEX. R. CIV. P. 296.

482. *See* TEX. R. CIV. P. 297; *see also* Wade v. Anderson, 602 S.W.2d 347, 350 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.). Even though findings of fact and conclusions of law are often prepared by the prevailing attorney, once they are filed and adopted by the court they are attributed to the court. *See* Berkman v. D. M. Oberman Mfg. Co., 230 S.W. 838, 840-41 (Tex. Civ. App.—Austin 1921, writ dism'd).

483. *See* TEX. R. CIV. P. 297; *see also* Cameron v. MacDonnell, 659 S.W.2d 911, 913 (Tex. App.—Corpus Christi 1983, no writ); Van Dyke v. Van Dyke, 624 S.W.2d 800, 802 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

484. *See* TEX. R. CIV. P. 297.

485. *See id.* 298. *See generally* Hewitt & Bright, *Findings of Fact: Crucial, Ignored, Often Fatal on Appeal,* 46 TEX. B.J. 937 (Aug. 1983). The request must be made within five days of the filing date of the original findings and conclusions. *See* Byrd v. Smith, 590 S.W.2d 772, 774 (Tex. Civ. App.—El Paso 1979, no writ).

486. *See* TEX. R. CIV. P. 298. The trial court's failure to file amended findings and conclusions is not automatically harmful, and the complaining party must show that the failure to

filed, the judgment must be affirmed if it can be upheld on any legal theory that has support in the evidence.[487] Furthermore, all questions of fact will be presumed to support the judgment.[488] Occasionally, the court will make findings of fact and conclusions of law in the written judgment. Texas courts have traditionally found that these recitations of fact and law fulfill the court's obligation under Rule 296.[489] On the other hand, any pronouncements made by the court after the close of the evidence, which are not subsequently incorporated in the written judgment, cannot be considered as findings of fact and conclusions of law.[490] On appeal, the trial court's findings of fact are binding on the appellate court unless challenged by a point of error.[491] However, findings of fact are not conclusive on appeal when a full statement of facts appear in the record.[492] As a result, the appellate courts are free to test the findings of fact by the evidence in the record the same way in which jury's answers are tested.[493] Finally, courts require that findings of fact must be supported by evidence of probative

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act made the judgment incorrect. *See* Shelby Intern, Inc. v. Wiener, 563 S.W.2d 324, 328 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

487. *See* Lassiter v. Bliss, 559 S.W.2d 353, 355 (Tex. 1977); Raymond v. Aquarius Condominium Owner's Ass'n, 662 S.W.2d 82, 85 (Tex. App.—Corpus Christi 1983, no writ); Concerned Citizens for Better Educ., Inc. v. Woodley, 623 S.W.2d 488, 490 (Tex. Civ. App.—Texarkana 1981, writ dism'd).

488. *See* Stewart v. Clark, 677 S.W.2d 246, 248 (Tex. App.—Corpus Christi 1984, no writ); Raymond v. Aquarius Condominium Owners Ass'n, Inc., 662 S.W.2d 82, 84 (Tex. App.—Corpus Christi 1983, no writ).

489. *See* Precipitair Pollution Control v. Green, 626 S.W.2d 909, 910 (Tex. App.—Tyler 1981, writ ref'd n.r.e.); Peterson v. Peterson, 595 S.W.2d 889, 891 (Tex. Civ. App.—Austin 1980, writ dism'd); Texas Constr. Group, Inc. v. City of Pasadena, 663 S.W.2d 102, 105 (Tex. App.—Houston [14th Dist.] 1984, writ dism'd). In *Texas Construction,* recital of facts in the order granting a temporary injunction was held to have fulfilled the court's obligation under Rule 296. *See id.* at 105.

490. *See In re* W. E. R., 669 S.W.2d 717, 716 (Tex. 1984); *cf.* Jampole v. Touchy, 673 S.W.2d 569, 574 (Tex. 1984) (oral pronouncements of trial court not part of appellate record).

491. *See* Anderson v. Smith, 635 S.W.2d 204, 206 (Tex. App.—Houston [1st Dist.] 1982, no writ); Wade v. Anderson, 602 S.W.2d 347, 349 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.). In the absence of the statement of facts, findings of fact are conclusive on the appellate court. *See* Texas Constr. Group, Inc. v. City of Pasadena, 663 S.W.2d 102, 105 (Tex. App.—Houston [14th Dist.] 1984, writ dism'd); Southard v. Southard, 567 S.W.2d 570, 573 (Tex. Civ. App.—Tyler 1978, no writ).

492. *See* Lubbock Mortgage & Inv. Co., Inc. v. Thomas, 626 S.W.2d 611, 614 (Tex. App.—El Paso 1981, no writ); Stephenson v. Perlitz, 537 S.W.2d 287, 289 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.).

493. *See* Rouver v. Dulaney, 589 S.W.2d 180, 182 (Tex. Civ. App.—Fort Worth 1979, no writ).

value.[494]

2. *Jury Trial*

a. Submission of the Charge

Under Rules 271, 272, and 273, the court has the obligation to prepare, sign, and deliver a written charge to the jury in open court.[495] In this regard, any party may provide and request written instructions, special issues, and definitions to the court for its consideration. However, contrary to popular belief, the court is free to disregard any issues requested, and may submit any charge it deems appropriate. However, if no issue is requested on a particular element, any complaint on appeal is waived, unless the element is conclusively established as a matter of law.[496] As a result, it is important that a party relying on an independent ground of recovery or defense submit issues to the trial court for inclusion in the court's charge.

b. Requests for Special Issues, Instructions, and Definitions[497]

The party who asserts an independent ground of recovery or defense must submit the controlling issues in substantially correct form or any complaint on appeal for failure of the trial court to include such issue is waived.[498] In many instances, complaints are raised that one or more crucial elements of a cause of action are not submitted to a jury. In this event, the party who relies upon the omitted ground must request the submission of the omitted issue or issues in substantially correct form or waive both a jury trial, and any error an appeal on that issue.[499] However, the party not relying on the omitted sub-

494. *See* Grimsley v. Grimsley, 632 S.W.2d 174, 177 (Tex. App.—Corpus Christi 1982, no writ); Block v. Waters, 564 S.W.2d 113, 115 (Tex. Civ. App.—Beaumont 1978, no writ).

495. *See* TEX. R. CIV. P. 271, 272, 273; *see also* Texas & Pacific Ry. Co. v. Davis, 374 S.W.2d 305, 309 (Tex. Civ. App.—El Paso, writ ref'd n.r.e.).

496. *See* TEX. R. CIV. P. 299; *see also* Akin v. Dahl, 661 S.W.2d 911, 913 (Tex. 1983); Glens Fall Ins. Co. v. Peters, 386 S.W.2d 529, 531 (Tex. 1965).

497. For general discussions on special issues, instructions, and definitions, see G. HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS (1969).

498. *See* Shwiff v. Priest, 650 S.W.2d 894, 901 (Tex. App.—San Antonio 1983, no writ); Powell v. Lenox Jenkins Interiors, 540 S.W.2d 772, 775 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.). *See generally* R. MCDONALD, TEXAS CIVIL PRACTICE § 12.32.2, at 346-55 (1983) (outlining duty to submit special issues); Spradley, *The Global Issue: Outlaw of the Special Issue Practice,* 18 HOUS. L. REV. 1 (1980).

499. *See* Griffin v. Eakin, 656 S.W.2d 187, 190 (Tex. App.—Austin 1983, no writ); Moffett v. Goodyear Tire & Rubber Co., 652 S.W.2d 609, 612 (Tex. App.—Austin 1983, writ ref'd

mission may preserve error for appeal by simply objecting that the missing element is not submitted.[500] The same rules apply to requested definitions and explanatory instructions with one important difference. The burden to request definitions and explanatory instructions requires the submission of the definition or instruction in writing regardless of who has the burden on the issue addressed by the definiton or instruction.[501]

The term "in substantially correct form" has given both lawyers and courts a difficult time. As a result, a body of case law has grown up around the practice of requesting issues, definitions, and instructions.[502] When the requested issue is one of a series of independent issues which are all essential to properly submit a theory of recovery or defense, all of the omitted issues must be requested in substantially correct form to preserve error.[503] Additionally, if the requested instruction refers to a word and states that the word is "defined herein," and the request does not include the definition of the word, the request is not in "substantially correct form."[504] On the other hand, the courts have not required requested issues to be perfect in order to pass the "substantially correct form" test.[505] The proper test is that a requested issue cannot be substantially correct if it would have been error to submit it over a proper objection.[506]

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n.r.e.); Garner Motors, Inc. v. Innes, 503 S.W.2d 655, 658 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.).

500. *See* Houston Gen. Ins. Co. v. Owens, 653 S.W.2d 93, 98 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.); Thywissen v. FTI Corp., 518 S.W.2d 947, 951 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

501. *See* State v. Harrington, 407 S.W.2d 467, 479 (Tex. 1966); D. W. Durham v. Uvalde Rock Asphalt Co., 599 S.W.2d 866, 875 (Tex. Civ. App.—San Antonio 1980, no writ); Wilson v. City of Port Lavaca, 407 S.W.2d 325, 331 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd n.r.e.).

502. *See generally* G. HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS (1969); R. McDONALD, TEXAS CIVIL PRACTICE §§ 12.33.1 to 12.36.7, at 348-66 (1984).

503. *See* Shwiff v. Priest, 650 S.W.2d 894, 901 (Tex. App.—San Antonio 1983, no writ); Mata v. Albert, 548 S.W.2d 496, 501 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.); Catilleja v. Camero, 402 S.W.2d 265, 271 (Tex. Civ. App.—Corpus Christi 1966), *aff'd,* 414 S.W.2d 424 (Tex. 1967).

504. *See* Griffin v. Eakin, 656 S.W.2d 187, 190 (Tex. App.—Austin 1983, no writ); Holland v. Leslie, 350 S.W.2d 859, 863 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.).

505. *See* Fawcett v. Bellah, 556 S.W.2d 598, 601 (Tex. Civ. App.—Corpus Christi 1977, no writ); Mata v. Albert, 548 S.W.2d 496, 501 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.); Crutcher - Rolfs - Cummings, Inc. v. Ballard, 540 S.W.2d 380, 390 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.), *cert. denied,* 433 U.S. 910 (1977).

506. *See* Armellini Exp. Lines of Florida, Inc. v. Ansley, 605 S.W.2d 297, 307 (Tex. Civ.

Special issues, instructions, and definitions must not only be submitted in substantially correct form, but must also be submitted in writing to the trial judge prior to the submission of the case to the jury.[507] This requirement of written requests has proven confusing to lawyers. As stated below, objections to the court's charge may be submitted orally and dictated to the court reporter to preserve error. However, the requirement of a writing for requests is absolute.[508] The reasons for these two rules is best explained in the recent supreme court decision of *Billy Woods v. Crane Carrier Co., Inc.*[509] In that decision, the plaintiff did not request an instruction in writing; instead the plaintiff's attorney dictated the instruction to the court reporter, along with objections to the court's charge. The plaintiff contended that the instruction dictated to the reporter in conjunction with one of the special issues was identical to the same instruction submitted in writing in conjunction with another special issue. The supreme court ruled that Rule 279 requires special issues, instructions, and definitions in writing.[510] Justice Kilgarlin stated that the reason for the rule was that the "prolificacy of requested issues and instructions," "the myriad of interruptions," and the "occasional confusion inherent in the charge" mandates that requests be in writing.[511] As Justice Kilgarlin points out, "[t]o expect a judge, after hearing oral and lengthy requests just once, to weigh their merits for inclusion in a charge ignores realities."[512] Additionally, requests for issues, instructions, or definitions should be made separately from objections to the court's charge so as to avoid confusion and loss of a potential error for appeal.[513]

App.—Corpus Christi 1980, writ ref'd n.r.e.); Adams v. Rhodes, 543 S.W.2d 18, 19 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.).

507. *See* TEX. R. CIV. P. 272; *see also* Stede v. Bost, 602 S.W.2d 385, 388 (Tex. Civ. App.—Austin 1980, no writ); Colandino v. El Paso Nat'l Bank, 585 S.W.2d 851, 853 (Tex. Civ. App.—El Paso 1979, no writ).

508. *See* Woods v. Crane Carrier Co., Inc., 693 S.W.2d 377, 379 (Tex. 1985).

509. 693 S.W.2d 377 (Tex. 1985).

510. *See id.* at 379.

511. *See id.* at 379.

512. *Id.* at 379.

513. *See* Ramirez v. Johnson, 601 S.W.2d 149, 151 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.). However, recent rulings by the supreme court have significantly diluted this rule. *See* Acord v. General Motors Corp., 669 S.W.2d 111, 114 (Tex. 1984); Betty Leavell Realty Co. v. Raggio, 669 S.W.2d 102, 104 (1984). In *Betty Leavell Realty,* the defendant objected to the submission of one issue specifically, and thereafter opposed an alternative issue that would cure the objection. The supreme court ruled that the judge, as well as the opposing

c. Objections to the Court's Charge

After the charge is prepared, but before it is delivered to the jury, the judge must give the parties an opportunity to examine and present objections to the court's charge.[514] In fact, a refusal to give reasonable time to make objections to the charge may be reversible error.[515] Unlike requests for special issues, instructions, and definitions, objections to the court's charge may not only be made in writing, but may be dictated to the court reporter in the presence of the judge and opposing counsel prior to submission of the charge to the jury.[516] However, it is important to note that objections dictated in the absence of the judge do not preserve error for appeal, as those objections do not give the court an opportunity to change the charge before submission to the jury.[517] Failure to file a timely objection to the submission of special issues, definitions, and instructions precludes review of the submission of the charge on those particulars on appeal.[518] In some instances, the parties have agreed to delay their objections to the court's charge until after the case has been submitted to the jury. This practice, although done by agreement and even with consent and approval of the court, violates Rule 272 and preserves no error on appeal.[519]

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party, understood the nature of the objection, and refused to amend the special issue to cure the stated objection. As a result the supreme court found that the court's failure to change the issue constituted a ruling. *See id.* at 104. The supreme court did not object to the practice of putting submissions in the same list as objections. *See id.* at 104.

514. *See* TEX. R. CIV. P. 272.

515. *See* Standard Life and Accident Ins. Co. v. Kirk, 465 S.W.2d 770, 773 (Tex. Civ. App.—Fort Worth 1971), *rev'd on other grounds,* 475 S.W.2d 570 (Tex. 1972). If the court does not allow sufficient time to make appropriate objections, the attorney, in order to preserve error, should state that he has not had an opportunity to sufficiently review the court's charge. If particular problems are apparent in the court's charge, those should be identified, and the request for additional time should indicate the precise amount of time given by the court for review. If the court refuses to allow additional time, a bystander's bill may be prepared complaining of the court's actions. *See id.* at 773.

516. *See* Union Carbide Corp. v. Burton, 618 S.W.2d 410, 414 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); 5 W. DORSANEO, TEXAS LITIGATION GUIDE § 122.05[2] (1985).

517. *See* McDonald v. New York Central Mut. Fire Ins. Co., 380 S.W.2d 545, 547 (Tex. 1964); Brantley v. Sprague, 636 S.W.2d 224, 225 (Tex. App.—Texarkana 1982, writ ref'd n.r.e.).

518. *See* Brown v. American Transfer and Storage Co., 601 S.W.2d 931, 938 (Tex. 1980); Ruff v. Christian Services of the Southwest, 627 S.W.2d 799, 803 (Tex. App.—Tyler 1982, writ ref'd n.r.e.); Hall v. Rodgers, 620 S.W.2d 217, 220 (Tex. Civ. App.—Waco 1981, no writ).

519. *See* Missouri Pac. Ry. Co. v. Cross, 501 S.W.2d 868, 873 (Tex. 1973); Suddeth v. Howard, 560 S.W.2d 514, 515-16 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.).

It is well settled that a general and vague objection to the charge preserves no error.[520] Courts have devised a simple test for deciding whether the objection has the required specificity. The test is whether the objection causes the court to become fully cognizant of the ground of the actual complaint.[521] Likewise, if an objection is obscured or concealed by voluminous unfounded objections or stock objections, error will be waived on appeal.[522]

Prior to 1984, failing to obtain the court's express ruling on an objection to the court's charge waived the right to complain of such ruling on appeal.[523] This rule lead to absurd results, as in many instances, trial judges would not rule on objections to the court's charge even when pressed by counsel. As a result, there would be no express ruling in the record from which to appeal.[524] In 1984 the supreme court overruled several decades of cases and held in *Acord v. General Motors Corp.*,[525] "if an objection is articulated and the trial court makes no change in the charge, the objection is, of necessity, overruled."[526] Within two months of the *Acord* decision, the court en-

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520. *See* Aero Energy, Inc. v. Circle C Drilling Co., 29 Tex. Sup. Ct. J. 41, 42 (Nov. 9, 1985); Monsanto Co. v. Milam, 494 S.W.2d 534, 537 (Tex. 1973); Bellefonte Underwriters Ins. Co. v. Brown, 663 S.W.2d 562, 574 (Tex. App.—Houston [14th Dist.] 1983, no writ). In *Bellefonte* an objection was made to an instruction on the basis that it, "gives a totally incorrect legal test." *Id.* at 574. The Houston Court of Appeals ruled that these objections were "totally inadequate" to preserve error. *See id.* at 574. In *Aero Energy* the supreme court recently stated:

> '[a] party objecting to a charge must point out distinctly the matter to which he objects and the grounds of his objection."

Aero Energy, Inc. v. Circle C Drilling Co., 29 Tex Sup. Ct. J. 41, 42 (Nov. 9 1985).

521. *See* Aero Energy, Inc. v. Circle C Drilling Co., 29 Tex Sup. Ct. J. 41, 42 (Nov. 9 1985); Davis v. Campbell, 572 S.W.2d 660, 662 (Tex. 1978); Citizens State Bank of Dickinson v. Bowles, 663 S.W.2d 845, 850 (Tex. App.—Houston [14th Dist.] 1983, writ dism'd); Mowery v. Fantastics Homes, Inc., 568 S.W.2d 171, 174 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).

522. *See* Bellefonte Underwriters Ins. Co. v. Brown, 663 S.W.2d 562, 574 (Tex. App.—Houston [14th Dist.] 1983, no writ). The Houston Court of Appeals in *Bellefonte* ruled, "[h]ere and throughout its brief, Bellefonte has failed to meet either the requirements or spirit of Rules 272 and 274 by clogging its exceptions and objections to the charge with non-meritorious, overused, and inapplicable stock objections. Error, if any, has been waived. . . ." *Id.* at 574.

523. *See* Hernandez v. Montgomery Ward & Co., 652 S.W.2d 923, 924 (Tex. 1983); Lone Star Steel Co. v. Wahl, 636 S.W.2d 217, 219 (Tex. App.—Texarkana 1982, no writ).

524. *E.g.*, Moppit v. Goodyear Tire & Rubber Co., 652 S.W.2d 608, 612 (Tex. App.—Austin 1982, no writ).

525. 669 S.W.2d 111 (Tex. 1984).

526. *Id.* at 114. The *Acord* decision overruled the holdings in *Hernandez v. Montgomery Ward & Co.*, 652 S.W.2d 923 (Tex. 1983) and *Cogburg v. Harbour*, 657 S.W.2d 432 (Tex.

tered another opinion which bolstered its new rule. In *Betty Leavell Realty Co. v. Raggio,*[527] the court held that once the defendant objected to the submission of an issue specifically and clearly, the court's refusal to amend the charge indicated that the objection was overruled, despite the fact that no formal ruling appeared in the record.[528] The supreme court noted that the judge, as well as plaintiff's counsel, understood the nature of the objection so that the presumption was logical and reasonable.[529]

Objections to the court's charge can be brought because of a variance between the pleadings and proof in the case. Any objections regarding a variance must be specific and point directly to the variance between the proof, pleading, and the requested charge.[530] Objections on the grounds of variance are not favored by the court, and the objections will be overruled if the pleadings give the opponent sufficient notice and opportunity to prepare an adequate defense.[531] Normally, variance is not harmful error. To be reversible, the variance must be substantial, misleading, and prejudicial.[532]

d. Deemed Findings

Rule 279 contains a trap for the unwary. Rule 279 provides that when a ground of recovery or defense consists of more than one element, and one or more of those elements are submitted through special issues that are necessarily referable to omitted elements, the court may deem the elements found in favor of the judgment.[533] In order for the court to deem these findings, the court must find that there was no objection to, or request for the omitted issues, and may only entertain a motion to deem on the request of a party after notice and

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1983), to the extent they conflict with *Acord. See* Acord v. General Motors, Inc., 669 S.W.2d 111, 114 (Tex. 1984).

527. 669 S.W.2d 102 (Tex. 1984).

528. *See id.* at 104.

529. *See id.* at 104.

530. *See* Burk Royalty Co. v. Walls, 616 S.W.2d 911, 924 (Tex. 1981); Fruehauf Corp. v. Ortega, 687 S.W.2d 777, 782 (Tex. App.—Corpus Christi 1985, no writ).

531. *See* Murray v. O & A Express, Inc., 630 S.W.2d 633, 635 (Tex. 1982); Fruehauf Corp. v. Ortega, 687 S.W.2d 777, 782 (Tex. App.—Corpus Christi 1985, no writ).

532. *See* Brown v. American Transfer and Storage Co., 601 S.W.2d 931, 937 (Tex. 1980); Siebenlist v. Harville, 596 S.W.2d 113, 116 (Tex. 1980); Hersh v. Hendley, 626 S.W.2d 151, 154 (Tex. App.—Fort Worth 1981, no writ).

533. *See* TEX. R. CIV. P. 279; *see also* Williams v. Northrup, 649 S.W.2d 740, 743 (Tex. App.—Eastland 1983, writ ref'd n.r.e.); Hoffman v. Wall, 602 S.W.2d 324, 327 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

hearing.[534] The purpose of the "necessarily referable" requirement of Rule 279 is to give the parties, against whom the issues may be deemed, fair notice of a partial submission of issues so those parties will have an opportunity to object to the failure to submit all of the necessary issues to a ground of recovery or defense.[535] As a result, if issues are submitted that are "necessarily referable" to omitted issues, the opposing party must object to the failure to include the omitted issues, or waive any later complaint if the court, in its discretion, deems the omitted issues found in favor of the judgment.[536]

e. Form of Submission

Under Rule 277 the method of submission of the case to the jury is within the discretion of the trial court.[537] However, there is increasing pressure from the Texas Supreme Court for the broad submission of special issues.[538] In fact, former Chief Justice Jack Pope indicated in a recent article that, "issues for the jury may, and ought to be, asked broadly."[539] At this writing, there is some indication that the supreme court will revise Rules 272 thru 279 to provide a mandatory broad form of submission of issues, but as yet no changes have been made.

f. Jury Argument

Rule 269 sets forth the parameters of jury argument.[540] The trial court is vested with broad discretion in fixing the time allowable for oral argument, and that discretion will not be disturbed on appeal in

534. *See* TEX. R. CIV. P. 279; *see also* Pinnacle Homes, Inc. v. R. C. L. Offshore Eng'g Co., 640 S.W.2d 629, 630 (Tex. App.—Tyler 1983, no writ).

535. *See* G. HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS 97 (1959).

536. *See* Superior Trucks, Inc. v. Allen, 664 S.W.2d 136, 144-45 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

537. *See* TEX. R. CIV. P. 277; *see also* Jacobs v. Jacobs, 670 S.W.2d 312, 313 (Tex. App.—Texarkana 1984, writ ref'd n.r.e.). *See generally* Comment, *Scope of Special Issues in Negligence Cases: Pleadings, Proof, and Rule 277,* 15 HOUS. L. REV. 735 (1978).

538. *See* Alvarez v. Missouri-Kansas-Texas Ry. Co., 683 S.W.2d 375, 377 (Tex. 1985); Lemos v. Montez, 680 S.W.2d 798, 799 (Tex. 1984); Scott v. Atchison, Topeka & Santa Fe Ry. Co., 572 S.W.2d 273, 275 (Tex. 1978); Mobile Chem. Co. v. Bell, 517 S.W.2d 245, 247 (Tex. 1974). *See generally* Spradley, *Global Issue: Outlaw of the Special Issue Practice,* 18 HOUS. L. REV. 1 (1980).

539. Pope, *The State of the Special Verdict,* 11 ST. MARY'S L.J. 1, 3 (1979).

540. *See* TEX. R. CIV. P. 269(b)-(h); *see also* E. COX, MANUAL ON JURY ARGUMENT IN TEXAS COURTS 75-84 (1947) (detailing types of improper jury arguments).

the absence of demonstrated injury to the complaining party.[541] To properly preserve any error for failing to give additional time during jury argument, the complaining party must show a request for the additional time, the court's refusal, and a demonstration that the refusal probably caused a rendition of an improper verdict.[542]

Most jury argument reversals are caused by improper jury argument.[543] As a result, jury argument should always be recorded[544] to provide an adequate record to substantiate the harm of improper jury argument.[545] Generally, attorneys are permitted wide latitude in discussing both the facts and issues during jury argument.[546] Rule 269(e), however, specifically states that only arguments confined to the evidence and arguments of opposing counsel are permissible.[547] Subsections (e) and (f) of Rule 269 prevent personal criticism between trial attorneys, sidebar remarks, and remarks by counsel when the other attorney is addressing the court or jury.[548] The party with the burden of proof on the whole case under the pleadings or on the issues submitted to the jury has a right to open and close the argument.[549] However, if the right to open and close the argument is improperly

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541. *See* Aultman v. Dallas Ry. & Ter. Co., 152 Tex. 509, 512, 260 S.W.2d 596, 600 (1953); Montes v. Lazzara Shipyard, 657 S.W.2d 886, 888 (Tex. App.—Corpus Christi 1983, no writ); Aetna Cas. & Sur. Co. v. Shiffert, 593 S.W.2d 768, 772 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.).

542. *See* Aetna Cas. & Sur. Co. v. Shiffert, 593 S.W.2d 768, 772 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); South Texas Nat. Gas Gathering Co. v. Guerra, 469 S.W.2d 899, 912 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.); Pirrung v. T. & N. O. Ry. Co., 350 S.W.2d 50, 51 (Tex. Civ. App.—Houston 1961, no writ).

543. *See generally* Burleson, *Voir Dire, Trial Tactics, and Jury Argument—Putting Flesh on the Bones of A Lawsuit,* 17 TRIAL LAW. F. 2 (1983); Crump, *Effective Jury Argument: The Organization,* 43 TEX. B.J. 468 (1980).

544. Reporters, however, do not usually record the argument unless specifically requested to do so by the attorneys. If a request is made, the court reporter does have a duty to record the argument. *See* TEX. R. CIV. P. 376. If the argument is not recorded, a bill of exception is necessary to preserve the error for appeal. *See id.* 372.

545. *See* Queen City Land Co. v. State, 601 S.W.2d 527, 530 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.); Zamora v. Romero, 581 S.W.2d 742, 750 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

546. *See* Zamora v. Romero, 581 S.W.2d 742, 750 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.). *See generally* Crump, *Effective Jury Argument: The Organization,* 43 TEX. B.J. 468, 469 (1983).

547. *See* TEX. R. CIV. P. 269(e); *see also* Dover Corp. v. Perez, 587 S.W.2d 761, 767 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

548. *See* TEX. R. CIV. P. 269(e), (f); *see also* Middleton v. Palmer, 601 S.W.2d 759, 763 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.). *See generally* 5 W. DORSANEO, TEXAS LITIGATION GUIDE § 120C.03 (1985) (detailing types of improper jury arguments).

549. *See* Walker v. Money, 132 Tex. 132, 135, 120 S.W.2d 428, 431 (1938); *see also* Hor-

decided by the court, the appellant must show that the denial was calculated to, and probably did, cause the rendition of an improper judgment.[550]

Improper jury argument is generally categorized as being curable or incurable.[551] If the argument is "curable," the party must promptly object, or any error in the argument is waived on appeal.[552] If, on the other hand, the argument is "incurable," no objection is needed to preserve error on appeal.[553] The test as to whether the argument is incurable is whether the prejudice of the argument can be eliminated by an instruction to the jury to disregard the improper argument.[554] The test for reversal for improper jury argument is roughly the same. If the argument, considered in its proper setting, was reasonably calculated to cause prejudice to the opposing side, and an instruction by the court or withdrawal of the argument by counsel could not eliminate the probability of prejudice, the case should be reversed.[555] In making the determination, the appellate court will review the entire record to determine whether the comment caused the rendition of an improper verdict.[556]

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ton v. Dental Capital Leasing Corp., 649 S.W.2d 655, 657 (Tex. App.—Texarkana 1983, no writ).

550. *See* Horton v. Dental Capital Leasing Corp., 649 S.W.2d 655, 657 (Tex. App.—Texarkana 1983, no writ); Francis v. Stanley, 574 S.W.2d 629, 631 (Tex. Civ. App.—Fort Worth 1978, no writ).

551. *See* Otis Elevator v. Wood, 436 S.W.2d 324, 333 (Tex. 1968); Howard v. Faberge, Inc., 679 S.W.2d 644, 649 (Tex. App.—Houston [1st Dist.] 1984, no writ).

552. *See* Houston Light & Power Co. v. Fisher, 559 S.W.2d 682, 685 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.); Magic Chef, Inc. v. Sibley, 546 S.W.2d 851, 857 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.). The objection to a curable jury argument must be ruled upon by the court for error to be preserved for appellate review. *See* Duke v. Power Elec. & Hardware Co., 674 S.W.2d 400, 405 (Tex. App.—Corpus Christi 1984, no writ); Hanover Ins. Co. v. Peyson, 373 S.W.2d 701, 704 (Tex. Civ. App.—Fort Worth 1963, no writ).

553. *See* Otis Elevator v. Wood, 436 S.W.2d 324, 333 (Tex. 1968); Howard v. Faberge, Inc., 679 S.W.2d 644, 649 (Tex. App.—Houston [1st Dist.] 1984, no writ). While no objection to incurable jury arguments is required, Rule 324 requires that if the court does not have an opportunity to rule on the improper jury argument the objection to the argument should be included in the motion for new trial so error will be preserved. *See* TEX. R. CIV. P. 324; 5 W. DORSANEO, TEXAS LITIGATION GUIDE § 120C.04[2] (1965).

554. *See* American Home Assurance Co. v. Coranado, 628 S.W.2d 818, 823 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.); General Motors Corp. v. Bryant, 582 S.W.2d 521, 529 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.).

555. *See* Texas Sand Co. v. Shield, 381 S.W.2d 48, 58 (Tex. 1964); Howard v. Faberge, Inc., 679 S.W.2d 644, 649 (Tex. App.—Houston [1st Dist.] 1984, no writ); Magic Chef, Inc. v. Sibley, 546 S.W.2d 851, 857 (Tex. Civ. App.—San Antonio 1977, no writ).

556. *See* Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835, 839-40 (Tex. 1979). The

g. Jury Deliberations

Error can arise in a trial even after the case is submitted to the jury. It is the responsibility of the judge, bailiff, and all attorneys in the case to check materials that are sent to the jury room.[557] The court is required to send all exhibits admitted into evidence into the jury during deliberations[558] since Rule 281 "is self-operative, and requires no requests from the jurors or counsel."[559] However, in the event that exhibits are not sent to the jury room, the harmless error rule applies, and the error must be such as was reasonably calculated to, and probably did, cause rendition of an improper judgment in the case.[560]

Occasionally, problems arise because improper documents are delivered to the jury room. In one case, a copy of the court's charge with notations by the appellee's lawyer was mistakenly delivered to the jury room.[561] The notations had been made for the purpose of aiding the appellee's lawyer in his argument to the jury.[562] The court refused to reverse the jury's verdict, noting that it was the duty of the judge, bailiff, and *all* lawyers to ensure that the correct exhibits were sent to the jury room.[563] However, in another case where the blanks in the special issues were completely filled in by the appellee's attorney and mistakenly delivered to the jury room, the court of appeals had no difficulty in reversing the case on jury misconduct grounds.[564]

The jury may communicate with the court by notifying the bailiff, who shall inform the judge of the request. Thereafter, the jury may communicate only with the court.[565] The means of communication are with the judge orally in open court or by written communication

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supreme court stressed in *Standard Fire* that courts should avoid expanding the category of incurable jury argument and should rely on corrective instructions to avoid unnecessary prejudice. *See id.* at 839-40.

557. *See* TEX. R. CIV. P. 281; *see also* City of Houston v. Simon, 580 S.W.2d 667, 668 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

558. *See* TEX. R. CIV. P. 281.

559. First Employees Ins. Co. v. Skinner, 646 S.W.2d 170, 172 (Tex. 1983).

560. *See id.* at 172.

561. *See* City of Houston v. Simon, 580 S.W.2d 667, 668 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

562. *See id.* at 668.

563. *See id.* at 668-70.

564. *See* Sidrain v. Western Textile Prod. Co., 258 S.W.2d 830, 834 (Tex. Civ. App.—Dallas), *rev'd on other grounds,* 152 Tex. 21, 262 S.W.2d 942 (1954).

565. *See* TEX. R. CIV. P. 285.

between the judge and the jurors.[566] In the case of written correspondence between the judge and the jury, care should be taken that the notes are placed in the record and are initialed by the judge so that they may be included in the transcript.[567] In many instances, the jury's notes will indicate what evidence had an effect on them, and the notes are valuable in demonstrating that error was either harmless or reversible error.

The jury may request that the statement of any witness be read to them on a certain point in dispute.[568] If a request is made and the jury recites that there is a conflict among the jurors on the substance of the testimony, the court must read the evidence back to the jury.[569] The court, however, has great discretion in deciding what part of the testimony can be read to jurors.[570] It is the court's duty to discover what parts of the evidence are the source of the conflict. The court does not err in refusing to read back testimony where the juror's request is nothing more than a request for rereading practically all the testimony of certain witnesses.[571]

Pursuant to the Texas Rules of Evidence and the revised Texas Rules of Civil Procedure, the scope of jury misconduct has been substantially limited, and a juror may only testify to whether outside influence was improperly brought to bear on any juror.[572] Due to the infancy of these new rules, which abolish testimony concerning most jury misconduct, no court has determined how broad the term "outside influence" should be. For example, can a juror's statement be an outside influence, or must others communicate with a juror from outside the courtroom? The party seeking the new trial has the burden of proving that an act of misconduct occurred, that it was material, and that the misconduct injured the movant such that it

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566. *See* TEX. R. CIV. P. 285, 286; *see also* Taylor v. Lewis, 553 S.W.2d 153, 159 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.).

567. *See* George Pharis Chevrolet, Inc. v. Polk, 661 S.W.2d 314, 316 (Tex. App.—Houston [1st Dist.] 1983, no writ).

568. *See* TEX. R. CIV. P. 287.

569. *See* Steinburger v. Archer County, 621 S.W.2d 838, 843-44 (Tex. App.—Fort Worth 1981, no writ).

570. *See* Wirtz v. Orr, 575 S.W.2d 66, 72 (Tex. Civ. App.—Texarkana 1978, writ dism'd).

571. *See* Hill v. Roberson, 592 S.W.2d 376, 383-84 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.).

572. *See* TEX. R. EVID. 606(b); *see also* TEX. R. CIV. P. 327(b). *See generally* Boyd, *Jury Misconduct Claims in Texas Civil Cases,* 21 S. TEX. L.J. 23 (1980).

caused the rendition of an improper judgment.[573]

IV. POST-TRIAL MOTIONS

A. *Judgment Notwithstanding the Verdict*

After a verdict is returned, the court may render a judgment notwithstanding the verdict upon motion and reasonable notice.[574] The standard for granting a judgment notwithstanding the verdict is whether a directed verdict after the close of the evidence would have been proper.[575] In most instances, motions for judgment notwithstanding the verdict are entered when special issue findings appear to have no support in the evidence.[576] In this regard, the court must determine that there is no evidence of probative value upon which the jury could have based their findings to the special issues.[577] In reviewing the record, all evidence must be considered in the light most favorable to the party in whose favor the jury verdict has been rendered, and every inference arising from that evidence is to be drawn in that party's favor.[578] If the trial or appellate court finds that the jury's answers to special issues have any support in the evidence, a judgment

573. *See* Keltner, *Jury Misconduct in Texas: Trying The Tryer of Fact,* 34 SW. L.J. 1131 (1981); *see also* Strange v. Treasure City, 608 S.W.2d 604, 606 (Tex. 1980); Bufkin v. Texas Farm Bureau Mut. Ins. Co., 658 S.W.2d 317, 322 (Tex. App.—Tyler 1983, no writ).

574. *See* TEX. R. CIV. P. 301. *See generally* Note, *Civil Procedure—Judgment Non Obstante Verdicto,* 49 TEXAS L. REV. 332, 334-37 (1971) (discussing general requirements of judgment notwithstanding verdict).

575. *See* TEX. R. CIV. P. 301; *see also,* Dodd v. Texas Form Prods. Co., 576 S.W.2d 812, 815 (Tex. 1979); Moore v. Reed, 668 S.W.2d 847, 849 (Tex. App.—El Paso 1984, no writ); Rowland v. City of Corpus Christi, 620 S.W.2d 930, 934 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

576. *See* TEX. R. CIV. P. 301; *see also* Douglass v. Panama, Inc., 504 S.W.2d 776, 777-78 (Tex. 1974) (jury's answer on contract expectations not supported by any evidence, therefore, properly disregarded); Carr v. Galvan, 650 S.W.2d 864, 868 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.) (special issue answers were unsupported by evidence, judgment n.o.v. proper).

577. *See* Williams v. Meyer, 629 S.W.2d 257, 259-60 (Tex. App.—Waco 1982, writ dism'd); Del Monte Corp. v. Martin, 574 S.W.2d 597, 602 (Tex. Civ. App.—San Antonio 1978, no writ); Hill v. W. E. Brittain, Inc., 405 S.W.2d 803, 809 (Tex. Civ. App.—Fort Worth 1966, no writ). Rule 301 does not require "no evidence at all" but only that the evidence lacks legal sufficiency to support the special issue answer. *See* Burt v. Lochausen, 152 Tex. 289, 291, 294 S.W.2d 194, 199 (1952); TM Prods., Inc. v. Nichols, 542 S.W.2d 704, 707 (Tex. Civ. App.—Dallas 1976, no writ).

578. *See* Dodd v. Texas Farm Prods. Co., 576 S.W.2d 812, 814 (Tex. 1979); Douglass v. Panama, Inc., 504 S.W.2d 776, 777 (Tex. 1974); Marquez v. Sears Roebuck & Co., 625 S.W.2d 52, 54 (Tex. Civ. App.—San Antonio 1981), *rev'd on other grounds,* 628 S.W.2d 772 (Tex. 1982).

notwithstanding the verdict is not permissible, and must be reversed on appeal.[579] The motion may be filed any time after the judgment is entered, but before the judgment becomes final.[580] A motion for judgment notwithstanding the verdict does not have the same specificity requirement of a Rule 268 motion for directed verdict.[581] However, a motion should have a statement of the jury findings attached and should specify the reasons that the jury findings should be ignored.[582] There appears to be no prerequisite in the rules of procedure for raising a motion for judgment notwithstanding the verdict, and in fact, a party that has previously requested a special issue may claim that the answer is not supported by the evidence in a motion for judgment notwithstanding the verdict.[583]

Some appellate review problems have arisen with motions for judg-

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579. *See* Williams v. Meyer, 629 S.W.2d 257, 259-60 (Tex. App.—Waco 1982, writ dism'd); Fiderius, Inc. v. Wallace Co., Inc., 583 S.W.2d 852, 856 (Tex. Civ. App.—Tyler 1979, no writ); Brownsville & Matamorous Bridge Co. v. Null, 578 S.W.2d 774, 778 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

580. *See* Needville Indep. School Dist. v. Stjst Resthome, 566 S.W.2d 40, 43 (Tex. Civ. App.—Beaumont 1978, no writ); Commercial Standard Ins. Co. v. Southern Farm Bureau Cas. Ins., 509 S.W.2d 387, 392 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.). The time period to file a motion for new trial is not tolled by filing a motion for judgment n.o.v. *See* Walker v. S & T Truck Lines, Inc., 409 S.W.2d 942, 943-46 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd).

581. *Compare* TEX. R. CIV. P. 301 ("upon motion and reasonable notice the court may render judgment non obstante verdicto") *with id.* 268 ("motion for directed verdict shall state the specific grounds therefor.")

582. *See* Dittderner v. Bell, 558 S.W.2d 527, 531-32 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.); *cf.* Olin Corp. v. Cargo Carriers, Inc., 673 S.W.2d 211, 214 (Tex. App.—Houston [14th Dist.] 1984, no writ) (without motion non obstante verdicto trial court cannot deny party judgment on verdict).

583. *See* Morris v. Transp. Ins. Co., 487 S.W.2d 780, 782 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.); *see also* Jackson v. Dallas, 443 S.W.2d 771, 775 (Tex. Civ. App.—Dallas 1969) (motion for directed verdict is not required for motion for judgment n.o.v.), *rev'd on other grounds,* 450 S.W.2d 62 (Tex. 1970). In federal court, however, a motion for directed verdict is a necessary prerequisite to a motion for judgment notwithstanding the verdict. *See* FED. R. CIV. P. 50(b). Furthermore, a party may not assert a ground in a motion for judgment notwithstanding the verdict that was not included in a motion for directed verdict. *See id.* 50(b); *see also* United States Indus. v. Brock Constr. Co., 671 F.2d 539, 543 (D.C. Cir. 1982); Meyers v. Moody, 475 F. Supp. 232, 235 (N.D. Tex. 1979). There are also other differences between a judgment notwithstanding the verdict in federal court and one in state court. For example, in federal court, a motion for judgment notwithstanding the verdict must be filed no later than ten (10) days after the entry of judgment and may be joined with a motion for new trial. *Compare* FED. R. CIV. P. 50(b) (ten day limitation for motion for judgment n.o.v.) *with* Commercial Standard Ins. Co. v. Southern Farm Bureau Cas. Ins. Co., 509 S.W.2d 387, 392 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.) (no limitation on time for motion n.o.v. except before judgment is final).

ment notwithstanding the verdict which were filed with a motion for new trial. In order to preserve the right to appeal the denial of a motion for judgment notwithstanding the verdict, that motion must be acted upon prior to the trial court's ruling on a motion for new trial.[584]

The standard of review on appeal is strict. In reviewing a judgment notwithstanding the verdict, the appellate court must indulge all reasonable inferences from the evidence in favor of the jury findings, and must determine whether the evidence as a matter of law required a judgment notwithstanding the verdict.[585] All other evidence and inferences to the contrary must be ignored.[586]

The trial court is without power to render a judgment notwithstanding the verdict on its own motion.[587] As a result, it is necessary to consider making a motion for judgment notwithstanding the verdict to perfect the record for appeal. If the motion for judgment notwithstanding the verdict is overruled, the movant may proceed directly to appeal without the necessity of filing a motion for new trial.[588] However, if the motion is granted, the respondent should bring forth any cross-points it wishes to appeal by a motion for new trial.[589] A failure to take this precaution may waive any right to complain on appeal.[590]

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584. *See* Diaz v. Deavers, 574 S.W.2d 602, 603-04 (Tex. Civ. App.—Tyler 1978, writ dism'd); Commercial Standard Ins. Co. v. Southern Farm Bureau Cas. Ins. Co., 509 S.W.2d 387, 392 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.); Hann v. Life & Cas. Ins. Co., 312 S.W.2d 261, 263 (Tex. Civ. App.—San Antonio 1958, no writ).

585. *See* Coffee v. F. W. Woolworth, 536 S.W.2d 539, 542 (Tex. 1976); Douglass v. Panama, Inc., 504 S.W.2d 776, 777 (Tex. 1974); Anderson v. Republic Nat'l Life Ins. Co., 623 S.W.2d 162, 163 (Tex. Civ. App.—Fort Worth 1981, no writ).

586. *See* Williams v. Bennett, 610 S.W.2d 144, 145 (Tex. 1981). *See generally* W. DORSANEO, TEXAS LITIGATION GUIDE § 130.03 (1985) (outlining proper appellate review standard for motion for judgment n.o.v.).

587. *See* Jacksboro Nat'l Bank v. City Nat'l Bank of Wichita Falls, 592 S.W.2d 672, 675 (Tex. Civ. App.—Fort Worth 1979), *rev'd on other grounds,* 602 S.W.2d 511 (Tex. 1980); Reed v. Enright, 488 S.W.2d 596, 598 (Tex. Civ. App.—Dallas 1972, no writ).

588. *See* TEX. R. CIV. P. 324; *see also* City of San Antonio v. Theis, 554 S.W.2d 278, 282 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.), *cert. denied,* 439 U.S. 807 (1978).

589. *See* TEX. R. CIV. P. 324(c); *see also* Fidelity & Cas. Co. of New York v. Central Bank of Houston, 672 S.W.2d 641, 644 (Tex. App.—Houston [14th Dist.] 1984, no writ); Western Constr. Co. v. Valero Transmission Co., 655 S.W.2d 251, 255 (Tex. App.—Corpus Christi 1983, no writ); Stevenson v. Adams, 640 S.W.2d 681, 683 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

590. *See* Shrader v. Artco Bell Corp., 579 S.W.2d 534, 541 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.).

B. *Motion for New Trial*

1. Purpose

Generally, a motion for new trial is the last chance to convince the trial court that error has occurred, causing the rendition of an improper judgment.[591] In 1981 and 1984, the rules regarding motions for new trial were revised, creating some traps for the unwary trial practitioner.[592] In 1981 Rule 324 was amended to remove the presumption that most points of error must first be presented to the trial court in a motion for new trial as a prerequisite for appeal.[593] In 1984 an amendment to Rule 324 created specific exceptions to the general rule of no requirement of motion for new trial.[594] Generally, a motion for new trial is still a prerequisite to an appeal for matters which have not otherwise been brought to the court's attention or for which additional evidence is needed.[595] The obvious purpose of a motion for new trial is to provide the trial court an opportunity to re-examine any specific error.[596] By requiring the movant to present the complaint in clear and understandable language, the trial judge may have a full

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591. *See* TEX. R. CIV. P. 320; *see also* Mushinski v. Mushinski, 621 S.W.2d 669, 671 (Tex. Civ. App.—Waco 1981, no writ) (motion for new trial is means to correct error, not attempt to try case differently); Townsend v. Collard, 575 S.W.2d 422, 423-24 (Tex. Civ. App.—Fort Worth 1978, no writ) (motion for new trial meant to cure only errors already made).

592. *See* TEX. R. CIV. P. 320, 324, 329b.

593. *See* TEX. R. CIV. P. 324 (1981). The 1981 rule provided, "a motion for new trial shall not be a prerequisite to the right to complain on appeal, in any jury or non-jury case." *Id.* 324. The purpose behind the 1981 amendment was to abolish the "useless formality" of a motion for new trial in most circumstances. *See* Guittard, *Other Significant Changes in the Appellate Rules,* 12 ST. MARY'S L.J. 667, 679 (1981).

594. *See* TEX. R. CIV. P. 324 ("point in a motion for new trial is not a prerequisite to a complaint on appeal in either a jury or non-jury case, *except as provided in subsection (b)")* (emphasis added).

595. *See* TEX. R. CIV. P. 324(b). Subdivision (b) enumerates the grounds for which a motion for new trial is still a prerequisite for appeal. These include the following:

1. A complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside a judgment by default;
2. A complaint of factual insufficiency of the evidence to support a jury finding;
3. A complaint that a jury finding is against the overwhelming weight of the evidence;
4. A complaint of inadequacy or excessiveness of the damages found by the jury; or
5. Incurable jury argument if not otherwise ruled on by the trial court.

Id. 324(b).

596. *See* Townsend v. Collard, 575 S.W.2d 422, 423-24 (Tex. Civ. App.—Fort Worth 1978, no writ). *See generally* Barrow, *Appellate Procedure Reform,* 12 ST. MARY'S L.J. 615, 618 (1981).

opportunity to correct errors or to grant a new trial.[597] A substantial amount of case law has developed around the practice involved in motions for new trials. At the outset, the rules of procedure provide an immense amount of unchecked power to the trial court in this area. For example, the granting of a motion for new trial is not reviewable on appeal.[598] Additionally, appellate courts will not issue a writ of mandamus directing a trial judge to set aside the granting of a motion for new trial[599] except in two isolated situations. The first is when the order granting a new trial is issued after the trial court's jurisdiction in the case ends.[600] The second is when the motion is granted because of a conflict in the jury's answers to special issues.[601]

Obviously, motions for new trial may be filed on any number of grounds, including jury misconduct, newly-discovered evidence, excessive or insufficient verdicts, insufficiency of evidence, motions to set aside default judgments, and the like. This article will not discuss the peculiarities of each type of motion, but will address the problems applicable to all motions for new trial.

2. Form

The rules of procedure do not dictate a particular form for the motion for new trial.[602] However, several items are clear. First, all motions for new trial must be in writing and signed by the party or the trial attorney.[603] There is no general rule on how detailed the grounds

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597. *See* Smith v. Brock, 514 S.W.2d 140, 142 (Tex. Civ. App.—Texarkana 1974, no writ).

598. *See* A. C. Grohn v. Marquardt, 657 S.W.2d 851, 857 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.); Fenno v. Sam Reece Air Conditioning & Heating, Inc., 572 S.W.2d 810, 811 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ); Napier v. Napier, 567 S.W.2d 851, 857 (Tex. Civ. App.—El Paso 1977, no writ).

599. *See* Johnson v. Court of Appeals, 162 Tex. 613, 615, 350 S.W.2d 330, 331 (1961); Maupin Constr. Co. v. Stovall, 647 S.W.2d 32, 34 (Tex. App.—Houston [1st Dist.] 1982, no writ); City of Perryton v. Boyer, 423 S.W.2d 170, 174 (Tex. Civ. App.—Amarillo 1968, man. over'd).

600. *See* Thursby v. Stovall, 647 S.W.2d 953, 955 (Tex. 1983); Clark & Co. v. Giles, 639 S.W.2d 449, 451 (Tex. 1982); Broussard v. Dunn, 568 S.W.2d 126, 127 (Tex. 1978).

601. *See* Johnson v. Court of Appeals, 162 Tex. 613, 615, 350 S.W.2d 330, 331 (1961); Rod Ric Corp. v. Barney, 651 S.W.2d 407, 409 (Tex. App.—El Paso 1983, no writ); Anheuser-Busch, Inc. v. Smith, 539 S.W.2d 234, 235 (Tex. Civ. App.—Houston 1976, no writ).

602. For a proposed form of a motion for new trial, see 6 W. DORSANEO, TEXAS LITIGATION GUIDE § 18.07.1, at 291 (1984).

603. *See* TEX. R. CIV. P. 320. A failure to sign the motion, however, is a mere irregularity, and is generally not fatal, especially if the motion is subsequently signed by order of the

in the motion must be.[604] Rule 321 states that each point in the motion must refer to the ruling of the court, "in such a way that the point of objection can be clearly identified and understood."[605] Furthermore, Rule 322 makes it clear that objections cast in general terms shall not be considered by the court.[606] In fact, courts have refused to consider grounds in motions for new trial which were too general and have also held that general grounds provide no basis for appeal.[607]

As a general rule, there is no necessity for verification of a motion for new trial or for affidavits to buttress the testimony.[608] However, when errors are complained of that occur outside of the proceedings, such as in the pre-trial proceedings, a verified record needs to be presented to the judge for consideration on the motion for new trial.[609]

3. Time Periods

The motion for new trial must be filed within thirty (30) days after

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court. *See* Turnbow Petroleum Corp. v. Fulton, 145 Tex. 56, 58, 194 S.W.2d 256, 257-58 (1946).

604. *See* TEX. R. CIV. P. 322 ("generality is to be avoided"). *See generally* W. DORSANEO, TEXAS LITIGATION GUIDE § 140.100(b)(1985); R. MCDONALD, TEXAS CIVIL PRACTICE § 18.07.1, at 291 (1984).

605. *See* TEX. R. CIV. P. 321. Merely incorporating previous objections from a motion for directed verdict or motion notwithstanding the verdict is insufficient to establish a ground of error. *See* Wagner v. Foster, 161 Tex. 333, 336, 341 S.W.2d 887, 891 (1960); L. F. Bauer v. Valley Bank of El Paso, 560 S.W.2d 520, 522 (Tex. Civ. App.—El Paso 1977, no writ).

606. *See* TEX. R. CIV. P. 322; *cf.* Biggers v. Continental Bus. Sys., 157 Tex. 351, 353, 303 S.W.2d 359, 368 (1957) (setting out points of error in separate paragraphs sufficient to overcome prohibition of generality).

607. *See* Gavrell v. Young, 407 S.W.2d 518, 522 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.); Morrow v. Flores, 225 S.W.2d 621, 623 (Tex. Civ. App.—Fort Worth 1949, writ ref'd n.r.e.). Appellate courts, however, tend to resolve any reasonable doubt in specificity so as to favor considering a point of error. *See In re* T.B.S., 601 S.W.2d 539, 543 (Tex. Civ. App.—Tyler 1980, no writ); McCarthy v. Jerperson, 527 S.W.2d 825, 826 (Tex. Civ. App.—El Paso 1975, writ ref'd); R. MCDONALD, TEXAS CIVIL PRACTICE § 18.07.1, at 292 (1984).

608. *See* Abercia v. First Nat'l Bank of San Antonio, 500 S.W.2d 573, 576 (Tex. Civ. App.—San Antonio 1973, no writ); R. MCDONALD, TEXAS CIVIL PRACTICE § 18.07.2, at 296 (1984).

609. *See* S. B. & T. Gem Imports, Inc. v. Creswell, 671 S.W.2d 145, 146 (Tex. App.—Houston [14th Dist.] 1984, no writ); Abercia v. First Nat'l Bank of San Antonio, 500 S.W.2d 573, 576 (Tex. Civ. App.—San Antonio 1973, no writ); Empire Life and Hosp. Ins. Co. v. Poole, 469 S.W.2d 644, 645 (Tex. Civ. App.—Waco 1971, no writ). For a good discussion of when affidavits and verifications are needed, see R. MCDONALD, TEXAS CIVIL PRACTICE § 18.07.2, at 296-302 (1984).

the judgment or other order complained of is signed.[610] This time period is almost absolute[611] since Rule 5 prevents the trial court from enlarging time periods "for taking any action under rules relating to new trials"[612] except in a limited situation.[613] Likewise, the filing of other intervening motions does not prevent the appellate time period from running.[614] Any motion for new trial filed more than thirty (30) days after the judgment or order is signed is void and preserves no rights for appeal.[615] The trial court may not alter or strike out the date on which a judgment is signed to prevent the running of the thirty-day period.[616]

An amended motion for new trial can be filed without leave of court within the original thirty-day period after the judgment or order is signed.[617] After this period of time, the court may entertain an amended motion for new trial if it is filed during the time in which the

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610. *See* TEX. R. CIV. P. 329b(a); *see also* Jackson v. Van Winkle, 660 S.W.2d 807, 808 (Tex. 1983) (motion for new trial must be filed within thirty days).

611. *See* McCormack v. Guillot, 597 S.W.2d 345, 347 (Tex. 1980); Farrow v. Bramble, 663 S.W.2d 893, 895 (Tex. App.—San Antonio 1984, no writ); Atkinson v. Culver, 589 S.W.2d 164, 166 (Tex. Civ. App.—El Paso 1979, no writ). Rule 4 offers a limited extension of the timetable by recognizing that legal holidays are not counted in the time period for a motion for new trial. *See* TEX R. CIV. P. 4.

612. *See* TEX. R. CIV. P. 5; *see also* Lind v. Gresham, 672 S.W.2d 20, 22 (Tex. App.—Houston [14th Dist.] 1984, no writ) (attempt to use Rule 5 to allow untimely motion for new trial is void); Smith v. Caney Creek Estates Club, Inc., 631 S.W.2d 233, 235 (Tex. App.—Corpus Christi 1982, no writ) (Rule 5 cannot extend timetables).

613. *See* TEX. R. CIV. P. 5. Rule 5 allows a party to mail a motion for new trial to the court by first class, United States mail, in a properly addressed and stamped envelope, provided the envelope is deposited in the mail at least one or more days before the date for filing. *See id.* 5. If the party meets and can prove all of Rule 5's requirements, the motion will be accepted if it reaches the court within ten (10) days of its due date. *See id.* 5; *see also* Hodges v. Texas, 539 S.W.2d 394, 396 (Tex. Civ. App.—Austin 1976, no writ) (party must establish compliance with Rule 5's "mail-in" provision by producing the postmarked envelope or by affidavit).

614. *See* Walker v. S & T Truck Lines, 409 S.W.2d 942, 943-44 (Tex. Civ. App.—Corpus Christi 1966, error ref'd) (motion for judgment n.o.v. had no effect in suspending time period for motion for new trial).

615. *See* Jackson v. Van Winkle, 660 S.W.2d 807, 809 (Tex. 1983); Farrow v. Farrow, 663 S.W.2d 893, 895 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.); Morris v. Morris, 615 S.W.2d 303, 305 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.); R. MCDONALD, TEXAS CIVIL PRACTICE § 18.06.2, at 287 (1984).

616. *See* Stephens v. Henry S. Miller Co., 667 S.W.2d 250, 252 (Tex. App.—Dallas 1984, no writ); *cf.* Reynolds v. Harrison, 635 S.W.2d 845, 846-47 (Tex. App.—Tyler 1982, writ ref'd n.r.e.) (trial court cannot extend time tables for appeals).

617. *See* TEX. R. CIV. P. 329b(b); *see also* Airco, Inc. v. Tijerina, 603 S.W.2d 785, 786 (Tex. 1980).

court has plenary power over its judgment.[618] However, the filing of the amended motion does not operate to extend the court's jurisdiction over the judgment for any longer period than the filing of the original motion.[619] The effect of a late-filed amended motion actually depends for its effect upon the attitude and actions of the court.[620] If the trial court takes no action on the motion, the motion preserves no error for appeal, and does not serve as a prerequisite for any of the items in Rule 324(b).[621] Even so, the court is still free to exercise its plenary power to set aside the initial judgment.[622]

Any motion for new trial, whether original or amended, is overruled by operation of law after the passage of seventy-five (75) days after the judgment was signed.[623] This automatic rule takes effect if no written order is entered within the seventy-five (75) day period.[624] As a result, there is no provision for extension of the seventy-five (75) day period, and any attempts to extend this period are considered a nullity.[625] However, the court does retain plenary power to enter additional orders after the motion for new trial is overruled by operation of law.[626] Under Rule 329b(e) the court has plenary power until thirty (30) days after all timely-filed motions for new trial are over-

618. *See* TEX. R. CIV. P. 329b(c); *see also In re* F. F., 636 S.W.2d 444, 446 (Tex. App.—Fort Worth 1982, no writ).

619. *See* TEX. R. CIV. P. 329b(e); *see also* Airco, Inc. v. Tijerina, 603 S.W.2d 785, 786 (Tex. 1980).

620. *See* 4 R. MCDONALD, TEXAS CIVIL PRACTICE § 18.06.2, at 287 (1984).

621. *See id.* at 287.

622. *See id.* at 287; *see also* Stephens v. Henry S. Miller Co., 667 S.W.2d 250, 252 (Tex. App.—Dallas 1984, no writ).

623. *See* TEX. R. CIV. P. 329b(c); *see also* Clark & Co. v. Giles, 639 S.W.2d 449, 450 (Tex. 1982) (no trial court action in writing ruling on motion; motion is overruled on 75th day).

624. *See* TEX. R. CIV. P. 329b(c); *see also* Taack v. McFall, 661 S.W.2d 923, 924 (Tex. 1983) (no written ruling on motion for new trial by 75th day, later ruling on motion is void).

625. *See* TEX. R. CIV. P. 5, 329b; *see also* Taack v. McFall, 661 S.W.2d 923, 924 (Tex. 1983). When the seventy-fifth (75) day falls on Saturday, Sunday, or a legal holiday, the motion for new trial is not overruled by operation of law until the next day following these special days. *See* Missouri-Kansas-Texas Ry. Co. v. Chesher, 354 S.W.2d 645, 648 (Tex. Civ. App.—Texarkana 1962, writ ref'd n.r.e.); *see also* TEX. R. CIV. P. 4 (holidays and weekends not counted in computing time periods).

626. *See* Anderson v. Anderson, 575 S.W.2d 318, 319 (Tex. Civ. App.—Dallas 1978, no writ); Mapus v. Garza, 508 S.W.2d 857, 858 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.). For a discussion on the plenary power of Texas trial courts, *see* Peeples, *Trial Court Jurisdiction and Control Over Judgments*, 17 ST. MARY'S L.J. 367 (1986).

ruled.[627] As a result, the trial court has the power to vacate, modify, correct, or reform the judgment or to grant a new trial within one hundred and five (105) days from the date of the signing of the judgment.[628] If it is the court's intention to actually grant a new trial, the court must do so in writing before the passage of one hundred and five (105) days, or forever lose jurisdiction to take any action whatsoever.[629] If the court grants a new trial, it retains jurisdiction only for the original seventy-five (75) day period.[630]

V. CONCLUSION

Protection of the record for appeal can be a tedious process, requiring strategic planning and split second decisions. However, the dividends are high. A record that is properly protected will preserve favorable judgments and provide a good basis for the overturning of unfavorable results.

It is obvious from the various subsections in this article that common threads in protecting the record exist within almost all of the procedural stages of a trial. As a result, trial practitioners should remember that, with few exceptions, an appellant must demonstrate four items to secure favorable results:

(1) Request: A party must show that the trial court was requested to take certain action or to refrain from taking action.

(2) Refusal: The record must demonstrate that the trial court refused to grant the request.

(3) Error: Legal authority must demonstrate that the trial court's action was incorrect.

(4) Harm: Rule 434 requires a showing that the trial court's refusal probably caused the rendition of an improper judgment. This fourth step is the one most overlooked by practitioners, and as a re-

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627. *See* TEX. R. CIV. P. 329b(e); *see also* Mathes v. Kelton, 569 S.W.2d 876, 878 (Tex. 1978).

628. *See* Transamerican Leasing Co. v. Three Bears, Inc., 567 S.W.2d 799, 801 (Tex. 1978); Garza v. Serrato, 671 S.W.2d 713, 714 (Tex. App.—San Antonio 1984, no writ); Meso Agro v. R. C. Dave & Sons, 584 S.W.2d 506, 508 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.).

629. *See* Taack v. McFall, 661 S.W.2d 923, 924 (Tex. 1983); Boris v. Boris, 642 S.W.2d 855, 857 (Tex. App.—Fort Worth 1982, no writ).

630. *See* Fulton v. Firch, 162 Tex. 351, 353, 346 S.W.2d 823, 825 (1961); Ranger Ins. Co. v. Robertson, 680 S.W.2d 618, 620-21 (Tex. App.—Austin 1984), *aff'd in part & rev'd in part,* 689 S.W.2d 209 (Tex. 1985).

sult, numerous appellate opinions admit that the trial court committed error, but refuse to find that the error was harmful. In this regard, it is important for the record to reflect why the court's error is harmful.

In civil cases, the record is the transcript (pleadings, motions, orders, written discovery, etc.) on file with the clerk and the statement of facts (as taken by the court reporter during both trial and hearings). It is axiomatic that the trial court's ruling should be reflected in the statement of facts or recorded by a signed written order. The same is true of motions made by any party. At each stage of the trial, it is important to take time to reflect on whether all of the motions, rulings, and other evidence which indicates harm are included in the appellate record. This short thought process will ensure successes on appeal.

Of the four steps mentioned above, three are established by the record. Obviously, the record must show the request, the refusal, and any resultant harm. The question of whether the court's action is error is reserved for the legal authorities that will be briefed on appeal. However, in many instances, valid appeals are denied because parties did not take the requisite steps to ensure that the record was properly preserved. Naturally, this negligence results in embarrassment, losses, and occasionally malpractice suits. Hopefully, this article will help trial practitioners avoid these pitfalls.