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Texas Civil Procedure

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TEXAS CIVIL PROCEDURE

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THE major developments in the field of civil procedure during the Survey period occurred through judicial decisions and statutory enactments.

I. SUBJECT MATTER JURISDICTION

The Texas Supreme Court addressed the jurisdiction of the district and county courts in a number of decisions during the Survey period. *Smith v. Clary Corp.*¹ held that the aggregating statute,² which allows multiple plaintiffs to aggregate their claims for purposes of the minimum jurisdictional amount in district court,³ did not apply to defeat jurisdiction over counterclaims brought by multiple defendants in a county court at law.⁴ Although each individual defendant's counterclaim must not exceed the maximum jurisdictional limits of the county court, the aggregation statute will not apply to divest the court of jurisdiction over the counterclaims of multiple defendants.⁵

The supreme court limited the jurisdiction of the district courts in two cases of interest to Texas attorneys. In *State Bar of Texas v. Gomez*,⁶ the court held that the district court lacked jurisdiction over a suit complaining of the State Bar of Texas' failure to institute a program to compel its members to provide free legal services.⁷ The unique jurisdictional aspect of the case, said the court, arose out of its own "power to regulate the practice of law in the State of Texas."⁸ Thus, plaintiffs' claim seeking to require the State Bar to implement a mandatory pro bono program was not justiciable because that entity's authority was limited to proposing regulations to the supreme court, and it could not implement the requested remedy on its own.⁹ Moreover, to the extent the district court would be required to direct the supreme court to take action, any relief would "impinge on the Court's exclusive authority to regulate the practice of law."¹⁰

This latter point also underlaid the decision in *Board of Disciplinary Appeals v. McFall*.¹¹ The district court in that case enjoined the disciplinary suspension of an attorney.¹² The supreme court granted a writ of mandamus to vacate the injunction and a writ of prohibition against fur-

1. 38 Tex. Sup. Ct. J. 1026 (July 7, 1995).

2. TEX. GOV'T CODE ANN. § 24.009 (Vernon 1988).

3. *Id.*

4. *Smith*, 38 Tex. Sup. Ct. J. at 1027.

5. *Id.* at 1026-27.

6. 891 S.W.2d 243 (Tex. 1994).

7. *Id.* at 244.

8. *Id.* at 245.

9. *Id.* at 246.

10. *Id.*

11. 888 S.W.2d 471 (Tex. 1994).

12. *Id.* at 472.

ther proceedings in the district court, holding that the district court lacked subject matter jurisdiction.¹³ The court noted that it had established "a comprehensive system of lawyer discipline" that included a right of appeal directly to the supreme court but did not provide for interim equitable relief in the district court.¹⁴

Finally, the supreme court held in *A&T Consultants v. Sharp*¹⁵ that only it, and not the district court, has jurisdiction over mandamus actions against the executive officers of the State of Texas identified in the constitution.¹⁶ In applying this rule to a mandamus action against one of those officials under the Texas Open Records Act,¹⁷ the court relied on the plain language of section 22.002(c) of the Government Code.¹⁸ The dissent argued, however, that the majority misread the Texas Open Records Act and established a "deplorable policy" by "taking upon itself the sole responsibility for reviewing every open records dispute involving six large state offices."¹⁹

II. SERVICE OF PROCESS

The Texas Supreme Court rejected an unduly formalistic approach to the requirement of service of process on a minor in *American General Fire & Casualty Co. v. Vandewater*.²⁰ The court of appeals had held that a minor could not waive service of process by voluntarily appearing in a suit through a guardian or next friend.²¹ The supreme court disagreed, stating that the focus should be on "whether the minor's interests have been properly protected and whether a deficiency in notice or due process has been shown."²² Because there were no such deficiencies in the case before it, and the minor's interests were protected by a guardian ad litem, the court held that the minor was properly made a party to the action.²³

The supreme court emphasized the importance of ensuring the accuracy of a return of service in *Primate Construction, Inc. v. Silver*.²⁴ How-

13. *Id.* at 472-73.

14. *Id.* at 472.

15. 904 S.W.2d 668 (Tex. 1995).

16. *Id.* at 672. Compare *Witt v. Whitehead*, 900 S.W.2d 374, 375 (Tex. App.—Austin 1995, writ denied) ("Although the supreme court has exclusive jurisdiction over suits for writ of mandamus, a district court has jurisdiction to issue [a mandatory] injunction against a state executive officer.") (citations omitted).

17. TEX. GOV'T CODE ANN. §§ 552.001-.353 (Vernon 1994 & Supp. 1996).

18. TEX. GOV'T CODE ANN. § 22.002(c) (Vernon 1988); *Sharp*, 904 S.W.2d at 672.

19. *Id.* at 682 (Hecht, J., dissenting) (emphasis original).

20. 907 S.W.2d 491 (Tex. 1995).

21. *Vandewater v. American Gen. Fire & Casualty Co.*, 890 S.W.2d 811, 814 (Tex. App.—Austin 1994) (discussed in A. Erin Dwyer & Donald Colleluori, *Annual Survey of Texas Law; Texas Civil Procedure*, 48 SMU L. REV. 1615, 1618 (1995) [hereinafter 1995 *Annual Survey*]), *rev'd*, 907 S.W.2d 491 (Tex. 1995).

22. *Vandewater*, 907 S.W.2d at 492.

23. *Id.* at 493.

24. 884 S.W.2d 151, 153 (Tex. 1994) (discussed in the 1995 *Annual Survey*, *supra* note 21 at 1617).

ever, *Herbert v. Greater Gulf Coast Enterprises, Inc.*²⁵ teaches that this authority should not be read so broadly as to mean that any inaccuracy in a return of service is fatal. In *Herbert*, the defendant was served with process in Connecticut under Rule 108.²⁶ The return of service stated, however, that a copy of the "Complaint," rather than the original petition, was delivered with the citation.²⁷ The court held that, notwithstanding the requirement of strict compliance with the rules regarding service of process, the erroneous reference to the petition as a complaint did not require setting aside the default judgment.²⁸

III. SPECIAL APPEARANCE

Invoking the exception it articulated in *Canadian Helicopters Ltd. v. Wittig*,²⁹ the supreme court allowed the defendant in *National Industrial Sand Ass'n v. Gibson*³⁰ to obtain immediate appellate review by mandamus of the district court's denial of its special appearance under Rule 120a.³¹ Under *Canadian Helicopters*, an appeal from the denial of a special appearance is normally deemed an adequate remedy unless the trial court's assertion of personal jurisdiction is so clearly erroneous that the harm to the defendant becomes irreparable.³² The court held that the facts in *Gibson* met this standard because the "trial court was not faced with a voluminous record filled with contradictory evidence, but only with the plaintiffs' bare allegations of conspiracy lacking any evidence of conspiratorial acts in or directed to Texas."³³ In light of the "total and inarguable absence of jurisdiction," mandamus relief was justified.³⁴

Practitioners concerned about a rigid application of the oft-stated maxim that a waiver will result from the failure to strictly comply with Rule 120a can take comfort from the decisions in *Hotel Partners v. Craig*³⁵ and *Potkovick v. Regional Ventures, Inc.*³⁶ In *Craig*, the plaintiffs alleged the defendants waived their special appearance by filing a motion for protective order that did not expressly state that it was "subject to" the special appearance. Noting that Rule 120a expressly allows a party to

25. No. 01-94-01240-CV, 1995 WL 678797 (Tex. App.—Houston [1st Dist.] Nov. 16, 1995, n.w.h.).

26. *Herbert*, 1995 WL 678797 at *1.

27. *Id.* at *3.

28. *Id.* at *3-*4.

29. 876 S.W.2d 304 (Tex. 1994).

30. 897 S.W.2d 769 (Tex. 1995).

31. *Gibson*, 897 S.W.2d at 771.

32. *Canadian Helicopters*, 876 S.W.2d at 308. See 1995 Annual Survey, *supra* note 21 at 1618-19.

33. *Gibson*, 897 S.W.2d at 776.

34. *Id.* (quoting *Canadian Helicopters*, 876 S.W.2d at 309). The dissent disagreed with this conclusion, noting that the majority wholly failed to explain why the defendant's appellate remedies were inadequate. *Gibson*, 897 S.W.2d at 777 (Cornyn, J., dissenting).

35. No. 05-92-01625-CV, 1994 WL 719707 (Tex. App.—Dallas, Dec. 30, 1994, n.w.h.).

36. 904 S.W.2d 846 (Tex. App.—Eastland 1995, no writ).

participate in discovery without waiving its special appearance³⁷ and that most of the defendants' filings contained the "subject to" language, the court held that there was no requirement that discovery-related documents contain "magic words" stating that they are "subject to" a special appearance.³⁸ Similarly, the *Potkovick* court held that Rule 120a's requirement that affidavits be served at least seven days before the hearing on a special appearance³⁹ is subject to the trial court's discretion to allow the late filing of such affidavits.⁴⁰

IV. VENUE

In response to recent outcries about burgeoning litigation and escalating damage awards, as well as increasing perceptions that many plaintiffs' suits are simply frivolous, the 74th Legislature enacted a series of comprehensive acts during the Survey period designed to accomplish sweeping "tort reform." Among these was Senate Bill 32, which effected significant revisions to the Texas venue statute.⁴¹ This amendment repealed four former provisions of the venue statute,⁴² added eleven new provisions,⁴³ and revised five others.⁴⁴ Twelve provisions remained unchanged.⁴⁵ With but one exception,⁴⁶ the amended statute became effective September 1, 1995.⁴⁷ Although a detailed discussion of the amended venue statute is beyond the scope of this article, some of the revisions are particularly noteworthy.

A. GENERAL RULE AND DEFINITIONS

Under the former statute, venue was always proper "in the county in which all or a part of the cause of action accrued or in the county of

37. TEX. R. CIV. P. 120a ("[t]he taking of depositions, the serving of requests for admissions, and the use of discovery processes, shall not constitute a waiver of such special appearance.").

38. *Craig*, 1994 WL 719707 at *6.

39. TEX. R. CIV. P. 120a.

40. *Potkovick*, 904 S.W.2d at 850.

41. Act of May 18, 1995, 74th Leg., R.S., ch. 138, 1995 Tex. Sess. Law Serv. 978 (Vernon) (codified at TEX. CIV. PRAC. & REM. CODE §§ 15.001-.66 (Vernon Supp. 1996)).

42. *Id.* § 10, 1995 Tex. Sess. Law Serv. at 981 (repealing TEX. CIV. PRAC. & REM. CODE ANN. §§ 15.036 (Corporations and Associations), 15.037 (Foreign Corporations), 15.040 (Nonresidents; Residence Unknown), 15.061 (Joinder of Defendants or Claims) (Vernon 1986)).

43. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 15.001, 15.003-.007, 15.0115, 15.018, 15.0641, 15.064, 15.066 (Vernon Supp. 1996).

44. Compare former TEX. CIV. PRAC. & REM. CODE ANN. § 15.001 (Vernon 1986) with TEX. CIV. PRAC. & REM. CODE ANN. § 15.002 (Vernon Supp. 1996); see TEX. CIV. PRAC. & REM. CODE ANN. §§ 15.011, 15.032-.033, 15.062 (Vernon Supp. 1996).

45. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 15.012-.017, 15.031, 15.035, 15.038-.039, 15.063-.064 (Vernon Supp. 1996).

46. Section 11(b) of the amending act provides that venue under TEX. CIV. PRAC. & REM. CODE § 15.018, dealing with FELA and Jones Act claims, applies only to a suit commenced on or after January 1, 1996. Act of May 18, 1995, 74th Leg., R.S., ch. 138, § 11(b), 1995 Tex. Sess. Law Serv. at 982 (Vernon).

47. *Id.* § 11(a), 1995 Tex. Sess. Law Serv. at 981.

defendant's residence if the defendant was a natural person."⁴⁸ Perhaps to eliminate continuing debate about where a cause of action accrued, the amended statute provides that venue is proper "in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred."⁴⁹ The general rule was also amended to add two new places where venue is appropriate: (1) "the county of defendant's principal office in [Texas], if the defendant is not a natural person;"⁵⁰ and (2) if none of the other general rules apply, the county in which the plaintiff resided at the time the cause of action accrued.⁵¹ Because § 15.002 now includes a general rule specifying venue for all suits brought against corporations (i.e., defendants who are not natural persons), the former exceptions establishing permissive venue for suits against domestic and foreign corporations have been repealed.⁵² The new general rule, however, substitutes "principal office in this state" for the various categories formerly appearing in the permissive venue sections.⁵³ This change will hopefully reduce the controversies that previously engulfed the courts as they struggled with the now-discarded term "agency or representative."⁵⁴

The general venue provision also adds a transfer rule modelled after the federal statute governing changes of venue.⁵⁵ Section 15.002(b) permits the trial court to transfer the case to another county of proper venue "[f]or the convenience of the parties and witnesses and in the interest of justice."⁵⁶ In contrast to its federal counterpart, however, this transfer provision is available only to defendants.⁵⁷ In addition, transfer is appropriate only where the court finds that maintaining the suit in the original venue would be unjust to the defendants because of economic or personal hardship, transfer would not work an injustice to any other party, and the balance of interests of all parties predominates in favor of the transfer.⁵⁸ Although the court must weigh each of these factors in making its decision, the amended statute provides no "check" on that decision-making process. Instead, the trial court's decision to grant or deny a transfer is grounds for neither an appeal nor a mandamus, and it does not constitute

48. See TEX. CIV. PRAC. & REM. CODE ANN. § 15.001 (Vernon 1986).

49. TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a)(1) (Vernon Supp. 1996). The amended statute still allows venue in the county of the defendant's residence if a natural person. *Id.* § 15.002(a)(2).

50. *Id.* § 15.002(a)(3).

51. *Id.* § 15.002(a)(4).

52. Act of May 18, 1995, 74th Leg., R.S., ch. 138, § 10, 1995 Tex. Sess. Law Serv. at 981 (Vernon) (repealing TEX. CIV. PRAC. & REM. CODE ANN. §§ 15.036, 15.037 (Vernon 1986)).

53. Compare TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a)(3) (Vernon Supp. 1996) with TEX. CIV. PRAC. & REM. CODE ANN. §§ 15.036-.037 (Vernon 1986) (repealed 1995).

54. See, e.g., *Ruiz v. Conoco, Inc.*, 868 S.W.2d 752 (Tex. 1993), discussed in Ernest E. Figari, et al., *Annual Survey of Texas Law: Texas Civil Procedure*, 47 SMU L. REV. 1677, 1692-94 [hereinafter 1994 *Annual Survey*].

55. See 28 U.S.C. § 1404(a) (1994).

56. TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(b) (Vernon Supp. 1996).

57. *Id.*

58. *Id.* § 15.002(b)(1)-(3).

reversible error.⁵⁹

Former section 15.061, enacted in 1983 essentially to codify the long-standing *Middlebrook* doctrine,⁶⁰ provided that a court with venue of a single claim against a defendant also had venue as to all properly joined claims against that defendant as well as any other defendants who were proper parties. The legislature repealed this provision, substituting in its stead three new provisions in the general section of the statute governing multiple parties and claims. The most important of these is section 15.003, which deals with multiple or intervening plaintiffs. It requires each plaintiff originally joining in the suit to establish proper venue, independent of any other plaintiff, unless it can show (again, independently of the other plaintiffs) that: (1) joinder is proper; (2) the venue is not unfair to any party; (3) "there is an essential need to have the claim tried in the county in which the suit is pending;" and (4) the venue is fair and convenient to the plaintiff and all defendants against whom the suit is brought.⁶¹ Identical rules apply to any later joining or intervening plaintiffs. Section 15.003 also provides for an expedited interlocutory appeal of the trial court's venue determination in the multiple or intervening plaintiff context. Section 15.005 of the new statute, entitled "Multiple Defendants," provides that, where a plaintiff has established proper venue against a defendant, the court has venue as to all defendants of all claims or actions arising out of the same transaction, occurrence, or series of transactions or occurrences.⁶² Section 15.004, on the other hand, makes clear that suits joining multiple claims arising out of the same transaction or occurrence may be brought only in the county required by a mandatory venue provision if any of the claims is governed by such a provision.

Finally, subchapter A of the venue statute includes three other new provisions that (1) set forth general definitions,⁶³ (2) make clear that venue is to be determined based on the facts existing at the time the cause of action accrued,⁶⁴ and (3) resolve any conflicts with the venue provisions of the Texas Probate Code in suits by or against an executor, administrator, or guardian for personal injury, death, or property damage.⁶⁵

B. MANDATORY AND PERMISSIVE VENUE

Under amended section 15.011 of the venue statute, suits for damages to real property are once again subject to mandatory venue in the county

59. *Id.* § 15.002(c).

60. *See Middlebrook v. David Bradley Mfg. Co.*, 86 Tex. 706, 26 S.W. 935, 935 (1894).

61. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a) (Vernon Supp. 1996).

62. *Id.* § 15.005.

63. *Id.* § 15.001.

64. *Id.* § 15.006.

65. *Id.* § 15.007 (Vernon Supp. 1996) (providing that the provisions of the general venue statute will control in such cases over any conflicting venue provisions of the Probate Code).

in which all or a part of the property is located.⁶⁶ The legislature also included a new provision mandating venue of lease disputes in the county in which the leased property is situated, either in whole or part.⁶⁷ Section 15.018, which is new, requires all suits under the Federal Employers' Liability Act⁶⁸ or the Jones Act⁶⁹ to be brought in the county where either all or a substantial part of the events or omissions giving rise to the claim occurred, the defendant's principal office is located, or the plaintiff resided when the cause of action accrued.⁷⁰

In addition to the aforementioned deletion of the permissive venue exceptions for suits against domestic and foreign corporations, the amended statute deleted the venue provision for suits against nonresidents or persons whose residence was unknown.⁷¹ Minor wording revisions were also made to the venue provisions for suits against insurance companies⁷² and for breach of warranty by manufacturers.⁷³

C. GENERAL PROVISION

Three new provisions were added to Subchapter D of the venue statute. The most significant of these is section 15.0641, which provides that one defendant's acts or omissions in relation to venue, including waiver, cannot impair or diminish the right of any other defendant to challenge venue.⁷⁴ The amended statute also now includes a section providing for an expedited mandamus remedy in cases involving a mandatory venue provision⁷⁵ and a provision making clear that the statute controls over any conflicting rule of civil procedure.⁷⁶

V. PARTIES

Texas Rule of Civil Procedure 42 provides that one or more members of a class may sue on behalf of the entire class if, among other things, the representative parties will fairly and adequately protect the interests of the class. The case of *Forsyth v. Lake LBJ Investment Corp.*⁷⁷ is informa-

66. *Id.* § 15.011. The 1983 amendments to the venue statute had deleted suits for damages to land or to prevent waste as a basis for invoking the mandatory exception concerning land actions. Compare TEX. CIV. PRAC. & REM. CODE ANN. § 15.011 (Vernon 1986) with TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon 1964 & Supp. 1982-83) (repealed 1983).

67. TEX. CIV. PRAC. & REM. CODE ANN. § 15.0115 (Vernon Supp. 1996).

68. 45 U.S.C. §§ 51-60 (1988).

69. 46 U.S.C. app. § 688 (1988).

70. TEX. CIV. PRAC. & REM. CODE ANN. § 15.018 (Vernon Supp. 1996).

71. Act of May 18, 1995, 74th Leg., R.S., ch. 138, § 10, 1995 Tex. Sess. Law Serv. 979, 981 (Vernon) (repealing TEX. CIV. PRAC. & REM. CODE ANN. § 15.040 (Vernon 1986)).

72. *Id.* § 3, 1995 Tex. Sess. Law Serv. at 980 (substituting "company's principal office in this state" and "resided at the time the cause of action accrued" for "home office of the company" and "resides," respectively, in TEX. CIV. PRAC. & REM. CODE ANN. § 15.032 (Vernon Supp. 1996)).

73. *Id.* Compare TEX. CIV. PRAC. & REM. CODE ANN. § 15.033 (Vernon Supp. 1996) with TEX. CIV. PRAC. & REM. CODE § 15.033 (Vernon 1986).

74. TEX. CIV. PRAC. & REM. CODE ANN. § 15.0641 (Vernon Supp. 1996).

75. *Id.* § 15.0642.

76. *Id.* § 15.066.

77. 903 S.W.2d 146 (Tex. App.—Austin 1995, writ dism'd w.o.j.).

tive in its interpretation of this requirement. The suit involved questions about the enforceability of restrictive covenants imposed on property located in the Horseshoe Bay subdivision. Lot owners in the subdivision intervened on both sides of the case. Among those actually participating in the action, those in favor of the restrictions outnumbered those opposed. Nevertheless, a group of intervenors seeking to declare the restrictions invalid requested the trial court to certify them as representatives of a class encompassing all lot owners in the subdivision. The trial court denied certification without elaborating the reasons for its decision.⁷⁸

In its opinion upholding the denial of class certification, the court of appeals focused on the perceived inadequacy of the class representatives to fairly and adequately protect the interests of the class members.⁷⁹ Indeed, the court concluded that the intervenors failed to satisfy either prong of the test for adequacy of representation: (1) an absence of antagonism between the class members and representatives and (2) an assurance that the representatives will vigorously prosecute the class members' claims and defenses.⁸⁰ Addressing the first component, the court observed that "class certification may be denied for lack of adequate representation if there is [even] a possibility of significant disagreement within the proposed class."⁸¹ The opinion also noted that courts are more inclined to deny certification where there is "hard evidence of real disagreement" within the class.⁸² Although the court acknowledged that the opposition of twelve class members did not alone establish that a majority of the class members opposed the position of the putative class representatives, it held that actual intra-class antagonism had been established because, of the class members actively participating in the action, those supporting the restrictions outnumbered those in opposition.⁸³

The court next considered whether the representatives would avidly pursue the claims and defenses of the class members. According to the court, the failure of all but one of the proposed representatives to attend the class certification hearing in person cast doubt upon the enthusiasm with which they would act on behalf of the class.⁸⁴ Citing federal authorities it termed as instructive,⁸⁵ the court held that the movants' near com-

78. See TEX. R. CIV. P. 42(a) (the trial court need not file findings of fact and conclusions of law).

79. 903 S.W.2d at 150-52 (citing TEX. R. CIV. P. 42(a)(4)).

80. *Forsyth*, 903 S.W.2d at 150-52 (citing *Wiggins v. Enserch Exploration, Inc.*, 743 S.W.2d 332, 335 (Tex. App.—Dallas 1987, writ dismissed w.o.j. for the test)).

81. *Forsyth*, 903 S.W.2d at 151.

82. *Id.*

83. *Id.*

84. *Id.* at 152.

85. See *Weisman v. Darneille*, 78 F.R.D. 669, 671 (S.D. N.Y. 1978) ("Plaintiffs' evident willingness to rely on counsel's ability to protect the interests of the class is inconsistent with the participation required of an adequate class representative."); *Goldchip Funding Co. v. 20th Century Corp.*, 61 F.R.D. 592, 594 (M.D. Pa. 1974) ("The class is entitled to more than blind reliance upon even competent counsel by uninterested and inexperienced representatives.").

plete reliance on their attorney at the evidentiary hearing weighed against certification.⁸⁶

*Ventura v. Banales*⁸⁷ addressed the interplay between the rules governing class actions and nonsuits. In Texas, the plaintiff has an absolute right to take a nonsuit under Rule 162⁸⁸ at any time before he has introduced all of his evidence.⁸⁹ Rule 42 specifies an exception to this general rule, however, by proscribing dismissals or settlements of class actions without the approval of the court and notice of the proposed dismissal or compromise being given to all members of the class in the manner the court directs.⁹⁰ In a case of first impression, the *Ventura* court decided that this latter rule does not override the general principle set out in Rule 162 until a class has actually been certified.⁹¹ The court therefore held that the plaintiffs had an absolute right to nonsuit their pre-certification class action.⁹² The court contrasted Texas procedure with Federal Rule 23, which does apply during the interim between filing of the complaint and certification of the class.⁹³ Although the Texas and Federal rules regarding class action are virtually identical,⁹⁴ the federal rule governing voluntary dismissals is very different from its Texas counterpart.⁹⁵ Accordingly, because Rule 162 generally allows plaintiffs much greater latitude than Federal Rule 41 to nonsuit their claims without court approval, the *Ventura* court did not feel compelled to follow federal authority by creating additional requirements to Rule 42.⁹⁶

VI. PLEADINGS

In two cases decided during the survey period, the courts reached similar conclusions about the interplay between Rules 5⁹⁷ and 99(b) despite differences in reasoning.⁹⁸ The plaintiff in *Thomas v. Gelber Group*⁹⁹ sued for breach of a gas purchase contract. Ten days after the defendant's answer was due, plaintiff filed a motion for default judgment. Four

86. *Forsyth*, 903 S.W.2d at 152.

87. 905 S.W.2d 423 (Tex. App.—Corpus Christi 1995, no writ).

88. TEX. R. CIV. P. 162.

89. *Ventura*, 905 S.W.2d at 424 (citing *Hooks v. Fourth Court of Appeals*, 808 S.W.2d 56, 59 (Tex. 1991)).

90. TEX. R. CIV. P. 42(e).

91. *Ventura*, 905 S.W.2d at 426.

92. *Id.*

93. *Ventura*, 905 S.W.2d at 425; see also *Diaz v. Trust Territory of the Pacific Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989); Newberg on Class Actions § 8.19 (3rd Ed. 1992).

94. Compare FED. R. CIV. P. 23(e) with TEX. R. CIV. P. 42(e).

95. See FED. R. CIV. P. 41(a) (court approval required before plaintiff may dismiss suit unless notice of dismissal filed before adverse party serves answer or motion for summary judgment or all parties sign a stipulation of dismissal).

96. *Ventura*, 905 S.W.2d at 426.

97. TEX. R. CIV. P. 5 provides that a document is deemed timely filed if it is properly addressed and stamped, mailed by first class mail on or before the "last day for filing same," and received by the clerk not more than ten days late.

98. TEX. R. CIV. P. 99(b) (defendant's answer due by 10:00 a.m. on the first Monday after the expiration of 20 days from the date of service).

99. 905 S.W.2d 786 (Tex. App.—Houston [14th Dist.] 1995, no writ).

days later, defendant sent his answer by first class mail. Although this answer was received in the clerk's office within ten days after it was mailed, the court had already entered the requested default between the dates of the defendant's mailing and the clerk's receipt of the answer. The court of appeals reversed the default judgment, observing that "[a] default judgment may not be granted when the defendant has an answer on file, even if the answer was filed late."¹⁰⁰ The issue articulated by the court was whether the "last day for filing" an answer, for purposes of Rule 5, is the date calculated under Rule 99(b) or the later date when the default judgment is actually entered.¹⁰¹ Choosing the latter, the court refused to treat a mailed answer differently than one filed with the clerk because once the provisions of Rule 5 are met, the post office becomes a branch of the clerk's office for purposes of filing pleadings.¹⁰² Therefore, the defendant's answer was "filed" by mail pursuant to Rule 5 before the trial court had signed the default judgment.¹⁰³ In *\$429.30 in U.S. Currency v. State*,¹⁰⁴ on the other hand, the court held that an answer "filed" one day after the due date was untimely even though it was mailed 13 days before, and received the same day as, the default judgment was rendered.¹⁰⁵ Despite being "untimely," however, the court reversed the default judgment because the answer had been filed before the default judgment was filed and because the defendant had not had notice of the default judgment hearing.¹⁰⁶

*Lofton v. Allstate Insurance Co.*¹⁰⁷ involved appellate Rule 4(b),¹⁰⁸ the mailbox rule for filings in Texas appellate courts. The sole issue in the case was "whether, in the absence of a postmark or a certificate of mailing, an attorney's uncontroverted affidavit may establish a date of mailing for compliance with" the rule.¹⁰⁹ In a per curiam opinion, the Texas Supreme Court held that it could.¹¹⁰ Although the case does not mention Rule 5, its holding undoubtedly extends to this companion rule of civil procedure.¹¹¹

Trial courts have broad discretion under Rule 41¹¹² with respect to severing improperly joined parties and claims.¹¹³ A severance is proper "to

100. *Id.* at 788; see also TEX. R. CIV. P. 239; *Davis v. Jefferies*, 764 S.W.2d 559, 560 (Tex. 1989).

101. *Thomas*, 905 S.W.2d at 789.

102. *Id.* (citing *Milam v. Miller*, 891 S.W.2d 1, 2 (Tex. App.—Amarillo 1994, writ ref'd.), discussed in 1995 *Annual Survey*, *supra* note 21 at 1626-27).

103. *Thomas*, 905 S.W.2d at 789.

104. 896 S.W.2d 363 (Tex. App.—Houston [1st Dist.] 1995, no writ).

105. *Id.* at 365.

106. *Id.* at 365-66.

107. 895 S.W.2d 693 (Tex. 1995) (per curiam).

108. TEX. R. APP. P. 4(b).

109. *Lofton*, 895 S.W.2d at 693.

110. *Id.* at 693-94.

111. Compare TEX. R. APP. P. 4(b) with TEX. R. CIV. P. 5.

112. TEX. R. CIV. P. 41.

113. See *Guaranty Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex. 1990).

do justice, avoid prejudice and further convenience."¹¹⁴ With these desired ends in mind, several courts of appeals have held in cases against insurers alleging both a breach of contract and a breach of the duty of good faith and fair dealing that trial courts are required to sever the claims when there is evidence of settlement offers which would be admissible in one action but highly prejudicial on the other.¹¹⁵ Some of these courts reasoned that an insurer's interests could not adequately be protected by a limiting instruction to the jury not to interpret evidence of the settlement offer as an admission of liability in the contract action.¹¹⁶ Bucking this trend, the court in *Allstate Insurance Co. v. Evins*¹¹⁷ held that a severance is not always required in these circumstances. The court observed that even an improper mention of a settlement offer is usually curable by a trial court's instruction to disregard.¹¹⁸ Therefore, it refused to assume that the jury would ignore a similar instruction limiting their consideration of the settlement offer to the bad faith claim.¹¹⁹

VII. DISCOVERY

A. SCOPE AND PROCEDURES

After several missed opportunities to address the issue,¹²⁰ the Texas Supreme Court considered the propriety of "apex" depositions (*i.e.*, depositions of corporate officers at the apex of the corporate hierarchy) in *Crown Central Petroleum Corp. v. Garcia*.¹²¹ The court held that, upon the filing of a motion for protective order supported by an affidavit attesting to a corporate official's lack of personal knowledge of the subject matter of the suit, the trial court should determine whether the party requesting the deposition has shown that the official has any unique or superior knowledge of discoverable information.¹²² If she does not, then the party requesting the deposition should be required to first seek the discovery through less intrusive means, such as depositions of lower-level employees, interrogatories, or document requests.¹²³ If, after a good faith effort to obtain the discovery through less intrusive means, the requesting party shows (1) the official's deposition is likely to lead to the discovery of admissible evidence, and (2) alternative means of discovery have been unsuccessful, the trial court should modify or vacate the pro-

114. *Id.*

115. *See, e.g.*, *United States Fire Ins. Co. v. Millard*, 847 S.W.2d 668 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding); *State Farm Mut. Auto. Ins. Co. v. Wilborn*, 835 S.W.2d 260 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding).

116. *See, e.g.*, *Wilborn*, 835 S.W.2d at 262.

117. 894 S.W.2d 847 (Tex. App.—Corpus Christi 1995, no writ).

118. *Id.* at 850 (citing *Beutel v. Paul*, 741 S.W.2d 510, 513 (Tex. App.—Houston [14th Dist.] 1987, no writ)).

119. 894 S.W.2d at 850.

120. *See 1995 Annual Survey, supra* note 21 at 1627.

121. 904 S.W.2d 125 (Tex. 1995).

122. *Id.* at 128 (holding based on language in *Liberty Mutual Ins. Co. v. Superior Court of San Mateo County*, 13 Cal. Rptr. 2d 363, 367 (Cal. Ct. App. 1992)).

123. 904 S.W.2d at 128.

tective order.¹²⁴

The supreme court also expressed concern about overly broad discovery directed to corporations in *Dillard Department Stores, Inc. v. Hall*,¹²⁵ which the court described as “a simple false arrest case.”¹²⁶ The court held that a request that the defendant produce incident reports and claim files relating to other false arrest claims at all of its stores nationwide for a five-year period was overly broad as a matter of law.¹²⁷ In response to the plaintiff’s argument that he needed these materials to determine whether he could allege in good faith a policy of racial discrimination on the part of the defendant, the court stated that “[t]his is the very kind of ‘fishing expedition’ that is not allowable under rule 167 of the Texas Rules of Civil Procedure.”¹²⁸

The supreme court decried the trial court’s management of a mass products liability suit in *Able Supply Co. v. Moye*.¹²⁹ The 300 defendants in that case sent a master set of interrogatories to the 3,000 plaintiffs, asking for, among other things, the identity of any physicians who had attributed any plaintiff’s alleged injury to a specific product manufactured or supplied by any defendant.¹³⁰ Pursuant to the trial court’s case management order, only 800 plaintiffs had answered this interrogatory in the eight years after it was propounded, and virtually all of them merely stated that they had not yet determined the answer and would supplement their response at a later date.¹³¹ Under these facts, the court held it was a clear abuse of discretion for the trial court to deny defendants’ motion to compel an answer to this interrogatory.¹³²

In what was apparently a case of first impression, the Texarkana court of appeals held in *Simmons v. Thompson*¹³³ that a party does not have an “absolute right” to have her attorney present at a physical examination ordered pursuant to Rule 167a.¹³⁴ The court concluded that whether the attorney should be allowed to attend the examination was within the discretion of a trial court and should be determined on a “case-by-case basis” on a showing of a particular need for the attorney’s presence.¹³⁵ The dissent, emphasizing that the examination was to be conducted by the opposing party’s physician, argued that the attorney’s presence might be just as important as his presence at an oral deposition and should be al-

124. *Id.* Even at this stage, the trial court retains discretion to protect against abuse through appropriate restrictions on “the duration, scope, and location of the deposition.” *Id.*

125. 909 S.W.2d 491 (Tex. 1995) (per curiam).

126. *Id.*

127. *Id.* at 491-492.

128. *Id.* at 492 (citing Loftin v. Martin, 776 S.W.2d 145, 148 (Tex. 1989)).

129. 898 S.W.2d 766 (Tex. 1995).

130. *Id.* at 767-68.

131. *Id.*

132. *Id.* at 771.

133. 900 S.W.2d 403 (Tex. App.—Texarkana 1995, orig. proceeding).

134. TEX. R. CIV. P. 167a; *Simmons*, 900 S.W.2d at 404.

135. 900 S.W.2d at 404.

lowed as a matter of right.¹³⁶

Practitioners should also take note of three opinions of the Texas Attorney General relating to deposition procedures. First, the Attorney General has concluded that, notwithstanding the provisions of Rules 202(1)(e)¹³⁷ and 166c,¹³⁸ a trial court cannot order, and the parties cannot stipulate to, the recording of an oral deposition solely by non-stenographic means.¹³⁹ The Attorney General relied on section 52.021(f) of the Civil Practice and Remedies Code,¹⁴⁰ which provides that, with certain exceptions not relevant here, "all depositions conducted in this state must be recorded by a certified shorthand reporter."¹⁴¹ To the extent the procedural rules conflict with this statutory provision, they are invalid.¹⁴² The Attorney General also opined that the witness fees required under section 22.001 of the Civil Practice and Remedies Code¹⁴³ are applicable to witnesses subpoenaed for depositions as well as court appearances.¹⁴⁴

B. PRIVILEGES AND EXEMPTIONS

The Texas Supreme Court addressed a number of privilege questions during the Survey period. In a decision that may have a significant impact on interstate controversies, the court held that the scope of the attorney-client privilege will be governed by the law of the state with the most significant relationship to the allegedly privileged communication.¹⁴⁵ The court noted that, although the attorney-client privilege is the only one of the communications privileges recognized by all the states, the degree of protection it affords may vary from state to state.¹⁴⁶ The court concluded that the most significant relationship test would foster the purpose behind the attorney-client privilege — *i.e.*, the free flow of information between client and attorney.¹⁴⁷

136. *Id.* (Grant, J., dissenting).

137. TEX. R. CIV. P. 202(1)(e) (court may order, on motion and notice, that deposition be recorded solely by non-stenographic means).

138. TEX. R. CIV. P. 166c (parties may stipulate to taking of deposition before any person and in any manner).

139. Op. Tex. Att'y Gen. Nos. DM-339 (1995), DM-308 (1994).

140. TEX. GOV'T CODE ANN. § 52.021(f) (Vernon Supp. 1996).

141. *Id.*; Op. Tex. Att'y Gen. Nos. DM-339, DM-308.

142. Op. Tex. Att'y Gen. Nos. DM-339, DM-308. The Attorney General also rejected the argument that TEX. R. CIV. P. 202(1)(e) could be harmonized with the statutory requirement of a certified shorthand reporter by construing the statute to require only that the reporter make the non-stenographic recording. Op. Tex. Att'y Gen. No. DM-339, n.3.

143. TEX. CIV. PRAC. & REM. CODE ANN. § 22.001 (Vernon Supp. 1996) (requiring payment of \$10 witness fee, which includes reimbursement for mileage).

144. Op. Tex. Att'y Gen. No. DM-342 (1995).

145. *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995).

146. *Id.* at 647. Relevant to this case, Texas applies control group test for corporate attorney-client privilege, while Michigan appears to follow subject-matter test. *Id.* at 646.

147. *Id.* at 647-48. The court also rejected a challenge to the sufficiency of an affidavit submitted to support the privilege claim based on an allegedly defective jurat and the fact that only a photocopy of the affidavit was submitted. *Id.* at 645-46. Compare *Humphreys v. Caldwell*, 888 S.W.2d 469, 470-71 (Tex. 1994) (affidavits submitted to support privilege claims were fatally defective because they failed to unqualifiedly represent that the facts stated therein were within the affiants' personal knowledge and were true).

Constitutional privileges were at issue in *Tilton v. Marshall*¹⁴⁸ and *Texas Department of Public Safety Officers Ass'n v. Denton*.¹⁴⁹ In *Tilton*, the court held that a request for evangelist Robert Tilton's records of entities or charities to which he tithed did not violate his First Amendment right of free exercise of religion or freedom of association.¹⁵⁰ In rejecting the freedom of association claim, the court distinguished Tilton's tithing records from the records of those who tithed to him. Tilton's tithing records would not reveal the name of those associated with the entities he tithed to; whereas the records of those who tithed to him, on the other hand, would reveal privileged information under a previous holding of the court.¹⁵¹

Denton addressed the issue of a plaintiff's assertion of his Fifth Amendment privilege against self-incrimination.¹⁵² The court held that the "offensive use" doctrine described in *Republic Insurance Co. v. Davis*¹⁵³ governed the plaintiff's Fifth Amendment privilege claim as well.¹⁵⁴ Although the offensive use test was met in the case before it, however, the court held that the trial court exceeded its discretion in simply dismissing plaintiff's claims.¹⁵⁵ Instead, the court directed the trial court to consider other possible remedies, including delaying the proceedings or imposing some lesser sanction.¹⁵⁶

Rule 166b(4) sets forth the now-familiar procedure to be followed by a party who seeks to withhold information or documents from discovery on privilege grounds.¹⁵⁷ The trial bar has struggled with the proper application of this procedure in responding to document requests that a party believes are both overbroad and seek potentially privileged materials. In *Texaco, Inc. v. Sanderson*,¹⁵⁸ the supreme court provided some guidance on this issue, holding that the Rule 166b(4) procedure is triggered only by "an appropriate discovery request."¹⁵⁹ Thus, the court held that the trial court erred in finding that the defendants had waived their privilege claims by failing to assert them properly in response to plaintiffs' overbroad document request.¹⁶⁰ Significantly, the high court's decision appears to hinge on the determination that the request in question was, in fact, overbroad. Because a party will often be unable to predict with certainty that a court will agree with its overbreadth objection, the careful

148. 38 Tex. Sup. Ct. J. 1140 (Aug. 1, 1995).

149. 897 S.W.2d 757 (Tex. 1995).

150. U.S. CONST. amend. I; *Tilton*, 38 Tex. Sup. Ct. J. at 1146.

151. *Id.* at 1146-47 (citing *Tilton v. Moye*, 869 S.W.2d 955, 956 (Tex. 1994)).

152. U.S. CONST. amend. V; *Denton*, 897 S.W.2d 757.

153. 856 S.W.2d 158, 163 (Tex. 1993).

154. *Denton*, 897 S.W.2d at 760-61.

155. *Id.* at 763-64.

156. *Id.* at 763.

157. TEX. R. CIV. P. 166b(4) (requiring party to plead particular exemption from discovery, introduce evidence necessary to support it, and produce the requested discovery for in camera inspection if necessary).

158. 898 S.W.2d 813 (Tex. 1995).

159. *Sanderson*, 898 S.W.2d at 815 (quoting TEX. R. CIV. P. 166b(4)).

160. *Id.*

practitioner would still be well advised to secure the opposing party's agreement if she wishes to proceed with a two-step procedure for the presentation of objections.

The court in *Dolcefino v. Ray*¹⁶¹ cast doubt on whether the Texas courts will read the United States Supreme Court decision in *Branzburg v. Hayes*¹⁶² as creating a qualified privilege for journalists.¹⁶³ The court noted that the Texas Rules of Civil Evidence, adopted after *Branzburg* was decided, do not include a journalist's privilege and indeed, state that no person has a privilege except as provided by the constitution, statute, or rule.¹⁶⁴ Nevertheless, the court did not decide the question because it found that the trial court had properly ordered the journalist to answer certain questions even if a qualified privilege were to be recognized.¹⁶⁵

*Hardesty v. Douglas*¹⁶⁶ involved an attempt to designate a physician as a consulting expert, thereby immunizing him from discovery, after the physician had already submitted an affidavit that was used to defeat summary judgment. Relying on the supreme court's decision in *Tom L. Scott, Inc. v. McIlhany*,¹⁶⁷ the court held that the attempted designation of the expert as consulting only was offensive to the intended purpose of the discovery rules and ineffective.¹⁶⁸ For purposes of the designation issue, the court reasoned that the submission of the expert's affidavit was the equivalent of calling him to testify.¹⁶⁹

C. DUTY TO SUPPLEMENT

Continuing a recent trend, the Texas courts generally evinced a more pragmatic and flexible approach during the Survey period to the rule requiring the automatic exclusion of witnesses who are not properly identified in original or supplemental interrogatory answers. Thus, in *Melendez v. State*,¹⁷⁰ the court held that it was error to exclude plaintiff's expert witness, who was not identified in a supplemental interrogatory answer, but who was included in a written designation of experts, was deposed, and provided a report to defendant.¹⁷¹ Similarly, the court in *\$23,900.00 v. State*¹⁷² held that a police officer was properly identified as a witness where the state provided the address and phone number for police head-

161. 902 S.W.2d 163 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding) (per curiam) *petition for cert. filed*, 64 U.S.L.W. 3561 (U.S., Feb. 5, 1996) (No. 95-1250).

162. 408 U.S. 665 (1972).

163. *Dolcefino*, 902 S.W.2d at 164.

164. *Id.* (citing TEX. R. CIV. EVID. 501).

165. *Id.* at 164-65.

166. 894 S.W.2d 548 (Tex. App.—Waco 1995, orig. proceeding).

167. 798 S.W.2d 556 (Tex. 1990).

168. *Hardesty*, 894 S.W.2d at 550-51 (citing *McIlhany*, 798 S.W.2d at 560).

169. *Id.* at 551.

170. 902 S.W.2d 132 (Tex. App.—Houston [1st Dist.] 1995, no writ).

171. *Id.* at 136-37. *But see* *Patton v. Saint Joseph's Hosp.*, 887 S.W.2d 233, 238-39 (Tex. App.—Fort Worth 1994, writ denied) (refusing to treat experts' reports or depositions as supplementation).

172. 899 S.W.2d 314 (Tex. App.—Houston [14th Dist.] 1995, no writ).

quarters, even though the officer was not stationed there.¹⁷³ The court also rejected the argument that the officer's testimony should have been excluded because the interrogatory answers were not sworn.¹⁷⁴ In *Heise v. Presbyterian Hospital*,¹⁷⁵ however, the court held that a party may not supplement its answers to interrogatories regarding witnesses simply by adopting a co-party's answers to those interrogatories.¹⁷⁶

The supreme court has held that good cause may exist to allow the testimony of an individual party-witness who has failed to identify himself in answers to interrogatories when his personal knowledge of relevant facts has been communicated to all parties at least thirty days before trial.¹⁷⁷ Two noteworthy cases decided during the Survey period measured the parameters of this rule. In *Morris v. Short*,¹⁷⁸ the court held that the plaintiff established good cause to allow her to call the defendant as a witness without having identified him in her interrogatory answers because the witness's identity was certain and his knowledge of relevant facts was communicated by the plaintiff in her pleadings and other interrogatory answers.¹⁷⁹ In *R.H. v. State*, however, the court held that the complaining witness in a juvenile proceeding was not the equivalent of a party.¹⁸⁰ Thus, the trial court erred in allowing the complaining witness's testimony when he was not identified in the state's interrogatory answers.¹⁸¹

The supreme court addressed the question of whether the erroneous exclusion of an expert's testimony was harmless error in *Williams Distributing Co. v. Franklin*.¹⁸² The court of appeals had held that the error was harmless because the defendant had identified as potential witnesses, but did not attempt to call at trial, two other experts on the same subject.¹⁸³ The supreme court rejected this analysis of the harmless error standard, stating that it put the defendant to the unacceptable choice of having to offer the testimony of another expert that it might consider weaker, thereby abandoning its complaint regarding the exclusion, or to disparage the weaker evidence on appeal to show reversible error.¹⁸⁴ The supreme court held the courts should not intrude in this way in the decision of a

173. *Id.* at 316-17; see also *FDIC v. Mediplex of Houston, Ltd.*, 889 S.W.2d 464, 465-66 (Tex. App.—Houston [14th Dist.] 1994, writ dismissed by agreement) (failure to provide expert witness's address and telephone number in interrogatory answer did not justify exclusion, where information was contained in expert's report delivered contemporaneously with, and referred to in, interrogatory answers).

174. \$23,900.00, 899 S.W.2d at 317.

175. 888 S.W.2d 264 (Tex. App.—Eastland 1994, writ granted).

176. *Id.* at 267.

177. *Smith v. Southwest Feed Yards*, 835 S.W.2d 89, 91 (Tex. 1992).

178. 902 S.W.2d 566 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

179. *Id.* at 570-71.

180. 905 S.W.2d 726 (Tex. App.—San Antonio 1995, no writ).

181. *Id.* at 729.

182. 898 S.W.2d 816 (Tex. 1995) (per curiam).

183. *Williams Distrib. Co. v. Franklin*, 884 S.W.2d 503, 509-10 (Tex. App.—Dallas 1994), *rev'd*, 898 S.W.2d 816.

184. *Franklin*, 898 S.W.2d at 817.

party and its counsel regarding what witnesses to call and why.¹⁸⁵

D. SANCTIONS

The supreme court overruled the trial court's imposition of discovery sanctions in *Global Services, Inc. v. Bianchi*,¹⁸⁶ which involved an allegation that the defendants had not produced documents requested by the plaintiff. As proof of the alleged failure, plaintiff submitted two exhibits to the trial judge *in camera*. The supreme court held that the trial judge erred in sanctioning defendants for failing to produce documents when the only evidence offered in support of the allegation was submitted *in camera* and not provided to defendants.¹⁸⁷

In *Occidental Chemical Corp. v. Banales*,¹⁸⁸ the trial court found that defense counsel had intentionally failed to disclose the name of adverse fact witnesses in discovery.¹⁸⁹ The trial court imposed monetary sanctions against the defendant's attorneys and also ordered that all of their notes of interviews with the undisclosed witness be produced to the plaintiffs.¹⁹⁰ The supreme court held that the attorney work product privilege protects two different types of information: (1) the attorney's thought processes and documents recording them; and (2) "the mechanical compilation of information to the extent such compilation reveals the attorney's thought processes."¹⁹¹ With respect to the former category, the court held that the privilege was absolute, subject only to the exceptions referred to in Rule 166b(3)(a).¹⁹² The court rejected, however, the argument that the privilege protecting compiled information was absolute as well.¹⁹³ The court then concluded, apparently without deciding which work product protection applied, that the trial court abused its discretion in ordering the attorney's notes produced under the facts of the case before it.¹⁹⁴

Since the supreme court announced the new, stricter standard for reviewing "death penalty" sanctions (e.g., striking pleadings, default judgments) in *TransAmerican Natural Gas Corp. v. Powell*,¹⁹⁵ the intermediate appellate courts have struggled with its application. For example, *TransAmerican* requires that a trial court, before imposing death penalty sanctions, "consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance."¹⁹⁶ In

185. *Id.*

186. 901 S.W.2d 934 (Tex. 1995).

187. *Id.* at 938.

188. 907 S.W.2d 488 (Tex. 1995).

189. *Id.* at 489.

190. *Id.*

191. *Id.* at 490.

192. TEX. R. CIV. P. 166b(3)(a) (citing exceptions to privilege found in TEX. R. CIV. EVID. 503(d)); *Banales*, 907 at 490.

193. *Banales*, 907 S.W.2d at 490.

194. *Id.*

195. 811 S.W.2d 913, 917-18 (Tex. 1991).

196. *Id.* at 917; see also *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992).

Andras v. Memorial Hospital System,¹⁹⁷ the court interpreted the supreme court's standard as requiring the actual imposition of lesser sanctions as a prerequisite to death penalty sanctions.¹⁹⁸ The court held, however, that a prior order to compel coupled with a threat to dismiss for non-compliance constituted such a lesser sanction.¹⁹⁹ The court in *Hamill v. Leve*²⁰⁰ declined to follow this interpretation of the standard for death penalty sanctions, concluding instead that lesser sanctions need only be considered, not actually imposed.²⁰¹ Thus, the court held that where the offending party had previously agreed to pay his opponent's attorney's fees in connection with a prior motion to compel, the trial court was within its discretion in dismissing the case as a sanction, despite the fact that the court itself had not imposed any prior sanctions.²⁰²

Rule 166b(7) requires that all discovery motions contain a certification by the movant that efforts to resolve the dispute without court intervention have been attempted and failed.²⁰³ In *United Services Auto Ass'n v. Thomas*,²⁰⁴ the court held that the trial judge abused his discretion in sanctioning a party for discovery abuse where the motion for sanctions did not contain such a certificate of conference.²⁰⁵

VIII. DISMISSAL

In regard to the subject of dismissals, the most significant case was the supreme court's decision in *Hyundai Motor Co. v. Alvarado*.²⁰⁶ In this case, the defendant obtained a partial summary judgment on certain of plaintiff's causes of action. Subsequently, the plaintiff filed a motion for nonsuit under Rule 162. Thus, the issue before the court was whether the partial summary judgment survived the nonsuit.

The supreme court recognized the general rule that a plaintiff has the right to take a nonsuit at any time until he introduces all evidence other than rebuttal evidence,²⁰⁷ and that a nonsuit "may have the effect of vitiating earlier interlocutory orders."²⁰⁸ The high court, however, drew the line with respect to summary judgment motions. The court reasoned that if the only cutoff point for nonsuit was after plaintiff had introduced all of his evidence, then the plaintiff "could in effect avoid any summary judgment by merely requesting a nonsuit after the case was adjudicated by the

197. 888 S.W.2d 567 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

198. *Id.* at 571 (citing *Blackmon*, 841 S.W.2d at 849-50).

199. *Andras*, 888 S.W.2d at 573.

200. 900 S.W.2d 457 (Tex. App.—Fort Worth 1995, no writ).

201. *Id.* at 461 & n.3.

202. *Id.* at 464-65. Although the trial court considered the agreement a lesser sanction, the appellate court held that the agreement was an indication that the lesser sanction would fail. *Id.*

203. *Id.*

204. 893 S.W.2d 628 (Tex. App.—Corpus Christi 1994, writ denied).

205. *Id.* at 629-30.

206. 892 S.W.2d 853 (Tex. 1995) (per curiam).

207. *Alvarado*, 892 S.W.2d at 854 (citing *Aetna Casualty & Sur. Co. v. Special*, 849 S.W.2d 805, 806 (Tex. 1993)).

208. *Id.*

summary judgment.”²⁰⁹ Accordingly, in order to give force to the partial summary judgment rule provisions, the supreme court held that once a trial court announces a decision on a summary judgment motion that adjudicates a claim, that claim is no longer subject to the plaintiff’s right to nonsuit.²¹⁰ Accordingly, if the plaintiff takes a nonsuit under that scenario, it has the effect of a dismissal with prejudice.

Rule 162 provides that any nonsuit or dismissal pursuant to that rule “shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief.”²¹¹ This provision has led to the well-established principle that a plaintiff’s nonsuit will not result in a dismissal of the entire case if the defendant has previously asserted a claim for affirmative relief.²¹² In *Quanto International Co. v. Lloyd*,²¹³ the court held that a defendant’s motion to refer all claims to arbitration was a “claim for affirmative relief” within the meaning of foregoing authorities.²¹⁴

Rule 165a governs the procedure for dismissal for want of prosecution and provides that a motion to reinstate a case dismissed for want of prosecution “shall set forth the grounds therefor and be verified by the movant or his attorney.”²¹⁵ Two decisions recognized qualifications to the requirement that a motion to reinstate be verified. In *Federal Lanes, Inc. v. City of Houston*,²¹⁶ the court held that a joint motion to reinstate a suit by both parties was equivalent to a stipulation as to the facts and there was no need to support the motion with a sworn affidavit or verification.²¹⁷ In *Neese v. Wray*,²¹⁸ the court held that a trial court may reinstate a case dismissed for want of prosecution on its own motion within 30 days after dismissal, even though plaintiff’s motion to reinstate was unverified.²¹⁹

A number of cases during the Survey period displayed a liberal trend to require reinstatement of cases that have been dismissed for want of prosecution.²²⁰ In each of these cases, the trial court had refused to reinstate a case that had been dismissed for want of prosecution. Although recognizing that the trial courts’ decision in this context was subject to considerable deference, each of the courts held that reinstatement was erroneously denied. In *Burns v. Drew Woods, Inc.*,²²¹ the court further

209. *Id.* at 855.

210. *Id.*

211. *See supra* notes 95-105 and accompanying text.

212. *BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 840 (Tex. 1990).

213. 897 S.W.2d 482 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding).

214. *Id.* at 487.

215. Tex. R. Civ. P. 165a(3).

216. 905 S.W.2d 686 (Tex. App.—Houston [1st Dist.] 1995, no writ).

217. *Id.* at 689.

218. 893 S.W.2d 169 (Tex. App.—Houston [1st Dist.] 1995 no writ)).

219. *Id.* at 170-71.

220. *Clark v. Yarbrough*, 900 S.W.2d 406, 410 (Tex. App.—Texarkana 1995, writ denied); *Burns v. Drew Woods, Inc.*, 900 S.W.2d 128, 130 (Tex. App.—Waco 1995, no writ); *Seigle v. Hollech*, 892 S.W.2d 201, 203-04 (Tex. App.—Houston [14th Dist.] 1994, no writ).

221. 900 S.W.2d 128.

noted that if the movant presents uncontroverted evidence that his failure to appear was based upon a reasonable explanation, then the trial court must reinstate the case.²²²

In *FDIC v. Kendrick*,²²³ the FDIC, as plaintiff, had announced to the trial court that it had reached a tentative settlement with defendant, but that such settlement was subject to approval by various committees of the FDIC. Subsequently, the trial court notified the parties that it expected the settlement to be consummated by a specified date. Before the specified date, the FDIC, with the permission of the defendant, requested a continuance of the deadline for at least 30 days in order for the FDIC to further consider the settlement offer. After the 30-day period expired, the trial court dismissed the action. Under those circumstances, the appeals court held that the trial court's dismissal of the action for want of prosecution was not an abuse of discretion.²²⁴ In this regard, the court observed that it was well established that neither settlement activity nor the passive attitude of opposing parties excuses a want of diligent prosecution.²²⁵

IX. SUMMARY JUDGMENT

*Murillo v. Valley Coca-Cola Bottling Co.*²²⁶ addressed the issue of whether trial testimony from another suit can be used as summary judgment evidence. Analogizing to cases involving the admissibility of court records from other suits,²²⁷ the *Murillo* court held that trial testimony from other cases is also acceptable summary judgment proof.²²⁸ The court stressed that the prior testimony must be certified or attested under oath as authentic.²²⁹ The testimony also must set forth facts that would be admissible at trial.²³⁰

Two other cases decided during the Survey period also involved issues of summary judgment evidence. In *Clendennen v. Williams*, the court held that an unsworn affidavit was not competent summary judgment proof and should be stricken.²³¹ In *Wilson v. Burford*, the Texas Supreme Court held that a deposition transcript attached to a brief in support of a motion for summary judgment, which was also referenced in the non-

222. *Id.* at 130.

223. 897 S.W.2d 476 (Tex. App.—Amarillo 1995, no writ).

224. *Id.* at 482.

225. *Id.* at 481.

226. 895 S.W.2d 758 (Tex. App.—Corpus Christi 1995, no writ).

227. Although the court cited one authority holding that pleadings from other lawsuits are proper summary judgment evidence, *see Kazmir v. Suburban Homes Realty*, 824 S.W.2d 239, 244 (Tex. App.—Texarkana 1992, writ denied), it concluded that Texas courts had not yet directly answered the question whether testimony from other suits was admissible. *Murillo*, 895 S.W.2d at 761.

228. 895 S.W.2d at 762.

229. *Id.*; *see also* TEX. R. CIV. P. 166a(c) (authenticated or certified public records are proper summary judgment evidence); TEX. R. CIV. P. 166a(f).

230. 895 S.W.2d at 762 (citing TEX. R. CIV. P. 166a(f) and *Mitre v. Brooks Fashion Stores, Inc.*, 840 S.W.2d 612, 618 (Tex. App.—Corpus Christi 1992, writ denied)).

231. 896 S.W.2d 257, 259 (Tex. App.—Texarkana 1995, no writ).

movants' response, was proper summary judgment evidence.²³² The court bypassed the question of whether the evidence became part of the record by its attachment to movant's brief.²³³ Instead, the court held that the deposition became evidence under Rule 166a(c)²³⁴ by the references to it in the non-movants' response.²³⁵ The non-movants argued that *McConnell v. Southside Independent School District*²³⁶ required summary judgment evidence to be set out in the motion. The supreme court disagreed, observing that *McConnell* held only that the grounds for summary judgment must be contained in the motion.²³⁷

The appellant in *Canadian Triton International Ltd. v. JFP Energy, Inc.*²³⁸ sought review of a trial court's summary judgment by writ of error. Appellate Rule 45²³⁹ prevents review by writ of error if the petitioner participated in person or by attorney in the "actual trial of the case."²⁴⁰ The court held that appellant had not participated in the "actual trial of the case" because there was no hearing where it could have participated, it did not receive notice that the motion was set to be acted upon, and it had not yet responded to the motion when the trial court ruled.²⁴¹ In contrast, the court in *Bowles v. Cook*²⁴² decided it had no jurisdiction to consider an appeal of a summary judgment by writ of error because the appellant there had participated in the "actual trial." Unlike the appellant in *Canadian Triton*, the appellant in *Bowles* had time to respond to the motion for summary judgment and did so long before the court granted the motion.²⁴³ Although the appellant did not appear at a summary judgment hearing, the court deemed this absence insignificant: "Taking part in all steps of a summary judgment proceeding other than appearing at the hearing on the motion is participation."²⁴⁴

Under Rule 166a(g),²⁴⁵ a trial court may continue a summary judgment hearing to permit discovery if it appears from the affidavits of a party opposing the motion that he cannot present by affidavit facts sufficient to justify his opposition. According to the court in *Levinthal v. Kelsey-Seybold Clinic*,²⁴⁶ this "rule clearly contemplates that the trial court will al-

232. 904 S.W.2d 628 (Tex. 1995) (per curium).

233. *Id.* at 629.

234. TEX. R. CIV. P. 166a(c).

235. 904 S.W.2d at 629.

236. 858 S.W.2d 337 (Tex. 1993).

237. 904 S.W.2d at 629.

238. 888 S.W.2d 235 (Tex. App.—El Paso 1994, no writ).

239. TEX. R. APP. P. 45(b).

240. Texas courts have generally held that parties participate in the "actual trial" when they have notice of the summary judgment hearing and respond to the motion. *See, e.g., Dillard v. Patel*, 809 S.W.2d 509, 510, 512 (Tex. App.—San Antonio 1991, writ denied); *Burton v. Home Indem. Co.*, 531 S.W.2d 665, 667 (Tex. Civ. App.—El Paso 1975, writ ref'd n.r.e.).

241. 888 S.W.2d at 237.

242. 894 S.W.2d 65 (Tex. App.—Houston [14th Dist.] 1995, no writ).

243. *Id.* at 68.

244. *Id.* at 67 (citing *Stubbs v. Stubbs*, 685 S.W.2d 643, 645 (Tex. 1985)).

245. TEX. R. CIV. P. 166a(g).

246. 902 S.W.2d 508 (Tex. App.—Houston [1st Dist.] 1994, no writ).

low the parties a reasonable opportunity to conduct discovery before granting a summary judgment."²⁴⁷ Although a trial court can presume that a plaintiff has investigated his own case prior to filing,²⁴⁸ the decision in *Levinthal* makes clear that this presumption does not deny a plaintiff the right to take advantage of the summary judgment continuance rule.²⁴⁹ Because the plaintiff diligently served discovery requests at the same time he filed his original petition, and the case had been on file for only three months when the summary judgment was granted, the court of appeals held that the trial court abused its discretion by refusing to continue the motion for summary judgment hearing.²⁵⁰

When a summary judgment order does not recite the specific grounds on which it was granted, a party appealing from that judgment must show that each of the independent arguments alleged in the motion was insufficient to support the order.²⁵¹ *Richardson v. Johnson & Higgins*²⁵² cautions that it is the court's written order, not an oral qualification or explanation of the order, that counts for application of this rule. Although the movant in *Richardson* included three grounds for summary judgment in its motion, the trial court announced that it was denying the first two grounds and granting the motion on the third ground only. The appellant therefore limited her argument on appeal to this single ground. The trial court's written order granting the motion, however, failed to specify the particular ground on which the court based its action. Accordingly, the *Richardson* court affirmed the summary judgment on the basis that appellant had failed to challenge either of the other two grounds on which the summary judgment could have been based.²⁵³ The court acknowledged the harshness of this rule, but noted its "prophylactic effect of eliminating disputes over the plain meaning of a court's formal order or judgment."²⁵⁴

Finally, in *Patterson v. First National Bank*,²⁵⁵ the court held that a defendant opposing a motion for summary judgment can rely on an affirmative defense raised in her written response even if she has not yet amended her answer to plead the affirmative defense.²⁵⁶ As used in Rule

247. *Id.* at 512.

248. See *Verkin v. Southwest Ctr. One, Ltd.*, 784 S.W.2d 92, 95-96 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

249. 902 S.W.2d at 511.

250. *Id.* at 512. According to the court, the following nonexclusive list of factors should be considered in deciding whether the trial court abused its discretion in denying the motion for continuance: "(1) the length of time the case has been on file; (2) the materiality of the discovery sought; and (3) whether due diligence was exercised in obtaining the discovery." *Id.* at 510 (citations omitted).

251. *Gannon v. Baker*, 830 S.W.2d 706, 709 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

252. 905 S.W.2d 9 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

253. *Id.* at 11.

254. *Id.* at 12.

255. No. 14-94-00358-CV, 1995 WL 517353 (Tex. App.—Houston [14th Dist.], Aug. 31, 1995, no writ).

256. *Id.* at *3.

166a(c),²⁵⁷ "the term 'answer' is broadly construed to mean an answer to Motion for Summary Judgment, not an answer filed in response to a petition."²⁵⁸

X. JURY PRACTICE

A. PROCEDURAL MATTERS

The Texas Constitution and Texas Rules of Civil Procedure require that a district court jury consist of twelve members unless not more than three jurors die or "be disabled from sitting."²⁵⁹ In *McDaniel v. Yarbrough*,²⁶⁰ the primary question presented was whether the trial court abused its discretion by dismissing a juror, as "disabled from sitting," when she was unable to return to the courthouse because of inclement weather. Holding that such action was erroneous, the supreme court equated the "disabled from sitting" language with an actual physical or mental incapacity on the part of a juror.²⁶¹ Accordingly, the temporary inability of a juror to return to court based on weather conditions did not meet that standard.²⁶²

*Batson*²⁶³ challenges continued to be the subject of considerable discussion among the appellate courts. In *Benavides v. American Chrome & Chemicals, Inc.*,²⁶⁴ the appellate court observed that the *Batson* rule applies to Hispanics.²⁶⁵ Further, the court held that a juror cannot be struck on account of race even when race is not the sole factor but is merely one factor in the decision to exercise a peremptory challenge.²⁶⁶ In *Dominquez v. State Farm Insurance Co.*,²⁶⁷ the court expounded upon the procedure for asserting a *Batson* challenge. The fundamental steps for asserting a *Batson* challenge are: (1) the complaining party must first present sufficient evidence to establish a prima facie case of discrimination; (2) the burden then shifts to the striking party to rebut the assumption of discrimination by producing a racially neutral explanation for each peremptory challenge; and (3) the complaining party may then offer evidence showing that the explanations are a sham or pretext for discrimination.²⁶⁸ In *Dominguez*, the attorney who had made the peremptory challenges allowed himself to be sworn in and responded without objection to the trial court's questions about his reasons for striking panel

257. TEX. R. CIV. P. 166a(c).

258. 1995 WL 517353 at *3.

259. TEX. CONST. art. V, § 13; TEX. R. CIV. P. 292.

260. 898 S.W.2d 251 (Tex. 1995).

261. *Id.* at 253 (citing *Houston & Texas Central Ry. Co. v. Waller*, 56 Tex. 331 (1882)).

262. *Id.* at 253.

263. *Batson v. Kentucky*, 476 U.S. 79 (1986).

264. 893 S.W.2d 624 (Tex. App.—Corpus Christi 1994), *writ denied*, 907 S.W.2d 516 (Tex. 1995) (per curiam).

265. *Id.* at 626.

266. *Id.* at 627.

267. 905 S.W.2d 713 (Tex. App.—El Paso 1995, *writ dismissed by agreement*).

268. *See*, *Texas Tech Univ. Health Science Ctr. v. Apodaca*, 876 S.W.2d 402, 407-08 (Tex. App.—El Paso 1994, *writ denied*).

members. Under those circumstances, the court of appeals held that he had waived any objection that no prima facie case was made for discriminatory use of peremptory challenges and, by failing to make an objection, had conceded that the first step of the *Batson* procedure had been satisfied.²⁶⁹ Accordingly, the only issue on appeal was whether the striking party had provided a racially neutral explanation for each of his peremptory challenges. The court found that youth and unemployment of a prospective juror were proper considerations in making a peremptory strike.²⁷⁰ On the other hand, the court rejected, as an explanation, the claim that a prospective juror had "responded well" to the questions by opposing counsel.²⁷¹ The court noted that the record contained no verbal response by the prospective juror in question and, further, there was no specific, detailed description of the juror's appearance in the record.²⁷² Under those circumstances, there was simply no basis in the record to support the explanation.²⁷³

Two cases addressed the timing of challenges to the array of a jury panel. In *Benavides v. Soto*,²⁷⁴ the plaintiff challenged the array of a jury panel on the basis that it had been selected pursuant to a computer method that had not been approved by the county commissioners' court as required by statute, and the computer program did not employ a random selection program. On appeal, the court held that both points of error had been waived because they were not presented until a motion for new trial was filed.²⁷⁵ The general rule is that errors in the process used to select the jury array or panel are waived if the complaint is first made in a motion for new trial.²⁷⁶ According to the court, "[t]his rule is primarily designed to prevent a party from taking his chance on a favorable verdict and then obtaining a second trial by reason of some irregularity in the array selection process."²⁷⁷ More importantly, the court held that this rule applied not only when the party is aware of the irregularity but also when the party could have discovered it by inquiry.²⁷⁸

In contrast, the court in *Mann v. Ramirez*²⁷⁹ held that, under the facts of that case, a motion for mistrial filed after the verdict was proper to raise a challenge to the array of the jury panel.²⁸⁰ In this case, the district court clerk had improperly excused prospective jurors for nonstatutory reasons. In addition, the district court clerk was having an "intimate rela-

269. *Dominguez*, 905 S.W.2d at 716.

270. *Id.* at 717.

271. *Id.*

272. *Id.*

273. *Id.* at 717-18.

274. 893 S.W.2d 69 (Tex. App.—Corpus Christi 1994, no writ).

275. *Id.* at 71.

276. *Id.*

277. *Id.*

278. *Id.*

279. 905 S.W.2d 275 (Tex. App.—San Antonio 1995, writ denied).

280. *Id.* at 280.

tionship" with the corporate representative of the defendant. Even though these matters were not brought to the attention of the trial court until after the verdict had been rendered, the appellate court held that the objections to the jury panel had not been waived.²⁸¹ In reaching that result, the appellate court gave particular weight to the fact that the plaintiff's attorney questioned the district court clerk, prior to voir dire, about the small number of jurors who had appeared and was assured that the number was affected by appropriate statutory exemptions.²⁸² Under those circumstances, the court stated that the plaintiff could not be faulted for relying on the assurances of the district court clerk's office regarding the jury-assembly procedure and had diligently pursued the error through their motion for mistrial as soon as irregularities became apparent.²⁸³

In order to preserve error regarding the trial court's failure to remove a prospective juror for cause, a party must give notice to the trial court of two things *prior* to exercising any peremptory challenges: (1) the party must inform the trial court that it will exhaust all peremptory challenges; and (2) the party must inform the trial court that after exercising all of its peremptory challenges, specific objectionable jurors will remain on the jury list.²⁸⁴ In *Brown v. Pittsburg Corning Corp.*,²⁸⁵ the court held that, under this test, the appellants' point of error was waived because they failed to bring the matter to the attention of the trial court before they had delivered their list of peremptory challenges to the trial court.²⁸⁶ In *Clark v. Harris County Sheriff's Department*,²⁸⁷ the court similarly held that a party had waived its challenge for cause.²⁸⁸ In this regard, the complaining party had "reurged" her challenges for cause to seven specified jurors prior to exercising peremptory strikes. The court of appeals, however, held this was insufficient even though it was admittedly reasonable to deduce from counsel's statement that there would be objectionable jurors remaining on the jury.²⁸⁹ Rather, the court of appeals endorsed the view that the manner for preserving error should remain clear without calling upon the courts to deduce or infer meanings from counsel's statements.²⁹⁰

In *Rabson v. Rabson*,²⁹¹ the court addressed questions as to the number of jurors that are required in trials in statutory probate court. The court held that, with respect to claims that are within the probate

281. *Id.*

282. *Id.* at 279.

283. *Id.* at 279-80.

284. *Hallett v. Houston Northwest Medical Ctr.*, 689 S.W.2d 888, 890 (Tex. 1985).

285. 909 S.W.2d 101 (Tex. App.—Houston [14th Dist.] 1995, no writ).

286. *Id.* at 104. Although the record did not present for review the specific moment of delivery, the court still held that the appellate's objection was not "timely." *Id.*

287. 889 S.W.2d 569 (Tex. App.—Houston [14th Dist.] 1994, no writ).

288. *Id.* at 570.

289. *Id.*

290. *Id.*

291. 906 S.W.2d 561 (Tex. App.—Houston [14th Dist.] 1995, writ denied).

court's exclusive jurisdiction, they may be tried to a jury of six.²⁹² In cases involving claims both within the probate court's exclusive jurisdiction and its concurrent jurisdiction with the district court, however, the appellate court held that a jury of twelve was required.²⁹³

B. JURY QUESTIONS

Two supreme court cases during the Survey period reflect a more lenient attitude on the part of the court with respect to preservation of error related to the jury charge. In *Alaniz v. Jones & Neuse, Inc.*,²⁹⁴ plaintiff submitted to the trial court a "complete requested charge" shortly after the trial began. The trial court submitted the proposed charge with the exception of a reference to future lost profits. Plaintiff objected on the record to the omission.

On appeal, the court of appeals held that plaintiff had failed to preserve his objection by including his request in a complete charge, by submitting his request before trial and not "after the charge was given to the parties," and by not making his request "separate and apart from [his] objections."²⁹⁵ Disagreeing with the court of appeals, the supreme court first noted that plaintiff's request was "written" as required by Rule 273.²⁹⁶ The court explained that Rule 273 "does not prohibit including a request in a complete charge as long as it is not obscured."²⁹⁷ The court further found that, although Rule 273 speaks in terms of a request for questions or instructions being submitted "after the charge,"²⁹⁸ it does not mean that requests may only be presented after the charge has actually been given to the parties by the trial court.²⁹⁹ Finally, the court concluded that plaintiff's written request was separate from his oral objection and, therefore, error had been preserved.³⁰⁰ In reaching these conclusions, the court emphasized that the requirements for preserving error as to a jury charge should "be applied in a common sense manner to serve the purposes of the rules, rather than in a technical manner which defeats them."³⁰¹

In *Lester v. Logan*,³⁰² the plaintiff submitted his questions and instructions on a single page, which consisted of a question on the implied warranty of fitness for a particular purpose with accompanying definitions for the terms implied warranty, producing cause, course of dealing, and usage

292. *Id.* at 562.

293. *Id.* at 562-63; see TEX. GOVT. CODE ANN. § 25.00261 (Vernon Supp. 1995).

294. 907 S.W.2d 450 (Tex. 1995) (per curiam).

295. *Alaniz v. Jones & Neuse, Inc.*, 878 S.W.2d 244, 245 (Tex. App.—Corpus Christ 1994), writ denied, 907 S.W.2d 450 (1995).

296. TEX. R. CIV. P. 273.

297. *Alaniz*, 907 S.W.2d at 451.

298. TEX. R. CIV. P. 273.

299. *Alaniz*, 907 S.W.2d at 451.

300. *Id.*

301. *Id.* at 452. Nevertheless, despite being properly presented, error was denied on want of merit. *Id.*

302. 907 S.W.2d 452 (Tex. 1995).

of trade. The court of appeals found that the plaintiff's submission was improper. Although denying the application for writ of error, the supreme court expressly disapproved of this holding and, therefore, implied that it is appropriate for a party to submit a question, along with accompanying instructions, on the same page rather than separately.³⁰³

In regard to the foregoing, the practitioner should be aware that the supreme court is in the process of substantially revising Rules 270 through 278³⁰⁴ which govern the jury charge procedure. One of the potential areas of revision is the simplification of the steps necessary to preserve objections to the charge. It is anticipated that these revisions will be completed during 1996.

A number of cases considered the effect of submitting erroneous instructions or questions to the jury. In *Reinhart v. Young*,³⁰⁵ the trial court submitted an instruction on unavoidable accident in this negligence case. Although not expressly deciding that such action was erroneous, the supreme court did caution that, except in certain types of cases, the trial judge should refrain from submitting this type of instruction.³⁰⁶ The court explained that the only purpose for the instruction was to ensure that the jury would understand that "they do not necessarily have to find one or the other parties" to the lawsuit is to blame for the occurrence in question, and the instruction is most often used to inquire about the causal effect of some physical condition or circumstance, such as weather conditions.³⁰⁷ The court noted that this type of instruction increases the risk that the jury will be misled or confused by the perception that the instruction represents a separate issue distinct from the general principles of negligence.³⁰⁸

Nevertheless, the court did not find the error, if any, in submitting the instruction to be harmful.³⁰⁹ In this regard, the court noted, among other things, that the jury charge had also contained an instruction on the doctrine of sudden emergency which reiterated much of the unavoidable accident instruction.³¹⁰ Since the plaintiff had made no objection to the instruction on sudden emergency, the court had difficulty attributing an improper verdict to the unavoidable accident instruction.³¹¹

In *Crawford v. Hope*,³¹² the court of appeals was somewhat more enthusiastic about an unavoidable accident instruction. In rejecting an argument that such an instruction constituted a comment on the weight of the evidence, the court noted that "every jury instruction and question

303. *Id.* at 453.

304. TEX. R. CIV. P. 270-278.

305. 906 S.W.2d 471 (Tex. 1995).

306. *Id.* at 472.

307. *Id.* (quoting *Yarbrough v. Berner*, 467 S.W.2d 188, 192 (Tex. 1971)).

308. *Id.*

309. *Id.* at 474.

310. *Reinhart*, 906 S.W.2d 471, 474 (Tex. 1995).

311. *Id.*

312. 898 S.W.2d 937 (Tex. App.—Amarillo 1995, writ denied).

comments in some way upon the evidence.”³¹³ According to the court, “submitting inferential rebuttals, such as unavoidable accident, [is] not tantamount to informing the jury” that one party’s evidence is more credible.³¹⁴ Rather, “[i]t simply educates the jury on the applicable elements of law and assists it in understanding the respective contentions.”³¹⁵

In *City of Brownsville v. Alvarado*,³¹⁶ a prisoner committed suicide in the city jail. His parents thereafter brought a wrongful death and survival action against the city. At the trial, the jury was first asked to determine if the negligence of the city caused the prisoner’s death and, second, to determine if the negligence or intentional conduct of the prisoner proximately caused his own death. If it answered both questions in the affirmative, then the jury was to allocate the appropriate percentages of negligence or intentional conduct between the city and the prisoner. The court of appeals determined that the submission of the second question, inquiring about the prisoner’s own conduct, was improper due to a statutory provision which prohibits the use of suicide as a defense in certain circumstances.³¹⁷ The supreme court disagreed.³¹⁸ The court observed that inclusion of an improper jury question is harmless error if the jury’s answers to other questions render the improper question immaterial and if the submission of the immaterial issue does not confuse or mislead the jury.³¹⁹ Given that the jury found, in response to the first question, that the city did not proximately cause the prisoner’s death, the court determined that the second issue was immaterial.³²⁰ Further, the second question regarding the prisoner’s own conduct was not ambiguous or misleading because the cause of death and the fact of suicide were never in doubt; the jury was simply asked to identify who was responsible.³²¹

In *Lone Star Gas Co. v. Lemond*,³²² a products liability case, the trial court added a sentence to the form for a jury charge on a marketing defect claim as found in the Texas Pattern Jury Charges.³²³ The trial court’s additional sentence stated “[a] seller’s duty to warn arises only where the dangers to be warned of are reasonably foreseeable and are such that a consumer cannot reasonably be expected to be aware of them.”³²⁴ Although the supreme court has emphasized in the past that surplus instructions are to be discouraged,³²⁵ it did not find the addition of the

313. *Id.* at 942.

314. *Id.*

315. *Id.*

316. 897 S.W.2d 750 (Tex. 1995).

317. *Id.* at 752; TEX. CIV. PRAC. & REM. CODE ANN. § 93.001 (Vernon 1995).

318. *Alvarado*, 897 S.W.2d at 753.

319. *Id.* at 752.

320. *Id.*

321. *Id.*

322. 897 S.W.2d 755 (Tex. 1995).

323. *Id.* at 756; 3 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 71.06 (1996).

324. *Lone Star Gas*, 897 S.W.2d at 756.

325. *Accord v. General Motors Corp.*, 669 S.W.2d 111 (Tex. 1984); *Lemos v. Montez*, 680 S.W.2d 798 (Tex. 1984).

extra sentence to be harmful error.³²⁶ Among other things, the court noted that the sentence was entirely consistent with other portions of the charge and, accordingly, the court did not see how "it could have nudged the jury improperly."³²⁷

The trial court in *George Grubb Enterprises v. Bien*³²⁸ followed the Pattern Jury Charge instruction on exemplary damages. The court, however, included a statement to the effect that in determining the amount of exemplary damages, the jury could not consider the assets, wealth, or profitability of any company affiliated with the defendant corporation unless they determined that those companies were operated as a single business enterprise. The court defined a "single business enterprise" as existing when two or more corporations associate together and, rather than operating as separate entities, integrate their resources to achieve a common business purpose.³²⁹

Finding the trial court's action to be improper, the supreme court expressed skepticism that it would "ever" be proper for a jury to consider the wealth of a related corporate entity, which had not been joined as a defendant, in deciding exemplary damages.³³⁰ In any event, the court determined that the instruction was erroneous because it did not specify all of the relevant factors that are necessary in order to disregard corporate structure.³³¹

Finally, the supreme court in *State Farm Life Insurance Co. v. Beaston*³³² considered the parameters of Rule 279.³³³ This rule provides, in general, that when an element of a claim or defense is omitted from the jury charge without objection and the trial court makes no written findings as to the element, such omitted element shall be deemed found by the court in such a manner as to "support" the judgment.³³⁴ In this case, the jury found that the plaintiff had sustained mental anguish as a result of unfair deceptive acts and practices of the defendant. Such a determination was not conditioned upon any finding as to whether that conduct was committed knowingly, a necessary element. On appeal, the plaintiff contended that defendant could not complain because a finding of "knowing conduct" should be deemed to have been made under Rule 279. Disagreeing with this contention, the supreme court noted that the trial court's judgment expressly excluded any award for mental anguish damages.³³⁵ Thus, the finding of "knowing conduct" in support of an award for mental anguish damages could not be deemed because such a finding would not "support" the judgment that was rendered in the court

326. *Lone Star Gas*, 897 S.W.2d at 756-57.

327. *Id.* at 756.

328. 900 S.W.2d 337 (Tex. 1995).

329. *Id.* at 338.

330. *Id.* at 339.

331. *Id.* (citing *Castleberry v. Branscum*, 721 S.W.2d 270, 273 (Tex. 1986)).

332. 907 S.W.2d 430 (Tex. 1995).

333. TEX. R. CIV. P. 279.

334. *Id.*

335. *State Farm*, 907 S.W.2d at 437.

below.³³⁶

XI. JUDGMENTS

A number of interesting points regarding judgments were addressed during the Survey period. In *Bonham State Bank v. Beadle*,³³⁷ a bank obtained a \$1,650,000 judgment in North Carolina against its borrowers under certain notes and guaranties. Subsequently, the debtors obtained a \$75,000 judgment against the bank in connection with a sequestration proceeding in Texas. Thereafter, the bank filed a declaratory judgment action seeking a declaration regarding its ability to offset the prior North Carolina judgment against the Texas judgment.

The supreme court concluded that this was an appropriate use of the declaratory judgment procedure. In this regard, the court concluded that the suit was not being used to obtain a review or modification of either judgment, but was solely to determine the rights of offset.³³⁸ Further, the court rejected the borrowers' argument that the claim of setoff should have been made in the Texas action. The court reasoned that, until the rendition of judgment in the Texas suit, the Bank's right of setoff did not exist.³³⁹ Further, the court concluded that the Bank's right of setoff was not a compulsory counterclaim in the Texas suit because it was "independent of the merits of either of the underlying judgments."³⁴⁰ Moreover, the right to recover the amount owed under a prior judgment, unlike a counterclaim, is not factually dependent on the disposition of the second lawsuit given that a judgment has already been rendered.³⁴¹

In *America's Favorite Chicken Co. v. Galvan*,³⁴² the court of appeals explored the power of the trial court to enter a nunc pro tunc judgment. In this case, plaintiff's attorney "accidentally" moved for a nonsuit "with prejudice," which the trial court granted. Approximately six months later, and after the trial court's plenary jurisdiction expired, plaintiff moved for a judgment nunc pro tunc, which the trial court granted and changed the order of nonsuit to read "without" instead of "with" prejudice.³⁴³ Finding this action to be erroneous, the court of appeals espoused the familiar proposition that "clerical" errors rather than judicial errors may be corrected pursuant to a court's nunc pro tunc powers at any time.³⁴⁴ The court concluded that any error made by the attorney in drafting the motion for nonsuit with prejudice did not constitute a clerical error; rather, any recitation or provision included in a judgment due to an attorney's mistake is part of the court's judgment as rendered and is,

336. *Id.*

337. 907 S.W.2d 465 (Tex. 1995).

338. *Id.* at 468.

339. *Id.* at 469.

340. *Id.* at 470.

341. *Id.*

342. 897 S.W.2d 874 (Tex. App.—San Antonio 1995, writ denied).

343. *Id.* at 876.

344. *Id.*

therefore, a judicial error as a matter of law.³⁴⁵

In *Brazos Valley Community Action Agency v. Robison*,³⁴⁶ plaintiff brought a wrongful death and survival action against a bus driver and his employer. Subsequently, the plaintiff obtained a default judgment against the driver at a hearing for which the employer received no notice. Thereafter, the trial court entered summary judgment against the employer on the ground that the default judgment against the driver established all facts necessary to show the employer's liability. Disagreeing with this conclusion, the appellate court noted that it was "fundamentally unfair" to use a default judgment to bind an employer based on an employee's default, particularly when the employer never received notice of the default hearing and did not appear for it.³⁴⁷

The court in *Tinney v. Willingham*³⁴⁸ addressed the power of the trial court to enter a judgment that varies from the terms of a settlement. In this case, the parties agreed to settle their dispute and dictated the terms of their settlement into the record. Subsequently, one of the parties filed a motion for judgment in which they requested the trial court sign and enter a judgment attached to the motion. The opposing party objected to the judgment on the basis that it did not conform to the settlement agreement announced in open court. Despite the objection, the trial court entered the judgment. Finding this to be erroneous, the court of appeals stated that if a trial court intends to render judgment based on the parties' settlement agreement, the "signed judgment must literally comply with the terms of the agreement."³⁴⁹ Because the judgment conflicted with the settlement agreement, the court held that the judgment was unenforceable.³⁵⁰

XII. MOTION FOR NEW TRIAL

Rule 41 of Texas Rules of Appellate Procedure³⁵¹ generally provides that the time for filing an appeal is within 30 days after the judgment is signed, or within 90 days after the judgment is signed "if a timely motion for new trial has been filed by any party." In *Gomez v. Texas Department of Criminal Justice*,³⁵² the plaintiff filed a "bill of review" within 30 days after an adverse judgment had been entered against him. Noting that plaintiff's bill of review had "assailed" the trial court's judgment, the supreme court held that this pleading was sufficient to extend the appellate time table from 30 to 90 days, even though it was not described as a

345. *Id.* at 879.

346. 900 S.W.2d 843 (Tex. App.—Corpus Christi 1995, writ denied).

347. *Id.* at 845.

348. 897 S.W.2d 543 (Tex. App.—Fort Worth 1995, no writ).

349. *Id.* at 544.

350. *Id.*

351. TEX. R. APP. P. 41(a)(1).

352. 896 S.W.2d 176 (Tex. 1995) (per curiam).

motion for new trial.³⁵³ In *Spellman v. Hoang*,³⁵⁴ the losing party filed a motion for new trial within the requisite period but did not pay the statutory filing fee for the motion.³⁵⁵ The court of appeals concluded the date of tender of the motion controlled for appellate purposes and, accordingly, the motion was sufficient to extend the appellate deadline.³⁵⁶

Pursuant to Rule 329b(e), a trial court has plenary power to grant a new trial or to modify, correct, or reform a judgment within 30 days after the judgment is signed.³⁵⁷ If a motion for new trial is filed, the trial court's plenary power is extended until 30 days after the motion is overruled either by written order or by operation of law.³⁵⁸ In *Childs v. L.M. Healthcare, Inc.*,³⁵⁹ the trial court "rendered" judgment on January 28, 1994, against the plaintiff. The plaintiff thereafter filed a motion for new trial on February 7, 1994, and a hearing was held on March 3, 1994. At the hearing, the trial court "signed" the January 28, 1994, judgment and also signed an order denying plaintiff's motion for new trial. Subsequently, plaintiff filed a motion to modify the judgment, and the trial court modified the judgment more than 30 days after March 3, 1994. Under these circumstances, the court held that the trial court acted improperly because it lost plenary power to modify the judgment once 30 days had transpired after denial of the motion for new trial.³⁶⁰ The court reasoned that if it were to hold otherwise, then a party could create indefinite delay through carefully timed filings of subsequent motions to modify.³⁶¹

XIII. SEALING OF COURT RECORDS

The court in *Marks v. Feldman*³⁶² condemned an attempt to circumvent the requirements for sealing court records under Rule 76a³⁶³ based on the allegation that grand jury secrecy mandated a different standard.³⁶⁴ In an action filed to perpetuate the testimony of Feldman, Marks' accountant, the United States objected on the grounds of a pending grand jury investigation in which Marks was a target and Feldman a potential witness. At the government's request, the district court conducted an ex parte, *in camera* hearing with the government's attorney only and further ordered the record of such hearing sealed. The court of appeals held that

353. *Id.* at 176-77.

354. 887 S.W.2d 480 (Tex. App.—San Antonio 1994, no writ).

355. *Id.* at 481; TEX. GOVT. CODE ANN. § 51.317 (Vernon 1988).

356. *Spellman*, 887 S.W.2d at 482. Compare *Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex. 1993); *Arndt v. Arndt*, 709 S.W.2d 281, 282 (Tex. App.—Houston [14th Dist.] 1986, no writ).

357. TEX. R. CIV. P. 329b(e).

358. *Faulkner v. Culver*, 851 S.W.2d 187, 188 (Tex. 1993).

359. 908 S.W.2d 593 (Tex. App.—Fort Worth 1995, no writ).

360. *Id.* at 595.

361. *Id.*

362. 910 S.W.2d 73 (Tex. App.—Dallas 1995, no writ).

363. TEX. R. CIV. P. 76a.

364. *Marks*, 910 S.W.2d at 74-75.

the ex-parte, *in camera* hearing violated the United States and Texas constitutions, the Texas procedural rules, and Texas case law.³⁶⁵ Further, the court held that the sealing of the record was improper given the failure of the trial court to adhere to the requirements of Rule 76a,³⁶⁶ and that Federal Rule of Criminal Procedure 6(e)³⁶⁷ could not be relied on as a basis for ignoring those requirements.³⁶⁸

XIV. DISQUALIFICATION AND RECUSAL OF JUDGES

Section 74.053 of the Texas Government Code permits a litigant to disqualify an assigned or visiting judge if he objects before the first hearing or trial over which the assigned judge is to preside.³⁶⁹ Earlier decisions have held that the objection is too late if it comes after the visiting judge makes any ruling in the case, even on a motion for continuance.³⁷⁰ *Morris v. Short*³⁷¹ reiterates this rule and also holds that an oral objection is insufficient.³⁷² Although the code does not explicitly state that the objection must be in writing, the *Morris* court implied such a requirement in the code's use of the words "files" and "filed."³⁷³ To properly object to a visiting judge, therefore, the party must file a written objection, even if it is a handwritten one.³⁷⁴ In somewhat of a contrast to *Morris*, the court in *Lee v. Bachus*³⁷⁵ held that a party does not waive its objection to a visiting judge by failing to register the objection before that judge presided at a docket call which set the case for trial at a future date. The court concluded that a mere docket call at which thirty-seven cases were set for trial in the future did not qualify as a pretrial hearing or trial, as those terms are used in the statute, and did not constitute calling the case "to" trial as contemplated by section 74.053.³⁷⁶

In *Amateur Athletic Foundation v. Hoffman*,³⁷⁷ a litigant timely filed his handwritten objection to a visiting judge who had been assigned to hear the matter. This objection failed to identify the challenged judge by name and, instead, objected only generally to "the visiting judge." Neverthe-

365. *Id.* at 78.

366. TEX. R. CIV. P. 76a.

367. FED. R. CRIM. P. 6(e).

368. *Marks*, 910 S.W.2d at 78.

369. TEX. GOV'T CODE ANN. § 74.053(c) (Vernon Supp. 1996).

370. *See, e.g.,* *Money v. Jones*, 766 S.W.2d 307, 308 (Tex. App.—Dallas 1989, writ denied) (discussed in Ernest E. Figari, Jr., A. Erin Dwyer & Donald Colleluori, *Annual Survey of Texas Law: Texas Civil Procedure*, 44 Sw. L.J. 551-52 (1990).

371. 902 S.W.2d 566 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

372. *Id.* at 569.

373. *Id.*; *see* TEX. GOV'T CODE ANN. § 74.053(b) (Vernon Supp. 1996) ("If a party . . . files a timely objection"); *see also id.* § 74.053(c) ("[o]bjection . . . must be filed before the first hearing or trial").

374. 902 S.W.2d at 569.

375. 900 S.W.2d 390 (Tex. App.—Texarkana 1995, no writ).

376. *Id.* at 392 (citing *Lewis v. Leftwich*, 775 S.W.2d 848, 849 (Tex. App.—Dallas 1989, orig. proceeding)).

377. 893 S.W.2d 602 (Tex. App.—Dallas 1994, no writ).

less, with one judge dissenting,³⁷⁸ the court held that the blanket objection was sufficient.³⁷⁹

Texas courts have repeatedly held that appellate judges are not subject to disqualification solely on the basis that they received campaign contributions from an attorney representing one of the parties to the appeal.³⁸⁰ The appellants in *Rogers v. Bradley*³⁸¹ cited an even more tenuous connection with a political campaign as grounds for disqualification. They moved to recuse four justices of the Texas Supreme Court who were depicted in a campaign video produced for the 1992 general election by TEX-PAC, the political action committee of the Texas Medical Association. Among other things, the TEX-PAC video highlighted the case involving the appellee Dr. Bradley and contained his plea to voters to elect "independent" and "fair" judges to the supreme court. It also appeared, however, that the content and circumstances of the video were outside the control of any of the candidates or existing jurists portrayed in the video. Therefore, the court denied appellants' motion to recuse as to each of the four justices challenged.³⁸²

The decision in *Rogers* is noteworthy because of the "Declaration of Recusal" filed by Justice Gammage and Justice Enoch's response to that declaration. Although he was not challenged in the motion to recuse, Justice Gammage unilaterally recused himself from participation in all matters related to the case because he too was depicted briefly in the video.³⁸³ In his "Declaration of Recusal" Justice Gammage opined that Rule 18b(2)(a)³⁸⁴ requires recusal whenever a judge's impartiality might reasonably be questioned, even if the judge has not engaged in any biased or prejudicial conduct.³⁸⁵ Therefore, although he had nothing to do with the videotape, Justice Gammage believed his recusal was necessary because a reasonable member of the public with knowledge of all the facts in the public domain would doubt that the judges portrayed favorably in the TEX-PAC video were actually impartial.³⁸⁶ Justice Gammage also

378. The dissenting judge observed that an objection which does not positively identify the judge would leave unanswered numerous questions, including whether the party had used its one objection against a retired judge or only one of its unlimited objections to a former judge. *Id.* at 604 (Whittington, J., dissenting). Compare TEX. GOV'T CODE ANN. § 74.053(b) (Vernon Supp. 1995) (only one objection allowed for retired judge) with § 74.053(d) (unlimited objections as to former judges who are not retired judges).

379. Hoffman, 893 S.W.2d at 603.

380. See *River Road Neighborhood Ass'n v. South Texas Sports, Inc.*, 673 S.W.2d 952 (Tex. App.—San Antonio 1984, no writ) and *Rocha v. Ahmad*, 662 S.W.2d 77 (Tex. App.—San Antonio 1983, no writ) (discussed in Ernest E. Figari, Jr., et al., *Annual Survey of Texas Law: Texas Civil Procedure*, 39 Sw. L.J. 419, 445 (1985)).

381. 909 S.W.2d 872 (Tex. 1995).

382. *Id.* at 880.

383. *Id.* at 873-74 (Gammage, J., Declaration of Recusal).

384. TEX. R. CIV. P. 18b(2)(a) (requiring a judge to "recuse himself in any proceeding in which . . . his impartiality might reasonably be questioned"). Pursuant to TEX. R. APP. P. 15a, the strictures for trial judges announced in Rule 18b apply equally to appellate justices.

385. 909 S.W.2d at 874.

386. *Id.*

articulated a general rule he would apply that requires recusal whenever (1) a person has sought to engender political support for a judicial candidate, (2) the effort is made through a medium intended to be widely circulated, and (3) that effort ties the success of the chosen candidate to the probable result in a pending or impending case.³⁸⁷

Responding to Justice Gammage's declaration, Justice Enoch noted that the case presented no grounds for constitutional or rule-based disqualification.³⁸⁸ The standards for recusal and disqualification focus on the conduct of the judge that is being examined, not the conduct of some third party.³⁸⁹ Therefore, a judge should not recuse himself or herself merely because others had engaged in normal, even vigorous, campaign activities.³⁹⁰ Indeed, given the realities of current political campaigns, Justice Enoch concluded that a judge's appearance in a campaign video, standing alone, would not cast doubt in the mind of a reasonable person about that judge's impartiality.³⁹¹

XV. DISQUALIFICATION OF COUNSEL

Satellite skirmishes in civil litigation continue to occur over the disqualification of counsel pursuant to Rule 1.09 of the Texas Disciplinary Rules of Professional Conduct.³⁹² In *Texaco, Inc. v. Garcia*,³⁹³ the Texas Supreme Court held that counsel who had represented a former client in 106 litigation matters over a seven year period was disqualified from representing another client in a matter adverse to the former client. Reiterating the rule it first announced in *NCNB Texas National Bank v. Coker*,³⁹⁴ the court stated that a movant seeking disqualification under the substantial relationship test must prove that the facts of the two representations are so related "that it creates a genuine threat that confidences revealed to his former counsel will be divulged to his present adversary."³⁹⁵ Because the allegations in the *Garcia* case involved liability issues, scientific issues, and defenses and strategies that were similar to those presented in a prior suit in which counsel had represented the former client, the trial judge abused his discretion in denying the motion to

387. *Id.*

388. *Id.* at 879; see TEX. CONST. art. V, § 11; TEX. R. CIV. P. 18b.

389. 909 S.W.2d at 881.

390. *Id.* at 882.

391. *Id.* at 883. Justice Enoch also described the contrary rule espoused by Justice Gammage as unworkable, observing that it would totally disrupt the efficient administration of justice in Texas because all nine justices of the supreme court would be required to recuse themselves simply because TEX-PAC was too pointed in its campaign activities. *Id.* at 883-84.

392. TEX. DISCIPLINARY R. PROF. CONDUCT 1.09(a)(3) (1989), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A, art. 10, § 9 (Vernon Supp. 1995) (lawyer shall not take representation that is adverse to a former client if the new matter is the same or a substantially related matter).

393. 891 S.W.2d 255 (Tex. 1995).

394. 765 S.W.2d 398, 400 (Tex. 1989).

395. 891 S.W.2d at 256.

disqualify.³⁹⁶

In *Henderson v. Floyd*,³⁹⁷ which was decided the same day as *Garcia*, the supreme court held that the presumption of shared confidences arising under the substantial relationship test cannot be rebutted by a showing that no confidential information was disclosed.³⁹⁸ Thus, a firm who hires a lawyer who formerly represented the adverse party in the same or substantially related matters cannot avoid disqualification by "shielding" the newly hired lawyer from any possible contact with the litigation.³⁹⁹ For similar reasons, the court in *Centerline Industries v. Knize*⁴⁰⁰ held that a lawyer who has given advice in a substantially related matter must be disqualified whether or not he has even gained any confidences as a result of the prior representation. Agreeing with a recent decision of the Fifth Circuit,⁴⁰¹ the court observed that the substantial relationship test is concerned with both a lawyer's duties of confidentiality and loyalty.⁴⁰² Therefore, because the lawyer admitted that the present case was substantially related to the matter in which he formerly represented the adverse party, he was disqualified notwithstanding his contention that all of the confidences he gained from the prior representation had already become public knowledge.⁴⁰³

At least one court has decided that a stricter standard for disqualification applies in the joint defense context. The plaintiff in *Rio Hondo Implementation Co. v. Euressti*⁴⁰⁴ originally sued two defendants. After one of these defendants settled, the lawyer who represented that defendant entered into a new law partnership with the attorney representing the plaintiff in the case. The non-settling defendant then moved to disqualify plaintiff's counsel on the basis that his new partner, by attending joint defense meetings that occurred before his former client settled, had gained confidential and privileged information of the remaining defendant. In a case of first impression, the *Rio Hondo* court held that a party claiming the joint defense privilege as a basis for disqualification "must establish in an evidentiary hearing that confidential information was actually shared."⁴⁰⁵ The court refused to apply the irrebuttable presumption that applies in other contexts arising under the substantial relationship

396. *Id.* at 257.

397. 891 S.W.2d 252 (Tex. 1995).

398. *Id.* at 254.

399. The rule announced for attorneys in *Floyd*, therefore, appears to be different than the standard for non-lawyer employees the supreme court adopted last year in *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831 (Tex. 1994) (presumption that nonlawyer who switches sides in ongoing litigation will share confidential information with members of new firm is rebuttable), discussed in 1995 *Annual Survey*, *supra* note 21, at 1648-49.

400. 894 S.W.2d 874, 876 (Tex. App.—Waco 1995, no writ).

401. *In re American Airlines*, 972 F.2d 605, 619 (5th Cir. 1992), *cert. denied*, 507 U.S. 912 (1993).

402. *Knize*, 894 S.W.2d at 876.

403. *Id.*

404. 903 S.W.2d 128 (Tex. App.—Corpus Christi 1995, no writ).

405. *Id.* at 132. In so holding, the court adopted the reasoning of *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 608 (8th Cir. 1977), *cert. denied*, 436 U.S. 905, (1978), in which the court noted that "[a]bsent an attorney-client relationship, no court has applied the

test because there had never been any attorney-client relationship between the movant and counsel for the co-defendant, and therefore Rule 1.09 did not technically apply.⁴⁰⁶ Therefore, because defendant's testimony did not reveal with any specificity the confidences allegedly revealed to her co-defendant, disqualification was inappropriate.⁴⁰⁷

XVI. MISCELLANEOUS

A. GUARDIAN AD LITEM

Rule 173⁴⁰⁸ vests the trial court with the authority to appoint a guardian ad litem for a minor who "is represented by a next friend or guardian who appears to the court to have an *interest adverse* to such minor."⁴⁰⁹ In *Brownsville-Valley Regional Medical Center v. Gamez*,⁴¹⁰ the supreme court considered the limitations on that authority. In this case, a group of family members (parents and their daughter) sued a hospital and a doctor for medical malpractice. Subsequently, the parties settled the case and the settlement payment was to be apportioned between the parents and a trust created for the benefit of the daughter. After settlement negotiations were complete, the trial court appointed an attorney as the daughter's guardian ad litem to represent her interest in the settlement. In approving the settlement, the trial court awarded the guardian ad litem not only the fees that he had spent on the case but also fees for services to be performed by him for a 22 year period following the settlement (the duration of the trust).

Finding that the trial court had abused its discretion by awarding the guardian ad litem fees for post-litigation services, the supreme court observed that representation of a guardian ad litem is limited to matters related to the suit for which he or she is appointed and, accordingly, the trial court "can appoint an ad litem *during litigation* to protect the interests of the minor when a conflict of interests arises."⁴¹¹ In this case, once the settlement was approved, there was no evidence of any ongoing conflict of interest that continued to exist.⁴¹² Accordingly, the supreme court concluded that the trial court should have dismissed the guardian ad litem

[irrefutable presumption that confidences were disclosed] inherent in Canon 4." *Euresti*, 903 S.W.2d at 132.

406. 903 S.W.2d at 131. The court also took a look at Rule 1.05, which prohibits using confidential information relating to a client to that client's disadvantage unless the client consents. See TEX. DISCIPLINARY R. PROF. CONDUCT 1.05(b)(2) (1989), *reprinted in* TEX. GOV'T CODE ANN. tit. 2, subtit. G, app. A, art. 10, § 9 (Vernon Supp. 1995).

407. *Euresti*, 903 S.W.2d at 132. The court implicitly acknowledged the difficulty a party will have in satisfying the required evidentiary standard when it observed that plaintiff's counsel was "understandably vague" in her trial testimony about the shared confidences for fear of waiving the privilege she was attempting to protect. *Id.* The court also considered the attorney's testimony by sealed affidavit, however, and thereby presumably approved the use of this mechanism as a means of furnishing the requisite evidence. *Id.*

408. TEX. R. CIV. P. 173.

409. *Id.* (emphasis added).

410. 894 S.W.2d 753 (Tex. 1995).

411. *Id.* at 756 (emphasis added).

412. *Id.*

at that point and should not have awarded fees for post-litigation services.⁴¹³ The court further noted that the probate code contains appropriate procedures for appointment of a guardian, if necessary, to protect a minor's interest after litigation has been concluded.⁴¹⁴

B. CONTEMPT

The supreme court also had occasion to consider one of the trial practitioner's favorite subjects—contempt. In *Ex parte Carney*,⁴¹⁵ a judgment creditor obtained a turnover order against a defendant which required him, among other things, to turn over certain specified documents to the sheriff. Subsequently, the judgment creditor filed a motion for contempt claiming that defendant “had not forwarded to the Sheriff all documents and items ordered” for the turnover.⁴¹⁶ The trial court issued a show cause order that referred to the motion for contempt and later held the defendant in contempt. The supreme court, however, considered the motion to be deficient because it did not state how defendant had failed to comply with the order.⁴¹⁷ Apparently, the supreme court was of the view that the motion should have stated with particularity the documents and items that the defendant had not turned over as required by the order.⁴¹⁸

In *Ex parte Chambers*,⁴¹⁹ the supreme court provided guidance as to the ability of trial courts to hold officers of a corporation in contempt for the failure of the corporation to comply with a court order. In this case, the trial court entered an order directing the defendant corporation to pay a fine, but it did not designate any particular person to carry out the order. Nonetheless, the supreme court held that the order was sufficiently specific to give rise to personal duties on the part of the corporation's sole officer, director, and shareholder to obey that order and to support a judgment of contempt.⁴²⁰ The court, however, did hold that, even if a corporation fails to comply with a court order, “it does not necessarily follow that all corporate agents or officers are in contempt.”⁴²¹ Rather, “there must be evidence in the record that the corporate agent charged with contempt was somehow personally connected with defying the authority of the court or disobeying its lawful decree.”⁴²²

Although the supreme court found that the particular officer in this case had the requisite authority and involvement, it concluded that a contempt order was not warranted.⁴²³ In this regard, the corporate officer demonstrated that the corporation did not have sufficient assets to pay

413. *Id.*

414. *Id.* at 756-57.

415. 903 S.W.2d 345 (Tex. 1995).

416. *Id.* at 346.

417. *Id.*

418. *Id.*

419. 898 S.W.2d 257 (Tex. 1995).

420. *Id.* at 260.

421. *Id.* at 261.

422. *Id.*

423. *Id.* at 261-62.

the fine at any point subsequent to the date of the order and, accordingly, the high court held that the involuntary inability of the corporation to comply with the order was a valid defense to criminal contempt.⁴²⁴

C. ABATEMENT

The courts of appeals struggled with the issue of whether a writ of mandamus can issue in connection with the trial court's ruling on a plea in abatement. In *Coastal Oil & Gas Corp. v. Flores*,⁴²⁵ the court determined that a plea in abatement should have been granted in a later-filed action because another court had acquired "dominant jurisdiction" in the a prior case.⁴²⁶ Nonetheless, the court held that a refusal to abate was an incidental ruling for which the aggrieved party had an adequate remedy by appeal and, accordingly, a writ of mandamus could not be issued.⁴²⁷ In *Dallas Fire Insurance Co. v. Davis*,⁴²⁸ the appellate court determined that the trial court acquired dominant jurisdiction over an insurer's declaratory judgment action and therefore lacked discretion to abate that action in favor of a later-filed action seeking to collect against the insurance policy.⁴²⁹ Unlike *Flores*, the court in *Davis* determined that, although mandamus ordinarily does not lie to correct an incidental ruling related to abatement, it is appropriate in cases where a trial court with dominant jurisdiction abates a first-filed action for an indefinite period of time; thus, mandamus will lie to compel the court to proceed to trial.⁴³⁰

D. ALTERNATIVE DISPUTE RESOLUTION

In *Martin v. Black*,⁴³¹ the court faced an issue that many trial attorneys will find familiar. After a two-day mediation, the parties had reached an "agreement," which was memorialized in "term sheets" signed by the parties and their counsel.⁴³² The term sheets contained a provision providing that "the parties' understandings are subject to securing documentation satisfactory to the parties."⁴³³ After the mediation and the execution of the terms sheets, the parties began exchanging settlement documentation, but were unsuccessful in reaching a consensus on the final settlement documents. Thereafter, one of the parties filed a motion to enforce the term sheets. Without conducting a trial, the trial court heard testimony regarding the term sheets and held that they constituted binding and enforceable settlement agreements.

424. 898 S.W.2d at 262.

425. 908 S.W.2d 517 (Tex. App.—San Antonio 1995, orig. proceeding).

426. *Id.* at 518.

427. *Id.*

428. 893 S.W.2d 288 (Tex. App.—Fort Worth 1995, orig. proceeding).

429. *Id.* at 292.

430. *Id.* at 294.

431. 909 S.W.2d 192 (Tex. App.—Houston [14th Dist.] 1995, no writ).

432. *Id.* at 194.

433. *Id.*

Observing that mediated settlement agreements are to be treated no differently than other contracts, the court of appeals decided that a fact issue existed regarding the parties' intent, namely, whether the parties intended for formal settlement documentation to be a condition precedent to a final settlement agreement, or merely a memorial of an already enforceable settlement agreement reflected in the term sheets.⁴³⁴ Accordingly, the court held that a jury trial should have been held regarding the settlement as a timely jury demand had been made.⁴³⁵ In reaching that result, the court observed that there is nothing in the statutory scheme for alternative dispute resolution which authorizes courts to follow special procedures for the enforcement of mediated settlement agreements.⁴³⁶

Similarly, in *Cary v. Cary*,⁴³⁷ the parties reached a written settlement after a protracted mediation. Four days later, one party filed a notice of "possible repudiation" of settlement agreement. Nonetheless, the trial court entered a consent judgment based on the settlement. The court of appeals found this action to be in error, noting that a consent judgment cannot be rendered unless consent exists at the time of judgment.⁴³⁸ The court found nothing in the alternative dispute resolution statute which would confer heightened dignity to an agreement reached through mediation.⁴³⁹ The court did recognize, however, that the aggrieved party could still assert a claim at trial for breach of the settlement agreement.⁴⁴⁰

Although not involving mediation, the supreme court in *S & A Restaurant Corp. v. Leal*,⁴⁴¹ addressed a similar issue. In this personal injury suit involving a plaintiff who was wheelchair bound, the parties announced a settlement in open court, which was approved by the trial judge. Before judgment was entered, plaintiff had a miraculous recovery and was observed walking by the defendant. Accordingly, the defendant sought to withdraw its consent to the settlement, but the trial court entered judgment anyway. In setting aside the judgment, the supreme court observed that a party may revoke its consent to a settlement at any time before a "judgment is rendered."⁴⁴² The court held that the plaintiff would still have a claim for breach of the settlement agreement, subject to defendant's defense of fraudulent inducement.⁴⁴³

434. *Id.* at 196-97 (citing *Foreca, S.A. v. GRD Dev. Co.*, 758 S.W.2d 744, 746 (Tex. 1988)).

435. *Id.* at 197.

436. *Id.* at 195.

437. 894 S.W.2d 111 (Tex. App.—Houston [1st Dist.] 1995, no writ).

438. *Id.* at 112.

439. *Id.* at 112-13.

440. *Id.* at 113.

441. 892 S.W.2d 855 (Tex. 1995).

442. *Id.* at 857.

443. *Id.* at n.1.

E. RULE 11

Rule 11 provides, in general, that no agreement touching any pending suit may be enforced "unless it be in writing, signed and *filed* with the papers as part of the record, or unless it be made in open court and entered of record."⁴⁴⁴ Although the rule has been in existence for over 100 years, the supreme court, in *Padilla v. LaFrance*,⁴⁴⁵ had occasion for the first time to consider the significance of the filing requirement. In this case, the parties had exchanged a series of letters which reflected an agreement on settlement. The letters, however, had not been filed with the court before one of the parties attempted to revoke his consent to the settlement. Although recognizing that Rule 11 requires a writing to be filed in the court record, the supreme court noted that the rule does not say when the writing must be filed.⁴⁴⁶ Recognizing the policy in Texas jurisprudence which favors settlement of lawsuits, the court held that the agreement was still enforceable even if the papers were filed after one of the parties withdrew their consent to the settlement.⁴⁴⁷

The court in *Southwestern Bell Telephone Co. v. Perez*,⁴⁴⁸ faced an issue that commonly arises. In this case, plaintiff's counsel sent a letter to defendant's counsel confirming an agreement whereby the defendant purportedly agreed to provide certain information in response to discovery requests. The court held that since the letter was not signed by defendant or his counsel, it was not enforceable under Rule 11.⁴⁴⁹

F. TEMPORARY RESTRAINING ORDERS

In *Ex parte Lesikar*,⁴⁵⁰ the supreme court held that an oral extension of a temporary restraining order is ineffective.⁴⁵¹ Accordingly, the court held that a party may not be held in contempt for violation of a temporary restraining order unless it is committed to writing and the party has notice of the actual written extension.⁴⁵²

444. TEX. R. CIV. P. 11 (emphasis added).

445. 907 S.W.2d 454 (Tex. 1995).

446. *Id.* at 461.

447. *Id.*

448. 904 S.W.2d 817 (Tex. App.—San Antonio 1995, no writ).

449. *Id.* at 822.

450. 899 S.W.2d 654 (Tex. 1995).

451. *Id.*

452. *Id.*; see TEX. R. CIV. P. 680.