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The major developments in the field of civil procedure during the Survey period occurred through judicial decisions and statutory and rule amendments.

I. SUBJECT MATTER JURISDICTION

In Continental Coffee Products Co. v. Cazarez, the Texas Supreme Court addressed the jurisdiction of a county court at law over a claim for violation of the Texas statute that prohibits an employer from discharging an employee in retaliation for filing a workers' compensation claim. The Court concluded that the provision of the statute authorizing a district court to restrain violations thereof did not give district courts exclusive jurisdiction over such cases generally or requests for injunction specifically. Thus, the Court looked to the Legislature's general grant of jurisdictional authority to the Harris County civil court at law and found it to be co-extensive with the jurisdiction of the district courts in cases in which the amount in controversy does not exceed $100,000. Because the plaintiff originally pleaded an amount within this jurisdictional limit, her subsequent amendment seeking more than $100,000 in damages (and the trial court's award in excess of that amount) did not strip the trial court of jurisdiction where the defendant failed to prove that the original amount in controversy was fraudulently alleged.
The Texas Supreme Court curtailed the district courts' power to grant certain types of injunctive relief in *Ex parte Evans.* The Court held in this habeas corpus proceeding that, while the district courts have authority, with certain exceptions, to enjoin litigation in other state courts in Texas or elsewhere, they are "completely without power to restrain federal court proceedings in *in personam* actions." Thus, the Court concluded that the contempt judgment against relator for violating an injunction by filing a federal court lawsuit was void.

By statute, a party may sue for an injunction to stay execution of a judgment, but any such suit must be tried in the court in which the judgment was rendered. This latter requirement is jurisdictional and does not merely relate to venue. In *Butron v. Cantu,* the court held that this requirement extends to an injunction that prohibits collection on a supersedeas bond. The court reasoned that, because a supersedeas bond suspends execution of the judgment and permits a judgment creditor to look only to the bond for satisfaction, enjoining recovery on the bond is the same as enjoining execution on the judgment. Thus, such an injunction can be sought only from the court that rendered the judgment, and any other court lacks jurisdiction.

II. SERVICE OF PROCESS

*Bloom v. Bloom* involved an appeal by writ of error from a default decree of divorce. The appellant complained that the trial court had never acquired personal jurisdiction over her because she was not properly served with process. The court of appeals did not reach the merits of the appellant's complaints regarding service, however, because it concluded that she was estopped under the "acceptance-of-benefits doctrine." As the court explained it, the acceptance-of-benefits doctrine prevents a party that voluntarily accepts the benefits of a judgment from thereafter prosecuting an appeal from that judgment. Although no court had previously held the doctrine applicable in a writ of error proceeding grounded on defective service, the court could discern no reason why it should not apply where appellant had knowledge of the judgment at the time she accepted benefits thereunder.

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7. 939 S.W.2d 142 (Tex. 1997).
8. *Id.* at 143 (quoting Donovan *v.* City of Dallas, 377 U.S. 408, 413 (1964)).
9. *See Evans,* 939 S.W.2d at 144.
11. *See TEX. CIV. PRAC. & REM. CODE ANN.* § 65.023(b) (Vernon 1997).
13. 960 S.W.2d 91 (Tex. App.—Corpus Christi, 1997, n.w.h.).
14. *See id.* at 95.
15. *See id.*
16. *See id.*
18. *See id.* at 945.
19. *See id.*
20. *See id.* (citing Carle v. Carle, 149 Tex. 469, 472, 234 S.W.2d 1002, 1004 (1950)).
21. *See Bloom,* 935 S.W.2d at 946-47.
Trial practitioners routinely forego filing motions to quash based on defective service, reasoning that it can gain them nothing more than additional time to answer. Moody National Bank v. Riebschlager teaches, however, that a motion to quash may be dispositive in a garnishment action. The garnishees in that case answered and moved to quash the service of the writ of garnishment. The court granted the motion to quash, but the garnishor never effected proper service thereafter. The garnishees then successfully moved for summary judgment on the ground that the writ was never properly served and, therefore, they were not liable as a matter of law. In affirming summary judgment, the court of appeals noted that garnishment is a harsh remedy that requires strict compliance with the statutory requirements and related procedural rules. Thus, notwithstanding the provisions of Rule 121, the court held that the garnishees' filing of an answer did not constitute an appearance and gave the court no jurisdiction over the funds in their possession. Likewise, the court held that Rule 122, which affords a defendant additional time to answer if service is quashed, is wholly inapplicable to garnishment proceedings and the garnishees were not deemed to have made a general appearance by filing their motion to quash.

The court in Laidlaw Waste Systems, Inc. v. Wallace disagreed with one of its sister courts of appeals on what constitutes strict compliance with the rules regarding service by mail. The district court clerk served the citation and petition in that case by certified mail, return receipt requested. When the return receipt came back to the clerk's office, it was time and date stamped, file-marked, initialed, and attached to the citation. The clerk did not, however, fill out the return of service section of the citation itself. The court of appeals reversed the ensuing default judgment, holding that, in attaching the postal return receipt rather than completing the return of service, the district clerk failed to strictly comply with the applicable procedural rules. The court noted that Walker v. 

22. See Tex. R. Civ. P. 122 (extending appearance date to ten o'clock a.m. on the Monday next after the expiration of twenty days after the day on which citation or service is quashed).
24. See id. at 523.
25. See id.
26. See id.
27. See id.
28. Tex. R. Civ. P. 121 ("An answer shall constitute an appearance of the defendant so as to dispense with the necessity for the issuance or service of citation upon him.").
29. See Riebschlager, 946 S.W.2d at 523-24.
31. See id.
32. See Riebschlager, 946 S.W.2d at 524.
33. 944 S.W.2d 72 (Tex. App.—Waco 1997, writ denied).
34. See id. at 73.
35. See id.
36. See id.
37. See id. at 74.
W.J.T., Inc. had found a similar use of a postal receipt in lieu of a return of service sufficient under the rules, but concluded that sound public policy favored a more rigorous enforcement of the strict compliance standard since it increases the opportunity for a party to be heard on the merits.

III. SPECIAL APPEARANCE

Beginning with National Industrial Sand Association v. Gibson, the Texas Supreme Court has allowed mandamus review of a trial court's denial of a special appearance in cases in which there was such a "total and inarguable absence of jurisdiction" that normal appellate review from a final judgment was inadequate. Even some members of the Court recognized, however, that this standard provided little guidance for the bench and bar. The Legislature eliminated this uncertainty during the Survey period with the enactment of section 51.014(a)(7) of the Texas Civil Practices and Remedies Code, which now permits an interlocutory appeal from the denial of a special appearance. The availability of this new right of interlocutory appeal will, of course, eliminate any need for the extraordinary remedy of mandamus.

IV. VENUE

Under former Texas practice, venue was fixed in the county named in a plea of privilege whenever a plaintiff nonsuited his action before the trial court made its venue determination. Although the Texas Supreme Court in Ruiz v. Conoco, Inc. refused to decide whether this "venue-
fixing” rule survived the 1983 venue amendments, the court of appeals in Geochem Tech Corp. v. Verseckes49 subsequently held that the rule still applies. Even so, the court in Zimmerman v. Ottis50 concluded that this rule does not authorize a trial court to grant a motion to transfer venue after the plaintiff has filed his motion for nonsuit. Instead, the trial court’s power in those circumstances is limited to performing the ministerial duty of entering an order of dismissal.51 According to Zimmerman, the remedy applied in Geochem lies with the court in which the plaintiff refiles his action, not the court of original filing.52 The appellate court could find no reason for allowing the court in which the action was first filed to ignore the nonsuit, anticipate a refiling of the same lawsuit elsewhere, and shortcut the process by transferring the nonsuited action to the county requested by the defendant.53

The plaintiff in Acker v. Denton Publishing Co.54 filed a suit in Tarrant County against numerous defendants alleging libel and slander. Section 15.017 of the venue statute,55 which is a “mandatory” venue provision,56 provides that a suit for libel, slander, or invasion of privacy must be brought either in the county in which the plaintiff resided at the time the cause of action accrued or the county in which any of the defendants resided at the time of suit. Although the plaintiff and all but one of the defendants in Acker resided in Denton County, the plaintiff predicated his venue choice on the undisputed fact that the remaining defendant resided in Tarrant County. That defendant, however, submitted an affidavit in support of a motion to transfer venue by all defendants in which he stated that he had not personally performed, assisted, or supervised the alleged libel and had no relation to the matters alleged by Plaintiff other than his service as an officer of the corporate defendant. Based on this affidavit, the trial court granted the defendant’s motion and transferred the suit to Denton County.

On appeal from a summary judgment subsequently rendered in favor of defendants, the plaintiff asserted that the original trial court erred when it sustained the motion to transfer venue because plaintiff’s petition expressly named the Tarrant County resident as one of the defendants. The court of appeals disagreed, concluding after a full review of the record that it did not “substantiate any claim by [plaintiff] against [the Tarrant County defendant] for acts done by him in his individual capacity.”57 According to the court, its full review of the record following judgment

50. 941 S.W.2d 259, 263 (Tex. App.—Corpus Christi 1996, no writ).
51. See id. at 261.
52. See id.
53. See id. at 261-62.
54. 937 S.W.2d 111 (Tex. App.—Fort Worth 1996, no writ).
55. TEX. CIV. PRAC. & REM. CODE ANN. § 15.017 (Vernon 1986).
57. Acker, 937 S.W.2d at 116.
was not only authorized by *Ruiz*,\(^{58}\) but also appropriate to provide a defendant with just recourse from improper venue that a plaintiff could otherwise wrongfully gain by fake or "inaccurate pleadings that the trial court had to accept at face value in the venue process."\(^{59}\) Although Rule 87 expressly provides that proof a cause of action exists is no longer required to establish venue,\(^{60}\) the *Acker* court's statements suggest that appellate review of a venue determination goes beyond the so-called "venue facts" that may be in controversy and even extends to the issue of whether plaintiff has substantiated a claim against a named defendant. Although it is not clear that the supreme court has yet reached the same conclusion in any of its decisions, the *Acker* statements are probably *dicta* and thus do not present the supreme court with an opportunity to address this issue.\(^{61}\)

V. PARTIES

*Deloitte & Touche LLP v. Fourteenth Court of Appeals*\(^{62}\) addresses a novel question: Does the Texas Supreme Court's mandamus jurisdiction extend to interlocutory class certification rulings of the court of appeals? The trial court in *Deloitte* denied class certification in the underlying lawsuit. On an interlocutory appeal under section 51.014(3) of the Civil Practice and Remedies Code,\(^{63}\) the court of appeals ordered a class certified.\(^{64}\) Although the parties opposing class certification then applied for writ of error in the Supreme Court, it dismissed the application for want of jurisdiction because an appeal of an interlocutory class certification is final in the court of appeals in the absence of a dissent or conflict.\(^{65}\) The imaginative defendant then filed an original mandamus proceeding contending that the court of appeals had abused its discretion by misapplying the procedural rule governing class actions.\(^{66}\)

Although the Court granted leave to consider the question, it ultimately concluded that it should not exercise its writ power under the circumstances of the case.\(^{67}\) In doing so, however, the Court expressly

\(^{58}\) *Ruiz v. Conoco, Inc.*, 868 S.W.2d 752, 757 (Tex. 1993).

\(^{59}\) *Acker*, 937 S.W.2d at 116 (citing *Wilson v. Texas Parks & Wildlife Dept.*, 886 S.W.2d 259, 262 (Tex. 1994)).

\(^{60}\) See *TEX. R. Civ. P.* 87(3)(a).

\(^{61}\) In this connection, the court observed that plaintiff's petition did not even allege that the Tarrant County defendant had personally committed any of the wrongs. See *Acker*, 937 S.W.2d at 116-17. Further, the defendant's affidavit proving his lack of involvement was uncontroverted by the plaintiff. See *id.* at 117. Therefore, it appears plaintiff had failed to plead a proper cause of action against that defendant, and it is unclear why the appellate court even needed to engage in a review of the full record.

\(^{62}\) 951 S.W.2d 394 (Tex. 1997).

\(^{63}\) *TEX. CIV. PRAC. & REM. CODE ANN.* § 51.014(3) (Vernon Supp. 1998) provides that a person may appeal from an interlocutory trial court order certifying or refusing to certify a class in a suit brought under *TEX. R. Civ. P.* 42.

\(^{64}\) See *Weatherly v. Deloitte & Touche*, 905 S.W.2d 642, 655 (Tex. App.—Houston [14th Dist.] 1995, writ dism'd w.o.j.).

\(^{65}\) See *TEX. GOV'T CODE ANN.* § 22.225(b), (c) (Vernon 1988 & Supp. 1998).

\(^{66}\) See *TEX. R. Civ. P.* 42.

\(^{67}\) See *Deloitte*, 951 S.W.2d at 395.
rejected the plaintiff's argument that the Legislature had foreclosed the possibility of mandamus jurisdiction by granting exclusive final authority over interlocutory class certification decisions to the courts of appeals.68 Although the Court acknowledged that review of such interlocutory orders fell outside its appellate jurisdiction,69 it determined that original jurisdiction for mandamus is not equivalent to appellate jurisdiction70 and that the Legislature had not excluded class certification rulings from the court's mandamus jurisdiction.71 Nonetheless, the Court observed that mandamus is appropriate only if a party establishes lack of an adequate appellate remedy and, even then, only in extraordinary circumstances.72 The Court concluded that Deloitte's appellate remedy was adequate both because of the statutorily granted interlocutory appeal of the class certification ruling and because Deloitte could appeal the class certification again after a trial on the merits.73 Moreover, the Court held that there is no "right" to a second appeal and, therefore, the "finality" of Deloitte's appellate remedy at the court of appeals level could not alone serve as a basis for the court's exercise of its mandamus power.74 The Court similarly rejected Deloitte's contention that the court of appeals' action in directing class certification by itself constituted an extraordinary circumstance giving rise to a mandamus remedy.75 Although the Court acknowledged that no Texas appellate court had ever directed certification of a class, it pointed out that numerous appellate courts from other jurisdictions had done so, including the Fifth Circuit.76

Although Deloitte's petition for writ of mandamus was denied, the Court's opinion leaves open the possibility of mandamus being issued against a court of appeals in this context for procedural irregularities or for actions taken by a court of appeals that are "so devoid of any basis in law as to be beyond its power."77 Justice Spector dissented, criticizing this part of the majority's analysis for "fail[ing] to reconcile the inherent conflict" between the court's assumption of mandamus jurisdiction in such cases and section 22.225(b), which makes the courts of appeals' decisions on class certification orders conclusive on the law and facts.78 Arguing that "the court should just say no to mandamus review in these

68. See id. at 396.
69. Indeed, the court had earlier dismissed Deloitte’s application for writ of error for lack of jurisdiction due to the legislative proscription of TEX. GOV'T CODE ANN. § 22.225(c) (Vernon Supp. 1998).
70. See Deloitte, 951 S.W.2d at 396.
71. See id. (citing TEX. GOV'T CODE ANN. § 22.002(a) (Vernon 1988) ("The supreme court . . . may issue writs of . . . mandamus agreeable to the principles of law regulating those writs, against . . . a court of appeals. . . .").)
72. See Deloitte, 951 S.W.2d at 396-97.
73. See id. at 397.
74. See id.
75. See id.
76. See id. (citing, inter alia, Forbush v. J.C. Penney Co., 994 F.2d 1101 (5th Cir. 1993)).
77. Deloitte, 951 S.W.2d at 398.
circumstances,"79 the dissent warned that the majority's refusal to draw a bright jurisdictional line in the case would cause losing parties to file mandamus petitions in virtually every class certification appeal.80

VI. PLEADINGS

Normally a party may amend or supplement its pleadings at any time up to seven days before trial.81 Within seven days of the date of trial, however, a party may not amend or supplement without leave of court.82 In Waite Hill Services, Inc. v. World Class Metal Works, Inc.,83 defendants sought leave to amend their answers to raise an affirmative defense that the loss sued upon was expressly excluded from coverage under the insurance policy at issue.84 The trial court denied leave because defendants waited until after opening statements to the jury before they presented supplemental answers that raised this defense for the first time. On appeal, defendants contended that leave was required because plaintiff did not meet its threshold burden of demonstrating surprise or prejudice.85 The court of appeals pointed out two Texas Supreme Court decisions,86 however, reinforcing the general principle that a trial court has no discretion to refuse the proffered amendment unless "(1) the opposing party presents evidence of surprise or prejudice; or (2) the amendment . . . asserts a new defense, and is thus prejudicial on its face."87 According to the court, the trial court was entitled to conclude that each supplemental pleading on its face was calculated to surprise and prejudice the plaintiff by reshaping the grounds of the defense in a manner that was untimely under Rules 63, 66 and 94.88

Even more germane to the court was the principle that a trial court does not abuse its discretion in refusing to allow an amendment when the record shows a lack of diligence by the party seeking to amend after the seven-day barrier, and the belated pleading contains matters that are not newly discovered but were readily available for earlier pleading had dili-

79. Deloitte, 951 S.W.2d at 399. Justice Spector gave due attribution of the quoted language to one amicus curiae, Professor William Dorsaneo. See id.
80. See id. at 400.
81. TEX. R. CIV. P. 63.
82. Id.
83. 935 S.W.2d 197 (Tex. App.—Fort Worth 1996) rev’d, 959 S.W.2d 182 (Tex. 1998).
84. Under TEX. R. CIV. P. 94, a defendant in a suit on an insurance contract who does not specifically allege in its written pleading that the loss was due to a risk specifically excepted by the contract may not raise that defense at trial.
85. See TEX. R. CIV. P. 63, 66 (generally providing that leave of court for amendments within seven days of trial or thereafter should be freely given absent showing of surprise or prejudice to opposing party).
87. Waite Hill Servs., 935 S.W.2d at 199.
88. See id. at 200; TEX. R. CIV. P. 63, 66, 94.
gence been used. The record revealed that defendants' counsel had knowledge of the exception's wording from the start of the dispute and the exception was also a subject of pretrial discovery. To permit a late amendment under these circumstances, said the court, would enable defendants to flout Rule 94 and transfer the adverse consequences of non-compliance from themselves to the opposing party who prepared for trial in good faith reliance on the pleadings that existed when trial began.  

VII. DISCOVERY

A. Procedures and Scope

The court in *AIU Insurance Co. v. Mehaffy* held that a trial court lacked the power to appoint an "auditor" to investigate allegations of discovery abuse. The court examined the possible sources of authority the trial court might have been relying upon (the lower court not having specified), including Rules 171, 172, and 215 but found each insufficient to support the trial court's order. Most trial practitioners are now familiar with the protection against "apex" depositions of high-ranking corporate officials. *Simon v. Bridewell* teaches, however, that the courts will not extend this protection beyond what is required to serve its purpose. Specifically, the court held in *Simon* that the proposed deponents, general partners in a limited partnership, were not exempt from depositions merely because they held high-ranking positions with related corporations. And although the court did not preclude the possibility that the apex doctrine might be extended to general partners in a limited partnership, it concluded that such an extension was not warranted under the facts of the case before it. Finally, the court also noted the general partners were named parties in the suit and, therefore, could be deposed regardless of their status as corporate officials.  

*Acevedo Trucking, Inc. v. State* serves as a reminder that the tran-
script of a deposition on written questions should be carefully reviewed for potential responsiveness objections prior to trial. The court in that case held that an objection that the deponent's answer was nonresponsive was waived where it was raised for the first time at trial.105 In reaching this conclusion, the court relied on Rule 207(3),106 which provides that objections to the manner and form of taking a deposition must be made in writing before trial if the deposition has been on file with the court for at least one day prior to trial.107

B. PRIVILEGE AND EXEMPTIONS

The Texas Supreme Court endorsed a strong consulting-expert privilege in General Motors Corp. v. Gayle.108 The trial judge in the underlying personal injury action had ordered General Motors to designate in advance whether its crash tests would be used solely for consulting purposes or would be introduced as evidence at trial, and that the plaintiff be allowed to attend any tests designated as evidentiary.109 The Court held that this advance-designation requirement undermined the consulting-expert privilege set forth in Rule 166b(3)(b).110 The Court reasoned that the consulting-expert privilege was intended to create a "sphere of protection and privacy" in which parties can perform litigation testing and otherwise prepare their cases free from the fear that they are producing evidence for their opponents.111 The Court rejected the plaintiffs' argument that it would be unfair to allow General Motors to run numerous crash tests, varying the parameters, and then present only those that were favorable to it.112 In this regard, the Court stated that the company could not "rig" a test since the test would only be admissible at trial if the conditions were substantially similar to those under which the accident occurred.113 Moreover, the Court was unmoved by plaintiffs' argument that they lacked the resources to conduct their own crash tests, noting that the consulting-expert privilege protects the core of a party's litigation strategy and is not subject to the substantial hardship exception applicable to the witness-statement and party communications privilege.114

The consulting-expert privilege was also at issue in Castellanos v. Littlejohn.115 There, the plaintiffs had mistakenly identified a doctor engaged as a consulting expert as a testifying expert in interrogatory answers.116 The defendant then claimed plaintiffs were required to execute a medical

105. See id. at 813.
107. See id.; Acevedo Trucking, 934 S.W.2d at 813.
108. 951 S.W.2d 469 (Tex. 1997).
109. See id. at 470.
110. See Gayle, 951 S.W.2d at 474 (discussing Tex. R. Civ. P. 166b(3)(b)).
111. See id.
112. See id. at 475.
113. See id.
114. See id. (citing Tex. R. Civ. P. 166b(3)).
116. See id. at 237.
authorization under Rule 166b(2)(h)\textsuperscript{117} so that it could obtain the consultant doctor's records.\textsuperscript{118} The court held, however, that the consulting-expert privilege limits Rule 166b(2)(h)\textsuperscript{119} and that the inadvertent disclosure of the consultant's identity was correctable and could not serve as a basis for compelling the disclosure of his medical records as well.\textsuperscript{120}

With virtually no discussion, the court in \textit{D.N.S. v. Schattman}\textsuperscript{121} held that a defendant doctor's narrative report to his insurer was a privileged party communication.\textsuperscript{122} The question of whether the report was nevertheless discoverable because the defendant was designated as a testifying expert, however, proved somewhat thornier. Agreeing with one of its sister courts of appeals, the court held that the mere designation of a party as an expert witness does not automatically waive the party-communication privilege if the party/expert does not rely on privileged materials as a basis for his testimony.\textsuperscript{123} The court then went on to analyze whether the report should be disclosed under either Rule 166b(2)(e)(1)\textsuperscript{124} or Rule 166b(2)(e)(2).\textsuperscript{125} The court concluded that only the latter rule, which by its terms governs tangible materials, was applicable.\textsuperscript{126} The court then held that a narrative report prepared in anticipation of litigation is distinct from a report prepared in anticipation of an expert’s testimony within the meaning of Rule 166b(2)(e)(2).\textsuperscript{127} Because the doctor did not prepare the pre-trial narrative report to his insurer in anticipation of his testimony as an expert, the report was not properly discoverable.\textsuperscript{128}

\section*{C. Duty to Supplement}

The court in \textit{Campos v. State Farm General Insurance Co.}\textsuperscript{129} addressed the interplay between Rule 215(5)\textsuperscript{130} automatic exclusion of expert witnesses who have not been timely designated\textsuperscript{131} and the limitations on so-called "death penalty" sanctions first announced in \textit{TransAmerican Natural Gas Corp. v. Powell}.\textsuperscript{132} The court held that \textit{TransAmerican}'s requirement that any discovery sanction chosen by a trial court be just—\textit{i.e.},

\begin{itemize}
\item \textsuperscript{117} TEX. R. CIV. P. 166b(2)(h).
\item \textsuperscript{118} \textit{See Castellanos}, 945 S.W.2d at 238.
\item \textsuperscript{119} TEX. R. CIV. P. 166b(2)(h).
\item \textsuperscript{120} \textit{See Castellanos}, 945 S.W.2d at 239-40.
\item \textsuperscript{121} 937 S.W.2d 151 (Tex. App.—Fort Worth 1997, orig. proceeding).
\item \textsuperscript{122} \textit{See id.} at 157.
\item \textsuperscript{123} \textit{See id.} at 156 (citing \textit{Aetna Cas. & Sur. Co. v. Blackmon}, 810 S.W.2d 438 (Tex. App.—Corpus Christi 1991, orig. proceeding)).
\item \textsuperscript{124} TEX. R. CIV. P. 166b(2)(e)(1).
\item \textsuperscript{125} TEX. R. CIV. P. 166b(2)(e)(2).
\item \textsuperscript{126} \textit{See D.N.S.}, 937 S.W.2d at 157.
\item \textsuperscript{127} \textit{See id.} at 158.
\item \textsuperscript{128} \textit{See id.} at 158-59.
\item \textsuperscript{129} 943 S.W.2d 52 (Tex. App.—San Antonio 1997, writ denied).
\item \textsuperscript{130} TEX. R. CIV. P. 215(5).
\item \textsuperscript{131} "A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to... offer the testimony of an expert witness... unless the trial court finds that good cause sufficient to require admission exists." \textit{Id.}
\item \textsuperscript{132} 811 S.W.2d 913 (Tex. 1991).
\end{itemize}
directly related to the offending conduct and not excessive—did not apply to the exclusion of expert witnesses under Rule 215(5) because the rule is mandatory and does not provide the trial court with any discretion in choosing a sanction. The court implicitly acknowledged, however, that TransAmerican's holding that due process limits the trial court's power to impose sanctions that "preclude presentation of the merits of the case" is potentially applicable to the exclusion sanction. Nevertheless, the court concluded that the exclusion of an expert witness on attorneys' fees in Campos did not constitute a death penalty sanction under the TransAmerican rule.

The plaintiffs in Cruz v. Furniture Technicians of Houston, Inc. complained of the exclusion of an expert witness they designated more than thirty days before trial, but after the deadline established by the trial court's docket control order. The plaintiffs argued that their designation was timely under Rule 166b(6)(b) and that they had provided the expert's written report at a mediation well in advance of the court-imposed deadline. This argument backfired, however, when the appellate court indicated that this earlier disclosure of the expert's identity evidenced that plaintiffs had not designated him "as soon as practicable" as required by Rule 166b(6)(b).

The court in Morua v. State Farm Fire & Casualty Co. revisited the issue of whether supplemental interrogatory answers must be verified. The court adhered to its prior holding in Ramirez v. Ramirez that verification is required. In doing so, however, the court noted the split among the intermediate appellate courts on the question. Obviously, this issue is ripe for review by the Texas Supreme Court.

D. Sanctions

A $10 million discovery sanction was struck down by the court in Ford Motor Co. v. Tyson. As a sanction for various alleged abuses of the discovery process, the trial judge in that case had entered an order ex-
cluding Ford from introducing certain evidence at trial, requiring it to pay the plaintiffs' attorneys' fees, and requiring it to pay the plaintiffs $10 million as sanctions. As to the first two parts of the order, the court of appeals concluded that Ford had an adequate remedy on appeal and therefore refused to grant mandamus relief. The appellate court held, however, that the $10 million sanction was an arbitrary fine that the trial court had no power to order and that mandamus would lie to correct such an unauthorized order. The court noted that Rule 215(3), which sets forth the available sanctions for abuse of the discovery process, restricts a trial court to a portion of the "laundry list" of sanctions set forth in Rule 215(2)(b), which does not include monetary fines. Even if the trial court's authority were not so limited under the rule, moreover, the court stated that a monetary fine for discovery abuse is inherently arbitrary "because it is unrestrained by law or statute and unrelated to any damages or expenses incurred by the injured party."

While exclusion of expert and fact witnesses who have not been timely identified in response to prior discovery requests is automatic under Rule 215(5), Lewis v. Western Waste Industries and Lucas v. Titus County Hospital District stand for the proposition that this automatic exclusion sanction does not extend to the other deficiencies in a party's discovery responses regarding such expert and fact witnesses. In Lewis, the court reversed the trial judge's exclusion of plaintiff's expert witness based on the inadequacy of the description of the expert's opinions in plaintiff's interrogatory answers. The court held that the defendants' failure to file a motion to compel, motion for sanctions, or other pretrial motion addressing this alleged deficiency waived any right to the sanction of exclusion. Similarly, the court in Titus held that plaintiffs waived

149. See id. at 531.
150. See id. at 532. The court did note, however, that it had "serious concerns" about the trial court's award of additional attorneys' fees in the event Ford appealed the sanction order or sought a writ of mandamus—regardless of whether it was successful in doing so. See id.
151. See id.
153. Tex. R. Civ. P. 215(2)(b); see Tex. R. Civ. P. 215(3) (upon finding that party is abusing discovery process, court "may, after notice and hearing, impose any appropriate sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of paragraph 2b of this rule").
154. See Ford Motor Co., 943 S.W.2d at 533-34.
155. Id. at 534.
157. 950 S.W.2d 407 (Tex. App.—Houston [1st Dist.] 1997, n.w.h.).
159. See Lewis, 950 S.W.2d at 409-10.
160. See id. at 410. Interestingly, the court noted that defendants claimed to have filed a motion in limine on this point before trial, but the record contained only the motion to strike made during trial and no motion in limine. See id. Presumably, the court would hold that a motion in limine filed immediately before trial commences would have been sufficient to avoid the waiver it found in Lewis. If denied, however, a motion in limine will not preserve error for appeal, and the complaining party will still need to object at trial to the admission of the expert's testimony.
any complaint about the defendant’s failure to supplement discovery responses to correct erroneous information. Because plaintiffs’ attorney learned shortly before trial, rather than during trial, that the information previously provided was incorrect, it was incumbent on plaintiffs to request a pretrial hearing on the alleged discovery abuse.

VIII. DISMISSAL

Noting the distinction between dismissal as a sanction and dismissal for want of prosecution, the Texas Supreme Court in *MacGregor v. Rich* reversed the decision of the appellate court and affirmed the dismissal by the trial court of a ten-year old action. The Court held that the trial court’s ruling dismissing the action based upon several stated grounds could reasonably be interpreted as either a sanction or a dismissal for want of prosecution. Because a dismissal for want of prosecution was not a clear abuse of discretion, the Court declined to review the dismissal as a death penalty sanction under *TransAmerican Natural Gas Corp. v. Powell*.

Similarly, in *Shook v. Gilmore & Tatge Manufacturing Co.*, the court held that the trial court did not clearly abuse its discretion in dismissing an action for want of prosecution when the plaintiff’s counsel failed to appear at a pretrial conference. Commenting that the plaintiff’s attorneys had failed to docket the pretrial hearing on the firm’s roster calendar following the departure of one of their attorneys, the court concluded that the attorney’s failure to appear was not an isolated act of negligence, but the result of conscious indifference because various attorneys and law clerks at the firm had reviewed the file and even discussed the case with defense counsel.

In *Transoceanic Shipping Co. v. General Universal Systems, Inc.*, the court granted the appellant’s writ of error and held that the trial court erred in granting a post-answer default judgment. The court noted that the record contained affirmative proof that the appellant’s counsel did not receive notice of the trial setting because it was mailed to the wrong address. In so holding, the court distinguished this situation from those cases denying writs of error where the record simply does not re-

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162. See id.
163. 941 S.W.2d 74 (Tex. 1997).
164. See id. at 76.
165. See id. at 75.
166. See id. (discussing *TransAmerican*, 811 S.W.2d at 917-18).
167. 951 S.W.2d 294 (Tex. App.—Waco 1997, no pet.).
168. See id. at 297-98.
169. See id. at 298.
170. 961 S.W.2d 418 (Tex. App.—Houston [1st Dist.] 1997, n.w.h.).
171. See id. at 420.
172. See id. The transcript included notices of a trial setting mailed to appellant’s counsel that were returned undelivered to the clerk’s office. See id.
flect that the clerk actually sent notice of the trial setting.\textsuperscript{173}

\textit{In re Romero}\textsuperscript{174} arose out of a personal injury case, in which the plaintiff originally filed suit in county court for damages allegedly sustained in a car accident. The plaintiff's insurer then intervened to pursue its subrogation rights. The plaintiff, having subsequently filed an identical action in district court, then filed a motion to dismiss the county court action with prejudice. The order granting the nonsuit, however, failed to mention the intervening insurer. Thirteen months later, the plaintiff and insurer sought and obtained an order from the county court modifying the nonsuit order from a dismissal "with prejudice" to "without prejudice." The defendant then filed a writ of mandamus, arguing that the modification order was void because it was signed after the county court had lost plenary power. The appellate court concluded, however, that the original order of nonsuit was interlocutory because it did not expressly or by necessary implication dispose all of the issues and all parties.\textsuperscript{175} Thus, the later order modifying the original order was not void.\textsuperscript{176}

\textbf{IX. SUMMARY JUDGMENTS}

The Texas Supreme Court amended Rule 166a\textsuperscript{177} during the Survey period by adding a provision that, effective September 1, 1997, permits "no evidence" motions.\textsuperscript{178} The new subsection provides that, "[a]fter adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence [as to] one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial."\textsuperscript{179} The motion must state the elements as to which there is no evidence, and the court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of fact.\textsuperscript{180} The amended rule brings Texas in line with the long-standing federal practice of permitting "no evidence" summary judgment motions.\textsuperscript{181}

As a result of public comments received following its initial announcement of the amendment, the Court revised its official comments appended to the change.\textsuperscript{182} Notwithstanding these amended comments, two justices dissented to the amended rule.\textsuperscript{183} Perhaps as a result of this

\begin{itemize}
\item \textsuperscript{173} \textit{See id.} (citing Robert S. Wilson Investment No. 16 Ltd. v. Blumer, 837 S.W.2d 860 (Tex. App.—Houston [1st Dist.] 1992, no writ)).
\item \textsuperscript{174} 956 S.W.2d 659 (Tex. App.—San Antonio 1997, orig. proceeding).
\item \textsuperscript{175} \textit{See id.} at 662.
\item \textsuperscript{176} \textit{See id.}
\item \textsuperscript{177} \textbf{TEX. R. CIV. P. 166a}.
\item \textsuperscript{178} \textit{See Order of April 16, 1997, Misc. Docket No. 97-9067, reprinted in 60 TEX. B.J. 534 (1997)}.
\item \textsuperscript{179} \textbf{TEX. R. CIV. P. 166a(i)}.
\item \textsuperscript{180} \textit{See id.}
\item \textsuperscript{181} \textit{See Celotex Corp. v. Catrett, 477 U.S. 317 (1986)}.
\item \textsuperscript{182} \textit{See Order of the Supreme Court, Misc. Docket No. 97-9139, reprinted in 60 TEX. B.J. 872 (1997)}.
\item \textsuperscript{183} \textit{See id.} at 873-874.
\end{itemize}
dissension, the Court took the unusual step of ordering that its comment, unlike other notes and comments in the rules, "is intended to inform the construction and application of the rule." Among other things, the comment specifies that a "discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the contrary," and ordinarily a no-evidence motion would be permitted after this period but not before. In addition, the comment provides that a respondent to a motion under Rule 166a(i) need not "marshall its proof; its response need only point out evidence that raises a fact issue on the challenged elements."

Issues regarding the "finality" of summary judgments continue to plague Texas courts notwithstanding the decision several years ago in Mafrige v. Ross. In Mafrige, the Texas Supreme Court held that if a summary judgment order appears to be final, as evidenced by the inclusion of "Mother Hubbard" language in the order, it should be treated as final for purposes of appeal. If the judgment grants more relief than requested, it should be reversed and remanded, but the appeal should not be dismissed. In Inglish v. Union State Bank, the Texas Supreme Court reapplied this rule with draconian consequences to the hapless plaintiff. The defendant in Inglish filed two motions for summary judgment, both of which were granted by the trial court. The first motion addressed only a few of plaintiff's claims; however, the order granting that motion stated that defendant was entitled to summary judgment "in this case" and that the plaintiff should "take nothing on account of his lawsuit." Plaintiff did not appeal this order. Several months later, the defendant sought summary judgment as to Plaintiff's remaining claims. At that time, the trial court granted a motion for judgment nunc pro tunc, which purported to correct the first order to reflect that it was only a partial summary judgment. It then entered a second order granting summary judgment as to all of plaintiff's claims. Following an affirmance of this second order by the court of appeals, plaintiff appealed to the Supreme Court and the defendant moved to dismiss that appeal for lack of jurisdiction.

Agreeing with the defendant, the Court held that the first summary judgment order was final and appealable under the rule it had announced

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184. Id. at 872.
185. Id. at 872-73.
186. Unfortunately, the comment does not illuminate the meaning of "point out evidence," a term which arguably conflicts with the amended rule's language requiring the respondent to "produce" summary judgment evidence raising a genuine issue of fact. Compare Tex. R. Civ. P. 166a(i) with Tex. R. Civ. P. 166a cmt. (1997).
187. 60 Tex. B.J. at 873.
188. 866 S.W.2d 590 (Tex. 1993).
189. See id. at 592. Evidence of a court's intention that its judgment be final includes language that purports to dispose of all claims or parties. See id.
190. See id.
191. 945 S.W.2d 810 (Tex. 1997) (per curiam).
192. Id. at 811.
in *Mafrije*\textsuperscript{193} Although the first order did not contain a true "Mother Hubbard" clause, it clearly purported to be final given the language of finality it contained.\textsuperscript{194} To avoid waiver, therefore, the plaintiff was required to seek correction of the first order while the trial court retained plenary power or perfect a timely appeal of that judgment.\textsuperscript{195} Having done neither, the plaintiff failed to invoke appellate jurisdiction and his appeal was dismissed without consideration of its merits.\textsuperscript{196}

In *Bandera Electric Cooperative, Inc. v. Gilchrist*,\textsuperscript{197} the Texas Supreme Court faced the question of what appellate relief is appropriate when a plaintiff does properly appeal a summary judgment that purports to be final but grants more relief than the movant requested. The trial court's judgment in *Bandera* contained a Mother Hubbard clause\textsuperscript{198} that professed to dispose of the plaintiff's claims and the defendant's counterclaims even though the plaintiff's motion had not addressed the counterclaims. As a result, the court of appeals reversed and remanded the entire case to the trial court.\textsuperscript{199} The Texas Supreme Court reversed, holding that the court of appeals should have considered the merits of the appeal.\textsuperscript{200} Acknowledging that the courts of appeals have reached differing results where a final summary judgment was entered when only partial summary judgment was appropriate,\textsuperscript{201} the Court concluded that the proper procedure for the court of appeals in these circumstances is to affirm those portions of the trial court's judgment that are correct and to reverse and remand only the remainder.\textsuperscript{202} By doing so, courts avoid the needless relitigation of decided issues and thus promote judicial economy.\textsuperscript{203}

Two cases decided during the Survey period involved issues of summary judgment evidence. *United Blood Services v. Longoria*\textsuperscript{204} reiterates that there is no difference between the standards for evidence that would

\textsuperscript{193} See id.
\textsuperscript{194} See id. (citing Springer v. Spruiell, 866 S.W.2d 592, 593 (Tex. 1993) (per curiam) (concluding that recitation stating plaintiffs shall "have and recover nothing" disposed of all claims asserted by plaintiffs and made summary judgment final and appealable)).
\textsuperscript{195} See *Inglish*, 945 S.W.2d at 811.
\textsuperscript{196} See id.
\textsuperscript{197} 946 S.W.2d 336 (Tex. 1997) (per curiam).
\textsuperscript{198} "A Mother Hubbard clause generally recites that all relief not expressly granted is denied." *Id.* at 336 n.1. The Supreme Court expressly noted, however, that language stating a summary judgment is granted as to all claims or that plaintiff "takes nothing" against defendant (like that at issue in *Inglish*) is the functional equivalent of a Mother Hubbard clause. See *id*.
\textsuperscript{199} 924 S.W.2d 388 (Tex. App.—San Antonio 1996), rev'd, 946 S.W.2d 336 (Tex. 1997) (per curiam).
\textsuperscript{200} See *Gilchrist*, 946 S.W.2d at 336.
\textsuperscript{202} See *Gilchrist*, 946 S.W.2d at 336.
\textsuperscript{203} See id. at 337.
\textsuperscript{204} 938 S.W.2d 29 (Tex. 1997).
be admissible in a summary judgment proceeding and those applicable at a regular trial. As a result, the Court held in Longoria that the decision whether a witness is qualified to give expert testimony at the summary judgment stage is a matter committed to the trial court’s discretion. According to Rizkallah v. Conner, however, an affidavit’s failure to set forth the expert qualifications of a witness is a defect in form that is waived if no objection is made. Mere conclusory statements in an affidavit, on the other hand, are defects in substance that can be raised for the first time on appeal. The Rizkallah court appeared less certain about the issue of whether lack of personal knowledge is a defect in form or substance, pointing out two decisions by the Texas Supreme Court that had caused it confusion on this score. Faced with this apparently conflicting authority, the court decided the better rule is that lack of personal knowledge is a defect in the form of an affidavit that can be waived by a failure to object.

X. JURY PRACTICE

The Texas Supreme Court in Goode v. Shoukfeh further clarified the procedural parameters of Edmonson challenges in Texas civil courts. In Goode, a medical malpractice case, the plaintiff contended that four of the defendant’s peremptory challenges were racially motivated. The defendant’s counsel articulated his reasons for striking each of the four jurors. Then the plaintiff’s counsel cross examined the defendant’s counsel and sought to introduce into evidence the latter’s notes from voir dire. The trial court sustained a work-product objection to the introduction of the attorney’s notes and refused to examine them in camera. The court of appeals upheld the trial judge’s determination.

The Texas Supreme Court affirmed the judgment of the courts below. In doing so, the Court first held that the proper standard of review of an Edmonson challenge on appeal is the familiar abuse of discretion standard. However, the Court went on to hold that a reviewing court will not be bound by the trial court’s finding of no discrimination “if the justification offered for striking a potential juror is ‘simply too incredible to be accepted.’” On the record before it, the Supreme Court concluded

205. See id. at 30.
206. See id.
207. 952 S.W.2d 580 (Tex. App.—Houston [1st Dist.] 1997, n.w.h.).
208. See id. at 586.
209. See id. at 587.
211. See Rizkallah, 952 S.W.2d at 585.
212. 943 S.W.2d 441 (Tex. 1997).
214. See Goode, 943 S.W.2d at 446.
that the trial court did not abuse its discretion in accepting the defendant's reasons for striking certain jurors.\textsuperscript{216} The Court then addressed what, for it, was an issue of first impression: whether the trial court should have allowed plaintiff's counsel to review, or at least conducted an \textit{in camera} inspection itself of, counsel's jury selection notes. The Court held that, as a general rule, attorneys' notes are non-discoverable work product under Texas Rule of Civil Procedure 166b(3)(a)\textsuperscript{217} unless the privilege is waived or one of the five exceptions enumerated in Texas Rule of Civil Evidence 503(d)\textsuperscript{218} is presented.\textsuperscript{219} Finding those five exceptions inapplicable, the Court then addressed the plaintiff's argument that, by testifying as to the reasons for their peremptory challenges, the defendant's counsel waived any applicable privilege. The Supreme Court refused to adopt this analysis, reasoning that such a rule would render an attorney's work product discoverable as a case progresses through trial.\textsuperscript{220} Moreover, the Court held that a trial court is generally not required to conduct an \textit{in camera} inspection of counsel's notes in an \textit{Edmonson} challenge since the purpose of such an inspection is to determine whether a document is privileged, which the attorneys' trial notes clearly are.\textsuperscript{221} The Court did hold, however, that the party advancing an \textit{Edmonson} challenge has the right to examine voir dire notes that are actually relied upon by the opposing attorney while giving sworn or unsworn testimony in response to such a challenge.\textsuperscript{222}

Finally, noting the absence of clearly defined \textit{Edmonson} procedures in Texas jurisprudence,\textsuperscript{223} the Court set forth several basic guidelines. First, the Court required that \textit{Edmonson} challenges be made in open court.\textsuperscript{224} Second, unsworn statements of counsel may be offered to explain peremptory challenges, and juror information cards may be made part of the record.\textsuperscript{225} Third, to the extent other evidence is to be included in the record, the rules of civil evidence and procedure apply.\textsuperscript{226} Finally, the trial court must permit the challenging party with the opportunity to rebut race-neutral explanations, including the right to cross examine the opposing counsel.\textsuperscript{227}

Construing the requirements of Rule 292,\textsuperscript{228} two panels of the Fort Worth Court of Appeals discussed when a juror is considered disabled from serving. In \textit{Sowards v. Yanes},\textsuperscript{229} the trial court dismissed an em-

\begin{itemize}
\item \textsuperscript{216} See id. at 447-48.
\item \textsuperscript{217} TEX. R. CIV. P. 166b(3)(a).
\item \textsuperscript{218} TEX. R. CIV. EVID. 503(d).
\item \textsuperscript{219} See Goode, 943 S.W.2d at 448.
\item \textsuperscript{220} See id.
\item \textsuperscript{221} See id. at 448-49.
\item \textsuperscript{222} See id. at 449.
\item \textsuperscript{223} See id.
\item \textsuperscript{224} See id. at 451.
\item \textsuperscript{225} See id.
\item \textsuperscript{226} See id.
\item \textsuperscript{227} See id. at 452.
\item \textsuperscript{228} TEX. R. CIV. P. 292.
\item \textsuperscript{229} 955 S.W.2d 456 (Tex. App.—Fort Worth 1997, pet. filed).
\end{itemize}
paneled juror as disabled who testified that he could not pay attention to
the evidence due to the illness and impending death of his grandfather.
The trial court then overruled the objections of both sides to proceeding
with an eleven-member jury and subsequently overruled the plaintiff's
motion for mistrial following a defense verdict. On appeal, the court re-
versed and remanded the action for a new trial, ruling that while a juror's
own physical or mental disability may permit the trial court to dismiss the
juror and continue the trial, the illness of a family member did not consti-
tute sufficient grounds to render a juror disabled under Rule 292.230

In Fiore v. Fiore,231 the court dismissed a juror who, after hearing some
of the evidence, advised that she had developed an extreme prejudice
against one of the litigants because he closely resembled her ex-son-in-
law, who had committed adultery while married to the juror's daughter.
The juror had also developed a skin rash that she attributed to her anxi-
ety. The appellate court remanded the case for a new trial holding that
neither the juror's rash nor prejudice rendered her disabled for purposes
of Rule 292.232

In H.E. Butt Grocery Co. v. Pais,233 the court reversed the decision of
the trial court in vacating a judgment for the defendant based upon the
jury's verdict and in entering a reformed judgment for the plaintiff. In
this slip and fall case, the jury found that the plaintiff was fifty-one per-
cent negligent and the grocery store was forty-nine percent negligent.
The jury ignored the conditioning instructions, however, and also
awarded the plaintiff monetary damages. The plaintiff then submitted
post-verdict affidavits from ten of the eleven jurors who signed the ver-
dict, stating that the percentage of liability assigned to the plaintiff were
mistakenly transposed by the foreperson. However, the plaintiff failed to
obtain an affidavit from the final juror who signed the verdict; and two
other jurors later recanted their affidavit testimony in favor of the plain-
tiff. The appellate court held that under these facts, it was error to grant
the plaintiff any relief from the judgment because clerical mistakes in the
verdict may only be shown by a unanimous jury, which did not exist
here.234 Moreover, even if a clerical error had been properly proven, the
only remedy available to the trial court is to grant a new trial, not to enter
a different judgment.235

In Guerra v. Wal-Mart Stores, Inc.,236 the court held that a juror's mem-
bership in Sam's Club, an entity related to Wal-Mart, was too remote to
constitute a direct or indirect interest in the subject matter of the litiga-
tion justifying disqualification.

230. See id. at 459.
231. 946 S.W.2d 436 (Tex. App.—Fort Worth 1997, writ denied).
232. See id. at 438.
233. 955 S.W.2d 384 (Tex. App.—San Antonio 1997, no pet. h.).
234. See id. at 387.
235. See id. at 388.
236. 943 S.W.2d 56 (Tex. App.—San Antonio 1997, no writ).
Finally, in its Letter Opinion No. 97-009, the Texas Attorney General opined that it was improper for a petit juror to receive reimbursement in excess of the statutorily mandated range in a given case, even where the litigants agreed to pay the difference between the statutory maximum and the additional amounts proposed to be paid to the jurors. All jurors who serve during a given year are entitled to receive the same amount, which was not to exceed thirty dollars (now fifty dollars) per day.

XI. JURY CHARGE

In Arthur Andersen & Co. v. Perry Equipment Corp., an accounting malpractice case, the Texas Supreme Court held that in a Deceptive Trade Practices Act case, a plaintiff may not submit the question of “reasonable and necessary attorneys' fees” to the jury in a form that asks for an answer to be expressed as a percentage of recovery. Instead, the Court announced that in determining what fees are reasonable, a fact finder must consider more than a party's contingency fee agreement, including such factors as: (1) the time and labor required, including the novelty and difficulty of the issues and the skill required to perform the legal service properly; (2) the likelihood that the case will preclude other employment by the attorney; (3) the fee customarily charged in the locality for similar legal services; (4) the amount of money involved and the results obtained; (5) time limitations imposed by the client or circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of counsel; and (8) whether the fee is fixed or contingent. Although the decision in Arthur Andersen expressly addresses only Deceptive Trade Practices Act claims, the Supreme Court’s reasoning appears to leave little room for an argument that attorneys' fees under other fee-shifting statutes can still be submitted to the jury in the form of a percentage of the judgment.

XII. JUDGMENTS

In a trilogy of cases decided on the same day, the Texas Supreme Court set forth the guidelines under which a request for findings of fact and conclusions of law properly extends the deadline for perfecting an appeal. In IKB Industries v. Pro-Line Corp., Phillips v. Beavers, and Awde v.

240. See id. (citing TEX. GOV'T CODE ANN. § 61.001(a)).
241. 945 S.W.2d 812 (Tex. 1997).
242. TEX. BUS. & COMM. CODE § 17.50(d) (Vernon Supp. 1998).
243. See Arthur Anderson, 945 S.W.2d at 819.
245. 938 S.W.2d 440 (Tex. 1997).
246. 938 S.W.2d 446 (Tex. 1997).
Dabeit\textsuperscript{247} the Court held that "[a] request for findings of fact and conclusions of law does not extend the time for perfecting an appeal of a judgment rendered as a matter of law, where findings and conclusions can have no purpose and should not be requested, made, or considered on appeal."\textsuperscript{248} As examples of such situations, the Court cited summary judgments, judgments following a directed verdict, judgment non-obstante veritdio, default judgments awarding liquidated damages, dismissals for want of prosecution or jurisdiction entered absent an evidentiary hearing, dismissals based upon the pleadings or special exceptions, and any judgments entered without an evidentiary hearing. By contrast, the Court ruled that a timely filed request for findings of fact and conclusions of law will extend the deadline for perfecting an appeal when they are required by Rule 296,\textsuperscript{249} or are not so required, but "are not without purpose."\textsuperscript{250} As examples of such instances, the Court listed judgments entered after a conventional bench trial, default judgments entered on a claim for unliquidated damages, judgments rendered as sanctions, and any judgments based in any part on any evidentiary hearing.

In applying these guidelines, the Texas Supreme Court in \textit{Phillips v. Beavers}\textsuperscript{251} held that a timely filed request for findings of fact and conclusions of law also extended the deadline for filing an appellate record under Rule 54(a)\textsuperscript{252} "when findings and conclusions are required by Rule 296, or when they are not required by Rule 296 but are not without purpose—that is, they could be properly considered by the appellate court."\textsuperscript{253}

In \textit{Board of Trustees of Bastrop Independent School District v. Toungeat},\textsuperscript{254} involving the application of hair-length regulations to male students, the Texas Supreme Court discussed the signing of a modified judgment and its impact on appellate timetables. The trial court in this case originally entered a judgment in favor of the school district, but later modified its judgment finding that the application of these regulations violated state constitutional and statutory laws. While the district court modified the original judgment within its plenary power, it failed to notify the parties of its modified judgment for another thirty-one days, and did not file the modified judgment until thirty-eight days after it had been signed. The Texas Supreme Court held that the signing (rather than the filing) of the modified judgment controlled whether the trial court timely modified the original judgment within its plenary power, and that Rule

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\item \textsuperscript{247} 938 S.W.2d 31 (Tex. 1997).
\item \textsuperscript{248} \textit{IKB Indus.}, 938 S.W.2d at 443.
\item \textsuperscript{249} TEX. R. CIV. P. 296.
\item \textsuperscript{250} \textit{IKB Indus.}, 938 S.W.2d at 443.
\item \textsuperscript{251} 938 S.W.2d 446 (Tex. 1997).
\item \textsuperscript{252} TEX. R. APP. P. 54(a).
\item \textsuperscript{253} 938 S.W.2d at 447. \textit{See also} City of Lancaster v. Texas Nat. Resource Conserv. Comm'n., 935 S.W.2d 226 (Tex. App.—Austin 1996, writ denied) (Where the record shows that the trial court's judgment is not based upon evidence heard by the trial court, a request for findings of fact will not extend appellate timetables).
\item \textsuperscript{254} 958 S.W.2d 365 (Tex. 1997).
\end{itemize}
306a(4) protects the appellant’s rights because the parties did not receive timely notice of the judgment. Thus, the Court held that the appellant’s timetable did not run until it was notified of the modified judgment, and further advised that the trial court should have submitted the modified judgment to the clerk immediately upon signing to avoid the need for a notification hearing under Rule 306a(3) and (4).

Several courts, including the Texas Supreme Court, considered the subjects of compulsory counterclaims, res judicata, and collateral estoppel during the Survey period. In Klein v. Dooley, the Court held that while a plaintiff’s nonsuit of a DTPA claim did not adversely affect the defendant’s DTPA counterclaim, the trial of the DTPA counterclaim on its merits did bar the plaintiff from later refiling suit against the same defendant based upon the same underlying facts because the plaintiff’s nonsuit rights were absolute and its claims were not compulsory counterclaims under Rule 97 to a DTPA claim for attorneys’ fees.

The plaintiff in Rexrode v. Bazar did not fare as well as the plaintiff in Klein. In Rexrode, a personal injury action resulting from a car accident, the plaintiff sued another driver and the plaintiff’s own insurer, but later nonsuited the individual defendant during trial. After the insurer nonsuited its cross claim, it successfully moved for an instructed verdict. The plaintiff then filed a second suit against the driver, who successfully moved for summary judgment under the doctrine of collateral estoppel. The appellate court affirmed, holding that because the plaintiff elected to proceed to verdict against the insurer, and as the instructed verdict in favor of the insurer necessarily involved litigation on the merits of the plaintiff’s underlying claims against the individual defendant, the doctrine of collateral estoppel barred the plaintiff’s second suit.

In Ingersoll-Rand Co. v. Valero Energy Corp., a complex action involving a construction contract and an indemnity clause that provided for the recovery of attorneys’ fees to the prevailing party, the defendants obtained an interlocutory summary judgment that the plaintiff’s claims against it were barred by the indemnity provision. The trial court severed this portion of the action and abated the balance of the case pending an appeal on the indemnity issues. After the abatement was lifted, the defendants moved for summary judgment on their claim for attorneys’ fees. The plaintiff filed its cross-motion for summary judgment, contending that the attorneys’ fees claims were compulsory counterclaims that had been waived and were now time barred. The appellate court affirmed,
holding that the parties seeking to recover their attorneys' fees had not timely done so, and could not properly wait until the underlying liability claim under the indemnity provision had been adjudicated.265

In *Goldman v. White Rose Distributing Co.*,266 the court balanced the doctrines of res judicata and judicial estoppel arising in the context of two actions involving a shareholder dispute. In the first action, Goldman, the corporation’s former president, sued the corporation and its shareholders for their failure to pay his annual bonus and the share of the proceeds from the sale of the corporation’s assets. The defendants counterclaimed against Goldman for misuse of funds. During the first trial, the defendants and their counsel repeatedly admitted that Goldman was owed certain funds that had been placed in escrow, and advised the jury not to consider those funds owed to Goldman as part of their deliberations. The jury found against Goldman and in favor of the defendants, which decision the appellate court affirmed, including the portion of the judgment denying recovery to Goldman. Goldman later demanded payments of amounts owed to him, offset by the amount of the judgment, and subsequently filed suit to recover those monies. The corporation successfully moved for summary judgment against Goldman under the theory of res judicata. On appeal, the court reversed holding that while all of the elements of res judicata were present regarding Goldman’s claims, the corporation was still judicially estopped from claiming res judicata, because such a position in the second action was inconsistent with the corporation’s position in the first case, such that it could not tell the court and jury in the first case that Goldman was entitled to recover funds and later rely upon res judicata as a defense to Goldman’s claims for those monies.267

Two courts opined on the relationship between judgments and agreements under Rule 11,268 reached in the context of the divorce proceedings. In *Spinks v. Spinks*,269 the trial court entered a final divorce decree based upon an agreement reached during a court-ordered mediation. The appellate court reversed, holding that one party had subsequently withdrawn its consent to agreement, which was not binding in any event because the non-revocation clause in the agreement was not underlined as mandated by section 153.0071(d) of the Family Code.270

In *Keim v. Anderson*,271 the appellate court reversed a judgment entered in a divorce decree where the trial court had originally awarded attorneys’ fees in a sanctions hearing, but later entered an oral final judg-

265. See id. at 819.
266. 936 S.W.2d 393 (Tex. App.—Fort Worth 1996), judgment vacated by, 949 S.W.2d 707 (Tex. 1997).
267. See *Goldman*, 949 S.W.2d at 710.
268. TEX. R. CIV. P. 11.
269. 939 S.W.2d 229 (Tex. App.—Houston [1st Dist.] 1997, no writ).
270. See id. at 234 (citing TEX. FAM. CODE ANN. § 153.0071(d) (Vernon 1996)).
ment based on a Rule 11 stipulation, following a substitution of counsel, which judgment did not mention the prior award of attorneys’ fees. The original attorney intervened to recover his fees, following which the trial court entered a final written decree that included an award of fees to the intervening attorney, to which the parties had not agreed in their stipulation. On appeal, the court reversed and remanded holding that the trial court’s oral rendition of judgment constituted a final judgment disposing of all issues and parties. However, because the trial court’s subsequent ruling contained provisions that varied from the parties’ Rule 11 agreement, the court below acted improperly and either had to: (1) accept the agreement as stipulated; (2) set aside the agreement to consider the intervention; or (3) reject the agreement as failing to constitute a just and right division of the parties’ estates.

In *Biotrace International, Inc. v. Wilwerding* the appellate court reversed a default judgment rendered against the defendants where the plaintiff’s latest petition failed to contain jurisdictional allegations sufficient to meet due process requirements. Specifically, while the plaintiff’s petition stated that telephone conversations occurred between the parties, the petition did not show that these conversations took place while the plaintiff was in Texas, and that such pleadings were insufficient to confer in personam jurisdiction over the defendants. Therefore, an error existed on the face of the record.

In *Caruso v. Shropshire,* the court held that an abstract of judgment of a judgmental lien listed under only one plaintiff and none of the remaining fifty-three judgment plaintiffs failed substantially to comply with the requirements of section 52.003 of the Texas Property Code by failing to list all of the judgment plaintiffs. Therefore, no valid judgment lien existed to be enforced.

Finally, in *State Farm Lloyds, Inc. v. Williams,* involving a coverage dispute under a homeowner’s insurance policy, the appellate court reversed and remanded a judgment where the trial court improperly assessed damages as a matter of law. In *Williams,* the appellees sued the estates of the homeowners seeking compensation for injuries they sustained as a result of certain shootings. The insurer defended those actions under a homeowner’s policy it had issued, that resulted in a judgment against the estates for $4.25 million, which the insurers refused to pay as to one of the homeowners. Thereafter, the appellees, assignees of the estates, filed suit against the insurer regarding the coverage issues. Following a trial on the merits, the trial judge entered a judgment as a matter of law for $4.25 million in actual damages, representing the amount of the

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272. TEX. R. CIV. P. 11.
273. See *Keim,* 943 S.W.2d at 942.
274. See id.
276. 954 S.W.2d 115 (Tex. App.—San Antonio 1997, no pet. h.).
judgment against the insureds in the original action. Because the trial court concluded that the appellees were entitled to a submission of liability issues, the trial court erred in then refusing to put a damage question to the jury based on these theories of liability. The court distinguished this case from other Stowers type cases where the amount can be readily determined where a simple mathematical calculation provides the difference between the policy limits and the amount of the underlying judgment. Here, the face of the judgment did not allow the trial court to determine the amount of the underlying judgment against the insured. Therefore, the trial court should have submitted a damage question to the jury.

XIII. MOTIONS FOR NEW TRIAL

Two cases during the Survey period addressed the issue of timely-filed motions for new trial and untimely-paid filing fees. In Tate v. E.I. DuPont de Nemours & Co., the appellant timely filed a motion for new trial, but did not pay the required fifteen dollar filing fee. The clerk treated the motion as "received" but not "filed" and did not forward the motion to the court for a ruling. After the motion was deemed overruled by operation of law, but before the trial court lost its plenary jurisdiction, the appellant perfected an appeal and tendered the filing fee. In reversing the court of appeals' dismissal of the appeal, the Texas Supreme Court held that, while the failure to pay the filing fee for a motion for new trial before it is overruled by operation of law forfeits the movant's opportunity to have the trial court consider the motion, it does not retroactively invalidate the conditional filing for purposes of the appellate timetable.

In a footnote, however, the Texas Supreme Court expressly declined to address the questions of: (1) whether a motion for new trial extends the appellate timetable if the filing fee is not paid within the period of the trial court's plenary jurisdiction; and (2) whether a motion for new trial, while extending the appellate timetable, properly preserves error for appeal where the filing fee is paid after a motion for new trial is overruled by operation of law.

In Polley v. Odom, the court addressed and answered the first of the two questions left open by the Supreme Court in Tate. Specifically, the Polley court held that where a party files a motion for new trial but does not pay the filing fee until after the trial court loses its plenary jurisdic-

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278. See id. at *4.
279. See id.
280. 934 S.W.2d 83 (Tex. 1996).
281. See id. at 84. In reaching its decision, the court of appeals had relied upon dicta in Arndt v. Arndt, 709 S.W.2d 281, 282 (Tex. App.—Houston [14th Dist.] 1986, no writ) (a motion for new trial "will not act to extend the appellate timetables if the required $15 fee is not paid before the motion is heard or before it is overruled"). See Tate, 934 S.W.2d at 84. Presumably, this language in Arndt has been overruled by the holding in Tate.
282. See id. at n.1.
283. 937 S.W.2d 623 (Tex. App.—Waco 1997, no writ).
tion, the appellate timetables were extended “regardless of when the filing fee is paid.”

XIV. SEALING OF COURT RECORDS

A divided Texas Supreme Court approved a trial court’s conduct of an ex parte, in camera hearing under the circumstances presented in United States v. Marks. The case arose out of an action filed by Marks to perpetuate the testimony of his accountant. The Office of Independent Counsel of the United States Government intervened in the proceeding and objected to the requested deposition on the ground that it would interfere with a pending grand jury investigation in which Marks was a target and his accountant a witness. The attorney for the government offered to tell the trial court enough about the grand jury investigation only if she could do so without Marks’ counsel present, stating that she could not reveal the information to anyone other than the court because of Rule 6(e) of the Federal Rules of Criminal Procedure. Over Mark’s objection, the trial court agreed to this request and, following the conclusion of the hearing, ordered the accountant’s deposition delayed and the court reporter’s record of the in camera proceeding sealed.

In a strongly-worded opinion, the Dallas Court of Appeals reversed the trial court’s sealing order. In addition to condemning the secret nature of the procedure, the appellate court had held that the trial court did not follow the requirements of Rule 76a in entering the sealing order. The Supreme Court modified and reinstated the trial court’s order, however, holding that an ex parte, in camera proceeding may be justified in “extraordinary circumstances” and was appropriate in the case before it. Although the Court acknowledged that the procedures for sealing of “court records” were not followed, it noted that Rule 76a(2)(a)(2) excepts from the definition of court records “documents in court files to which access is otherwise restricted by law.” Accordingly, the Court held that, “[t]o the extent the sealed record contained information protected by Rule 6(e), it is not a ‘court record’ under Rule 76a(2)(a)(2), and thus sealing of those portions of the record does not

284. Id. at 626.
285. 949 S.W.2d 320 (Tex. 1997).
286. See id. at 322.
287. See id. at 322-23.
288. See id. at 323 (citing FED. R. CRIM. P. 6(e)).
289. See id.
290. See Marks v. Feldman, 910 S.W.2d 73, 75 (Tex. App.—Dallas 1995) (likening the trial court’s procedure to the British Star Chamber), rev’d, 949 S.W.2d 320 (Tex. 1997).
291. See id.
292. TEX. R. CIV. P. 76a.
293. See Marks, 910 S.W.2d at 78 (citing TEX. R. CIV. P. 76a(3) (requiring written motion and public notice)).
294. Marks, 949 S.W.2d at 322.
295. TEX. R. CIV. P. 76a(2)(a)(2).
296. Marks, 949 S.W.2d at 324 (quoting TEX. R. CIV. P. 76a(2)(a)(2)).
violating Rule 76a.”297 The Court also rejected Marks’ argument that the
ex parte proceeding and sealing of the record violated his due process
rights under the Federal and State Constitutions.298 Ex parte proce-
dings, while looked on with “extreme disfavor” are necessary in certain
circumstances, and the Court concluded that hearing oral statements in
camera is not so unlike reviewing written materials as to violate due
process.299

XV. DISQUALIFICATION AND RECUSAL OF JUDGES

Section 74.053 of the Texas Government Code300 permits a litigant to
disqualify an assigned or visiting judge if he objects before the first hear-
ing or trial over which the assigned judge is to preside.301 Numerous de-
cisions have held that an objection under section 74.053 is too late if it
comes after the assigned judge makes any ruling in the case, even on a
motion for continuance.302 Three cases decided during the Survey period
draw into question this broad statement of the rule.

In Bourgeois v. Collier,303 for example, the court of appeals permitted a
litigant to disqualify a judge assigned to the trial on the merits after that
judge had earlier presided at a contempt proceeding without objection.
The visiting judge presided at the contempt proceeding pursuant to a gen-
eral assignment to the court for a period of one week. This general as-
signment also expressly authorized the visiting judge to sit longer if
necessary to complete any trials commenced during the week or to rule
on other matters growing out of cases tried during the week. More than a
month later, after the general assignment had expired, the same visiting
judge was specially reassigned to hear the trial of the case when the regu-
lar trial judge recused himself due to health reasons. In his order overrul-
ning the litigant’s objection to the special assignment, the visiting judge
characterized the special assignment as “superfluous” because the earlier
general assignment vested him with authority to preside over all matters
in controversy in the case. The court of appeals decided, however, that
the special assignment evidenced the presiding administrative judge’s
view that the contempt proceeding was separate and independent from
the trial of the underlying case.304 The appellate court shared that view,
holding that because a contempt proceeding is quasi-criminal in nature it
is not necessarily a pretrial hearing that authorizes a visiting judge to hear

297. Id. The Court did hold that certain parts of the sealed record clearly did not fall
within the scope of grand jury secrecy and ordered those portions unsealed. Id. at 323-24.
298. See id. at 325-26.
299. Id.
300. TEX. GOV’T CODE ANN. § 74.053(c) (Vernon Supp. 1998).
301. See id.
303. 959 S.W.2d 241 (Tex. App.—Dallas, 1997, no writ).
304. See id. at *3.
all related proceedings under a general assignment. Accordingly, the court concluded that the visiting judge had no authority, except by the special assignment, to preside over the trial on the merits. Because the litigant objected to the visiting judge before he presided over any hearing pursuant to the special assignment, the objection was timely and disqualification was mandatory.

The court of appeals in O'Connor v. Lykos also ordered disqualification of a visiting judge who had been assigned to the retrial of a case after earlier presiding without objection at the hearing on a motion for new trial. Once again, the decision was predicated on the existence of two separate assignment orders. According to the appellate court, the visiting judge’s authority under the first general assignment terminated when she signed the order granting a new trial. At that point, any authority the visiting judge had to conduct the retrial would have had to be based on the second assignment order, to which a timely objection was made. DiFerrante v. Smith likewise holds that an objection to a subsequent assignment of the same visiting judge is timely if made before the judge presides at any hearing pursuant to the second assignment order. The visiting judge in DiFerrante first presided at a recusal hearing pursuant to assignment. Later, he was separately assigned to preside over the lawsuit generally. According to the court of appeals, the parties could not have had a right under section 74.053 to object to the subsequent assignment until that assignment was made, which did not occur until after the earlier recusal matter was concluded.

Although section 74.053 of the Government Code generally allows a party to make only one objection to any assigned judge, objections to “a former judge or justice who was not a retired judge” are unlimited in number. Because former judges who had not yet qualified for retiree status when they resigned from the bench or were defeated for reelection are still members of the Judicial Retirement System, they can accumulate retirement credit by continuing to serve as assigned, visiting judges. Thus, a former judge, although not vested when the judge leaves elective

305. See id.
306. See id. at *4.
307. See id. (citing Starnes v. Chapman, 793 S.W.2d 104, 107 (Tex. App.—Dallas 1990, orig. proceeding)).
308. 960 S.W.2d 96 (Tex. App.—Houston [1st Dist.] 1997, orig. proceeding).
309. See id. at *2. The court noted, however, that its analysis in this regard was based on an interpretation of the language of the assignment order itself rather than some underlying statute or principle of common law. See id. at *2 n.3.
310. See id. at *2. The court also held that there is no statutory requirement that the objection be verified and that verification is unnecessary because, unlike a rule 18a motion to disqualify or recuse, a party need not assert any facts in an objection to an assigned judge. Id. at *2. See Tex. R. Civ. P. 18a.
312. See id. at 849.
314. Id. § 74.053(d).
315. See Tex. Gov’t Code Ann. §§ 831.001(3), 832.001(a) and (d), 833.101, 836.001(5), 837.001(a) and (d), 838.101 (Vernon 1994).
office, may accumulate enough service credits to receive an annuity and, if other requirements are met, may become a retired judge.\textsuperscript{316} The question presented in \textit{Mitchell Energy Corp. v. Ashworth}\textsuperscript{317} was whether assigned judges in these circumstances constituted “former judges” or “retired judges” for purposes of determining the number of objections a party can make under section 74.053. After analyzing both the language and history of the statute in an effort to divine the Legislature’s intent,\textsuperscript{318} the Supreme Court held that the status of a judge as a “former judge . . . who was not a retired judge” is fixed when a judge leaves office.\textsuperscript{319} The litigant’s objection to the assigned judge in \textit{Mitchell} was therefore valid and disqualification was mandatory, even though the litigant had already exercised an objection under section 74.053(b) to an earlier assigned judge, because the former judge subsequently assigned to the case did not qualify for “senior judge” status until after she left office.\textsuperscript{320}

\textbf{XVI. DISQUALIFICATION OF COUNSEL}

\textit{News America Publishing, Inc. v. Priest}\textsuperscript{321} involved the anti-contact rule,\textsuperscript{322} which prohibits communications by opposing counsel with a person known to be represented by counsel. The plaintiff in \textit{Priest} sued for breach of contract and tortious interference naming as defendants a publishing corporation and several of its former officers. All of the defendants were represented by counsel. During the course of the suit, one of the individual defendants sent a letter to plaintiff and his counsel advising them that he had terminated his counsel, that he was no longer represented in the matter, and that he wished to meet without his “former” counsel present to discuss the lawsuit. No notice of this communication or the meeting subsequently held between the individual defendant, the plaintiff, and plaintiff’s attorneys was given to the individual defendant’s “former” counsel or counsel for the co-defendants. Following the meeting, plaintiff non-suited the individual defendant. Months later, after the other defendants had learned of the meeting and the plaintiff had designated the non-suited defendant as one of his expert witnesses, defendants filed a motion seeking to disqualify plaintiff’s lawyers for violations of

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\textsuperscript{316} See id. § 75.001; Mitchell Energy Corp. v. Ashworth, 943 S.W.2d 436, 439 (Tex. 1997).
\textsuperscript{317} 943 S.W.2d 436 (Tex. 1997).
\textsuperscript{318} See id. at 438-40.
\textsuperscript{319} Id. at 437.
\textsuperscript{320} Id.
\textsuperscript{322} Disciplinary Rule 4.02(a) states: “In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.” TEX. DISCIPLINARY R. PROF’L CONDUCT 4.02(a), reprinted in TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1998) (TEX. STATE BAR R. art X, § 9).
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Rule 4.02. While acknowledging that common courtesy required a phone call between lawyers before the meeting was held, the trial court denied the motion to disqualify presumably on the basis that the non-suited defendant was no longer represented by counsel at the time of the meeting.

In what appears to be a case of first impression in Texas, the appellate court in Priest decided that disqualification of plaintiff's counsel was mandatory under the circumstances and granted mandamus relief. In doing so, the court conceded that any person may terminate his counsel and, when this occurs, opposing counsel is free to communicate with the now-unrepresented person within the guidelines of Rule 4.03. The issue for the court, however, was whether the client's unilateral statement to opposing counsel that he had terminated his lawyer and wished to engage in discussions outside that lawyer's presence was sufficient to terminate the attorney-client relationship before he had conveyed that decision to his lawyer. The court decided it was not for two reasons. First, after reviewing various bar opinions suggesting that Rule 4.02(a)'s protections may not be waived by the client, the court decided that the plaintiff's counsel had an ethical responsibility to do more to ascertain the representational status of opposing counsel in the ongoing litigation rather than to rely on the unilateral statements of the former defendant. Second, the court decided that Texas's procedural rules regarding designation of lead counsel and substitution of counsel prevented plaintiff's attorney from communicating with the former defendant until his attorney had formally withdrawn from the representation. Finally, in granting the requested mandamus relief, the court observed that the anti-contact rule is more than common courtesy; it is a professional requirement imposed to protect the client, other parties, and the very integrity of the adversary system.

Rule 1.06 provides that a lawyer shall not represent opposing parties to the same litigation. Based on this rule, a law firm that appeared as

323. See Priest, 1997 WL 268540 at *5.
324. See id. at *1.
325. See id. at *6.
326. See id. at *4. Disciplinary Rule 4.03, entitled "Dealing With Unrepresented Person," sets guidelines for communications between counsel and persons who are not represented by counsel. TEX. DISCIPLINARY R. PROF'L CONDUCT 4.03.
327. See Priest, 1997 WL 268540 at *1.
330. See TEX. R. CIV. P. 8 (attorney whose signature first appears on initial pleadings shall be attorney in charge; until designation changed in writing, said attorney shall be responsible for suit and all communications from other counsel with respect to suit shall be sent to him).
331. See TEX. R. CIV. P. 10.
332. See Priest, 1997 WL 268540 at *5.
333. See id. at *6.
334. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(a).
local counsel for the defendant in *Smirl v. Bridewell* immediately withdrew from that representation after being reminded by plaintiff's counsel that it had earlier been contacted by the plaintiff about serving as his local counsel. Attempting to expand the rule's coverage, the plaintiff also sought to remove the defendant's lead law firm in the case on the basis that it too was disqualified under subsection (f) of the rule, which addresses lawyers who are members of or associated with the disqualified lawyer's firm. The *Smirl* court disagreed, holding that the local counsel was not a "member" of or "associated with" the defendant's lead law firm under the plain language of the rule. Given the context of the rule, the court concluded that "member" means a partner or shareholder of the firm and "associated with" refers to an associate, who is a lawyer on the firm's payroll as an employee.

**XVII. MISCELLANEOUS**

A. **Sanctions**

The court in *Wallace v. Investment Advisors, Inc.* affirmed Rule 13 sanctions against an attorney for filing a lawsuit solely as a means to obtain the deposition of a third-party witness for use in an arbitration proceeding. The plaintiff in that case had initiated the arbitration proceeding, but was unable under the applicable arbitration rules to compel the witness's deposition. Plaintiff and defendants then entered into an agreement whereby defendants would agree to submit to the arbitration in exchange for plaintiff's agreement to file a state-court lawsuit, obtain the deposition of the third party, and then dismiss the lawsuit. The trial court found, and the appellate court agreed, that the resulting lawsuit was fraudulently filed, and the plaintiff's attorney subject to sanctions, because it was never intended that the controversy would actually be decided by the court.

Rule 13 permits sanctions to be imposed only for "good cause, the particulars of which must be stated in the sanctions order." The issue

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335. 932 S.W.2d 743 (Tex. App.—Waco 1996, orig. proceeding [leave denied]).
336. *See* Tex. Disciplinary R. Prof'L Conduct 1.06(f) provides: "If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct."
337. *Smirl*, 932 S.W.2d at 745.
338. *Id.* at 744 (citing Samuels v. Montgomery, 793 S.W.2d 337, 340 (Tex. App.—Houston [14th Dist.] 1990, orig. proceeding [leave denied])).
339. 960 S.W.2d 885 (Tex. App.—Texarkana 1997, no pet. h.).
341. *See* Wallace, 960 S.W.2d at 890.
342. *See id.* at 887.
343. *See id.* at 887-88.
344. *See id.* at 888. The dissent in *Wallace* argued that the majority was, in effect, improperly punishing the attorney for violating the "spirit," rather than any express provision, of the rules. *Id.* at 890 (Cornelius, C.J., dissenting).
346. *Id.*
in *Land v. AT&S Transportation, Inc.*\(^{347}\) was whether, in order to preserve error for appeal, a party must object to a lack of particularity in a sanctions order.\(^{348}\) Noting that its sister courts of appeal were split on this issue,\(^{349}\) the court in *Land* held that the complaining party must object in the trial court to the lack of particularity.\(^{350}\)

**B. Arbitration**

The Texas Supreme Court interpreted the statutory standard for vacating an arbitration award based on "evident partiality by an arbitrator appointed as a neutral"\(^{351}\) in *Burlington Northern Railroad Co. v. TUCO, Inc.*\(^{352}\) Following an extensive survey of the federal and state authorities on the issue,\(^{353}\) the Court held "that a prospective neutral arbitrator selected by the parties or their representatives exhibits evident partiality if he or she does not disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality."\(^{354}\) Importantly, the question is not whether the nondisclosed facts actually establish bias; the nondisclosure itself satisfies the statutory standard of evident partiality.\(^{355}\) Applying this standard to the case before it, the Court held that the failure of a neutral arbitrator in a three-arbitrator panel to disclose that one of the party arbitrators had recently referred a major piece of litigation to him constituted evident partiality.\(^{356}\)

The Texas Supreme Court emphasized the heavy burden on a party claiming that there has been a waiver of a right to arbitration in *EZ Pawn Corp. v. Mancias.*\(^{357}\) Deciding the case under the Federal Arbitration Act,\(^{358}\) the Court held that a delay of almost one year in requesting arbitration, where there had been little activity in the case and the opposing party did not otherwise demonstrate prejudice from the delay, did not establish a waiver.\(^{359}\) In *Bruce Terminix Co. v. Carroll,*\(^{360}\) on the other hand, the court held that a party's failure to proceed with a court-ordered arbitration for almost three years constitutes a waiver of its right to arbitrate.\(^{361}\)

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347. 947 S.W.2d 665 (Tex. App.—Austin 1997, n.w.h.).
348. See id. at 666.
349. See id. at 667.
350. See id. at 667. The court also rejected the appellant's challenges to the sufficiency of the evidence because he failed to provide a complete record from the trial, which the statement of facts from the sanctions hearing indicated the trial court had considered in imposing sanctions. See id. at 668.
351. TEX. CIV. PRAC. & REM. CODE ANN. § 171.014 (Vernon 1997).
352. 960 S.W.2d 629 (Tex. 1997).
353. See id. at 704-06.
354. Id. at 707.
355. See id. This duty of disclosure applies only a neutral arbitrator and not party arbitrators who are not intended to be neutral. See id. at 707-08.
356. See id. at 708.
357. 934 S.W.2d 87, 90 (Tex. 1996).
359. See EZ Pawn, 934 S.W.2d at 89-90.
360. 953 S.W.2d 537 (Tex. App.—Waco 1997, orig. proceeding).
361. See id. at 540.
C. ADR and Rule 11 Agreements

In *Banda v. Garcia*, the Texas Supreme Court held that an attorney's unsworn statements that a settlement had been entered into prior to the filing of suit constituted some evidence sufficient to allow the trial court to enforce the settlement. The Court reasoned that while an attorney's statements must normally be under oath to be considered as evidence, the opposing party failed to object even though he was on notice that the attorney was trying to prove the existence and terms of the oral agreement. Curiously, the Court did not discuss at all its own precedent, recently reaffirmed in *Padilla v. LaFrance*, that a settlement agreement must comply with Rule 11 in order to be enforceable. It is impossible to tell from the opinion if this omission is the result of the failure of the parties to raise the issue or an unstated premise that the oral agreement at issue was not one “touching” on the suit pending within the meaning of Rule 11 since it was entered into prior to the filing of suit.

*Tindall v. Bishop, Peterson & Sharp, P.C.*, on the other hand, squarely addressed the issue of the enforceability of a settlement agreement under Rule 11. The parties in that case had dictated their agreement to the court reporter at a deposition. When the defendant failed to perform under the agreement, the plaintiff successfully moved for summary judgment. The court of appeals agreed with the defendant that an agreement announced to, and transcribed by, a deposition officer does not meet the writing and signature requirements of Rule 11. The court went on to hold, however, that the oral agreement was nevertheless enforceable as an exception to the statute of frauds and, therefore, affirmed the summary judgment in plaintiff's favor. This latter conclusion is difficult to square with the Supreme Court authority, discussed above, that a settlement agreement must comply with Rule 11 to be enforceable.

The court in *Nueces County v. De Pena* provided useful guidance for practitioners representing governmental bodies. Responding to an order

362. 955 S.W.2d 270 (1997).
363. See id. at 272.
364. See id.
365. 907 S.W.2d 454 (Tex. 1995).
367. See *Padilla*, 907 S.W.2d at 460.
368. TEX. R. Civ. P. 11.
369. 961 S.W.2d 248 (Tex. App.—Houston [1st Dist.] 1997, n.w.h.).
371. See *Tindall*, 961 S.W.2d at 249.
372. See id. at 250.
373. See id. at 251. Nor does such a procedure constitute an agreement made in open court and entered of record. See TEX. R. Civ. P. 11.
374. TEX. BUS. & COMM. CODE ANN. § 26.01(b)(6) (Vernon 1987) (agreements performable within a year).
375. See *Tindall*, 961 S.W.2d at 252.
376. TEX. R. Civ. P. 11.
377. See *Padilla*, 907 S.W.2d at 460.
referring the case to mediation, the Nueces County Commissioners' Court authorized the county attorney to represent it at the mediation and to settle the case within a specified range. On the opposing party's motion, however, the trial court ordered the county judge to personally attend the mediation conference. Noting that a county can only act through its commissioners' court, and that even the county judge did not, therefore, have the individual authority to settle the case, the court of appeals held that the trial judge abused his discretion in requiring the county judge to attend the mediation.

379. See id. at 836.
380. See id.
381. See id. at 836-37.