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TEXAS CIVIL PROCEDURE

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JUDICIAL decisions handed down during the Survey period accounted for most of the noteworthy developments in the area of civil procedure.

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I. SUBJECT MATTER JURISDICTION

Bailey v. Cherokee County Appraisal District[1] raised the question whether a suit instituted to collect ad valorem taxes that had accrued on estate property during administration should be considered a cause of action against the estate, to be brought in probate court, or a claim for which the heirs were personally liable. The court of appeals ruled that the heirs could be held personally liable for the taxes and that district courts had concurrent jurisdiction over such actions with statutory probate courts.[2] The Texas Supreme Court reversed, holding that the tax suit constituted a claim against only the estate and that it should have been filed in the probate court where the administration was pending.[3] The court based its decision on various Probate Code provisions that, when construed together, appeared to characterize ad valorem taxes as claims against the estate.[4] Consequently, the heirs were not personally liable for these claims because the estate was still under administration.[5] The taxing authorities argued, however, that the district court was empowered with original probate jurisdiction and, therefore, had jurisdiction to hear their tax claims as a matter incident to the estate. The supreme court disagreed, observing that although a court may be vested with probate jurisdiction it may exercise its jurisdiction over matters incident to the estate only if a probate proceeding connected with such matters is already pending in that court.[6] Moreover, the county court at law had already acquired "dominant" jurisdiction to the exclusion of the district court, because the estate administration was pending there before the taxing authorities filed their suit in district court.[7] Finally, the court remarked that administration of the estate was properly initiated in the county court at law because such courts share original probate jurisdiction with the constitutional county courts, to the exclusion of the district courts, in any county where there are statutory courts exercising probate jurisdiction.[8]

This latter ruling in *Bailey* underpinned the decision in *Miller v. Woods*.[9] The case arose from a will contest that was initially pending in the constitutional county court. The county judge subsequently transferred the case to the county court at law which, in turn, transferred it to the district court. Based on section 5(c) of the Texas Probate Code[10] and the pronouncements of *Bailey*, the court of appeals determined that the

1. 862 S.W.2d 581 (Tex. 1993).
2. Bailey v. Cherokee County Appraisal Dist., 817 S.W.2d 117, 119 (Tex. App.—Tyler 1991), *rev'd*, 862 S.W.2d 581 (Tex. 1993).
3. 862 S.W.2d at 582.
4. *Id.* at 583 (citing TEX. PROB. CODE ANN. §§ 322, 329(a)(1) (Vernon 1980 & Supp. 1995)).
5. *Id.*
6. *Id.* at 585.
7. *Id.* at 586; *see* Curtis v. Gibbs, 511 S.W.2d 263, 267 (Tex. 1974).
8. *Id.* at 585; *see* TEX. PROB. CODE ANN. § 5(c) (Vernon 1980 & Supp. 1995).
9. 872 S.W.2d 343 (Tex. App.—Beaumont 1994, no writ).
10. TEX. PROB. CODE ANN. § 5(c)(Vernon 1980 & Supp. 1995) provides:

district court lacked jurisdiction to enter a judgment in the will contest.[11] Because Liberty County had a statutory county court exercising probate jurisdiction, the court held that such court shared original probate jurisdiction with the constitutional county court, to the exclusion of the district court.[12]

One other appellate court construed section 5(c) of the Probate Code during the Survey period. *Garland v. Garland*[13] holds that although a family district court is granted continuing jurisdiction over support of a disabled adult child, this fact does not endow that court with jurisdiction to grant or deny guardianship of the adult child's estate.[14] Instead, an application for guardianship of the person or the estate of an adult child must first be filed in the statutory probate court.[15]

II. SERVICE OF PROCESS

The Texas Supreme Court emphasized the weight to be given the recitations in the return of service in *Primate Construction, Inc. v. Silver*.[16] Defendant Primate Construction appealed by writ of error from a default judgment entered against it.[17] Although the plaintiff first added Primate Construction as a defendant in its second amended petition, the pre-printed portion of the return of service signed by the sheriff indicated that the original petition was attached to the citation served on Primate Construction.[18] The supreme court held that the default judgment had to be reversed because the record did not affirmatively show proper service, but instead reflected service of a version of the petition in which Primate Construction was not named as a defendant.[19] The court rejected the plaintiff's argument that the pre-printed portions of the return of service were entitled to less weight than the information actually filled in by the officer responsible for effecting service.[20] If the facts recited in any portion of the return are incorrect, it is the obligation of the party requesting service to ensure that an amended return is filed prior to judgment.[21]

Rule 108a[22] of the Texas Rules of Civil Procedure provides a means of effecting service of process on a party in a foreign country. As one court

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> In those counties where there is a statutory probate court, county court at law, or other statutory court exercising the jurisdiction of a probate court, all applications, petitions and motions regarding probate and administrations shall be filed and heard in such courts and the constitutional county court, rather than in the district courts . . . .

11. *Miller*, 872 S.W.2d at 345.
12. *Id.*
13. 868 S.W.2d 847 (Tex. App.—Dallas 1993, no writ).
14. *Id.* at 850.
15. *Id.*; *see* TEX. PROB. CODE ANN. §§ 5(c), 606, 609 (Vernon 1980 & Supp. 1995).
16. 884 S.W.2d 151 (Tex. 1994).
17. *Id.* at 152.
18. *Id.*
19. *Id.* at 153.
20. *Id.* at 152-53.
21. *Id.* at 153.
22. TEX. R. CIV. P. 108a.

of appeals recently made clear, however, the rule is not the exclusive method for serving process on a foreign defendant.[23] The court held that the Texas long-arm statute,[24] which provides for service on "non-residents," does not distinguish between residents of other states and residents of foreign countries;[25] thus, a party in a foreign country may be served under the long-arm statute.[26]

Vandewater v. American General Fire & Casualty Co.[27] addressed the issue of service of process on a minor. The court held that a minor may not waive service of process upon her by voluntarily appearing in a suit, nor may the minor's guardian or next friend do so on her behalf.[28] Indeed, the court concluded that a trial court does not even have jurisdiction to appoint a guardian ad litem for a minor until the minor has been properly served.[29]

III. PERSONAL JURISDICTION

In order to contest the propriety of a Texas court's exercise of personal jurisdiction, a defendant must file a special appearance under Rule 120a.[30] The Texas Supreme Court decided two cases during the Survey period that define when a defendant may obtain immediate appellate review of a trial court's denial of a special appearance. In the first, *Canadian Helicopters Ltd. v. Wittig*,[31] the court held that a defendant normally has an adequate remedy by way of appeal from the denial of a special appearance, and mandamus review is therefore unavailable.[32] Noting that it had not considered this specific issue previously,[33] the court rejected the argument that the inconvenience and loss of time that the defendant would suffer in having to go through an entire trial rendered the appellate remedy inadequate.[34] The court added a curious caveat to its ruling, however, stating that it would not foreclose the possibility that a trial court's denial of a special appearance might be so clearly erroneous that the harm to the defendant would be irreparable and mandamus would then be appropriate.[35] The dissent seized on this inconsistency in the majority's opinion, arguing that whether there has been an abuse of

23. Commission of Contracts of the Gen. Executive Comm. of the Petroleum Workers Union of the Republic of Mexico v. Arriba, Ltd., 882 S.W.2d 576, 584-85 (Tex. App.—Houston [1st Dist.] 1994, no writ).

24. TEX. CIV. PRAC. & REM. CODE ANN. § 17.041-.045 (Vernon 1986 & Supp. 1995).

25. *See id.* § 17.041 (defining "non-resident" to include an individual who is not a resident of Texas).

26. *Arriba, Ltd.*, 882 S.W.2d at 584-85.

27. No. 3-93-282-CV, 1994 WL 513641 (Tex. App.—Austin, Sept. 21, 1994, n.w.h.).

28. *Id.* at *3.

29. *Id.*

30. TEX. R. CIV. P. 120a.

31. 876 S.W.2d 304 (Tex. 1994).

32. *Id.* at 305.

33. *Id.* at 306.

34. *Id.* The court also rejected the argument that due process concerns mandate the availability of immediate appellate court review. *Id.* at 307-08.

35. *Id.* at 308-09.

discretion and whether there is an adequate remedy by appeal are logically independent inquiries; thus, said the dissent, the issue of the adequacy of an appellate remedy ought not to turn on whether there has been "a super-clear abuse of discretion."[36]

Although *Canadian Helicopters* represents the general rule in Texas, the supreme court announced an exception to that rule in *K.D.F. v. Rex*.[37] In *Rex*, the Kansas Public Employees' Retirement System and two affiliated entities filed special appearances, contending that the Texas courts were required by principles of interstate comity to recognize their sovereign immunity under Kansas law and, therefore, should decline to exercise jurisdiction over them.[38] The supreme court held that appeal was not an adequate remedy for the denial of a special appearance in this situation, and that mandamus would therefore lie.[39] This "comity exception" to the general rule, explained the court, is based on "the risk of harm to interstate and international relations likely to occur if a Texas trial court erroneously exercises jurisdiction over another sovereign."[40]

Moore v. Elektro-Mobil Technik GmbH[41] and *Clark v. Noyes*[42] addressed two procedural issues that may arise when a defendant contests personal jurisdiction. In *Moore*, the court recognized the general rule that any act of the defendant invoking the court's judgment on a question other than jurisdiction may be construed as a general appearance.[43] Nevertheless, the court held that a letter from the insurer of a foreign manufacturer sued in Texas, which stated that it was moving to dismiss on grounds of insufficiency of process and inquired as to whether a local attorney was necessary to bring the motion, did not waive the manufacturer's right later to file a special appearance.[44] The court in *Clark* clarified that, although Texas state courts must utilize the federal due process standard in analyzing whether an out-of-state defendant has the requisite minimum contacts with Texas, state procedural rules apply in making that determination even though they may vary from the procedure followed in the federal courts.[45]

The Texas courts continued to explore the outer reaches of the Texas long-arm statute[46] during the Survey period. The Fort Worth Court of Appeals' decision in *International Turbine Service, Inc. v. Lovitt*[47] is particularly instructive. The defendant insurers in that case held non-resident insurance licenses in Texas, although they conducted only a very

36. *Id.* at 310 (Hecht, J., dissenting).
37. 878 S.W.2d 589 (Tex. 1994).
38. *Id.* at 590-91.
39. *Id.* at 592-93.
40. *Id.* at 593.
41. 874 S.W.2d 324 (Tex. App.—El Paso 1994, writ denied).
42. 871 S.W.2d 508 (Tex. App.—Dallas 1994, no writ).
43. *Moore*, 874 S.W.2d at 327.
44. *Id.* at 326-28.
45. *Clark*, 871 S.W.2d at 511.
46. TEX. CIV. PRAC. & REM. CODE ANN. § 17.041-.045 (Vernon 1986 & Supp. 1995).
47. 881 S.W.2d 805 (Tex. App.—Fort Worth 1994, writ denied).

small portion of their business in Texas.[48] Notwithstanding this ongoing contact with Texas, the court held that the insurers' activities in this state were not substantial enough to support a finding of general jurisdiction.[49] Because specific jurisdiction was lacking, therefore, the court affirmed the trial court's order sustaining the insurers' special appearance.[50]

IV. VENUE

Although the venue statute expressly mandates reversal on appeal if a case is transferred to a county of improper venue, the statute is unclear with respect to cases in which a lawsuit was originally brought in a county of proper venue, but was subsequently transferred to another county in which venue was also proper.[51] Ten years after the legislature's overhaul of the Texas venue statute,[52] the courts of appeals were still split on the question of whether an erroneous transfer in these circumstances constituted reversible error.[53] Some courts concluded by implication from the statute that a trial court's erroneous venue ruling in these circumstances was harmless.[54] Other courts disagreed, holding that a plaintiff's right to prosecute his suit in the county in which he rightfully brought it is a fundamental right that is not susceptible to a harmless error analysis.[55] The supreme court recently ended the controversy by deciding *Wilson v. Texas Parks & Wildlife Dep't.*[56] *Wilson* holds that a trial court commits reversible error whenever it transfers a case from a county of proper venue selected by the plaintiff.[57]

The defendant in *Wilson* had filed a motion to transfer venue of the action to Blanco County. The motion was granted and the case was transferred to Blanco County where, after a jury trial, the court entered a take-nothing judgment in favor of the defendant. The court of appeals affirmed, deciding that the erroneous transfer of a lawsuit from one

48. *Id.* at 809.

49. *Id.* at 810.

50. *Id.*

51. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1986) ("[I]f venue was improper it shall in no event be harmless error and shall be reversible error.").

52. *See* Act of June 17, 1983, 68th Leg., R.S., ch. 385 § 1, 1983 Tex. Gen. Laws 2119, 2119-24 (now codified at TEX. CIV. PRAC. & REM. CODE ANN. §§ 15.001-.100 (Vernon 1986)).

53. *See* discussion in Ernest E. Figari, Jr., A. Erin Dwyer & Donald Colleluori, *Texas Civil Procedure, Annual Survey of Texas Law*, 47 SMU L. Rev. 1677, 1694-96 (1994) [hereinafter Figari, *1994 Annual Survey*].

54. *See, e.g.*, Lewis v. Exxon Co., U.S.A., 786 S.W.2d 724, 728 (Tex. App.—El Paso 1989, writ denied); *see also* Flores v. Arrieta, 790 S.W.2d 75, 77 (Tex. App.—San Antonio 1990, writ denied) (dictum) (discussed in Ernest E. Figari, Jr., A. Erin Dwyer & Donald Colleluori, *Texas Civil Procedure, Annual Survey of Texas Law*, 45 Sw. L.J. 73, 91-92 (1991) [hereinafter Figari, *1991 Annual Survey*]).

55. *See, e.g.*, Hendrick v. McMorrow, 852 S.W.2d 22, 24-25 (Tex. App.—Beaumont 1993, no writ); Maranatha Temple, Inc. v. Enterprise Prods. Co., 833 S.W.2d 736, 742 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

56. 886 S.W.2d 259 (Tex. 1994).

57. *Id.* at 261.

county of proper venue to another did not constitute reversible error.[58] The appellate court relied heavily on *Ruiz v. Conoco, Inc.*[59] in arriving at this conclusion.[60] In particular, the court emphasized *Ruiz*'s holding that a venue decision will be affirmed if venue was proper in "the ultimate county of suit."[61] The court of appeals interpreted this statement as meaning that the propriety of plaintiff's initial venue selection was irrelevant once the case had been transferred.[62] Although this inference by the appellate court appeared to be legitimate, it proved to be mistaken.

The supreme court reversed the court of appeals' decision and held that, if a plaintiff initiates an action in a county of proper venue, transfer of venue under section 15.063(1)[63] would be reversible error even if venue would have been proper in the county of transfer had it been originally chosen by the plaintiff.[64] According to the court, the plaintiff has the right to choose venue in the first instance;[65] to hold that an erroneous transfer is harmless would eviscerate that right.[66] The court also observed that the language of Rule 87[67] is mandatory.[68] Thus, if the plaintiff meets its burden under the rule, no other place can be a proper venue in the case, and the trial court must keep the lawsuit in the county where it was filed.[69] The court further noted that its holding would guard against the forum shopping that occurs when a party intentionally asserts faulty, invalid grounds for a change of venue from one permissible county to another permissible county that the party perceives as more favorable.[70]

Wilson also provided the court with an opportunity to reiterate the standard of appellate review for venue determinations that it announced

58. Wilson v. Texas Parks & Wildlife Dep't, 853 S.W.2d 825, 829 (Tex. App.—Austin 1993), *rev'd*, 886 S.W.2d 259 (Tex. 1994).

59. 868 S.W.2d 752 (Tex. 1993).

60. 853 S.W.2d at 829 (citing Ruiz v. Conoco, Inc., 36 Tex. S. Ct. J. 412, 418 (Dec. 31, 1992) (opinion withdrawn)). Although the court of appeals decided *Wilson* before the supreme court issued its opinion on rehearing in *Ruiz*, the latter opinion contains language almost identical to the language from the original opinion in *Ruiz* that was cited by the court of appeals. *Compare* 868 S.W.2d at 758 *with* 36 Tex. Sup. Ct. J. at 417-18.

61. 853 S.W.2d at 829 (citing *Ruiz*, 36 Tex. Sup. Ct. J. at 418).

62. *Id.* The court also noted that the *Ruiz* opinion approvingly cited Lewis v. Exxon Co., U.S.A., 786 S.W.2d 724 (Tex. App—El Paso 1989, writ denied), thereby indicating an implicit rejection of the approach taken in Maranatha Temple, Inc. v. Enterprise Prods. Co., 833 S.W.2d 736 (Tex. App.—Houston [1st Dist.] 1992, writ denied). *Id.* (citing *Ruiz*, 36 Tex. Sups. Ct. J. at 418).

63. TEX. CIV. PRAC. & REM. CODE ANN. § 15.063(1) (Vernon 1986) ("The court . . . shall transfer an action to another county of proper venue if . . . the county in which the action is pending is not a proper county . . . .").

64. *Wilson*, 886 S.W.2d at 261.

65. *Id.* at 260.

66. *Id.*

67. TEX R. CIV. P. 87(3)(c) ("If a claimant has adequately pleaded and made prima facie proof that venue is proper in the county of suit . . . then the cause shall not be transferred but shall be retained in the county of suit . . . .").

68. *Wilson*, 886 S.W.2d at 261.

69. *Id.*

70. *Id.* at 261 n.3 (quoting Maranatha Temple, Inc. v. Enterprise Prods. Co. , 833 S.W.2d 736, 741 (Tex. App.—Houston [1st Dist.] 1992, writ denied)).

last year in *Ruiz*.[71] Under that standard, an appellate court must review the entire record, including the trial on the merits, in determining the propriety of venue.[72] This review, said the court, seeks to balance the conflicting interests of the plaintiff and the defendant.[73] It secures the plaintiff's right to choose and maintain suit in a county of proper venue, and it insulates the defendant from the potential effects of fraud or inaccuracy during the pleading stage.[74]

In an interesting case of limited temporal significance, the court in *Autin v. Daniel Bruce Marine, Inc.*[75] held that a Jones Act[76] case pursued in state court could not be dismissed under either state or federal doctrines of forum non conveniens.[77] The doctrine of forum non conveniens gives a court discretionary power to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if another court heard the action. Four years ago, the supreme court held in *Dow Chemical Co. v. Castro Alfaro*[78] that the legislature had statutorily abolished the doctrine in suits brought under section 71.031[79] of the Texas Civil Practice and Remedies Code.[80] In response to *Alfaro*, the Texas Legislature amended the wrongful death statute in 1993 to permit courts to decline jurisdiction in certain circumstances under the doctrine of forum non conveniens.[81] This amendment came too late for the hapless defendant in *Autin*, however, as the statutorily-enacted doctrine applies only to cases filed after September 1, 1993.[82] Ignoring contrary Fifth Circuit authority,[83] the court also held that the defendant could not obtain a dismissal under the federal law of forum non conveniens because the state, not federal, doctrine applied to a Jones Act case pursued in state court.[84] In its strongly-worded opinion, the court also observed that the policy determinations which establish the rules and principles a Texas trial court must follow are best left to the Texas Supreme Court and the Texas Legislature, not the Fifth Circuit.[85]

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71. *See* Ruiz v. Conoco, Inc., 868 S.W.2d 752, 758 (Tex. 1993).
72. *Wilson*, 886 S.W.2d at 262.
73. *Id.*
74. *Id.*
75. 862 S.W.2d 208 (Tex. App.—Beaumont 1993, no writ).
76. 46 U.S.C.A. app. § 688 (West 1975 & Supp. 1994).
77. *Autin*, 862 S.W.2d at 210.
78. 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991).
79. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986).
80. 786 S.W.2d at 678-79.
81. Act of March 4, 1993, 73d Leg., R.S., ch. 4, 1993 Tex. Gen. Laws 10 (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(a) (Vernon Supp. 1995)).
82. *Id.* at ch. 4, § 2 ("This Act applies to a cause of action filed on or after September 1, 1993."). *See also* Carl C. Scherz, Comment, *Section 71.051 of The Texas Civil Practice and Remedies Code - The Texas Legislature's Answer to* Alfaro*: Forum Non Conveniens in Personal Injury and Wrongful Death Litigation*, 46 BAYLOR L. REV. 99, 101-02, 106-09 (1994).
83. *See* Exxon Corp. v. Chick Kam Choo, 817 F.2d 307, 319-21 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140 (1988).
84. *Autin*, 862 S.W.2d at 210.
85. *Id.* Soon after the *Autin* decision, the United States Supreme Court decided American Dredging Co. v. Miller, 114 S. Ct. 981 (1994), which likewise held that federal

Although it was less critical of the Fifth Circuit, the Texas Supreme Court's later opinion in *Exxon Corp. v. Chick Kam Choo*[86] fully accorded with the reasoning of the *Autin* decision. The court in *Chick Kam Choo* also held that the federal maritime law of forum non conveniens did not preempt the application of Texas "forum non conveniens law" in a non-Jones Act case.[87] The case involved a foreign alien's claim under Singapore law for the death of her husband, which occurred while he was working in the engine room of a berthed tanker in Singapore. Under these circumstances, the court perceived "minimal, if any, impact" on international maritime commerce from permitting plaintiff's suit to proceed in a Texas state court.[88] As in *Autin*, the state doctrine of forum non conveniens did not apply to this case because it was filed before September 1, 1993.[89]

If a party contracts in writing to perform an obligation in a particular county, section 15.035(a) of the venue statute authorizes a suit on that obligation to be brought in the named county.[90] *Spiritas Holdings, Inc. v. Darling-Delaware Co.*[91] makes clear that this venue exception applies only when the obligation sued upon is the same obligation for which the contract specifies a place of performance. The parties in *Spiritas* had entered into an asset purchase agreement that required the defendant to make an escrow payment in Tarrant County by a certain date. The parties also agreed that the defendant's failure to pay the escrow amount would not constitute a breach and, instead, would only authorize the plaintiff to terminate the agreement. When the defendant subsequently refused to make the escrow payment, claiming a breach by the plaintiff, plaintiff filed suit in Tarrant County seeking a declaratory judgment that it was authorized to terminate the asset purchase agreement. The defendant filed a motion to transfer venue claiming that the only contract provision containing a place of performance was the escrow clause, but that because it had no obligation to make the payment that clause could not be used by the plaintiff as a basis for establishing venue under section 15.035(a). The court of appeals agreed, concluding that plaintiff's suit did not arise "by reason of" an obligation to pay the earnest money because the plaintiff had neither sued nor could have sued defendant for its failure to make this payment.[92] Instead, the plaintiff had sued on an "obligation" growing out of a contract termination provision, and this provision did not name a county or place of performance.[93] Section 15.035(a) did

law does not preempt state law regarding the doctrine of forum non conveniens in admiralty cases filed under the Jones Act. 114 S. Ct. at 988.

86. 881 S.W.2d 301 (Tex. 1994).
87. *Id.* at 306.
88. *Id.*
89. *See id.* at 303 n.4.
90. TEX. CIV. PRAC. & REM. CODE ANN. § 15.035(a) (Vernon 1986).
91. 875 S.W.2d 14 (Tex. App.—Fort Worth 1994, writ denied).
92. 875 S.W.2d at 16.
93. *Id.*

not apply, therefore, and the suit was transferred to Dallas County as the defendant had requested.[94]

Finally, in *Tippy v. Walker*[95] the supreme court ruled that the six-month residency period[96] for mandatory transfer of venue in child custody modification motions begins to run when the child's residency in the different county commences, even if that precedes the date of the original custody decree.[97] *Tippy* makes explicit the court's implicit holding over a decade earlier in *Arias v. Spector*.[98]

V. PARTIES

Martinez v. Humble Sand & Gravel, Inc.[99] presented the frequently recurring question of when a severance order produces a final judgment. It is well-established that a judgment must dispose of all parties and all issues in order to be a final judgment subject to appeal.[100] If a judgment is final as to some but not all of the parties to an action, the court can make the judgment final and appealable by severing into a different cause the claims and parties disposed of by the judgment.[101] If the order of severance contemplates a subsequent addition of parties to the severed cause, however, the judgment will not become final until a later order unambiguously designates all parties encompassed by the judgment in the severed cause.[102]

In *Martinez*, several defendants had moved for summary judgment on the basis of limitations while other defendants watched from the sidelines. The order granting these motions recited that summary judgment was being rendered in favor of all defendants irrespective of whether they had filed a summary judgment motion. The court later signed a severance order with the stated intention of making the summary judgment final and appealable. That order, however, allowed the previously passive defendants in the original action to become severed into the new cause at future dates by filing their own motions for summary judgment. The supreme court therefore concluded that the order of severance was interlocutory as to any defendants later added to the action because appellate deadlines run from the date an order or judgment is signed,[103] and a party cannot become subject to appeal prior to the time that the order or judgment in fact applies to that party.[104] Indeed, because the order of

94. *Id.* at 17.
95. 865 S.W.2d 928 (Tex. 1993) (per curiam).
96. *See* TEX. FAM. CODE ANN. § 11.06(b) (Vernon 1986 & Supp. 1995).
97. *Tippy*, 865 S.W.2d at 929.
98. 623 S.W.2d 312 (Tex. 1981).
99. 875 S.W.2d 311 (Tex. 1994) (per curiam).
100. Northeast Indep. Sch. Dist. v. Aldridge, 400 S.W.2d 893, 895 (Tex. 1966).
101. *Martinez*, 875 S.W.2d at 312. Depending on the order in which the judge signs each document, the period for perfecting an appeal may date from either the judgment or the order of severance. *Id.* at 313.
102. *Id.* at 314.
103. *See* TEX. R. APP. P. 5(b)(1).
104. *Martinez*, 875 S.W.2d at 313.

severance failed to specify all parties disposed of as of the date the order was signed but, instead, contemplated entry of a later "final" order unambiguously specifying all parties included in the severed cause, the court held that the order and judgment were also interlocutory as to the defendants who had originally moved for summary judgment.[105] The appeal was therefore dismissed.

VI. PLEADINGS

Several cases decided during the Survey period focused on the grant or denial of trial amendments. Rule 66[106] requires a trial court to freely permit trial amendments whenever the objecting party fails to demonstrate that the amendment would prejudice its prosecution or defense of the suit. Interpreting this rule several years ago, the supreme court held that a court may not refuse a trial amendment "unless (1) the opposing party presents evidence of surprise or prejudice, or (2) the amendment asserts a new cause of action or defense, and thus is prejudicial on its face."[107] In cases where the rule does not mandate allowance of the trial amendment, the decision to permit or deny the amendment rests within the court's discretion.[108] Misapplication of Rule 66 in a disciplinary proceeding forced the supreme court to readdress the standards for trial amendments in *State Bar of Texas v. Kilpatrick*.[109] The trial court in the case had permitted the State Bar to amend its pleadings at trial to include an allegation of barratry. The court of appeals held that this trial amendment should not have been permitted because it added a new cause of action and, therefore, was "prejudicial on its face."[110] The supreme court interpreted this statement by the court of appeals as effectively holding that all trial amendments which are not mandatory under Rule 66 must be rejected.[111] To the contrary, reiterated the court, the decision whether to grant or deny a nonmandatory trial amendment is always discretionary.[112] It therefore reversed the decision of the court of appeals, holding that the trial amendment at issue did not entail surprise or unfair prejudice of a type that would render its allowance an abuse of discretion.[113]

Zavala v. Trujillo[114] furnishes another example of the liberal application courts give Rule 66. The trial court there denied the plaintiff's requested trial amendment, which sought to add a new theory of negligence

105. *Id.* at 313-14.
106. TEX. R. CIV. P. 66.
107. Greenhalgh v. Service Lloyd's Ins. Co., 787 S.W.2d 938, 939 (Tex. 1990)(citations omitted).
108. *Id.*
109. 874 S.W.2d 656 (Tex.), *cert. denied*, 114 S. Ct. 2740 (1994).
110. 869 S.W.2d 361, 365 (Tex. App.—Houston [14th Dist.] 1993), *rev'd*, 874 S.W.2d 656 (Tex.), *cert. denied*, 114 S. Ct. 2740 (1994).
111. 874 S.W.2d at 658.
112. *Id.*
113. *Id.*
114. 883 S.W.2d 242 (Tex. App.—El Paso 1994, writ denied).

based on an alleged violation of the Texas Water Safety Act.[115] The defendant demonstrated that the plaintiff had never revealed this theory of liability in his discovery responses, and it appears the trial court decided that this failure to supplement discovery coupled with the plaintiff's failure to plead the statute caused unfair surprise to the defendant. The court of appeals disagreed, holding that the plaintiff's lack of diligence was not a factor to be considered in the Rule 66 equation[116] and that the defendant had failed to demonstrate prejudice sufficient to preclude the allowance of the proposed trial amendment.[117]

The decision in *Texas General Indemnity Co. v. Ellis*,[118] on the other hand, demonstrates that courts are not supposed to grant all trial amendments. Written pleadings to conform to the evidence must at least be filed before the case is submitted to the jury.[119] Although the trial court in *Ellis* granted a party's oral motion for leave to file a trial amendment pleading the existence of "good cause," no amended pleading was filed prior to submission of the jury charge. The court of appeals held, therefore, that the trial court had erred in submitting that issue to the jury.[120]

Every trial practitioner knows that a defendant's original answer must be filed by 10:00 a.m. on the Monday following the expiration of twenty days after service.[121] *Conaway v. Lopez*[122] makes clear that the answer need not be rushed to the courthouse by 10:00 a.m. on Tuesday if the defendant's appearance day falls on a legal holiday. Instead, the defendant has until the end of the next day that is not a Saturday, Sunday, or legal holiday to file its answer under these circumstances.[123] The *Conaway* court concluded that Rule 4 plainly applied to the situation,[124] and that the rule unambiguously extends deadlines to the "end" of the next day.[125] The court also observed that the 10:00 a.m. deadline is simply a relic that has outlived its usefulness in light of modern practices.[126] In a somewhat similar vein, the court in *Milam v. Miller*[127] held that a defendant who posted his answer by 10:00 a.m. on his appearance day was not

115. TEX. PARKS & WILD. CODE ANN. §§ 31.001-.142 (Vernon 1991 & Supp. 1995).

116. *Zavala*, 883 S.W.2d at 249 (citing *Greenhalgh*, 787 S.W.2d at 939). Unfortunately, this rule seems to tolerate, if not invite, "sandbagging." The court hastened to note, however, that its opinion should not be read to imply approval of plaintiff's discovery disclosures. *Zavala*, 883 S.W.2d at 249 n.8.

117. *Id.* at 249.

118. 888 S.W.2d 830 (Tex. App.—Tyler 1994, n.w.h.).

119. TEX. R. CIV. P. 67.

120. *Ellis*, 888 S.W.2d at 831.

121. *See* TEX. R. CIV. P. 99(c) (requiring that citation contain prescribed notice of when answer is due).

122. 880 S.W.2d 448 (Tex. App.—Austin 1994, writ requested).

123. *Id.* at 451. *But see* Solis v. Garcia, 702 S.W.2d 668, 671 (Tex. App.—Houston [14th Dist.] 1985, no writ) (where Monday appearance day was legal holiday, default judgment rendered at 11:00 a.m. on the following day was proper).

124. *Conaway*, 880 S.W.2d at 450.

125. *Id.*; *see* TEX. R. CIV. P. 4.

126. *Conaway*, 880 S.W.2d at 451.

127. No. 07-93-0161-CV, 1994 WL 319588 (Tex. App.—Amarillo, July 7, 1994, writ ref'd).

subject to default even though the answer was not received at the clerk's office until several days later.[128] According to the court, "once the provisions of Rule 5[129] are met, the post office becomes a branch of the district clerk's office for purposes of filing pleadings."[130] Unfortunately, the court merely assumed without discussing that the answer would need to be placed in the mail by 10:00 a.m. on the day in question in order to be deemed timely. This conclusion is not automatically dictated by the language of Rule 5, and it may be open to question in light of the *Conaway* rationale.

Cruz v. Morris[131] demonstrates that the repercussions of failing to amend a pleading in response to a court's order sustaining special exceptions can be quite severe. Although it is well established that a court may not strike a pleading on special exceptions without first providing the affected party an opportunity to amend,[132] the trial court in *Cruz* struck a party's damage allegations and, ultimately, her entire pleading after she failed to cure a defect in her allegations that was raised by special exception. Observing that this action may have been a bit too severe, the court of appeals nevertheless affirmed the trial court's action as being within the bounds of its discretion.[133]

VII. DISCOVERY

A. Discovery Procedures

Trial practitioners representing corporate clients should take note of Justice Gonzalez's dissent from the supreme court's denial of leave to file a petition for writ of mandamus in *Monsanto Co. v. May*.[134] The issue raised in *Monsanto* — which Justice Gonzalez noted had been before the court three times previously, but which it had been prevented from reviewing each time — was the propriety of so-called "apex" depositions.[135] Justice Gonzalez described an apex deposition as one in which a plaintiff seeks to depose the highest ranking executive officials of a large corporation, who have no personal knowledge of the facts at issue, as a strategy for forcing settlement.[136] Justice Gonzalez would hold that such a deposition should be allowed only if (1) it is reasonable to conclude that the executive has personal knowledge of the underlying facts, and (2) less intrusive means of discovery have been exhausted.[137]

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128. *Id.* at *2.
129. Tex. R. Civ. P. 5 provides that any document sent to the proper clerk by first-class U.S. mail in a properly addressed and stamped wrapper, and deposited in the mail on or before the last day for filing same, is deemed timely filed so long as it is received by the clerk no more than ten days tardily.
130. *Milam*, 1994 WL 319588 at *1.
131. 877 S.W.2d 45 (Tex. App.—Houston [14th Dist.] 1994, no writ).
132. *See* Texas Dep't of Corrections v. Herring, 513 S.W.2d 6, 10 (Tex. 1974).
133. *Cruz*, 877 S.W.2d at 48.
134. 889 S.W.2d 274 (Tex. 1994) (Gonzalez, J., dissenting).
135. *Id.* at 274.
136. *Id.*
137. *Id.* at 277.

The plaintiff in *Overall v. Southwestern Bell Yellow Pages, Inc.*[138] served a combined set of interrogatories and requests for production of documents that required responses within thirty days.[139] The court of appeals concluded that while this timing was consistent with Rule 167,[140] which requires a response to a request for production within thirty days of service of the request,[141] it ran afoul of the rule governing interrogatories, which provides that the time allowed for responding shall not be less than thirty days.[142] According to the court, this defect in the interrogatories did not infect the accompanying requests for production and, therefore, the defendant was still required to produce responsive documents within the thirty-day time frame.[143] Because the defendant did not send the plaintiff certain responsive documents in its possession, but instead argued they were available for inspection at its attorney's office, the court upheld the trial court's refusal to allow the defendant to introduce those documents at trial.[144]

The court's analysis in *Overall* is suspect on several fronts. First, Rule 168(4)[145] envisions that the party propounding interrogatories shall specify a time within which the answering party must respond, and that the time so specified shall not be *less* than thirty days.[146] The *Overall* plaintiff specified thirty days exactly. The court's conclusion that this was improper seems to assume that, by asking for answers *within* thirty days, the plaintiff was requiring answers to be served not more than twenty-nine days after service of the interrogatories. The defendant could have served his answers to the interrogatories on the thirtieth day, however, thereby complying with both Rule 168(4)[147] and the time specified by the plaintiff.[148]

Similarly, the court's conclusion that Rule 167(1)(f)[149] requires a party to send documents along with its response to the party who has served the request for production is questionable. The provision cited by the court appears to address only the manner of organization of documents made available for inspection — not the timing or location of their production.[150] These latter issues are dealt with in other sections of the rule, which provide that (1) a party shall produce responsive documents to which no objection has been made *after* serving its response,[151] and (2)

138. 869 S.W.2d 629 (Tex. App.—Houston [14th Dist.] 1994, no writ).
139. *Id.* at 630.
140. TEX. R. CIV. P. 167.
141. TEX. R. CIV. P. 167(2).
142. TEX. R. CIV. P. 168(4); *Overall*, 869 S.W.2d at 630-31.
143. *Overall*, 869 S.W.2d at 631.
144. *Id.*
145. TEX. R. CIV. P. 168(4).
146. *Id.*
147. TEX. R. CIV. P. 168(4).
148. *See* TEX. R. CIV. P. 4 (in computing time periods under the rules of procedure the last day of the period is included).
149. TEX. R. CIV. P. 167(1)(f).
150. *Id.*
151. TEX. R. CIV. P. 167(1)(d).

the requesting party shall specify a reasonable time, place, and manner for inspecting the documents.[152]

Rule 167a[153] authorizes the trial court to order a mental examination of a party who has put his mental condition in issue.[154] The supreme court has held that routine allegations of mental anguish do not place a party's mental condition in issue for purposes of this rule.[155] In *Crouch v. Gleason*,[156] however, the court held that an allegation that the defendant exploited the plaintiff's mental weaknesses was sufficient to put the plaintiff's mental condition in issue and to permit the court to order a mental examination.[157]

Davis v. Ruffino[158] addressed the proper locale of the defendant's deposition during the pendency of a motion to transfer venue. The defendant complained that, until his venue motion was heard, any deposition of him should be taken where he resided rather than in the county of suit.[159] The court of appeals disagreed and held that the trial court had the discretion to order the deposition to be taken in the county of suit.[160]

B. Privileges and Exemptions

The Texas Supreme Court upheld First Amendment[161] claims of privilege in two cases decided during the Survey period. In the first, *Tilton v. Moyé*,[162] the court was faced with a claim by evangelist Robert Tilton that the First Amendment's freedom of association guarantee[163] protected him from having to disclose a list of those he claimed to have healed.[164] The trial court had rejected this claim of privilege in a suit brought against Tilton by one of his former followers.[165] The supreme court conditionally granted mandamus relief, vacating the trial court's order.[166] The court held that, like a request for a membership list, the request at issue was specifically aimed at identifying persons who share particular (in this case, religious) beliefs.[167] In the absence of a more particularized showing of need, therefore, the court concluded that the requested discovery was improper.[168]

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152. Tex. R. Civ. P. 167(1)(c).
153. Tex. R. Civ. P. 167a.
154. Tex. R. Civ. P. 167a(a).
155. Coates v. Whittington, 758 S.W.2d 749, 753 (Tex. 1988).
156. 875 S.W.2d 738 (Tex. App.—Amarillo 1994, orig. proceeding).
157. *Id.* at 739-40.
158. 881 S.W.2d 186 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding).
159. *Id.* at 187.
160. *Id.*
161. U.S. Const. amend. I.
162. 869 S.W.2d 955 (Tex. 1994).
163. U.S. Const. amend. I.
164. *Tilton*, 869 S.W.2d at 956.
165. *Id.*
166. *Id.* at 958.
167. *Id.* at 956.
168. *Id.*

Similarly, the court held in *Ex Parte Lowe*[169] that the Attorney General had not made a sufficient showing of need to justify production of the membership list of the Texas Knights of the Ku Klux Klan in the face of a First Amendment privilege claim.[170] The court interpreted United States Supreme Court precedent as requiring the state to make a convincing showing of a substantial relationship between the information sought and a compelling state interest.[171] Proof of the Texas Knights' discriminatory beliefs was insufficient to meet this test.[172]

In *Simpson v. Tennant*,[173] a case of first impression in Texas,[174] the court held that under the communications-to-clergymen privilege the identity of a communicant, as well as the substance of the communication, was privileged from disclosure pursuant to Rule 505 of the Texas Rules of Civil Evidence.[175] The clergyman in *Simpson* refused to disclose in his deposition what he had been told about the cause of a playground accident, or from whom he had received the information, because the information had come to him in the context of a confession. The court had little difficulty in concluding that the substance of the communication was privileged.[176] The identity of the communicant presented a more difficult issue, however, because Rule 505 speaks only of privileged communications,[177] and the rules of procedure expressly authorize discovery of potential parties and persons with knowledge of relevant facts.[178] Nevertheless, relying on a variety of policy rationales, the court held that the identity of the communicant was also privileged.[179] The court bolstered its conclusion by analogy to the attorney-client privilege, noting that the identity of a client can be privileged where it is "inextricably intertwined with the subject matter of the communication."[180] Based on the clergyman's description, the court reasoned it was a fair inference that the unidentified communicant was involved in the events leading up to the playground accident.[181]

The Texas Supreme Court extended the reasoning of *National Union Fire Insurance Co. v. Valdez*,[182] which held that a request for an attor-

169. 887 S.W.2d 1 (Tex. 1994).
170. *Id.* at 3. The court first rejected a "per se 'Ku Klux Klan' exception" to the qualified First Amendment associational rights privilege. *Id.*
171. *Id.*
172. *Id.* at 4.
173. 871 S.W.2d 301 (Tex. App.—Houston [14th Dist.] 1994, orig. proceeding).
174. *Id.* at 303. Indeed, the court was unable to locate more than a few authorities from any jurisdiction addressing this issue. *Id.* at 311-12.
175. TEX. R. CIV. EVID. 505; *Simpson*, 871 S.W.2d at 306.
176. *Id.* at 305-06.
177. TEX. R. CIV. EVID. 505(b).
178. TEX. R. CIV. P. 166b(2)(d).
179. *Simpson*, 871 S.W.2d at 309.
180. *Id.*
181. *Id.* The court did not address whether a party could be required to supply the identity of a potential witness in the less revealing context of an interrogatory answer if his only knowledge of the witness was derived from a communication privileged under TEX. R. CIV. EVID. 505.
182. 863 S.W.2d 458 (Tex. 1993).

ney's entire litigation file is objectionable on work product grounds,[183] to a request for a district attorney's file in a criminal case.[184] The court concluded that, even though the trial court's order had allowed the district attorney to remove particular documents from the file that were protected by the attorney-client or work product privileges, the organization of the non-privileged portions of the file could provide clues as to the prosecutor's mental impressions, and the work product objection was therefore valid.[185]

The supreme court has ruled that the "offensive use" waiver doctrine, which prohibits a party from asserting an affirmative claim for relief and at the same time refusing to disclose highly relevant information based on a claim of privilege, can be applied to the attorney-client privilege.[186] In *Valero Energy Corp. v. M.W. Kellogg Construction Co.*[187] the court cited the plaintiff's offensive use of the attorney-client privilege not to support a finding that privilege had been waived, but as a basis to strike certain allegations in the plaintiff's pleadings.[188] *Denton v. Texas Department of Public Safety Officers Association*[189] addressed the related question of what a trial court should do when a plaintiff who is the subject of a pending criminal prosecution invokes the Fifth Amendment privilege[190] against giving testimony in his civil suit. In order to avoid putting the plaintiff to the choice of waiving his privilege or foregoing his civil claim, the court of appeals concluded that the trial court should have granted an abatement of the civil suit until the criminal case was over.[191]

Rule 510[192] of the Texas Rules of Civil Evidence establishes a privilege for mental health information. The rule contains an exception, however, for communications or records relevant to the mental condition of a patient in a suit in which any party relies upon such condition as a part of its claim or defense.[193] Despite the seemingly clear language of this exception, intermediate appellate courts were split with respect to the question of whether the exception should be held to apply only when a party attempted to use the privilege offensively.[194] In *R.K. V. Ramirez*,[195] the supreme court resolved the issue by holding that the patient-litigant exception stated in Rule 510(d)(5) is unrelated to the offensive use doctrine

183. *Id.* at 460.
184. State *ex rel.* Curry v. Walker, 873 S.W.2d 379, 380-81 (Tex. 1994).
185. *Id.* Because the defendants in the criminal cases were on probation or had received deferred adjudication, the court treated those cases as still active, thereby avoiding the question of whether the work product protection would extend beyond the conclusion of the criminal prosecutions. *Id.* at 380 n.1.
186. Republic Ins. Co. v. Davis, 856 S.W.2d 158, 163 (Tex. 1993).
187. 866 S.W.2d 252 (Tex. App.—Corpus Christi 1993, writ denied).
188. *Id.* at 256.
189. 862 S.W.2d 785 (Tex. App.—Austin 1993, writ granted).
190. U.S. CONST. amend. V.
191. *Denton*, 862 S.W.2d at 792.
192. TEX. R. CIV. EVID. 510.
193. TEX. R. CIV. EVID. 510(d)(5).
194. *See* R.K. v. Ramirez, 887 S.W.2d 836, 841 (Tex. 1994).
195. 887 S.W.2d 836 (Tex. 1994).

and exists independently from it.[196] The patient-litigant exception therefore applies whenever "a party's condition relates in a significant way to a party's claim or defense."[197]

C. Sanctions

The Texas courts continued to struggle during the Survey period with the standard for the imposition of "death penalty" sanctions (*e.g.*, striking pleadings, default judgments) announced by the supreme court in *Trans-American Natural Gas Corp. v. Powell*.[198] For example, *State v. Carrillo*[199] stands for the proposition that the *TransAmerican* guidelines do not apply to the sanction of deemed admissions based on a party's evasive or incomplete answers.[200] The court reasoned that Rule 215(4) of the Texas Rules of Civil Procedure[201] does not provide for any less severe sanction for the failure to properly respond to a request for admission,[202] and a trial court therefore cannot consider the possibility of imposing less severe sanctions as *TransAmerican* requires.[203] Moreover, the deeming of certain matters as admitted is not necessarily dispositive of a party's claims or defenses.[204]

The uncertainty about how strictly a court will enforce the *TransAmerican* standards is typified by two decisions rendered within a month of each other by the Corpus Christi Court of Appeals. In the first, *Allied Resources Corp. v. Mo-Vac Service Co., Inc.*,[205] the trial court ordered the defendants to produce certain documents and to pay a monetary sanction; if the sanction was not paid, the court's order warned, a default judgment would be entered.[206] The documents were not timely produced, the monetary sanction was not paid, and the trial court entered the default judgment.[207] The court of appeals upheld this sanction as appropriate and just, notwithstanding that the defendants had responded to other discovery, had their attorney withdraw during the course of the discovery dispute, and had not received any notice of the hearing at which the court actually entered the default judgment.[208] In contrast, the same court held in *Zappe v. Zappe*[209] that the trial court abused its discretion

196. *Id.* at 841.
197. *Id.* at 842.
198. 811 S.W.2d 913 (Tex. 1991).
199. 885 S.W.2d 212 (Tex. App.—San Antonio 1994, n.w.h.).
200. *Id.* at 216.
201. Tex. R. Civ. P. 215(4).
202. *See* Tex. R. Civ. P. 215(4)(a).
203. *Carrillo*, 885 S.W.2d at 216.
204. *Id.*
205. 871 S.W.2d 773 (Tex. App.—Corpus Christi 1994, writ denied).
206. *Id.* at 778.
207. *Id.*
208. *Id.* at 780-81. The court described the defendants' conduct of the entire case as "marked by delay, avoidance and obstruction of process," *id.* at 780, a characterization with some support in the factual recitation. Nevertheless, the discovery abuse on which the sanction was based was limited just to the defendants' failure to produce certain documents over a period of several months.
209. 871 S.W.2d 910 (Tex. App.—Corpus Christi 1994, no writ).

in striking a party's pleadings for failing to timely and completely respond to discovery.[210] As in *Allied Resources*, the ultimate sanction was imposed in *Zappe* only after the offending party failed to pay attorney's fees the court had awarded.[211] Because the party raised the issue of her inability to pay the monetary sanction, however, and the trial court made no further inquiry on that subject, the appellate court held that the sanction could not stand.[212]

D. Duty to Supplement

Rule 166b(6)(b)[213] requires parties to supplement their discovery responses to disclose the identity of expert witnesses they expect to call to testify "as soon as is practical," but in no event less than thirty days prior to trial.[214] The Texas Supreme Court resolved a conflict among the courts of appeals regarding the significance of this "as soon as is practical" requirement in *Mentis v. Barnard*.[215] The court stated that this provision does not establish any particular time in the life of a lawsuit when experts must be designated, nor does it require a party to identify a potential expert as soon as he is first contacted.[216] The rule requires only designation as soon as practical after it is decided that the expert is expected to be called at trial.[217] Thus, if a party seeks to exclude her opponent's expert witness based on this provision, she cannot merely point to how long the case was on file before the expert was designated, but must instead adduce evidence that the designation was improperly delayed.[218]

As in prior years, the automatic exclusion of witnesses who are not disclosed at least thirty days before trial was the subject of a number of cases during the Survey period. In *Aluminum Co. of America v. Bullock*,[219] the supreme court held that the defendant demonstrated good cause for failing to designate an expert witness where the expert's testimony was necessary to rebut previously undisclosed changes in the testimony of plaintiffs' expert.[220] The court also noted that the plaintiffs themselves had identified the expert they objected to the defendant calling, but specifically refused to decide whether this fact alone would have been sufficient to support a finding of good cause to allow the defendant to call the expert as a witness.[221] In *Kawasaki Motors Corp., U.S.A. v. Thompson*,[222] the supreme court did not even reach the issue of good

210. *Id.* at 914.
211. *Id.* at 912.
212. *Id.* at 913-14 (citing Braden v. Downey, 811 S.W.2d 922, 929 (Tex. 1991)).
213. Tex. R. Civ. P. 166b(6)(b).
214. *Id.*
215. 870 S.W.2d 14 (Tex. 1994).
216. *Id.* at 16.
217. *Id.*
218. *Id.*
219. 870 S.W.2d 2 (Tex. 1994).
220. *Id.* at 4.
221. *Id.*
222. 872 S.W.2d 221 (Tex. 1994).

cause in light of its determination that the parties' agreement limiting discovery effectively withdrew plaintiffs' interrogatory regarding expert witnesses and, therefore, left nothing to be supplemented.[223]

The intermediate appellate courts also grappled with the interplay between the automatic exclusion rule and the limitations on "death penalty" sanctions described in *TransAmerican Natural Gas Corp. v. Powell*.[224] In *Smart v. Winslow*,[225] the court concluded that the trial court's "mechanistic application"[226] of Rule 215(5)[227] to exclude all of the plaintiff's expert testimony, with the result that a directed verdict was entered against him, violated the standards of *TransAmerican* and due process.[228] The court in *Crane v. Texas Department of Transportation*[229] took a different tack, holding that while the exclusion of the plaintiff's experts was mandated by Rule 215(5),[230] the trial court abused its discretion, as limited by *TransAmerican*, in refusing to continue the trial in order to allow the plaintiff time to supplement her discovery responses.[231]

The El Paso Court of Appeals concluded that a party's failure to sign and verify his supplemental interrogatory answers justified the trial court's exclusion of the testimony of an expert witness identified in such supplemental answers.[232] The court acknowledged the line of cases holding that supplemental answers need not be verified.[233] It reasoned, however, that all but one of those cases involved only the failure to verify supplemental answers, while in the case before it the party had not complied with any of the formalities required by Rule 168(5).[234]

Any complaint on appeal regarding a trial court's decision to allow or exclude an expert witness' testimony is subject to a harmless error stan-

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223. *Id.* at 224.

224. 811 S.W.2d 913 (Tex. 1991). The supreme court did not reach this issue in a case in which the argument was made to it that the automatic exclusion sanction violated *TransAmerican*. Thomas v. Ray, 889 S.W.2d 237, 239 n.2 (Tex. 1994).

225. 868 S.W.2d 409 (Tex. App.—Amarillo 1993, no writ).

226. *Id.* at 414.

227. TEX. R. CIV. P. 215(5).

228. *Smart*, 868 S.W.2d at 416. *See also* Linkous v. Murry, 875 S.W.2d 41, 42-43 (Tex. App.—Houston [14th Dist.] 1994, no writ) (holding that the exclusion of all expert testimony as a sanction for failure to answer an unrelated interrogatory constituted a death penalty sanction, which was too severe under the circumstances).

229. 880 S.W.2d 55 (Tex. App.—Tyler 1994, writ denied).

230. TEX. R. CIV. P. 215(5).

231. *Crane*, 880 S.W.2d at 57-59. *See also* Texas Tech Univ. Health Sciences Ctr. v. Apodaca, 876 S.W.2d 402, 409-10 (Tex. App.—El Paso 1994, writ denied) (party objecting to undesignated expert's testimony was not prejudiced by postponement of trial that allowed other party time to supplement).

232. Ramirez v. Ramirez, 873 S.W.2d 735, 740 (Tex. App.—El Paso 1994, no writ).

233. *Id.* (citing cases). *See also* Stern v. State *ex rel.* Ansel, 869 S.W.2d 614, 628 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (lack of verification of supplemental answers did not require exclusion of witness).

234. TEX. R. CIV. P. 168(5); *Ramirez*, 873 S.W.2d at 740. The only other "formality" mentioned by the court was the party's failure to sign the supplemental answers. Of course, in the cases cited by the court where supplemental answers were not verified, they likely were not signed by the party either; thus, the court's attempt to distinguish those cases does not seem meaningful.

dard.[235] Error in excluding the witness requires reversal only if the witness' testimony would have been controlling on a material issue and not cumulative.[236] In *Williams Distrib. Co. v. Franklin*,[237] the court construed this standard to mean that the exclusion of a party's expert witness was harmless where that party had identified other potential experts on the same subject in its interrogatory answers, but did not attempt to call them at trial.[238]

E. MISCELLANEOUS

The supreme court narrowed the scope of mandamus review of discovery disputes two years ago in *Walker v. Packer*.[239] Indeed, the dissent in *Walker* predicted that mandamus would virtually never be available to review a trial court's order denying requested discovery.[240] If *Gustafson v. Chambers*[241] is any indication, the dissent's concern was greatly overstated. First, the *Gustafson* court held that when a trial court improperly sustains an objection to a written interrogatory, and the interrogatory therefore is not answered, there is no adequate remedy on appeal because the requested information is not made a part of the record.[242] Second, the court interpreted *Walker* as permitting mandamus to correct an erroneous denial of discovery that goes "to the heart of a party's case."[243] This standard is arguably more liberal than that envisioned by the majority in *Walker*, which spoke of the inadequacy of an appellate remedy where the denial of discovery so severely hampers a party's ability to present its case that to conduct the trial "would be a waste of judicial resources."[244]

In *Kessell v. Bridewell*,[245] the court held that a non-party has standing, both in the trial court and in the court of appeals, to object to a party's production of documents in which the non-party has a privacy interest.[246] The objectors in that case were employees of the defendant insurance company, whose performance evaluation records were sought by the plaintiffs.[247] Finding no controlling case law, the court of appeals determined that the discovery rules must be construed broadly enough to allow non-parties to object in these circumstances.[248] It would be incongruous, the court reasoned, to let the defendant employer assert objections on the employees' behalf while depriving the employees them-

235. Mentis v. Barnard, 870 S.W.2d 14, 16 (Tex. 1994).
236. *Id.*
237. 884 S.W.2d 503 (Tex. App.—Dallas 1994, writ requested).
238. *Id.* at 509-10.
239. 827 S.W.2d 833 (Tex. 1992).
240. *Id.* at 846 (Doggett, J., dissenting).
241. 871 S.W.2d 938 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding).
242. *Id.* at 945 (citing *Walker*, 827 S.W.2d at 843).
243. *Gustafson*, 871 S.W.2d at 947 (citing *Walker*, 827 S.W.2d at 843).
244. *Walker*, 827 S.W.2d at 843.
245. 872 S.W.2d 837 (Tex. App.—Waco 1994, orig. proceeding).
246. *Id.* at 840.
247. *Id.* at 839.
248. *Id.* at 839-40.

selves of the right to assert a constitutional privacy claim that is personal to them.[249]

The procedure governing special masters was the subject of *Trans-American Natural Gas Corp. v. Mancias*.[250] Although the court approved the use of a special master to provide the trial judge with required technical expertise, it held that it was clearly improper to order, as the trial court did, that the master could be deposed and could testify at trial regarding his findings.[251] Allowing such testimony would cast the master in the role of advocate rather than impartial referee.[252] In addition, the appellate court held that the trial court lacked the authority to order the parties to pre-pay the anticipated fees for the special master.[253]

VIII. DISMISSAL

Osterloh v. Ohio Decorative Products, Inc.[254] involved the propriety of a trial court's reliance on the address listed for plaintiff's attorney in a register of attorneys maintained by the district clerk, rather than the address reflected in the court's own file. A notice of intent to dismiss for want of prosecution was sent to plaintiff's counsel at an old address found in the Harris County District Clerk's Register of Attorneys.[255] The court's file accurately reflected plaintiff's counsel's new address; however, he had failed to update the district clerk's register.[256] The court of appeals held that the district clerk had no authority to ignore the address shown in the papers on file in sending the notice of intent to dismiss.[257] Accordingly, the plaintiff was entitled to challenge the dismissal by bill of review, since his counsel had not received proper notice, and the failure to update the district clerk's register was not a sufficient basis to conclude that he was negligent as a matter of law.[258]

Pursuant to Rule 165a(3),[259] an oral hearing must be held on a timely-filed motion to reinstate a case that has been dismissed for want of prosecution.[260] In *Matheson v. American Carbonics*,[261] the court construed this rule to mean that the movant need not even request a hearing; it is incumbent upon the trial court to conduct the hearing regardless.[262] The

249. *Id.* at 840.
250. 877 S.W.2d 840 (Tex. App.—Corpus Christi 1994, orig. proceeding).
251. *Id.* at 843.
252. *Id.*
253. *Id.* at 844.
254. 881 S.W.2d 580 (Tex. App.—Houston [1st Dist.] 1994, no writ).
255. *Id.* at 581.
256. *Id.*
257. *Id.* at 582.
258. *Id.* at 581-82 (bill of review complainant must prove, inter alia, that he was prevented from asserting claim or defense by fraud, accident, or mistake of the opposing party or court personnel, unmixed with any fault or negligence of his own).
259. TEX. R. CIV. P. 165a(3).
260. *Id.*
261. 867 S.W.2d 146 (Tex. App.—Texarkana 1993, no writ).
262. *Id.* at 147-48 (disagreeing with Cabrera v. Cedarapids, Inc., 834 S.W.2d 615, 618 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

court noted, however, that the movant may affirmatively waive a hearing on its motion to reinstate.[263]

IX. SUMMARY JUDGMENT

Several significant decisions involving summary judgment procedure emanated from the Texas Supreme Court during the Survey period. In *Lewis v. Blake*[264], for example, the court addressed two questions of procedure. First, when a motion for summary judgment is served by mail, does Rule 21a[265] add three days to the twenty-one day notice of hearing period prescribed by Rule 166a?[266] Second, does Rule 4[267] govern the computation of this notice period prescribed by Rule 166a?[268] Answering both questions in the affirmative, the court held that Rule 21a extends the minimum notice period for a summary judgment hearing by three days when the motion is served by mail.[269] Applying Rule 4, the court also concluded that the day of hearing, but not the day of service, is to be included in computing the minimum twenty-one day notice period under Rule 166a(c).[270] As a result, the court rejected appellant's argument that a summary judgment hearing could not be held before the twenty-fifth day after the date a motion for summary judgment was mailed.[271] Instead, Rule 4 allows a summary judgment motion to be heard on the twenty-fourth day after it is served by mail.[272]

In *Mafrige v. Ross*[273] the supreme court attempted to eliminate confusion caused by two of its earlier decisions[274] about the finality of orders granting motions for summary judgment. Twelve years ago, when the court held that a summary judgment order was final in *Schlipf v. Exxon*

263. *Matheson*, 867 S.W.2d at 147 n.2. *See also* Solomon v. Parkside Med. Serv., Inc., 882 S.W.2d 492, 492-93 (Tex. App.—Houston [1st Dist.] 1994, n.w.h.) (party who requests that motion to reinstate be set on the submission docket without an oral hearing is estopped from complaining that the court failed to conduct such a hearing).

264. 876 S.W.2d 314 (Tex. 1994).

265. TEX. R. CIV. P. 21a provides, in pertinent part: "Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail or by telephonic document transfer, three days shall be added to the prescribed period."

266. *Lewis*, 876 S.W.2d at 314; TEX. R. CIV. P. 166a(c).

267. TEX. R. CIV. P. 4 states in part: "In computing any period of time prescribed or allowed by these rules . . . the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included . . . ."

268. *Lewis*, 876 S.W.2d at 314.

269. *Lewis*, 876 S.W.2d at 315. In so holding, the court expressly disapproved of three court of appeals' decisions that have reached the contrary conclusion. *See* Cronen v. City of Pasadena, 835 S.W.2d 206, 208-09 (Tex. App.—Houston [1st Dist.] 1992, no writ); De Los Santos v. Southwest Tex. Methodist Hosp., 802 S.W.2d 749, 754 (Tex. App.—San Antonio 1990, no writ); Lynch v. Bank of Dallas, 746 S.W.2d 24, 25 (Tex. App.—Dallas 1988, writ denied).

270. *Lewis*, 876 S.W.2d at 316.

271. *Id.* at 315.

272. *Id.* at 315.

273. 866 S.W.2d 590 (Tex. 1993).

274. *See* Teer v. Duddlesten, 664 S.W.2d 702 (Tex. 1984); Schlipf v. Exxon Corp., 644 S.W.2d 453 (Tex. 1982).

Corp., it noted that the judgment included "Mother Hubbard" language and emphasized that such language helped clarify that a trial court intended its judgment to be final.[275] Two years later, however, the court stated in *Teer v. Duddlesten* that Mother Hubbard clauses should not be used in partial summary judgments.[276] Opining that *Schlipf* represents the better view, the court in *Mafrige* held that if a summary judgment order appears to be final, it should be treated as such for purposes of appeal.[277] The court observed that litigants should be able to rely on judgments that facially appear to be final, and that higher courts should be able to treat such judgments as final when considering appeals.[278]

Several decisions[279] over the past few years have held that the *Deerfield*[280] authentication rules for unfiled discovery materials survived the 1990 amendments to Rule 166a.[281] Disagreeing with these earlier cases, the supreme court held in *McConathy v. McConathy*[282] that authentication of deposition excerpts submitted as summary judgment evidence is no longer required under Rule 166a(d).[283] According to the court, paragraph d of Rule 166a, which was added by the 1990 amendments, superseded any authentication requirements such as those articulated in *Deerfield*.[284] The court observed that depositions are available to all parties in a case, and that the accuracy of excerpts submitted with motions for summary judgment can be easily verified.[285] Thus, said the court, authentication is neither necessary nor required under the amended rule.[286]

X. JURY PRACTICE

Further expanding the limitations on the use of peremptory jury strikes it first imposed in *Batson v. Kentucky*,[287] the United States Supreme Court held in *J.E.B. v. Alabama ex rel. T.B.*[288] that the Equal Protection Clause prohibits discrimination in the exercise of peremptory strikes on

275. *Schlipf*, 644 S.W.2d at 454.
276. *Teer*, 664 S.W.2d at 704.
277. *Mafrige*, 866 S.W.2d at 592. Evidence of a court's intention that its judgment be final includes language that purports to dispose of all claims or parties. *Id.*
278. *Id.*
279. *See, e.g.*, Prowse v. Schelhase, 838 S.W.2d 787 (Tex. App.—Corpus Christi 1992, no writ); Hollingsworth v. King, 810 S.W.2d 772, 773-74 (Tex. App.—Amarillo), *writ denied per curiam*, 816 S.W.2d 340 (Tex. 1991), discussed in Figari, *1991 Annual Survey*, *supra* note 54, at 91-92.
280. *See* Deerfield Land Joint Venture v. Southern Union Realty Co., 758 S.W.2d 608, 610 (Tex. App.—Dallas 1988, writ denied).
281. *See* TEX. R. CIV. P. 166a(d), added by a Supreme Court of Texas order of April 24, 1990, effective September 1, 1990.
282. 869 S.W.2d 341 (Tex. 1994).
283. *Id.* at 341.
284. *Id.* at 342.
285. *Id.*
286. *Id.*
287. 476 U.S. 79 (1986). In *Batson*, the Court held that the government could not, in a criminal case, use its peremptory strikes in a racially discriminatory manner. *Id.* at 89. The Court extended *Batson* to civil suits in Edmonson v. Leesville Concrete Co., 500 U.S. 614, 615 (1991).
288. 114 S. Ct. 1419 (1994).

the basis of gender.[289] Citing the long history of gender discrimination in the United States, the Court concluded that, in the exercise of peremptory strikes, group generalizations based on sex were no less invidious than those based on race.[290] Although *J.E.B.* involved a state's use of peremptory strikes in a civil proceeding, it seems certain that the majority opinion was intended to restrain even a private litigant's conduct in civil cases.[291]

Civil trial practitioners who are unfamiliar with the procedural steps involved in making or defending a *Batson* challenge should review *Texas Tech University Health Sciences Center v. Apodaca*.[292] Relying on case law developed in the criminal context, the court in *Apodaca* first described the prima facie case of discrimination the movant must present in order to be entitled to an evidentiary hearing challenging the opposing party's use of her peremptory strikes.[293] At such a hearing, the challenged party has the burden of articulating a non-discriminatory reason for striking the veniremember, and, once she has done so, the burden of persuasion shifts back to the movant to prove by a preponderance of the evidence that the proffered justification is pretextual.[294] The appellate court will review the trial court's determination under a clearly erroneous standard based on the record in its entirety.[295]

Rule 220[296] of the Texas Rules of Civil Procedure provides that the failure of a party to appear at trial constitutes a waiver of his right to a jury trial.[297] The Texas Supreme Court resolved a conflict among the courts of appeals regarding the scope of this waiver in *Bradley Motors v. Mackey*.[298] The Amarillo Court of Appeals had held in *Mackey* that the defendant's failure to appear at trial waived his right to a jury trial only

289. *Id.* at 1421.

290. *Id.* at 1422-28. Interestingly, the Court noted that the use of strikes based on other characteristics that may be disproportionately associated with one sex or the other might still be permissible, provided the proffered reason is not pretextual. *Id.* at 1424.

291. *Id.* at 1427-29 (discussing the right of individual jurors, as well as parties, to non-discriminatory jury selection procedures and concluding that "*litigants* may not strike potential jurors solely on the basis of gender") (emphasis added). *See also id.* at 1430-31 (O'Connor, J., concurring) (expressing belief that the Court's holding should be limited to government's use of peremptory strikes).

292. 876 S.W.2d 402 (Tex. App.—El Paso 1994, writ denied).

293. *Id.* at 407-08.

294. *Id.* at 408.

295. *Id. In re* A.D.E., 880 S.W.2d 241 (Tex. App.—Corpus Christi 1994, no writ), involved an unsuccessful *Batson* challenge. The state in that case responded to an allegation of racial discrimination with the assertion that one African-American veniremember was struck because she was a neighbor of plaintiff's attorney, and the other was struck because she was a "grandmotherly type." *Id.* at 243-45. Interestingly, although *A.D.E.* was decided after the United States Supreme Court's decision in *J.E.B.* outlawing gender discrimination in the use of peremptory strikes, the court did not mention that decision. The careful practitioner should now question, however, whether reasons offered for strikes that are racially neutral, such as the "grandmotherly type" reason articulated in *A.D.E.*, might be interpreted as evidencing a gender bias.

296. TEX. R. CIV. P. 220.

297. *Id.*

298. 878 S.W.2d 140 (Tex. 1994).

with respect to liability and not unliquidated damages.[299] Pointing out that no other court of appeals had ever reached that conclusion, the supreme court reversed.[300] The court held that Rule 220[301] controlled over the arguably inconsistent Rule 243,[302] which provides that if a default judgment is rendered on a claim for unliquidated damages, and the defendant has demanded a jury, the court should not hear evidence of damages, but should instead award a writ of inquiry and set the case on the jury docket.[303]

Two other noteworthy cases during the Survey period addressed a party's effort to properly perfect its right to a jury trial. In *Almaguer v. Jenkins*,[304] the court held that where a jury is timely requested, but the jury fee is paid late, a party is entitled to a jury trial unless the adverse party would be prejudiced or the court's docket disrupted.[305] In *Sunwest Reliance Acquisitions Group, Inc. v. Provident National Assurance Co.*,[306] on the other hand, the court held that even a properly perfected right to a jury trial can be waived if the trial judge proceeds to trial without a jury, and the requesting party fails to object or otherwise affirmatively indicate on the record that it intends to stand on its right to a jury trial.[307]

XI. JURY QUESTIONS

In its original opinion in *Spencer v. Eagle Star Insurance Co. of America*,[308] the Texas Supreme Court held that where a submitted jury question was merely defective because it failed to include a necessary accompanying instruction, rather than immaterial, the objecting party is entitled only to a new trial and not a judgment notwithstanding the verdict.[309] During the Survey period, the court substituted a new opinion on rehearing in *Spencer*, although it adhered to its original conclusion.[310] The court distinguished the cases relied upon by the defendant and amici curiae in their motions for rehearing for the proposition that rendition of judgment was appropriate, noting that those cases involved the failure to submit any jury question at all on a controlling issue.[311] The court was similarly unpersuaded by the argument that future plaintiffs would be given an incentive to submit defective jury charges in hopes of a favorable verdict, knowing that their only risk on appeal is the possibility

299. Mackey v. Bradley Motors, Inc., 871 S.W.d 243, 248-49 (Tex. App.—Amarillo), *aff'd in part and rev'd and remanded in part*, 878 S.W.2d 140 (Tex. 1994).
300. *Mackey*, 878 S.W.2d at 141.
301. TEX. R. CIV. P. 220.
302. TEX. R. CIV. P. 243.
303. *Id.*; *Mackey*, 878 S.W.2d at 141.
304. 882 S.W.2d 903 (Tex. App.—Corpus Christi 1994, no writ).
305. *Id.* at 904-05.
306. 875 S.W.2d 385 (Tex. App.—Dallas 1993, no writ).
307. *Id.* at 387.
308. 36 Tex. Sup. Ct. J. 1090 (June 30, 1993), *withdrawn and substituted by*, 876 S.W.2d 154 (Tex. 1994).
309. *Id.* at 1092.
310. Spencer v. Eagle Star Ins. Co. of Am., 876 S.W.2d 154, 155-58 (Tex. 1994).
311. *Id.* at 157-58.

that a new trial will be ordered.[312] According to the court, the need to retry a case should be sufficient disincentive to requesting an erroneous charge; moreover, it is ultimately the trial court's responsibility to ensure that a proper charge is submitted.[313]

The supreme court also clarified the respective burdens on the parties in submitting jury questions and accompanying instructions in *Dresser Industries, Inc. v. Lee*.[314] The plaintiff objected to the defendant's proposed contributory negligence question as not being "in substantially correct wording" because it was not accompanied by an instruction that the plaintiff had no duty to discover defects in a product or to guard against their existence.[315] Although the court assumed the accuracy of the plaintiff's statement of the substantive law, it nevertheless rejected his complaint regarding the proposed submission.[316] The court held instead that the burden was on the plaintiff to object to the absence of a limiting instruction.[317]

Alaniz v. Jones & Neuse, Inc.,[318] serves as a reminder that the submission of a proposed charge prior to trial may not be sufficient to preserve error.[319] The court in *Alaniz* concluded that the plain language of Rule 273[320] requires a party to submit proposed jury questions, instructions, and definitions *after* the court's proposed charge is given to the parties or their attorneys in order to preserve error.[321] Moreover, a subsequent objection to the charge and oral request that the court submit the questions and instructions requested by the party prior to trial may constitute an impermissible intertwining of the party's objections and requests.[322]

XII. JUDGMENT

The Texas Supreme Court took on the issue of prejudgment interest in *C & H Nationwide, Inc. v. Thompson*[323] and *Ellis County State Bank v. Keever*.[324] The court held in *C & H Nationwide* that the prejudgment interest statute[325] makes no distinction between past and future damages, and therefore, a party is entitled to prejudgment interest on future damages.[326] Although the majority acknowledged that construing the term "interest" to apply to future damages "sacrifice[s] a certain purity of meaning," it nevertheless concluded that the Legislature had clearly in-

312. *Id.* at 158.
313. *Id.*
314. 880 S.W.2d 750 (Tex. 1993).
315. *Id.* at 755.
316. *Id.*
317. *Id.*
318. 878 S.W.2d 244 (Tex. App.—Corpus Christi 1994, writ requested).
319. *Id.* at 245.
320. TEX. R. CIV. P. 273.
321. *Alaniz*, 878 S.W.2d at 245.
322. *Id.*
323. 37 Tex. Sup. Ct. J. 1059 (June 22, 1994).
324. 888 S.W.2d 790 (Tex. 1994).
325. TEX. REV. CIV. STAT. ANN. art. 5069-1.05, § 6(a) (Vernon Supp. 1995).
326. *C & H Nationwide*, 37 Tex. Sup. Ct. J. at 1066-67.

tended such an imprecise usage.[327] The court also rejected the defendants' argument that construing section 6(a)[328] to permit interest on future damages deprived them of due process and violated their right to trial by jury.[329] The court reasoned that the legislature had broad discretion in fashioning the prejudgment interest component of an injured plaintiff's remedy as part of its overall tort reform efforts.[330]

The supreme court refused to carry the logic of *C & H Nationwide* the next step, however, when it held in *Keever* that prejudgment interest may not be recovered on a punitive damages award.[331] Although section 6(a)[332] states that prejudgment interest accrues "on the amount of the judgment,"[333] the court found a countervailing legislative mandate in section 41.006 of the Civil Practice and Remedies Code.[334] Section 41.006[335] expressly prohibits prejudgment interest on punitive damages awards in cases in which it applies.[336] Parsing the less than clear statutory language, the court took a broad view of what types of cases were covered by section 41.006[337] and ultimately concluded that the statute was "intended to preclude an award of prejudgment interest on punitive damages that might otherwise be required by section 6(a)."[338]

The supreme court addressed the formal requisites of a valid judgment in *Stewart v. USA Custom Paint & Body Shop, Inc.*[339] The trial court in *Stewart* had signed a captionless order dismissing a case for want of prosecution, and several days later a computer printout listing a number of cases, including the *Stewart* case, was generated.[340] At some unknown point, the two documents were stapled together and placed in the *Stewart* case file.[341] The supreme court held that, while a properly executed order of dismissal is a judgment, it must meet the formal requisites of a judg-

327. *Id.* at 1067.
328. TEX. REV. CIV. STAT. ANN. art. 5069-1.05, § 6(a) (Vernon Supp. 1995).
329. *C & H Nationwide*, 37 Tex. Sup. Ct. J. at 1068.
330. *Id.* at 1068-69.
331. *Keever*, 888 S.W.2d at 798; *see also C & H Nationwide*, 37 Tex. Sup. Ct. J. at 1067-68 & n.7.
332. TEX REV. CIV. STAT. ANN. art. 5069-1.05, § 6(a) (Vernon Supp. 1995).
333. *Id.*
334. TEX. CIV. PRAC. & REM. CODE § 41.006 (Vernon Supp. 1995); *Keever*, 888 S.W.2d at 798.
335. TEX. CIV. PRAC. & REM. CODE, § 41.006 (Vernon Supp. 1995).
336. *Id.*; *see id.* § 41.002(a) (identifying actions to which Chapter 41 applies).
337. *Id.* § 41.006. The court concluded that the listing of actions to which Chapter 41 applies in § 41.002(a) is not exclusive, since § 41.002(b) identifies certain actions to which Chapter 41 does not apply. *Id.* § 41.002(a) and (b); *Keever*, 888 S.W.2d at 798.
338. 888 S.W.2d at 798. It is unclear whether the expansive phrasing of the court's holding is intended to mean that prejudgment interest will not be permitted on punitive damages awards even in cases identified in § 41.002(b) to which Chapter 41 does not apply. *See* Crum & Forster, Inc. v. Monsanto Co., No. 06-92-00100-CV, 1994 W.L. 506209 at *47-48 (Tex. App.—Texarkana, Sept. 19, 1994, writ requested) (concluding that *Keever* does not apply to cases brought under the Texas Deceptive Trade Practices — Consumer Protection Act and the Texas Insurance Code, and that prejudgment interest is part of the damages to be trebled under those statutes).
339. 870 S.W.2d 18 (Tex. 1994).
340. *Id.* at 19.
341. *Id.*

ment.[342] Specifically, the court stated that a judgment must be sufficiently definite to define the rights of the parties such that ministerial officials can execute on the judgment based only on the information contained therein.[343] The court concluded that the captionless order in the case before it failed this test.[344]

The Texas courts wrestled with questions regarding the preclusive effect to be given judgments during the Survey period. In the most significant case, the supreme court refused to give non-mutual collateral estoppel effect to a prior federal court judgment in *Sysco Food Services, Inc. v. Trapnell*.[345] The high court disagreed with the court of appeals' determination that the plaintiffs in this products liability death action had not had a full and fair opportunity in the prior federal action to litigate the issue on which several defendants sought to invoke collateral estoppel.[346] Nevertheless, given the unusual procedural posture, in which the other defendants would not be bound by the federal court finding and would, in fact, be trying to prove the contrary, the court concluded it would not serve the goals of collateral estoppel nor be fair to the plaintiffs to give that finding preclusive effect against them.[347] Although the court characterized its holding as a narrow one, based on facts unlikely to recur,[348] the dissent viewed the majority opinion as an example of a hard case making bad law.[349]

Default judgments were once again the subject of judicial scrutiny during the Survey period. For example, the court in *Strut Cam Dimensions, Inc. v. Sutton*,[350] disagreed with a decision of one of its sister court of appeals in holding that the presumption of finality that normally applies to cases "regularly set for a conventional trial on the merits"[351] does not apply to a post-answer default judgment based on the defendant's failure to appear for trial.[352]

XIII. MOTION FOR NEW TRIAL

As discussed in Figari, *1994 Annual Survey*, the Texas Supreme Court previously held that a trial court has the authority to vacate an order granting a new trial that it had previously entered.[353] In a case decided

342. *Id.* at 20.
343. *Id.*
344. *Id.*
345. 37 Tex. Sup. Ct. J. 1130, 1135 (June 22, 1994).
346. *Id.* at 1134-35.
347. *Id.* at 1135-36.
348. *Id.* at 1136-37.
349. *Id.* at 1137 (Enoch, J., dissenting) ("[t]he Court's misapplication of the doctrine of collateral estoppel is motivated by nothing more than the Court's desire to avoid what it perceives is an unfair result").
350. No. 13-93-651-CV, 1994 WL 547855 (Tex. App.—Corpus Christi, Oct. 6, 1994, *on reh'g* 1995 WL 55648 (Tex. App.—Corpus Christi, Feb. 9, 1995, n.w.h.).
351. North East Indep. School Dist. v. Aldridge, 400 S.W.2d 893, 897 (Tex. 1966).
352. *Sutton*, 1994 WL 547855 at *2. *Cf.* Thomas v. Dubovy-Longo, 786 S.W.2d 506, 507 (Tex. App.—Dallas 1990, writ denied).
353. Fruehauf Corp. v. Carillo, 848 S.W.2d 83, 84 (Tex. 1993).

during the Survey period, the court clarified that this authority exists only so long as the trial court retains plenary power over the original judgment.[354] Any order vacating the new trial after that time is void.[355]

The supreme court addressed several other procedural issues regarding motions for new trial during the Survey period as well. *Director, State Employees Workers' Compensation Division v. Evans*[356] presented the issue of whether a party moving for a new trial after a default judgment must introduce evidence at the hearing on its motion in order to satisfy the test of *Craddock v. Sunshine Bus Lines, Inc.*,[357] or whether it may rely on affidavits filed with the motion.[358] The court held that the movant may meet its burden with affidavits, and that these affidavits need not be introduced into evidence at the hearing.[359] In *Fredonia State Bank v. General American Life Insurance Co.*,[360] the court held that a motion for new trial filed before the trial court enters an amended final judgment is sufficient to preserve the movant's complaint regarding the factual insufficiency of the evidence when the substance of the motion is applicable to the amended judgment as well.[361] And in *Jamar v. Patterson*,[362] the high court held that a motion for new trial was conditionally filed when it was tendered to the district clerk without payment of the proper fee, and the date of that conditional filing was controlling for purposes of extending the appellate timetable where the fee was subsequently paid.[363]

The rules of procedure require the district clerk to immediately provide the parties or their attorneys with written notice of the entry of a final judgment.[364] Rule 306a(4)[365] extends the thirty-day period for filing post-judgment motions when a party proves, on sworn motion, that she did not receive the required notice within twenty days, such that the period begins on the date the party did receive notice — but in no event more than ninety days after the original judgment was signed.[366] Two

354. Porter v. Vick, 888 S.W.2d 789 (Tex. 1994).
355. *Id.*
356. 37 Tex. Sup. Ct. J. 779 (May 11, 1994).
357. 134 Tex. 388, 133 S.W.2d 124 (1939).
358. *Evans*, 37 Tex. Sup. Ct. J. at 780.
359. *Id.*
360. 881 S.W.2d 279 (Tex. 1994).
361. *Id.* at 281-82. The court did not resolve the related question, on which the courts of appeals have split, of whether a motion for new trial that is overruled by operation of law operates to extend the appellate deadlines from the date of the amended judgment. *Id.* at 282 n.2.
362. 868 S.W.2d 318 (Tex. 1993).
363. *Id.* at 319. Since *Jamar* was decided, two intermediate appellate courts have concluded that the conditional filing of a new trial motion without the required fee is effective to extend the appellate timetable even when the fee is not paid until a jurisdictional challenge is raised on appeal. Spellman v. Hoang, 887 S.W.2d 480, 482 (Tex. App.—San Antonio 1994, n.w.h.); Ramirez v. Get "N" Go #103, 888 S.W.2d 29, 31 (Tex. App.—Corpus Christi 1994, n.w.h.). If the fee is not paid while the trial court retains plenary power, however, the trial court should refuse to consider the motion, and there may be a basis to argue that the specific grounds raised in the motion are waived. *Id.*
364. TEX. R. CIV. P. 306a(3).
365. TEX. R. CIV. P. 306a(4).
366. *Id.*

appellate courts came to opposite conclusions during the Survey period regarding the consequences of a party's failure to verify its motion to enlarge the time for filing post-judgment motions. In *Vineyard Bay Development Co. v. Vineyard on Lake Travis*[367] the court allowed a party that originally filed an unverified motion for enlargement of time to file a verified motion more than thirty days after it received notice of the judgment and still avail itself of the benefit of the extended timetable.[368] The Dallas Court of Appeals rejected this approach, however, in *Womack-Humphreys Architects, Inc. v. Barrasso*.[369] Conceding that Rule 306a(5)[370] does not expressly place a time limit on the filing of a motion for enlargement of time, the court nevertheless construed the rule in its entirety as requiring a party to establish a prima facie case of the trial court's extended jurisdiction through the filing of a sworn motion within thirty days of the date notice of the judgment was first received.[371]

The court in *City of McAllen v. Ramirez*[372] addressed a significant distinction between motions for new trial and motions to reinstate under Rule 165a(3).[373] Although the rules governing the two motions are similar in many respects, the court held that, because a motion to reinstate must be verified in order to extend the trial court's plenary jurisdiction, a party could not circumvent that requirement by filing an unverified motion for new trial instead.[374] The court rejected the argument that the statement in Rule 165a that the dismissal and reinstatement procedures are cumulative of any other procedures available to the parties[375] permits a party to follow the motion for new trial route.[376] Instead, it concluded that Rule 165a(3)[377] sets forth the exclusive remedy by way of a verified motion to reinstate.[378]

XIV. SEALING OF COURT RECORDS

The San Antonio Court of Appeals decided a pair of cases addressing procedural and substantive issues under Rule 76a[379] during the Survey period.[380] Both cases involved the efforts of a news reporter to unseal court records relating to the settlement of lawsuits arising out of sexual

367. 864 S.W.2d 170 (Tex. App.—Austin 1993, writ denied).
368. *Id.* at 172.
369. 886 S.W.2d 809 (Tex. App.—Dallas 1994, writ requested).
370. TEX. R. CIV. P. 306a(5).
371. *Barrasso*, 886 S.W.2d at 816. The court stated that its opinion should not be construed as requiring the hearing on such a motion to be held within the thirty-day period. *Id.*
372. 875 S.W.2d 702 (Tex. App.—Corpus Christi 1994, orig. proceeding).
373. TEX. R. CIV. P. 165a.
374. *Ramirez*, 875 S.W.2d at 704-05.
375. TEX. R. CIV. P. 165a(4).
376. *Ramirez*, 875 S.W.2d at 705.
377. TEX R. CIV. P. 165a(3).
378. *Ramirez*, 825 S.W.2d at 704.
379. TEX. R. CIV. P. 76a.
380. *See* Fox v. Doe, 869 S.W.2d 507 (Tex. App.—San Antonio 1993, writ denied); Fox v. Anonymous, 869 S.W.2d 499 (Tex. App.—San Antonio 1993, writ denied).

assaults on minors.[381] The court held that the public notices given of the hearings on the requests for a sealing order were adequate, despite the fact that they did not disclose the identities of the parties.[382] Further, the court held that the substantial privacy interest of the minor plaintiffs in concealing their identities clearly outweighed the public interest in open court records.[383] Thus, the court upheld the orders redacting the minors' names from the agreed judgments entered in the two cases.[384]

XV. DISQUALIFICATION AND RECUSAL OF JUDGES

Rule 18a,[385] which governs the disqualification and recusal of judges for cause, provides that a party may file a motion for disqualification or recusal at least ten days before the date set for trial or other hearing.[386] Before proceedings in the case may continue, the judge to whom the motion is directed must either excuse himself or refer the motion to the presiding judge of the district for determination.[387] Courts have repeatedly held that the mandatory "recuse or refer" provision of Rule 18a does not come into play unless the motion to recuse is timely filed.[388] In two cases decided during the Survey period, therefore, trial courts overruled motions to recuse that were filed less than ten days in advance of the scheduled hearing. In each case, however, the court of appeals reversed.[389]

Jamilah v. Bass[390] involved a trial court's order holding an attorney in contempt. After the attorney failed to appear at a scheduled hearing in a divorce action, the trial court ordered the attorney to appear six days later and show cause why she should not be held in contempt for her nonappearance. Upon receiving notice of the show cause hearing, the attorney immediately filed a motion seeking to recuse the judge from the case. The trial court denied this motion without hearing because it failed to comply with the ten day requirement of Rule 18a.[391] The judge then proceeded with the scheduled contempt hearing and held the attorney in contempt. Although the court of appeals acknowledged that a party who fails to comply with the procedural requirements of Rule 18a waives her

381. *Doe*, 869 S.W.2d at 509; *Anonymous*, 869 S.W.2d at 501.
382. *Doe*, 869 S.W.2d at 510-11; *Anonymous*, 869 S.W.2d at 504.
383. *Doe*, 869 S.W.2d at 512; *Anonymous*, 869 S.W.2d at 507.
384. *Doe*, 869 S.W.2d at 512; *Anonymous*, 869 S.W.2d at 507. The court held that redaction was not the equivalent of sealing the judgments, which is prohibited by TEX. R. CIV. P. 76a(1). *Doe*, 869 S.W.2d at 510; *Anonymous*, 869 S.W.2d at 503.
385. TEX. R. CIV. P. 18a.
386. TEX. R. CIV. P. 18a(a).
387. TEX. R. CIV. P. 18a(c).
388. *See, e.g.*, Houston N. Properties v. White, 731 S.W.2d 719, 722 (Tex. App.—Houston [1st Dist.] 1987, writ dism'd); Gonzalez v. Gonzalez, 659 S.W.2d 900, 901-02 (Tex. App.—El Paso 1983, no writ), discussed in Ernest E. Figari, Jr., Thomas A. Graves & A. Erin Dwyer, *Texas Civil Procedure, Annual Survey of Texas Law*, 39 Sw. L. J. 419, 446 (1985).
389. Jamilah v. Boass, 862 S.W.2d 201 (Tex. App.—Houston [14th Dist.] 1993, no writ); Metzger v. Sebak, No. 01-92-00912-CV, 1994 WL 525523 (Tex. App.—Houston [1st Dist.], Sept. 29, 1994, writ requested).
390. 862 S.W.2d 201 (Tex. App.—Houston [1st Dist.] 1993, no writ).
391. *Id.* at 202 n.2.

right to complain of a judge's failure to recuse himself,[392] it nevertheless held that the trial court should have recused himself or referred the motion to the presiding judge under the circumstances.[393] Because the attorney filed her motion to recuse the day after she received notice of the contempt hearing, and less than ten days existed between that date and the date of the hearing, the court concluded that the trial judge had violated his plain duty by deciding the motion himself, which is not an option available under the rule.[394]

Faced with similar facts, the court in *Metzger v. Sebek*[395] decided identically. According to the court, the ten-day requirement of Rule 18a cannot apply if the movant receives less than ten days notice of the hearing from which he seeks to recuse the judge.[396] Any contrary holding would not be reasonable, said the court, because litigants cannot be required to comply with a rule when compliance is impossible.[397] The *Metzger* court also held that none of the following facts constituted a sufficient basis for disqualification or recusal of the trial judge: (1) the judge had once clerked for a participating attorney for the defense, and the judge's son had clerked for another of the defense firms; (2) a defense firm once had invited the judge to a firm outing; (3) the judge had dined previously at a restaurant owned by one of the defense attorneys; and (4) the judge had received campaign contributions from some of the defense firms.[398] The court observed that Rule 18b[399] covers none of these situations, and not one of the alleged grounds of recusal provided good reason to question the trial judge's impartiality.[400]

XVI. DISQUALIFICATION OF COUNSEL

Satellite skirmishes in civil litigation continue to occur over the disqualification of counsel. *Metropolitan Life Insurance Co. v. Syntek Finance Corp.*,[401] a recent decision of the Texas Supreme Court, dealt with the "substantial relationship" test for attorney disqualification based on prior representation of the same or a related client. Rule 1.09 of the Texas

392. *Id.* at 202-03 (citing Watkins v. Pearson, 795 S.W.2d 257 (Tex. App.—Houston [1st Dist.] 1990, writ denied)).

393. *Jamilah*, 862 S.W.2d at 203.

394. *Id.*

395. No. 01-92-00912-CV, 1994 WL 525523 (Tex. App.—Houston [1st Dist.], Sept. 29, 1994, writ requested).

396. *Id.* at *26.

397. *Id.* Although some of the motions from which the plaintiff sought to recuse the judge had been on file for more than ten days before the hearing, this fact did not influence the court's decision. Instead, the court concluded that the plaintiff could treat the motions as potential nullities, and need not move to recuse the judge, until the motions were set for hearing. *Id.*

398. *Id.* at *27.

399. TEX. R. CIV. P. 18b(2) lists those instances in which a judge should recuse himself.

400. *Metzger*, 1994 WL 525523 at *27.

401. 881 S.W.2d 319 (Tex. 1994).

Disciplinary Rules of Professional Conduct[402] provides that a lawyer shall not take a representation that is adverse to a former client if the new matter is the same or a substantially related matter. Reiterating the rule it first announced in *NCNB Texas National Bank v. Coker*,[403] the court in *Syntek* stated that a movant seeking disqualification under the substantial relationship test must prove that the facts of the two representations "are so related that a genuine threat exists that confidences revealed to former counsel will be divulged to a present adversary."[404] The movant apparently attempted to meet this burden by pointing to information used by opposing counsel in the suit that allegedly was disclosed to that counsel in confidence during a prior representation. After reviewing evidence that suggested otherwise,[405] the court held the trial court had not abused its discretion in denying the motion to disqualify based on a determination that "no substantial relationship existed between the current and former representations."[406]

In two cases decided on the same day, the supreme court addressed the standards governing a disqualification motion predicated on the hiring of a nonlawyer employee. *Phoenix Founders, Inc. v. Marshall*[407] involved the attempted disqualification of a law firm that rehired a paralegal who had worked for opposing counsel for only three weeks. Again relying on *Coker*,[408] the court conclusively presumed that confidential information about the case was imparted to the paralegal during her three-week employment because she actually worked on the case during her employment.[409] The court would not conclusively presume, however, that the paralegal shared this confidential information with the other members of her new firm.[410] Instead, the court recognized only a rebuttable presumption that a nonlawyer who switches sides in ongoing litigation will share confidential information acquired at the first firm with members of the new firm.[411] Specifically, the court held that the challenged firm may rebut the presumption "by showing that sufficient precautions have been taken to guard against any disclosure of confidences."[412] Although the court acknowledged that disqualification would always be required in

402. TEX. DISCIPLINARY R. PROF. CONDUCT 1.09(a)(3) (1989), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 1994) (STATE BAR RULES art. X, § 9).
403. 765 S.W.2d 398, 400 (Tex. 1989).
404. *Syntek*, 881 S.W.2d at 320-21.
405. The court observed that there was testimony indicating that the information at issue was available in the public domain and disclosed to opposing counsel by movant during discovery in the current litigation. *Id.* at 321.
406. *Id.*
407. 887 S.W.2d 831 (Tex. 1994).
408. *See Coker*, 765 S.W.2d at 400.
409. *Phoenix Founders*, 887 S.W.2d at 834.
410. *Id.*
411. *Id.*
412. *Id.* at 835. In particular, "the newly-hired paralegal should be cautioned not to disclose any information relating to the representation of a client of the former employer . . . she should be instructed not to work on any matter on which [she] worked during [her] prior employment . . . and the firm should take other reasonable steps to ensure that [she] does not work on any matters on which [she] worked for her prior employer." *Id.*

some circumstances absent the consent of the former employer's client,[413] ordinarily disqualification would not be required as long as " 'the practical effect of formal screening has been achieved.' "[414]

The court in *Phoenix Founders* appeared to draw comfort from the consistency between its view and the decisions of various bar committees on ethics and courts in other jurisdictions.[415] The court believed these decisions were founded on a recognition that paralegals and other nonlawyers should form a mobile workforce.[416] The court thereby seemed to distinguish the situation presented in *Petroleum Wholesale, Inc. v. Marshall*,[417] in which the Dallas Court of Appeals articulated a conclusive presumption that an attorney who has obtained confidential information shares it with other members of her firm.[418] Nevertheless, the decision in *Phoenix Founders* raises serious questions about the continued validity of the decision in *Petroleum Wholesale*.[419]

Grant v. Thirteenth Court of Appeals[420] furnished the court with an immediate opportunity to practice the rules it announced in *Phoenix Founders*. Although the court of appeals in *Grant* employed the rebuttable presumption rule in deciding the case, the supreme court concluded that the intermediate court erred when it held that the presumption had been rebutted simply by evidence that no confidences were actually revealed by the nonlawyer employee.[421] According to the court, the test for disqualification is met by demonstrating a genuine threat of disclosure, not an actual event of disclosure.[422] The court remarked that any rule focusing on actual disclosure would place an unscalable hurdle before the party seeking disqualification, inasmuch as the only persons who know whether confidences were actually shared will typically be the same persons opposing the disqualification.[423] After considering evidence which revealed that the new firm had failed to institute appropriate safeguards like those described in *Phoenix Founders*, the court held that the trial judge had acted properly in granting the motion to disqualify.[424]

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413. For example, when information relating to the representation of the adverse client has in fact been disclosed, or when screening would be ineffective or the nonlawyer necessarily would be required to work on the other side of a matter that is the same as or substantially related to a matter on which the nonlawyer has previously worked. *Id.*

414. *Id.* (quoting *In re* Complex Asbestos Litigation, 232 Cal. App. 3d 572, 283 Cal. Rptr. 732, 746-47 (1991)).

415. *Id.*; *see also* TEX. COMM. ON PROFESSIONAL ETHICS, Op. 472, 55 TEX. B. J. 520 (1992); ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, Informal Op. 1526 (1988).

416. *Phoenix Founders*, 887 S.W.2d at 835.

417. 751 S.W.2d 295, 299 (Tex. App.—Dallas 1988, orig. proceeding).

418. *Phoenix Founders*, 887 S.W.2d at 834.

419. The court expressly declined the opportunity to decide whether *Petroleum Wholesale* was correctly decided, however, or whether it remained viable under the new disciplinary rules which, unlike Canon 9 of the former Texas Code of Professional Responsibility, no longer prohibit the mere appearance of impropriety. *Id.* at 835 & n.1.

420. 888 S.W.2d 460 (Tex. 1994) (per curiam).

421. *Id.* at 462.

422. *Id.*

423. *Id.*

424. *Id.* at 468.

Except in limited circumstances, Rule 3.08(a) of the Texas Disciplinary Rules of Professional Conduct prohibits an attorney from acting as both a lawyer and a witness in the same case.[425] Although the supreme court addressed this ethical rule just last term in *Mauze v. Curry*,[426] courts continue to struggle with its application. In *Koch Oil Co. v. Anderson Producing, Inc.*,[427] for example, the court held consonant with *Mauze* that an attorney had violated Rule 3.08(a) by testifying as both a fact and expert witness in the case, and that the trial court had abused its discretion in failing to disqualify the attorney on the motion of the opposing party.[428] In contrast, the court in *May v. Crofts*[429] refused to mandate that an attorney be disqualified in a probate proceeding in which the opposing party planned to call the attorney as a material fact witness. Although the majority in *May* seemed concerned about the possibility that opposing counsel was attempting to use Rule 3.08(a) as a tactical weapon by calling the attorney as a witness,[430] the dissenting opinion suggests that the need for the attorney's testimony was legitimate.[431]

The careful practitioner faced with the decision of whether to seek disqualification of his opponent should take note of *Vaughan v. Walther*.[432] There the supreme court held that a party had waived his complaint by failing to file his motion to disqualify until six and one-half months after discovering the basis for disqualification.[433]

XVII. MISCELLANEOUS

A. SANCTIONS

Unfortunately, the topic of sanctions continues to receive an undeserved level of attention from the Texas appellate courts. Many of the decisions involve Rule 13, which provides that the signature of an attorney (or a party) on a court filing constitutes a certificate that he has read the filing and it "is not groundless and brought in bad faith, or groundless and brought for the purpose of harassment."[434] *Monroe v. Grider*,[435] a recent decision of the Dallas Court of Appeals, considered the "bad faith" requirement of the rule. First, the court rejected appellant's argument that the definition of "bad faith" under the Texas Deceptive Trade

425. TEX. DISCIPLINARY R. PROF. CONDUCT 3.08(a) (1989), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 1994) (STATE BAR RULES art. X, § 9).

426. 861 S.W.2d 869 (Tex. 1993), discussed in Figari, *1994 Annual Survey*, *supra* note 53, at 1716.

427. 883 S.W.2d 784 (Tex. App.—Beaumont 1994, writ requested).

428. *Id.* at 789.

429. 868 S.W.2d 397 (Tex. App.—Texarkana 1993, orig. proceeding).

430. *Id.* at 399.

431. *Id.* at 400 (Grant, J., dissenting).

432. 875 S.W.2d 690 (Tex. 1994).

433. *Id.* at 691.

434. TEX. R. CIV. P. 13.

435. 884 S.W.2d 811 (Tex. App.—Dallas 1994, writ denied).

Practices Act[436] should apply to Rule 13.[437] Instead, the court concluded that public policy supports a lesser standard for bad faith under Rule 13 than under the DTPA.[438] Second, the court held that a party acts in bad faith for Rule 13 purposes when discovery puts him on notice that his understanding of the facts may be incorrect and he does not thereafter make a reasonable inquiry into the facts supporting a pleading.[439] A party cannot avoid Rule 13 sanctions, said the court, by claiming he was unaware of the facts making his claim groundless, unless he has made the reasonable inquiry mandated by Rule 13.[440]

A trial court may not impose sanctions under Rule 13 except for good cause, and any sanctions order that is entered must include specific findings supporting the court's action.[441] Earlier cases considering the issue have held that a party waives any complaint it might have about the lack of specificity in the sanctions order by failing to timely object to the form of the order in the trial court.[442] The court in *Campos v. Ysleta General Hospital, Inc.*[443] agreed, but suggested that even a half-hearted attempt to call the trial court's attention to the need for particularized findings may be sufficient to avoid waiver.[444] More importantly, the court held that the remedy for a trial court's failure to make the required level of findings is to abate the appeal and remand the case for a short period of time during which the trial court can make particularized findings.[445]

Two cases decided during the Survey period involved sanctions that were imposed in connection with court-ordered mediations. In *Island Entertainment, Inc. v. Castaneda*,[446] the court reversed an order levying sanctions as a result of a party's failure to perform a settlement agreement signed during mediation. "Breach of contract has never been a ground for judicial sanctions," remarked the court, and breach of a settlement contract after mediation is indistinguishable from a breach of contract without mediation.[447] *Hansen v. Sullivan*[448] accords with an earlier

436. TEX. BUS. & COM. CODE ANN. § 17.01-17.46 (Vernon 1987 & Supp. 1995).

437. *Monroe*, 884 S.W. 2d at 818.

438. *Id.* The court observed that the policy behind Rule 13, which is intended to discourage frivolous pleadings, differed from the policy underlying the DTPA, which "prevents courts from easily imposing sanctions that would discourage consumers from suing for deceptive trade practices." *Id.*

439. *Id.*

440. *Id.* at 819; *cf.* Thomas v. Capital Sec. Services, Inc., 836 F.2d 866, 874 (5th Cir. 1988).

441. TEX. R. CIV. P. 13.

442. *See, e.g.*, Booth v. Malkan, 858 S.W.2d 641, 644 (Tex. App. —Fort Worth 1993, writ denied), discussed in Figari, *1994 Annual Survey*, *supra* note 53, at 1685; Bloom v. Graham, 825 S.W.2d 244, 247 (Tex. App.—Fort Worth 1992, writ denied).

443. 879 S.W.2d 67 (Tex. App.—El Paso 1994, writ denied).

444. *Id.* at 70.

445. *Id.* at 71.

446. 882 S.W.2d 2 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

447. *Id.* at 5.

448. 886 S.W.2d 467 (Tex. App.—Houston [1st Dist.] 1994, n.w.h.).

decision by the same court[449] holding that a mediation order requiring "good faith negotiations" is void.[450] The *Hansen* court therefore overturned a trial court's order sanctioning a party for failing to negotiate in good faith at the mediation.[451]

Two additional cases involving sanctions are worthy of note. First, the court in *Masterson v. Cox*[452] held that a trial judge abused his discretion by entering a default judgment against a litigant for her failure to attend a Rule 166[453] pretrial hearing. Unlike *Koslow's v. Mackie*,[454] in which the supreme court upheld a "death penalty" sanction levied under similar circumstances, the aggrieved party in *Masterson* had no notice the pretrial conference was to be a disposition hearing.[455] Finally, in what appears to be a case of first impression, the Amarillo court of appeals held in *Beasley v. Peters*[456] that an attorney-party appearing in a case pro se could not recover attorney's fees as a sanction under Rule 13 because the attorney represented herself and, therefore, did not "incur" any fees.[457]

B. Settlement Agreements

Rule 11[458] provides that no agreement between attorneys or parties in connection with a pending suit will be enforced unless it is made in open court on the record or it is made in writing and filed with the court. As pointed out by the court in *Padilla v. LaFrance*,[459] there has been "considerable confusion, and an abundance of dicta, concerning whether Rule 11 means what it says."[460] Perhaps most troubling about Rule 11, and the issue under consideration in *Padilla*, is whether it extends to written settlement agreements. The majority in *Padilla*, relying on the supreme court's ruling in *Kennedy v. Hyde*,[461] held that settlement agreements are subject to rejection or repudiation, irrespective of whether they are in writing and fully-executed, unless and until they are filed with the court.[462] The dissenting judge took a different view, suggesting that a party to a series of writings that arguably constitutes a contract should not be permitted to arbitrarily repudiate his agreement simply because it refers to a pending lawsuit.[463] The dissent echoes the lament of every

449. Decker v. Lindsay, 824 S.W.2d 247, 250-51 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding) (court cannot force litigants to negotiate during mediation, but only to attend).
450. *Hansen*, 886 S.W.2d at 469.
451. *Id.*
452. 886 S.W.2d 436, 439 (Tex. App. — Houston [1st Dist.] 1994, n.w.h.).
453. Tex. R. Civ. P. 166.
454. 796 S.W.2d 700 (Tex. 1990).
455. *Masterson*, 886 S.W.2d at 439.
456. 870 S.W.2d 191 (Tex. App.—Amarillo 1994, no writ).
457. *Id.* at 196.
458. Tex. R. Civ. P. 11.
459. 875 S.W.2d 730 (Tex. App.—Houston [14th Dist.] 1994, writ granted).
460. *Id.* at 733.
461. 682 S.W.2d 525 (Tex. 1984).
462. *Padilla*, 875 S.W.2d at 734.
463. *Id.* at 735 (Murphy, J. dissenting).

practitioner faced with the dilemma of trying to ensure the validity of a signed settlement agreement while also attempting to prevent the publication of settlement terms that necessarily results from the filing of the settlement document itself. No similar concerns were voiced by the Dallas Court of Appeals in *Stevens v. Snyder*.[464] There the court held that a party who accepts a settlement agreement cannot later arbitrarily withdraw from that agreement.[465] Although it appears the party attempting to withdraw from the settlement in *Stevens* did so before the agreement was filed of record, the court of appeals affirmed a judgment based on the settlement terms.[466] In doing so, the court cited Rule 11 as authorizing the enforcement of settlement agreements, but made no mention of the rule's filing requirement.[467] The supreme court has granted the application for writ of error in *Padilla* and hopefully will resolve the reigning uncertainty exemplified by the court of appeals' opinions in *Padilla* and *Stevens*.

464. 874 S.W.2d 241 (Tex. App.—Dallas 1994, writ denied).
465. *Id.* at 243.
466. *Id.* at 244.
467. *Id.* at 243. The court also relied on TEX. CIV. PRAC. & REM. CODE ANN. § 154.071(a) (Vernon Supp. 1995) because the settlement agreement was signed during a mediation. Rule 11, however, does not appear to differentiate between settlement agreements signed in or out of mediation.