SMU | Dedman School of Law

SMU Law Review

Volume 45
Issue 1 *Annual Survey of Texas Law*

Article 4

January 1991

Civil Procedure

Ernest E. Figari Jr.

A. Erin Dwyer

Donald Colleluori

CIVIL PROCEDURE

by

Ernest E. Figari, Jr., A. Erin Dwyer** and Donald Colleluori****

JUDICIAL decisions and amendments to the Texas Rules of Civil Procedure[1] and the Texas Rules of Appellate Procedure[2] shaped the major developments in the field of civil procedure during the Survey period. This Article examines these developments and considers their impact on existing Texas procedure.

I. JURISDICTION OVER THE SUBJECT MATTER

The most significant development in the area of subject matter jurisdiction was *Tafflin v. Levitt*,[3] a recent decision of the United States Supreme Court, which is destined to increase the caseload of Texas state courts. Overruling the Texas view on the matter,[4] the Court authoritatively held that state

* B.S., Texas A & M University; LL.B., University of Texas; LL.M., Southern Methodist University. Attorney at Law, Dallas, Texas.

** B.A., University of Notre Dame; J.D., University of Texas. Attorney at law, Dallas, Texas.

*** B.A., Dickinson College; J.D., New York University. Attorney at Law, Dallas, Texas.

1. The Texas Supreme Court amended the Texas Rules of Civil Procedure twice during the survey period. Initially, the Texas Supreme Court modified 60 rules, added five new rules, and repealed five rules of civil procedure. These changes became effective September 1, 1990. *See Changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Evidence*, 53 TEX. B.J. 589 (1990). Later, the Texas Supreme Court withdrew three of its earlier amendments, revised the same three rules a second time, and amended one additional rule. This second set of changes became effective retroactively to September 1, 1990. *See Changes to Texas Rules of Civil Procedure and Texas Rules of Appellate Procedure*, 53 TEX. B.J. 1033 (1990).

2. The Texas Supreme Court also amended the Texas Rules of Appellate Procedure twice during the survey period. Initially, the Texas Supreme Court modified 44 rules and added one new rule of appellate procedure. These changes became effective September 1, 1990. *See Changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Evidence*, 53 TEX. B.J. 589 (1990). Subsequently, the Texas Supreme Court withdrew one of the earlier amendments, revised the same rule a second time, and amended one additional rule. This second set of changes became effective retroactively to September 1, 1990. *See Changes to Texas Rules of Civil Procedure and Texas Rules of Appellate Procedure*, 53 TEX. B.J. 1033 (1990).

3. 110 S. Ct. 792 (1990).

4. Before *Tafflin*, appellate courts in Texas unanimously held that state courts do not have subject matter jurisdiction over claims brought under RICO. *See* Greenstein, Logan & Co. v. Burgess Mktg., Inc., 744 S.W.2d 170, 180 (Tex. App.—Waco 1987, writ denied); Main Rusk Assoc. v. Interior Space Constr., Inc., 699 S.W.2d 305, 307 (Tex. App.—Houston [14th Dist.] 1985, no writ); *accord* Chivas Prod. Ltd. v. Owen, 864 F.2d 1280, 1286 (6th Cir. 1988); Cacioppe v. Superior Holsteins III, Ltd., 650 F. Supp. 607, 608 nn.1-2 (S.D. Tex. 1986); Broadway v. San Antonio Shoe, Inc., 643 F. Supp. 584, 586 (S.D. Tex. 1986); Spence v. Flynt, 647 F. Supp. 1266, 1270 (D. Wyo. 1986); Massey v. Oklahoma City, 643 F. Supp. 81, 84

courts have concurrent subject matter jurisdiction with federal courts over civil claims brought under the federal Racketeer Influenced and Corrupt Organizations Act.[5] In *Peek v. Equipment Service Co.*,[6] the Texas Supreme Court answered the question of whether a plaintiff invokes the subject matter jurisdiction of a trial court by filing a petition which fails to allege either a specific amount of damages or that the damages sustained exceed the court's minimum jurisdictional limits. Concluding that the plaintiff's omission of any assertion regarding the amount in controversy did not deprive the court of jurisdiction, the supreme court found that such constituted a pleading defect subject to special exception and amendment.[7]

II. JURISDICTION OVER THE PERSON

The reach of the Texas long-arm statute[8] continues to be the subject of judicial measurement. A recent decision of the United States Court of Appeals for the Fifth Circuit, *Bullion v. Gillespie*,[9] suggests that the statute's reach may be longer in the case of service on a non-resident physician who has caused a resident to suffer adverse medical consequences in Texas. The plaintiff, a Texas resident, suffered from an unusual disorder and, on the recommendation of her Texas physician, contacted a specialist who practiced medicine in California. The plaintiff subsequently traveled to California for examination and treatment by the specialist and, while there, agreed to participate in an experimental treatment program for her disorder. After returning to Texas, the plaintiff received three separate deliveries of an experimental drug which she took under the supervision of her local physician. Her local physician then reported the results to the specialist in California. The plaintiff made a series of payments to the specialist for the medical serv-

(W.D. Okla. 1986); Kinsey v. Nestor Exploration Ltd., 604 F. Supp. 1365, 1370-71 (D.C. Wash. 1985); VanderWeyst v. First State Bank, 425 N.W.2d 803, 812 (Minn.), *cert. denied*, 488 U.S. 943 (1988); Greenview Trading Co. v. Hershman & Leicher, P.C., 108 A.D.2d 468, 489 N.Y.S.2d 502, 504-6 (1985). *Contra* McCarter v. Mitcham, 883 F.2d 196, 201 (3d Cir. 1989); Brandenburg v. Seidel, 859 F.2d 1179, 1193-95 (4th Cir. 1988); Lou v. Belzberg, 834 F.2d 730, 738-39 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988); DuBroff v. DuBroff, 833 F.2d 557, 562 (5th Cir. 1987); County of Cook v. MidCon Corp. 773 F.2d 892, 898 (7th Cir. 1985); Contemporary Servs. Corp. v. Universal City Studios Inc., 655 F. Supp. 885, 893 (C.D. Cal. 1987); Carman v. First Nat'l Bank, 642 F. Supp. 862, 864 (W.D. Ky. 1986); HMK Corp. v. Walsey, 637 F. Supp. 710, 717 (E.D. Va. 1986), *cert. denied* 484 U.S. 1009 (1988); Chas. Kurz Co. v. Lombardi, 595 F. Supp. 373, 381 n.11 (E.D. Pa. 1984); Luebke v. Marine Nat'l Bank, 567 F. Supp. 1460, 1462 (E.D. Wis. 1983); Cianci v. Superior Court, 40 Cal. 3d 903, 908-16, 710 P.2d 375, 376-82, 221 Cal. Rptr. 575, 576-82 (1985); Simpson Elec. Corp. v. Leucadia, Inc., 72 N.Y.2d 450, 461, 530 N.E.2d 860, 866 (1988); Rice v. Janovich, 109 Wash.2d 48, 55, 742 P.2d 1230, 1235 (1987). *See generally* Comment, *Adjudication of Civil RICO Actions - State Courts Get An Offer They Can't Refuse: Lou V. Belzberg* 62 ST. JOHN'S L. REV. 301 (1988); Note, *Civil RICO: The Propriety of Concurrent State Court Subject Matter Jurisdiction* 57 FORDHAM L. REV. 271 (1988); Note, *Concurrent Jurisdiction Over RICO Claims*, 73 CORNELL L. REV. 1047 (1988).

5. 18 U.S.C. §§ 1961-1968 (1988).

6. 779 S.W.2d 802 (Tex. 1989).

7. *Id.* at 805.

8. TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041-45 (Vernon 1986 & Supp. 1991) (formerly TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964) (repealed 1985)).

9. 895 F.2d 213 (5th Cir. 1990).

ices and drugs and, in turn, received related correspondence from the specialist. Subsequently, the plaintiff experienced a worsened condition which she attributed to the experimental drug. She filed suit in Texas against the specialist, alleging medical malpractice and deceptive trade practices, and obtained service under the long-arm statute. The record showed that, while the specialist was licensed to practice medicine in California, she was not licensed in Texas. The record also indicated that the specialist neither solicited the plaintiff as a patient nor traveled to Texas to treat or examine her. Finding these contacts insufficient for jurisdictional purposes, the trial court dismissed the suit for lack of personal jurisdiction and an appeal ensued.

In reversing the dismissal, the opinion of the Fifth Circuit provided procedural and substantive guidance in this area. Rejecting the view that the burden was on the plaintiff to sustain personal jurisdiction by a preponderance of the evidence, the court reiterated that she was only obliged to establish the necessary contacts by a prima facie showing. Acknowledging that key jurisdictional facts were in dispute, the court nevertheless concluded that under the prima facie standard it had to accept as true the plaintiff's evidence that the specialist shipped drugs to her in Texas that proximately caused her injuries. Concluding that the alleged tort took place in whole or part in Texas, the Fifth Circuit cautioned that Texas had an ardent interest in protecting its citizens from unlicensed physicians dispensing harmful experimental drugs.[10]

In *Saktides v. Cooper*,[11] a federal district court applied the "fiduciary shield" principle[12] to determine the amenability of a non-resident employee of a foreign corporation to service under the long-arm statute on the basis of the employee's contacts with the forum state on behalf of the corporation.[13] The plaintiff sued the non-resident employee on several causes of action, effecting service under the long-arm statute and arguing that the court had personal jurisdiction over the defendant employee because of his contacts with Texas as an agent of the corporation. Declining to sustain service, the court reasoned that a corporate agent whose only contact with the forum is through performance of his official duties is not subject to personal jurisdiction in the forum by virtue of such contact.[14]

---

10. The court stated that "Texas has a strong interest in protecting its citizens from allegedly harmful experimental drugs, dispensed by those not licensed to practice within the state." *Id.* at 217.

11. 742 F. Supp. 382 (W.D. Tex. 1990).

12. The fiduciary shield principle provides: "[I]f an individual has contact with a particular state only by virtue of his acts as a fiduciary of the corporation, he may be shielded from the exercise, by that state, of jurisdiction over him personally on the basis of that conduct." Marine Midland Bank v. Miller, 664 F.2d 899, 902 (2d Cir. 1981); *accord* Weller v. Cromwell Oil Co., 504 F.2d 927, 929 (6th Cir. 1974) (jurisdiction over corporation's individual officers cannot be based solely upon jurisdiction over corporation); Wilshire Oil Co. v. Riffe, 409 F.2d 1277, 1281 n.8 (10th Cir. 1969) (even if foreign corporation is subject to service because it transacts business through agents operating in forum state, such agents are not engaged in business so as to allow application of long-arm statue to them as individuals unless agents transact business on their own behalf apart from corporation).

13. 742 F. Supp. at 385-87.

14. *Id.* at 387. Rather, the court concluded that

> [f]rom a policy perspective, it would offend traditional notions of fair play and

The Texas Supreme Court, in *Schlobohm v. Schapiro*,[15] modernized the Texas test governing the determination of personal jurisdiction. Previously, federal decisions[16] concluded that when effecting service under the long-arm statute, due process requirements could be satisfied either "generally"[17] or "specifically."[18] As originally formulated, however, the Texas test did not allow for such requirements to be satisfied "generally" through the use of continuing and systematic contacts unrelated to the asserted claim.[19] Acknowledging that its rulings had not kept pace with evolving federal precedent in the area, the supreme court concluded that, if not modified, its test could convey the false belief that jurisdiction may be based only on the act or transaction of the defendant that gave rise to the cause of action.[20] Accordingly, the supreme court reformulated the Texas test to provide that if the cause of action does not arise from a specific act or transaction, jurisdiction may nevertheless be exercised if the defendant's contacts with Texas are continuous and systematic.[21]

A relatively obscure provision of the Texas long-arm statute[22] received attention during the survey period. Section 17.045 of that statute stipulates that when process is delivered to the Secretary of State for forwarding to a non-resident defendant, the process must contain a statement of the name and address of the non-resident's home or home office to facilitate such forwarding.[23] Two cases, *Lissak v. Health International, Inc.*[24] and *Mahon v.*

> substantial justice to force employees who have had occasion to do business by telephone or mail with any number of given states to require that they defend lawsuits in these states in their individual capacity based on acts performed not for their own benefit, but for the benefit of their employer.

Id.

See Forsythe v. Overmyer, 576 F.2d 779, 783 (9th Cir.), *cert. denied*, 439 U.S. 864 (1978); Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc., 519 F.2d 634, 637 (8th Cir. 1975); Bamford v. Hobbs, 569 F. Supp. 160, 168 (S.D. Tex. 1983); Siskind v. Villa Found. for Educ., Inc., 642 S.W.2d 434, 437 (Tex. 1982). *See generally* Figari, Graves & Dwyer, *Texas Civil Procedure, Annual Survey of Texas Law*, 37 SW. L.J. 289, 292 (1983) (discussing corporate agents' amenability to service).

15. 784 S.W.2d 355 (Tex. 1990).

16. *See* Southmark Corp. v. Life Inv., Inc., 851 F.2d 763, 772-73 (5th Cir. 1988); Smith v. Dainichi Kinzoky Kogyo Co., 680 F. Supp. 847, 852-53 (W.D. Tex. 1988).

17. " 'General jurisdiction' is personal jurisdiction based on a defendant's contacts with the forum that are unrelated to the controversy. To exercise general jurisdiction, the court must determine whether 'the contacts are sufficiently systematic and continuous as to support a reasonable exercise of jurisdiction.' " 851 F.2d at 772 (citation omitted).

18. " 'Specific jurisdiction' . . . is personal jurisdiction based on contacts with the forum that are related to the particular controversy. Even a single purposeful contact may in a proper case be sufficient to meet the requirement of minimum contacts when the cause of action arises from the contact." *Id.* (citation omitted).

19. The supreme court noted that under the Texas test, as originally articulated in O'Brien v. Lampar Co., 399 S.W.2d 340, 342 (Tex. 1966), in order to satisfy due process requirements, the cause of action "must arise from, or be connected with" the nonresident's contacts with Texas. 784 S.W.2d at 358.

20. 784 S.W.2d at 358.

21. *Id.*

22. TEX. CIV. PRAC. & REM. CODE ANN. § 17.045 (a) (Vernon Supp. 1990).

23. *Id.*

24. No. C14-89-00489-CV (Tex. App.—Houston [14th Dist.], Mar. 22, 1990, no writ) (unpublished opinion).

Caldwell, Haddad, Skaggs, Inc.[25] considered this address requirement. Reiterating that the provision requires a statement of the individual's home address when service is sought to be made on an individual defendant,[26] the court in *Lissak* set aside a default judgment because the record showed that process had been forwarded to the individual's former business address.[27]

Mahon arose from a challenge to a default judgment taken against an individual defendant in a suit on a lease. Arguing that the address requirement had been fulfilled, the plaintiff asserted that the lease, which had been introduced into evidence as an exhibit at the default hearing, set forth a business address for the defendant and that this was the address it had supplied to the Secretary of State for forwarding service.[28] During the 1989 Survey period, a court of appeals held the reference to home office in the statute was inapplicable to an individual and that, in the case of a natural person, a home address must be utilized.[29] Apparently overlooking this decision, the *Mahon* court approved the home office reference for use in the case of an individual defendant and upheld the default judgment, reasoning that where a contract provides only one address, such address constitutes the home office of the party.[30]

III. SPECIAL APPEARANCE

Former rule 120a[31], which governed special appearance practice in Texas, has been a source of uncertainty for a party attempting to establish his position on personal jurisdiction at a special appearance hearing. Due to the former rule's failure to specify the type of proof the trial court may receive at a special appearance hearing, the propriety of using pleadings and affidavits for this purpose had been in doubt.[32] Adhering to a strict approach under former rule 120a, the court in *Electronic Data Systems Corp. v. Hanson*[33]

25. 783 S.W.2d 769 (Tex. App.—Ft. Worth 1990, no writ).

26. No. C14-89-00489-CV (Tex. App.—Houston [14th Dist.], Mar. 22, 1990, no writ) (unpublished opinion); *accord* Chaves v. Todaro, 770 S.W.2d 944, 946 (Tex. App.—Houston [1st Dist.] 1989, no writ); Bannigan v. Market St. Dev., Ltd., 766 S.W.2d 591; 593 (Tex. App.—Dallas 1989, no writ).

27. No. C14-89-00489-CV (Tex. App.—Houston [14th Dist.], Mar. 22, 1990, no writ) (unpublished opinion).

28. 783 S.W.2d 771.

29. *See* Chaves v. Todaro, 770 S.W.2d 944, 946 (Tex. App.—Houston [1st Dist.] 1989, no writ).

30. 783 S.W.2d at 771. *But see* Chaves v. Todaro, 770 S.W.2d at 944-46.

31. TEX. R. CIV. P. 120a (1983).

32. *See* Haskell v. Border City Bank, 649 S.W.2d 133, 135 (Tex. App.—El Paso 1983, no writ) (affidavits are inadmissible hearsay); Main Bank & Trust v. Nye, 571 S.W.2d 222, 223 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.) (court's research disclosed no cases ruling on admissibility of affidavits at special appearance hearings). In contrast, when an objection to personal jurisdiction is asserted in federal court, affidavits and uncontroverted pleadings represent a proper method of proof. *See, e.g.*, D.J. Investments, Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc., 754 F.2d 542, 546 (5th Cir. 1985) (uncontroverted allegations in the plaintiff's complaint must be taken as true for jurisdictional purposes); Edwards v. Associated Press, 512 F.2d 258, 262 n.8 (5th Cir. 1975) (appropriate to consider affidavits when resolving jurisdictional disputes); O'Hare Int'l Bank v. Hampton, 437 F.2d 1173, 1176 (7th Cir. 1971) (courts may receive and weigh affidavits when considering jurisdictional challenge).

33. 792 S.W.2d 506 (Tex. App.—Dallas 1990, no writ).

disallowed the use of either pleadings or affidavits at special appearance hearings.[34] Modernizing this aspect of the practice, rule 120a was amended effective September 1, 1990 to permit the trial court to determine a special appearance on the basis of pleadings and affidavits, as well as the results of discovery and oral testimony.[35] If affidavits are used at a special appearance, however, the amended rule requires that such affidavits must be served at least seven days before the hearing, be made on personal knowledge, set forth specific facts that would be admissible in evidence, and show affirmatively that the affiant is competent to testify.[36] In the event the party opposing the special appearance can demonstrate that he cannot present facts essential to justify his opposition by affidavit, the trial court may order a continuance to allow the opposing party adequate time to obtain affidavits, depositions or conduct discovery. The trial court may also make such other orders, as are just.[37] As a safeguard, amended rule 120a further provides that if the trial court concludes that any affidavits presented are made in bad faith, the court may impose rule 13 sanction for the filing of a groundless pleading.[38] Despite these important changes to rule 120a, the advisory comment makes it clear that the amendments preserve prior Texas practice of placing the burden of proof on the party contesting the court's jurisdiction.[39]

The trial practitioner representing a nonresident defendant at a special appearance hearing in state court should be aware of the implications of *General Electric Co. v. Brown & Ross International Distributors, Inc.*.[40] Reiterating that a non-resident defendant has the burden of proof at a special appearance hearing,[41] the court emphasized that this burden forces the non-

34. *Id.* at 508.

35. *See* TEX. R. CIV. P. 120(3); *see also* Carlson, *Procedure Update: 1990 Amendments to Texas Rules of Civil Procedure and Appellate Practice*, 9 ADVOC. 223, 227 (Oct. 1990).

36. TEX. R. CIV. P. 120a(3). It appears that these affidavit requirements were borrowed from rule 166a which governs the use of affidavits in the summary judgment context. TEX. R. CIV. P. 166a(e) stipulates that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify." As a result, case law discussing the standards applicable to summary judgment affidavits should provide guidance respecting the use of affidavits in the special appearance area.

37. TEX. R. CIV. P. 120a(3); *see* Carlson, *supra* note 35 at 227. This aspect of amended rule 120a was also derived from summary judgment practice under rule 166a. TEX. R. CIV. P. 166a(f) provides "should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

38. *See* TEX. R. CIV. P. 13. Similarly, a provision in rule 166a authorizes the imposition of sanctions for affidavits which have been submitted "in bad faith or solely for the purpose of delay." *See* TEX. R. CIV. P. 166a(g).

39. TEX. R. CIV. P. 120a (advisory comment).

40. No. 01-89-0369-CV (Tex. App.—Houston [1st Dist.], May 31, 1990, no writ) (opinion not yet reported).

41. *Id.*; *see, e.g.*, Siskind v. Villa Found. for Educ., Inc., 642 S.W.2d 434, 438 (Tex. 1982) (defendant must negate all bases of personal jurisdiction); Hoppenfeld v. Crook, 498 S.W.2d 52, 55 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.) (burden of proof and persuasion on nonresident defendant); Taylor v. American Emery Wheel Works, 480 S.W.2d 26, 31 (Tex. Civ. App.—Corpus Christi 1972, no writ) (nonresident defendant bears burden of pleading and proving lack of jurisdiction). *But see* Familia de Boom v. Arosa Mercantil, S.A., 629 F.2d

resident to adduce evidence negating all bases of personal jurisdiction.[42] In order to prevail at a special appearance hearing, the nonresident defendant must present evidence negating both a specific basis[43] and a general basis[44] for personal jurisdiction.[45]

Rule 120a has always required a party making a special appearance to file a sworn motion prior to any other pleading or motion.[46] As originally enacted, rule 120a did not provide for an amendment of the special appearance motion to correct a deficiency.[47] Consequently, the filing of an unsworn motion constituted a general appearance which subjected the movant to the court's jurisdiction for all purposes.[48] Later versions of rule 120a, however, permitted amendments to special appearance motions to cure such defects.[49] Focusing on this advancement in the rule, earlier cases[50] concluded that rule 120a permitted an amendment to supply a verification of the motion. Recently, *Villalpando v. De La Garza*[51] considered the situation where the de-

---

1134, 1138 (5th Cir. 1980) (if defendant challenges jurisdiction, plaintiff has burden of proof), *cert. denied*, 451 U.S. 1008 (1981); Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 490 (5th Cir. 1974) (party invoking personal jurisdiction has burden of proof); Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228, 1232 (5th Cir. 1973) (plaintiff must establish prima facie showing that long-arm statute satisfied).

42. No. 01-80-00369-CV (Tex. App.—Houston [1st Dist.], May 31, 1990, no writ) (opinion not yet reported); *accord* Zac Smith & Co. v. Otis Elevator Co., 734 S.W.2d 662, 664 (Tex. 1987), *cert. denied*, 484 U.S. 1063 (1988) ("[I]t is incumbent upon the nonresident defendant to negate all bases of personal jurisdiction").

43. "Specific" personal jurisdiction exists when the cause of action relates to the defendant's contacts with the forum and those contacts were occasioned by the defendant's purposeful conduct. *See also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980) (defendant must have clear notice that its acts may support personal jurisdiction); Bearry v. Beech Aircraft Corp., 818 F.2d 370, 374 (5th Cir. 1987) (defendant subject to personal jurisdiction if it invokes benefits and protection of forum state's laws). A plaintiff cannot, by its conduct alone, establish the requisite minimum contacts. *World-Wide Volkswagen*, 444 U.S. at 298 (citing Hanson v. Penchla, 357 U.S. 235, 253 (1958)).

44. "General" personal jurisdiction exists when the cause of action does not relate to the defendant's purposeful conduct within the forum, but the defendant's contacts with the forum are continuous and systematic. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-17 (1984) (general personal jurisdiction requires contacts of continuous and systematic nature); Bearry v. Beech Aircraft Corp., 818 F.2d 370, 374 (5th Cir. 1987) (due process demands continuous and systematic contacts for general jurisdiction).

45. No. 01-89-00369-CV (Tex. App.—Houston [1st Dist.], May 31, 1990, no writ) (opinion not yet reported); *Zac Smith & Co.*, 734 S.W.2d at 664; Schlobohm v. Schapiro, 784 S.W.2d 355, 358-59 (Tex. 1990).

46. TEX. R. CIV. P. 120a.

47. TEX. R. CIV. P. 120a (Vernon 1966).

48. *See* Stewart v. Walton Enter., Inc., 496 S.W.2d 956, 959 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.); Austin Rankin Corp. v. Cadillac Pool Corp., 421 S.W.2d 733, 734 (Tex. Civ. App.—Beaumont 1967, no writ).

49. *See* TEX. R. CIV. P. 120a(1). *See generally* Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 30 SW. L.J. 293, 294 (1976) (review of developments in Texas civil procedure).

50. *See* Stegall & Stegall v. Cohn, 592 S.W.2d 427, 429 (Tex. Civ. App.—Fort Worth 1979, no writ) (record did not support plaintiff's contention that defendants waived their special appearance by failing to seek a hearing on the motion to dismiss); Dennett v. First Continental Inv. Corp., 559 S.W.2d 384, 385 (Tex. Civ. App.—Dallas 1977, no writ) (special appearances may be amended to cure defects); *cf.* Duncan v. Denton County, 133 S.W.2d 197, 198 (Tex. Civ. App.—Fort Worth 1939, writ dism'd) (amendment of unsworn controverting affidavit to add verification permitted).

51. 793 S.W.2d 274 (Tex. App.—Corpus Christi 1990, no writ).

fendant filed an unsworn motion but failed to amend such motion prior to the special appearance hearing and supply the required verification. Finding a waiver in such instance, the appellate court concluded that the defendant's failure to cure the defect prior to the hearing, even in the absence of a special exception or objection, constituted a general appearance and submitted the defendant to personal jurisdiction.[52]

IV. SERVICE OF PROCESS

The Supreme Court of Texas rendered a sharply divided opinion in *Higginbotham v. General Life & Accident Insurance Co.*,[53] and opened a Pandora's box of procedural ills. Former article 3.64 of the Texas Insurance Code,[54] which applied to the issue in question, authorized service on a domestic insurance company at the home offices of the company during business hours.[55] The plaintiff effected service on the two defendants, both of whom were domestic insurance companies, by leaving process at their home office on a specified date "at 12:01 o'clock p.m." On the basis of this service, the trial court entered a default judgment against the defendants. The defendants subsequently sought to set the default judgment aside by filing a motion for new trial. The trial court conducted a hearing on the motion and, after receiving evidence, denied the motion and entered an order finding that service was proper under the statute. Noting that nothing in the record indicated that the specified time of service was during the defendants' "business hours," the court of appeals found that the plaintiff did not comply with the applicable statute and thus set aside the default judgment.[56] The supreme court, however, relied on the evidence adduced at the hearing on the motion for new trial to conclude that the omission had been corrected after-the-fact. The majority held the trial court's order denying a new trial was "tantamount to a formal amendment of the return of citation" under rule 118,[57] and therefore, the record sufficiently showed valid service.[58] Suggesting that the majority "cavalierly" changed Texas law[59] with its "remark-

52. *Id.* at 276.

53. 796 S.W.2d 695 (Tex. 1990) (5-4 decision).

54. TEX. INS. CODE ANN. art. 3.64 (Vernon 1981), *repealed*, Act of April 30, 1987, ch. 46, § 12, 1987 Tex. Gen. Laws 179, 188.

55. *Id.*

56. *See* General Life & Accident Ins. Co. v. Higginbotham, 750 S.W.2d 19, 21 (Tex. App.—Fort Worth 1988), *rev'd*, 796 S.W.2d 695 (Tex. 1990). *See generally* Figari, Graves & Dwyer, *Texas Civil Procedure, Annual Survey of Texas Law*, 43 SW. L.J. 485, 492 (1989) (review of developments in Texas civil procedure).

57. 796 S.W.2d at 697. TEX. R. CIV. P. 118 provides that "[a]t any time in its discretion and upon such notice and on such terms as it deems just, the court may allow any process or proof of service thereof to be amended . . . ." It should be noted that the hearing before the trial court related to the defendants' motion for new trial and, as a result, they had no warning or notice that an amendment of the deficient return would arise from such hearing. *See* 796 S.W.2d at 696. Indeed, when the trial court entered its order denying the motion for new trial, it did not even purport to amend the defective return; rather, it was not until the matter came under appellate review by the supreme court that such a view was espoused. *Id.* at 697.

58. *Id.* at 697.

59. *Id.* at 700.

able holding",[60] the dissent forcefully argued that under long-standing Texas precedent evidence received after a judgment to correct process cannot supply necessary information not found in the record when the judge signed the order.[61]

In *Wilson v. Dunn*[62] the supreme court reviewed the propriety of a default judgment obtained on the basis of substituted service. The plaintiff, after having made repeated attempts at personal service on the defendant, filed a motion for substituted service under rule 106.[63] Although rule 106 requires that a motion for substituted service be supported by an affidavit,[64] the plaintiff obtained an order from the trial court authorizing substituted service without such affidavit.[65] Subsequently, the trial court relied on the substituted service and entered a default judgment against the defendant. Upon learning of the default, the defendant filed a motion for a new trial. After a hearing, however, the court denied the motion. On review the supreme court found that the plaintiff's failure to comply with rule 106 and supply the trial court with the required affidavit invalidated the substituted service and necessitated that the default judgment be set aside. Furthermore, although the plaintiff established at the hearing before the trial court that the defendant had notice of the suit, the supreme court nevertheless concluded that actual notice to the defendant, without proper service, was insufficient to give the trial court jurisdiction.[66]

In *Retail Technologies, Inc. v. Palm City T.V., Inc.*[67] the trial court entered a default judgment against a defendant on the basis of a return of service that was not signed by the service officer. On review of the record an appellate court, emphasizing that rule 107[68] mandates that the service officer sign the return before filing it, held that the omission was fatal to service and set aside the default judgment.[69]

V. PLEADINGS

Several amendments to the Texas Rules of Civil Procedure constituted the most significant developments in the area of pleadings. First, rule 13,[70] which attempts to deter the filing of frivolous pleadings,[71] underwent signifi-

60. *Id.* at 699.
61. *Id.*
62. 800 S.W.2d 833 (Tex. 1990).
63. TEX. R. CIV. P. 106.
64. TEX. R. CIV. P. 106(b).
65. 800 S.W.2d at 833-34.
66. *Id.* at 63.
67. 791 S.W.2d 345 (Tex. App.—Fort Worth 1990, no writ).
68. TEX. R. CIV. P. 107.
69. 791 S.W.2d at 347.
70. TEX. R. CIV. P. 13.
71. *See generally* Benedetto & Keltner, *Changes in Pleading Practices (Including the Frivolous Suit Question)*, 1987 ST. MARY'S NINTH ANNUAL PROCEDURAL INSTUTUTE: CIVIL PROCEDURE 1988—RULES AND STATUTORY CHANGES F-2 to -12 (discussing legislative history, purpose, and effect of rule 13); Carlson, *Procedural Changes Mandated by the 1988 Rule Changes*, 6 ADVOC. 22, 23 (1987) (discussing frivolous suit deterrence purpose of rule 13).

cant changes during the survey period.[72] Rule 13 has always provided that the signatures of attorneys or parties on a court filing certify that they have read it and that the filing "is not groundless and brought in bad faith or groundless and brought for the purpose of harassment."[73] The rule defines groundless as "no basis in law or fact and not warranted by good faith argument for the extension, modification or reversal of existing law."[74] If a party or attorney signs a filing in violation of the rule, the court, upon motion or its own initiative, shall impose sanctions upon the person who signed such filing, a represented party, or both.[75] Originally, the rule clearly empowered the trial court to levy sanctions on its own motion.[76] Furthermore, the rule did not require advance notice to the offending party.[77] As a result, one case during the 1989 survey period had held that prior notice was not required.[78] Amended rule 13 now specifically requires that the trial court defer imposition of sanctions until after notice and a hearing.[79] Further, amended rule 13 now requires that any sanctions imposed be appropriate for the violation.[80]

Former rule 13[81] was ineffective because it provided that a trial court could not impose sanctions if, before the earliest of either the 90th day after the court determined a violation or prior to the expiration of the trial court's plenary power, the offending party withdrew or amended the filing to the satisfaction of the court.[82] Rule 13 was amended to eliminate this ninety day grace period and thereby increase its effectiveness.[83]

---

72. TEX. R. CIV. P. 13.

73. TEX. R. CIV. P. 13; *see also* FED. R. CIV. P. 11 (analogous federal rule governing signing of pleadings). *See generally* 5 Wright & Miller, FED. PRAC. & PROC. §§ 1331-35 (2d Ed. 1990) (discussing federal analogous to TEX. R. CIV. P. 13).

74. TEX. R. CIV. P. 13. Two filings, however, are exempt from the scope of the rule 13. Specifically, the rule provides that neither a general denial nor the amount requested for damages in a pleading may constitute a violation. *Id.*

75. TEX. R. CIV. P. 13. It should be noted that one case during the survey period clarified that former rule 13 does not apply to a nonparty. *See* Texas Att'y Generals Office v. Adams, 793 S.W.2d 771, 775 (Tex. App.—Ft. Worth 1990, no writ). Under Rule 13, the trial court may impose sanctions against the offending party which include disallowance of further discovery, assessment of discovery expenses or taxable costs, establishment of designated facts, refusing to allow the disobedient party to support or oppose claims or defenses, striking pleadings, dismissal of claims, rendition of a default judgment, and contempt. *See* TEX R. CIV. P. 215(2)(b) (miscellaneous sanctions); TEX. R. CIV. P. 215(2)(b)(6) (contempt).

76. TEX. R. CIV. P. 13 (1988).

77. *Id.*

78. Goad v. Goad, 768 S.W.2d 356, 358 (Tex. App.—Texarkana 1989, writ denied), *cert denied*, 110 S. Ct. 722, (1990).

79. TEX. R. CIV. P. 13; *see* Carlson, *supra* note 35, at 224.

80. TEX. R. CIV. P. 13.

81. TEX. R. CIV. P. 13.

82. *Id.* Focusing on this aspect of the rule, a court during a prior survey period held rule 13 did not impose on the trial court the burden of notifying the litigant of his right to withdraw or amend the offending pleading. *See* Cloughly v. NBC Bank-Seguin, 773 S.W.2d 652, 656-57 (Tex. App.—San Antonio 1989, writ denied).

83. *See* TEX. R. CIV. P. 13; Carlson, *supra* note 35, at 224; *see also* FED. R. CIV. P. 11 (analogous federal rule governing signing of pleadings). *See generally* 5 Wright & Miller, FED. PRAC. & PROC. §§ 1331-35 (2d Ed. 1990) (discussing federal rule analogous to amended TEX. R. CIV. P. 13).

The rules[84] setting forth service requirements with respect to pleadings have been consolidated into amended rule 21.[85] Reverting to earlier practice, all instruments filed with the clerk must now be served on all parties, not just adverse parties.[86]

Rule 21a, which authorizes various methods for serving filings, was amended to keep pace with advancing technology. The rule now provides that service may be effected by "telephonic document transfer."[87] In an effort to avoid an aggressive use of this method of service, however, the rule further provides that telephonic document transfer service after 5:00 p.m. local time of the recipient shall be deemed served on the next day.[88] To aid practitioners in the use of this new method of service, the court now requires all filings to provide, if available, attorney telecopier information.[89]

Furthermore, rule 45[90] was amended to permit a copy of a pleading to be filed with the clerk, presumably by fax if desired.[91] When a pleading is required to be verified,[92] however, the amended rules nevertheless permit a copy to be filed with the clerk[93] and served on the other parties to the litigation,[94] provided the party making the filing maintains the signed original for inspection by the court or any party, should a question be raised as to its authenticity.[95] Finally, new rule 21b authorizes the trial court, after notice and hearing, to impose certain sanctions against a party who fails to serve filings in accordance with the rules.[96]

Taking a cue from a recent case,[97] which recognized modern technology at the courthouse, the Texas Supreme Court amended rule 26.[98] The amended rule allows the court clerk to keep a court docket in a permanent record,[99] such as on a computer system, rather than in a bound book as the former rule required.[100]

Former rule 63 of the Texas Rules of Civil Procedure provided that parties may amend their pleadings by filing them with the clerk; parties may file any amendment within seven days of the trial date or less only after leave is

84. TEX. R. CIV. P. 72 (1988), 73 (1981).
85. TEX. R. CIV. P. 21; *see* Carlson, *supra* note 35, at 225-26.
86. *Id.*
87. TEX. R. CIV. P. 21a; *see* Carlson, *supra* note 35, at 226.
88. *Id.*
89. TEX. R. CIV. P. 57; *see* Carlson, *supra* note 35, at 226.
90. TEX. R. CIV. P. 45.
91. *See* Carlson, *supra* note 35, at 226.
92. *See* TEX. R. CIV. P. 93, 185, 682, 690.
93. TEX. R. CIV. P. 45; *see* Carlson, *supra* note 35, at 226.
94. *See* TEX. R. CIV. P. 21 & 21a.
95. TEX. R. CIV. P. 45.
96. TEX. R. CIV. P. 21b; *see* Carlson, *supra* note 35, at 226.
97. *See* Gibraltar Sav. Ass'n v. Kilpatrick, 770 S.W.2d 14, 17-18 (Tex. App.—Texarkana 1989, writ denied) ("[t]he fact that the computerized record has not yet been reduced to paper writing does not mean it is not a part of the court record, so long as it is capable of being transcribed").
98. TEX. R. CIV. P. 26.
99. *Id.*
100. TEX. R. CIV. P. 26 (1963).

obtained.[101] Previously, doubt had arisen as to the intended scope of the word "amendment" under rule 63. For instance, troubling issues included whether rule 63 applied to all pleadings after the first in a series or whether rule 63 applied to original pleadings provided they were tendered for filing after a time limit authorized by the rule. One court[102] took a liberal approach to the former rule's interpretation and concluded that an original counterclaim by a defendant, being "supplemental" to the record,[103] was required to be filed within the time allowed by the rule.[104] In an attempt to clarify this area, Texas recently amended rule 63 to require that the trial pleadings of all parties, except those permitted by way of trial amendment, be on file at least seven days before trial unless leave of court permitted later filing.[105]

VI. SEALING OF COURT RECORDS

The presumption at common law is well established that all court records are open to the public.[106] Hence, when a party sought to have court records sealed, such party had to satisfy certain procedural and substantive requirements in order to overcome this presumption of openness.[107] These requirements, being a matter of common law, were not always readily discernable.[108] Apparently aimed at definitizing such requirements, the legislature recently enacted a statute[109] directing the Texas Supreme Court to establish procedures for the sealing of court records. In response to this mandate, the Texas Supreme Court recently adopted rule 76a,[110] which became effective September 1, 1990 and governs the sealing of court records.[111]

---

101. TEX. R. CIV. P. 63 (1961).

102. Brown Lex Real Estate Dev. Corp. v. American Nat'l Bank-South, 736 S.W.2d 205 (Tex. App.—Corpus Christi 1987, writ ref'd, n.r.e.).

103. *Id.* at 206; *accord* Hawkins v. Anderson, 672 S.W.2d 293, 295 (Tex. App.—Dallas 1984, no writ); Claude Regis Vargo Enter. v. Bacarisse, 578 S.W.2d 524, 528 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.); Box v. Associates Inv. Co., 389 S.W.2d 687, 689 (Tex. Civ. App.—Dallas 1965, no writ).

104. 736 S.W.2d at 206.

105. TEX. R. CIV. P. 63; *see* Carlson, *supra* note 35, at 226. It should be noted in passing that one case during the survey period held that the "date of trial" language in the rule refers to the date the case is set for trial and not the date the trial actually begins. *See* Carr v. Houston Business Forms, Inc., 794 S.W.2d 849, 851 (Tex. App.—Houston [14th Dist.] 1990, no writ).

106. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978).

107. *See* Newman v. Graddick, 696 F.2d 796, 802 (11th Cir. 1983) ("proper notice" to the public required); *In re* Knoxville News-Sentinel Co., 723 F.2d 470, 476 (6th Cir. 1983) (public must be allowed a "reasonable opportunity to present their claims").

108. *See* Doggett, *Rule 76a — Sealing of Court Records*, 9 ADVOC. 143 (June 1990).

109. *See* TEX. GOV'T CODE ANN. § 22.010 (Vernon Supp. 1991). The statute provides that "[t]he supreme court shall adopt rules establishing guidelines for the courts of this state to use in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed." *See also* Carlson, *supra* note 35, at 226.

110. TEX. R. CIV. P. 76a; *see generally* Doggett, *supra* note 108, at 143-48; Carlson, *supra* note 35, at 226-27.

111. The Texas Supreme Court adopted rule 76a over the dissent of two justices who described the rule as the most controversial of any in the history of the court. *See Changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure and Texas Rules of Civil Evidence*, 53 TEX. B.J. 589, 590 (1990).

A. Scope of Application

Rule 76a applies to suits filed after its effective date or to court records filed or exchanged after that date in suits pending on its effective date.[112] Court records, for purposes of the rule, mean any and all documents filed in connection with any matter before any civil court[113] as well as any settlement agreements and discovery not filed of record, which concern matters that have "a probable adverse effect upon the general public health or safety, . . . the administration of public office, . . . or the operation of government."[114] The definition of court records contained in the rule, however, expressly excludes documents filed en camera to obtain a discovery ruling, documents to which access is restricted by law, or documents filed in an action under the Texas Family Code.[115]

B. Procedural Requirements

Under the practice at common law, before any sealing could take place, a party seeking to seal court records had to afford the public both reasonable notice of and an opportunity to be heard in the matter.[116] Codifying the notice requirement, rule 76a requires the movant to post a public notice at the "site where notices for meetings of county governmental bodies are to be posted;" such notice must set forth the date and place of the proposed hearing and the particulars of the case as listed in the rule.[117] Further, immediately after posting such notice, the movant must file a verified copy of it with the clerk of the trial court and with the clerk of the supreme court.[118]

With regard to the second common law requirement, rule 76a mandates that a hearing on a motion to seal court records must be held in open court not less than fourteen days after the movant has filed the motion and posted notice.[119] Apparently continuing the practice under common law, rule 76a stipulates that the hearing on a motion to seal must be held in open court, that is, "open to the public."[120] The rule, however, permits the trial court to inspect records in camera when necessary.[121]

Regarding the evidence to be adduced at a hearing, rule 76a incorporates

112. TEX. R. CIV. P. 76a(9). In this regard, one authority noted that "court records exchanged in those cases [*i.e.*, cases pending on the effective date of the rule] after that date are subject to the rule's provisions *even if covered by a prior sealing or protective order.* Moreover, any motions in a pending case to alter a sealing order that has been issued prior to September 1 are governed by the new rule." Doggett, *supra* note 108, at 146 (emphasis added). Rule 76a expressly states it does not apply to any court records sealed in an action in which a final judgment had been entered before its effective date. TEX. R. CIV. P. 76a(9).

113. TEX. R. CIV. P. 76a(2)(a); *see* Doggett, *supra* note 108, at 144-45.

114. TEX. R. CIV. P. 76a(2)(b),(c).

115. TEX. R. CIV. P. 76A(2)(a)(1),(2),(3).

116. Newman v. Graddick, 696 F.2d 796, 802 (11th Cir. 1983).

117. TEX. R. CIV. P. 76a(3); *see* Carlson, *supra* note 35, at 227; Doggett, *supra* note 108, at 145.

118. TEX. R. CIV. P. 76a(3).

119. TEX. R. CIV. P. 76a(4). *See* Carlson, *supra* note 35, at 227; Doggett, *supra* note 108, at 145.

120. TEX. R. CIV. P. 76a(4).

121. *Id.*

the procedure applicable to the determination of a special appearance under rule 120a.[122] The rule thereby authorizes the use of affidavits in connection with a motion to seal provided they are served at least seven days before the hearing, are made on personal knowledge, show affirmatively that the affiant is competent to testify, and set forth specific facts that would be admissible in evidence.[123] At the conclusion of a properly conducted hearing, if the trial court orders any part of the record to be sealed, the trial court order must specify the court's reasons for finding and concluding whether the required showing has been made, identify the specific portions of the court records to be sealed, and state how long such portion of the court records are to remain sealed.[124]

C. *Substantive Requirements*

Rule 76a reiterates the common law rule that court records "are presumed to be open to the general public."[125] The rule also mandates that court records may be sealed only upon a showing that a specified, serious and substantial interest clearly outweighs both this presumption of openness and any probable adverse effect that sealing will have upon general public health or safety. Further, the movant must demonstrate that no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.[126] Hence, in order to overcome the presumption of openness, a movant under the rule must establish the possession of "a specified, serious, and substantial interest" which clearly outweighs such presumption and that less restrictive means will not protect the specific interest involved.[127]

---

122. *Id.*

123. TEX. R. CIV. P. 120a; *see supra* notes 36-50; Doggett, *supra* note 108, at 145.

124. TEX. R. CIV. P. 76a(6); *see also* Doggett, *supra* note 108, at 145.

125. TEX. R. CIV. P. 76a(1). In this connection one commentator has cautioned that "rule 76a begins with the clear presumption that all civil court records are open to the public. In those *rare* instances when closure should be authorized, a court *must* first satisfy certain substantive and procedural requirements." Doggett, *supra* note 108, at 144 (emphasis added). Another authority discussing the first draft of rule 76a, observed that "the proposed rule begins with the *indisputable presumption* that all civil court records are open to the public." McElhaney & Leatherbury, *An Overview: Proposed Rule 76a*, 54 TEX. BAR J. 340 (1990) (emphasis added). Of course, the common law articulations of the presumption are myriad. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."); Times Herald Printing Co. v. Jones, 717 S.W.2d 933, 938 (Tex. App.—Dallas 1986), *rev'd on other grounds*, 730 S.W.2d 648 (Tex. 1987) ("the presumption of a public right of access to judicial records applies to civil cases as well as criminal cases").

126. TEX. R. CIV. P. 76a(1); *see* Carlson, *supra* note 35, at 227; Doggett, *supra* note 108, at 144.

127. The standard that must be met in order to overcome the presumption of openness has been described at common law using various terms. Regardless of the verbiage used, however, the standard appears to be stringent. *See, e.g.*, Wilson v. American Motors Corp., 759 F.2d 1568, 1571 (11th Cir. 1985) (It must be shown that the denial to access is necessitated by a compelling governmental interest) (citing Globe Newspaper Corp. v. Superior Court, 457 U.S. 596, 606-07 (1982)); *In re* Knoxville News-Sentinel Co., 723 F.2d 470, 476 (6th Cir. 1983) ("Only the most compelling reasons can justify non-disclosure of judicial records"); *In re* National Broadcasting Co., 635 F.2d 945, 952 (2d Cir. 1980) ("Only the most compelling circum-

Garcia v. Peeples[128] a Texas Supreme Court decision during a prior survey period in a discovery context, may provide guidance as to the nature of the showing required to obtain a sealing order under rule 76a. The court reviewed an order issued under former rule 166b,[129] which sealed materials obtained during the discovery process, and emphasized that "a particular and specific demonstration of fact, as distinguished from stereotyped conclusory statements" was essential to justify such an order.[130] Moreover, the court cautioned that "sweeping predictions of injury" and "broad allegations of harm, unsubstantiated by specific examples or articulated reasoning", do not justify such extraordinary relief.[131] The showing required in *Garcia* for obtaining a sealing order as to discovery materials not filed of record would appear to apply with equal force to materials placed of record.[132]

D. Miscellaneous

Rule 76a authorizes the entry of an interim sealing order prior to a full hearing on a motion to seal in specified circumstances.[133] The standard for obtaining an interim sealing order, however, is stringent.[134] Moreover, the issuance of such an order does not reduce in any way the burden of proof of a party at the hearing on the motion.[135]

The rule also modifies the existing practice[136] and states that "[a]ny person may intervene as a matter of right at any time before or after judgment to seal or unseal records."[137] The rule further provides that a trial court issuing a sealing order retains continuing jurisdiction to enforce or modify

---

stances should prevent . . . public access"). The stringent standard may not be satisfied by an agreement among the litigants. *Wilson*, 759 F.2d at 1571 n.4 (agreement of the parties, following the filing of suit, to seal the court record does not outweigh the presumption of openness so as to justify sealing).

128. 734 S.W.2d 343 (Tex. 1987). *See generally* Figari, Graves & Dwyer, *Texas Civil Procedure, Annual Survey of Texas Law*, 42 SW. L.J. 523, 545 (1988).

129. TEX. R. CIV. P. 166b (1984).

130. 734 S.W.2d at 345 (citing United States v. Garrett, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978)).

131. 734 S.W.2d at 345 (citing Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3rd Cir. 1986)).

132. Indeed, TEX. R. CIV. P. 166b(5), which governs the entry of sealing orders in the discovery context, was also amended by the Texas supreme court when rule 76a was adopted. Rule 166b(5) now provides that, whenever a litigant seeks to have discovery sealed or its disclosure limited, the trial court's determination of the matter "[s]hall be made in accordance with the provisions of Rule 76a." In short, the court has decided that the sealing of all court-related materials, whether placed of record or produced privately in the discovery process, should comply with the procedures set forth in new rule 76a. *See* Doggett, *supra* note 108, at 145.

133. TEX. R. CIV. P. 76a(5); *see* Doggett, *supra* note 108, at 145.

134. *See* Doggett, *supra* note 108, at 145.

135. TEX. R. CIV. P. 76a(5).

136. *See* Times Herald Printing Co. v. Jones, 717 S.W.2d 933 (Tex. App.—Dallas 1986), *rev'd on other grounds*, 730 S.W.2d 648 (Tex. 1987); Express-News Corp. v. Spears, 766 S.W.2d 885 (Tex. App.—San Antonio 1989, no writ). *See generally* Doggett, *supra* note 108, at 145 n.18.

137. TEX. R. CIV. P. 76a (7); *see* Doggett, *supra* note 108, at 145.

the order.[138]

Finally, rule 76a grants the right to an interlocutory appeal from rulings in this area. Any order sealing or unsealing court records shall be deemed to be "a final judgment which may be appealed by any party or intervenor who participated in the hearing."[139]

VII. PARTIES

Rule 60[140] sets forth the procedure under which a nonparty may intervene in a suit. Under rule 60 an intervenor is not required to secure the trial court's permission prior to intervening in a suit; instead, any party opposing the intervention has the burden to challenge the intervention by a motion to strike.[141] Faced with a situation where the trial court struck an intervention on its own motion, the supreme court in *Guaranty Federal Savings Bank v. Horseshoe Operating Co.*[142] held that, "[w]ithout a motion to strike, a trial court abuses its discretion in striking an intervention."[143] While rule 60 does not set a deadline by which a nonparty must intervene in a pending suit,[144] the absence of such a time limit has not gone unnoticed. Specifically, the court in *Highlands Insurance Co. v. Lumberman's Mutual Casualty Co.*[145] concluded that, although rule 60 is silent on the matter, an attempt to intervene in a suit after the entry of judgment and during a pending motion for new trial, was not authorized, presumably even in the absence of a motion to strike the intervention.[146] Moreover, since the intervention was impermissible as a matter of law, the court reasoned that the intervenor never became a party to the suit and any appeal taken by the intervenor had to be dismissed for want of jurisdiction.[147]

VIII. DISQUALIFICATION OF JUDGES

Amended rule 18b[148] significantly expands the grounds for recusal of judges. Under the amended rule, judges are still required to recuse themselves in any proceeding[149] in which their impartibility might reasonably be questioned.[150] The rule also still requires recusal in instances where the judge has personal knowledge of disputed evidentiary facts or a personal bias

138. TEX. R. CIV. P. 76a(7); *see* Carlson, *supra* note 35, at 227; Doggett, *supra* note 108, at 145.
139. TEX. R. CIV. P. 76a(8); *see* Carlson, *supra* note 35, at 227; Doggett, *supra* note 108, at 146.
140. TEX. R. CIV. P. 60.
141. *Id.*
142. 793 S.W.2d 652 (Tex. 1990).
143. *Id.* at 657.
144. *See* TEX. R. CIV. P. 60.
145. 794 S.W.2d 600 (Tex. App.—Austin 1990, no writ).
146. *Id.* at 603.
147. *Id.* at 604.
148. TEX. R. CIV. P. 18b.
149. "Proceeding" is defined to include pretrial, trial or other stages of litigation. *Id.* 18b(4)(a).
150. TEX. R. CIV. P. 18b(2)(a).

concerning the subject matter or a party.[151] In addition, a judge should now recuse himself in any proceedings in which (1) he or a lawyer with whom he previously practiced law has been a material witness;[152] (2) he participated as counsel, adviser or material witness in the matter in controversy, or expressed an opinion on the merits while acting as an attorney in government service;[153] (3) he or certain members of his immediate family have a financial interest in the subject matter or a party, or any other interest that might be affected by the outcome of the proceeding;[154] (4) he or other persons having a certain relationship with him, as described in the rule, are witnesses or parties to the proceedings, or are related to the parties or have an interest in the proceedings in the manner set forth in the rule;[155] and (5) he, his spouse, or a person within the first degree of relationship to either of them, or that person's spouse, is acting as a lawyer in the proceeding.[156] The amended rule also includes a definitional section which, among others, establishes detailed guidelines as to what constitutes a "financial interest" for purposes of the rule.[157] Rule 18b imposes a duty on the judge to inform himself about his personal and fiduciary financial interests and to make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children.[158] If a judge does not discover the existence of his or a relative's financial or other interest that would require recusal until after he has devoted substantial time to the matter, the rule does not require recusal if the interest otherwise requiring recusal is divested.[159] In addition, the parties to a proceeding may always waive any ground for recusal after such ground is fully disclosed on the record.[160]

Although rule 18a[161] escaped amendment during the survey period, at least one court grappled with a perceived ambiguity in its language. In *Dunn v. County of Dallas*[162] a divided panel of the Dallas court of appeals reversed a summary judgment entered nearly one year after the trial judge sent a letter communicating his intention to recuse himself from the case.[163] Although the trial judge directed his letter to all parties, as well as the presiding administrative judge of the district, neither party filed a written mo-

151. TEX. R. CIV. P. 18b(2)(b).
152. TEX. R. CIV. P. 18b(2)(c).
153. TEX. R. CIV. P. 18b(2)(d).
154. TEX. R. CIV. P. 18b(2)(e).
155. TEX. R. CIV. P. 18b(2)(f).
156. TEX. R. CIV. P. 18b(2)(g). This last ground of recusal parallels the prohibition contained in TEX. GOV'T. CODE ANN § 82.066 (Vernon Supp. 1991) (attorney may not appear before judge in civil case related to him by affinity or consanguinity within the first degree).
157. TEX. R. CIV. P. 18b(4).
158. TEX. R. CIV. P. 18b(3).
159. TEX. R. CIV. P. 18b(6). The amendment allows divestiture as an alternative to recusal when the grounds for recusal are those set forth in "subparagraphs (2)(e) or (2)(f)(iii)," however, the latter reference is apparently a typographical error. The context of the rule suggests that divestiture would be an appropriate alternative to recusal under the circumstances described in subparagraph (2)(f)(ii), rather than (2)(f)(iii).
160. TEX. R. CIV. P. 18b(5).
161. TEX. R. CIV. P. 18a governs the procedure for disqualification or recusal of judges.
162. 794 S.W.2d 560 (Tex. App.—Dallas 1990, no writ).
163. *Id.* at 561.

tion under rule 18a and the court did not assign another judge to handle the case. Finding neither of these irregularities dispositive,[164] the court of appeals held that the trial court's letter constituted an order of recusal valid and effective at the time the judge signed it.[165] According to the court, rules 18a and 18b impose only two requirements on a judge electing to recuse himself under either rule: (1) an order of recusal and (2) a request to the administrative judge to assign a replacement judge for the proceeding.[166] The majority in *Dunn* concluded that the judge's letter satisfied both requirements because it constituted a clear and unequivocal act of the trial court, not unlike many other acts of a court that are routinely communicated to the parties either orally or by letter.[167] Since rule 18a forbids any further action by a trial judge after he signs an order of recusal, except for good cause, the court of appeals determined that the trial court lacked power to enter the summary judgment once the judge sent the letter of recusal.[168]

In *J-IV Investments v. David Lynn Machine, Inc.*[169] the Dallas court of appeals followed a long line of Texas decisions and refused to require recusal of a trial judge who accepted a campaign contribution from one of the parties' counsel. Citing recent Texas decisions which refused to disqualify trial judges in similar circumstances,[170] the court held that the trial judge had not abused his discretion by deciding that the campaign contribution did not create a bias mandating recusal.[171]

IX. VENUE

Whitson v. Harris[172] addressed the interplay between jurisdictional and venue statutes. The plaintiff in *Whitson* had sustained injuries ostensibly covered by her group health insurance policy. By the time the plaintiff asserted her claim for benefits under the policy, however, her insurance carrier was in receivership. The receiver denied the plaintiff's claim on the basis that her injuries were not covered by the policy; the plaintiff then brought suit in Gray County to collect the policy benefits. The receiver interposed a

164. The court observed that judges may voluntarily recuse themselves under TEX. R. CIV. P. 18b(2), and no motion by either party is a prerequisite to the application of the rule. 794 S.W.2d at 562. The court further noted that the validity of an order is not affected by the fact that further, incidental proceedings may be required to fully effectuate the order. *Id.* at 563. Thus, the presiding judge's failure to assign a replacement judge did not operate in any way to invalidate the "order" of recusal. *Id.*

165. *Id.* at 562.

166. *Id.*

167. *Id.*

168. *Id.* at 563; *see* TEX. R. CIV. P. 18a(c).

169. 784 S.W.2d 106 (Tex. App.—Dallas 1990, no writ).

170. *See* Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 842-45 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) *cert. denied*, 485 U.S. 994 (1988).

171. 784 S.W.2d at 107-08.

172. 792 S.W.2d 206 (Tex. App.—Austin 1990, writ denied).

plea of privilege,[173] arguing that section 3(h) of the Texas Insurance Code[174] was a mandatory venue provision that required the suit to be brought in Travis County, where the receivership was pending. The Gray County district court sustained the receiver's plea and ordered the cause transferred to Travis County.[175] The receiver then successfully moved for summary judgment on the basis that section 3 (h) barred the plaintiff's claim because the plaintiff had not filed the claim in Travis County within three months after receiving the defendant's written notice rejecting the claim.

On appeal from the summary judgment, plaintiff contended that her suit was timely since she commenced the action in Gray County within the three month grace period specified by section 3(h). The court of appeals agreed, holding that section 3(h) was merely a mandatory venue provision, and not a statute circumscribing jurisdiction.[176] According to the court, the statute of limitations is tolled whenever a plaintiff timely files a petition in a court possessing subject matter jurisdiction, even if venue is not proper in that court.[177] In dictum, the court acknowledged that a trial court order that purports to transfer venue is void if a jurisdictional statute governs the cause.[178] The court thereby implied that the plaintiff's initial filing in Gray County would not have tolled the statute of limitations if section 3(h) were jurisdictional.

Section 15.064(b) of the Civil Practice and Remedies Code provides that improper venue is never harmless error and, as a consequence, is always reversible error.[179] According to the court in *Flores v. Arrieta*,[180] however, this rule does not mandate a reversal of a trial court's erroneous transfer of a case unless venue is improper in the transferee court. In *Flores*, the appellant contended that the trial court erred in transferring the case because venue was proper in the county where appellant commenced her suit. Nevertheless, the appellant conceded on appeal that venue was also proper in the transferee court. Although the court held that the appellant failed to preserve error by providing the court with the required record on appeal,[181] it

173. Prior to their amendment in 1983, the rules of procedure governing venue hearings provided for the filing of a "plea of privilege" as the procedural mechanism for challenging a plaintiff's choice of venue. *See* TEX. R. CIV. P. 84, 86, 87, 88, 89, 93, 120a, 385, 527 (1983). Complementing the legislature's 1983 overhaul of the Texas venue statute, Act of June 17, 1983, ch. 385, § 1, 1983 Tex. Gen. Laws 2119-2124 [now codified at TEX. CIV. PRAC. & REM. CODE ANN. § 15.001-15.100 (Vernon 1986)], the Texas Supreme Court promulgated amended procedural rules in 1983 that eliminated all references to the plea of privilege. *See* Order of June 15, 1983, *reprinted at* 46 TEX. B.J. 858-59 (1983)(special tear-out section).

174. TEX. INS. CODE ANN. art. 21.28, § 3(h) (Vernon Supp. 1990) provides that any action on an insurance claim rejected by a receiver must be brought in the court in which the receivership proceeding is pending within three months after service of the receiver's written rejection notice.

175. The court of appeals subsequently affirmed the district court's order sustaining the receiver's plea of privilege. Whitson v. Harris, 682 S.W.2d 423, 426 (Tex. App.—Amarillo 1984, no writ).

176. 792 S.W.2d at 209.

177. *Id.* at 210.

178. *Id.* at 208 (citing Cleveland v. Ward, 116 Tex. 1, 285 S.W. 1063, 1071 (1926)).

179. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1990).

180. 790 S.W.2d 75 (Tex. App.—San Antonio 1990, writ denied).

181. *Id.* at 76-77.

also noted in an alternative holding that appellant's concession directly contradicted any finding under section 15.064(b) that venue was improper.[182]

The Texas Supreme Court's recently enacted amendments to the rules of civil procedure impacted the venue rules only slightly. The court amended rule 87(3)(a)[183] to clarify that a party is never required to supply proof of the existence of a cause of action for venue purposes. Instead, the parties' pleadings are considered conclusive on the issue of whether a cause of action exists, and the parties' proof should be limited to venue facts.[184]

X. LIMITATIONS

The discovery rule provides that a statute of limitations will not start running until the plaintiff discovers the true facts giving rise to his claimed damage or until the date the plaintiff should have reasonably discovered the facts that establish the cause of action.[185] Over the past two decades Texas courts have steadily expanded the rule's coverage.[186] In *Moreno v. Sterling Drug, Inc.*[187] however, the Texas Supreme Court held that the discovery rule does not apply in a wrongful death action. The appellants in *Moreno* were parents of infants who died of Reye's Syndrome. In the days preceding the deaths, the infants were administered doses of children's aspirin manufactured by the appellee. The parents did not discover the connection between aspirin and Reye's Syndrome until after the infants' deaths. By the time the parents filed their actions against the drug manufacturer, more than two years had expired since the infants' deaths.

The relevant limitations statute provided that a party suing for wrongful death must bring his suit no later than two years after the death of the injured person.[188] Responding to a certified question from the United States Court of Appeals for the Fifth Circuit,[189] the court in *Moreno* held that the discovery rule does not apply to this statute of limitations.[190] In reaching this conclusion, the court observed that the discovery rule served as a judicially constructed test used to determine when a plaintiff's cause of action accrued in cases where the applicable statute of limitations was silent as to

182. *Id.* at 77.

183. TEX. R. CIV. P. 87(3)(a).

184. *Id.*

185. Hays v. Hall, 488 S.W.2d 412, 414 (Tex. 1972) (statute of limitations begins to run from time of discovery of true facts or from date they should have been discovered using ordinary care and diligence); Anderson v. Sneed, 615 S.W.2d 898, 901 (Tex. Civ. App.—El Paso 1981, no writ) (utilizing discovery rule to determine when cause of action accrued). *See generally* Figari, Graves & Gordon, *Texas Civil Procedure, Annual Survey of Texas Law*, 36 SW. L.J. 435, 450 (1982) (discussing discovery rule generally).

186. *See, e.g.*, Willis v. Maverick, 760 S.W.2d 642 (Tex. 1988) (legal malpractice); Kelley v. Rinkle, 532 S.W.2d 947 (Tex. 1976)(filing false and libelous credit report); Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967) (foreign object left in body by surgeon); Atkins v. Crosland, 417 S.W.2d 150 (Tex. 1967) (negligent preparation of tax return by accountant).

187. 787 S.W.2d 348 (Tex. 1990).

188. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(b) (Vernon 1986).

189. TEX. CONST. art. V, § 3-c(a) (Vernon Supp. 1991) confers jurisdiction on the Texas Supreme Court to answer questions of state law certified from a federal appeals court.

190. 787 S.W.2d at 349.

the date of accrual.[191] In contrast, the limitations statute for wrongful death prescribes an absolute limitations period by stating expressly that the cause of action accrues at the date of death.[192] By specifying that date, the legislature foreclosed judicial application of the discovery rule, and the court could not disregard the plain language of the statute or distort the function of the discovery rule by employing it in these circumstances.[193]

The court in *Moreno* also held that the statute of limitations for wrongful death actions did not violate the open courts provision of the Texas Constitution.[194] In order to establish an open courts violation, a litigant must show that he possesses a well-recognized common-law cause of action that is being arbitrarily or unreasonably restricted by statute.[195] If, however, common law does not recognize the cause of action, because the action itself is a creature of statute, then the legislative restrictions placed on the cause of action do not abridge the litigant's constitutional rights.[196] The court determined that the appellants failed to satisfy the first prong of the open courts test because wrongful death actions did not exist at common law but owe their existence to legislative enactments.[197]

The Texas Supreme Court again focused its attention on the discovery rule in *Burns v. Thomas*.[198] The defendant in *Burns*, a lawyer facing a malpractice claim, obtained a summary judgment on the basis of limitations. Although the court of appeals affirmed the summary judgment, the supreme court concluded that the defendant failed to establish by summary judgment proof the date when the plaintiff first discovered, or should have discovered, the existence of his cause of action.[199] Reiterating a statement made the previous year in *Woods v. William M. Mercer, Inc.*,[200] the court announced that a defendant seeking summary judgment on the basis of limitations has the burden of negating the discovery rule.[201] The defendant had argued on appeal that the discovery rule did not apply at all because the trial court granted the summary judgment before the supreme court decided *Willis v.*

191. *Id.* at 351 (citing Weaver v. Witt, 561 S.W.2d 792, 794 (Tex. 1977)).

192. 787 S.W.2d at 351; TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(b) (Vernon 1986).

193. 787 S.W.2d at 354. The court also noted that it refused to engraft a discovery rule on other statutes of limitation that were similarly absolute and specifically defined the date or event which triggered "accrual." *Id.* at 353; *see* Safeway Stores, Inc. v. Certainteed Corp., 710 S.W.2d 544, 546-48 (Tex. 1986); Morrison v. Chan, 699 S.W.2d 205, 208 (Tex. 1985).

194. 787 S.W.2d at 349; TEX. CONST. art. I, § 13 provides "all courts shall be open, and every person for an injury done him, and his lands, goods, person or reputation, shall have remedy by due course of law."

195. 787 S.W.2d at 355; Lucas v. United States, 757 S.W.2d 687, 690 (Tex. 1988).

196. 787 S.W.2d at 355.

197. *Id.* at 356; Witty v. American Gen. Distrib., Inc., 727 S.W.2d 503, 504 (Tex. 1987); TEX. CIV. PRAC. & REM. CODE § 71.002 (Vernon 1986).

198. 786 S.W.2d 266 (Tex. 1990).

199. *Id.* at 267.

200. 769 S.W.2d 515, 518 n.2 (Tex. 1988). According to the court, the decision in *Woods* effectively overruled the court's earlier holding in Smith v. Knight, 608 S.W.2d 165 (Tex. 1980), which placed the summary judgment burden on the party relying on the discovery rule. 786 S.W.2d at 267 n.2.

201. 786 S.W.2d at 267.

Maverick.[202] The supreme court rejected this argument, and pointed to the general rule that its decisions are retrospective in operation.[203]

Three cases decided during the survey period considered the impact of service of process and joinder of parties on the statute of limitations. In *Gant v. DeLeon*[204] the supreme court held that the unexplained failure to serve process on a defendant for more than three years established lack of diligence as a matter of law.[205] Accordingly, the date of service on the defendant did not relate back to the date the plaintiff filed the suit. Therefore, the statute of limitations barred the plaintiff's suit even though plaintiff filed his original petition within the applicable limitations period.[206] Similarly, in *Cothrum Drilling Co. v. Partee*[207] the Eastland court of appeals held a judgment could not be entered against individual partner defendants who were not served with citation within the limitations period.[208] Although the partnership itself was timely served with process in the manner specified by statute,[209] the court ruled that the statute did not authorize a judgment against individual partners who had not been served before the limitation period expired.[210] Finally, in *Matthews Construction Co. v. Rosen*[211] the supreme court held that the filing of suit against a corporation tolls limitations as to a subsequent suit against the alter ego of that corporation.[212] The court disregarded the usual rules of limitations, and drew a parallel to its earlier decision in *Castleberry v. Branscum*.[213] In that case, the court disregarded the usual rules concerning the separate nature of corporate entities, and held that it could act in equity to disregard the usual rules of law in order to avoid an unjust result.[214] According to the court, similar considerations justified tolling the statute of limitations in a second suit against an alter ego where it had prevented satisfaction of the judgment obtained against the corporate defendant in the first suit.[215]

---

202. 760 S.W.2d 642 (Tex. 1988). In *Willis*, the supreme court held for the first time that the discovery rule applied to actions for legal malpractice. *Id.* at 645.

203. 786 S.W.2d at 267 n.1 (citing Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983)). The court further observed that the discovery rule applied to the plaintiff's DTPA claims as well. 786 S.W.2d at 267; *see* TEX. BUS. & COMM. CODE ANN. § 17.565 (Vernon 1987) (DTPA claims must be brought within two years after either date of violation or the date on which consumer discovered or should have discovered the violation).

204. 786 S.W.2d 259 (Tex. 1990).

205. *Id.* at 259.

206. *Id.* at 260; *see* Rigo Mfg. Co. v. Thomas, 458 S.W.2d 180, 182 (Tex. 1970) (plaintiff must not only file suit within the limitations period but must also use diligence to have the defendant served).

207. 790 S.W.2d 796 (Tex. App.—Eastland 1990, writ denied).

208. *Id.* at 800.

209. TEX. CIV. PRAC. & REM. CODE ANN. § 17.022 (Vernon 1986) states that citation served on one member of a partnership authorizes a judgment against the partnership and the partner actually served.

210. 790 S.W.2d at 800.

211. 796 S.W.2d 692 (Tex. 1990).

212. *Id.* at 693.

213. 721 S.W.2d 270 (Tex. 1986).

214. *Id.* at 271-273.

215. 796 S.W.2d at 693-94.

Williams v. Khalaf[216] is probably the most significant of the many decisions regarding limitations that the supreme court handed down during the survey period. The issue in *Williams*, which the court acknowledged was important to the jurisprudence of the entire state,[217] was whether a four-year, or a two-year statute of limitations governs causes of action for fraud. Prior to 1979, it was well-settled that a two year statute of limitations[218] applied to an action for damages based upon fraud or deceit.[219] Although the two-year statute did not expressly mention actions for fraud, the statute applied to actions for debts not evidenced by a writing. Courts consistently classified fraud as such a debt, at least for limitations purposes, due to the historical development of fraud as a quasi-contractual cause of action evolved from assumpsit.[220] On the other hand, a four-year statute of limitations governed actions for a debt evidenced by a writing.[221] In 1979, however, the legislature amended the two statutes to eliminate the distinction between debts evidenced by a writing and other debts, and included all actions for debt under the four-year statute.[222] Although nothing in the legislative history of the amending act suggested that the legislature intended the limitations period for fraud to remain two years,[223] cases decided after 1979 routinely applied the two-year statute of limitations to causes of action for fraud.[224] Moreover, in several decisions involving other types of business torts, the Texas Supreme Court decided that the two-year statute of limitations still applied.[225]

Despite these prior decisions, the *Williams* court ruled that a four-year statute of limitations now governs fraud actions due to the 1979 amendments enacted by the legislature.[226] In doing so, the court adhered to its earlier classification of fraud as a debt for limitations purposes. The court also concluded that the legislature was charged with knowledge of the court's prior holdings regarding this classification when it elected in 1979 to subject all debt actions to a four-year statute of limitations.[227] The court found no inconsistency between its decision in *Williams* and its earlier holdings regarding other business torts because these latter causes of action, like most other torts generally, evolved from the common law action for trespass

---

216. 802 S.W.2d 651 (Tex. 1990).
217. *Id.* at 138.
218. *See* TEX. REV. CIV. STAT. ANN. art. 5526 (codified as TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 1986).
219. *E.g.* Quinn v. Press, 135 Tex. 60, 64, 140 S.W.2d 438, 440 (1940).
220. 802 S.W.2d at 657.
221. TEX. REV. CIV. STAT. ANN. art. 5527 (1925) (codified as TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 (Vernon 1986)).
222. Act of June 13, 1979, ch. 716 § 2, 1979 Tex. Gen. Laws 1768-69.
223. 802 S.W.2d at 657.
224. *See* Hurlbut v. Gulf Atl. Life Ins. Co., 749 S.W.2d 762, 765 (Tex. 1987); Coastal Distrib. Co. v. NKG Spark Plug Co., 779 F.2d 1033, 1038 (5th Cir. 1986).
225. Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988) (legal malpractice); Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 168 (Tex. 1987) (breach of duty of good faith and fair dealing); First Nat'l Bank v. Levine, 721 S.W.2d 287 (Tex. 1986) (unfair competition).
226. 802 S.W.2d at 652.
227. *Id.* at 136.

rather than assumpsit.[228] The court distinguished its two post-1979 amendment decisions that applied a two-year statute to fraud actions by observing that the fraud occurred in each instance more than two years before the legislative amendment and, therefore, the claims were already time-barred by the date the legislature amended the limitations statute.[229] Despite the controversial nature of the *Williams* decision, the issue now appears settled, and intermediate appellate courts have already begun to apply the rule announced in *Williams*.[230]

XI. DISCOVERY

A. Discovery Procedures

In a return to the pre-1988 procedure, rules 167[231] and 168[232] have been amended to require that interrogatories and requests for production, as well as the responses thereto, be filed with the court.[233] While deposition notices still need not be filed, such notices must now identify any persons who will attend the deposition other than the deponent, parties, spouses of parties, and counsel.[234] Hopefully, this new requirement that notice be given, and the concomitant opportunity to seek a protective order, will eliminate squabbles between counsel over attempts to invoke the rule[235] in order to exclude witnesses at depositions.

The Texas Supreme Court came down strongly in favor of a party's right to videotape a deposition in *Masinga v. Whittington*.[236] In *Masinga*, one of the defendants obtained a protective order prohibiting the videotaping of his deposition based solely on his unverified objection that it would be unnecessarily distracting and stressful to him. The supreme court held the trial court abused its discretion in granting the protective order.[237] The court stated that, to avoid the videotaping of a deposition, a party must make a factual showing of a "particular, specific, and demonstrable injury."[238] In a concurring opinion, Justice Doggett elaborated on the role of videotaped depositions in modern litigation and concluded that, at least with respect to a witness who cannot be subpoenaed at trial, a trial court will almost always commit an abuse of discretion in denying the right to videotape a deposition.[239]

---

228. *Id.* at 134-35.
229. *Id.* at 136.
230. *See* Spangler v. Jones, 797 S.W.2d 125, 132 (Tex. App.—Dallas 1990, writ denied) (fraud governed by four-year statute).
231. TEX. R. CIV. P. 167.
232. TEX. R. CIV. P. 168.
233. TEX. R. CIV. P. 167(e); TEX. R. CIV. P. 168.
234. TEX. R. CIV. P. 200(2)(a); TEX. R. CIV. P. 208(1) (depositions upon written questions). If a party other than the party who noticed the deposition intends to have other persons attend, that party too must give reasonable notice to all parties of the identity of those persons. TEX. R. CIV. P. 200(2)(a); TEX. R. CIV. P. 208(l).
235. *See* TEX. R. CIV. P. 267; TEX. R. CIV. EVID. 614.
236. 792 S.W.2d 940 (Tex. 1990).
237. *Id.* at 940.
238. *Id.*
239. *Id.* at 943 (Doggett, J., concurring).

Sherwood Lane Associates v. O'Neill[240] addressed the issue of whether mandamus relief is available to compel a psychiatric examination.[241] A Houston court of appeals concluded that fundamental fairness requires a party to submit to a psychiatric examination if she has put her mental condition in issue and designated her own expert witness to testify to same.[242] Thus, mandamus may compel a trial court to order the examination.[243] According to the concurrence, however, the *O'Neill* holding does not mean that the trial judge must order that the examination be conducted by an expert chosen by the opposing party; if some valid objection to the opposing party's expert exists, the judge has the discretion to appoint an independent expert.[244]

While only a court order may compel a physical or mental examination,[245] rule 166b(2)(h)[246] states that a party may obtain the medical records of a party alleging physical or mental injury "upon written request."[247] In *Kentucky Fried Chicken National Management Co. v. Tennant*[248] the same Houston court of appeals held that such a request is not required to be in any particular form and need not necessarily comply with the specificity requirements of a Rule 167(1)(c)[249] document request.[250]

A trial court may permit a party to withdraw or amend deemed admissions upon a showing of good cause, if the opposing party will not be unduly prejudiced and the merits of the action will be subserved.[251] According to the courts in *Employers Insurance v. Halton*[252] and *Boone v. Texas Employers' Insurance Association*[253] a showing of inadvertence or oversight on the part of the responding party may be sufficient to meet this good cause standard.[254] In reaching this conclusion,[255] both courts relied on case law interpreting the good cause requirement for setting aside default judgments under rule 320.[256] While the result appears to be reasonable, it stands in marked contrast to the recent supreme court authority that stringently interprets the

240. 782 S.W.2d 942 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding).
241. Effective September 1, 1990, Texas Rule of Civil Procedure 167a provides for a court-ordered examination of a party by a psychologist if that party has designated a psychologist as an expert who will testify. This rule modifies the holding of *Coates v. Whittington*, 758 S.W.2d 749, 751 (Tex. 1988), that a party may not be required to submit to an examination by a psychologist, as opposed to a psychiatrist, under old Rule 167a.
242. 782 S.W.2d at 945.
243. *Id.*
244. *Id.* at 945-46 (Dunn, J., concurring).
245. TEX. R. CIV. P. 167a.
246. TEX. R. CIV. P. 166b(2)(h).
247. *Id.*
248. 782 S.W.2d 318 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding).
249. TEX. R. CIV. P. 167(1)(c).
250. *Tennant*, 782 S.W.2d at 320.
251. TEX. R. CIV. P. 169(2).
252. 792 S.W.2d 462 (Tex. App.—Dallas 1990, writ denied).
253. 790 S.W.2d 683 (Tex. App.—Tyler 1990, no writ).
254. *Halton*, 792 S.W.2d at 466-67; *Boone*, 790 S.W.2d at 688-89.
255. *Halton*, 792 S.W.2d at 465-66; *Boone*, 790 S.W.2d at 689.
256. TEX. R. CIV. P. 320; *see generally* Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124, 126 (1939)(unavailablility of personnel responsible to defend was proper ground for setting aside default judgment).

good cause standard in the area of supplementation of discovery responses.[257]

B. Privileges and Exemptions

The Texas Supreme Court addressed the scope of the exemption from discovery for consulting experts during the survey period, by amending the Texas Rules of Civil Procedure and rendering decisions in two mandamus proceedings. Under new rule 166b(3)(b),[258] the identity and opinions of a consulting expert are discoverable if reviewed by a testifying expert.[259] Accordingly, trial courts will not have to decide, as required under the former rule,[260] whether the consulting expert's work product formed a basis, in whole or in part, of the testifying expert's opinions.[261]

In *Axelson, Inc. v. McIlhany*[262] the supreme court answered several questions regarding the scope of the consulting expert privilege, yet may also have raised a number of new questions. The court held that a party may not shield from discovery the factual knowledge and opinions of a participant in the events underlying a lawsuit merely by designating that person as a consulting-only expert.[263] The soundness of this general proposition is evident under the facts of *Axelson*.

The defendants in a gas well blowout case attempted to designate the petroleum engineer in charge of the well from its inception as a consulting expert. The plaintiff's protested such a designation would prevent them from inquiring into the engineer's mental impressions and opinions as a first-hand observer. The supreme court noted the consulting expert exemption extends only to one who has been informally consulted or specially employed in anticipation of litigation.[264] Thus, employees with knowledge by virtue of first-hand involvement in the incident giving rise to the litigation cannot qualify as consulting-only experts because the consultation was not their only source of information.[265] The court left open the possibility that a party may utilize its own employee as a consulting expert in litigation, provided that person did not work in the area that became the subject of the litigation, but was reassigned specifically to assist the employer in anticipation of the litigation.[266]

In addition to explaining the status of these so-called dual capacity witnesses, the *Axelson* court held that the consulting expert exemption protects from discovery only the identity, mental impressions, and opinions of consulting-only experts, but not the facts known to such experts.[267] The opin-

257. *See infra* notes 302-25 and accompanying text.
258. TEX. R. CIV. P. 166b(3)(b).
259. *Id.*
260. TEX. R. CIV. P. 166b(3)(b) (Vernon Supp. 1990).
261. *Id.*
262. 798 S.W.2d 550 (Tex. 1990).
263. *Id.* at 554.
264. *Id.* at 554-55.
265. *Id.*
266. *Id.* at 555.
267. *Id.* at 554 n.8.

ion is unclear whether the court also intended these statements to apply to the paradigmatic consulting-only expert, without the dual capacity wrinkle at issue in *Axelson*.[268] If so, then the trial practitioner faces many new issues in selecting and utilizing consulting experts. For example, if a consulting-only expert prepares a written report for counsel, must the trial court parse the report to segregate what constitutes factual information and what constitutes mental impressions and opinions so as to order production of the former category? Indeed, does the bright line between facts and opinions that the supreme court seems to be drawing even exist, especially in the case of a consulting expert who does her own testing, analysis, or examination as part of the consultation? Moreover, a broad reading of *Axelson* suggests that if a party fortuitously discovers the identity of the opposition's consulting expert, that party is entitled to discover the facts known to the expert through deposition as opposed to an interrogatory seeking disclosure of all material facts. Until future resolution of these and other questions, the practitioner should exercise caution when using consulting experts.

In another consulting expert decision during the survey period, *Scott, Inc. v. McIlhany*[269] the Supreme Court of Texas disallowed an attempt to redesignate certain experts from testifying experts to consulting-only experts.[270] The defendants in *Scott*, through a settlement with certain of the plaintiffs, had gained control of those plaintiffs' expert witnesses who were prepared to give testimony damaging to the defendants. The plaintiffs and defendants redesignated the experts as consulting only. Upon the application of the remaining plaintiffs for mandamus relief, the supreme court held that the redesignation of experts under these facts violated the policy underlying the rules of discovery.[271] The court held that disputes should be decided by the facts that are revealed rather than concealed.[272] Thus, the redesignation was ineffective.[273] A contrary holding, said the court, would do nothing to " 'preclude a party in a multi-party case from in effect auctioning off a witness' testimony to the highest bidder.' "[274]

In *Ginsberg v. Fifth Court of Appeals*[275] the supreme court held that a party could not rely on the psychotherapist-patient privilege[276] offensively, after affirmatively invoking the jurisdiction of the court, to shield relevant information from discovery.[277] Two cases decided during the survey period

268. *Compare id.* at 58 ("The rule we announce today, however, 'should not extend to consulting [only] experts . . . whose only source of factual information was the consultation.' ") (citing Barrow & Henderson, *1984 Amendments to the Texas Rules of Civil Procedure Affecting Discovery*, 15 ST. MARY'S L.J. 713, 729 (1984)), *with Axelson*, 798 S.W.2d 555 ("In any event, a party may discover facts known by an employee acting as a 'consulting-only' expert.").

269. 798 S.W.2d 556 (Tex. 1990).

270. *Id.* at 560.

271. *Id.*

272. *Id.* at 559.

273. *Id.* at 559-60.

274. *Id.* at 559 (quoting Williamson v. Superior Court, 148 Cal. Rptr. 39, 45, 582 P.2d 126, 132 (1978)).

275. 686 S.W.2d 105 (Tex. 1985).

276. TEX. R. CIV. EVID. 510.

277. *Ginsberg*, 686 S.W.2d at 107-08.

reached opposite conclusions regarding the application of the *Ginsberg* sword/shield distinction to claims of attorney-client privilege.

In *Parten v. Brigham*[278] the plaintiff brought a bill of review and suit for partition, alleging she was defrauded into agreeing to a consent divorce decree as a result of her husband's concealment of community assets.[279] Relying on *Ginsberg*, the court prohibited the plaintiff from asserting the attorney-client privilege with respect to communications with her attorney regarding the community estate.[280] While noting that the filing of a lawsuit rarely affects the validity of a claim of attorney-client privilege,[281] the court concluded that under these facts the plaintiff's assertion of the privilege constituted an impermissible offensive use.[282]

Cantrell v. Johnson,[283] on the other hand, presented a more typical example of a plaintiff's invocation of the attorney-client privilege. The defendant in *Cantrell* requested all documents reflecting communications between the plaintiff and his attorney relating to several agreements at issue in the suit. The court held these documents were not discoverable.[284] Although the trial court based its decision on a number of factors, including an express finding both that the plaintiff had not waived the privilege and the withheld documents were not relevant,[285] the court of appeals indicated its doubt that the attorney-client privilege could ever be abrogated under a *Ginsberg* analysis.[286]

Finally, two decisions of note discussed the attorney work product doctrine during the survey period. The court in *Wood v. McCown*[287] while acknowledging that the exemption from discovery for work product developed in a civil case normally terminates at the end of that case,[288] nevertheless refused to compel the production in a civil action of the work product of the attorney who represented the defendant in an already concluded criminal prosecution.[289] In *Leede Oil & Gas, Inc. v. McCorkle*[290] the court held that the work product doctrine did not prohibit the trial judge from ordering the production of excerpts from three documents prepared by the plaintiff's attorneys relating to conferences with a deceased witness.[291] In doing so, however, the court noted that the portions of the documents to be produced did

278. 785 S.W.2d 165 (Tex. App.—Fort Worth 1989, orig. proceeding).
279. *Id.* at 166.
280. *Id.* at 167-68.
281. *Id.* at 168.
282. *Id.*
283. 785 S.W.2d at 185 (Tex. App.—Waco 1990, orig. proceeding).
284. *Id.* at 189-90.
285. *Id.* at 189.
286. *Id.* at 190. ("The *Ginsberg* holding must be limited to the facts of that case and does not control the disposition of this matter. *Ginsberg* has never been applied to the attorney/client privilege by the Texas Supreme Court.").
287. 784 S.W.2d 126 (Tex. App.—Austin 1990, orig. proceeding).
288. *Id.* at 128-29; *see also* Eddington v. Touchy, 793 S.W.2d 335, 336-37 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding) ("none of the investigative privileges protect documents from discovery in litigation separate from the 'pending litigation.' ").
289. *McCown*, 784 S.W.2d at 129.
290. 789 S.W.2d 686 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding) (per curiam).
291. *Id.* at 687.

not give any indication of the mental impressions, opinions, or trial strategy of plaintiff's attorneys.[292]

C. *Procedure for Claiming Privilege or Exemption*

The 1990 amendments to the Texas Rules of Civil Procedure further clarified the procedure for the presentation of objections during discovery and essentially codified the supreme court's decision in *McKinney v. National Union Fire Insurance Co.*[293] a case discussed in the 1990 Annual Survey. Rule 166b(4)[294] now expressly provides that an objection or motion for protective order made by a party to discovery is sufficient to preserve that objection, and the objecting party does not waive the objection by failing to obtain a ruling thereon prior to trial.[295] In addition, the new rule includes a requirement that affidavits offered to support an objection based on any exemption or immunity from discovery be served at least seven days before the hearing on such objection.[296]

Despite the great increase in the number of mandamus actions involving discovery matters in recent years, the supreme court reminded the bench and bar in *Pope v. Stephenson*[297] that the decision not to pursue that extraordinary remedy does not prejudice or waive a party's right to complain of an error in the pre-trial process on appeal.[298] If the appeal route is chosen, the complaining party must show that error was harmful and must, therefore, ensure that any *in camera* documents are brought forward to the court of appeals.[299]

Green v. Lerner[300] is another case of interest to the trial practitioner. In *Green*, the relator argued that the objecting party waived any claim of privilege by failing to identify in its motion for protective order each specific document allegedly exempt from discovery. While the court agreed that rule 166b(4)[301] requires a party to plead specifically the particular exemption or immunity relied upon, the court rejected the relator's contention that an objection to production requires a listing of each of the documents withheld.[302]

---

292. *Id.*

293. 772 S.W.2d 72 (Tex. 1989).

294. TEX. R. CIV. P. 166b(4).

295. *Id.* The supreme court's original amendment to rule 166b(4) contained a caveat that a party could not utilize at trial any matter withheld from discovery pursuant to an objection or motion for protective order, whether ruled upon or not. *See Changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Evidence*, 53 TEX. B.J. 589, 597 (1990). This provision quickly came under criticism, and was deleted (retroactively to September 1, 1990) by an order of the supreme court dated September 4, 1990.

296. TEX. R. CIV. P. 166b(4).

297. 787 S.W.2d 953 (Tex. 1990).

298. *Id.* at 954 n. 1, (disapproving Caudillo v. Chiuminatto, 741 S.W.2d 545, 546 (Tex. App.—Corpus Christi 1987, no writ)).

299. 787 S.W.2d at 954.

300. 786 S.W.2d 486 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding).

301. TEX. R. CIV. P. 166b(4).

302. 786 S.W.2d at 489.

D. Duty to Supplement Discovery

Numerous decisions during the survey period focused on the duty to supplement discovery responses imposed by Rules 166b(6)[303] and 215(5).[304] *Sharp v. Broadway National Bank*[305] evidences that, as in prior years, the supreme court was out in front of the intermediate appellate courts in urging the strict enforcement of the exclusionary sanction against those who fail to supplement timely. In *Sharp*, the trial court permitted the plaintiff to offer the testimony of two expert witnesses on the issue of attorney's fees. The plaintiff, however, had failed to identify either witness in response to the defendants' interrogatories.

The plaintiff argued that the good cause exception to rule 215(5)[306] had been met because (1) the parties had orally identified the attorney's fee experts more than once in advance of trial, (2) defendants' counsel knew the only trial issue was attorney's fees, (3) the parties had deposed one of the experts, and (4) the failure to supplement was inadvertent. The supreme court held that these explanations, either individually or taken together, did not establish good cause to allow the witnesses' testimony.[307] While the supreme court has clearly enunciated a stringent good cause standard, such standard is not insurmountable. For example, in *Stevenson v. Koutzarov*[308] the court found that good cause existed to allow an undisclosed witness to testify where the offering parties asserted they did not know they would need the witness' testimony until the opposing party amended his pleadings ten days prior to trial.[309]

Courts continued to struggle during the survey period with the issue of what types of witnesses must be identified in response to an interrogatory asking for the identity of persons with knowledge of relevant facts. In *Jamail v. Anchor Mortgage Services, Inc.*[310] the appellate court held the trial court did not err in allowing the defendant's corporate representative, who was not identified in its interrogatory answers, to testify generally with respect to lending regulations because he was not a person with " 'knowledge of facts relevant to this cause of action.' "[311] Conversely, in *Orkin Exterminating Co. v. Williamson*[312] the same court upheld the exclusion of the testimony of a records custodian who had not been identified as a person having knowledge of relevant facts.[313]

---

303. TEX. R. CIV. P. 166b(6).
304. TEX. R. CIV. P. 215(5).
305. 784 S.W.2d 669 (Tex. 1990)(per curiam).
306. TEX. R. CIV. P. 215(5).
307. *Sharp*, 784 S.W.2d at 671-72. *See also* Stiles v. Royal Ins. Co. of Am., 798 S.W.2d 591, 596 (Tex. App.—Dallas 1990, writ denied) (letter to opposing counsel insufficient to identify witness).
308. 795 S.W.2d 313 (Tex. App.—Houston [1st Dist.] 1990, writ denied).
309. *Id.* at 318.
310. 797 S.W.2d 369 (Tex. App.—Austin 1990, no writ).
311. *Id.* at 375.
312. 785 S.W.2d 905 (Tex. App.—Austin 1990, writ denied).
313. *Id.* at 910-11. The court also expressed some disagreement with the characterization of the proffered witness as merely a records custodian. *Id.* at 910.

Perhaps the most intriguing issue in the supplementation of discovery answers area, however, is whether the exclusionary sanction should be applied to a party who forgets to designate himself as a person with knowledge of relevant facts. In *Volunteer Council of Denton State School, Inc. v. Berry*[314] the Dallas court of appeals assumed, without deciding, that a party should be precluded from offering her own testimony at trial where she was not identified in response to interrogatories.[315] One Houston court of appeals has taken the contrary position, however, in *NCL Studs, Inc. v. Jandl*[316] and *Henry S. Miller Co. v. Bynum*.[317] Both cases hold that when a party fails to identify himself as a witness, such party may testify even if he cannot show good cause.[318] Finally, the one court that has considered the issue concluded that a party always has the right to examine the opposing party at trial, irrespective of whether the opponent was identified as a person with knowledge in the offering party's interrogatory answers.[319]

Rule 166b(6)[320] requires a party to identify its expert witnesses as soon as is practical, but in no event later than thirty days before trial.[321] The first half of this requirement has received scant attention in the reported case law. The San Antonio court of appeals, however, held that the requirement vests the trial court with the discretion to determine whether a party used due diligence in seeking out and identifying its experts.[322] The Tyler court of appeals recently rejected this interpretation of the practical notification standard in *Mother Frances Hospital v. Coats*.[323] The Tyler court held that, in the absence of a specific order, a party is not required to seek out its experts at any particular time prior to trial.[324] The court did, however, use the as soon as is practical test to exclude expert testimony which the defendants had decided to use almost a full year before supplementing its interrogatory answers.[325]

E. Sanctions

Rule 215(3)[326] was amended in 1990 to provide explicitly that sanctions for abuse of the discovery process may only be imposed after notice and hearing.[327] In *Brighton Square Publishing, Inc. v. Nelson*[328] the court re-

314. 795 S.W.2d 230 (Tex. App.—Dallas 1990, writ denied).
315. *Id.* at 234-35.
316. 792 S.W.2d 182 (Tex. App.—Houston [1st Dist.] 1990, writ denied).
317. 797 S.W.2d 51 (Tex. App.—Houston [1st Dist.] 1990, no writ).
318. *Id.* at 57-58; *Jandl*, 792 S.W.2d at 186.
319. E-Z Mart Stores, Inc. v. Terry, 794 S.W.2d 63, 65-6 (Tex. App.—Texarkana 1990, writ denied).
320. TEX. R. CIV. P. 166b(6).
321. *Id.*
322. Builder's Equip. Co. v. Onion, 713 S.W.2d 786, 788 (Tex. App.—San Antonio 1986, orig. proceeding) (per curiam).
323. 796 S.W.2d 566 (Tex. App.—Tyler 1990, orig. proceeding).
324. *Id.* at 570-71.
325. *Id.* at 571.
326. TEX. R. CIV. P. 215(3).
327. *Id.* The amendment to rule 215(3) also makes it clear that any sanction imposed be "appropriate."
328. 795 S.W.2d 29 (Tex. App.—Houston [1st Dist.] 1990, no writ).

versed a default judgment entered as a sanction under rule 215(2)(b)(5)[329] because the record did not affirmatively show that the trial court afforded the offending party an opportunity to be heard on the motion for sanctions.[330] The court refused to consider the movant's argument that the failure to seek a hearing operated as a waiver of the right to one under the trial court's local rules, since the movant did not provide the court with competent proof of the content of such local rules.[331]

Rule 215[332] grants trial judges broad discretion to impose a variety of sanctions against a party for discovery abuses.[333] In *Lehtonen v. Clarke*,[334] however, the Houston court of appeals held that a trial judge may not impose a sanction that is not expressly authorized by that rule.[335] Specifically, the court concluded that rule 215(2)(b)(5),[336] which authorizes the entry of an order striking pleadings as a sanction, did not empower the trial court to strike a motion for new trial as a sanction for a party's failure to answer post-judgment interrogatories.[337]

During the survey period, the Fort Worth Court of Appeals apparently wrote the last chapter in the sanction proceedings engendered by a litigant's attempt to depose Sam Walton, chairman of Wal-Mart Stores, Inc. This story left off in the 1990 Annual Survey with the court refusing to rule in a mandamus proceeding on the propriety of the multi-million dollar sanctions being assessed against Wal-Mart, because an adequate remedy was available on appeal. In *Carrizales v. Wal-Mart Stores, Inc.*[338] the plaintiff appealed after the newly-elected trial judge withdrew the 11.55 million dollar sanction his predecessor had levied against Wal-Mart. The court of appeals concluded that the new judge had an absolute right to withdraw the sanction order during the period in which he retained plenary jurisdiction over the case.[339]

XII. SUMMARY JUDGMENT

The Texas Supreme Court added a new paragraph to rule 166a[340] during the survey period, which clarifies the procedure for presenting summary judgment evidence to the trial court. Rule 166a(d)[341] now expressly provides that a court may use unfiled discovery as summary judgment evidence if the party relying upon such discovery files and serves on all parties (1)

329. TEX. R. CIV. P. 215(2)(b)(5).
330. *Nelson*, 795 S.W.2d at 31-32.
331. *Id.* at 31.
332. TEX. R. CIV. P. 215.
333. *See* Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-42 (Tex. 1985), *cert. denied*, 476 U.S. 1159 (1986).
334. 784 S.W.2d 945 (Tex. App.—Houston [14th Dist.] 1990, writ denied).
335. *Id.* at 947-48.
336. TEX. R. CIV. P. 215(2)(b)(5).
337. *Clarke*, 784 S.W.2d at 947.
338. 794 S.W.2d 129 (Tex. App.—Fort Worth 1990, writ denied).
339. *Id.* at 130.
340. TEX. R. CIV. P. 166a.
341. TEX R. CIV. P. 166a(d).

either an appendix containing the discovery materials or a notice containing specific references to such materials, and (2) a statement of intent to use the specified discovery as summary judgment proof.[342] The timetable for filing these materials is the same as for the filing of the motion and response, twenty-one and seven days, respectively.[343] At least two Texas courts held prior to the passage of this new rule that, in order to rely upon copies of deposition excerpts as summary judgment evidence, such copies must be properly authenticated by affidavit.[344] The rule is unclear as to whether the new procedure under rule 166a(d)[345] obviates this requirement.[346]

A number of courts during the survey period addressed the sufficiency of summary judgment affidavits, and whether and how a party must object to them. In *Grand Prairie Independent School District v. Vaughan*[347] the supreme court held that the failure to object to a summary judgment affidavit on the ground that such affidavit did not reflect it was made on personal knowledge resulted in a waiver of that complaint on appeal.[348] Conversely, the absence of a jurat on an affidavit constituted a substantive, rather than formal, defect in *Tucker v. Atlantic Richfield Co.*[349] Therefore, the party did not waive the complaint on appeal by failing to bring it to the trial court's attention.[350] The court in *El Paso Associates, Ltd. v. J. R. Thurman & Co.*[351] held that, if an objection is required, such objection must be in writing.[352] Finally, in *Connor v. Waltrip*[353] the court concluded that, as long as a summary judgment affidavit is based on personal knowledge, the affiant need not specifically state that the facts set forth are true.[354]

Texas courts during the survey period also addressed attendance at a summary judgment hearing. In *Lee v. Braeburn Valley West Civic Association*[355]

342. *Id.*
343. TEX. R. CIV. P. 166a(c).
344. *See* Mendez v. International Playtex, Inc., 776 S.W.2d 732, 733 (Tex. App.—Corpus Christi 1989, writ denied); Deerfield Land Joint Venture v. Southern Union Realty Co., 758 S.W.2d 608, 610 (Tex. App.—Dallas 1988, writ denied).
345. TEX. R. CIV. P. 166a(d).
346. Interestingly, the Dallas court of appeals, which first announced the two-step procedure for the use of deposition excerpts in *Deerfield*, whereby the copied pages of the deposition are authenticated by the attorney's affidavit and the court reporter's certificate attests to the accuracy of the transcription, recently held that the failure to include the attorney's affidavit was not fatal. Deer Creek Ltd. v. North Am. Mortgage Co., 792 S.W.2d 198, 201 (Tex. App.—Dallas 1990, no writ). The court stated that *Deerfield* merely announced a suggested method for authenticating deposition excerpts, rather than dictating an exclusive method. *Id.* The Corpus Christi court of appeals, on the other hand, has taken the position that both steps of the authentication process are required when copies of deposition excerpts are submitted. Kotzur v. Kelly, 791 S.W.2d 254, 256 (Tex. App.—Corpus Christi 1990, no writ). Moreover, *Kelly* went on to hold that the opposing party did not waive its right to complain of the lack of the attorney's affidavit on appeal by failing to object in the trial court. *Id.* at 256-57.
347. 792 S.W.2d 944 (Tex. 1990)(per curiam).
348. *Id.* at 945.
349. 787 S.W.2d 555 (Tex. App.—Corpus Christi 1990, writ denied).
350. *Id.* at 557.
351. 786 S.W.2d 17 (Tex. App.—El Paso 1990, no writ).
352. *Id.* at 19.
353. 791 S.W.2d 537 (Tex. App.—Dallas 1990, no writ).
354. *Id.* at 539.
355. 786 S.W.2d 262 (Tex. 1990).

the supreme court held that the defendant was required to file a motion for new trial in order to raise his absence from the summary judgment hearing as an issue on appeal.[356] A motion for new trial was not necessary to preserve the defendant's other complaints regarding the summary judgment, however, and his failure to include them in the motion for new trial was, therefore, irrelevant.[357]

In *Clarke v. Denton Publishing Co.*[358] the Fort Worth Court of Appeals held that a state prisoner was not denied his right of access to the courts as a result of having been refused permission to attend the hearing on a motion for summary judgment filed against him.[359] In reaching this conclusion, the court relied upon the fact that the trial court took the prisoner's written brief into account. In addition, the court noted Rule 166a's[360] prohibition against the introduction of oral testimony at a summary judgment hearing.[361]

XIII. JURY QUESTIONS

During the survey period, the Texas Supreme Court continued to exhort[362] trial courts to follow the mandate of Texas Rule of Civil Procedural 277[363] that jury cases be submitted upon broad form questions whenever feasible.[364] In *Texas Department of Human Services v. E.B.*[365] the supreme court reversed a court of appeals decision that had found fault with a broad form submission in a suit to terminate the parent-child relationship.[366] The court of appeals specifically held as defective the trial court's charge, which asked simply if the parent-child relationship should be terminated, because the applicable statute required the state to establish by clear and convincing evidence one or more specified grounds for termination.[367] Since the state relied upon two possible grounds for termination, the court of appeals held it was impossible to determine from the record if the state discharged its burden of convincing at least ten jurors that one particular ground existed.[368]

The supreme court disagreed with this analysis. In its original opinion in the case, the court stated that the " 'five jurors this/five jurors that' argument" could have been handled by an instruction.[369] On rehearing, the

356. *Id.* at 263.
357. *Id.*
358. 793 S.W.2d 329 (Tex. App.—Fort Worth, 1990, writ denied).
359. *Id.* at 330-31.
360. TEX R. CIV. P. 166a(c).
361. 793 S.W.2d at 330-31.
362. *See* Figari, Dwyer & Colleluori, *Texas Civil Procedure, Annual Survey of Texas Law*, 44 SW. L.J. 541, 573-75 (1990).
363. TEX. R. CIV. P. 277.
364. *Id.*
365. 33 Tex. Sup. Ct. J. 596 (June 20, 1990), *opinion on rehearing*, 802 S.W.2d 647 (Tex. 1990).
366. 802 S.W.2d 647, 649 (Tex. 1990). The 1990 Annual Survey discussed the court of appeals opinion, *E.B. v. Texas Dep't of Human Services*, 766 S.W.2d 387 (Tex. App.—Austin 1989), *rev'd*, 802 S.W.2d 647 (Tex. 1990).
367. 766 S.W.2d at 388-90.
368. *Id.* at 390.
369. 33 Tex. Sup. Ct. J. at 598.

court reaffirmed its holding that the trial court's broad form submission was proper, but deleted the reference to an explanatory instruction.[370] In its place, the court stated that the controlling issue was whether the parent-child relationship should be terminated, not what specific ground or grounds supported the termination.[371]

Two noteworthy decisions during the survey period examined the propriety of a trial judge's instructions to a jury. The first, *American Bankers Insurance Co. v. Caruth*,[372] arose from a trial on the issue of additional damages held after the trial court entered a default judgment as to liability and liquidated damages against the defendant as a discovery sanction. The trial court's charge to the jury included thirty-six paragraphs of "Findings of Fact", which essentially set out the various allegations that had been established against the defendant by virtue of the default judgment. The court of appeals concluded that the inclusion of these recitations constituted an impermissible comment on the weight of the evidence.[373] While a trial judge may assume uncontroverted facts in charging the jury, the information provided in the *Caruth* charge was not designed to assist the jury in answering any question. The information instead implied that the judge thought that the law and facts favored the plaintiffs and that they should be compensated commensurately.[374]

A trial court's instructions and refusal to release a deadlocked jury constituted reversible error in *Shaw v. Greater Houston Transportation Co.*[375] The *Shaw* jury announced on three occasions, with increasing emphasis each time, that they were at an impasse on the issue of damages. Rather than dismiss the jury, however, the trial judge made a number of statements in the nature of a so-called "dynamite" charge. The court of appeals found these statements to be coercive because they clearly indicated that the judge would not allow a hung jury.[376]

XIV. JURY PRACTICE

In *Batson v. Kentucky*[377] the United States Supreme Court held that the prosecution in a criminal case may be required to provide a racially neutral explanation to justify its use of peremptory strikes if the defendant establishes a prima facie case of discrimination.[378] During the survey period, the Fifth Circuit and two Texas courts of appeals held that *Batson* is inapplicable to civil litigation.[379] Each of these decisions rationalized that, unlike a

370. 802 S.W.2d at 648-49.
371. *Id.*
372. 786 S.W.2d 427 (Tex. App.—Dallas 1990, no writ).
373. *Id.* at 435.
374. *Id.*
375. 791 S.W.2d 204 (Tex. App.—Corpus Christi 1990, no writ).
376. *Id.* at 209.
377. 476 U.S. 79 (1986).
378. *Id.* at 92-94.
379. Edmonson v. Leesville Concrete Co., 895 F.2d 218, 219 (5th Cir. 1990)(en banc); Texas Health Enter., Inc. v. Tolden, 795 S.W.2d 17, 18-19 (Tex. App.—El Paso 1990, no writ); Powers v. Palacios, 794 S.W.2d 493, 495 (Tex. App.—Corpus Christi 1990, no writ).

criminal prosecution, a civil lawsuit does not involve state action.[380] In contrast, in *CEJ v. State*,[381] the Dallas court of appeals extended *Batson* to juvenile delinquency trials, which, while classified as civil proceedings, are quasi-criminal in nature.[382]

Employers Insurance v. Horton[383] discussed the constitutional right to a jury trial.[384] As the result of scheduling difficulties, the trial court required the parties, over the defendant's objection, to complete their presentations in one day and further required the jury to begin deliberations late that same evening. The defendant argued that the court did not provide a meaningful trial since the defendant had to present its evidence in the evening hours to a weary jury. While the court of appeals disfavored the practice of holding juries for long periods of time without recess, the appellate court nevertheless found no violation of the defendant's constitutional right to a trial by jury.[385]

In order to obtain a jury trial in Texas, a litigant must request a jury trial and deposit the appropriate jury fee.[386] The decision in *Forscan Corp. v. Dresser Industries, Inc.*[387] should serve as a reminder to trial practitioners that both an express demand and the payment of the fee are essential. In *Forscan*, defendants' counsel sent a letter to the district clerk and enclosed a check that the letter described as representing the jury fee. The appeals court held the trial court properly removed the case from the jury docket because the defendants' cover letter did not represent a sufficient request for a jury.[388]

Texas Employers' Insurance Association v. Guerrero[389] involved an interesting claim of improper jury argument. The appeals court held that references by plaintiff's counsel to unity in his closing argument constituted an impermissible (and incurable) appeal for ethnic solidarity, since the plaintiff, his attorney, his treating physician, and eleven of the twelve jurors had Spanish surnames.[390] Although the court acknowledged that the ethnic references it perceived in *Guerrero* were "veiled and subtle" in comparison to other cases which appealed on the basis of racial prejudice, the court nevertheless concluded that Texas courts must condemn sophisticated arguments of such a nature as readily as those that are open and unabashed.[391]

---

380. *Edmonson*, 895 F.2d at 221-22; *Tolden*, 795 S.W.2d at 18-19; *Powers*, 794 S.W.2d at 495.

381. 788 S.W.2d 849 (Tex. App.—Dallas 1990, writ denied).

382. *Id.* at 852.

383. 797 S.W.2d 677 (Tex. App.—Texarkana 1990, no writ).

384. TEX. CONST. art. I, § 15; art. V, § 10.

385. 797 S.W.2d at 682.

386. TEX. R. CIV. P. 216(a), (b).

387. 789 S.W.2d 389 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

388. *Id.* at 392.

389. 800 S.W.2d 859 (Tex. App.—San Antonio 1990, no writ).

390. *Id.* at 862. In a vigorous dissent, Justice Biery took issue with, among others, the majority's conclusion that these facts alone could give rise to any inference that plaintiff's counsel was attempting to appeal to a sense of ethnic unity among the jurors. *Id.* at 870.

391. *Id.* at 866.

XV. JUDGMENT, DISMISSAL, AND MOTIONS FOR NEW TRIAL

Pursuant to the recent amendments to the Texas Rules of Civil Procedure, rule 301[392] now provides that every judgment shall be set forth in a separate, written document signed by the judge, and that a judgment is not rendered until it is signed by the judge.[393] In addition, rule 305[394] was amended to allow any party, rather than only the prevailing party, to prepare a form of judgment and submit it to the court.[395]

The 1990 amendments also changed the timetable and procedure for filing requests for findings of fact and conclusions of law. Rule 296[396] now provides that, in any non-jury case, a "Request for Findings of Fact and Conclusions of Law" shall be filed with the clerk of the court within twenty days after the judgment is signed.[397] The clerk has a duty to immediately call the request to the attention of the judge who tried the case.[398] The court then has twenty days from the date the request is filed to file its findings and conclusions.[399] If the court fails to file such findings timely, the party making the request may file within thirty days after the filing of the original request a "Notice of Past Due Findings of Fact and Conclusions of Law," which the clerk is again obliged to call immediately to the court's attention. The court's time to file its findings and conclusions is then extended an additional twenty days.[400] Apparently, this new procedure relieves the requesting party of the somewhat ambiguous obligation imposed under old Rule 297 of calling the court's attention to its failure to file timely findings of fact and conclusions of law.

Any party may file requests for additional or amended findings or conclusions within ten days after the court's filing of the original findings and conclusions.[401] The court may then file any additional or amended findings or conclusions it deems appropriate within ten days.[402] Nothing, however, will be deemed or presumed by the court's failure to make additional findings or conclusions.[403] Finally, Texas Rule of Appellate Procedure 41(a)(1)[404] has also been amended to extend a party's time to ninety days in order to perfect an appeal in non-jury cases in which such party has filed a timely request for findings of fact and conclusions of law.[405]

---

392. TEX. R. CIV. P. 301.
393. *Id.* A new rule 299a has also been added. Rule 299a provides that findings of fact shall not be recited in a judgment, and if any finding erroneously contained in a judgment conflicts with a finding of fact made pursuant to rules 297 and 298, the latter shall control for appellate purposes. TEX. R. CIV. P. 299a.
394. TEX. R. CIV. P. 305.
395. *Id.*
396. TEX. R. CIV. P. 296.
397. *Id.*
398. *Id.*
399. TEX. R. CIV. P. 297.
400. *Id.*
401. TEX. R. CIV. P. 298.
402. *Id.*
403. *Id.*
404. TEX. R. APP. P. 41(a)(1).
405. *Id.*

In *Rogers v. Clinton*[406] the Texas Supreme Court held a defendant has an absolute right to withdraw a motion for new trial at any time before it is heard.[407] The attorneys retained by the defendant's insurer filed a motion for new trial to set aside a default judgment that the court entered against the defendant. While this motion was pending, the defendant settled with the plaintiffs by, among other things, assigning to them any claims he had against his insurer. Moreover, just twenty minutes before the court was to hear the motion for new trial, the defendant filed a notice that he was discharging the attorneys hired by his insurer and withdrawing his motion for new trial. The trial court nevertheless heard the motion and set aside the default judgment, and both the plaintiffs and defendant sought mandamus relief.

In a five to four decision, the supreme court held that the district court exceeded its lawful authority and abused its discretion in granting the motion for a new trial.[408] The court rejected the insurer's argument that, once a motion for new trial under rule 329b[409] is timely filed, the trial court's plenary jurisdiction over its judgment is extended beyond thirty days even if a party subsequently withdraws the motion.[410] Instead, the court analogized a defendant's right to withdraw a motion for new trial to a plaintiff's absolute right to nonsuit a case.[411]

XVI. APPELLATE PROCEDURE

A. Rule Amendments

The Texas Supreme Court amended more than forty of the Texas Rules of Appellate Procedure effective September 1, 1990. Although some of these changes were merely cosmetic, and a full discussion of each of the amended rules is beyond the scope of this survey, many amendments merit discussion due to their significance to the appellate practitioner.

1. Service

Rule 4, as amended, expressly permits parties to serve each other by telephonic document transfer.[412] Service by fax is complete, however, only

406. 794 S.W.2d 9 (Tex. 1990).
407. *Id.* at 11.
408. *Id.*
409. TEX. R. CIV. P. 329b.
410. 794 S.W.2d at 11. In a sharp dissent, Justice Cook disputed the majority's interpretation of rule 329b, instead finding within it a clear indication that the trial court retains plenary jurisdiction for a period of thirty days following any form of disposition of a timely motion for new trial. *Id.* at 12-14 (Cook, J., dissenting). Although Justice Cook agreed with the salutory principle of encouraging settlements, which he perceived the majority was focusing upon, he argued that the parties were not free to bargain with the trial court's judgment at a time when the court still had plenary power. *Id.* at 13.
411. *Id.* at 11.
412. TEX. R. APP. P. 4(f). Similarly, the court amended the counterpart rule governing service in the trial court. *See* TEX. R. CIV. P. 21a. The amended appellate rule does not include any provision, however, for filing papers with the appellate court by fax.

upon receipt.[413] The amended rule also obligates each attorney filing papers with an appellate court to include his telecopier number, if any, along with other required identifying information.[414] Prior to its amendment, another section of rule 4 required a filing by mail to be sent at least one day before the filing deadline.[415] Under the amended rule, an appellate filing made by mail will now be deemed timely if it is deposited in the mail on or before the last day for filing and received by the clerk not more than ten days after the filing deadline.[416] Finally, the supreme court modified a number of other appellate rules to require service of all appellate filings, except the record, on every party to the trial court's judgment, because the interests of a non-appealing party may be affected by another party's appeal.[417] For the same reason, appellate court clerks are now required to mail notices and copies of all appellate court orders and opinions to each of the parties to the trial court's judgment.[418]

2. *Timetables on Appeal*

Rules 41 and 54 have been amended to conform the appellate timetables for jury and nonjury cases.[419] In a nonjury case, the appeal bond is now due within ninety days after the judgment is signed if any party has timely filed a request for findings of fact and conclusions of law.[420] In these circumstances, the transcript and statement of facts, if any, must be filed within 120 days after the judgment.[421] The amendments to rules 51 and 53, on the other hand, make clear that a timely request for preparation of the record is not a prerequisite to the court's exercise of appellate jurisdiction.[422] The court will still accept a transcript or statement of facts tendered within the time specified by rule 54(a),[423] even if a party fails to timely request preparation of the statement of facts or to file his designation of matters to be included in the transcript.[424] In the latter situation, however, the failure of the clerk to include matters in the transcript that the dilatory party did not timely designate will not be grounds for complaint on appeal.[425]

Several rule amendments involve the filing of motions for rehearing in the courts of appeal, and their impact on the deadline for an application for writ

413. TEX. R. APP. P. 4(f).
414. TEX. R. APP. P. 4(a). An amendment to TEX. R. CIV. P. 57 requires similar information to be included in any filing made with the trial court.
415. *See* TEX. R. APP. P. 4(b) (Vernon 1989).
416. TEX. R. APP. P. 4(b). A companion amendment to the Texas Rules of Civil Procedure establishes an identical scheme for filings made in the trial court. TEX. R. CIV. P. 5.
417. *See* TEX. R. APP. P. 40a(4), 46(d), 74(q), 131(a), 136(h), 190(b).
418. *See* TEX. R. APP. P. 74(a), 91, 131(a), 132(c), 190(c).
419. TEX. R. APP. P. 41, 54 (comments to 1990 changes).
420. TEX. R. APP. P. 41(a).
421. TEX. R. APP. P. 54(a).
422. *See* TEX. R. APP. P. 51(b), 53(a).
423. TEX. R. APP. P. 54(a) provides that the transcript and statement of facts shall be filed within 60 days after the judgment is signed or, if any party has timely filed a motion for new trial, motion to modify the judgment, or request for findings of fact and conclusions of law, within 120 days after the judgment is signed.
424. TEX. R. APP. P. 51(b), 53(a).
425. TEX. R. APP. P. 51(b).

of error to the supreme court. Amended rule 100(g) empowers the supreme court to review any order of the court of appeals denying a request for an extension of time to file a motion for rehearing in a civil case.[426] Under rule 130, if any party timely files an application for writ of error, any other party entitled to file an application may do so within forty days after the court of appeals has overruled the last motion for rehearing timely filed by any party.[427] If, however, a party prematurely files an application for writ of error, the premature filing does not prevent any other party from filing a motion for rehearing or the court of appeals from considering any subsequently filed motion for rehearing.[428] In these circumstances, the prematurely filed application for writ of error will be deemed to have been filed subsequent to, but on the same date as, the court of appeals' ruling on the last timely filed motion for rehearing.[429]

Finally, the supreme court added a provision to rule 5 that closes a loophole which previously existed in the procedure for implementing the delayed appellate timetables described in the rule.[430] Rule 5(b)(5)[431] now directs the trial court to make a specific finding of the date a party first obtained knowledge of the appealable order so as to fix the date from which the appellate time periods run.

3. *Supreme Court Procedures*

Various rule amendments clarify or refine procedures used in the supreme court. For example, a number of amended rules expressly require that parties file twelve copies of certain instruments with the supreme court.[432] In addition, a party may now obtain an extension of time from the supreme court in which to file a motion for rehearing.[433] Finally, the entire procedure for direct appeals to the supreme court has been modified.[434]

Other rules were amended to reflect the supreme court's actual practices. The rules now provide that in each case the court will determine the appro-

426. TEX. R. APP. P. 100(g).

427. TEX. R. APP. P. 130(c).

428. TEX. R. APP. P. 130(b). The amended rule codifies the holding in Doctors Hosp. Facilities v. Fifth Court of Appeals, 750 S.W.2d 177 (Tex. 1988).

429. TEX. R. APP. P. 130(b).

430. If a party has neither received notice nor acquired actual knowledge of a final judgment or other appealable order within twenty days after the order or judgment was signed, the appellate filing deadlines will not begin to run until the date the party first received notice or obtained knowledge of the judgment's signing. TEX. R. APP. P. 5(b)(4). The commencement date for the appellate periods, however, will in no event begin later than 90 days after the execution of the judgment or order. *Id.*

431. TEX. R. APP. P. 5(b)(5).

432. *See* TEX. R. APP. P. 130(b) (applications for writ of error); TEX. R. APP. P. 160 (motions for extension of time).

433. TEX. R. APP. P. 190(e) authorizes the supreme court to grant an extension of time to file a motion for rehearing if a party files a motion reasonably explaining the need for more time within fifteen days after the motion for rehearing is due. This amendment conforms the supreme court practice to that of the courts of appeals. *See* TEX. R. APP. P. 54(c).

434. *See* TEX. R. APP. P. 140.

priate time periods for oral argument,[435] and that the clerk's office will announce all judgments or decrees of the court.[436] Rule 133 was amended expressly to permit the court to explain its denial of an application for writ of error.[437] By deleting section (b) of the same rule, the supreme court made its review of cases involving conflicts in prior decisions discretionary.[438]

4. *Miscellaneous*

Prior to its amendment, rule 9 provided for the substitution of parties on appeal in the event of a party's death or separation from public office.[439] Section (d) of the rule, which was added by amendment, permits the appellate court to order substitution of a successor party in any other situation that the court decides is necessary or appropriate.[440] The supreme court amended rule 15a,[441] which provides for disqualification and recusal of appellate judges, to almost completely parallel the procedural rule governing recusal of trial judges.[442] Finally, although en banc review of decisions is still disfavored, amended rule 79 authorizes such review whenever consideration by the full court is necessary to secure or maintain uniformity of decisions.[443]

B. Case Authorities

In *Warren v. Triland Investment Group*[444] the supreme court held that, unless an appellant limits an appeal pursuant to rule 40(a)(4),[445] an appellee may complain by cross-point in his brief to the court of appeals of any error in the trial court between the appellant and the appellee without perfecting an independent appeal.[446] The *Warren* decision represents the court's second pronouncement on this issue in less than a year.[447] The careful practitioner should note, however, that this rule for appeals to the intermediate appellate court differs from the rule for appeals to the supreme court. To obtain a different and more favorable judgment in the supreme court than that rendered by the court of appeals, a party must file a timely motion for rehearing and an application for writ of error in the court of appeals.[448]

435. TEX. R. APP. P. 172. Upon the vote of at least six members, the supreme court may also determine that a cause should be submitted without oral argument. TEX. R. APP. P. 170.
436. TEX. R. APP. P. 181.
437. TEX. R. APP. P. 133(a).
438. *See* TEX. R. APP. P. 133(b) (repealed 1990).
439. TEX. R. APP. P. 9(a), (b), (c).
440. TEX. R. APP. P. 9(d).
441. TEX. R. APP. P. 15a.
442. TEX. R. APP. P. 15a explicitly adopted the grounds for disqualification and recusal of trial judges set forth in TEX. R. CIV. P. 18b.
443. TEX. R. APP. P. 79(e). The rule also continues to permit en banc review in extraordinary circumstances. *Id.*
444. 779 S.W.2d 808 (Tex. 1989).
445. TEX. R. APP. P. 40(a)(4).
446. 779 S.W.2d at 809.
447. *See* Donwerth v. Preston II Chrysler-Dodge, Inc., 775 S.W.2d 634 (Tex. 1989).
448. *Id.* at 639, n.5 (citing Archuleta v. International Ins. Co., 667 S.W.2d 120, 123 (Tex. 1984).

Mindful of the principles espoused in rule 1,[449] the Corpus Christi Court of Appeals in *Riviea v. Marine Drilling Co.*[450] liberally construed the appellate filing rules so as to forgive what otherwise would have been a costly procedural blunder by the appellant. Rule 54(c)[451] authorizes the court of appeals to extend the deadline for an appellant's filing of the statement of facts if the appellant files his motion for an extension within fifteen days after the statement of facts is due. In response to the appellant's timely filed second motion for an extension, the court in *Riviea* granted an extension until December 28, 1989, of the filing deadline for the statement of facts. Although the court reporter missed this extended deadline, she filed the statement of facts five days later along with an affidavit explaining her inability to meet the December 28 cutoff date. The appellant, however, failed to file a third motion for extension in connection with the court reporter's tardiness until three weeks past the filing deadline. A divided court nevertheless held that the appellant timely filed the statement of facts because the appellant filed the court reporter's affidavit within fifteen days of the extended deadline.[452] The court acknowledged the supreme court's earlier holding in *B. D. Click v. Safari Drilling Corp.*[453] that a court of appeals has no authority to consider a late-filed motion for extension of time.[454] But by treating the court reporter's affidavit as a valid motion for extension, the court of appeals was able to avoid the harsh result that otherwise would have been required due to the appellant's delay of twenty-one days in filing its third motion for extension.[455]

In nearly identical circumstances, the supreme court twice during the survey period refused to punish a party for an error made by the clerk. In *Biffle v. Morton Rubber Industries, Inc.*[456] the supreme court held that a party timely filed an appeal bond delivered to the clerk before the deadline for perfecting the appeal, even though the clerk inadvertently failed to filemark the bond until after the deadline.[457] Faced with a similar situation involving a motion for new trial, the court in *Mr. Penguin Tuxedo Rental & Sales, Inc. v. NCR Corp.*[458] held that a party was not to blame for the clerk's failure to timely file-stamp an instrument that had been delivered to the court for filing prior to the applicable deadline.[459] The rule announced in *Biffle* and *Mr.*

449. TEX. R. CIV. P. 1 directs courts to construe liberally the rules so as to obtain a just, fair, equitable and impartial adjudication of litigants' rights.

450. 787 S.W.2d 189 (Tex. App.—Corpus Christi 1990, no writ).

451. TEX. R. APP. P. 54(c).

452. *Riviea*, 787 S.W.2d at 191.

453. 638 S.W.2d 860 (Tex. 1982).

454. *Riviea*, 787 S.W.2d at 190. The court also observed that the rule announced in *B. D. Click* was not limited to an original motion for extension of time but also applied to all subsequently filed motions for extension. *Id.* (citing Chojnacki v. The Court of Appeals For the First Supreme Judicial District, 699 S.W.2d 193 (Tex. 1985)), discussed in Figari, Graves & Dwyer, *Texas Civil Procedure, Annual Survey of Texas Law*, 40 SW. L.J. 491, 529 (1986).

455. *Riviea*, 787 S.W.2d at 191.

456. 785 S.W.2d 143 (Tex. 1990)(per curiam).

457. *Id.* at 144.

458. 787 S.W.2d 371 (Tex. 1990).

459. *Id.* at 372.

Penguin accords with prior holdings of the court[460] and is intended to protect a diligent party from being penalized by errors or omissions of the court clerk.[461]

XVII. MISCELLANEOUS

A. Rule Amendments

Several of the recent amendments to the Texas Rules of Civil Procedure should affect local court rules. A new provision of Rule 3a[462] supplants local rules establishing timetables at variance with the state rules, and makes the timetables incorporated in the Texas Rules of Civil Procedure mandatory. Another new feature to rule 3a precludes local courts from using unpublished local rules or standard local practices to determine issues of substantive merit.[463] Under amended rule 3a, no local rule, order or practice of any court, other than those that fully comply with rule 3a, may be applied to determine the merits of any matter.[464] Amendments to rule 245,[465] which governs the assignment of cases for trial, should also affect local practices. A new provision of the rule provides that a request for trial setting constitutes a representation that the requesting party reasonably and in good faith expects to be ready for trial by the date requested.[466] Unlike some existing local rules in various districts, the amended rule does not require other representations about trial readiness to obtain a trial setting.[467] Pursuant to the amended rule, parties are also now entitled to at least forty-five days notice of a case's first setting for trial.[468]

The supreme court completely rewrote three other procedural rules during the recently enacted amendments. Unlike its predecessor, amended rule 10[469] now permits an attorney to withdraw from representing a party only upon written motion for good cause, even if the party substitutes another attorney as counsel of record. The amended rule also clarifies the procedure to be followed in cases where an attorney withdraws without another attorney immediately substituting as counsel.[470] The supreme court also substantially broadened the rule governing pretrial conferences[471] to resemble closely its federal counterpart.[472] The amended rule permits the court and parties to consider the following matters, among other things, at a pretrial

460. *See* Standard Fire Ins. Co. v. LaCoke, 585 S.W.2d 678, 680 (Tex. 1979) (instrument is deemed filed in law when it is delivered to clerk regardless of whether it is filemarked).
461. 785 S.W.2d at 144.
462. TEX. R. CIV. P. 3a(2).
463. *See* TEX. R. CIV. P. 3a(6).
464. *Id.*
465. TEX. R. CIV. P. 245.
466. *Id.*
467. *Id.*
468. *Id.* When a case has previously been set for trial, however, the court may reset the case to a later date on any reasonable notice or by agreement of the parties. *Id.*
469. TEX. R. CIV. P. 10.
470. *Id.*
471. TEX. R. CIV. P. 166.
472. *See* FED. R. CIV. P. 16.

conference: (1) a discovery schedule;[473] (2) the exchange of witness lists;[474] (3) the marking and exchange of exhibits;[475] (4) a proposed jury charge, or proposed findings and conclusions in a nonjury case;[476] and (5) settlement.[477] The court also essentially rewrote rule 183[478] to adopt procedures for the appointment and compensation of interpreters.

Two other miscellaneous rule amendments bear mention. As a result of an amendment to rule 4,[479] Saturdays, Sundays, and holidays are no longer counted in any time periods of five days or less specified in the rules except in certain circumstances.[480] Rule 687[481] was also amended to conform with an amendment to rule 680 made two years ago.[482] Under the amended rule, a temporary restraining order (TRO) must set a date for the temporary injunction hearing that is not later than fourteen days from the date of the TRO.[483]

B. Case Authorities

1. Forum Non Conveniens

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 should hear the action. The issue in *Dow Chemical Co. v. Alfaro*[484] focused on whether the legislature statutorily abolished the doctrine of forum non conveniens in wrongful death and personal injury actions arising out of incidents in foreign states or countries. The plaintiffs in the case were eighty-two Costa Rican employees of Standard Fruit Company. The employees sued Dow Chemical Company and Shell Oil Company claiming that they had suffered personal injuries from their exposure to a pesticide manufactured by the defendants. A Harris County district court concluded it had jurisdiction to hear the case under the governing statute.[485] The district court, nevertheless, dismissed the case on the basis of forum non conveniens.[486] The court of appeals reversed the trial court's decision, holding that the legislature had statutorily abolished the doctrine of forum non conveniens in suits brought under section

473. TEX. R. CIV. P. 166(c).
474. TEX. R. CIV. P. 166(h), (i).
475. TEX. R. CIV. P. 166(l).
476. TEX. R. CIV. P. 166(k).
477. TEX. R. CIV. P. 166(o).
478. TEX. R. CIV. P. 183.
479. TEX. R. CIV. P. 4 provides the method for computing any time periods specified by the rules.
480. These days are still counted for purposes of the three-day periods in TEX. R. CIV. P. 21 & 21a, extending other periods by three days when a certain type of service is used, and for purposes of the five-day periods provided for under TEX. R. CIV. P. 748-49c.
481. TEX. R. CIV. P. 687.
482. The 1988 amendment to TEX. R. CIV. P. 680 authorized trial courts to enter temporary restraining orders up to fourteen days in length.
483. TEX. R. CIV. P. 687(e).
484. 786 S.W.2d 674 (Tex. 1990).
485. *See* TEX. REV. CIV. STAT. ANN. art. 4678 (Vernon 1975)(recodified as TEX. CIV. PRAC. & REM. CODE § 71.031 (Vernon 1986)).
486. 786 S.W.2d at 675.

71.031[487] of the Texas Civil Practice and Remedies Code.[488]

In a lengthy opinion containing two separate concurrences and four dissents, a sharply divided supreme court affirmed the judgment of the court of appeals.[489] According to the majority, the language in section 71.031(a) providing that actions "may be enforced in the courts of this state" prevented a trial court from relinquishing its jurisdiction under the doctrine of forum non conveniens.[490] Adverting to a 1932 writ refused decision of the El Paso court of appeals, which the majority considered controlling,[491] the *Dow* court held that the legislature, in enacting the predecessor of section 71.031,[492] had conferred an absolute right on citizens of foreign states or countries to maintain certain wrongful death or personal injury actions in the Texas courts.[493] In his dissent, Justice Gonzalez argued that the legislature could not have intended to preclude application of forum non conveniens to suits brought under the statute because the doctrine did not exist in Texas until after the predecessors to section 71.031 were enacted.[494] The majority disagreed, stating that the doctrine of forum non conveniens appeared in Texas well before the legislature's enactment of article 4678 in 1913.[495] The majority was likewise untroubled by the dissenting justices' expressed fears that the *Dow* holding would transform Texas into an irresistible forum of last resort for all mass disaster lawsuits.[496]

2. *Entry of Judgment by Substitute Judges*

Rule 18 authorizes a successor judge to hear and dispose of all pending motions in a court when a judge dies, resigns, or becomes disabled during the court's term.[497] The rule does not, however, expressly provide for a successor judge to render judgment in a nonjury trial over which he did not preside. Accordingly, the appeals court in *W.C. Banks, Inc. v. Team, Inc.*[498] vacated a judgment entered by a trial judge in a nonjury case that was actually heard by his predecessor. The court noted that there was no evidence that the predecessor judge had died, resigned, or become disabled, thereby rendering rule 18 inapplicable.[499]

---

487. TEX. CIV. PRAC. & REM. CODE § 71.031 (Vernon 1986) provides that actions for wrongful death or personal injury arising from events in foreign states or countries may be brought in Texas under certain circumstances.

488. Alfaro v. Dow Chemical, 751 S.W.2d 208 (Tex. App.—Houston [1st Dist.] 1988), *aff'd* 786 S.W.2d 674 (Tex. 1990).

489. *Alfaro*, 786 S.W.2d at 679.

490. *Id.* at 675.

491. *Id.* at 678, (citing Allen v. Bass, 47 S.W.2d 426 (Tex. Civ. App.—El Paso 1932, writ ref'd)).

492. TEX. REV. CIV. STAT. ANN. art. 4678, (Vernon 1975).

493. *Alfaro*, 786 S.W.2d at 678-679.

494. *Id.* at 691 (Gonzalez, J., dissenting).

495. *Id.* at 676; TEX. REV. CIV. STAT. ANN. art 4678 (Vernon 1975), recodified as TEX. CIV. PRAC. & REM. CODE § 71.031 (Vernon 1986).

496. *Id.* at 690 (Gonzalez, J., dissenting).

497. TEX. R. CIV. P. 18.

498. 783 S.W.2d 783 (Tex. App.—Houston [1st Dist.] 1990, no writ).

499. *Id.* at 786.

3. Christmas Cheer

Finally, in *Dorchester Master Ltd. Partnership v. Hunt*[500] the supreme court held that a party timely filed an appeal bond on Tuesday, December 27, because the Monday after Christmas is a legal holiday whenever Christmas falls on a Sunday.[501] The respondents argued that rule 5(a),[502] which provides for the computation of time periods on appeal, defined as "holidays" only those dates specified in article 4591.[503] The court admitted that the referenced statute did not include December 26 as one of the holidays listed. Nevertheless, the court chose to ignore the literal terms of rule 5 limiting holidays to those defined by the statute in favor of a definition of holidays based on "popular acceptance."[504]

500. 790 S.W.2d 552 (Tex. 1990)(per curiam).
501. *Id.* at 551-52.
502. TEX. R. APP. P. 5(a).
503. TEX. REV. CIV. STAT. ANN. art. 4591 (Vernon Supp. 1991).
504. *Hunt*, 790 S.W.2d at 552-53. The court's 1990 amendment to TEX. R. APP. P. 5(a), deleting the reference to article 4591, should eliminate any future misunderstandings.