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

I. JURISDICTION OVER THE PERSON

The reach of the Texas long-arm statute continues to be the subject of judicial measurement. The statute authorizes the exercise of jurisdiction over a nonresident when the nonresident is doing business in Texas. Doing business includes a situation where a nonresident “contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state.” A recent decision of the United States Court of Appeals for the Fifth Circuit, Jones v. Petty-Ray Geophysical, Geosource, Inc., is instructive where a plaintiff seeks to predicate personal jurisdiction on a contract basis.

In Jones, the plaintiff asserted a claim for the wrongful death of her husband, leading to the contention that it arose out of a contract between a French corporation and her husband’s employer, a Delaware corporation headquartered in Texas. After she instituted suit in Texas against the Delaware corporation, that company, in turn, asserted a third-party claim against the French corporation, effecting service under the Texas long-arm statute. The contract relied upon for jurisdictional purposes contemplated joint exploration by the two corporations for hydrocarbon substance in the Republic of Sudan. It obligated the Delaware corporation to provide certain equipment and personnel for use in Sudan but did not specify their place of origin. While the negotiation of the contract included a few communications sent to and from Texas, it was negotiated primarily in the United Kingdom. Moreover, the parties signed the contract in the United Kingdom and it contained

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2. TEX. CIV. PRAC. & REM. CODE ANN. § 17.044 (Vernon 1986).
3. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042(1) (Vernon 1986).
a choice of law provision requiring application of English law. The record showed that when time for performance arrived, the Delaware corporation chose to satisfy a significant part of its requirements through resort to personnel and equipment originating in Texas. In this connection, the plaintiff's husband was recruited by the Delaware corporation in Texas and dispatched to Sudan to assist with its performance under the contract. After personal jurisdiction was challenged by the French corporation, the trial court granted a dismissal and an appeal to the Fifth Circuit ensued.

Where a contract is asserted as the basis for personal jurisdiction, the Fifth Circuit indicated that the place of contractual performance is the most significant factor in determining whether due process is satisfied. However, with respect to performance under the joint exploration contract, the court noted that the only Texas activity under it was the unilateral activity of the Delaware corporation in using equipment and personnel from Texas. The court further observed that the place of contracting and the law governing the contract, while not dispositive, are also relevant factors to be considered in making such a jurisdictional determination. Since an examination of the critical factors did not implicate Texas, the court affirmed the dismissal of the French corporation for lack of personal jurisdiction.

Wenche Siemer v Learjet Acquisition Corp., another decision of the Fifth Circuit, is an indication that due process considerations cannot be satisfied solely by the qualification of a nonresident corporation to transact business in the forum state and its corresponding appointment of an agent there to receive service of process. The plaintiffs, all of whom were both residents of European countries and the survivors of two pilots of an aircraft that crashed in Egypt, sued the manufacturer of the aircraft in Texas. Prior to suit, the manufacturer, which was a Delaware corporation headquartered in Kansas, had qualified under the Texas Business Corporation Act to transact business in Texas and appointed a Texas agent there to receive service on its behalf. When the plaintiffs commenced suit they effected service over the manufacturer by serving its designated agent in Texas. The manufacturer moved to dismiss for lack of personal jurisdiction. In response, the plaintiffs argued that the manufacturer's qualification and appointment of a service agent in Texas was tantamount to "consent" to be sued there or, alterna-

5. Id. at 1068; see Barnstone v. Congregation Am Echad, 574 F.2d 286, 288 (5th Cir. 1978).
6. Id. at 1069-70; see Barnstone, 574 F.2d at 289.
7. Id. at 1069; see Southwest Offset, Inc. v. Hudco Publishing Co., 622 F.2d 149, 151 (5th Cir. 1980).
8. Id. at 1069-70.
10. When a foreign corporation has qualified under the Act to transact business in Texas and has appointed an agent in the state to receive process on its behalf, the relevant statute provides that "the registered agent so appointed . . . shall be agents of such corporation upon whom any process . . . permitted by law to be served upon the corporation may be served." TEX. BUS. CORP. ACT ANN. art. 8.10(A) (Vernon 1980).
11. "The rationale behind the theory of consent is that in return for the privilege of doing business in the state, and enjoying the same rights and privileges as a domestic corporation, the
tively, was sufficient “presence” in the state to sustain jurisdiction over its person. Overruling these arguments, the trial court granted the motion. On appeal, the Fifth Circuit resorted to a due process analysis, reasoning that service could be sustained only if due process was satisfied “generally” or “specifically.” Rejecting the plaintiffs’ argument based on “consent,” the court overlooked authority to the contrary and concluded that “a foreign corporation that properly complies with the Texas registration statute only consents to personal jurisdiction where such jurisdiction is constitutionally permissible.” Similarly, the court found that the manufacturer’s appointment of an agent in Texas was not the equivalent of “presence” for jurisdictional purposes, holding that “a registered agent, from any conceivable perspective, hardly amounts to ‘the general business presence’ of a corporation so as to sustain an assertion of general jurisdiction.” Although virtually conceding the lack of “special” jurisdiction, the plaintiffs argued that “general” jurisdiction was nevertheless satisfied by the manufacturer’s qualification and appointment of an agent in Texas, even though their claim did not arise out of any business it had conducted in Texas. Rebuffing this contention, the court concluded that “a foreign corporation that properly complies with the Texas registration statute only consents to personal jurisdiction where such jurisdiction is constitutionally permissible.” Finding insufficient minimum contacts with Texas, the court affirmed the dismissal.
of the manufacturer.21

The recent decision of the Texas Supreme Court in Malaysia British Assurance v. El Paso Reyco, Inc.22 clarifies the "territory-of-coverage" approach to the determination of personal jurisdiction which was recently adopted in Texas.23 In outlining this approach, the supreme court had held that, in determining whether a nonresident insurer has purposefully established minimum contacts with Texas, two significant factors are: "[(a)] the insurer's awareness 'that it was responsible to cover losses arising from a substantial subject of insurance regularly present' in the forum state, [and] [(b)] the nature of the particular insurance contract and [its] coverage."24 In Malaysia British Assurance, the supreme court reversed a lower court that had misapplied these tests to an alien insurer.25

The alien reinsurer, a Malaysian company having no connection with Texas, reinsured the nonresident primary insurer which, in turn, provided insurance coverage to a Texas corporation. After the individual plaintiff, a Texas resident, recovered a judgment against the insured Texas corporation, the two joined together in a suit against the primary insurer on the primary coverage. By the time they obtained judgment, however, the primary insurer was insolvent. Thereafter, the Texas plaintiffs targeted the Malaysian reinsurer for satisfaction of their recovery. They sued the reinsurer in Texas on its reinsurance agreement and effected service under the long-arm statute. The alien reinsurer objected to personal jurisdiction, the trial court sustained the challenge, and the plaintiffs perfected an appeal.

As framed by the court of appeals, the question was whether a Texas court may exercise jurisdiction over an alien reinsurer whose only contact with Texas was entering into a reinsurance agreement with a now insolvent nonresident primary insurer, who had insured a Texas corporation against whom there is an outstanding final judgment remaining unpaid.26 Focusing on the alien reinsurer's contract of reinsurance with the primary insurer, which specified that such insurer would be writing casualty insurance within the United States, the court of appeals concluded the reinsurer had the necessary relationship with Texas to subject its person to Texas jurisdiction.27 Reversing the trial court, the court of appeals held that Texas courts were

21. Id. at 184.
22. 830 S.W.2d 919 (Tex. 1992) (per curiam).
23. "In exercising jurisdiction [over alien insurance companies], the courts infer the necessary contact from policy language defining the territory of coverage. In short, if the geographical scope of the coverage includes the forum state, then the court, having jurisdiction over the insured, may exercise jurisdiction over the insurer as well." William C. Hoffman, Personal Jurisdiction Over Alien Insurance Companies: The Territory-of-Coverage Rule, 26 Tort & Insur. L. J. 703, 703 (1991). See generally Ernest E. Figari, Jr., A. Erin Dwyer, & Don Colleluori, Texas Civil Procedure, Annual Survey of Texas Law, 45 Sw. L.J. 1375, 1376-77 (1992) [hereinafter Figari, 1992 Annual Survey].
25. 830 S.W.2d 919, 920.
27. Id. at 530-31.
obliged to assume jurisdiction.28

Disagreeing, the supreme court concluded that the court of appeals had misfocused its attention on the primary insured's contacts with Texas, rather than the Texas contacts of the Malaysian reinsurer being sued. Emphasizing that under the reinsurance agreement the losses the Malaysian reinsurer was obligated to cover were the losses by the nonresident primary insurer, not its insureds, the supreme court concluded that “[t]his twice-removed contact with Texas is not sufficient for in personam jurisdiction.”29

Service under the Texas long-arm statute is not complete until the Secretary of State forwards process to the nonresident defendant.30 In order to establish the jurisdiction of the trial court over the defendant's person the record must therefore affirmatively show that the process was forwarded.31 This showing may be made by filing a certificate of mailing issued by the Secretary of State.32 In the case of an unreceptive defendant, the trial attorney has been concerned with the question of whether a certificate indicating that process was forwarded but returned “unclaimed” by the defendant satisfied this service requirement. Answering in the negative, the court in Barnes v. Frost Nat'l Bank33 held that such service was incomplete and did not satisfy the long-arm statute.34 Observing that “at a minimum the certificate of service must affirmatively show notice given,” the court concluded that “[a]n unclaimed letter from the Secretary of State's office can hardly further the aim and objective of the long-arm statute, which is to provide reasonable notice of the suit and an opportunity to be heard.”35 Since an earlier case36 had approved a long-arm service when the certificate showed that process had been “refused,” as opposed to “unclaimed,” the court in Barnes distinguished the two situations. Explaining that “[i]f a defendant were to know of the existence of certified mail and refuse to accept it, this would tend to show the defendant did in fact have notice;”37 however, if the process is “unclaimed,” the court reasoned that it could mean “that the plaintiff gave the Secretary of State the wrong address for the defendant, in which case the defendant would not receive notice” and “due process would not be observed.”38

28. Id. at 531.
29. 830 S.W.2d at 921. The supreme court was careful to distinguish its holding from Guardian Royal, where the insurer had issued a policy covering its insured's Texas subsidiary. Id.
31. 500 S.W.2d at 96.
32. See Vanguard Inv. v. Fireplaceman Inc., 641 S.W.2d 655, 656 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).
33. 840 S.W.2d 747 (Tex. App.—San Antonio 1992, no writ).
34. Id. at 750.
35. Id.
37. 840 S.W.2d at 750.
38. Id.
A relatively obscure provision of the Texas long-arm statute 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 nonresident defendant, the process must contain a statement of the name and address of the nonresident’s “home or home office” to facilitate such forwarding. Boreham v. Hartsell recently considered this address requirement as it related to an individual defendant. The record before the court revealed that the Secretary of State was furnished with only the defendant’s address at “1800 West Cliff Drive, No. 17,” and that he forwarded process to that location. The plaintiff obtained a default judgment based on this service, and the defendant sought to set it aside, arguing noncompliance with the statutory provision. In response, the plaintiff contended that a designation like “No. 17” in an address is a common method of referring to an apartment and hence it could be inferred that, being an apartment, it was the defendant’s home address. Refusing to indulge in such an inference, the appellate court concluded that nothing in the record showed that the address furnished to the Secretary of State was the home or home office required by the statute and set aside the judgment.

II. SPECIAL APPEARANCE

Two cases during the Survey period, Laykin v. McFall and N. H. Helicopters, Inc. v. Brown, addressed the availability of mandamus review of a ruling on a special appearance and reached opposite conclusions. In Laykin, the Amarillo court of appeals was confronted with a petition for writ of mandamus seeking review of the trial court’s denial of the defendant’s special appearance. Acknowledging the supreme court’s recent admonition that mandamus review is to be granted only sparingly, the court nevertheless concluded that precedent permitted mandamus review of an erroneous overruling of a special appearance in a personal jurisdiction context. After concluding mandamus review was appropriate, the court dismissed the suit for lack of personal jurisdiction. Similarly, in Brown the Dallas court of

40. Id.
41. 826 S.W.2d 193 (Tex. App.—Dallas 1992, no writ).
42. Id. at 196-97; see Security Pac. Corp. v. Lupo, 808 S.W.2d 126, 127 (Tex. App.—Houston [14th Dist.] 1991, writ denied); Bannigan v. Market St. Developers, Ltd., 766 S.W.2d 591, 593 (Tex. App.—Dallas 1989, no writ).
43. 830 S.W.2d 266 (Tex. App.—Amarillo 1992, no writ) (2-1 decision).
44. 841 S.W.2d 424 (Tex. App.—Dallas 1992, no writ).
46. See United Mexican States v. Ashley, 556 S.W.2d 784, 785 (Tex. 1977) (mandamus review of adverse ruling on "special appearance" permitted in suit against Mexico to consider claim of sovereign immunity); Hutchings v. Biery, 723 S.W.2d 347, 348 (Tex. App.—San Antonio 1987, no writ) (mandamus review of adverse ruling on "special appearance" denied in parent-child proceeding to consider finding that jurisdiction of trial court continued from original divorce proceeding). It is noteworthy that, although the defensive plea in both United Mexican States and Hutchings was labeled a "special appearance," neither case dealt with a challenge to personal jurisdiction.
47. 830 S.W.2d at 268.
48. Id. at 271.
appeals was asked to accept mandamus review of the denial of a special appearance. Disagreeing with the decision of its sister court, the Dallas court of appeals declined to entertain mandamus review, concluding that an appeal after a final judgment was an adequate remedy.\textsuperscript{49}

Texas Rule of Civil Procedure 120a,\textsuperscript{50} which governs special appearance practice in Texas, was significantly amended in 1990.\textsuperscript{51} One court during the Survey period ruled that one of these amendments serves to shift the burden of proof at a special appearance hearing from the defendant to the plaintiff, provided a proper special appearance has been filed.\textsuperscript{52} Previously, it was well established that the burden of proof in state court was on the defendant to show that he was not amenable to process.\textsuperscript{53} Pointing to the provision in the amended rule directing the trial court to determine the special appearance on the basis of, among other things, "the pleadings,"\textsuperscript{54} the court concluded that the effect of this language was to shift the burden of proof to the plaintiff. According to the court, it was now clear that "a sworn special appearance which sets out sufficient facts to show a lack of jurisdiction will establish a prima facie case of no jurisdiction."\textsuperscript{55}

\textit{Franklin v. Geotechnical Serv., Inc.}\textsuperscript{56} is a warning to the trial practitioner that some Texas courts may relax the rules of evidence for a special appearance hearing. Counsel for the defendant read excerpts from a deposition at the special appearance hearing but did not enter the entire deposition into evidence. Apparently the trial court relied on the entire deposition and dismissed the defendants for lack of personal jurisdiction. On appeal, the court of appeals looked to Rule 120a which directs the trial court to "determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony."\textsuperscript{57}

\textsuperscript{49} 841 S.W.2d at 426. It should be noted that the court in \textit{Brown} distinguished the precedent relied upon in \textit{Laykin} because they were atypical of special appearances and presented factors which militated against the adequacy of a remedy by appeal. \textit{Id.} at 426 n.1.

\textsuperscript{50} TEX. R. CIV. P. 120a.


\textsuperscript{52} See Martinez v. Valencia, 824 S.W.2d 719, 723 (Tex. App.—El Paso 1992, no writ). This decision brings the Texas practice in line with the procedure followed by the federal courts. See, e.g., Jetco Elec. Indus., Inc. v. Gardiner Elec. Co., 473 F.2d 1228, 1232 (5th Cir. 1973) ("[p]laintiff has the burden of proving that defendant is amenable to process under the state's jurisdiction statute"); Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 489-90 (5th Cir. 1974) ("the party seeking to invoke the jurisdiction of a federal court has the burden of establishing that jurisdiction exists"). See generally Ernest E. Figari, Jr., \textit{Texas Civil Procedure, Annual Survey of Texas Law}, 29 Sw. L.J. 265 n.3 (1975).


\textsuperscript{54} TEX. R. CIV. P. 120a(3).

\textsuperscript{55} 824 S.W.2d at 723.

\textsuperscript{56} 819 S.W.2d 219 (Tex. App.—Fort Worth 1991, writ denied).

\textsuperscript{57} TEX. R. CIV. P. 120a(3) (emphasis added).
Observing that since the deposition was the result of discovery processes and was a pleading, inasmuch as it had been attached as an exhibit to a brief in the trial court, the court concluded that the entire deposition was before the trial court for its consideration of the special appearance. Accordingly, relying on the entire deposition, the court concluded that the evidence before the trial court supported the dismissal.

While Rule 120a does not directly address whether a jury may be impaneled to decide issues underlying a decision on a special appearance, the usual practice is for the trial court to decide such matters. Perhaps sustaining the obvious, the court in Board of County Comm'rs v. Amarillo Hosp. Dist. overruled an argument by the defendant that its request for a jury trial at a special appearance hearing should have been granted. The court reiterated that the "determination of personal jurisdiction is a matter for the court, not the jury."

III. SERVICE OF PROCESS

A number of decisions during the Survey period considered challenges to service of process on the basis of inadvertent errors occurring in the course of service. In McGraw-Hill, Inc. v. Futrell the court of appeals reviewed the propriety of a $1.85 million default judgment obtained on the basis of returns that the process servers did not verify. In this regard, Rule 107 which prescribes the requirements of a return after service, mandates that "[t]he return of citation by an authorized person shall be verified." Each of the returns in question contained a certification at the bottom by the process server that citation had been delivered to the named defendant; however, there was nothing on the return or attached to it that could be considered a verification of such statement. Finding this noncompliance with Rule 107 to be fatal, the supreme court set aside the default judgment.

Similarly, in Wood v. Brown the supreme court invalidated a service by publication due to an inadvertent error and set aside a default judgment. The plaintiff, after attempting personal service on the defendant, sought to effect service by publication. The rule specifying the procedure for issuance

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58. 819 S.W.2d at 223.
59. Id.
60. Tex. R. Civ. P. 120a. Emphasizing the type of proof that may be considered in deciding a special appearance, the rule states that "[t]he court shall determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony." Id. at 120a(3) (emphasis added).
61. 835 S.W.2d 115 (Tex. App.—Amarillo 1992, no writ).
62. Id. at 121.
64. 823 S.W.2d 414 (Tex. App.—Houston [1st Dist.] 1992, writ denied).
66. Id.
67. 823 S.W.2d at 415.
68. 819 S.W.2d 799 (Tex. 1991) (per curiam).
69. Id. at 800.
of service by publication, Rule 109,70 requires that before a clerk shall issue service by publication, the plaintiff or his attorney must file an affidavit stating “that the residence of [the] . . . defendant is unknown,” “that such defendant is a transient person,” or “that such defendant is absent from or is a nonresident of the State.” Noting that the plaintiff’s attorney’s affidavit failed to contain any of the required statements, the supreme court held that the plaintiff’s service by publication was defective and would not support the default judgment based on it.71

Royal Surplus Lines Ins. Co. v. Samaria Baptist Church72 highlighted an obscure statute which permits public officials to perform service by certified mail in lieu of registered mail in those instances where registered mail has been prescribed. The plaintiff sued a non-profit corporation and effected service on the defendant by serving the Secretary of State under the Texas Non-Profit Corporation Act.73 The Secretary of State forwarded process to the defendant by certified mail, but the letter enclosing process was returned “unclaimed.” The trial court entered a default judgment when the defendant failed to appear. The defendant later appeared and challenged the default judgment. Reversing the default judgment and ordering a new trial, the court of appeals held that the use of certified mail was not in strict compliance with the Act.74 In denying an application for writ of error, the supreme court noted that the court of appeals had incorrectly concluded the Secretary of State could not utilize certified mail. The supreme court pointed to article 29c, which expressly authorizes a public official “to use certified mail with return receipt requested, in lieu of registered mail in all instances where registered mail has heretofore been required.”75 Nevertheless, the supreme court agreed with the result, observing that the Secretary of State had forwarded process to the wrong address, utilizing “1201 Bassie” instead of “1201 Bessie.” For this reason, the supreme court denied the petitioner’s application for writ of error.76

IV. PLEADINGS

Texas Rule of Civil Procedure 13,77 aimed at deterring the filing of frivolous pleadings,78 was the subject of judicial attention during the Survey period. Rule 13 has always provided that the signatures of attorneys or parties

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70. TEX. R. CIV. P. 109.
71. 819 S.W.2d at 800.
72. 840 S.W.2d 382 (Tex. 1992) (per curiam).
73. TEX. REV. CIV. STAT. ANN. art. 1396-2.07(B) (Vernon 1980).
75. TEX. REV. CIV. STAT. ANN. art. 29c (Vernon 1969).
76. 840 S.W.2d at 382-83.
77. TEX. R. CIV. P. 13.
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.”79 The rule defines groundless as “no basis in law or
fact and not warranted by good faith argument for the extension, modifi-
cation or reversal of existing law.”80 Sanctions shall be imposed by the court,
upon motion or its own initiative, upon either or both the person who signed
a filing in violation of the rule and the represented party.81 Joining with an
earlier Texas case82 and following the lead of pertinent federal authority,83
the court in Rodriguez v. State Dep’t of Highways84 held that appellate re-
view of an order granting or denying relief under Rule 13 should be by way
of an “abuse of discretion” standard.85

Notably, under Rule 13 a trial court may not impose sanctions except for
good cause and, if imposed, the court must set forth the particulars of the
good cause in its sanctions order.86 Heeding this admonition in the rule,
several cases87 during the Survey period held that Rule 13 imposes a duty on
the trial court to point out with particularity the facts on which sanctions
are based and that a failure to do so will invalidate the sanctions order.

Finally, one court recently held that when the sanctions awarded under
Rule 13 are in the form of recovery of attorneys’ fees, proof of the necessity

79. TEX. R. Civ. P. 13; see also FED. R. Civ. P. 11 (analogous federal rule governing
signing of pleadings). See generally 5 Charles Alan Wright & Arthur R. Miller, FED. PRAC. &
80. TEX. R. Civ. P. 13. Rule 13 may lead to a resurgence in special exception practice in
Texas. Traditionally, a special exception may be used, among other things, to force the
pleader to allege all essential elements of his cause of action. See, e.g., Covington v. Associated
Employers Lloyds, 195 S.W.2d 209, 211 (Tex. Civ. App.—Eastland 1946, writ ref’d). Inter-
acting with special exception practice, Rule 13 prohibits a pleader from making a statement in
his pleading known to be groundless and false and authorizes the imposition of sanctions if a
violation occurs. Thus, if an essential allegation known to be without evidentiary support is
omitted from a pleading, the pleader might avoid the threat of Rule 13. As a result, special
exception practice may be utilized to compel the full pleading of a cause of action so as to
subject a previously omitted allegation to the scrutiny of Rule 13.
81. TEX. R. Civ. P. 13. Under Rule 13, the trial court may impose sanctions against the
offending party which include disallowance of further discovery, assessment of discovery ex-
penses 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);
82. See Home Owners Funding Corp. v. Scheppler, 815 S.W.2d 884, 888-89 (Tex. App.—
Corpus Christi 1991, no writ).
84. 818 S.W.2d 503 (Tex. App.—Corpus Christi 1991, no writ).
85. Id. at 504.
Antonio 1989, writ denied) (better practice is for trial court to specify the factual basis for
good cause which supports its sanctions order).
V. SEALING OF COURT RECORDS

The presumption at common law is well established that all court records are open to the public. 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. These requirements, being a matter of common law, were not always readily discernable. The legislature, apparently attempting to define such requirements, enacted a statute directing the Texas Supreme Court to establish procedures for the sealing of court records. Responding to this mandate, the Texas Supreme Court adopted Rule 76a, which became effective September 1, 1990 and governs the sealing of court records. Rule 76a spawned a number of judicial decisions during the Survey period which are of significance to the trial practitioner.

Eli Lilly and Co. v. Marshall, a decision of the Texas Supreme Court, is an admonition that before a trial court may make a ruling on a party's motion to seal court records under Rule 76a, the trial court must conduct a hearing and render a decision in compliance with the rule. The plaintiffs filed a products liability suit against the manufacturer of an antidepressant drug and, in the course of attempted discovery, the manufacturer filed a motion with the trial court seeking an order restricting disclosure of any documents it had to produce concerning the drug. The manufacturer based its motion on the assertion of a trade secret. At the hearing on the motion, the plaintiffs disputed whether Rule 76a applies to a trade secret and the trial court refused to address the merits of that claim. After the trial court denied the manufacturer's motion, it sought review of the ruling by mandamus. The supreme court observed that, while the rule's definition of "court records" specifically excludes "discovery in cases originally initiated to pre-
serve bona fide trade secrets,"96 the rule "does not mean that access to trade secrets cannot be limited in other types of litigation."97 Thus, the supreme court held that, "[r]egardless of the cause of action, a properly proven trade secret is an interest that should be considered in making the determination under Rule 76a" and, accordingly, "the trial court abused its discretion by refusing to conduct a hearing and render a decision on the motion in compliance with Rule 76a."98

In Chandler v. Hyundai Motor Co.,99 expanding on its earlier decision in this area, the supreme court held that the definition of "court records" under rule 76a encompasses "filed discovery" in a suit, as well as discovery not filed of record, provided it concerns matters that have "a probable adverse effect upon the general public health or safety."100

Rule 76a also modifies the former intervention practice in this area,101 stipulating that "[a]ny person may intervene as a matter of right at any time before or after judgment to seal or unseal records."102 A recent decision of the Austin court of appeals, Public Citizen v. Insurance Servs. Office, Inc.,103 is a warning to a potential intervenor in a rule 76a proceeding that it cannot be slow to assert its rights. The state filed an antitrust suit in 1988 against several insurance companies and, to expedite the discovery process, the parties agreed to conduct discovery under an agreed protective order. The order permitted any party to designate as confidential any document that the party believed contained protectible information. The order restricted access to the documents designated confidential to specific individuals and prohibited their use for any purpose except in preparing and trying the suit. Two years later Rule 76a was adopted and became effective.

As noted previously, Rule 76a applies to court records filed or exchanged after its effective date in suits pending on its effective date.104 Court records, for purposes of the rule, include all documents "filed in connection with any matter before any civil court,"105 as well as any settlement agreements and discovery not filed of record, provided they concern matters that have "a probable adverse effect upon the general public health or safety, . . . the

96. TEX. R. CIV. P. 76a(2)(c) (emphasis added).
97. 829 S.W.2d at 158 (emphasis added).
98. Id.
99. 829 S.W.2d 774 (Tex. 1992).
100. Id. at 775.
102. TEX. R. CIV. P. 76a(7); see Doggett, supra note 91, at 145.
103. 824 S.W.2d 811 (Tex. App.—Austin 1992, no writ).
104. TEX. R. CIV. P. 76a(9). In this regard, one authority noted that "[c]ourt 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 91, 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).
105. TEX. R. CIV. P. 76a(2)(a); see Doggett, supra note 91, at 144-45.
administration of public office, . . . or the operation of government."\textsuperscript{106}

Subsequently, the state filed a motion with the trial court seeking to be relieved of the protective order in the future, contending it was contrary to Rule 76a and, moreover, that the insurance companies had been abusing the order. The trial court conducted a hearing on the motion and, while not a party, a consumer group and potential intervenor received advance notice and appeared there as an observer. The consumer group did not, however, seek to participate in the hearing. After the hearing the trial court vacated the protective order as to all documents filed or exchanged after the rule's effective date but permitted the order to control documents exchanged before that date.\textsuperscript{107}

Dissatisfied with the trial court's ruling, the consumer group sought to intervene in the proceeding and, at the same time, moved for a modification of the ruling to the extent it allowed any discovery to remain sealed. Although the trial court permitted the intervention, the court denied the remainder of the relief sought by the consumer group.\textsuperscript{108} In affirming the trial court, the court of appeals relied on the provision in rule 76a stating that "[a]n order sealing or unsealing court records shall not be reconsidered on motion of any party or intervenor who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order."\textsuperscript{109} According to the court, this provision "prevents an interested non-party such as [the consumer group] from waiting on the sidelines until a court issues an order, and then, if dissatisfied with the outcome, intervening and forcing the parties . . . to relitigate the issue."\textsuperscript{110}

\section*{VI. DISQUALIFICATION OF COUNSEL}

Establishing a new standard that significantly increases the likelihood of disqualification motions, the court in \textit{Clarke v. Ruffino}\textsuperscript{111} disqualified a firm from representing a former client's adversary without proof of a substantial relationship between the current and prior representations. Under the Texas rules formerly governing disciplinary conduct,\textsuperscript{112} a party seeking to disqualify his adversary's counsel on the basis of a prior attorney-client relationship was required to establish that the factual matters involved in the prior representation were so related to the facts in the pending litigation that a genuine threat existed that confidences revealed to his former counsel would be di-

\textsuperscript{106.} \textsc{Tex. R. Civ. P. 76a(2)(b)-(c).} 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. \textsc{Tex. R. Civ. P. 76a(2)(a)(1), (2) & (3).}

\textsuperscript{107.} \textsc{824 S.W.2d at 812.}

\textsuperscript{108.} \textsc{Id.}

\textsuperscript{109.} \textsc{Tex. R. Civ. P. 76a(7).}

\textsuperscript{110.} \textsc{824 S.W.2d at 813.}

\textsuperscript{111.} \textsc{819 S.W.2d 947 (Tex. App.--Houston [14th Dist.] 1991, writ dism'd w.o.j.)}.

\textsuperscript{112.} \textsc{Supreme Court of Texas, Code of Professional Responsibility} (Vernon 1988).
vulged to his present adversary. The court in Ruffino held that this "substantial relationship" test was no longer the exclusive ground for disqualification in cases alleging prior representation. Instead, the new Texas Disciplinary Rules of Professional Conduct set forth an additional basis for disqualification in such circumstances.

The court in Ruffino acknowledged that Rule 1.09 of the new disciplinary rules continues to proscribe representation adverse to a former client if the representation involves a matter substantially related to the prior representation. According to the court, however, representation adverse to the former client is additionally prohibited if, in reasonable probability, the new representation will involve a violation of the lawyer's obligations of confidentiality to his former client. Rule 1.05, which sets forth those obligations, defines "confidential information" as both privileged and unprivileged information. Moreover, "unprivileged client information" includes "all information relating to a client or furnished by the client . . . during the course of or by reason of the representation of the client." Applying these definitions literally, but without discussing what would constitute a violation of the confidentiality requirements of Rule 1.05, the Ruffino court concluded that the law firm was subject to disqualification simply because it obtained "confidential" information about its former client by virtue of the prior representation. While perhaps unintended by the court, the result of its reasoning appears to be the mandatory disqualification of counsel in all cases involving representation adverse to a former client. The court's ruling in this regard probably constitutes dictum, however, because the court also held under the facts of the case that the current and former representations were substantially related.

VII. VENUE

Section 15.064(b) of the Texas venue statute provides that transfer of a case to a county of improper venue shall constitute reversible error on appeal. The statute is silent, however, about cases in which a lawsuit is origi-
nally brought in a county of proper venue but is erroneously transferred to another county in which venue is also proper.124 Earlier cases interpreting the statute concluded by implication that a trial court’s erroneous venue ruling in these latter circumstances was harmless.125 The court in Marantha Temple, Inc. v. Enterprise Prods. Co.126 disagreed, holding that a plaintiff’s right to prosecute his suit in the county in which he rightfully brought it is a fundamental right that is not susceptible to a harmless error analysis.127

The plaintiff in Marantha Temple sued numerous corporations for damage to its property allegedly caused by defendants’ negligent contamination of the environment. Although plaintiff’s property was situated in Chambers County, where the alleged releases of contaminants by the defendants also occurred, the plaintiff commenced its action in Harris County. According to the appellate court, venue was proper in Harris County because many of the defendants were foreign corporations who maintained registered agents there.128 Under the joinder provision of the venue statute,129 the Harris County court also had venue of all other claims properly joined against the remaining defendants, unless a mandatory venue exception was raised.130 After examining the plaintiff’s petition, the appellate court rejected defendants’ argument that the suit was governed by the mandatory venue exception for suits involving title to land, which would have justified the suit’s transfer to Chambers County.131

The defendants further contended on appeal that any error in transferring the suit was harmless because venue was also proper in Chambers County. Although the court conceded that venue would have been proper in Chambers County if the plaintiff had initially brought the suit there, it still concluded that the error in transferring venue there was not harmless.132 According to the court, the plaintiff loses his valuable right to choose the suit’s forum whenever a trial court wrongly transfers venue, even when the case is transferred to a county of proper venue.133 The court also observed that its holding would guard against the forum shopping that occurs when a

124.  Id.
127.  Id. at 742.
128.  Id. at 738. See TEX. CIV. PRAC. & REM. CODE ANN. § 15.037 (Vernon 1986).
129.  TEX. CIV. PRAC. & REM. CODE ANN. § 15.061 (Vernon 1986) provides that a court has venue of all properly joined claims against multiple defendants so long as the court has venue of an action or claim against any one defendant and a mandatory venue exception does not apply.
130.  833 S.W.2d at 738.
131.  Id. at 738-39. TEX. CIV. PRAC. & REM. CODE ANN. § 15.011 (Vernon 1986) is a mandatory venue exception that requires all suits for recovery of real property or to quiet title to be brought in the county in which all or part of the property is located. This venue provision applies, however, only when the suit directly involves a question of title to land, and the nature of the suit must be determined solely from the facts alleged and the relief sought in plaintiff’s petition. Stiba v. Bowers, 756 S.W.2d 835, 839 (Tex. App.—Corpus Christi 1988, no writ).
132.  833 S.W.2d at 740.
133.  Id. at 741.
party intentionally asserts faulty, invalid grounds for a change of venue from one permissible county to another permissible county which he perceives as more favorable.\textsuperscript{134}

The decision in \textit{Marantha Temple} also clarified one of the procedural requirements relating to proof of disputed venue facts. Rule 87 provides that all properly pleaded venue facts "shall be taken as true unless specifically denied by the adverse party."\textsuperscript{135} Although some of the defendants in \textit{Marantha Temple} had denied "those venue facts pleaded in Plaintiff's Original Petition that purport to establish venue in Harris County,"\textsuperscript{136} the court refused to accept these statements as specific denials that would trigger the requirement of further proof by plaintiff of disputed venue facts.\textsuperscript{137} Instead, the court held that a "specific denial" of a venue fact requires that the fact itself be specifically denied.\textsuperscript{138} Accordingly, because none of the defendants had specifically denied that it was a foreign corporation with a registered agent in Harris County, the plaintiff was not required to make prima facie proof of that fact under Rule 87.\textsuperscript{139}

\section*{VIII. LIMITATIONS}

Several cases during the Survey period concerned the statute of limitations for legal malpractice suits. In \textit{Hughes v. Mahaney & Higgins},\textsuperscript{140} for example, the Texas Supreme Court held that when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on the malpractice claim is tolled until all appeals in the underlying litigation are exhausted.\textsuperscript{141} In joining other jurisdictions\textsuperscript{142} that have adopted "this well-reasoned rule,"\textsuperscript{143} the court observed that a cause of action for legal malpractice normally accrues when the client sustains a legal injury or, in cases governed by the discovery rule, when the client discovers or should have discovered the facts establishing his cause of action.\textsuperscript{144} When an attorney commits malpractice while providing legal services in connection with ongoing litigation, however, "the legal injury and discovery rules can force the client into adopting inherently inconsistent liti-

\begin{itemize}
\item \textsuperscript{134} Id.
\item \textsuperscript{135} TEX. R. CIV. P. 87(3)(a).
\item \textsuperscript{136} 833 S.W.2d at 740.
\item \textsuperscript{137} Id.
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Id.; see TEX. R. CIV. P. 87(3)(a).
\item \textsuperscript{140} 821 S.W.2d 154 (Tex. 1991).
\item \textsuperscript{141} Id. at 157.
\item \textsuperscript{142} See, e.g., Bonanno v. Potthoff, 527 F.Supp. 561, 565 (N.D. Ill. 1981) (applying Illinois law); Amfac Dist. Corp. v. Miller, 673 P.2d 792, 793 (Ariz. 1983); see also cases cited at 821 S.W.2d at 157 n.5.
\item \textsuperscript{144} Id. at 156; see Smith v. McKinney, 792 S.W.2d 740, 742 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (legal injury rule); Willis v. Maverick, 760 S.W.2d 642, 643 (Tex. 1988) (discovery rule); see Ernest E. Figari, Jr., Thomas A. Graves & A. Erin Dwyer, \textit{Texas Civil Procedure, Annual Survey of Texas Law}, 43 Sw. L.J. 485, 498 (1989) [hereinafter Figari, 1989 Annual Survey].
\end{itemize}
CIVIL PROCEDURE

An "exhaustion of appeals" rule eliminates this untenable conflict by tolling limitations for the second cause of action throughout the pendency of the first suit. In reaching this conclusion, the court also analogized to other cases in which the limitations period is tolled while a party is prevented from exercising his legal remedy due to the pendency of other legal proceedings.

Two cases decided after Hughes expanded on its holding. In Washington v. Georges, the court concluded that the tolling rule set forth in Hughes applied even if a party did not perfect an appeal in the underlying suit in which his attorney committed the malpractice. In the court's view, all appeals had not been exhausted so long as an appeal could still be perfected; thus, the limitations period did not begin to run until the time for perfecting an appeal had expired. In Gulf Coast Inv. Corp. v. Brown, the Texas Supreme Court extended the tolling rule it announced in Hughes to a claim alleging that an attorney's malpractice resulted in a wrongful foreclosure action by a third-party against the attorney's client. For purposes of the tolling rule, the court could see no distinction between malpractice committed during pending litigation and malpractice that resulted in ensuing litigation.

Rowntree v. Hunsucker involved the limitations provision contained in the Texas health care statute. The plaintiff was referred to the defendant physician in October 1985 for hypertension. The defendant performed a physical examination during plaintiff's first visit and prescribed medication for her elevated blood pressure. The plaintiff returned to defendant's office on several occasions over the course of the following year either for unrelated conditions or to have her blood pressure checked. Although plaintiff's last visit with the defendant was in September 1986, she continued to take

145. 821 S.W.2d at 156.
146. Id. at 156-57.
147. See, e.g., Walker v. Hanes, 570 S.W.2d 534, 540 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (limitations tolled while prior submission of same case was being appealed); Cavitt v. Amsler, 242 S.W. 246, 249 (Tex. Civ. App.—Austin 1922, writ dism'd w.o.j.) (limitations on suit for dividends tolled while suit to determine ownership of stock was being appealed).
148. 821 S.W.2d at 157.
149. 837 S.W.2d 146 (Tex. App.—San Antonio 1992, writ denied).
150. Id. at 147.
151. Id.
152. 821 S.W.2d 159 (Tex. 1991) (per curiam).
153. Id. at 160.
154. Id.
155. Id.
156. Id.
157. 833 S.W.2d 103 (Tex. 1992).
158. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1992) (two year statute of limitations on health care claims).
blood pressure medication for more than a year after that date pursuant to a prescription that the defendant agreed to refill. In January 1988, plaintiff suffered a debilitating stroke due to an occluded carotid artery. On October 30, 1989, plaintiff filed suit alleging that defendant had negligently failed to diagnose her occluded artery during his treatment of her for high blood pressure.

The issue on appeal was whether plaintiff's taking medication pursuant to the prescription refills constituted a "course of treatment" absent any other concomitant medical care. The health care limitations statute requires an action to be filed within two years from either the occurrence of the breach or tort giving rise to the claim or the date the medical treatment that is the subject of the claim is completed. According to the supreme court in Rowntree, "the date of last treatment is relevant only if a course of treatment has been established for the condition that is the subject of the claim." The plaintiff in the suit did not allege, however, that the defendant's course of treatment was the direct cause of her injury. Nor did she otherwise allege a course of treatment for the condition made the basis of her claim so that the statute of limitations could run from the last date of such treatment. Instead, plaintiff complained that the defendant breached a duty to perform the proper examinations from which he should have detected the occluded arteries. The defendant could have breached this duty, according to the court, only on those occasions when he had an opportunity to perform an examination. Because plaintiff's last visit to the defendant, which was the latest opportunity he would have had to breach any such duty, occurred more than two years prior to the commencement of the suit, plaintiff's claim was barred by limitations.

Finally, the court in Martinez v. Windsor Park Dev. Co. held that the term "holiday" as used in the limitations statute includes any day on which the clerk's office is officially closed or that the commissioner's court has declared to be a holiday in the county in which the suit is pending. The court's decision was all but compelled by its identical holding earlier in the term with respect to Rule 4 of the Texas Rules of Civil Procedure. Limitations on the plaintiff's personal injury action in Martinez expired on

159. 833 S.W.2d at 104.
161. 833 S.W.2d at 105.
162. Id. at 108.
163. Id. In so holding, the court rejected the court of appeals' holding that limitations was extended by plaintiff's taking of medication. Id. at 107. According to the court, a rule that extended limitations until all authorized prescription refills had been taken would be unworkable and supplant the fixed limitations period established by the legislature with a period that is selected by the patient. Id.
164. 833 S.W.2d 950 (Tex. 1992).
165. Tex. Civ. Prac. & Rem. Code Ann. § 16.072 states that the period for filing suit is extended to include the next day that county offices are open for business whenever the last day of a limitations period falls on a Saturday, Sunday, or holiday.
166. 833 S.W.2d at 951.
167. See Miller Brewing Co. v. Villareal, 829 S.W.2d 770 (Tex. 1992).
April 13, 1990, and because the Bexar County Commissioners Court had ordered the courthouse closed on that date in observance of Good Friday, plaintiff's action filed the following Monday was still timely.169

IX. DISCOVERY

A. Discovery Procedures

Depositions were the subject of a number of decisions during the Survey period. The Texas Supreme Court held in *Kennedy v. Eden*170 that a trial court's protective order prohibiting a certain person from attending a deposition was overly broad to the extent it also forever prohibited that person from discussing the case with anyone other than the attorneys of record.171 Without expressing an opinion on whether such an order would ever be authorized, the court stated that there was no justification for the order in the circumstances of the case before it.172 The court of appeals in *Smith, Wright, & Weed, P.C. v. Stone*173 directed the trial judge to vacate an order quashing, on relevancy grounds, a notice to take the deposition of the plaintiffs' attorney.174 And in *Jones v. Colley*,175 the court approved of a party playing an edited version of a videotaped deposition at trial.176 The court noted that there is no rule requiring a deposition to be read or played in sequence, and a party has the right to present evidence in the manner he believes is most persuasive, "provided that it does not convey a distinctly false impression."177

*Fitzgerald v. Rogers*178 involved a court order requiring a defendant to execute an authorization form allowing the plaintiff to obtain information regarding the defendant from financial institutions. The court of appeals recognized that a party is deemed under Rule 166b(2)(b)179 to have within his possession, custody, or control documents that he has a right to obtain from a third party.180 However, where the response to plaintiff's document request stated that the defendant had no financial statements or credit applications, and the plaintiff had not impeached that assertion in any way, the plaintiff was not entitled to an authorization permitting financial institutions to release information about the defendant.181

169. 833 S.W.2d at 951.
170. 837 S.W.2d 98 (Tex. 1992).
171. *Id.* at 98-99.
172. *Id.* at 99.
174. *Id.* at 928-29.
175. 820 S.W.2d 863 (Tex. App.—Texarkana 1991, writ denied).
176. *Id.* at 866.
177. *Id.* (emphasis original). The court cited as obvious examples of what it would consider objectionable editing techniques any attempt to introduce partial answers or to mismatch questions and answers. *Id.* at n.3.
178. 818 S.W.2d 892 (Tex. App.—Tyler 1991, no writ).
180. *Fitzgerald*, 818 S.W.2d at 895 n.5.
181. *Id.* at 895-96.
B. PRIVILEGES AND EXEMPTIONS

The Texas Supreme Court ruled in *Owens-Corning Fiberglas Corp. v. Caldwell*\(^\text{182}\) that the work product privilege is not limited to documents prepared in connection with the particular case in which discovery is sought, but is instead continuing in nature.\(^\text{183}\) The court noted that the primary purpose of the work product doctrine is to provide protection for any attorney’s thought processes in litigation, a purpose that would be defeated if the privilege was limited to the particular case.\(^\text{184}\) Moreover, the court cited two additional justifications for its conclusion. First, if the rule were otherwise, it would be at odds with the attorney-client privilege, which is not limited to the individual case in which the privileged communication occurs.\(^\text{185}\) Second, a party that is a frequent litigant must be allowed to develop an overall legal strategy.\(^\text{186}\) Finally, the court stated that the rule it was adopting is in accordance with the work product rule in federal court, as well as the majority of state courts.\(^\text{187}\)

The scope of attorney work product also received attention during the Survey period. In *Owens v. Wallace*,\(^\text{188}\) the court concluded that an interrogatory asking a party to specify the facts he intends to rely upon is not susceptible to a work product objection.\(^\text{189}\) A request for production of a party’s trial exhibits, however, was found to be impermissible as invading the work product privilege in *Texas Tech Univ. Health Sciences Ctr. v. Schild*.\(^\text{190}\) Moreover, the court in *Schild* held that no evidence or in camera inspection was required to preserve the objection, since the request on its face sought privileged work product.\(^\text{191}\)

Rule 503(a)(2) of the Texas Rules of Civil Evidence\(^\text{192}\) defines a representative of the client, for purposes of the attorney-client privilege, as “one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.”\(^\text{193}\) The San Antonio court of appeals strictly applied this definition in the context of a corporate client, holding that a valid claim of privilege is not established merely by proof that the persons who were privy to the attorney communications were

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\(^{182}\) 818 S.W.2d 749 (Tex. 1991).

\(^{183}\) Id. at 750-52.

\(^{184}\) Id. at 750.

\(^{185}\) Id. at 751.

\(^{186}\) Id.

\(^{187}\) Id. & n.4-5. The court disapproved of one Texas case that had reached a contrary result, *DeWitt & Rearick, Inc. v. Ferguson*, 699 S.W.2d 692 (Tex. App.—El Paso 1985, orig. proceeding), and limited the scope of its own prior decision in *Allen v. Humphries*, 559 S.W.2d 798 (Tex. 1977), to assertions of the investigative and consulting expert privileges.

\(^{188}\) 821 S.W.2d 746 (Tex. App.—Tyler 1992, orig. proceeding).

\(^{189}\) Id. at 748. In what may be the first judicial determination of the issue, the court in *Owens* also held that, where a set of interrogatories requires more than thirty answers in violation of TEX. R. CIV. P. 168(5), it is incumbent on the responding party to answer the first thirty questions rather than refusing to respond at all. 821 S.W.2d at 749.


\(^{191}\) Id.

\(^{192}\) TEX. R. CIV. EVID. 503(a)(2).

\(^{193}\) Id.
employees of the corporation. The court noted that, while there are no Texas cases on the issue, several commentators have written that Rule 503(a)(2) represents an adoption of the "control group" test for determining whether an employee is a representative of the corporation for purposes of privilege, which the United States Supreme Court rejected in *Upjohn Co. v. United States*. The court in *K.P. v. Packer* held that Rule 510(d)(5), which provides an exception to the privilege for mental health records where the record is relevant to a proceeding where the party's mental or emotional condition is at issue, was not applicable to the mental health records of a mother who brought an action as next friend on behalf of her child. In *S.A.B. D.O. v. Schattman*, the court construed this same exception as abrogating the privilege whenever a party's mental or emotional condition has been put in issue, either by that party or the opposing party. The court noted that its conclusion in this regard was contrary to two decisions from another court of appeals. Finally, even in the absence of any specific exception or waiver in Rule 503, the court in *Westheimer v. Tennant* held that a plaintiff should not be entitled to invoke the attorney-client privilege offensively to shield relevant facts from discovery.

*Nicholson v. Wittig* involved the rarely litigated privilege for communications with a member of the clergy. One of the plaintiffs in that case, a wrongful death action, had spoken with a chaplain employed by the hospital defendant. The defendants argued that the chaplain should be permitted to testify to matters discussed with the plaintiff that related to her husband's medical treatment, rather than spiritual matters, notwithstanding that the plaintiff had properly invoked the privilege. The court disagreed, holding that the chaplain was acting in his capacity as a spiritual advisor.

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196. See generally Ginsberg v. Fifth Court of Appeals, 686 S.W.2d 105, 107-08 (Tex. 1985) (holding that plaintiff could not seek affirmative relief and at the same time withhold relevant information based on claim of psychotherapist-patient privilege).
197. 826 S.W.2d 664 (Tex. App.—Dallas 1992, orig. proceeding).
198. TEX. R. CIV. EVID. 510(d)(5).
199. Id.
200. Packer, 826 S.W.2d at 667.
201. 838 S.W.2d 290 (Tex. App.—Fort Worth 1992, orig. proceeding [leave denied]).
202. Id. at 293.
203. Id. at 229-93 (citing Scheffey v. Chambers, 790 S.W.2d 879 (Tex. App.—Houston [14th Dist.] 1990, orig. proceeding) and Dossey v. Salazar, 808 S.W.2d 146 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding [leave denied])).
204. TEX. R. CIV. EVID. 503.
205. 831 S.W.2d 880 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding).
206. Id. at 883-84 (disagreeing with Cantrell v. Johnson, 785 S.W.2d 185 (Tex. App.—Waco 1990, orig. proceeding)).
207. 832 S.W.2d 681 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding [leave denied]).
within the meaning of Rule 505(b),\textsuperscript{208} regardless of the nature of the communication.\textsuperscript{209}

C. Sanctions

A number of cases decided during the Survey period addressed the effect of the Texas Supreme Court's 1991 decisions in \textit{TransAmerican Natural Gas Corp. v. Powell}\textsuperscript{210} and \textit{Braden v. Downey}\textsuperscript{211} on a trial judge's ability to impose sanctions for discovery abuse. In \textit{Chrysler Corp. v. Blackmon},\textsuperscript{212} the high court clarified that, while a trial judge's detailed findings of fact may assist a reviewing court in some instances, they are not a prerequisite to the imposition of the "death penalty" sanctions of dismissal or default.\textsuperscript{213} In addition, the court noted that the proper standard of review on appeal from a sanctions order is abuse of discretion, rather than the legal and factual insufficiency standard applicable to appeals from nonjury trials.\textsuperscript{214}

\textit{Kutch v. Del Mar College}\textsuperscript{215} held, apparently for the first time in this state, that the Texas courts "have the inherent power to sanction for abuse of the judicial process which may not be covered by rule or statute."\textsuperscript{216} This inherent power may be invoked where the conduct in question significantly interferes with the court's exercise of its powers; due to its amorphous nature, however, it should be sparingly used.\textsuperscript{217} Moreover, the due process limitations described in \textit{TransAmerican} are applicable to sanctions imposed under the court's inherent power as well.\textsuperscript{218} In \textit{FDIC v. Finlay},\textsuperscript{219} however, the court held that a trial judge may not dismiss a suit with prejudice as a sanction for the plaintiff's violation of an oral order made at a pretrial conference.\textsuperscript{220}

Rule 162\textsuperscript{221} provides that a plaintiff's dismissal or nonsuit of his claims does not affect any pending motion for sanctions.\textsuperscript{222} In \textit{Felderhoff v. Knauf},\textsuperscript{223} the supreme court considered the related issue of what impact a

\textsuperscript{208}TEX. R. CIV. EVID. 505(b).
\textsuperscript{209}Nicholson, 832 S.W.2d at 687.
\textsuperscript{210}811 S.W.2d 913 (Tex. 1991).
\textsuperscript{211}811 S.W.2d 922 (Tex. 1991).
\textsuperscript{212}841 S.W.2d 844 (Tex. 1992).
\textsuperscript{213}Id. at 853. In Braden, however, the supreme court held that if the imposition of a monetary sanction is so severe that it may preclude a party's continuation of the suit, the trial judge must either provide that the sanction is payable only upon the entry of final judgment or make an express finding why the sanction will not have such a preclusive effect. 811 S.W.2d at 929.
\textsuperscript{214}841 S.W.2d at 853.
\textsuperscript{215}831 S.W.2d 506 (Tex. App.—Corpus Christi 1992, no writ).
\textsuperscript{216}Id. at 510.
\textsuperscript{217}Id.
\textsuperscript{218}Id. at 511. See also Lanfear v. Blackmon, 827 S.W.2d 87, 90-91 (Tex. App.—Corpus Christi 1992, orig. proceeding [leave denied]) (applying TransAmerican guidelines in vacating trial court's dismissal of plaintiff's claim as sanction for alleged perjury).
\textsuperscript{219}832 S.W.2d 158 (Tex. App.—Houston [1st Dist.] 1992, writ denied).
\textsuperscript{220}Id. at 158.
\textsuperscript{221}TEX. R. CIV. P. 162.
\textsuperscript{222}Id.
\textsuperscript{223}819 S.W.2d 110 (Tex. 1991).
nonsuit has on a plaintiff's ability to challenge previously imposed sanctions. The court concluded that "[a] nonsuit does not act as a waiver, bar or adjudication precluding plaintiffs from complaining on appeal of monetary sanctions granted before the nonsuit."224 The court in Schein v. American Restaurant Group, Inc.225 held that a sanction order barring plaintiff from introducing certain evidence at trial would be enforced in a second suit that was filed by the plaintiff on the same cause of action, where the plaintiff had nonsuited the first case after the sanction was imposed.226 The court reasoned that to rule otherwise would allow any discovery sanction to be avoided simply by filing a nonsuit.227

D. DUTY TO SUPPLEMENT DISCOVERY

Once again, cases addressing the duty to supplement were plentiful during the Survey period. Unlike prior years, however, the supreme court retreated slightly in the battle to enforce the mandatory sanction of exclusion of witnesses whose identities are not timely disclosed in accordance with Rules 166b(6)228 and 215(5).229 First, the court issued a new opinion on rehearing in Alvarado v. Farah Mfg. Co. Inc.230 Although the court adhered to its original conclusion that the rebuttal witness at issue should not have been permitted to testify because her identity was not disclosed in response to interrogatories,231 the tone of the opinion changed. In this connection, the majority appeared concerned about the potential inconsistency between the automatic exclusion of even critical witnesses under Rule 215(5)232 and the TransAmerican233 standards for the imposition of sanctions for other types of discovery abuse.234 The court went on to hint that the supplementation rules may soon be amended to provide trial courts with a broader range of possible sanctions that can be imposed.235 Moreover, the court made clear that, in the meantime, a trial court is not powerless to prevent the mandatory exclusion rule from causing injustice.236 Specifically, the court noted that a continuance of the trial setting, with the imposition of a monetary sanction against the party whose failure to supplement necessitated the continuance, may be appropriate under certain circumstances.237 Soon after

224. Id. at 111.
226. Id. at 308-09.
227. Id. at 309.
228. Tex. R. Civ. P. 166b(6).
230. 830 S.W.2d 911 (Tex. 1992).
231. Id. at 917.
234. Alvarado, 830 S.W.2d at 915. Prior to the new opinion in Alvarado, several courts had attempted to take TransAmerican into account in failure to supplement cases. E.g., Hogan v. Credit Motors, Inc., 827 S.W.2d 392, 394-96 (Tex. App.—San Antonio 1992, writ denied (per curium)); Pilgrim's Pride Corp. v. Thompson, 818 S.W.2d 185, 189-90 (Tex. App.—Tyler 1991, orig. proceeding).
235. Alvarado, 830 S.W.2d at 915.
236. Id.
237. Id. at 915-16 & n.5.
Alvarado, the supreme court held for the first time since the 1984 amendments to the Texas Rules of Civil Procedure that an undisclosed witness would be allowed to testify in *Smith v. Southwest Feed Yards.* In *Smith,* the court held that an individual party, whose identity is certain and whose personal knowledge has been communicated to all other parties more than thirty days before trial, could testify despite having failed to identify himself in response to a proper interrogatory. Justices Gonzales and Hecht concurred in the decision, the former because he apparently believed that the good cause exception to the exclusion sanction should not be so rigidly construed, and the latter because he believed that the application of the rule to preclude an individual party from testifying would violate the TransAmerican standards. Justice Cornyn dissented strongly, chastising the majority for ignoring the clear language of the court's prior decisions on the subject. Nevertheless, the supreme court has twice reaffirmed its conclusion that undisclosed party witnesses should be permitted to testify on their own behalf since its decision in *Smith.*

The lower courts have already begun exploring the parameters of the exception to the exclusionary rule the supreme court has announced. In particular, two courts have addressed, with differing results, the question of whether a party should be permitted to call an individual adverse party as a witness without having previously identified the adverse party in answers to interrogatories. In *Brekalo v. Ballard,* the appellate court held that the trial court did not abuse its discretion in prohibiting the plaintiff from calling the defendant as a witness at trial. In *Weng Enterprises, Inc. v. Embassy World Travel, Inc.*, on the other hand, the court stated that the trial court abused its discretion by excluding the testimony of one of the defendants, who the plaintiff sought to call as a witness. The court held that the plaintiff did not properly preserve the error, however, because it failed make an offer of proof.

Rule 166b(6)(b) requires a party to supplement its interrogatory answers to identify expert witnesses "as soon as is practical," but no later than thirty days before trial. Courts continue to struggle with the question of when a party may be required to designate its experts under the first prong

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238. 835 S.W.2d 89, 95-96 (Tex. 1992).
239. *Id.* at 91-92.
240. *Id.* at 92-93 (Gonzales, J., concurring).
241. *Id.* at 95 (Hecht, J., concurring).
242. 835 S.W.2d at 95-96, 99 (Corny, J., dissenting).
244. 836 S.W.2d 783 (Tex. App.—Fort Worth 1992, no writ).
245. *Id.* at 785. See also *Guerrero v. Sanders* (Tex. App.—Fort Worth 1992), rev'd in part, 1993 WL 22016 (Tex. App.—Fort Worth Feb. 2, 1993, n.w.h.) (holding that even if refusing to allow defendant to call plaintiff adversely was an abuse of discretion, it was not harmful error).
247. *Id.* at 221.
248. *Id.*
249. TEX. R. CIV. P. 166b(6)(b).
250. *Id.*
of this test, and what the consequences are of failing to do so. In *Tinsley v. Downey*, the court joined those courts that have held that the "as soon as is practical" language does not require a party to designate experts as soon as they are contacted or risk their exclusion at trial. The court reasoned that a party may wish to consult an expert for investigative purposes first, without making a decision on whether she will testify until she has reviewed all of the relevant material gathered in discovery. In *Loffland Brothers Co. v. Downey*, the trial court had ordered the parties to designate their expert witnesses more than eight months prior to the scheduled trial date pursuant to Rule 166b(2)(e)(3). The appellate court held that it was an abuse of his discretion to deny the defendants' motion for leave to designate experts, which was filed a month after this deadline, since there was no justifiable reason for strict enforcement of the early designation requirement.

In *Ticor Title Insurance Co. v. Lacy*, the supreme court held that a party in a multi-party suit has the right to rely on another party's answers to interrogatories even though she was not the party that propounded such interrogatories. Thus, if the interrogatory answers fail to disclose an expert or fact witness, any other party may object to the testimony of such witness. During the Survey period, the courts of appeals differed on whether a party should likewise be entitled to rely on another party's identification of witnesses in offering their testimony even though she did not supplement her own interrogatory answers to disclose them. In *Bullock v. Aluminum Co. of America*, the court concluded that *Ticor Title* stands only for the proposition that a party can rely on another party's interrogatory answers defensively, i.e., to prevent a witness from testifying. Thus, the court refused to allow the defendant to call witnesses it failed to identify even though the plaintiffs did. In *West Texas Gathering Co. v. Exxon Corp.*, on the other hand, the court interpreted *Ticor Title* broadly to allow the plaintiff to

251. 822 S.W.2d 784 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding [leave denied]).
252. Id. at 786-87.
253. Id. at 787.
255. TEX. R. Civ. P. 166b(2)(e)(3) (allowing judge to compel determination and disclosure of whether expert will testify within a reasonable and specific time before trial). Loffland, 822 S.W.2d at 250. In Pedraza v. Peters, 826 S.W.2d 741 (Tex. App.—Houston [14th Dist.] 1992, no writ), the court held that the trial court lacked authority to compel an early designation of experts, apparently because there was no trial setting at the time the order was entered. Id. at 745.
256. Loffland, 822 S.W.2d at 252.
257. 803 S.W.2d 265 (Tex. 1991).
258. Id. at 266.
259. Id.
260. 843 S.W.2d 640 (Tex. App.—Corpus Christi, n.w.h.).
261. Id. at 640.
262. Id. See also Baylor Medical Plaza Servs. Corp. v. Kidd, 834 S.W.2d 69, 73 (Tex. App.—Texarkana 1992, writ denied) (refusing to allow party to call expert witness designated as a fact witness by another party); Thompson v. Kawasaki Motors Corp., U.S.A., 824 S.W.2d 212, 217 (Tex. App.—Dallas 1991, writ requested) (party must designate an expert witness despite opposing party's designation of same expert).
call two witnesses it failed to identify in its interrogatory answers based upon
the defendant's designation of them.\textsuperscript{264}

\textit{Housing Auth. v. Rodriguez-Yepez}\textsuperscript{265} involved the issue of what informa-
tion a party must provide regarding the fact witnesses it may call at trial. The
plaintiff requested in an interrogatory to one of the defendants not only
the identity of persons with knowledge of relevant facts, but also a specific
statement of the facts known to each such person. The defendant objected
that she was not required to state the knowledge possessed by the persons
identified in her response. The court of appeals agreed with the defendant,
holding that under Rule \textsuperscript{166b(2)(d)\textsuperscript{266}} the burden is on the requesting party
to depose any individuals who are identified in interrogatory answers to de-
terminate what knowledge they possess.\textsuperscript{267} The court opined that requiring a
party to detail all of the knowledge of each potential witness, at the risk of
having any testimony that is not specified excluded under Rule \textsuperscript{215(5)\textsuperscript{268}}
would create "an impossible burden."\textsuperscript{269} In denying the plaintiff's applica-
tion for writ of error, however, the Texas Supreme Court stated that it
"should not be construed as approving the implication that deposition is the
sole vehicle for obtaining information concerning the knowledge and opin-
ions of witnesses with knowledge or relevant facts."\textsuperscript{270}

The Texas courts also addressed several procedural issues raised by the
duty to supplement during the Survey period. \textit{Foster v. Cunningham}\textsuperscript{271}
stands for the proposition that a request for the identity of potential wit-
tesses in a deposition will, like a request in interrogatories, trigger a duty to
supplement on the responding party.\textsuperscript{272} In \textit{Shell Western E&P, Inc. v. Parti-
tida},\textsuperscript{273} the court held that service of supplemental interrogatory answers
were timely when they were placed in the mail thirty days prior to trial,
notwithstanding that they were received only twenty-eight days before

\textsuperscript{264} Id. at 776.
\textsuperscript{265} 828 S.W.2d 499 (Tex. App.—El Paso 1992, writ denied), \textit{writ denied per curiam}, 843
S.W.2d 475 (Tex. 1992).
\textsuperscript{266} TEX. R. Civ. P. 166b(2)(d).
\textsuperscript{267} \textit{Housing Auth.}, 828 S.W.2d at 501.
\textsuperscript{268} TEX. R. Civ. P. 215(5).
\textsuperscript{269} \textit{Housing Auth.}, 828 S.W.2d at 501.
\textsuperscript{270} \textit{Housing Auth.}, 843 S.W.2d at 476. The supreme court also noted that the broad scope
of permissible discovery can be tempered by the trial court's discretion, on a case by case basis,
to issue protective orders. \textit{Id.}
\textsuperscript{271} 825 S.W.2d 806 (Tex. App.—Fort Worth 1992, writ denied).
\textsuperscript{272} Id. at 808. \textit{Foster} should also serve as a reminder that when a party first learns of
information that should be disclosed within thirty days of trial, and may therefore be able to
successfully demonstrate good cause why it should not be excluded, supplementation should
still be made as soon as possible even though the thirty-day deadline was missed. \textit{Id.} at 808-09
(holding that there was no good cause to allow testimony of witness for whom incorrect ad-
dress had been given where responding party located witness five days prior to trial but did not
provide information to requesting party).
\textsuperscript{273} 823 S.W.2d 400 (Tex. App.—Corpus Christi 1992, orig. proceeding).
Finally, the court in *Kramer v. Lewisville Memorial Hospital* held that supplemental answers to interrogatories are not required to be verified, and, therefore, witnesses identified in an unverified supplemental response would not be prohibited from testifying.

E. MISCELLANEOUS

Probably the most significant decision in the discovery arena during the Survey period was *Walker v. Packer*, in which the Texas Supreme Court reaffirmed the strict standard for obtaining mandamus relief. Specifically, the court held that mandamus will issue to correct a discovery order only if the petitioner demonstrates that there is no adequate remedy by appeal. The court disapproved of its prior opinions in *Barker v. Dunham* and *Allen v. Humphries* to the extent they could be construed as abolishing or relaxing this requirement in the discovery context. Further, the court held that "an appellate remedy is not inadequate merely because it may involve more expense or delay" than a mandamus, once again disapproving its own former precedents to the extent they implied a more lenient standard.

In response to a lengthy dissent by Justice Doggett, the majority in *Walker* went on to explain why the resurrection of the traditional limitations on mandamus relief would not effectively deprive litigants of meaningful review of discovery orders, offering several examples of circumstances under which a writ would still issue. First, appeal would not be an adequate remedy where the error will be incurable, such as when a trial court orders the production of privileged information. Second, a discovery error that effectively precludes a party from presenting a viable claim or defense at trial, so that the requirement of a trial would be a wasteful formality, would be subject to immediate mandamus review. Finally, the court opined that ordinary appeal may be inadequate if the trial court prohibits discovery and

274. *Id.* at 402-03. Interestingly, the court also appeared to construe the requirement that a copy of the interrogatory answers "be filed promptly in the clerk's office," Tex. R. Civ. P. 168, to mean that filing of the supplemental answers must also be accomplished at least thirty days before trial. *Id.*

275. 831 S.W.2d 46 (Tex. App.—Fort Worth 1992, writ granted).

276. *Id.* at 48. The Fort Worth court's conclusion in this regard is consistent with that of the other courts that have addressed the issue. *Id.* (citing cases). But see Thompson v. Kawasaki Motors Corp., U.S.A., 824 S.W.2d 212, 216 (Tex. App.—Dallas 1991, writ requested) (identification of experts must be done in proper response to interrogatories and not simply by letter).

277. 827 S.W.2d 833 (Tex. 1992).

278. *Id.* at 842.

279. *Id.*

280. 551 S.W.2d 41 (Tex. 1977).

281. 559 S.W.2d 798 (Tex. 1977).

282. *Walker*, 827 S.W.2d at 842.

283. *Id.* (citing cases).

284. *Id.* at 843. The court's opinion, and this example in particular, drew a rebuke from Justice Doggett that the majority was applying a "double standard" by announcing that the "remedy [of mandamus] will be available to support concealment of the truth but not its disclosure." *Id.* at 846 (Doggett, J., dissenting).

285. *Id.* at 843.
The missing discovery cannot be included in the record. The court noted, however, that this situation should rarely arise if the procedures of Rule 166b(4) are followed.

In Remington Arms Co. v. Canales, the supreme court held that a defendant who had failed to timely object to a request for production due to miscommunication in its counsel's office had demonstrated good cause to allow it to lodge its objections out of time. The court found that, while inadvertence of counsel in failing to object was not good cause in and of itself, in the case before it the defendant had responded to an identical request for production from the same plaintiffs' counsel in another suit of the same type. The case is significant because the supreme court clearly indicated that the good cause standard for allowing late objections is the same strict good cause standard for determining whether to allow an undisclosed witness to testify at trial. The cautious practitioner should question, therefore, whether this ruling affects in any way those cases that apply a more lenient standard for good cause in determining whether to allow the withdrawal of deemed admissions pursuant to Rule 169(2).

Production of a party's tax returns was at issue in Chamberlain v. Cherry and Sears, Roebuck & Co. v. Ramirez. In Chamberlain, the court held that the supreme court's decision in Lunsford v. Morris, which allows plaintiffs to take discovery on defendants' net worth in cases where punitive damages are sought, did not require production of the defendant's tax returns since such returns do not reveal net worth information. In a similar vein, the supreme court held in Sears, Roebuck that, where the defendant produced its annual reports, and plaintiff did not challenge the accuracy of the net worth figures reflected in such reports, the trial court abused its discretion in ordering the defendant to produce its federal income tax returns as well. Finally, the decision in Keene Corp. v. Caldwell addressed the interplay between state court discovery requests and federal court protective orders. There, the appellate court held that the trial judge abused his discretion in

286. Id. at 843-44.
287. TEX. R. CIV. P. 166b(4) (governing procedure for presenting objections to discovery and providing for in camera review of allegedly privileged or exempt information).
288. Walker, 827 S.W.2d at 844.
289. 837 S.W.2d 624 (Tex. 1992).
290. Id. at 626.
291. Id. at 625-26.
292. Id. (citing cases).
293. TEX. R. CIV. P. 169(2). See, e.g., North River Ins. Co. of New Jersey v. Greene, 824 S.W.2d 697, 700-01 (Tex. App.—El Paso 1992, writ denied) (inadvertence of counsel or clerical error can negate conscious indifference and thereby support motion for leave to withdraw deemed admissions).
295. 824 S.W.2d 558 (Tex. 1992).
296. 746 S.W.2d 471 (Tex. 1988).
297. Id. at 473.
298. Chamberlain, 818 S.W.2d at 205-07.
299. Sears, Roebuck, 824 S.W.2d at 559.
300. 840 S.W.2d 715 (Tex. App.—Houston [14th Dist.] orig. proceeding).
ordering documents to be produced in violation of a protective order previously entered by a federal court in another case. The court reasoned that the parties' reliance interest in the protective order and principles of comity were both entitled to great weight in its analysis and would require that the discovery be denied. Moreover, the court also held that the protective order was entitled to full faith and credit protection.

X. SUMMARY JUDGMENT

A series of procedural snafus provided the court in Nickerson v. E.I.L. Instruments, Inc. with an opportunity to address the notice requirements of Rule 166a. On June 11 the defendant served a motion for summary judgment, which was set for hearing exactly twenty-one days later on July 2. Two weeks later the hearing was reset for July 9. Seven days before the new hearing date, the plaintiff filed his response to the summary judgment motion. The following day, however, the court granted defendant's motion without any hearing. In response to a subsequent motion for new trial in which plaintiff complained that he had not received twenty-one days notice of the original hearing as required by Rule 166a(c), the trial court ordered a new trial. Immediately thereafter on the same date, however, the trial court again granted defendant's motion for summary judgment.

In reversing the trial court's judgment, the court of appeals agreed with plaintiff's first contention that he had not received the required twenty-one days notice of the initial hearing. The court observed that both the date notice is given and the date of the hearing are excluded in computing the notice period required under Rule 166a(c). Although the court noted that the original hearing was reset to a later date, it expressed no opinion as to whether this resetting cured the initial defect with respect to notice. Instead, it found that the trial court committed additional error by granting defendant's motion before the second date set for the hearing, which deprived plaintiff of the opportunity to file any additional response to the motion before the hearing. Although the trial court would have had discretion in deciding whether to grant plaintiff's petition for leave to file an additional response, the court of appeals nonetheless held that a party's right to petition the court for such leave is guaranteed under Rule 166a(c).

Finally, the court concluded that the order granting a new trial, followed by an immediate reconsideration of the summary judgment motion on the

301. Id. at 720.
302. Id.
303. Id.
304. 817 S.W.2d 834 (Tex. App.—Houston [1st Dist.] 1991, n.w.h.).
305. TEX. R. CIV. P. 166a.
306. Id. 166a(c).
307. Id., citing Williams v. City of Angleton, 724 S.W.2d 414, 417 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).
308. 817 S.W.2d at 835-36.
310. Id. 166a(c).
311. Id.
same day, did not solve the notice problem.\textsuperscript{312} Once the trial court granted the motion for new trial, it was required to give plaintiff reasonable notice of any subsequent summary judgment hearing.\textsuperscript{313} Under the facts of the case, the \textit{Nickerson} court held that at least seven days notice of the hearing should have been given.\textsuperscript{314}

Despite these strict notice requirements of rule 166a, \textit{Negrini v. Beale}\textsuperscript{315} warns that defects in the notice provided under the rule may be waived. Although the appellant in \textit{Negrini} apparently did not receive notice of the summary judgment hearing until less than twenty-one days before the date of the hearing, the court held that the appellant waived any challenge to the defective notice by appearing at the hearing without filing a controverting affidavit or requesting a continuance.\textsuperscript{316} While the court observed that a complete failure to provide any notice of the hearing would present a jurisdictional issue that could be raised for the first time on appeal, a party's allegation that he received less notice than required by statute does not present an issue of jurisdiction and, therefore, must first be raised in the trial court.\textsuperscript{317}

Two other cases decided during the Survey period also involved issues of summary judgment procedure. \textit{University of Texas System v. Ainsa, Skipworth, Zavaleta and Butterworth}\textsuperscript{318} held that a trial court may not grant a summary judgment in favor of a party who has not filed a motion for summary judgment.\textsuperscript{319} \textit{Prowse v. Schellhase}\textsuperscript{320} joins the growing list of courts\textsuperscript{321} which have held that the \textit{Deerfield}\textsuperscript{322} authentication rules for unfiled discovery materials survived the adoption of a new section to Rule 166a\textsuperscript{323} regarding summary judgment use of discovery materials not otherwise on file.

Finally, in \textit{Elder Constr., Inc. v. City of Colleyville},\textsuperscript{324} the supreme court held that a trial court may not reverse an interlocutory summary judgment in favor of one party without providing that party an opportunity to try fully the issues thereby reinjected into the case.\textsuperscript{325} Thus, the trial court erred when it waited until after the close of evidence to reverse its previously granted partial summary judgment, and then submitted questions to the jury

\textsuperscript{312} \textit{Id.}
\textsuperscript{313} \textit{Id.}
\textsuperscript{314} \textit{Nickerson}, 817 S.W.2d at 836.
\textsuperscript{315} 822 S.W.2d 822 (Tex. App.—Houston [14th Dist.] 1992, n.w.h.).
\textsuperscript{316} \textit{Id.} at 823.
\textsuperscript{317} \textit{Id.}, citing Davis v. Davis, 734 S.W.2d 707, 712 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).
\textsuperscript{318} 823 S.W.2d 692 (Tex. App.—El Paso 1992, n.w.h.).
\textsuperscript{319} \textit{Id.} at 693-94. See \textit{Teer v. Duddleston}, 664 S.W.2d 702, 704 (Tex. 1984).
\textsuperscript{320} 838 S.W.2d 787 (Tex. App.—Corpus Christi 1992, n.w.h.).
\textsuperscript{322} \textit{See Deerfield Land Joint Venture v. Southern Union Realty Co.}, 758 S.W.2d 608, 610 (Tex. App.—Dallas 1988, writ denied).
\textsuperscript{323} \textit{Tex. R. Civ. P. 166a(d)} (adopted in 1990).
\textsuperscript{324} 839 S.W.2d 91 (Tex. 1992).
\textsuperscript{325} \textit{Id.} at 91.
about issues that had earlier been foreclosed by the summary judgment.\textsuperscript{326}

\section*{XI. JURY QUESTIONS}

Rule 277\textsuperscript{327} requires cases to be submitted to the jury on broad-form questions whenever feasible.\textsuperscript{328} The Texas Supreme Court provided guidance to trial courts in carrying out this mandate in two cases decided during the Survey period. In \textit{Keetch v. Kroger Co.},\textsuperscript{329} the high court stated that a premises liability case can properly be submitted to the jury on a general negligence question if it is accompanied by appropriate instructions.\textsuperscript{330} In \textit{State Dep't of Highways & Pub. Transp. v. Payne},\textsuperscript{331} the court held that the defendant's requested jury question, inquiring about an issue on which the trial court failed to adequately instruct the jury in connection with its broad-form submission, was sufficient to preserve error even in the absence of a proper objection to the charge.\textsuperscript{332}

The requirement that a party submit proposed jury questions and instructions in substantially correct form in order to preserve error in the court's charge\textsuperscript{333} was also the subject of two decisions of note during the Survey period. The court in \textit{Dresser Indus., Inc. v. Lee}\textsuperscript{334} held that a defendant's requested broad-form question on plaintiff's negligence was not in substantially correct form because it was not accompanied by a limiting instruction.\textsuperscript{335} The court in \textit{Otis Elevator Co. v. Shows}\textsuperscript{336} applied this rule even more stringently, holding that the trial court did not err in refusing to submit the defendant's requested instruction on unavoidable accident because it included a second sentence not found in the Texas Pattern Jury Charges.\textsuperscript{337} Significantly, the court apparently agreed that the defendant was entitled to an instruction to the jury of the type included as the second sentence of its proposed submission; because it was joined with the unavoidable accident instruction, however, the court concluded it would have been an improper

\begin{itemize}
\item \textsuperscript{326} \textit{Id.}
\item \textsuperscript{327} TEX. R. CIV. P. 277.
\item \textsuperscript{328} \textit{Id.} Interestingly, several cases decided during the Survey period noted the disadvantage of submitting a case on broad-form questions, \textit{i.e.}, the inability to determine the basis for the jury's negative answer. \textit{E.g.}, \textit{Dealers Elec. Supply v. Pierce}, 824 S.W.2d 294 (Tex. App.--Waco 1992, writ denied).
\item \textsuperscript{329} 845 S.W.2d 262 (Tex. 1992).
\item \textsuperscript{330} \textit{Id.} at 266.
\item \textsuperscript{331} 838 S.W.2d 235 (Tex. 1992).
\item \textsuperscript{332} \textit{Id.} at 239. Significantly, the court decried the byzantine rules that have evolved for preserving error in the charge and stated that recommendations for their simplification are currently under consideration. \textit{Id.} at 239-40. In the meantime, however, the current rules should be applied to serve when possible what the court noted should be the single test: "whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling." \textit{Id.} at 240.
\item \textsuperscript{333} TEX. R. CIV. P. 278.
\item \textsuperscript{334} 821 S.W.2d 406 (Tex. App.—Tyler 1991, writ granted).
\item \textsuperscript{335} \textit{Id.} at 407-08.
\item \textsuperscript{336} 822 S.W.2d 59 (Tex. App.—Houston [1st Dist.] 1991, writ denied).
\item \textsuperscript{337} \textit{Id.} at 61 (citing 1 \textsc{state bar of texas, texas pattern jury charges, pjc} § 3.04 (1987)).
\end{itemize}
Thus, the defendant apparently would have preserved the error if it had tendered the two requested instructions separately to the trial judge.

XII. JURY PRACTICE

As reported in Figari, 1992 Annual Survey, the United States Supreme Court recently held that a party to a civil suit may not use its peremptory challenges to exclude prospective jurors solely on account of their race. Several decisions during the Survey period discussed the proper procedure for making a "Batson" challenge to a party's use of peremptory strikes. For example, in Lott v. City of Fort Worth, the court, relying on criminal precedents, stated that a Batson hearing is an evidentiary hearing in which the trial judge serves as factfinder. The complaining party must establish a prima facie case of discrimination by showing that the opposing party "struck most or all of the members of the identified group from the venire, or has used a disproportionate number of peremptories against the group." The burden then shifts to the challenged party to rebut the presumption of discrimination by offering a racially neutral explanation for each of the questioned peremptory strikes. If the trial judge determines that even one member of the complaining party's race was struck for discriminatory reasons, the entire jury selection process is invalidated.

In order to complain on appeal that the trial court erred in failing to strike a prospective juror for cause, a party must advise the trial court, prior to exercising her peremptory challenges, that she will exhaust her peremptory challenges and that specific objectionable jurors will remain on the panel. In Beavers v. Northrop Worldwide Aircraft Servs., Inc., the court held that appellants failed to comply with this rule when they raised their objection immediately after delivering their list of peremptory strikes to the trial judge.

338. 822 S.W.2d at 61.
340. The Supreme Court first announced the rule prohibiting the prosecution in a criminal case from utilizing its peremptory strikes in a racially discriminatory manner in Batson v. Kentucky, 476 U.S. 79, 89 (1986).
341. 840 S.W.2d 146 (Tex. App.—Fort Worth 1992, n.w.h.).
342. Id. at 149. The trial judge's findings of fact will be subject to a "clearly erroneous" standard of review on appeal. Id. at 150.
343. Id. at 150 (quoting Dewberry v. State, 776 S.W.2d 589, 591 (Tex. Crim. App. 1989)).
344. Lott, 840 S.W.2d at 150. The opinion provides examples of some of the factors that a court should look at in determining the legitimacy of a party's allegedly race-neutral explanation, including (1) whether the reason given is related to the facts of the case, (2) whether there was a lack of meaningful questioning of the prospective juror, (3) whether persons with similar characteristics were also struck, and (4) whether an explanation based on a group trait is shown to apply specifically to the stricken juror. Id. at 151. Obviously, in order to preserve any error in the trial court's overruling of a Batson challenge, the complaining party must ensure that the voir dire is recorded. Soto v. Texas Industries, Inc., 820 S.W.2d 217, 219 (Tex. App.—Fort Worth 1991, no writ).
345. Lott, 840 S.W.2d at 153.
but before the jury was seated. The court stated that peremptory challenges are exercised by the parties' actions and not by the trial court's conduct in seating the jury.

The court in Fazzino v. Guido concluded that the trial judge did not commit fundamental error by allowing jurors to propound questions to witnesses at trial. The court noted that the issue was apparently one of first impression in the civil courts in Texas, although two recent appellate court decisions in criminal cases had permitted juror questioning of witnesses. In reaching its decision, the Fazzino court emphasized that the procedure utilized by the trial judge, namely, taking written questions from jurors and receiving objections to same outside the jury's presence, protected the parties from harm.

XIII. JUDGMENT, DISMISSAL, AND MOTION FOR NEW TRIAL

More than fifty years ago, the Texas Supreme Court announced the test for granting a motion for new trial after a default judgment in Craddock v. Sunshine Bus Lines. In Bank One, Texas, N.A. v. Moody, the court clarified that the Craddock test consists of only three elements, the first of which is that the failure to file an answer was not intentional, but was due to a mistake or accident. Put another way, a mistake or accident can negate an intention not to file an answer. The court also held that a mistake of law may be sufficient to satisfy the first element of the Craddock test. Thus, the court concluded that the garnishment defendant in Moody was entitled to a new trial where it failed to file an answer because of a mistaken belief that freezing the garnished accounts and tendering the funds on deposit to the trial court was a sufficient response to the writ of garnishment.

The supreme court also set aside default judgments in Smith v. Lippmann and Clements v. Barnes. In the former case, the court held that a pro se defendant who files, within the time for answering, a signed letter

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348. Id. at 680-81.
349. Id. at 681.
350. 836 S.W.2d 271 (Tex. App.—Houston [1st Dist.] 1992, n.w.h.).
351. Id. at 276. The court apparently addressed the issue under a fundamental error standard since neither party objected to the procedure of allowing juror questions at trial. Id.
353. Fazzino, 836 S.W.2d at 275-76.
354. 134 Tex. 388, 133 S.W.2d 124 (1939).
355. 830 S.W.2d 81 (Tex. 1992).
356. Id. at 82-83.
357. Id. at 83.
358. Id. at 84.
359. Id. at 85.
360. 826 S.W.2d 137 (Tex. 1992).
361. 834 S.W.2d 45 (Tex. 1992).
identifying the parties, the case, and his current address has sufficiently an-
swered and is entitled to notice of any further proceedings. In the latter, the
court reversed the court of appeals' denial of a court-appointed bank-
ruptcy trustee's writ of error from a default judgment because the plaintiff
failed to allege that the trustee acted outside the scope of her authority, as
would have been necessary to avoid her judicial immunity.

Procedural aspects of motions for new trial were at issue in two notewor-
ty decisions during the Survey period. The supreme court held in
Mueller v. Saravia that, where a judgment contains an order severing the adjudicated claims and assigning them a new cause number, a motion for new trial filed under the original cause number is sufficient to extend the time for appeal.

Finally, the Texas Supreme Court proclaimed in Stewart Title Guaranty Co. v. Sterling that, contrary to what many had believed, the "one satisfaction rule" of Bradshaw v. Baylor University is not dead. The one satisfaction rule, which prohibits a party from recovering more than the total amount of his damages where he has settled with at least one joint tortfeasor by requiring a dollar for dollar credit against any judgment that he subsequently obtains for the same injury, was called into doubt by Duncan v. Cessna Aircraft Co. As the court stated in Stewart Title, however, Duncan did not authorize double recovery; instead, it simply avoided the problem through judgment reductions based on the comparative fault of the settling defendant rather than the Bradshaw dollar for dollar credit. Thus, in those areas in which the law does not provide for the allocation of fault or causation, such as intentional torts, the one satisfaction rule is still applicable.

XIV. RES JUDICATA

The Texas Supreme Court reaffirmed the transactional approach to res judicata in Barr v. Resolution Trust Corp., thereby eliminating some of the confusion previously associated with the doctrine. In several earlier decisions, the court had recognized that res judicata, or claim pre-

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362. Smith, 826 S.W.2d at 138.
363. Clements, 834 S.W.2d at 46-47.
364. 826 S.W.2d 608 (Tex. 1992).
365. Id. at 609.
366. 822 S.W.2d 1 (Tex. 1991).
367. 126 Tex. 99, 84 S.W.2d 703 (1935).
368. Stewart Title, 822 S.W.2d at 6.
369. Id. at 2-3.
370. 665 S.W.2d 414, 430-32 (Tex. 1984) (rejecting the reasoning behind the one satisfaction rule in the context of the comparative causation scheme adopted by the court for products liability suits).
371. Stewart Title, 822 S.W.2d at 3.
372. Id.
373. 837 S.W.2d 627 (Tex. 1992).
374. See Jeanes v. Henderson, 688 S.W.2d 100, 103 (Tex. 1985); Gracia v. RC Cola - 7 Up Bottling Co., 667 S.W.2d 517, 519 (Tex. 1984); Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816, 818 (Tex. 1984).
clusion,\textsuperscript{375} prevented the splitting of a cause of action by proscribing relitigation of claims that had been finally adjudicated as well as related matters that should have been litigated in the prior suit. Because this definition of the rule would literally require joinder of all disputes between the parties, regardless of whether they had anything in common, the court acknowledged in \textit{Barr} that it had resorted to a wide variety of theories and tests over the years in order to give res judicata a more restrictive application.\textsuperscript{376} For example, in \textit{Griffin v. Holiday Inns of America},\textsuperscript{377} the court rejected the view that a judgment as to one claim was res judicata of all claims arising out of the same transaction. Instead, the court stated that a judgment on one cause of action was "not conclusive of a subsequent suit on a different cause of action except as to those issues of fact actually litigated and determined in the first suit."\textsuperscript{378} In \textit{Westinghouse Credit Corp. v. Kownslar},\textsuperscript{379} on the other hand, the court made no attempt to determine whether there was more than one cause of action involved, choosing instead to decide the case solely on policy grounds.\textsuperscript{380} Later, in both \textit{Texas Water Rights Comm. v. Crow Iron Works}\textsuperscript{381} and \textit{Gracia v. RC Cola - 7-Up Bottling Co.},\textsuperscript{382} the court adopted a transactional test, shifting the focus from the cause of action to the subject matter of the litigation.\textsuperscript{383} Although this latter formulation of the doctrine was inconsistent with the test announced earlier in \textit{Griffin}, the court did not expressly overrule the \textit{Griffin} test in either \textit{Crow Iron Works} or \textit{Gracia}.

Unable to reconcile these varying approaches, the court in \textit{Barr} re-embraced the transactional test announced in \textit{Crow Iron Works} and \textit{Gracia} and expressly overruled its earlier decision in \textit{Griffin}.\textsuperscript{384} In doing so, the court observed that the transactional test was consistent with the approach taken by the Restatement of Judgments,\textsuperscript{385} and substantially similar to the compulsory counterclaim rule\textsuperscript{386} embodied in the Texas Rules of Civil Proce-

\begin{itemize}
  \item \textsuperscript{375} Issue preclusion, or collateral estoppel, prevents relitigation only of particular issues already resolved in a prior suit. 837 S.W.2d at 647.
  \item \textsuperscript{376} Id. at 648; see generally 5 William Dorsaneo, \textit{Texas Lit. Guide}, § 131.06[4][b][ii] (1991).
  \item \textsuperscript{377} 496 S.W.2d 535 (Tex. 1973).
  \item \textsuperscript{378} Id. at 538.
  \item \textsuperscript{379} 496 S.W.2d 531 (Tex. 1973).
  \item \textsuperscript{380} Id. at 532. The court acknowledged in \textit{Barr} that this pure policy approach lacked objective standards and afforded little basis for consistency and formulation of precedent. 837 S.W.2d at 649 (quoting Z. Steakley & W. Howell, \textit{Ruminations on Res Judicata}, 28 Sw. L. J. 355, 362-63 (1974)).
  \item \textsuperscript{381} 582 S.W.2d 768 (Tex. 1979).
  \item \textsuperscript{382} 667 S.W.2d 517 (Tex. 1984).
  \item \textsuperscript{383} According to the court in \textit{Crow Iron Works}: "The scope of res judicata is not limited to matters actually litigated; the judgment in the first suit precludes a second action.. on causes of action or defenses which arise out of the same subject matter and which might have been litigated in the first suit." 582 S.W.2d at 771-72; accord \textit{Gracia}, 667 S.W.2d at 519.
  \item \textsuperscript{384} 837 S.W.2d at 649.
  \item \textsuperscript{385} \textbf{Restatement of Judgments} § 24(1) provides that a final judgment on an action extinguishes the right to bring suit on the transaction, or series of connected transactions, out of which the action arose.
  \item \textsuperscript{386} TEX. R. CIV. P. 97(a) requires a party to state as a counterclaim any claim that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.
\end{itemize}
Under this transactional approach, trial courts must analyze the factual basis of a party's claims without regard to the form of the action in order to determine what constitutes the subject matter of a suit. A subsequent suit will then be barred if it arises out of the same subject matter as a previous suit and, through the exercise of diligence, could have been litigated in the prior suit.

In *Fidelity Mut. Life Ins. Co. v. Kaminsky*, the court considered whether a plaintiff's claim for attorney's fees incurred in defending a suit for breach of a lease was barred by the plaintiff's failure to assert that claim as a counterclaim in the earlier suit. In addressing the question, the court first observed that parties are typically permitted to recover attorney's fees even in suits in which their entitlement to such fees is contingent upon the outcome of the suit. The court also noted that at least one other court had specifically held that a tenant who successfully defended a suit for breach of a lease could recover his attorney's fees in the initial suit. As a result, the court concluded that the plaintiff could have recovered his fees by counterclaim in the prior suit.

The court considered more difficult, however, the question of whether plaintiff's counterclaim for fees was compulsory in the first suit. According to plaintiff, his entitlement to fees was contingent on his success in defending the prior suit. Therefore, the claim for fees was immature at the time of the first suit and could not be a compulsory counterclaim in that suit. The court acknowledged that a counterclaim is compulsory only if it is mature at the time the defendant is required to file his answer. Moreover, the court termed "persuasive" the federal cases holding that a claim for attorney's fees incurred defending a previous lawsuit was not a compulsory counterclaim. Nonetheless, the court held that plaintiff's claim was a compulsory counterclaim in the first suit and, therefore, barred by res judicata due to his failure to assert the claim in that suit. The court decided that the claim for fees was not premature in the first suit even though recovery of those fees was contingent on the outcome of that suit. Moreover, permitting a separate suit in these circumstances, according to the court, would only encourage a multiplicity of suits and delays in litigation, thereby undermining

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387. 837 S.W.2d at 649-50.
388. *Id.* at 649.
389. *Id.* at 650.
391. *Id.* at 880.
392. *Id.* at 880.
393. *Id.* at 881.
394. *Id.*
395. *Id.*; see Wyatt v. Shaw Plumbing Co., 760 S.W.2d 245, 247 (Tex. 1988) (setting forth six elements of compulsory counterclaims, including maturity of the claim).
397. 820 S.W.2d at 882.
398. *Id.*
399. *Id.*
the policy purposes of the compulsory counterclaim rule. 400

Guy v. Damson Oil Corp. 401 discusses the proper procedure for abating a suit on the basis of a prior pending action in the court of appeals. The plaintiffs in Guy filed suit against various defendants asserting title to fractional interests in certain oil and gas leases. Defendants responded with a plea in abatement alleging that plaintiffs had earlier filed the same lawsuit against them in Harris County, and that a take nothing judgment had been entered in that suit in favor of the defendants. Although the judgment entered in the Harris County suit was still on appeal, the trial court in Guy sustained the defendants' plea in abatement and entered an order dismissing plaintiffs' suit with prejudice. On appeal from the order of dismissal, plaintiffs argued that their second suit was not subject to abatement since the earlier suit was no longer pending in the Harris County trial court and defendants could not use a plea in abatement as the vehicle for advancing a defense of res judicata.

Prior to the decision in Scurlock Oil Co. v. Smithwick, 402 a judgment in Texas was not final for res judicata purposes while an appeal was still pending. Cases decided before Scurlock, therefore, had held that the pendency of an appeal from a trial court's judgment was also sufficient grounds for abatement and dismissal of a subsequent suit. 403 Because the Scurlock decision brought a judgment on appeal within the scope of res judicata, 404 it was unclear after Scurlock whether the pendency of a prior action on appeal should still be raised by plea in abatement as opposed to an affirmative defense of res judicata. According to the court in Guy, either method is appropriate. 405 The court acknowledged that the affirmative defense of res judicata was now available under the circumstances of the case in light of the recent decision in Scurlock. 406 It found nothing in the Scurlock opinion, however, to suggest that the extension of res judicata to judgments on appeal was intended to narrow the use of pleas in abatement. 407 On the contrary, the court noted that federal courts 408 and commentators 409 alike had concluded that abatement continued to be the preferable remedy while the outcome of the first judgment remained uncertain on appeal. 410

Although it decided that a plea in abatement was proper, the court in Guy held that the trial judge had no authority to dismiss the case with prejudi-
dice.\textsuperscript{411} The court remarked that dismissal pursuant to a plea in abatement upon the ground of prior pending action should be effective only so long as the cause of abatement continues to exist.\textsuperscript{412} Thus, the order of dismissal should have been without prejudice to bringing a new suit upon the same set of facts if the cause of action still existed after the grounds for abatement disappeared.\textsuperscript{413}

XV. MISCELLANEOUS

1. Appointment of Masters

Rule 171\textsuperscript{414} permits trial courts to appoint a master in chancery for good cause in exceptional cases. In\textit{Owens-Corning Fiberglas Corp. v. Caldwell},\textsuperscript{415} the trial court appointed a master to oversee all discovery in the underlying litigation on the basis that the suit was a controversy of substantial complexity in which the increased expenses associated with a master would be offset by the master's efforts in reducing the complexities of trial.\textsuperscript{416} Eight months later, but prior to the first proceeding before the master, one of the parties objected to the master's appointment. When the trial court refused to rule on this objection, the complaining party filed an original mandamus proceeding against the trial judge in the court of appeals. Respondent, the trial court, responded by arguing that the challenge to the master was untimely and that the underlying suit was exceptional, thus justifying the appointment of a master.

The court of appeals rejected respondent's arguments on the basis of\textit{Simpson v. Canales},\textsuperscript{417} which was recently decided by the Texas Supreme Court. In\textit{Simpson}, the court held that a case was not exceptional and there was no good cause to refer all discovery matters to a master, even though the suit was a complex toxic tort case involving eighteen defendants and voluminous discovery that had already spawned eight hearings on discovery motions.\textsuperscript{418} In contrast, the suit in\textit{Caldwell} involved only five defendants and less than a dozen written discovery requests served by the parties. The court of appeals concluded that if\textit{Simpson} was not an exceptional case justifying a blanket order of discovery, neither was\textit{Caldwell}.

The\textit{Caldwell} court likewise rejected respondent's contention that petitioner had waived its challenge to the master's appointment by waiting eight months to object.\textsuperscript{420} Unable to locate any Texas authority on point,\textsuperscript{421} and

\textsuperscript{411} \textit{Id.} at *4.
\textsuperscript{413} 1991 WL 181894 at *4.
\textsuperscript{414} TEX. R. Ov. P. 171.
\textsuperscript{415} 830 S.W.2d 622 (Tex. App.—Houston [1st Dist.] 1991, n.w.h.).
\textsuperscript{416} \textit{Id.} at 623.
\textsuperscript{417} 806 S.W.2d 802 (Tex. 1991).
\textsuperscript{418} \textit{Id.} at 812.
\textsuperscript{419} \textit{Id.} at 820.
\textsuperscript{420} \textit{Id.} at 626-27.
\textsuperscript{421} \textit{Id.} at 626.
because Rule 171 does not itself specify a time by which the parties must object to the appointment of a master, the court examined cases interpreting the companion federal rule. Although these cases require a party to object to the appointment of a special master at the time of the appointment or within a reasonable time thereafter, the court observed that none of the federal cases defined what constituted a reasonable time. The court concluded, therefore, that there was no fixed arbitrary period in which the objection must be asserted; rather, a party may register his objection at any time before he participates in proceedings before the master. Accordingly, the court held that the objection had not been waived since it was filed prior to the first hearing before the master, even though the parties had copied the master with their written discovery over the eight months that elapsed between the date of the master's appointment and the first scheduled hearing before the master.

2. Judicial Estoppel

Under the doctrine of judicial estoppel, a party is estopped from asserting any position contrary to a position he has alleged or admitted under oath in a prior proceeding. According to the court in Wells v. Kansas University Endowment Association, however, judicial estoppel does not apply to contradictory positions taken in the same proceeding. Consequently, the court in Wells held that a party was not judicially estopped in the proceeding by virtue of statements contained in his affidavit and interrogatory answers filed in the same proceeding.

3. Sanctions

In Lassiter v. Shavor, the appellant's trial pleadings were stricken as a sanction for his violation of the trial court's order in limine. Although no procedural rule specifically authorizes a trial court to strike a party's pleadings for violation of a pretrial order unrelated to discovery, the court held on the basis of Koslow's v. Mackie that such a sanction was available

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422. See TEX. R. CIV. P. 171.
423. FED. R. CIV. P. 53.
424. See, e.g., Burlington N. R.R. v. Washington Dep't of Revenue, 934 F.2d 1064, 1069 (9th Cir. 1991); Cruz v. Hauck, 515 F.2d 322, 331 (5th Cir. 1975).
425. 830 S.W.2d at 624.
426. Id. at 625.
427. Id.
430. Id. at 488.
431. Id.
432. 824 S.W.2d 667 (Tex. App.—Dallas 1992, n.w.h.).
433. In contrast, TEX. R. CIV. P. 215(2)(5) expressly authorizes a court to strike a party's pleadings for failure to comply with a discovery request or order. See also TEX. R. CIV. P. 215(3) (authorizing a trial court to impose any sanction authorized by rule 215(2) for abuse of the discovery process).
434. 796 S.W.2d 700, 703-04 & n.1 (Tex. 1990).
under appropriate circumstances. The court also held, however, that the standards for review of discovery sanctions announced in TransAmerican Natural Gas Corp. v. Powell applied equally to sanctions imposed for violation of other pretrial orders. Under TransAmerican, sanctions for discovery abuse must be just and appropriate. In addition, the imposition of severe sanctions is limited by the requirements of constitutional due process. After finding no evidence in the record that appellant had acted in flagrant bad faith or with callous disregard for the order in limine, the court in Lassiter concluded that the harsh sanction selected by the trial court did not comport with the requirements of due process. Accordingly, it reversed the trial court’s judgment as an abuse of discretion.

4. Referral to Mediation

Section 154.021(a) of the Texas Civil Practice and Remedies Code authorizes a trial court on its own motion to refer a suit to alternative dispute resolution. The court may not refer the dispute to mediation, however, if a party objects to the procedure on a reasonable basis. Moreover, the mediator appointed by the court may not compel the parties to negotiate or coerce them to enter into a settlement agreement. On the basis of these provisions, the court in Decker v. Lindsay held that a trial court did not abuse its discretion in ordering the parties to mediation over the objection of the plaintiff. According to the court, one party’s mere belief that mediation will not resolve a lawsuit does not constitute a reasonable basis for objection. Nevertheless, the court held that the order of referral in Decker was void inasmuch as it required the parties to actually negotiate in good faith and attempt to reach a settlement. In this respect, concluded the court, the order violated the open courts provision of the Texas Constitution.

435. 824 S.W.2d at 669.
437. 824 S.W.2d at 670.
438. 811 S.W.2d at 916-17. In order to be "just," the sanction must not be excessive and a direct relationship must exist between the offensive conduct and the sanctions imposed. Id.
439. Id. at 917-18.
440. 824 S.W.2d at 670.
441. Id.
443. Id. § 154.022(c).
444. Id. § 154.053(a).
445. 824 S.W.2d 247 (Tex. App.—Houston [1st Dist.] 1992, n.w.h.).
446. Id.
447. Id. at 252.
449. 824 S.W.2d at 251. The court refused to address plaintiff’s contention that the entire ADR statute was unconstitutional, however, because plaintiff’s brief failed to present any argument or authorities supporting that contention. Id.