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

I. JURISDICTION OVER THE PERSON

A number of cases during the Survey period measured the reach of the Texas long-arm statute.\(^1\) A recent decision of the United States Court of Appeals for the Fifth Circuit, *Polythane Systems, Inc. v. Marina Ventures International, Ltd.*,\(^2\) considered an instructive variation of the usual use of the statute.

In *Polythane Systems* a Texas manufacturer coupled the filing of a Texas declaratory judgment action with the Texas long-arm statute to preempt the filing elsewhere of product liability claims that had been threatened against it. The two nonresident defendants, owners of marinas located in Maryland, had constructed floating dock systems at those marinas utilizing foam produced and sold by the manufacturer. When the dock systems began losing their buoyancy, the marina owners attributed the problem to the manufacturer’s product. Upon being informed of the problem, the manufacturer seized the initiative, filed a declaratory judgment action in Texas, and effected service on the marina owners using the long-arm statute. The marina owners moved to dismiss for lack of personal jurisdiction and, after the trial court denied their motion, they asserted product liability counterclaims back against the manufacturer. A trial on the merits subsequently resulted in a judgment exonerating the manufacturer.

The marina owners appealed from the adverse judgment, contending that the trial court, among other things, lacked personal jurisdiction. The Fifth Circuit observed that personal jurisdiction over a nonresident defendant can

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\(^1\) *TEX. CIV. PRAC. & REM. CODE ANN.* §§ 17.041-45 (Vernon 1986 & Supp. 1993) (formerly *TEX. REV. CIV. STAT. ANN.* art. 2031b (Vernon 1964) (repealed 1985)).

\(^2\) 993 F.2d 1201 (5th Cir. 1993).
be general or specific; however, it concluded that the defendants’ contacts with Texas did not support general jurisdiction.\(^3\)

Focusing on specific jurisdiction, the Fifth Circuit held that the marina owners had purposely availed themselves of the privilege of conducting business in Texas when they purchased and received delivery of the foam in Texas and made payments to the manufacturer in Texas.\(^5\) The Fifth Circuit emphasized that both the manufacturer's declaratory judgment action and the marina owners' counterclaims arose from that sales relationship.\(^6\) In addressing the fairness of requiring the defendants to litigate such disputes in Texas, the Fifth Circuit concluded that the manufacturer, as the declaratory judgment plaintiff, had an interest in ascertaining what liability it might have had for the marinas' problems and a legitimate interest in defending its product's reputation against claims that the foam was defective.\(^7\) On this basis, the Fifth Circuit sustained the trial court's exercise of personal jurisdiction.\(^8\)

\(\textit{Aviles v. Kunkle},\)\(^9\) another decision of the Fifth Circuit, addressed an unusual use of the Texas long-arm statute by migrant farm workers in an attempt to redress alleged violations of certain federal employment statutes. Three groups of migrant farm workers, all of whom resided in Texas, filed suit in Texas against two Ohio farmers and their foreman for federal employment claims arising out of their participation in the 1983 harvest at the defendants' farm in Ohio.

The farmers, who were residents of Ohio and had no direct contact with Texas, had employed the Texas workers to assist with their 1982 harvest and, at its conclusion, offered them employment the following year in connection with the 1983 harvest. When the time for the 1983 harvest approached, a representative of the defendants telephoned the plaintiffs in Texas and informed them when the harvest was expected to begin. Another representative of the defendants wrote to the plaintiffs and suggested they arrive in Ohio by a certain date to begin work. The plaintiffs arrived in Ohio by the communicated date but were unable to start work for several weeks because the crop was not ready. Later, complaining of their employment conditions during the 1983 harvest, the plaintiffs filed suit in Texas and effected service on the defendants under the long-arm statute. The defendants filed a motion to dismiss for lack of personal jurisdiction. After finding no

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3. 993 F.2d at 1205. "'General jurisdiction' is personal jurisdiction based on a defendant's contacts with the forum that are unrelated to the controversy. To exercise general jurisdiction, the court must determine whether 'the contacts are sufficiently systematic and continuous as to support a reasonable exercise of jurisdiction.'" Southmark Corp. v. Life Investors, Inc., 851 F.2d 763, 772 (5th Cir. 1988) (citation omitted). "'Specific jurisdiction' . . . is personal jurisdiction based on contacts with the forum that are related to the particular controversy. Even a single purposeful contact may in a proper case be sufficient to meet the requirement of minimum contacts when the cause of action arises from the contact." Id. (citation omitted).
4. 993 F.2d at 1205.
5. \textit{Id.}
6. \textit{Id.}
7. \textit{Id.} at 1206.
8. \textit{Id.}
9. 978 F.2d 201 (5th Cir. 1992).
basis for general jurisdiction, the trial court ruled that it had specific jurisdiction over the defendants' person. This determination was, however, based on a perceived partial performance of a contract in Texas, partial commission of a tort in Texas, and recruitment of Texas residents in Texas for employment outside the state. An appeal to the Fifth Circuit ensued. Focusing on the three bases relied upon by the trial court, the Fifth Circuit observed that "[s]uch actions can in some cases provide the requisite minimum contacts permitting a court to exercise personal jurisdiction over a nonresident defendant, but only if the asserted cause of action arises out of these 'contacts.'"10 Continuing, the Fifth Circuit emphasized that the plaintiffs' claims were not based on any contract, tort, or recruitment in Texas, but upon the alleged violation of two federal statutes arising out of employment conditions in Ohio.11 In reversing the trial court's determination, the Fifth Circuit held that the plaintiffs' federal claims arose out of their 1983 employment in Ohio, not out of any contacts upon which the trial court rested its exercise of personal jurisdiction.12 Thus, Aviles reiterates that, in order for specific jurisdiction to be sustained, there must be a nexus between the contacts relied upon and the claims asserted.

Joining with an earlier case,13 Leonard v. USA Petroleum Corp.14 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 plaintiff, a broker and a resident of Texas, brought suit in Texas against a California corporation, which was the owner of certain gas stations in Puerto Rico, claiming the corporation breached a commission agreement covering a sale of those stations arranged by the plaintiff. Prior to suit, the California corporation 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.15 When the plaintiff commenced suit he apparently effected service over the nonresident corporation by serving its designated agent in Texas. The nonresident corporation moved to dismiss for lack of personal jurisdiction. In reply, the plaintiff asserted that the corporation's qualification and appointment of a service agent in Texas was tantamount to "consent" to be sued there and obviated any due process inquiry.16 Overruling this argument, the federal district court held that, "[i]n comply-

10. 978 F.2d at 204.
11. Id. at 205.
12. Id.
15. 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).
ing with the Texas registration statute, [the nonresident corporation] consented to personal jurisdiction in Texas only if the jurisdiction was constitutional.” 17 Since the nonresident corporation did not have sufficient contacts with Texas to satisfy due process, the federal district court ruled that personal jurisdiction was lacking. 18

A relatively obscure provision 19 of the Texas long-arm statute continued to receive attention during the Survey period. A provision of that statute stipulates that when process is delivered to the Secretary of State for forwarding to a nonresident defendant, the Secretary of State “shall require a statement of the name and address of the nonresident’s home or home office” to facilitate such forwarding. 20 Whiskeman v. Lama 21 recently considered this address requirement as it related to an individual defendant. The record before the court revealed that the Secretary of State received only an address for the defendant in Arizona 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. Observing that nothing in the record showed that the Arizona address furnished the Secretary of State was the “home office” address required by the statute, the court concluded the statute had not been satisfied and set aside the judgment. 22

II. SPECIAL APPEARANCE

An earlier decision 23 of the supreme court reiterated that a nonresident defendant has the burden of proof at a special appearance hearing 24 and,

17. Id. at 888-89; but see Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1270 n.21 (5th Cir. 1981) (stating that “by virtue of the theory of consent to jurisdiction implicit in TEX. BUS. CORP. ACT ANN. art. 8.10, a foreign corporation consents to amenability to jurisdiction for purposes of all lawsuits brought within the state, whether or not the cause of action relates to activities within the state.”); Goldman v. Pre-Fab Transit Co., 520 S.W.2d 597, 598 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ) (stating that “in return for the privilege of doing business in this state, and enjoying the same rights and privileges as a domestic corporation, the foreign corporation has consented to amenability to jurisdiction for purposes of all lawsuits within the state”).


20. Id.


24. 734 S.W.2d at 664; see, e.g., Siskind v. Villa Found. for Educ., Inc., 642 S.W.2d 434,
moreover, that such burden obliges the nonresident to adduce proof negating all bases of personal jurisdiction.25 Thus, in order to prevail at a special appearance hearing, a nonresident defendant must present evidence negating both a “specific” basis26 and a “general” basis27 for personal jurisdiction.28 Temperature Systems, Inc. v. Bill Pepper, Inc.29 illustrates some of the pitfalls presented by this procedure. In its petition, the plaintiff relied only on specific jurisdiction, alleging a contract connected with Texas as the underlying basis. After the nonresident defendant was served by substituted service, it filed a special appearance attacking service and a hearing was held by the trial court on the matter. At the hearing, in addition to establishing facts supporting the specific basis for jurisdiction, the plaintiff adduced evidence showing a basis for general jurisdiction. The defendant apparently failed to object to this evidence, and thereby tried the issue of general jurisdiction by consent. At the conclusion of the hearing the trial court overruled the defendant's special appearance but did not recite the basis for its decision. Subsequently, the defendant perfected an appeal and sought to overturn the trial court’s ruling. On appeal, the court of appeals found that a specific basis for jurisdiction was lacking.30 Since the trial court did not state a basis for its ruling, however, the court of appeals examined the record to ascertain if the ruling could be upheld on any other basis supported by the evidence.31

Concluding that the evidence adduced at the special appearance hearing supported general jurisdiction and that the defendant had failed to shoulder its burden by negating this basis, the court of appeals affirmed the trial

438 (Tex. 1982) (holding that the defendant must negate all bases of personal jurisdiction); Hoppenfield v. Crook, 498 S.W.2d 52, 55 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.) (holding that the burden of proof and persuasion rests upon the nonresident defendant); Taylor v. American Emery Wheel Works, 480 S.W.2d 26, 31 (Tex. Civ. App.—Corpus Christi 1972, no writ) (holding that the nonresident defendant bears burden of pleading and proving lack of jurisdiction). But see Familia de Boom v. Arosa Mercantil, S. A., 629 F.2d 1134, 1138 (5th Cir. 1980) (stating that if defendant challenges jurisdiction, plaintiff has burden of proof); cert. denied, 451 U.S. 1008 (1981); Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 490 (5th Cir. 1974) (holding that the party invoking personal jurisdiction has burden of proof); Jetco Elec. Indus. Inc. v. Gardiner, 473 F.2d 1228, 1232 (5th Cir. 1973) (holding that the plaintiff must establish a prima facie showing that the long-arm statute is satisfied).

25. Zac Smith & Co., 734 S.W.2d at 664.

26. “Specific” personal jurisdiction exists when the cause of action relates to the defendant's contacts with the forum and those contacts were occasioned by the defendant's purposeful conduct. See also World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980) (stating that the defendant must have clear notice that its acts may support personal jurisdiction); Bearry v. Beech Aircraft Corp., 818 F.2d 370, 374 (5th Cir. 1987) (holding that the defendant is subject to person jurisdiction if it invokes benefits and protection of forum state's laws). Plaintiff cannot, by his conduct alone, establish the requisite minimum contacts. World-Wide Volkswagen Corp., 444 U.S. at 298.

27. “General” personal jurisdiction exists when the cause of action does not relate to the defendant's purposeful conduct within the forum, but the defendant's contacts with the forum are continuous and systematic. See, e.g., Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-17 (1984) (stating that general personal jurisdiction requires contacts of continuous and systematic nature); Bearry v. Beech Aircraft Corp., 818 F.2d at 374 (holding that due process demands continuous and systematic contacts for general jurisdiction).

28. Zac Smith & Co., 734 S.W.2d at 664.

29. 854 S.W.2d 669 (Tex. App.—Dallas 1993, writ dism'd by agreement) (2-1 decision).

30. 854 S.W.2d at 675.

31. Id. at 672-73.
Hotel Partners v. KPMG Peat Marwick is a warning that plaintiff's counsel should allege specific facts supporting personal jurisdiction. The plaintiff's petition in Hotel Partners, while acknowledging the defendant was a nonresident, contained no allegations that the defendant had committed any acts in Texas. After being served with the petition under the long-arm statute, the defendant filed a special appearance challenging service. Following a hearing on the matter, the trial court sustained the special appearance. On appeal the plaintiff sought reversal, arguing that the defendant's evidence at the hearing only showed it was a nonresident and failed to negate a specific or general basis for personal jurisdiction. Agreeing that as a general rule a defendant bears the burden of negating all bases for personal jurisdiction, the court of appeals observed that the burden is narrowed when a plaintiff fails to support personal jurisdiction with specific allegations in his petition. In this regard, the court of appeals held that "[w]ithout jurisdictional allegations by the plaintiff that the defendant has committed any act in Texas, the defendant can meet its burden of negating all potential bases of jurisdiction by presenting evidence that it is a nonresident." As a result, the trial court's order sustaining the special appearance was affirmed.

Two recent cases, adding to an existing conflict, addressed the availability of mandamus review of a ruling on a special appearance. Rejecting the availability of such review, both courts concluded that mandamus was unavailable in that instance and that appeal was an adequate remedy at law.

III. SERVICE OF PROCESS

The most significant development in the area of service of process was the decision of the Texas Supreme Court in State Farm and Casualty Co. v. Costley. After ten attempts at personal service, the plaintiff obtained an order from the trial court under rule 106 allowing substituted service. The

32. Id. at 676.
33. 847 S.W.2d 630 (Tex. App.—Dallas 1993, writ denied).
34. Id. at 634.
35. Id.
36. Id. at 634; accord Temperature Systems, Inc. v. Bill Pepper, Inc., 854 S.W.2d 669, 673 (Tex. App.—Dallas, writ dism'd by agreement) (stating that "[a] defendant must negate all bases of jurisdiction even if there are no jurisdictional allegations in a plaintiff's petition" but "[i]n such a case, proof that a defendant is a nonresident is sufficient to meet this burden").
37. 847 S.W.2d at 635.
40. 859 S.W.2d at 653; 855 S.W.2d at 791.
42. TEX. R. CIV. P. 106(b). In addition to specifying certain methods of service upon a defendant, the residual section of rule 106 provides that "the court may authorize service . . . in any manner . . . [which] will be reasonably effective to give the defendant notice of the suit." Id. 106(b)(2).
order authorized substituted service on the defendant by mailing a copy of process certified mail, return receipt requested, to the defendant’s mailing address, with an additional copy sent by first-class mail. After substituted service had been effectuated, a return was filed showing compliance with the trial court’s order. Subsequently, on the basis of this service, the plaintiff obtained a default judgment against the defendant. Since no return receipt bearing the defendant’s signature was received, however, the court of appeals reversed the default judgment. In this regard, the court of appeals held that service by first-class mail did not satisfy the requirement of rule 106 that substituted service “be reasonably effective to give the defendant notice” since there was no showing of actual notice.43 Reversing, the supreme court concluded that the trial court properly authorized service by first-class mail and that “to require proof of actual notice upon substituted service would frustrate Rule 106(b)’s purpose of providing alternative methods” of service.44

Article 29c, which was apparently intended to provide flexibility when the United States mails are used to forward service to a defendant, provides that “all public officials are hereby authorized and empowered to use certified mail with return receipt requested, in lieu of registered mail in all instances where registered mail has heretofore been required or may hereafter be authorized by law.”45 Royal Surplus Lines Insurance Co. v. Samaria Baptist Church,46 a recent decision of the supreme court, authoritatively ruled that article 29c means what it says. The plaintiff sought to personally serve a non-profit corporation but was unable to locate the defendant’s registered agent. In this instance, the Texas Non-Profit Corporation Act authorizes service on the Secretary of State of Texas and directs that office to forward process to the defendant’s registered agent by registered mail.47 Instead, the Secretary of State forwarded a copy of the process by certified mail. Although the mailing was returned “unclaimed,” the trial court entered a default judgment against the defendant on the basis of this service. The court of appeals reversed the default judgment, holding that the use of certified mail was not in strict compliance with the Act.48 Disagreeing, the supreme court concluded that article 29c authorized the use of certified mail in this instance in place of registered mail.49

Royal Surplus Lines also considered the impact of a typographical error made by the Secretary of State in the course of forwarding process. The

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44. 1993 WL 218646 at *1.
45. TEX. REV. CIV. STAT. ANN. art. 29c (Vernon 1969) (emphasis added).
46. 840 S.W.2d 382 (Tex. 1992).
47. TEX. REV. CIV. STAT. ANN. art. 1396-2.07(B) (Vernon 1980).
49. 840 S.W.2d at 382-83; see Harold-Elliott Co., Inc. v. K.P./Miller Realty Growth Fund I, 853 S.W.2d 752, 754 (Tex. App.—Houston [1st] 1993, no writ) (approving use of certified mail when TEX. BUS. CORP. ACT ANN. art. 2.11(B) required forwarding of process by Secretary of State by registered mail.)
certificate of compliance by the Secretary of State reflected that process was sent to the defendant's registered agent at "1201 Bassie" while the official records of that office showed that the address of the agent was "1201 Bessie." Although the forwarding envelope and receipt card had been corrected with "Bassie" being marked out and "Bessie" being written in, the supreme court held that the error was sufficient to require that the default judgment be set aside.

IV. PLEADINGS

Rule 13, which is aimed at deterring the filing of frivolous pleadings, was the subject of judicial scrutiny during the Survey period. Rule 13 provides that the signatures of attorneys or parties on a court filing certify that they have read it and that the filing "is not groundless and brought in bad faith or groundless and brought for the purpose of harassment." "'Groundless', for purposes of the rule, means no basis in law or fact and not warranted by good faith argument for the extension, modification or reversal of existing law." If a party or attorney signs a filing in violation of the rule, "the court, upon motion or upon its own initiative, shall impose sanctions . . . upon the person who signed it, a represented party, or both." GTE Communications Systems Corp. v. Tanner, a recent decision of the Texas Supreme Court, considered this "groundless" requirement in a summary judgment context.

The plaintiffs asserted product liability claims against the defendant but the defendant denied any participation in the manufacture of the product in question. This denial was the central focus of defendant's amended answers, motion for summary judgment, and two supporting affidavits. After a hearing, the trial court denied the motion for summary judgment, primarily because a fact question existed regarding whether the defendant participated in

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50. 840 S.W.2d at 383.
51. Id.
52. TEX. R. CIV. P. 13.
55. TEX. R. CIV. P. 13. Two filings are, however, exempt from the scope of the amended Rule 13. Specifically, the rule provides that neither a general denial nor the amount requested for damages in a pleading constitute a violation. Id.
56. TEX. R. CIV. P. 13. The trial court may impose sanctions against the offending party which include disallowance of further discovery, assessment of discovery expenses or taxable costs, establishment of designated facts, refusing to allow the disobedient party to support or oppose claims or defenses, striking pleadings, dismissal of claims, rendition of a default judgment, and contempt. See TEX. R. CIV. P. 215(2)(b) (miscellaneous sanctions); TEX. R. CIV. P. 215(2)(b)(8) (contempt).
57. 856 S.W.2d 725 (Tex. 1993).
the manufacture of the product. Subsequently, on the request of the plain-
tiffs, the trial court granted rule 13 sanctions against the defendant for filing
the amended pleadings, motion, and supporting affidavits, all of which con-
tained the denial. Since the sanctions awarded provided that the defendant's
pleadings be stricken and was therefore determinative of the case, the de-
fendant sought immediate review by mandamus.

Reiterating that Rule 13 only applied to papers signed by counsel, the
supreme court concluded that sanctions based on the filing of the affidavits
were unsupportable since they were not signed by counsel.58 Further, as
regards the trial court's conclusion that the denial in the amended pleadings
and motion were sanctionable, the supreme court observed that those sanc-
tions could not be sustained unless those papers were "groundless" as de-
defined by the rule.59 Directing its attention to the motion, the supreme court
concluded that:

[A] motion for summary judgment asserting that no genuine issue of
material fact exists is not proved groundless or in bad faith merely
by the filing of a response which raises an issue of fact, even if the response
was or could have been anticipated by the movant. Nor is denial of a
motion for summary judgment alone grounds for sanctions. Rule 13
does not permit sanctions for every pleading or motion that requests relief
which is denied.60

In conclusion, the supreme court opined that mandamus review was war-
ranted in that instance, inasmuch as the sanctions entered by the trial court
were "case determinative" or "death penalty" sanctions.61

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.62 Giving this language full effect, an ear-
erlier case63 overturned a sanctions order which failed to state the particulars
of good cause warranting the imposition of sanctions. Refining this rule,
Booth v. Malkan64 warns that, unless the lack of specificity in the sanctions
order is called to the attention of the trial court in a timely fashion, the
matter is waived and will not be considered on appeal.

Severance of claims was the subject of judicial attention during the Survey
period. Rule 41 of the Texas Rules of Civil Procedure, which establishes the
procedure governing the severance of claims, empowers a trial court to sever
a claim from a case "at any stage of the action, before the time of submission
to the jury or to the court if trial is without a jury, on such terms as are

58. 856 S.W.2d at 730.
59. Id.
60. Id. (emphasis added).
61. 856 S.W.2d at 732; see Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 845 n.2 (Tex.
63. GTE Communication Sys. Corp. v. Curry, 819 S.W.2d 652, 653 (Tex. App.—San
Antonio 1991) (original proceeding); contra Powers v. Palacios, 771 S.W.2d 716, 718-19 (Tex.
App.—Corpus Christi 1989, writ denied) (holding that the failure of trial court to recite facts
in its order constituting good cause was not fatal to a levy of sanctions and was harmless
error).
64. 858 S.W.2d 641, 644 (Tex. App.—Fort Worth 1993, writ denied).
Adhering strictly to this requirement, *State Department of Highways and Public Transportation v. Cotner*, a recent decision of the Texas Supreme Court, authoritatively held that Rule 41 does not permit a trial court to sever a claim after it has been submitted to the trier of fact.

The principle has long been that, despite the breath of Rule 41, an order which severs a *compulsory* counterclaim from the primary suit is not authorized by the rule and constitutes an abuse of discretion. Granting that the principle may vary depending on the type of counterclaim involved, the court in *Goins v. League Bank and Trust* concluded that, despite the principle applicable to a compulsory counterclaim, Rule 41 authorizes a *permissive* counterclaim to be severed from the primary suit.

Finally, *Richard and Associates v. Millard* is an indication that the array of claims asserted in a case may be such that a severance is mandated. The plaintiff filed suit against the defendant for the negligent operation of an automobile and against the defendant's insurance adjuster for bad faith settlement practices. After the trial court refused to grant a severance of the claims against the adjuster from the balance of the case, the adjuster sought mandamus review of such refusal. Under the plaintiff's formulation of the claims in the suit, the adjuster argued that he would be prejudiced if the two claims were tried together. Finding that the circumstances left the trial court with no discretion in the matter, the court of appeals directed that a severance be granted because a joint trial of the claims would necessarily involve extensive evidence of insurance and unduly prejudice the defense.

V. PARTIES

Section 51.014 of the Texas Civil Practice & Remedies Code, which authorizes the taking of interlocutory appeals in limited instances, allows a party to appeal from an interlocutory order that "certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure." Prompting an interpretation of section 51.014, the court in *Price Mortuary Colleges, Inc. v. Bjerce* was faced with an attempted interlocutory appeal from a trial court's amendment of its earlier order certifying a class action. Acknowledging that the amendment increased the size of the class, the court nevertheless found that Section 51.014 authorized an interlocutory appeal only with respect to the original order certifying the class.

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65. TEX. R. CIV. P. 41.
66. 845 S.W.2d 818 (Tex. 1993) (per curiam).
67. 845 S.W.2d at 819; accord Coalition of Cities for Affordable Utility Rates v. Public Utility Comm'n, 798 S.W.2d 560, 564 (Tex. 1990).
68. See, e.g., Ryland Group, Inc. v. White, 723 S.W.2d 160, 161 (Tex. App.—Houston [1st Dist.] 1986, no writ) (original proceeding); Nueces County Hospital Dist. v. Texas Health Facilities Comm'n, 576 S.W.2d 908, 910 (Tex. Civ. App.—Austin 1979, no writ).
69. 857 S.W.2d 628, 630 (Tex. App.—Houston [1st Dist.] 1993, no writ).
70. 856 S.W.2d 765 (Tex. App.—Houston [1st Dist.] 1993, no writ).
71. Id. at 767.
72. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(3) (Vernon Supp. 1993).
73. 841 S.W.2d 878 (Tex. App.—Dallas 1992, no writ).
and not an amendment of it.\textsuperscript{74} For this reason, the court dismissed the interlocutory appeal for lack of jurisdiction.\textsuperscript{75}

A case which may be of interest to the trust practitioner is \textit{Wohler v. LaBuena Vida In Western Hills, Inc.}\textsuperscript{76} In a suit against a trustee to foreclose a lien on certain of the trust's real property, the plaintiff obtained a default judgment after service was effected on the trustee. In attempting to overturn the default judgment, the trustee argued on appeal that the beneficiaries of the trust were necessary parties to the suit but were not served or given notice. Rejecting the trustee's argument, the court of appeals reiterated that beneficiaries of a trust are not necessary parties to a suit against the trustee unless the trustee has an adverse interest to the beneficiaries.\textsuperscript{77} Finding no adverse interest apparent from the record, the court of appeals affirmed the default judgment.\textsuperscript{78}

\section*{VI. SEALING OF COURT RECORDS}

The presumption at common law is well established that all court records are open to the public.\textsuperscript{79} Hence, when a party sought to have court records sealed, that party had to satisfy certain procedural and substantive requirements in order to overcome this presumption of openness.\textsuperscript{80} These requirements, being a matter of common law, were not always readily discernable.\textsuperscript{81} The legislature, apparently attempting to define such requirements, enacted a statute\textsuperscript{82} 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,\textsuperscript{83} which became effective September 1, 1990 and governs the sealing of court records.\textsuperscript{84}

Under the practice at common law, before any sealing could take place, a party seeking to seal court records had to afford the public both reasonable

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{74} \textit{Id.} at 880.
\item \textsuperscript{75} \textit{Id.} at 881.
\item \textsuperscript{76} 855 S.W.2d 891 (Tex. App.—Fort Worth 1993, no writ).
\item \textsuperscript{77} 855 S.W.2d at 893; \textit{accord} Mason v. Mason, 366 S.W.2d 552, 554 (Tex. 1963).
\item \textsuperscript{78} 855 S.W.2d at 893-94.
\item \textsuperscript{80} \textit{See} Newman v. Graddick, 696 F.2d 796, 802 (11th Cir. 1983) (finding that "proper notice" to the public is required); \textit{In re} Knoxville News-Sentinel Co., 723 F.2d 470, 476 (6th Cir. 1983) (stating that the public must be allowed a "reasonable opportunity to present their claims").
\item \textsuperscript{81} \textit{See} Lloyd Doggett, \textit{Rule 76a—Sealing Court Records}, 9 ADVOC. 143 (June 1990) [hereinafter Doggett].
\item \textsuperscript{82} \textit{See} \textit{TEX. GOV'T CODE ANN.} § 22.010 (Vernon Supp. 1991). The statute provides that "[t]he supreme court shall adopt rules establishing guidelines for the courts of this state in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed." \textit{Id.; see also} Elaine A. Carlson, \textit{Procedure Update: 1990 Amendments to Texas Rules of Civil Procedure and Appellate Procedure}, 9 ADVOC. 223, 226 (Oct. 1990) [hereinafter Carlson].
\item \textsuperscript{83} \textit{TEX. R. CIV. P.} 76a; \textit{see generally} Doggett, \textit{supra} note 72, at 143-48; Carlson, \textit{supra} note 73, at 226-27.
\item \textsuperscript{84} The Texas Supreme Court adopted Rule 76a over the dissent of two justices who described the rule as the most controversial of any in the history of the court. \textit{See} Changes to \textit{Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure and Texas Rules of Civil Evidence}, 53 \textit{TEX. B.J.} 589, 590 (1990).
\end{enumerate}
\end{footnotesize}
notice of and an opportunity to be heard in the matter. Codifying the notice requirement, Rule 76a requires the movant to post a public notice at the "site where notices for meetings of county governmental bodies are to be post;" such notice must set forth the date and place of the proposed hearing and the particulars of the case as listed in the rule.

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

The case of Chandler v. Hyundai Motor Co. made its second appellate appearance due to Rule 76a, focusing on the rule's requirements. Reading Rule 76a strictly, the court in Chandler reiterated that the requirements of the rule are mandatory and a failure to satisfy them invalidates the sealing order. Chandler is also significant in its holding that an appeal from a Rule 76a order is not mooted by an intervening trial of the case, primarily because the public's interest inherent in disclosure of court records cannot be mooted or settled by the actions of the party litigants.

86. TEX. R. CIV. P. 76a(3); see Carlson, supra note 73, at 227; Doggett, supra note 72, at 145.
87. TEX. R. CIV. P. 76a(1); see Carlson, supra note 73, at 227; Doggett, supra note 72, at 144.
88. The standard that must be met in order to overcome the presumption of openness has been described at common law using various terms. Regardless of the verbiage used, however, the standard appears to be stringent. See, e.g., Wilson v. American Motors Corp., 759 F.2d 1568, 1571 (11th Cir. 1985) (stating that it must be shown that the denial to access is necessitated by a compelling governmental interest) (citing Globe Newspaper Corp. v. Superior Court, 457 U.S. 596, 606-07 (1982)); In re Knoxville News-Sentinel Co., 723 F.2d 470, 476 (6th Cir. 1983) (stating that "[o]nly the most compelling reasons can justify non-disclosure of judicial records"); In re National Broadcasting Co., 635 F.2d 945, 952 (2d Cir. 1980) (stating that "[o]nly the most compelling circumstances should prevent . . . public access"). The stringent standard may not be satisfied by an agreement among the litigants. Wilson, 759 F.2d at 1571 n.4 (holding that an agreement of the parties, following the filing of suit, to seal the court record does not outweigh the presumption of openness so as to justify sealing).
89. 844 S.W.2d 882 (Tex. App.—Houston [1st Dist.] 1992, no writ).
90. In its first appellate appearance, the Texas Supreme Court held that the definition of "court records" in 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's health and safety." Chandler v. Hyundai Motor Co., 829 S.W.2d 774, 775 (Tex. 1992); see Figari, 1993 Annual Survey, supra note 9, at 1066.
91. The requirements of Rule 76a specifically mentioned by the court were (1) notice, (2) sustaining the burden and standard of proof, and (3) a statement by the trial court of the specific reasons for the entry of the sealing order. See Chandler, 844 S.W.2d at 884.
92. 844 S.W.2d at 884.
93. Id. at 883; see Wilson v. American Motors Corp., 759 F.2d 1568, 1577 n.4 (11th Cir. 1985).
The application of Rule 76a to documents obtained in discovery was the subject of considerable controversy during the survey period. Rule 76a states that "court records" are "presumed to be open to the public," directing that such records are to be open for public examination. Hence, when documents perceived to be confidential or proprietary are produced by a litigant during discovery, the litigant usually moves to have their confidentiality protected and the trial court is obliged to determine whether the documents qualify as "court records," subject to the openness requirement and calling into play the sealing procedure prescribed in the rule.

Rule 76a defines "court records" to include discovery which has not been filed of record only when the information concerns "matters that have a probable adverse effect upon the general public health and safety." While the scope of the rule in this respect appears straightforward, the procedural burdens inherent in the "court records" determination have proved troublesome. Eli Lilly and Co. v. Biffle, a recent decision of the Dallas Court of Appeals, is a virtual guidebook to the procedure to be followed in this area. The plaintiffs sought document discovery from the defendants in a product liability suit, and the defendants countered by seeking to limit disclosure of the unfiled documents because they contained proprietary information. In setting a procedural course, the trial court presumed that the discovery documents were open to the public without regard to their effect upon "general public health and safety." The defendants objected, asserting that the trial court was obliged to first determine whether the documents were "court records" and therefore subject to the presumption. Overruling this contention, the trial court proceeded to convene a hearing in the matter and, at such hearing, allocated the burden of proof to the defendants. After concluding that the defendants had failed to shoulder the burden, the trial court denied the defendants a sealing order and an appeal ensued.

Reversing the ruling of the trial court, the court of appeals admonished that "Rule 76a does not contain a presumption that discovery documents not filed with the trial court are court records." The court emphasized that, "discovery not filed with the trial court is open to the public only if it is a court record as defined by the rule" and "[a] trial court may not presume a particular . . . group of documents are court records if a party in a Rule 76a motion raises the issue of whether the discovery in question constitutes court records." With respect to the burdens applicable at a Rule 76a hearing involving discovery documents and how they should be allocated, the court stated that:

94. TEX. R. CIV. P. 76a(1).
97. No. 05-92-00987-CV, 1993 WL 318936 (Tex. App.—Dallas 1993, n.w.h.).
98. Id.
99. Id.
100. 1993 WL 318936, at *2.
If the character of the discovery documents that are the subject of the motion to seal is disputed, we hold it is the burden of the party asserting that the documents are open to the public to prove by a preponderance of the evidence that the documents are court records as defined by Rule 76a.\(^{102}\)

Observing that the burden may shift depending on the outcome of this initial determination, the court held that:

If that burden of proof is met and the trial court finds the documents are court records, the documents then are presumed to be open to the general public. At that point, the party moving for the sealing order has the burden to show by a preponderance of the evidence that the court records, though presumed to be open to the general public, should be sealed nonetheless for the reasons set forth in Rule 76a(1).\(^{103}\)

Concluding that the trial court had abused its discretion by initially placing the burden of proof on the defendants at the Rule 76a hearing, the court of appeals remanded the matter for further proceedings consistent with its opinion.\(^{104}\)

VII. DISQUALIFICATION OR RECUSAL OF JUDGES

The use of retired or visiting judges continued to generate new case law during the Survey period. Prior to its recent amendment, section 74.053 of the Texas Government Code\(^{105}\) allowed each party only one objection to an “assigned” judge. In 1991 the legislature added a provision which permits either party to object to the assignment of a “former” judge who is not qualified as a “retired” judge.\(^{106}\) The court in Garcia v. Employers Insurance of Wausau\(^{107}\) held that this amendment affords each party an unlimited number of objections to “former” judges.\(^{108}\) Thus, the appellant in the case was still entitled to object to the “retired” judge that was assigned to hear the case after appellant had already used an objection to knock out the “former” judge previously assigned to the case.\(^{109}\) Although the defendants in Rubin v. Hoffman\(^{110}\) knew for several weeks that a visiting judge had been assigned to hear the case, they did not object to the assignment until one hour before a temporary injunction hearing was scheduled to begin in front of the visiting judge. Nevertheless, the court of appeals held that defendants


\(^{103}\) 1993 WL 318936, at *2. In an earlier decision, the Dallas Court of Appeals rejected “clear and convincing evidence” as the standard of proof allocated to a movant in a rule 76a hearing in favor of a “preponderance of the evidence.” See Upjohn Co. v. Freeman, No. 05-92-00777-CV, 1992 WL 351191, at *2 (Tex. App.—Dallas Nov. 24, 1992, no writ).

\(^{104}\) 1993 WL 318936, at *3.

\(^{105}\) Acts of 1987, 70th Leg., ch. 505, § 1, 1987 TEX. GEN. LAWS 2118 (now codified at TEX. GOV'T CODE ANN. § 74.053(b) (Vernon Supp. 1993)).

\(^{106}\) See TEX. GOV'T CODE ANN. § 74.053(d) (Vernon Supp. 1993).

\(^{107}\) 856 S.W.2d 507 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

\(^{108}\) Id. at 508.

\(^{109}\) Id.

\(^{110}\) 843 S.W.2d 658 (Tex. App.—Dallas 1992, no writ).
had timely objected to the assignment under section 74.053.111 While both the plaintiffs and the trial court accused defendants of bad faith or harassment in springing their objection at the last minute, the court of appeals could find no exception to the mandatory language of the statute on either of those two bases.112 Finally, in a case of first impression, the court in Lone Star Industries, Inc. v. Ater113 decided that a retired judicial officer may not act as an assigned judge until he makes the formal election required under section 75.001114 to qualify for service.115 Although the retired judge in Ater unquestionably met the eligibility requirements to serve as an assigned judge,116 and he filed his written election with the supreme court within ninety days of his retirement, he had already begun to serve on an assigned case before filing his formal election. Consequently, all actions the retired judge took before the date of his election were null and void.117

Rule 18a, which governs the disqualification of judges for cause, provides that a party may file a motion to disqualify at least ten days before the date set for trial.118 Before proceedings in the case can continue, the judge to whom the motion is directed must either recuse himself or refer the motion to the presiding judge of the district for determination.119 If the judge declines to recuse himself voluntarily, he may enter no orders in the case between the date the motion to disqualify is filed and the date it is decided, except for good cause shown in the order itself.120 Given the latter stricture of the rule, the court in Mixon v. Moje121 set aside as void temporary custody orders the trial court entered after one party sought to disqualify him. In doing so, the court of appeals observed that the trial judge had already recused himself in response to the motion before he entered the temporary orders.122 The appellate court also pointed out that the trial court's order did not fit within the rule's exception because it failed to state any facts constituting good cause.123 According to Winfield v. Doggett,124 a motion to disqualify can still be timely even if it is filed after the case has already been

111. Id. at 659; see Tex. Gov't Code Ann. § 74.053(c) (Vernon Supp. 1993) (stating that an objection must be filed before the first hearing or trial over which the assigned judge presides).
112. 843 S.W.2d at 659.
114. Tex. Gov't Code Ann. § 75.001 (Vernon Supp. 1993). A retiree may make the election by delivering a document to the chief justice of the Texas Supreme Court within 90 days of retirement, in which case the election is effective immediately. Id. § 75.001(b)(1). Otherwise, the retiree must petition the supreme court, and the election is not effective unless and until the supreme court approves the petition. Id. §§ 75.001(b)(2) & 75.001(c).
115. Ater, 845 S.W.2d at 337.
117. 845 S.W.2d at 337.
118. Tex. R. Civ. P. 18a(a).
119. Id. 18a(c), 18a(d).
120. Id. 18a(d).
121. 860 S.W.2d 209 (Tex. App.—Texarkana 1993, no writ).
122. Id. at 210.
123. Id.
124. 846 S.W.2d 920 (Tex. App.—Houston [1st Dist.] 1993, no writ).
tried. Whenever an appellate court reverses a judgment and remands a case for new trial, the case stands upon the docket as if it had not been tried. If a motion to recuse is then filed more than ten days before the case is set for retrial or other hearing, the motion is timely under Rule 18a(a).

VIII. VENUE

Ruiz v. Conoco, Inc. involved venue issues arising from a plaintiff’s third suit against the same defendant. Plaintiff’s original suit, filed in Harris County, was dismissed as a sanction for discovery abuse. Plaintiff filed a second suit in Zapata County shortly before the dismissal of the first suit. Although the defendant filed a motion to transfer venue of this suit to Harris County, the trial court dismissed the second suit for non-prosecution before ruling on the motion to transfer. When the plaintiff’s representative subsequently filed a third lawsuit in yet another county, the defendant again responded by filing a motion to transfer venue, which was denied by the trial court.

On appeal, the defendant argued that venue of the third suit was fixed in Harris County by virtue of the dismissal of plaintiff’s second suit while the motion to transfer was still pending. As the defendant correctly pointed out, numerous decisions under the pre-existing venue statute and rules had held that venue was fixed in the county named in a plea of privilege whenever a plaintiff nonsuited his action before the trial court made its venue determination. Although the court of appeals acknowledged in dictum that this “venue fixing” rule survived the 1983 venue amendments, it held that the rule did not apply to Ruiz because his earlier suit was dismissed involuntarily by order of the trial court. Nevertheless, the court concluded that defendant’s motion to transfer venue should have been granted because plaintiff failed to make prima facie proof that the defendant, a foreign corpo-

125. Id. at 922.
126. Id.
129. See, e.g., Royal Petroleum Corp. v. McCallum, 134 Tex. 543, 135 S.W.2d 958, 967 (1940); Wilson v. Wilson, 601 S.W.2d 104, 105 (Tex. Civ. App.—Dallas 1980, no writ).
131. 818 S.W.2d at 123. According to the court of appeals, neither a dismissal for lack of prosecution nor a dismissal for discovery abuse is voluntary. Id.
ration, had an agency or representative in the county of suit. The court of appeals therefore reversed the venue determination and remanded to the trial court with an order that the case be transferred to Harris County.

In the supreme court, the defendant again argued that venue was fixed in Harris County due to the dismissal of plaintiff's earlier suit while a motion to transfer venue was pending. The supreme court disagreed, observing that the so-called "res judicata" rule of venue applied under the old statute only because a plaintiff who dismissed his suit implicitly admitted that the plea of privilege had merit. Concluding that a plaintiff whose action is involuntarily dismissed does not concede the merits of any pending motions, the Court held that a dismissal for want of prosecution while a motion to transfer venue is pending does not fix venue in the county named in the motion to transfer venue. Unlike the court of appeals, however, the supreme court included no dictum in its opinion regarding the continued vitality of the "res judicata" rule. The Court stated that it need not decide whether the rule still exists under the current venue statute because plaintiff did not voluntarily nonsuit either of his two earlier cases.

Notwithstanding this ruling, the supreme court agreed with the intermediate appellate court that there was no basis for venue in Starr County and the case should have been transferred to Harris County. Although plaintiff alleged that venue was proper in Starr County under section 15.037 because the defendant employed a production foreman there, plaintiff's evidence demonstrated that this purported agent was empowered only to order pre-approved supplies of minimal value. This was not enough, according to the Court, and there was no other evidence the production foreman had the degree of discretion required to establish venue in Starr County. In order to satisfy section 15.037, opined the Court, a plaintiff must establish either that the business of the defendant is actually conducted in the county of suit in a more or less regular and permanent form (agency) or that a party possessing broad power and discretion to act for the defendant resides there (representative).

Of perhaps greater significance is the court's discussion in Ruiz of the standard for appellate review of venue determinations. Under rule 87, a trial court deciding a motion to transfer venue must accept as true all venue facts

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132. Id. at 126 (citing Milligan v. Southern Express, Inc., 151 Tex. 315, 250 S.W.2d 194, 198 (1952)).
133. 818 S.W.2d at 118.
135. Id.
136. Id.
137. Id.
138. Id. at *14-15.
139. Section 15.037 provides that foreign corporations doing business in Texas may be sued in any county in which the company may have an agency or representative. TEX. CIV. PRAC. & REM. CODE § 15.037 (Vernon 1986).
141. Id.
established by prima facie proof prior to the venue hearing.\textsuperscript{142} Section 15.064 of the venue statute, on the other hand, requires an appellate court to consider the entire record, including the trial on the merits, in determining the propriety of venue.\textsuperscript{143} Pursuant to the statute, therefore, an appellate court must reverse\textsuperscript{144} the venue determination if evidence in the record—even evidence adduced after the trial court decided the venue question—destroys the prima facie proof on which the trial court relied.\textsuperscript{145} The supreme court questioned the wisdom of this statute, pointing out that it allows appellate review of the venue decision on a basis different from that on which it was determined by the trial court.\textsuperscript{146} Nevertheless, the Court observed that it was constrained by the plain language of the statute which was unambiguous.\textsuperscript{147} Therefore, it held that an appellate court must conduct an independent review of the entire evidentiary record in determining whether venue was proper in the ultimate county of suit.\textsuperscript{148}

Apparently to minimize the problems that would otherwise result from this "fundamental flaw"\textsuperscript{149} in the venue statute, the supreme court also held that an appellate court need not review the evidence regarding venue for factual sufficiency.\textsuperscript{150} According to the Court, section 15.064(b) does not mandate a review of the record for factual sufficiency and, therefore, such a level of review is neither necessary nor wise.\textsuperscript{151} Consequently, "if there is any probative evidence in the entire record, including trial on the merits, that venue was proper in the county where judgment was rendered, the appellate court must uphold the trial court's determination."\textsuperscript{152}

Although the venue statute mandates reversal on appeal if a case is transferred to a county of improper venue, the statute is silent about cases in which a lawsuit is originally brought in a county of proper venue but is subsequently transferred to another county in which venue is also proper.\textsuperscript{153} Some courts interpreting the statute before \textit{Ruiz} concluded by implication that a trial court's erroneous venue ruling in these circumstances was harmless.\textsuperscript{154} The court in at least one other pre-\textit{Ruiz} decision 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

\begin{itemize}
  \item[142.] \textit{Tex. R. Civ. P.} 87(3)(a); see also \textit{Tex. Civ. Prac. \& Rem. Code} § 15.064(a) (Vernon 1986) (no factual proof concerning the merits shall be required in venue hearings).
  \item[143.] \textit{Tex. Civ. Prac. \& Rem. Code} § 15.064(b) (Vernon 1986).
  \item[144.] \textit{Id.} ("if venue was improper it shall in no event be harmless error and shall be reversible error").
  \item[145.] \textit{Ruiz}, 1993 WL 382062, at *12.
  \item[146.] \textit{Id.}
  \item[147.] \textit{Id.}
  \item[148.] \textit{Id.}
  \item[149.] \textit{Id.}
  \item[150.] \textit{Id.}
  \item[151.] \textit{Id.}
  \item[152.] \textit{Id.}
  \item[153.] See supra note 127 and associated text.
\end{itemize}
error analysis. Unfortunately, the decision in *Ruiz* may not have answered the question satisfactorily inasmuch as two courts of appeals decided the issue differently in opinions handed down after *Ruiz*.

In *Wilson v. Texas Parks and Wildlife Department* for example, the Austin Court of Appeals held that a trial court's erroneous transfer of a case from a county of proper venue to another county of proper venue does not constitute reversible error. The court relied heavily on *Ruiz* in arriving at this conclusion. In particular, the court emphasized *Ruiz*'s holding that a venue decision will be affirmed if venue was proper in "the ultimate county of suit." Although the court acknowledged that *Ruiz* involved a trial court's refusal to transfer venue, it concluded that the supreme court's analysis likewise governed cases in which the trial court ordered a transfer. According to the court, "the only question to resolve in venue appeals under section 15.064 is whether venue was proper in the ultimate county of suit."

Although there is much in *Wilson* to commend, the Beaumont Court of Appeals took an equally logical but different view in *Hendrick v. McMorrow*. The *Hendrick* court likewise noted that, according to *Ruiz*, the issue on appeal is not whether the trial court properly determined venue but whether venue was improper in the ultimate county of suit. The court hastened to add, however, that *Ruiz* did not clarify what was meant by "improper" venue. Apparently concluding that venue any place other than the county a plaintiff *rightfully* chooses is always improper, the court reversed the trial court's order transferring venue to a county of defendant's choosing even though venue admittedly would have been proper in that county if plaintiff had initially filed there. In doing so, the court emphasized that the choice of venue lies with the plaintiff under Texas' statutory


157. 853 S.W.2d 825 (Tex. App.—Austin 1993, no writ).

159. *Id.*
160. 853 S.W.2d at 829.
161. *Id.* The court also noted that the *Ruiz* opinion cited *Lewis* approvingly, thereby indicating an implicit rejection of the *Marantha* approach. *Id.* (citing *Ruiz*, 36 Tex. S. Ct. J. at 418).

162. 852 S.W.2d 22 (Tex. App.—Beaumont 1993, no writ).
164. 852 S.W.2d at 24. Therefore, according to *Hendrick*, the decision in *Ruiz* settled only the question of what standard of review governed venue appeals. *Id.*
165. *Id.* at 25.
scheme.\(^{166}\) In order to give the venue statutes their intended effect, therefore, a trial court’s error in transferring a case from a county of proper venue selected by the plaintiff cannot be considered harmless.\(^{167}\)

Although Hendrick and Wilson were each decided before the supreme court issued its opinion on rehearing in Ruiz, the latter opinion contains language almost identical to the language from the original opinion in Ruiz that was cited by both courts of appeals.\(^{168}\) Given these intermediate courts’ differing perceptions about the meaning of that language, the issue will apparently remain unsettled until the supreme court speaks again.

IX. LIMITATIONS

Ruiz v. Conoco, Inc.,\(^ {169}\) which is discussed at length in the preceding section of this article dealing with venue, also involved an important issue of limitations. Ruiz timely filed a suit for personal injury accusing Conoco of negligence. By the time that suit was dismissed for discovery abuse, Ruiz had already filed another suit against Conoco. The trial court also dismissed this second suit for want of prosecution. In the meantime, a court in an unrelated proceeding determined that Ruiz had been incompetent since the date of his accident, and appointed Ruiz’s wife as his guardian. Ruiz’s wife then brought a third suit against Conoco in her capacity as Ruiz’s guardian. Because the guardian filed this latter suit more than five years after Ruiz’s accident, however, Conoco alleged the suit was barred by limitations.\(^ {170}\)

The guardian responded that the two-year statute of limitations had been tolled due to Ruiz’s incompetency. On appeal, Conoco contended that Texas’s tolling provision\(^ {171}\) was intended to protect only those who did not have access to the courts during the period of their legal disability. According to Conoco, therefore, the tolling statute did not apply to Ruiz because he had access to the courts after his accident, as evidenced by his filing of the two earlier lawsuits.

The supreme court rejected defendant’s attempt to equate the tolling provision for legal disabilities with a lack of access to the courts.\(^ {172}\) In doing so the court drew an analogy to cases involving minors, in which access to the courts has never operated to suspend the legal disability.\(^ {173}\) The Court fur-
ther noted that the disability of an incompetent includes his inability to participate in, control, or even understand the progression of his suit, assuming he has access to the courts to file one. Because access alone does not guarantee that minors or incompetents will have a viable opportunity to protect their legal rights, the Court decided that the tolling provision is intended to do more than merely ensure access to the courts. For this reason, the Court held that the mere commencement of a lawsuit on behalf of a legally incapacitated person does not by itself terminate the protection of the tolling provision. Although the Court acknowledged that limitations could be tolled for the lifetime of a plaintiff under this standard, it concluded that “this possibility did not dictate a different result.”

In DeCheca v. Diagnostic Center Hospital, Inc. the supreme court answered four questions certified to it from the United States Court of Appeals for the Fifth Circuit. All of these questions involved the interplay between the notice and limitations provisions of the Texas health care statute. Specifically, the court was asked: (1) whether notice of a health care liability claim to one health care provider operates under section 4.01(c) to toll the two-year statute of limitations for seventy-five days as to all health care providers against whom a claim is timely asserted; (2) whether a claim is barred when notice is served within the extended limitations period, but plaintiff does not file suit until after the extended limitations deadline in order to comply with the sixty day pre-suit notice requirement of the statute; (3) whether each health care provider sued is entitled to a separate sixty day pre-suit negotiation period; and (4) whether a claim may be abated beyond the extended limitations deadline due to a plaintiff’s failure to provide timely pre-suit notice to each defendant named in the suit. These questions arose because plaintiffs served pre-suit notice of their health care claim on only some of the named defendants within two years of the date their cause of action accrued. Pre-suit notice was served on the remaining defendants within two years and seventy-five days of accrual, however, and they were also named in the suit plaintiffs filed by the extended limitations.

175. Id.
176. Id. at *10. In reaching this conclusion, the court followed what it believed to be the well-established majority rule. See Jean E. Maess, Annotation, Tolling of State Statute of Limitations in favor of One Commencing Action Despite Existing Disability, 30 A.L.R. 4th 1092, 1093 (1984).
178. 852 S.W.2d 935 (Tex. 1993).
180. TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 4.01(a), 4.01(c) & 10.01 (Vernon Supp. 1993).
181. Id. § 4.01(c) (proper notice of health care claim tolls limitations to and including 75 days following the delivery of notice as to all parties and potential parties).
182. Id. § 10.01 (two year statute of limitations on health care claims).
183. Id. § 4.01(a) (person asserting a health care liability claim shall give written notice to each health care provider against whom claim is being made at least 60 days before filing suit).
184. DeCheca, 852 S.W.2d at 936.
deadline. As a result, these latter defendants did not receive their pre-suit notice at least sixty days in advance of suit.

Answering all four of the Fifth Circuit's questions in the affirmative, the supreme court first determined that the "potential parties" language of section 4.01(c) means that notice to any of the health care providers tolls the limitations period for seventy-five days as to all health care providers the plaintiff ultimately sue. The court emphasized, however, that a plaintiff may never file his suit outside the extended limitations period. To avert expiration of the limitations period, therefore, a plaintiff may be required under exigent circumstances to file his suit before the sixty day pre-suit notice period elapses or even without tendering any notice. Nevertheless, each defendant sued is still entitled to a separate sixty day pre-suit period for negotiations. So long as plaintiff sues each defendant within the limitations period, however, abatement is the only remedy for failure to provide the requisite notice to a particular defendant. Moreover, the court announced that such an abatement may extend beyond the two year and seventy-five day extended limitations period.

Finally, in Federal Debt Management, Inc. v. Weatherly the Dallas Court of Appeals held that contract actions brought by assignees of the Federal Deposit Insurance Corporation are subject to the four year statute of limitations applicable under Texas law. Plaintiff argued that FIRREA's six year statute of limitations applied because it was bringing the claim as an assignee of the FDIC. The court concluded otherwise based on the language of the statute, which is limited to the FDIC and does not expressly cover assignees. Further, because the statute of limitations governing a particular cause of action is not a "right" that can be inherited by an assignee, the court disagreed with plaintiff's contention that the Texas UCC required application of the six year statute. The court likewise rejected plaintiff's policy arguments, stating it would not "rewrite an otherwise clear and unambiguous statute under the guise of public policy." The careful practitioner should note that the decision in Weatherly splits with several recent decisions by other courts of appeals and that the Texas Supreme

185. Id.
186. Id. at 937-38.
187. Id. at 938.
188. Id.
189. Id.
190. Id. at 938-39.
191. Id. at 939.
192. 842 S.W.2d 774 (Tex. App.—Dallas 1992, writ granted).
193. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a) (Vernon 1986) (4 year statute of limitations for actions on debt).
194. See 12 U.S.C. § 1821(d)(14) (six year statute of limitations for contract claims brought by the FDIC as conservator or receiver).
195. 842 S.W.2d at 776.
196. TEX. BUS. & COM. CODE ANN. § 3.201(a) (Vernon 1968) provides, in pertinent part, that "transfer of an instrument vests in the transferee such rights as a transferor has therein."
197. 842 S.W.2d at 777.
198. Id. at 778.
199. See Thweatt v. Jackson, 838 S.W.2d 725 (Tex. App.—Austin 1992, writ granted);
Court has granted a writ of error in the case, presumably to resolve the conflict.

X. DISCOVERY

A. DISCOVERY PROCEDURES

In *Barbero v. Wittig*\(^{200}\) the supreme court held that, in accordance with the express terms of Rule 206(2),\(^{201}\) the custodial attorney of a deposition must make the original deposition available upon request for photocopying by any other party.\(^{202}\) The court noted that the custodial attorney may apply to the trial court for any orders that may be necessary to protect the integrity of the original transcript.\(^{203}\)

The supreme court has previously held that a party's mere pleading of mental anguish damages is not sufficient to require that party to submit to mental examination pursuant to Rule 167a.\(^{204}\) The court in *Spear v. Gayle*\(^{205}\) applied this reasoning in holding that a plaintiff cannot require a defendant to submit to a mental examination merely by pleading that the defendant's conduct was attributable to a psychological disorder.\(^{206}\) The court noted that, to rule otherwise, would open the door to compelled mental examination of defendants in virtually every personal injury suit.\(^{207}\)

*Villages of Greenbriar v. Hutchison*\(^{208}\) involved the question of whether a witness can be required to obtain a copy of a sworn statement the witness gave to one party in a lawsuit so that he can produce it to the other party to the suit.\(^{209}\) The court of appeals acknowledged that the Texas Rules of Civil Procedure give a witness the right to obtain a copy of his statement.\(^{210}\) Nevertheless, the court held that those rules did not require the witness to obtain the statement, and the trial court erred, therefore, in ordering the witness to do so at the other party's request.\(^{211}\) Interestingly, in reaching its conclusion, the court did not mention Rule 166b(2)(b),\(^{212}\) which provides that a person is deemed to have possession, custody, or control of a document if he has a superior right to compel production of it from a third party.\(^{213}\)

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201. TEX. R. Civ. P. 206(2).
203. *Id.*
204. TEX. R. Civ. P. 167a; see *Coats v. Whittington*, 758 S.W.2d 749, 753 (Tex. 1988).
205. 857 S.W.2d 122 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding).
206. *Id.* at 125-26.
207. *Id.* at 125.
209. *Id.* at *1.
210. *Id.* at *2-3* (citing TEX. R. Civ. P. 166b(2)(g) and 166b(3)(c)).
212. TEX. R. Civ. P. 166b(2)(b).
213. *Id.*
B. PRIVILEGES AND EXEMPTIONS

The Texas Supreme Court decided a number of cases during the Survey period involving privileges and exemptions from discovery. At least one of those decisions, *National Tank Co. v. Brotherton*, can be expected to have a significant effect on trial practitioners. In *Brotherton*, the Court concluded that Texas Rule of Civil Evidence 503(a)(2) adopts the so-called "control group" test in defining who is a representative of a corporate client for purposes of the attorney-client privilege. Under this test, only communications between attorneys and the upper echelon of corporate management are generally protected by the privilege. The Court recognized that the United States Supreme Court previously rejected the control group test for a number of reasons in *Upjohn Co. v. United States* but held that Rule 503, which was promulgated after the decision in *Upjohn*, nevertheless clearly adopted the control group test. In order to properly support an attorney-client privilege objection, therefore, the objecting party must produce evidence that the representative of a corporate client with whom the attorney has communicated had the authority to engage counsel or act on counsel's advice.

The opinion in *Brotherton* also clarified to some degree the scope of the attorney work product privilege under Rule 166b(3)(a). Acknowledging that "work product" is not defined in the rule or its own prior opinions, the supreme court nevertheless concluded that there was nothing to indicate that the phrase was intended to have a different meaning than that adopted by the federal courts. Thus, the Court held that "the term 'work product' as used in Rule 166b(3)(a) applies only to materials prepared in anticipation of litigation." The Court left unanswered, however, the question of

214. 851 S.W.2d 193 (Tex. 1993).
215. TEX. R. CIV. EVID. 503(a)(2). The rule provides: "A representative of the client is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." *Id.*
216. *Brotherton*, 851 S.W.2d at 197.
217. *Id.* The usual alternative to the control group test is the "subject matter" test, which cloaks with privilege any communications by a company's employee to its attorney if the employee is acting at the direction of his superiors, and the subject matter upon which the attorney's advice is sought and dealt with in the communication involves the employee's performance of his duties. *Id.* at 198 (quoting Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), aff'd per curiam by an equally divided court, 400 U.S. 348 (1971)).
219. TEX. R. CIV. EVID. 503.
220. *Brotherton*, 851 S.W.2d at 197-98. The court noted that both the control group and subject matter tests "are supported by legitimate policy rationales, and neither is without its critics." *Id.* at 198 (citations omitted).
221. *Id.* at 199 (holding that, because there was no evidence that the employees interviewed by corporation's attorney were representatives of corporation within meaning of TEX. R. CIV. EVID. 503(a)(2), those communications were not protected by attorney-client privilege). The court implied, without expressly deciding, that an employee of a liability insurer may qualify as a representative of the insured if he has the authority to hire counsel and act on counsel's advice on behalf of the insured. *Id.*
222. TEX. R. CIV. P. 166b(3)(a).
223. *Brotherton*, 851 S.W.2d at 201-02.
224. *Id.* at 202.
whether "work product" in Texas is limited solely to opinion work product, or whether it includes instead both opinion and ordinary work product.225

Finally, the Court took the opportunity in Brotherton to modify the two-prong test enunciated in Flores v. Fourth Court of Appeals226 for determining if an investigation is conducted in anticipation of litigation for purposes of Rule 166b(3)(c) and 166b(3)(d).227 Under Flores, trial courts were required to determine (1) if a reasonable person would have anticipated litigation, with an emphasis on whether there were outward manifestations that litigation was "imminent," and (2) if the objecting party in fact had a good faith belief that litigation would ensue.228 Brotherton removed the "imminence" requirement from this test on the ground that it impaired the policies behind the witness statement and party communication privileges.229 The Court therefore disapproved of its prior decision in Stringer v. Eleventh Court of Appeals230 to the extent it held that the occurrence of an accident alone could never be sufficient to trigger the privilege.231 Instead, the Court held that both prongs of the test are met if, upon an evaluation of the totality of the circumstances, a reasonable person would conclude, and the party actually believes in good faith, that there is a "substantial chance" that litigation will ensue.232 Moreover, although the Court noted that investigations that are actually undertaken for some other purpose are not in anticipation of litigation, even investigations that are routinely undertaken in the ordinary course of business may be in anticipation of litigation if both prongs of this test have been met.233

The supreme court again addressed the work product privilege in National Union Fire Insurance Co. v. Valdez.234 The Court held that production of an attorney's entire litigation file would reveal the attorney's mental processes with respect to the organization of the file and decision of what to include in it; thus, a request for such a file is objectionable on work product grounds.235 The Court was careful to point out, however, that a party is not prevented from requesting specific documents or categories of documents that are relevant, even though those documents may be contained in the attorney's file.236

In Republic Insurance Co. v. Davis237 the supreme court stated for the first time that the "offensive use" waiver, announced in Ginsberg v. Fifth Court of

225. Id. at 202 n.11.
226. 777 S.W.2d 38 (Tex. 1989).
227. TEX. R. CIV. P. 166b(3)(c); TEX. R. CIV. P. 166b(3)(d); Brotherton, 851 S.W.2d at 203-07.
228. Flores, 777 S.W.2d at 40-41.
229. Brotherton, 851 S.W.2d at 203.
230. 720 S.W.2d 801 (Tex. 1986).
231. Brotherton, 851 S.W.2d at 204.
232. Id. at 204.
233. Id. at 204, 206-07.
234. 863 S.W.2d 458 (Tex. 1993).
235. Id. at 460.
236. Id.
237. 856 S.W.2d 158 (Tex. 1993).
Appeals, is applicable to the attorney-client privilege. The Court held, however, that an offensive use waiver should not be lightly found and articulated the following factors that should guide the determination:

First, before a waiver may be found the party asserting the privilege must seek affirmative relief. Second, the privileged information sought must be such that, if believed by the fact finder, in all probability it would be outcome determinative of the cause of action asserted. Mere relevance is insufficient. A contradiction in position is insufficient. The confidential communication must go to the very heart of the affirmative relief sought. Third, disclosure of the confidential communication must be the only means by which the aggrieved party may obtain the evidence. If any one of these requirements is lacking, the trial court must uphold the privilege.

It is unclear to what extent the Court intended these requirements to apply outside the context of the attorney-client privilege, especially since certain privileges created by the Texas Rules of Civil Evidence contain their own exceptions for cases in which the privileged information is relevant. At least one court has applied the Republic Insurance Co. factors, however, in determining whether there was an offensive use waiver of a party's privilege against self incrimination.

Republic Insurance Co. is also significant because it reaffirms that the party communication privilege of Rule 166b(3)(d) applies only to communications that occur in connection with the particular action in which the privilege is asserted. Although the Court apparently recognized the inconsistency of this holding with the policies underlying its decision in Owens-Corning Fiberglas Corp. v. Caldwell, the Court stated that it could not ignore the express language of the rule.

The supreme court addressed waiver of the attorney-client and work product privileges by inadvertent disclosure in Granada Corp. v. First Court of Appeals. The Court noted that, pursuant to the Texas Rules of Civil Evidence, a privilege is waived if the information is voluntarily disclosed by the

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238. 686 S.W.2d 105, 107 (Tex. 1985).
239. Republic Ins. Co., 856 S.W.2d at 163.
240. Id. at 163 (footnotes omitted). In the case before it, the supreme court concluded that the first of these requirements was not met because plaintiff's declaratory judgment action did not constitute a claim for affirmative relief. Id. at 164. Similarly, in Valdez, 863 S.W.2d 458, the court held that the defendant insurer's motion for summary judgment, which relied on the testimony of its former attorney that the denial of a claim was reasonable, did not give rise to an offensive use waiver because the insurer was not seeking affirmative relief. Id. at 461-62.
241. See, e.g., TEX. R. CIV. EVID. 509(d)(4) (creating exception to physician-patient privilege for communications relevant to physical or mental condition that is relied upon by any party as part of its claim or defense).
242. See Denton v. Texas Dep't of Public Safety Officers Ass'n, 862 S.W.2d 785 (Tex. App.—Austin 1993, n.w.h.).
243. TEX. R. CIV. P. 166b(3)(d).
244. Republic Ins. Co., 856 S.W.2d at 165.
245. 818 S.W.2d 749, 750-52 (Tex. 1991) (holding that work product privilege is not limited to documents prepared in connection with particular case in which discovery is sought).
246. Republic Ins. Co., 856 S.W.2d at 165.
247. 844 S.W.2d 223 (Tex. 1993).
holder of the privilege.248 Thus, the Court held that a party who seeks to avoid a waiver of privilege with respect to documents that have been disclosed must prove, with specificity, that the disclosure was involuntary and not merely inadvertent.249 The factors to be considered in determining involuntariness include the precautionary measures taken, the delay in rectifying the error, the extent of any inadvertent disclosure, and the scope of discovery.250

The effect of federal regulatory policies on discovery in the Texas courts was at issue in Eli Lilly and Co. v. Marshall.251 Over a strongly-worded dissent,252 the Court concluded that while Food and Drug Administration (FDA) regulations regarding the confidentiality of the identity of persons and institutions reporting adverse reactions to a drug did not preempt Texas law, those regulations should have been given due consideration by the trial court before it ordered the defendant drug company to produce copies of such reports.253 Specifically, the Court held that the trial court abused its discretion by ordering disclosure of the reporters' identities without a showing of particularized need and relevance.254

Pittsburgh Corning Corp. v. Caldwell255 involved the issue of whether a court can order production of a portion of written communications that are protected by the attorney-client privilege. The trial court in that case had ordered the objecting party to redact those portions of several documents that fell within the attorney-client privilege and produce those portions that contained relevant, factual information.256 Although the court of appeals agreed that relevant facts may not be hidden by a claim of privilege, it held that those facts must be discovered by means other than production of privileged documents containing the information.257 According to the appellate court, "[o]nce it is established that a document contains a confidential communication, the privilege extends to the entire document, and not merely the specific portions relating to legal advice, opinions, or mental analysis."258

C. SANCTIONS

The Texas appellate courts continued to struggle during the Survey period with cases in which trial courts imposed "death penalty" sanctions (such as entering default judgment and striking pleadings) for discovery abuse. In

248. Id. at 226 (quoting TEX. R. CIV. EVID. 511).
249. Granada Corp., 844 S.W.2d at 226.
250. Id.
251. 850 S.W.2d 155 (Tex. 1993).
252. Id. at 161-64 (Doggett, J., dissenting).
253. Id. at 160.
254. Id. The court thereafter granted in part a motion to enforce compliance with its writ of mandamus, when the trial court, without further evidence or argument, modified its prior order to require disclosure only of the identity of persons or institutions reporting suicide as an adverse reaction. Eli Lilly and Co. v. Marshall, 850 S.W.2d 164, 165-66 (Tex. 1993).
255. 861 S.W.2d 423 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).
256. Id. at 424.
257. Id. at 425.
258. Id.
Otis Elevator Co. v. Parmelee,259 for example, the supreme court reversed a
trial court's imposition of death penalty sanctions as inconsistent with the
standards enunciated in TransAmerican Natural Gas Corp. v. Powell,260
where there was nothing in the record approaching the flagrant bad faith or
abuse necessary to support such sanctions.261 Significantly, the high court
reached this conclusion despite the fact that no statement of facts from the
hearing on the motion for sanctions was included in the record on appeal.262
The Court relied on the fact that the trial judge's order made no reference to
evidence considered, and apparently none was adduced at the hearing on the
motion.263

Following the supreme court's lead, the courts of appeals now routinely
overturn death penalty sanctions on a variety of grounds. In State Farm
Ins. Co. v. Pults,264 the court held that striking defendant's pleadings and
witnesses as a sanction for violating a prior discovery order could not be
upheld where the prior order was not in writing and had not been “ren-
dered” in open court, although the parties had been notified telephonically
of the trial court's ruling.265 In Westfall Family Farms v. King Ranch266 the
court held that an order compelling discovery is not an order imposing lesser
sanctions; thus, the trial court should not have struck the offending party's
pleading for failing to comply with a prior order compelling discovery with-
out first considering and imposing lesser sanctions.267 Shook v. Gilmore &
Tatge Manufacturing Co.268 involved what the dissent called “the only case
in American jurisprudence in which a court has sanctioned a litigant for
using death threats to extort a settlement.”269 Remarkably, the majority
concluded that the trial court erred in dismissing the plaintiff's claims as a
sanction for this conduct because it found that the trial court failed to con-
sider lesser sanctions, and the record did not support a presumption that the
plaintiff's claims lacked merit.270

The propriety of post-trial sanctions for pretrial discovery abuse was at
issue in Remington Arms Co. v. Caldwell.271 The supreme court refused to
absolutely bar the imposition of sanctions for discovery abuse that is first
revealed during or after trial.272 If a party fails to obtain pretrial rulings on
discovery disputes that are known before trial, however, she waives any

259. 850 S.W.2d 179 (Tex. 1993).
261. Parmelee, 850 S.W.2d at 180-81.
262. Id. at 181.
263. Id.
264. 856 S.W.2d 691 (Tex. App.— Corpus Christi 1993, no writ).
265. Id. at 692-93.
266. 852 S.W.2d 587 (Tex. App.—Dallas 1993, writ denied).
267. Id. at 591-92.
268. 851 S.W.2d 887 (Tex. App.— Waco 1993, writ denied).
269. Id. at 894 (Thomas, C.J., dissenting).
270. Id. at 893. Shook is also significant for its discussion of whether a trial court has the
inherent power to sanction a party for conduct interfering with the judicial process, a proposi-
tion which the majority appeared to doubt. Id. at 890-92.
271. 850 S.W.2d 167 (Tex. 1993).
272. Id. at 170.
claim for sanctions based on that conduct. Moreover, a party cannot rely on her opponent's conduct during trial to support the imposition of discovery sanctions under Rule 215 because that rule is addressed only to pretrial discovery misconduct. The trial court has its contempt powers available to it to punish trial misconduct.

Finally, the supreme court reversed the Fort Worth Court of Appeals' decision in Schein v. American Restaurant Group, Inc., a case discussed in the 1993 Annual Survey. The supreme court held that sanctions excluding evidence for failure to properly respond to discovery are intended to promote settlement and prevent trial by ambush. If the trial is postponed, the purpose for the sanction is eliminated. Accordingly, exclusion sanctions for failure to timely respond to discovery do not survive a nonsuit.

D. DUTY TO SUPPLEMENT DISCOVERY

As in prior years, the duty to supplement discovery was the subject of numerous reported decisions during the Survey period. The Texas Supreme Court emphasized in two cases that the automatic exclusion of witnesses pursuant to Rule 215(5) for failure to timely supplement interrogatory answers should not be extended beyond its proper purpose. Thus, in H.B. Zachry Co. v. Gonzalez the Court held that the automatic exclusion does not continue where the trial is postponed for more than thirty days. Similarly, the court held in Aetna Casualty & Surety Co. v. Specia that the automatic exclusion sanction does not survive a nonsuit.

Rule 166b(6) requires parties to disclose the substance of an expert witness's expected testimony no less than thirty days before trial. In Exxon Corp. v. West Texas Gathering Co. the supreme court clarified that this rule does not prevent an expert from refining his opinions through the time of trial. The Court indicated, however, that a material alteration of the expert's testimony within thirty days of trial would lead to exclusion of the changed testimony just as if the witness had not been disclosed at all.

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273. Id.
274. TEX. R. CIV. P. 215.
275. Remington Arms Co., 850 S.W.2d at 171-72.
276. Id. at 172.
278. 852 S.W.2d at 497.
279. Id.
280. Id.; see also Aetna Casualty & Surety Co. v. Specia, 849 S.W.2d 805 (Tex. 1993) (holding that sanctions for failure to supplement discovery response do not survive a nonsuit).
281. TEX. R. CIV. P. 215(5).
282. 847 S.W.2d 246 (Tex. 1993).
283. Id. Of course, if the trial court has excluded witnesses based upon some other sanctionable conduct of a party, that ruling may be continued to the next trial setting. Id.
284. 849 S.W.2d 805 (Tex. 1993).
285. Id. at 807.
286. TEX. R. CIV. P. 166b(6).
287. Id.
289. Id. at *4.
290. Id. at *5.
First State Bank v. Fatheree stands for the proposition that witnesses identified within thirty days of trial are subject to the sanction of automatic exclusion only when the identification is contained in supplemental discovery responses. The court held that where the defendant first answered interrogatories several days late, and within thirty days of trial, the witnesses identified in those interrogatory answers did not have to be excluded from testifying. The court reasoned that Rule 166b(6) imposed no duty to supplement until the interrogatories were answered, and Rule 215(5) addresses only failure to respond or supplement responses to discovery, not untimely responses.

Which party must identify potential witnesses, and in what manner, was once again a point of contention during the Survey period. The court in Bullock v. Aluminum Co. of America held that the defendant could not call by deposition witnesses that it had failed to identify as either persons with knowledge of relevant facts or experts, even though the plaintiffs had designated them. In Kreymer v. North Texas Municipal Water District, on the other hand, the court concluded that, where both parties designated an expert witness, both parties should be entitled to cross-examine that expert on any matters falling within the scope of either party's designation. Ramsey v. Lucky Stores, Inc. held that when a potential witness's current address is properly disclosed, exclusion of that witness's testimony for failure to provide a telephone number is unwarranted.

The San Antonio Court of Appeals joined a number of its sister courts in holding that supplemental answers to interrogatories need not be verified. In Varner v. Howe on the other hand, the court stated that a letter identifying a potential witness failed to meet any of the formal requirements of Rule 168 and, therefore, was insufficient to be considered a supplemental answer to interrogatories. Accordingly, the court held that the witness should not have been permitted to testify. Although the court did not rest its conclusion on the lack of verification alone, it expressed disagreement with those courts that have concluded verification of supplemental interro-

291. 847 S.W.2d 391 (Tex. App.—Amarillo 1993, writ denied).
292. Id. at 294.
293. TEX. R. CIV. P. 166b(6).
294. Id.; see Fatheree, 847 S.W.2d at 394.
295. TEX. R. CIV. P. 215(5).
296. Id.; see Fatheree, 847 S.W.2d at 394; see also Hopkins v. Massey, 862 S.W.2d 679 (Tex. App.—Tyler 1993, no writ).
298. Id. at 641-43.
299. 842 S.W.2d 750 (Tex. App.—Dallas 1992, no writ).
300. Id. at 753.
301. 853 S.W.2d 623 (Tex. App.—Houston [1st Dist.] 1993, writ denied).
302. Id. at 632.
303. Soefje v. Stewart, 847 S.W.2d 311, 314 (Tex. App.—San Antonio 1992, writ denied). The court further held that supplemental answers need not be signed by the parties. Id.
305. TEX. R. CIV. P. 168.
306. Varner, 860 S.W.2d at 462.
307. Id.
gatory answers is not required. The court stated that failing to require verification would allow a party to hold back material information and then provide it in an unworn supplement just before the thirty-day deadline.

Finally, the Dallas Court of Appeals was called upon to interpret the requirement of Rule 166b(6)(b) that a party designate its expert witnesses “as soon as is practical” in *Mentis v. Barnard*. The court concluded that the trial court did not abuse its discretion in striking plaintiffs’ expert, who was first identified thirty-two days before trial, as not being designated as soon as practical, where the case had been pending for almost two years and the relevant discovery request had been outstanding for over eighteen months. The court noted, however, that there is disagreement over the meaning of the “as soon as is practical” language among the courts of appeals. The supreme court has granted the application for writ of error in *Mentis*, and it will presumably provide much needed guidance on the proper interpretation of this provision.

E. MISCELLANEOUS

The scope of proper discovery was the subject of two unusual cases decided during the Survey period. The first, *Keene Corp. v. Wittig* involved an attempt to discover information about a newspaper advertisement the corporate defendant placed in a Houston newspaper during jury deliberations in a related lawsuit. The advertisement contained opinions of the defendant’s president regarding the wastefulness of asbestos lawsuits and the large legal fees and awards the defendant had paid. The plaintiffs argued that information regarding the motivations behind the advertisement was relevant to their claim for punitive damages. Although the court acknowledged that advertisements published during or shortly before trial in order to affect jury deliberations may be a legitimate concern, and that the trial court has the power to remedy any inappropriate conduct of that type, pretrial inquiry into the motivations behind the advertisement is beyond the scope of proper discovery.

*Martin v. Khoury* involved a subpoena duces tecum directed to the president of East Texans Against Lawsuit Abuse, Inc. (ETALA), seeking the production of ETALA’s current membership list and the identity of any-

308. *Id.*
309. *Id.*
310. TEX. R. CIV. P. 166b(6)(b).
312. *Id.* at 123-24.
313. *Id.* at 124.
314. 855 S.W.2d 280 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).
315. *Id.* at 281.
316. *Id.*
317. *Id.* at 283.
318. *Id.*
319. *Id.* at 283-84. Because the lack of relevance was dispositive, the court declined to address the constitutional free speech arguments raised by the defendant. *Id.* at 282-83.
one who had contributed to that organization.\textsuperscript{321} The parties issuing the subpoena argued that it was relevant to their voir dire because ETALA had influenced public opinion regarding personal injury plaintiffs.\textsuperscript{322} The trial court ordered the deponent to produce the requested documents for an \textit{in camera} inspection.\textsuperscript{323} The court of appeals granted a writ of mandamus directing the trial court to withdraw that order.\textsuperscript{324} The court held that the requested discovery was improper because it had no relevance to the subject matter of the lawsuit.\textsuperscript{325} In response to plaintiffs' concerns about ETALA’s influence on potential jurors, the court stated that discovery should not be permitted without a showing that plaintiffs could not obtain the necessary information by voir dire of the jury panel.\textsuperscript{326} Moreover, the court expressed concern regarding the infringement of the First Amendment right to association in the absence of some controlling justification for allowing the requested discovery.\textsuperscript{327}

\section*{XI. SUMMARY JUDGMENT}

Issues relating to summary judgment pleading practice sharply divided the supreme court in \textit{McConnell v. Southside Independent School District}.\textsuperscript{328} The defendant in the case had filed a one page motion for summary judgment to which it attached a twelve page supporting brief. The defendant’s brief expressly presented the grounds on which judgment was sought, but its motion stated only that there were “‘no genuine issues as to any material facts.’”\textsuperscript{329} Although plaintiff filed a written exception to the motion on the basis that it failed to present any grounds, the trial court overruled the exception and rendered summary judgment for the defendant. The court of appeals affirmed, holding that Rule 166a\textsuperscript{330} allows a movant to “set out the specific grounds for summary judgment in a brief served . . . contemporaneously with the motion itself.”\textsuperscript{331}

The supreme court reversed this judgment in a 5-4 decision, holding that the grounds for a motion for summary judgment must be set out in the motion itself and cannot be furnished by an accompanying brief.\textsuperscript{332} The Court observed that this requirement is plainly stated in the rule\textsuperscript{333} and does not unduly burden the movant.\textsuperscript{334} A plurality of the Court also noted that carv-

\begin{footnotesize}
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  \item 321. \textit{Id.} at 164-65.
  \item 322. \textit{Id.} at 165.
  \item 323. \textit{Id.} at 164.
  \item 324. \textit{Id.} at 167.
  \item 325. \textit{Id.} at 166.
  \item 326. \textit{Id.} at 166-67.
  \item 327. \textit{Id.} at 167.
  \item 328. 858 S.W.2d 337 (Tex. 1993).
  \item 329. \textit{Id.} at 338.
  \item 330. TEX. R. CIV. P. 166a.
  \item 331. 814 S.W.2d 247, 248 (Tex. App.—Austin 1991) (per curiam), \textit{rev'd}, 858 S.W.2d 337 (Tex. 1993).
  \item 332. 858 S.W.2d at 341.
  \item 333. \textit{Id.} at 339; see TEX. R. CIV. P. 166a(c) (“The motion for summary judgment shall state the specific grounds therefore.”).
  \item 334. 858 S.W.2d at 341.
\end{itemize}
\end{footnotesize}
ing exceptions to this simple requirement would frustrate the purpose of the rule and inject uncertainty into summary judgment proceedings as to what issues were presented for consideration. In a vigorous dissent, two justices advocated a "more flexible" approach that would at least permit a movant to specify his grounds for summary judgment by reference to other documents so long as the opposing party was provided adequate information to oppose the motion and the summary judgment issues were defined.

The rest of the plurality opinion concerns corollary questions about the non-movants' response and whether objections to a defective motion or response are required to preserve error. According to the plurality opinion, non-movants must likewise set out in their written response the issues they assert in avoidance of the motion, and they cannot present those issues merely by reference to the summary judgment evidence. The opinion also states that a non-movant need not object or except to a motion presenting no grounds as a predicate for appeal. Instead, an exception is required only if the non-movant intends to complain on appeal that the grounds stated in the motion were unclear or ambiguous. The plurality opinion announces similar rules governing the movants' objections to the written answer or response. A majority of the Court refused to join in these latter portions of the plurality opinion, however, and they appear to be mere dicta.

In E.B. Smith Co. v. United States Fidelity & Guaranty Co. the court held that a party does not comply with the requirements of amended Rule 166a(d), which governs the use of unfiled discovery instruments as evidence, by simply filing a notice identifying deposition excerpts by name and page numbers. Instead, a party must provide the trial court with the actual language he is relying on from the unfiled deposition or other discovery document. The court opined that the amended rule does permit a party who appropriately specifies the unfiled discovery to rely on these materials

335. Id. at 345 (Hecht, J., dissenting). This dissenting opinion also took the majority to task for failing to address whether the trial court's purported mistake constituted reversible error under TEX. R. APP. P. 184(b). Id. at 347.

In a separate opinion, the remaining two dissenters agreed with the majority that TEX. R. CIV. P. 166a(c) established a bright line rule that was not followed in the trial court. Id. at 349 (Enoch, J., dissenting). Nevertheless, they agreed with their brethren dissenters that the error was harmless. Id. at 350.

337. Id. at 341-43.
338. Id. at 341.
339. Id. at 342. Even if the motion specifies some grounds, an exception is not required to preserve a complaint that the motion did not present the grounds upon which the court relied in granting summary judgment. Id.

340. Id.
341. Id. at 343.
342. 850 S.W.2d 621 (Tex. App.—Corpus Christi 1993, writ denied).
343. TEX. R. CIV. P. 166a(d), which was added by amendment in 1990, provides, in pertinent part: "[d]iscovery products not on file with the clerk may be used as summary judgment evidence if . . . a notice containing specific references to the discovery . . . [is] filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs . . . ."
344. 850 S.W.2d at 624.
345. Id.
without attaching them to an affidavit, the motion for summary judgment, or a written response. This latter statement by the court is arguably dictum, however, and possibly conflicts with earlier decisions by the same court and others that have held that the Deerfield authentication rules for unfiled discovery materials survived the 1990 amendments to Rule 166a.

Two other cases decided during the Survey period also involved issues of summary judgment evidence. In Federal Deposit Insurance Corp. v. Moore the court held that movants may not rely on their own answers to interrogatories or depositions filed less than twenty-one days before the hearing as evidence in support of the motion for summary judgment. In Coleman v. United Savings Association the court refused to disregard an affidavit in which the affiant made a statement based on "knowledge and belief" instead of "personal knowledge." According to the court, the requirement in Rule 166a that affidavits be made on personal knowledge is satisfied by an affirmative showing in the affidavit of how the affiant became familiar with the facts and not by a self-serving recitation that the affiant has "personal knowledge."

CBI Industries, Inc. v. National Union Fire Insurance Co. involved a discovery issue of a different stripe. The defendant insurance company filed a motion for summary judgment on the basis of a provision in its policy that allegedly excluded coverage for plaintiff's environmental claims. The trial court granted the motion on the grounds that this exclusionary "pollution" clause was clear and unambiguous. The plaintiff argued that the language of the policy was at least latently ambiguous, and that the trial court should have permitted it to proceed with discovery before granting the summary judgment. Agreeing that the plaintiff had not been given a reasonable opportunity for discovery, the court of appeals reversed the judgment and remanded the case to the trial court without deciding whether the exclusion was ambiguous. The court emphasized that Rule 166a(c) clearly con-

346. Id.
350. 846 S.W.2d 492 (Tex. App.—Corpus Christi 1993, writ denied).
351. Id. at 496.
352. Id. at 495.
353. 846 S.W.2d 128 (Tex. App.—Fort Worth 1993, no writ).
354. Id. at 131.
355. TEX. R. CIV. P. 166a(f).
356. 846 S.W.2d at 131.
357. 860 S.W.2d 662 (Tex. App.—Houston [1st Dist.] 1993, writ requested).
358. A latent ambiguity arises from extraneous or collateral facts that make the meaning of a written instrument uncertain although its language is clear and unambiguous. Id. at 665.
359. Id. at 664.
360. TEX. R. CIV. P. 166a(c).
templates that the trial court allow a reasonable opportunity for discovery before granting a summary judgment.\textsuperscript{361} Given the unique and complex issues presented in the case, the court concluded that the six months that had elapsed between commencement of the suit and entry of the judgment was an insufficient period for plaintiff to conduct adequate discovery addressed to the issue of latent ambiguity.\textsuperscript{362}

\section*{XII. JURY QUESTIONS}

The Texas Supreme Court addressed the difference between “defective” and “immaterial” jury questions in \textit{Spencer v. Eagle Star Insurance Co. of America}.\textsuperscript{363} The trial court in \textit{Spencer} submitted a jury question, over the defendant’s objection, asking whether the defendant had engaged in an “‘unfair practice in the business of insurance.’”\textsuperscript{364} The jury answered this question affirmatively, but the trial court disregarded the finding and entered judgment notwithstanding the verdict.\textsuperscript{365} The court of appeals affirmed.\textsuperscript{366} The supreme court agreed with both lower courts that the question was defective because, without an accompanying instruction, it failed to specify the actions for which the defendant could be held liable.\textsuperscript{367} Because the question plainly attempted to secure a finding on a statutory cause of action, however, the Court held that it was not immaterial.\textsuperscript{368} Thus, the defendant was entitled only to a new trial and not the judgment notwithstanding the verdict granted by the trial court.\textsuperscript{369}

The supreme court has emphasized in recent years the mandatory nature of Rule 277,\textsuperscript{370} which requires cases to be submitted to the jury on broad-form questions whenever feasible.\textsuperscript{371} In \textit{H.E. Butt Grocery Co. v. Warner},\textsuperscript{372} however, the Court held that the failure to submit a properly tendered broad-form question and accompanying instructions did not constitute harmful error.\textsuperscript{373} The Court stated that, although submitted in granulated form, the questions to the jury set forth the proper elements of the plaintiffs’ cause of action.\textsuperscript{374}

\begin{footnotesize}
\begin{enumerate}
\item[361.] 860 S.W.2d at 665.
\item[362.] \textit{Id.} at 665-66.
\item[363.] 860 S.W.2d 868 (Tex. 1993).
\item[364.] \textit{Id.} at 869-70.
\item[365.] \textit{Id.} at 870.
\item[366.] \textit{Id.}
\item[367.] \textit{Id.; see also} Adams v. Valley Fed. Credit Union, 848 S.W.2d 182, 185 (Tex. App.—Corpus Christi 1992, writ denied) (stating that instructions are even more important when broad form submissions are used).
\item[368.] \textit{Spencer}, 860 S.W.2d at 870.
\item[369.] \textit{Id.}
\item[370.] \textit{TEX. R. CIV. P. 277.}
\item[371.] \textit{Id.}
\item[372.] 845 S.W.2d 258 (Tex. 1992).
\item[373.] \textit{Id.} at 260.
\item[374.] \textit{Id. Compare} Westgate, Ltd. v. State of Texas, 843 S.W.2d 448, 457-58 (Tex. 1992) (where failure to utilize broad-form questions produced a demonstrably different damage figure the error was harmful).
\end{enumerate}
\end{footnotesize}
XIII. JURY PRACTICE

In a case that could affect Texas state court procedure, the Fifth Circuit held in *United States v. Broussard* that *Batson v. Kentucky*, which prohibits racial discrimination in the use of peremptory jury strikes, does not extend to gender-based discrimination. The court reasoned that racial discrimination is at the core of the Fourteenth Amendment, and that gender has not been considered a suspect classification entitled to the same degree of protection as race.

The Texas Supreme Court considered the right to a jury trial in *Rivercenter Associates v. Rivera*. The plaintiff in that case sought to strike the defendants' jury demand based upon a jury waiver provision in the contracts upon which suit was brought. When the trial court denied the motion, the plaintiff sought mandamus relief. The supreme court held that the plaintiff had not shown that it diligently pursued its right to a non-jury trial in light of the passage of over four months between the filing of the defendants' jury demand and the plaintiff's motion to strike. The Court did not reach the issue of the constitutionality of contractual jury waivers.

The necessity and timeliness of objections were at issue in *Martinez v. City of Austin* and *Roling v. Alamo Group (USA), Inc.* In *Martinez* the plaintiffs objected after the jury had been sworn that a “systemic bias” denied them sufficient minority representation on the jury. The court held that this objection came too late. The *Roling* court held that, as in the case of an incomplete jury verdict, an objection must be made to conflicting jury findings in order to preserve error.

XIV. JUDGMENT, DISMISSAL, AND MOTION FOR NEW TRIAL

The Dallas Court of Appeals reconciled two lines of cases dealing with the effect of a second judgment being entered in a single cause in *Azbill v. Dallas County Child Protective Services*. The court held that, unless the record shows that the trial court intended to vacate the first judgment entered and replace it with the second judgment, the latter is a nullity.
Careful trial practitioners should make note of *Lowe v. United States Shoe Corp.*,392 which addressed the constitutional sufficiency of a notice of intent to dismiss for want of prosecution. The trial court in *Lowe* sent a notice that failed to specify what cases would be dismissed although a list was posted at the courthouse and available for a nominal fee from the district clerk.393 The court of appeals held that the failure to identify the cases to be dismissed by name did not render the notice constitutionally defective.394

The Texas Supreme Court addressed the proper interpretation of Rule 306a(4)395 in *Levit v. Adams*.396 Rule 306a(4) extends the thirty-day period for filing post-judgment motions when a party does not receive notice of a judgment or dismissal within twenty days such that the period begins on the date the party does receive notice, but in no event more than ninety days after the original judgment or dismissal order was signed.397 The supreme court noted that the courts of appeals had disagreed over how this rule applied when a party learned of a judgment or dismissal between the 90th and 120th days after it was entered.398 The Court concluded that, correctly interpreted, the rule does not provide that the ninetieth day itself will trigger the thirty-day filing period; thus, the thirty-day period cannot begin to run if the party receives notice more than ninety days following the entry of the judgment or order of dismissal.399

The similarities and differences between motions to reinstate and motions for new trial were explored in *Carrera v. Marsh*400 and *Brim Laundry Machinery Co. v. Washex Machinery Corp.*401 In *Carrera* the court held that an unverified motion for new trial filed during the extended period allowed under Rule 306a(4)402 was not sufficient to reinvoke the trial court’s plenary jurisdiction.403 The court based its holding on decisions requiring verification of motions to reinstate.404 On the other hand, the Fort Worth Court of Appeals held that a premature motion to reinstate would not be deemed filed subsequent to the signing of the order of dismissal as would a motion for new trial under Rule 306c,405 notwithstanding the similarities between the two types of motions.406

The Texas Supreme Court addressed a number of procedural issues surrounding motions for new trial during the Survey period. The Court held in

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392. 849 S.W.2d 888 (Tex. App.—Houston [14th Dist.] 1993, writ denied).
393. Id. at 889.
394. Id. at 891.
395. TEX. R. CIV. P. 306a(4).
396. 850 S.W.2d 469 (Tex. 1993).
397. TEX. R. CIV. P. 306a(4).
398. *Levit*, 850 S.W.2d at 470 (citations omitted).
399. Id. at 470.
400. 847 S.W.2d 337 (Tex. App.—El Paso 1993, no writ).
401. 854 S.W.2d 297 (Tex. App.—Fort Worth 1993, writ denied).
402. TEX. R. CIV. P. 306a(4).
403. *Carrera*, 847 S.W.2d at 342.
404. Id. at 341-43.
405. TEX. R. CIV. P. 306c.
406. *Brim Laundry Machinery Co.*, 854 S.W.2d at 301.
Fruehauf Corp. v. Carrillo\(^{407}\) that a trial court has the authority during the 75-day period after a judgment is entered to vacate an order for new trial that it had previously entered.\(^{408}\) Where a new trial order is vacated and the original judgment reinstated, however, the Court held in Old Republic Insurance Co. v. Scott\(^{409}\) that the appellate timetable begins anew.\(^{410}\) Finally, the Court concluded in Horrocks v. Texas Department of Transportation\(^{411}\) that an appellate court cannot render judgment based on a no evidence point that was preserved solely in a party's motion for new trial.\(^{412}\)

**XV. MISCELLANEOUS**

A. **Forum Non Conveniens**

The doctrine of forum non conveniens gives a court discretionary power to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if another court heard the action. Three years ago, the supreme court held in Dow Chemical Co. v. Alfaro\(^{413}\) that the legislature had statutorily abolished the doctrine in suits brought under section 71.031\(^{414}\) of the Texas Civil Practice and Remedies Code.\(^{415}\) The dissenting justices in Dow expressed fears that the Court's holding would transform Texas into an irresistible forum of last resort for all mass disaster lawsuits.\(^{416}\) The legislature has now eliminated those concerns by amending the Texas wrongful death statute.\(^{417}\) Section 71.051 of the statute permits the court to decline jurisdiction under the doctrine of forum non conveniens if a case brought by a non-resident of the United States would be more properly heard in another forum.\(^{418}\) Under the amended statute, the doctrine also applies in certain circumstances to cases filed by U.S. residents.\(^{419}\)

B. **Subpoena Range**

A newly enacted amendment to the Texas Civil Practice and Remedies Code extends the subpoena range for witnesses to 150 miles.\(^{420}\) Moreover, it appears this distance is to be measured from the county line rather than the location of the courthouse.\(^{421}\) Prior to this legislative enactment, a subpoena

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\(^{407}\) 848 S.W.2d 83 (Tex. 1993).
\(^{408}\) Id. at 84.
\(^{409}\) 846 S.W.2d 832 (Tex. 1993).
\(^{410}\) Id. at 833.
\(^{411}\) 852 S.W.2d 498 (Tex. 1993).
\(^{412}\) Id. at 498-99.
\(^{413}\) 786 S.W.2d 674 (Tex. 1990), cert. denied, 498 U.S. 1024 (1991).
\(^{414}\) TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986) provides that actions for wrongful death or personal injury arising from events in foreign states or countries may be brought in Texas under certain circumstances.
\(^{415}\) 786 S.W.2d at 678-79.
\(^{416}\) Id. at 690 (Gonzalez, J., dissenting).
\(^{418}\) Id. (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(a) (Supp. 1994)).
\(^{419}\) Id. § 71.051(b).
\(^{420}\) Act of May 7, 1993, 73d Leg., R.S., ch. 103, § 1, 1993 Tex. Sess. Law Serv. 193 (Vernon) (codified as TEX. CIV. PRAC. & REM. CODE ANN. § 22.002 (Supp. 1994)).
\(^{421}\) Id.
could be issued under Rule 176 only for a witness who resided within one hundred miles of the courthouse in which the suit was pending.\textsuperscript{422}

\section*{C. Mary Carter Agreements}

In \textit{Elbaor v. Smith}\textsuperscript{423} the supreme court announced that Mary Carter agreements are "unwise and champertous device[s] that . . . [have] failed to achieve. . . [their] intended purpose."\textsuperscript{424} Although various courts have defined the term "Mary Carter agreement" in different fashions,\textsuperscript{425} the \textit{Elbaor} court clarified that a Mary Carter agreement exists whenever a settling defendant retains a financial stake in the plaintiff's recovery \textit{and} remains a party at the trial of the case.\textsuperscript{426} This type of arrangement, said the court, creates a tremendous incentive for the settling defendant to assist the plaintiff's presentation of his case.\textsuperscript{427} Moreover, rather than promote settlement, a Mary Carter agreement frequently makes litigation inevitable by granting the settling defendant a veto power over any proposed settlement between the plaintiff and the remaining defendants.\textsuperscript{428} Although the Court announced guidelines for use in Mary Carter scenarios six years ago hoping to prevent the harmful skewing of the trial process caused by these agreements,\textsuperscript{429} the \textit{Elbaor} Court decided that these remedial measures did not eliminate the agreements' unjust influences.\textsuperscript{430} The Court therefore held that Mary Carter agreements are void as against public policy,\textsuperscript{431} and the Court agreed belatedly with Justice Spears' concurrence in \textit{Smithwick} that "'they are inimical to the adversary system, and they do not promote settlement—their primary justification.'"\textsuperscript{432} Due to considerations of fairness and policy, however, the Court limited its holding to cases already in the judicial pipeline and those tried on or after December 2, 1992.\textsuperscript{433}

\begin{itemize}
\item\textsuperscript{422} TEX. R. CIV. P. 176.
\item\textsuperscript{423} 845 S.W.2d 240 (Tex. 1992).
\item\textsuperscript{424} Id. at 249.
\item\textsuperscript{425} Id. at 247 n.13. \textit{Compare} General Motors Corp. v. Simmons, 558 S.W.2d 855 (Tex. 1977) (agreement exists where settling defendant retains financial interest and remains a party), \textit{overruled on other grounds by} Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984) \textit{with} Bristol-Myers Co. v. Gonzales, 561 S.W.2d 801, 805 (Tex. 1978) (agreement is settlement where settling defendant retains financial interest in plaintiff's recovery).
\item\textsuperscript{426} 845 S.W.2d at 247. The agreement need not expressly require the settling defendant to participate at trial; the participation requirement is satisfied by the continued presence of the settling defendant as a party in the case. \textit{Id.} at 247 n.14.
\item\textsuperscript{427} Id. at 247.
\item\textsuperscript{428} Id. at 248.
\item\textsuperscript{429} \textit{See} Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1, 9-11 (Tex. 1986) (Spears, J., concurring).
\item\textsuperscript{430} 845 S.W.2d at 249-50.
\item\textsuperscript{431} \textit{Id.} at 250.
\item\textsuperscript{432} \textit{Id.} at 248 (quoting from Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1, 8 (Tex. 1986) (Spears, J., concurring)).
\item\textsuperscript{433} 845 S.W.2d at 251. Although supreme court decisions usually apply retrospectively, exceptions are recognized when considerations of fairness and policy dictate prospective effect only. Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 434 (Tex. 1984).
\end{itemize}
D. DISQUALIFICATION OF COUNSEL

Except in limited circumstances, rule 3.08(a) of the Texas Disciplinary Rules of Professional Conduct prohibits an attorney from acting as both a lawyer and a witness in the same case. In *Mauze v. Curry* the attorney for the plaintiff in a legal malpractice action signed an affidavit controverting the defendant's motion for summary judgment. Because plaintiff's counsel thereby effectively "testified" as an expert witness in the case, the supreme court in *Mauze* held that the lawyer was disqualified from further representation of the plaintiff.

E. APPOINTMENT OF GUARDIANS

Rule 173 authorizes the appointment of a guardian ad litem to protect a minor's interest during litigation. The Court in *McGough v. First Court of Appeals* held that the rule does not restrict the timing of the appointment, and that a trial court had not abused its discretion by appointing a second guardian ad litem in a case following its entry of judgment. The Court pointed out that a guardian ad litem may have usefulness at all stages of a case, not just the trial.

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435. 861 S.W.2d 869 (Tex. 1993).
436. *Id.* at 870.
438. 842 S.W.2d 637 (Tex. 1992).
439. *Id.* at 640.
440. *Id.*