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Texas Civil Procedure

by

Ernest E. Figari, Jr.,* Thomas A. Graves,** and A. Erin Dwyer***

The major developments in the field of civil procedure during the survey period occurred through judicial decisions, statutory enactments,¹ and amendments to the Texas Rules of Civil Procedure.² This Article examines these developments and considers their impact on existing Texas procedure.

I. JURISDICTION OVER THE SUBJECT MATTER

Adams v. Calloway,³ following a similar holding of an earlier case,⁴ sustained the jurisdiction of a statutory probate court to adjudicate a claim for wrongful death against an administrator. Generally, section 5(d) of the Texas Probate Code⁵ authorizes a statutory probate court to hear all matters “incident to an estate” and, according to section 5A(b),⁶ all claims “against” estates fall within this grant. Interpreting section 5A(b) literally, the Corpus Christi court of appeals concluded that a tort claim against an estate must be brought in the probate court where the estate is being administered.⁷

Two other cases, Pullen v. Swanson⁸ and Bank of the Southwest v. Stehle,⁹

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² As a result of the amendments, 137 rules were modified, 16 new rules were added, and 66 rules were repealed. These changes became effective Apr. 1, 1984. See Rules of Civil Procedure, 47 TEX. B.J. (Feb. 1984) (special pull-out section).
³ 662 S.W.2d 423 (Tex. App.—Corpus Christi 1983, no writ).
⁵ TEX. PROB. CODE ANN. § 5(d) (Vernon 1980).
⁶ Id. § 5A(b).
⁷ 662 S.W.2d at 426-27.
⁸ 667 S.W.2d 359 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).
⁹ 660 S.W.2d 572 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).
considered the scope of the “incident to an estate” language. Faced with a suit brought in district court to collect from an executrix on certain promissory notes signed by the decedent, the court in *Pullen* concluded that the claims were incident to the decedent’s estate, ruling that the suit should be decided by the probate court before whom the estate was pending. In *Stehle* a plaintiff brought suit in a district court where certain realty owned by an estate was located, seeking to enforce against the estate’s representative an option to purchase the realty. Concluding that the claim was one incident to the estate, the San Antonio court of appeals reversed a judgment in the plaintiff’s favor. Joining the holding of an earlier case, the court in *Stehle* also concluded that the statutory probate court has exclusive jurisdiction of a claim incident to the estate. A district court therefore lacks subject matter jurisdiction to adjudicate such a claim.

A later case, *Farah v. Fashing*, suggested that the “incident to an estate” language of section 5(d) has limits. In a proceeding initiated by two beneficiaries to contest their administrator’s final accounting, the administrator asserted a third-party claim for malpractice against the attorneys who had represented him in the matter, seeking indemnity and contribution. On mandamus review of the probate court’s dismissal of the third-party claim, the appellate court reasoned that in order for the third-party claim to be incident to the estate, its outcome must be necessary to the resolution of the estate. The court concluded that the claim could not be so categorized, and upheld the dismissal.

Article 1970-3, which indirectly controls the subject matter jurisdiction of all the County Courts at Law of Dallas County, was recently amended. The statute now authorizes county courts to hear civil matters in which the amount in controversy exceeds $500, exclusive of interest, and does not exceed twenty thousand dollars, exclusive of interest, mandatory damages and penalties, attorney’s fees, and costs. Hence, in cases in which the matter in controversy falls within this jurisdictional range these county courts share

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10. 667 S.W.2d at 362; see English v. Cobb, 593 S.W.2d 674, 676 (Tex. 1979).
11. 660 S.W.2d at 574.
13. 660 S.W.2d at 574; see Seay v. Hall, 663 S.W.2d 468, 472 (Tex. App.—Dallas 1983), aff’d in part and rev’d in part, 677 S.W.2d 19 (Tex. 1984). But see *Pullen v. Swanson*, 667 S.W.2d 359, 362-63 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e.).
15. *Id.* at 342; see Lucik v. Taylor, 596 S.W.2d 514, 516 (Tex. 1980).
16. 666 S.W.2d at 343.
19. *Id.* art. 1970-3, § 2 (Vernon Pam. Supp. 1965-1985). In past years similar changes have been made to the jurisdiction of county courts at law in other counties. See, e.g., *id.* arts. 1970-33(b), 1970-62.2, § 2(c) (Tarrant County); 1970-112, 1970-126a, § 2, 1970-126b, § 2(b) (Jefferson County); 1970-166d, § 2(b), 1970-166e, § 2(b) (Wichita County); 1970-112a, § 1(b) (Harris County); 1970-305, § 2(b), 1970-305c, § 2(d) (Cameron County); 1970-324, § 2, 1970-324a, § 2, 1970-324a.1, § 1, 1970-324a.2, § 2 (Travis County); and 1970-339, § 3a, 1970-339A, § 3a, 1970-339c, § 1(d), 1970-339D, § 2(c) (Nueces County).
concurrent jurisdiction with the district courts.20

II. JURISDICTION OVER THE PERSON

The reach of the Texas long-arm statute, article 2031b,21 continued to be the subject of judicial measurement. Section 3 of article 2031b provides that when a nonresident “engages in business in this State,” the statute authorizes service of a nonresident “in any action, suit or proceedings arising out of such business.”22 For a brief period, the “arising out of” language raised questions as to the ability of a plaintiff to establish personal jurisdiction under article 2031b on nonresidents on the basis of activities unrelated to the asserted cause of action.23 The Texas Supreme Court, however, has now settled that the Texas long-arm statute reaches as far as due process will permit and that business contacts unrelated to the asserted cause of action will support the exercise of personal jurisdiction under article 2031b.24

Proceeding from this point, the United States Supreme Court in Hall v. Helicopteros Nacionales de Colombia, S.A.25 articulated a due process test for the situation in which unrelated contacts are relied upon to sustain personal jurisdiction under article 2031b. The plaintiffs, survivors of four individuals killed in the crash of a helicopter in Peru, sued a Colombian corporation in a wrongful death action and effected service under article 2031b. Neither the individuals killed in the crash nor their representatives were residents of, or had any contacts with, Texas. A joint venture that had employed the persons killed was engaged in the construction of a pipeline in Peru and, in connection with the project, had contracted with the defendant to furnish helicopter transportation service in that country. The contract was partially negotiated in Texas, but the defendant executed the contract in Peru. Further, the contract provided that the parties to it were to be subject to the forum and laws of Peru. Although monies due the defendant under the contract originated from a Texas bank, they were sent to the defendant in either New York or Panama.

Aside from the negotiation session, the defendant had purchased a major portion of its helicopter fleet from a manufacturer based in Texas and had

22. Id. § 3 (Vernon 1964).
23. See Wyatt v. Kaplan, 686 F.2d 276, 285 (5th Cir. 1982) (cause of action for libel does not arise out of nonresident contacts if not published in forum state); Jim Fox Enters., Inc. v. Air France, 664 F.2d 63, 64 (5th Cir. 1981) (no personal jurisdiction when nonresident was never in forum in connection with cause of action); Placid Invs., Ltd. v. Girard Trust Bank, 662 F.2d 1176, 1178 (5th Cir. 1981) (long-arm statute does not reach foreign corporation with substantial business in forum when claim does not relate to such business), vacated on rehearing, 689 F.2d 1218, 1220 (5th Cir. 1982); Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1267 (5th Cir. 1981) (requirements of long-arm statute not met where substantial activities in forum had no causal relation to cause of action), discussed in Figari, Graves & Gordon, Texas Civil Procedure, Annual Survey of Texas Law, 36 Sw. L.J. 435, 436-37 (1982).
24. Hall v. Helicopteros Nacionales de Colombia, S.A., 638 S.W.2d 870 (Tex. 1982), rev’d on other grounds, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984); see Placid Invs., Ltd. v. Girard Trust Bank, 689 F.2d 1218, 1219 (5th Cir. 1982), vacating 662 F.2d 1176 (5th Cir. 1982).
sent prospective pilots and other personnel there to be trained at the manufacturer's facility. The defendant had no other contacts with Texas. The Supreme Court reiterated that personal jurisdiction over a nonresident may be sustained on the basis of unrelated contacts without offending due process; however, the Court emphasized that, in such a situation, the unrelated contacts must be continuous and systematic.26 The Court in *Hall* concluded that the defendant's contacts were insufficient to satisfy this test.27

The Fifth Circuit in *C&H Transportation Co. v. Jensen & Reynolds Construction Co.*28 reiterated a two-pronged test for meeting the requirements of due process when effecting service under article 2031b. First, "[t]he defendant must have some minimum contacts with the state resulting from an affirmative act or acts on its part" and, second, "it must not be unfair or unreasonable to require the nonresident defendant to defend the suit in the forum."29

The plaintiff, a motor carrier based in Texas, sued the defendant, a Louisiana corporation, to collect the balance of freight charges due for transportation services in the movement of crane parts from Louisiana to Washington. In the course of an interstate conference call the defendant, who was located in Washington at the time, informed the plaintiff where the parts were to be transported. Thereafter, the parts were picked up and transported through Texas to their destination in Washington. After the haul was completed, the defendant mailed a $30,000 check to the plaintiff in Texas, and a dispute ensued as to whether an additional sum was owed for the services. Pointing to "[t]he mere use of interstate commerce on a single occasion involving the forum, the fortuitous routing of equipment through the forum on the way to its destination in Washington, and the mailing of a payment check to the forum,"30 the court concluded that purposeful availment of conducting activities within the forum had not been shown.31 Emphasizing that the defendant's sole contact with Texas was the single, isolated transaction involved, the court found the first element of the two-pronged test to be lacking and affirmed the trial court's dismissal of the suit.32

When the registered agent of a foreign corporation authorized to transact business in Texas cannot be found, article 8.10 of the Texas Business Corporation Act33 authorizes service to be effected over the corporation by delivering two copies of the process to the secretary of state. According to article

27. 104 S. Ct. at 1874, 80 L. Ed. 2d at 414.
28. 719 F.2d 1267 (5th Cir. 1983).
29. *Id.* at 1269; accord *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1028 (5th Cir. 1983) (not unfair or unreasonable to require nonresident corporation to defend suit in Texas since contracts were made in Texas and would be governed by Texas law); *Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149, 152 (5th Cir. 1980) (exchange of communication insufficient to be characterized as purposeful activity within the forum).
30. 719 F.2d at 1270.
31. *Id.*
32. *Id.*
33. *TEX. BUS. CORP. ACT. ANN.* art. 8.10(B) (Vernon 1980).
8.10, the secretary of state “shall immediately cause one of such copies thereof to be forwarded by registered mail, addressed to the corporation at its principal office in the state or country under the laws of which it is incorporated.” 34 The Texas Supreme Court concluded during an earlier survey period that service under article 2031b is not completed until process is forwarded by the designated state official to the nonresident defendant. 35 In order to establish the jurisdiction of the trial court over the defendant’s person, the record must affirmatively show that the process was forwarded. 36 In Roland Communications, Inc. v. American Communications Corpus Christi, Inc. 37 this principle was applied to service attempted under article 8.10. Invoking article 8.10, the plaintiff had caused the secretary of state to be served with two copies of the process; however, the record failed to show that a copy of the process was forwarded to the defendant. Setting aside a default judgment that had been entered on the basis of this service, the appellate court concluded that, as a result of this omission, the trial court never acquired jurisdiction over the person of the defendant. 38

_C.W. Brown Machine Shop, Inc. v. Stanley Machine Corp._ 39 indicated that advertisement by a nonresident in a national publication that is circulated in Texas will not of itself subject the nonresident to service under article 2031b. The plaintiff, a Texas resident, read an advertisement in a national publication sponsored by a Massachusetts corporation in the business of buying and selling machinery and, as a result, became interested in purchasing one of the items described. After requesting descriptive material concerning the machine from the Massachusetts seller, the plaintiff traveled to Massachusetts to inspect and test the machine. Thereafter, the plaintiff purchased the machine, the seller shipped it to Texas, and the plaintiff wired the purchase price to the seller in Massachusetts. After discovering a defect in the machine, the plaintiff initiated suit in Texas and served the seller under article 2031b. The court of appeals concluded that the seller’s mere advertisement in national publications circulated in Texas was insufficient to subject its person to jurisdiction in the state and therefore affirmed a dismissal of the suit. 40

### III. Service of Process

A number of significant changes were made in the Texas Rules of Civil Procedure with respect to service of process. Rule 108a, 41 which is completely new and patterned after its federal counterpart, 42 provides several

34. _Id._
36. _Id._
37. 662 S.W.2d 145 (Tex. App.—Corpus Christi 1983, no writ).
38. _Id._ at 147; see Flynt v. City of Kingsville, 125 Tex. 510, 82 S.W.2d 934 (1935).
39. 670 S.W.2d 791 (Tex. App.—Fort Worth 1984, no writ).
42. _See_ _FED. R. CIV. P._ 4(i).
alternative procedures for serving a party in a foreign country. Specifically, it authorizes service: (1) "in the manner prescribed by the law of the foreign country;"43 (2) "as directed by the foreign authority in response to a letter rogatory or a letter of request;"44 (3) "in the manner provided by Rule 106,"45 which is the rule governing service generally in Texas;46 (4) "pursuant to the terms and provisions of any applicable treaty or convention;"47 (5) "by diplomatic or consular officials when authorized by the United States Department of State;"48 or (6) "by any other means directed by the court that is not prohibited by the law of the country where service is to be made."49 Regardless of the method chosen, the procedure used must be "reasonably calculated, under all the circumstances, to give actual notice of the proceedings to the defendant in time to answer and defend."50 Intended to permit acquisition of personal jurisdiction to the maximum limit, rule 108a authorizes service on the foreign defendant "to the full extent that he may be required to appear and answer under the Constitution of the United States or under any applicable convention or treaty in an action either in rem or in personam."

To eliminate confusion as to whether service of a counterclaim or cross-claim had to be by citation, amended rule 12452 now provides that "[w]hen a party asserts a counter-claim or a cross-claim against another party who has entered an appearance, the claim may be served in any manner prescribed for service of citation or as provided in Rule 21(a)."53 Of course, rule 21(a) permits service to be made by delivering a copy of the pleading to the party to be served or to his agent or attorney, either in person or by registered mail.54

Two decisions during the survey period invalidated service of process on the basis of inadvertent errors occurring during the execution of service. In Lewis v. Lewis55 an officer served a citation ninety-six days after its issuance despite a stipulation in the citation that provided for a ninety-day limitation on effectiveness. The defendant contended that the citation was void be-

43. TEX. R. CIV. P. 108a(1)(a); see FED. R. CIV. P. 4(i)(1)(A).
44. TEX. R. CIV. P. 108a(1)(b); see FED. R. CIV. P. 4(i)(1)(B).
45. TEX. R. CIV. P. 108a(1)(c).
46. Id. 106 directs that service is to be effected by the designated officer upon the defendant either by personal delivery or by mailing the process in a prescribed manner to the defendant. When securing service by either of these preferred methods is impractical, rule 106 authorizes the trial court, upon motion, to order substituted service upon the defendant by one of several acceptable methods. See generally Figari, Texas Civil Procedure, Annual Survey of Texas Law, 35 Sw. L.J. 359, 364 (1981) [hereinafter cited as 1981 Annual Survey].
47. TEX. R. CIV. P. 108a(1)(d).
48. Id. 108a(1)(e).
49. Id. 108a(1)(f).
50. Id. 108a(1).
52. TEX. R. CIV. P. 124.
53. Id.
54. Id. 21(a).
55. 667 S.W.2d 910 (Tex. App.—Waco 1984, no writ).
cause the officer failed to serve the citation within the ninety days, and sought to set aside a default judgment rendered against him on the basis of the service. The court of appeals concluded that the time requirement stated in the citation for effecting service was mandatory, held that the service over the defendant consequently was ineffective, and invalidated the default judgment.

A similar error occurred in *Cates v. Pon*, in which the trial court had authorized a recognized method of substituted service under rule 106, directing in its order that "service be performed by Leonard Green." Subsequently deputy constable Lindsey E. Siriko effected substituted service. After a default judgment was taken, the defendant challenged the service on the basis of the substitution of process servers. The appellate court in setting aside the default judgment followed a rule of strict compliance and found the service to be fatally defective due to its variance from the service order.

IV. Venue

The recently adopted amendments to the Texas venue statute prohibit interlocutory appeals of venue rulings. Instead, the venue question is now appealed together with any appeal from the trial on the merits. Not surprisingly, only a handful of cases during the survey period even considered venue questions, and most of those involved venue provisions as they existed before the 1983 amendments.

One case that may have continuing significance, notwithstanding the recent amendments, is *City of Fort Gates v. Cathey*. In *Cathey* the defendant filed a motion for change of venue asserting its inability to obtain an impartial trial in the county where the action was pending. The plaintiff responded to defendant's motion and affidavits by filing a controverting plea, also supported by affidavits. The issue thus formed was tried to the judge, who overruled the defendant's motion for a change of venue. On appeal, the court held that defendant had shown no abuse of discretion on the part of the trial court because it had failed to bring forward a statement of facts

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56. *Id.* at 911; see *Tex. R. Civ. P.* 101.
58. 663 S.W.2d 99 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).
60. 663 S.W.2d at 100.
61. *Id.* at 102.
65. 665 S.W.2d 586 (Tex. App.—Waco 1984, writ ref'd n.r.e.).
66. *Id.* at 589; see *Tex. R. Civ. P.* 257-259.
from the trial court’s hearing on the motion. Unfortunately, the appellate court’s decision does not reveal whether the defendant’s motion was filed before or after the effective date of the amendments to rule 258. The amended version of that rule arguably permits the trial court to make its determination solely on the basis of the affidavits, in which case a statement of facts from the hearing should not be required on appeal.

In at least one other case, the appellate court may also have failed to consider a recent amendment to the controlling venue provision. In Red Bird Bank v. Crocker National Bank the court sustained the defendant’s special appearance challenging venue, holding that the defendant had not waived the venue protections of section 94 of the National Bank Act, which had restricted the venue of such suits against national banks to the county of the bank’s principal place of business. In reaching this conclusion, the court apparently overlooked the Depository Institutions Act of 1982, which limited the scope of the national bank venue privilege by confining its application to national banks for which a receiver has been appointed. In line with the prevailing authorities on the subject, the court also held that a special appearance is a proper means of raising federal venue issues in a Texas state court lawsuit.

V. Pleadings

The pleading requirements for actions on sworn accounts have changed substantially. Rule 185 previously provided that a defendant was required to file a written denial under oath stating that each and every item of the sworn account claim was not just or true or that some specific items were not just or true. The new rule simply requires that the party resisting a sworn account claim “file a written denial, under oath.” Further, the rule specifies that “[i]n no particularization or description of the nature of the component parts of the account or claim is necessary,” unless a special exception is sustained to the petition. With respect to counterclaims and cross-claims, rule 92 now provides that, in the absence of a responsive pleading to a cross-
claim or counterclaim, a party shall be deemed to have pleaded a general
denial to the counterclaim or cross-claim, but shall not have waived any
special appearance or plea of privilege as a result.\textsuperscript{78}

Two cases during the survey period addressed issues related to pleadings.
In \textit{Dawson v. Garcia}\textsuperscript{79} the plaintiffs sought to recover damages and "such
other and further relief to which they may be entitled either at law or in
equity."\textsuperscript{80} In the light of the absence of the word "interest" in the prayer for
relief, the Dallas court of appeals concluded that the plaintiffs had waived
their right to record prejudgment interest.\textsuperscript{81} The \textit{Dawson} decision, however,
should be considered in light of other cases that have held, when prejudg-
ment interest is permitted by law, that a petition containing a general prayer
for relief is sufficient.\textsuperscript{82}

Rule 101 provides that a defendant's written answer is to be filed on the
Monday next after the expiration of twenty days from the date of service.\textsuperscript{83}
In \textit{Proctor v. Green}\textsuperscript{84} the twentieth day for the answer fell on the Sunday
before the fourth of July. Rejecting defendant's contention that an answer
was not required until July eleventh, the court concluded that the answer
was originally due on Monday, the fourth of July, but was extended to only
July fifth as a result of the legal holiday.\textsuperscript{85}

\section*{VI. LIMITATIONS}

The limitations provisions included in the Texas health care statutes con-
tinued to receive intense judicial scrutiny during the survey period. Last
term in \textit{Borderlon v. Peck}\textsuperscript{86} the supreme court ruled that fraudulent conceal-
ment would toll the limitations period specified in article 4590i.\textsuperscript{87} This term
the supreme court initially ruled in \textit{Nelson v. Krusen}\textsuperscript{88} that the discovery
rule\textsuperscript{89} was inapplicable in a case governed by article 5.82 of the Texas Insur-

\begin{footnotesize}
\textsuperscript{78} Id. 92.
\textsuperscript{79} 666 S.W.2d 254 (Tex. App.—Dallas 1984, no writ).
\textsuperscript{80} Id. at 267.
\textsuperscript{81} Id. at 268.
\textsuperscript{82} See Sanchez v. Matthews, 636 S.W.2d 455, 461 (Tex. App.—San Antonio 1982, writ
ref'd n.r.e.) (abuse of discretion to deny filing of amendment specially pleading for prejudg-
ment interest); Arndt v. National Supply Co., 633 S.W.2d 919, 924 (Tex. App.—Houston
[14th Dist.] 1982, writ ref'd n.r.e.) (simple prayer for interest provides fair notice of claim for
relief for prejudgment interest).
\textsuperscript{83} 673 S.W.2d 390 (Tex. App.—Houston [1st Dist.] 1984, no writ).
\textsuperscript{84} Id. at 392-93.
\textsuperscript{85} 661 S.W.2d 907 (Tex. 1983), discussed in 1984 Annual Survey, supra note 4, at 438.
\textsuperscript{86} 661 S.W.2d at 909. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp.
1985) generally provides a two-year limitation period for filing malpractice suits against physi-
cians or hospitals carrying liability insurance.
\textsuperscript{88} The discovery rule provides that the statute of limitations will not start running until
the plaintiff discovers the true facts giving rise to his claimed damage or until the date discover-
ity should reasonably have been made. See, e.g., Hays v. Hall, 488 S.W.2d 412, 414 (Tex.
1972); Gaddis v. Smith, 417 S.W.2d 577, 579-80 (Tex. 1967). See generally 1983 Annual Sur-
vey, supra note 73, at 300-01.
\textsuperscript{89} In Mann v. A. H. Robins Co., 741 F.2d 79 (5th Cir. 1984), one of the Dalkon shield cases
that was also decided during the survey period, the Fifth Circuit held that the discovery rule
\end{footnotesize}
ance Code—the predecessor to article 4590i.\textsuperscript{90} According to the court, the legislature made no allowance for the judicially created discovery rule in enacting article 5.82.\textsuperscript{91} The court distinguished its holding in \textit{Borderlon} by stating that fraudulent concealment "is an affirmative defense predicated upon an intentional wrong perpetrated by the defendant, whereas the 'discovery rule' is a test used to determine when a plaintiff's cause of action accrues based upon statutory construction and the knowledge available to the plaintiff."\textsuperscript{92}

On rehearing, the supreme court confirmed its original view that article 5.82 abolished the discovery rule in actions against health care providers who carry liability insurance.\textsuperscript{93} For that very reason, however, the court held that the statute violated the open courts provision of the Texas Constitution.\textsuperscript{94} In \textit{Krusen} the plaintiffs had sued a doctor and his hospital, alleging that the doctor negligently advised a pregnant woman that she was not a genetic carrier of muscular dystrophy and was no more likely than any other woman to have a child afflicted by the disease. The plaintiffs alleged that they would have terminated the pregnancy had they known of the risk that their child would be born with the disease. The child's disease went unnoticed, and indeed could not have been discovered, until he had difficulty in walking at age three. The supreme court held that because suit could not be brought until after expiration of the limitations period, and the discovery rule was inapplicable, article 5.82 required the plaintiffs to do the impossible—to sue before they had any reason to know they should sue.\textsuperscript{95} Characterizing that result as shocking, absurd, and unjust, the court held that the limitations provision was unconstitutional to the extent it purported to cut off an injured person's right to sue before the person had a reasonable opportunity to discover the wrong and bring suit.\textsuperscript{96}

Having declared the limitations statute unconstitutional as applied to the parents' cause of action, the court attempted to reconcile the case with its earlier decision in \textit{Sax v. Votteler}.\textsuperscript{97} According to the court, the adult litigants in \textit{Sax} discovered their injuries while they still had a reasonable time
tolled the applicable statute of limitations until the plaintiff discovered the cause of her injury. \textit{Id.} at 81-82; \textit{accord} Timbertake v. A. H. Robins Co., 727 F.2d 1363 (5th Cir. 1984).


\textsuperscript{91} 27 Tex. Sup. Ct. J. at 83.

\textsuperscript{92} Id. at 84.

\textsuperscript{93} 678 S.W.2d 918, 920 (Tex. 1984).

\textsuperscript{94} Id. at 923; \textit{Tex. Const. art. I, § 13.}

\textsuperscript{95} 678 S.W.2d at 923.

\textsuperscript{96} Id.

\textsuperscript{97} 648 S.W.2d 661 (Tex. 1983), \textit{discussed in 1984 Annual Survey, supra note 4, at 435-36. In Sax the court held that \textit{Tex. Ins. Code Ann. art. 5.82, § 4, repealed by Act of June 16, 1977}, ch. 817, § 41.03, 1977 Tex. Gen. Laws 2039, 2064, did not run afoul of the open courts provision as applied to the claims in favor of the minor's parents. 648 S.W.2d at 667. The statute was declared unconstitutional, however, to the extent it barred assertion of the minor's cause of action once he reached the age of majority, if more than two years had expired since the date of injury, even though the minor had no right to bring his suit beforehand. \textit{Id.}
to sue since they had over one year from the date of discovery to file suit even if the two-year limitations period was not tolled. Thus, unlike the parents in *Krusen*, the plaintiffs in *Sax* at least had an opportunity to file their claims before the limitations period expired, even without the tolling aid of the abrogated discovery rule.

Although article 5.82 of the insurance code was repealed in 1977, the significance of the *Krusen* decision will not be as shortlived. Courts have already implied that the statute's interpretation applies equally to its successor, article 4590i, section 10.01, which is virtually identical to the repealed limitations statute. Indeed, in *Phillips v. Sharpstown General Hospital* the court relied on *Krusen* in holding that the discovery rule was also inapplicable to the limitations statute contained in article 4590i. The court's decision was announced before the rehearing in *Krusen*, however, and the court concluded without argument that the "constitutional rights of these adult appellants were not impaired." This holding nevertheless accords with the supreme court's subsequent analysis in *Krusen* since the plaintiffs, like the parents in *Sax*, discovered their injury more than a year before the expiration of the two-year limitations period. The court in *Phillips* also decided that the notice provision contained in article 4590i suspends the running of the statute of limitations. Consequently, notice of the health care claim given within sixty days of the expiration of the two-year limitations period suspends the limitations period for seventy-five days, following which the remaining period of the original two-year limitations continues to run.

*Valdez v. Texas Children's Hospital* considered the tolling effect of another statute on the limitations period prescribed by article 4590i. There the court held that the two-year limitations period was suspended for twelve months pursuant to article 5538 because of the minor plaintiff's death. The court disagreed with the defendant's contention that article 4590i, sec-

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98. 678 S.W.2d at 923.
99. *See supra* note 90.
100. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1985).
102. 664 S.W.2d 162 (Tex. App.—Houston [1st Dist.] 1983, no writ).
103. *Id.* at 167.
104. *Id.* at 169.
105. The court also held that the plaintiff's constitutional attacks on the statute were not properly preserved for review on appeal because plaintiffs did not include these arguments in their summary judgment response. *Id.*; *see City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 677 (Tex. 1979); TEX. R. CIV. P. 166a(c).
106. TEX. REV. CIV. STAT. ANN. art. 4590i, § 4.01(c) (Vernon Supp. 1985) states that the provision requiring 60 days' notice before suit can be brought, *id.* § 4.01(a), tolls the limitations period for a period of 75 days following such notice.
107. 664 S.W.2d at 165.
108. *Id.* The court rejected appellee's alternative position that the limitations period was simply extended to the date following 75 days from the delivery of the notice. *Id.*
109. 673 S.W.2d 342 (Tex. App.—Houston [1st Dist.] 1984, no writ).
110. TEX. REV. CIV. STAT. ANN. art. 5538 (Vernon 1958) provides:
tion 10.01 established an absolute two-year bar for the filing of health care liability claims, and chose instead to harmonize the two statutes. Finally, in *Morrison v. Chan* the court held that the limitations period under article 459oi begins to run from either the date the health treatment complained of was completed or the date of the act or omission on which the claim is founded. The court rejected appellant's interpretation of the applicable language, which would have permitted filing of a claim two years from the date of the injury in cases where the damages were suffered at some point after the commission of the negligent act.

In addition to cases involving medical malpractice, the courts handed down several decisions concerning limitations in other areas of professional malpractice. In *Brown v. M.W. Kellogg Co.*, for example, the Fifth Circuit construed article 5536a, the statute of limitations governing malpractice claims against engineers and architects for defective design and construction of improvements. First, the court found that the statute was not tolled until the plaintiff's injury was manifested, since the running of the statute commenced upon substantial completion of the improvements. Stressing the remedial nature of the statute, the court also rejected the plaintiff's contention that the sale of technology or concepts does not constitute the "design, planning, or construction of an improvement to real property" contemplated by the statute. In addition, the court dispensed with the plaintiff's constitutional attacks on the statute, finding that all but one of them had been rejected previously either by Texas courts or the Fifth Circuit.

Finally, the court held that the scope of the statute was not limited

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111. 673 S.W.2d at 345.
112. Id. at 344; see Hart v. Winsett, 171 S.W.2d 853, 855 (Tex. 1943) (duty to harmonize statutes if reasonably possible to do so).
113. 668 S.W.2d 483 (Tex. App.—Fort Worth 1984, writ ref’d n.r.e.).
114. Id. at 485.
115. Id.
116. 743 F.2d 265 (5th Cir. 1984).
117. TEX. REV. CIV. STAT. ANN. art. 5536a (Vernon Supp. 1985) provides a ten-year period of limitations for filing suits against architects and engineers alleging injury arising out of defective improvements. The period commences to run after the substantial completion of the improvements. *Id.*
118. 743 F.2d at 268.
119. *Id.* The court observed that plaintiffs' proffered interpretation would render the statute meaningless because "it is the ideas and concepts of engineers and the technology incorporating them, which, upon embodiment in construction, make their services valuable." *Id.*
120. See, e.g., Hasty v. Rust Eng’g Co., 726 F.2d 1068, 1070 (5th Cir. 1984) (rejecting claim that statute violated due process and equal protection clauses of state and federal constitutions, and TEX. CONST. art. III, § 35); Ellerbe v. Otis Elevator Co., 618 S.W.2d 870 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref’d n.r.e.) (rejecting claim that statute violates open courts provision of the Texas constitution), *appeal dismissed for want of substantial federal question*, 459 U.S. 802 (1982). The court in *Brown* also held that the statute was not forbidden special legislation since it extended evenlyhandedly to all architects and engineers, residents and nonresidents alike. 743 F.2d at 269; see TEX. CONST. art. III, § 56.
to individuals, and that corporations, if they otherwise qualified, enjoyed the statute's benefit.\footnote{121} According to Hixson v. Salem Corp.,\footnote{122} however, a corporation must prove, rather than simply allege, that it is an "engineer" in order to raise a limitations defense under the statute.\footnote{123} In Armstrong v. Ablon\footnote{124} the court held that dismissal of the plaintiffs' first suit under rule 170,\footnote{125} as a sanction for failure to comply with the court's discovery order, was equivalent to a dismissal for want of prosecution.\footnote{126} Accordingly, the statute of limitations was not tolled by the pendency of the plaintiff's earlier lawsuit.\footnote{127}

VII. PARTIES

The sweeping amendments to the Texas Rules of Civil Procedure effected minor modifications to several of the rules relating to parties. The most significant of these changes affected rule 38,\footnote{128} which governs third-party practice. A defending party need no longer obtain leave of court before filing a third-party claim if the claim is filed within thirty days after service of his original answer.\footnote{129} If the election to file such a claim is made later, however, the third-party plaintiff is still required to seek leave of court, with notice to all parties, before bringing the claim.\footnote{130} The amendment to rule 38 also deleted the language providing that a third-party defendant is bound with respect to the adjudication of liability between the plaintiff and the third-party plaintiff.\footnote{131} That modification, however, is probably not intended to change the existing law on the subject.

As pointed out in earlier surveys,\footnote{132} since 1977 shareholder-plaintiffs bringing derivative suits have not been required to satisfy the prerequisites of rule 42.\footnote{133} They were obliged instead to comply with article 5.14(B) of the Texas Business Corporation Act.\footnote{134} The 1984 amendment to the rule, however, inserted a new provision specifically addressing derivative suits.\footnote{135} It provides that a plaintiff in a derivative suit must allege that he was a record or beneficial owner of shares at the time of the transaction complained about, or that the shares devolved upon him by operation of law from a

\begin{footnotes}
\item[121] 743 F.2d at 268.
\item[122] 673 S.W.2d 345 (Tex. App.—Texarkana 1984, writ ref’d n.r.e.).
\item[123] Finding that a genuine issue of fact existed on this point, the court reversed a summary judgment in favor of the corporation. \textit{Id.} at 346.
\item[124] No. 05-83-00600-CV (Tex. App.—Dallas June 20, 1984, no writ) (not yet reported).
\item[126] No. 05-83-00600-CV, slip op. at 3.
\item[127] \textit{Id.}
\item[128] Tex. R. Civ. P. 38.
\item[129] \textit{Id.} 38(a).
\item[130] \textit{Id.}
\item[131] \textit{Id.}
\item[134] TEX. BUS. CORP. ACT ANN. art. 5.14(B) (Vernon 1980).
\item[135] Tex. R. Civ. P. 42(a).
\end{footnotes}
person who was an owner at that time. Further, the plaintiff must allege with particularity the efforts he made to have the board of directors bring the suit, or the reasons why no such efforts were made. Finally, the plaintiff must fairly and adequately represent the interests of other similarly situated shareholders, and the suit cannot be dismissed or settled without proper notice to those shareholders and court approval.

Rule 161, which allows a plaintiff suing multiple defendants to dismiss the suit as to unserved defendants, was also amended during the survey period. Under the amended rule a plaintiff may not dismiss his suit against a principal obligor without also dismissing the parties secondarily liable, except in cases covered by article 2088. Changes made with respect to other rules concerning parties were purely cosmetic.

Although rule now contemplates that indispensable parties are rather rare, courts generally apply a strict standard in cases involving ownership of real property. Thus, in Partin v. Holden the court reversed a decree of partition, even as to the six answering defendants, because all of the owners of undivided interests in the land were not served with process in the suit. Noting that recent changes had liberalized the rules governing party joinder, the court nevertheless held that the matter of absent parties was jurisdictional in partition suits owing to the express requirements of rule 757. Accordingly, the court held that the judgment

136. Id. A person owning an interest in a voting trust for shares at the specified time may also bring the derivative suit. Id.
137. Id. The additional pleading requirements imposed on plaintiffs under the new rule do not effect a change in the existing substantive law. Under art. 5.14(B), the plaintiff was already required to plead his shareholder demand on the directors, and he had no standing to bring the suit unless he met the same stock ownership requirements now contained in rule 42. See Tex. Bus. Corp. Act Ann. art. 5.14(B) (Vernon 1980).
138. Id.
139. Id. 161.
140. Id. Tex. Rev. Civ. Stat. Ann. art. 2088 (Vernon 1964) provides that a judgment may not be entered against an endorser, surety, or guarantor, when the suit has been discontinued against the primary obligor, unless the primary obligor is outside the reach of process, or notoriously insolvent. In Ferguson v. McCarrell, 582 S.W.2d 539, 541 (Tex. Civ. App.—Austin), writ ref'd n.r.e. per curiam, 588 S.W.2d 895 (Tex. 1979), the court held that a judgment rendered in a suit which proceeded solely against the guarantors of a note did not violate article 2088 where the written guaranty contracts imposed the status of primary obligors upon the guarantors. See generally 1981 Annual Survey, supra note 46, at 374-75.
141. For example, Tex. R. Civ. P. 97(f) was rewritten to eliminate language that simply repeated provisions contained elsewhere in the rules. The rules regarding death of a party were also updated slightly by substituting the word “dismissed” in place of the outmoded term “discontinued.” Id. 151, 153.
142. Id. 39.
143. See Pirtle v. Gregory, 629 S.W.2d 919, 920 (Tex. 1982) (per curiam), discussed in 1983 Annual Survey, supra note 73, at 306; Cooper v. Texas Gulf Indus., Inc., 513 S.W.2d 200, 204 (Tex. 1974).
144. See, e.g., Neely v. Schooler, 643 S.W.2d 229, 231 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.)(party to whom defendant had deeded land was indispensable in suit for specific performance of contract of sale).
145. 663 S.W.2d 883 (Tex. App.—Austin 1983, no writ).
146. Id. at 886-87.
147. Id. at 885.
148. Tex. R. Civ. P. 757 provides: “Upon the filing of petition for partition, the clerk shall issue citation for each of the joint owners, or joint claimants, named therein, as in other cases,
was not sustainable on appeal, even though the defendants registered their nonjoinder complaint for the first time on appeal.\textsuperscript{149} The court also concluded that the plaintiff's citation by publication on the absent defendants was insufficient since the trial court failed to appoint an attorney to represent the absent owners served by publication, as required by rule 759.\textsuperscript{150}

Rule 42(b)(4) provides in part that a case may be certified as a class action if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members."\textsuperscript{151} Finding that questions about a class plaintiff's alleged injuries caused by contamination from a nearby lead smelter were not questions common to the class, the court in \textit{RSR Corp. v. Hayes}\textsuperscript{152} held that the trial court had abused its discretion in certifying the purported class.\textsuperscript{153} Specifically, the court noted that the amount of lead on each class member's land varied greatly, and that seventy percent of the class members within a significant area did not have hazardous levels of lead on their land. Therefore, the question of whether the lead contamination level was hazardous was not a question common to the class.\textsuperscript{154} Likewise, since liability under a theory of negligence requires a showing of injury, and the undisputed facts demonstrated in many cases an absence of injury, the court concluded that the question of liability also was not common to the class.\textsuperscript{155}

### VIII. Discovery

No area of civil process underwent more change during the past year than that of discovery. The new amendments to the Texas Rules of Civil Procedure, which became effective April 1, 1984, literally revolutionized discovery practice in Texas. The following discussion will focus on the more important rule modifications and recent judicial decisions that appear to have continuing applicability.

\textit{The Scope of Discovery.} Consolidating a number of prior provisions, new rule 166b\textsuperscript{156} now defines the scope of discovery available under the various discovery procedures. In general, parties may obtain discovery regarding "any matter which is relevant to the subject matter in the pending action."\textsuperscript{157} Further, proposed discovery is not objectionable on the ground that "the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admis-
sible evidence.”¹⁵⁸

In *Jampole v. Touchy*¹⁵⁹ the supreme court addressed issues concerning the scope of discovery in a products liability action. Claiming that his wife had died in an automobile accident because of a defectively designed fuel tank, the plaintiff sought to obtain information from the defendant regarding alternative design information about other automobiles that were substantially similar to the automobile involved in the accident. The supreme court, however, held that the trial court took an unduly restrictive view of the degree of similarity necessary for the design information on other vehicles to be relevant.¹⁶⁰ In this connection, the court stated that the alternative information would be discoverable even if the other automobiles were not identical.¹⁶¹

The plaintiff also complained about the trial court’s denial of discovery concerning assembly diagrams and instructions for his wife’s car. Based on an objection that the requested documents were competitively sensitive and had proprietary value, the trial court ruled that the defendant was not required to produce any of the assembly documentation. The supreme court disagreed with that conclusion and held that the discovery could not be denied, “because of an asserted proprietary interest . . . when a protective order would sufficiently preserve that interest.”¹⁶²

The *Jampole* case is also significant because it revealed the supreme court’s continuing willingness to issue writs of mandamus in discovery proceedings. The court previously had granted mandamus relief in connection with rulings that either granted or denied discovery, provided a clear abuse of discretion was shown.¹⁶³ The supreme court had not, however, specifically addressed the question of whether a writ of mandamus should be issued in the discovery context, given the existence of a remedy by appeal after trial. Addressing this issue directly in *Jampole*, the supreme court decided that an appellate remedy was not adequate and that, therefore, a writ of mandamus was appropriate. The supreme court specifically noted that the appellate remedy was inadequate because on appeal the plaintiff would not be able to show the substance of the information that was discoverable and thus could not establish that a denial of discovery was harmful.¹⁶⁴ According to the court, the appeal remedy was not as effective as mandamus since a party should not have to try his lawsuit without important discovery, “only

¹⁵⁸. *Id.*
¹⁵⁹. 673 S.W.2d 569 (Tex. 1984).
¹⁶⁰. *Id.* at 573.
¹⁶¹. *Id.* at 573-74.
¹⁶². *Id.* at 574-75.
¹⁶³. E.g., West v. Solito, 563 S.W.2d 240, 244 (Tex. 1978) (attorney cannot be compelled to disclose matters within attorney-client privilege unless client waives privilege); Allen v. Humphreys, 559 S.W.2d 798, 801 (Tex. 1977) (abuse of discretion to deny requested discovery with respect to relevant and material items unavailable from other sources); Barker v. Dunham, 551 S.W.2d 41, 42 (Tex. 1977) (discovery of reports, factual observations, and opinions of nontestifying expert should be permitted); Crane v. Tunks, 160 Tex. 182, 191, 328 S.W.2d 434, 440 (1959) (income tax return subject to discovery provided that relevancy and materiality to the issues are shown).
¹⁶⁴. 673 S.W.2d at 576.
to have that lawsuit rendered a certain nullity on appeal." 165

**Experts and Potential Fact Witnesses.** Rule 166b 166 clarifies certain aspects related to the discovery of information about experts and potential fact witnesses. Under the rule a party may obtain discovery of the identity and location of any potential party and of persons having knowledge of relevant facts.167 The rule specifies that a person has knowledge of relevant facts "when he or she has or may have knowledge of any discoverable matter." 168 Practitioners should be aware that the rule does not authorize discovery of the identity of witnesses, but only persons having knowledge of relevant facts.169

Rule 166b also sets forth a comprehensive procedure regarding the discovery of the identity of experts and related information.170 In essence, the rule establishes three categories of experts: (1) testifying experts; (2) consulting experts; and (3) consulting experts whose work product is used, in whole or in part, as a basis for a testifying expert's opinion. As under the prior rules, a party may obtain discovery of the identity and location of an expert who may be called as a witness, including the subject matter on which the expert is expected to testify, his mental impressions and opinions, and the factual basis for such mental impressions and opinions.171 The same information may also be obtained concerning a nontestifying expert if the expert's work product forms a basis, in whole or in part, for the opinions of an expert who may be called as a witness.172 Otherwise, information related to a consultant expert is not discoverable.

The new rule 166b(e)(3) specifically provides that the trial judge may now compel a party to make the "determination and disclosure of whether an expert may be called to testify within a reasonable and specific time before the date of trial." 173 The trial judge may also require the reduction of an expert's report to tangible form within a reasonable time before the date of trial.174 The trial court is entitled to exclude testimony of any expert witness or person having knowledge of a discoverable matter when information concerning the witness was not disclosed as required by rule 166b, "unless the trial court finds that good cause sufficient to require admission exists." 175

Although decided prior to the enactment of rule 166b, two recent cases may still be relevant to issues concerning discovery of expert information. In *Jones & Laughlin Steel, Inc. v. Schattman*,176 an action related to defec-

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165. *Id.*
167. *Id.* 166b(d).
168. *Id.*
169. *Id.*
170. *Id.* 166b(e).
171. *Id.* 166b(e)(1).
172. *Id.*
173. *Id.* 166b(e)(3).
174. *Id.* 166(e)(4).
175. *Id.* 215(5).
176. 667 S.W.2d 352 (Tex. App.—Fort Worth 1984, no writ).
tive tubing, the defendant claimed that the trial court had improperly re-
quired his employee to testify about an analysis of the tubing. The plaintiff
had sought in this connection an order compelling the defendant's employee
to testify about the analysis, which he refused to do during his deposition.
At a hearing concerning the reconsideration of an order compelling discov-
ery, the defendant indicated, for the first time, that the employee would act
as a consultant. In light of this positive designation of the employee's status
as a consultant, the court of appeals held that the lower court abused its
discretion in ordering further discovery of the employee's analysis.177 Fur-
ther, the appellate court noted that even a full-time employee may be design-
nated as a consultant, which makes his expert opinion immune from
discovery.178 In comparison, the court in Crowe v. Smith179 found that an
expert was not used solely for consultation and was therefore subject to dis-
cover.180 In this negligence action the plaintiff had been treated by a doctor
whose report was favorable to the defendant's case. In light of the plaintiff's
failure to establish that the doctor had directly aided the plaintiff's attorney
in the investigation and preparation of the case, the court of appeals con-
cluded that the doctor-expert's report was discoverable.181 Further, the ap-
pellate court noted that an expert is not necessarily a consultant merely
because he will not be called as a witness.182

Insurance and Settlement Agreements. Under rule 166b(f)(1) a party may
obtain discovery regarding insurance agreements, although an application
for insurance is not to be treated as part of the agreement.183 The rule al-
 lows the discovery of the existence and contents of any settlement agree-
ment.184 The rule clearly specifies, however, that information concerning
insurance and settlement agreements is not, by reason of disclosure, admissi-
ble in evidence at trial.185

In addition to the rule change, the court in Aztec Life Insurance Co. v.
Dellana186 considered the question of whether a plaintiff in an insurance case
should be allowed to discover the defendant's insurance claims denial jour-
nal and claims files. Contending that the defendant insurance company had
breached a credit life and disability insurance policy, the plaintiff also as-
serted that, in denying his claim, the insurance company had violated article
21.21 of the Texas Insurance Code,187 which, in general, prohibits unfair
and deceptive practices in the insurance business. Seeking to develop his
claim, the plaintiff served a request for production of documents upon the

177. Id. at 356; see Barker v. Dunham, 551 S.W.2d 41, 44 (Tex. 1977).
178. 667 S.W.2d at 356.
179. 679 S.W.2d 22 (Tex. App.—Houston [14th Dist.] 1983, no writ).
180. Id. at 23.
181. Id.
182. Id.
183. TEX. R. CIV. P. 166b(f)(1).
184. Id.
185. Id. 166b(f)(2).
186. 667 S.W.2d 911 (Tex. App.—Austin 1984, no writ).
defendant insurance company to obtain a claims denial journal and all files that related to claims that had been denied under the same exclusion under which plaintiff's claim had been denied. The appellate court concluded that the defendant should be required to produce the requested documents because they were relevant to the assertion that the defendant had engaged in a course of dealing that was unfair and deceptive.\textsuperscript{188} The court also held that any concern about disclosure of private information in the claims files could be resolved by an in-camera inspection of the files by the trial court and the issuance of a protective order, if needed.\textsuperscript{189}

\textit{Exemptions from Discovery.} As a result of the recent rule amendments, the exemptions from discovery have now been comprehensively listed in a single provision in rule 166b.\textsuperscript{190} In general, the exempted matters include: (1) an attorney's work product; (2) written statements of potential witnesses and parties; (3) the identity, mental impressions, and opinions of nontestifying experts; (4) communications passing between the parties' agents, representatives, or employees that are made subsequent to the occurrence or transaction upon which the suit is based and in connection with the prosecution, investigation, and defense of the occurrence or transaction; and (5) privileged matters. Unlike former rule 186a,\textsuperscript{191} the new rule protects only communications between a party's employees, agents, and representatives who are investigating a claim and does not exempt information obtained in the course of an investigation of a claim or defense by those persons.

Addressing the question of whether a party's statements to his insurance carrier are privileged, the court in \textit{Menton v. Lattimore}\textsuperscript{192} held that those statements are immune from discovery. In this malpractice case, the defendant-doctor was interviewed by a claims agent for his insurance company. The interview was tape-recorded and eventually the trial court ordered a transcript of the tape recording produced to the plaintiffs, notwithstanding a claim of privilege. As a general rule, statements made by a party to his insurance representative in the course of an investigation are privileged.\textsuperscript{193} The plaintiffs, however, argued on appeal that an exception should apply because the statements were made in the furtherance of a fraudulent scheme by the doctor to conceal the true facts concerning the incident in question. Recognizing that the question was one of first impression, the court of appeals refused to create an exception for an "illegal, perjured or dishonest defense" or the "planning or perpetration of a crime or fraud."\textsuperscript{194} The appellate court thus regarded the tape transcript as privileged.

In an action involving an automobile accident that resulted in the death of

\begin{itemize}
\item \textsuperscript{188} 667 S.W.2d at 915.
\item \textsuperscript{189} Id. at 916.
\item \textsuperscript{190} Tex. R. Civ. P. 166b(3).
\item \textsuperscript{191} Tex. R. Civ. P. 186a (Vernon 1976).
\item \textsuperscript{192} 667 S.W.2d 335 (Tex. App.—Fort Worth 1984, no writ).
\item \textsuperscript{193} See Tex. R. Civ. P. 166b(3)(b), (c); Tex. R. Civ. P. 186a (Vernon 1976).
\item \textsuperscript{194} 667 S.W.2d at 341.
\end{itemize}
a police officer, the court in *W. W. Rodgers & Sons Produce Co. v. Johnson*\(^{195}\) held that witness statements were not discoverable. The wife of the police officer and the city of Dallas brought an action against the company whose truck had been involved in the accident. The defendant sought to compel the city to produce certain witness statements taken by police officers from witnesses to the accident. Finding that the purpose of the proposed discovery was for impeachment, the appellate court ruled that the witness statements were not discoverable.\(^{196}\) In this connection, the court relied heavily on a prior supreme court decision that held that witness statements can not have impeachment value prior to trial.\(^{197}\)

Supplementation of Discovery. One of the most important revisions to the new discovery rules is the general requirement that a party must supplement discovery not less than thirty days prior to the beginning of trial, unless the court finds that good cause exists for permitting or requiring later supplementation.\(^{198}\) A party is under a duty seasonably to supplement discovery if he obtains information on the basis of which he knows that the original response was incorrect or incomplete when made or he knows that the response, though correct and complete when made, is no longer true and complete and the circumstances are such that failure to amend an answer is in substance misleading.\(^{199}\) A party is also obligated to supplement information concerning the identity of expert witnesses and the substance of their testimony "as soon as is practical, but in no event less than thirty . . . days prior to the beginning of trial except on leave of court."\(^{200}\) In addition to the rule, a duty to supplement discovery may be imposed by order of the trial court, agreement of the parties, or through a new request for supplementation of prior answers.\(^{201}\) As a sanction for failure to supplement discovery, rule 215 specifies that the party who fails to supplement shall not be entitled to present the supplemental evidence unless the trial court finds that "good cause sufficient to require admission exists."\(^{202}\)

Requests for Admissions and Interrogatories. Significantly, the new rule 166b(2)(a) modifies prior practice regarding interrogatories and requests for admission by providing that such forms of discovery are no longer objectionable because they seek an opinion or contention that relates to fact or the application of law to fact.\(^{203}\) With respect to interrogatories, the trial court may, in its discretion, order that an interrogatory not be answered concern-

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\(^{195}\) 673 S.W.2d 291 (Tex. App.—Dallas 1984, no writ).
\(^{196}\) Id. at 295.
\(^{197}\) Russell v. Young, 452 S.W.2d 434, 437 (Tex. 1970).
\(^{198}\) TEX. R. Civ. P. 166b(5).
\(^{199}\) Id. 166b(5)(a).
\(^{200}\) Id. 166b(5)(b).
\(^{201}\) Id. 166b(5)(c).
\(^{202}\) Id. 215(5).
\(^{203}\) Id. 166b(2)(a). Formerly, the courts had held that opinions and contentions were not the proper subject of interrogatories and requests for admissions. See e.g., Boyter v. MCR Constr. Co., 673 S.W.2d 938, 941 (Tex. App.—Dallas 1984, writ ref'd n.r.e.); Henke Grain Co. v. Keenan, 658 S.W.2d 343, 347 (Tex. App.—Corpus Christi 1983, no writ).
ing an opinion or contention until discovery has been completed, the date of a pretrial conference, or at a later time.\footnote{TEX. R. Civ. P. 166b(2)(a).}

Rule 169 provides that responses to requests for admissions shall be made within thirty days after the service of the request rather than, as under former practice, ten days after service.\footnote{Id. 169.} Further, responses to requests for admissions may be made by a written answer or objection signed by the party or his attorney, rather than a sworn statement signed by the party as was required under the old rule.\footnote{Id.} With respect to sanctions for failure to comply with the admission procedure, rule 215 specifies that a request shall be deemed admitted unless a timely response or objection is served.\footnote{Id. 215(4)(a).} An evasive or incomplete answer may be treated as a failure to answer.\footnote{Id. 215(4)(a).}

Under the new rules it is thus not necessary to move to have requests deemed admitted if a party fails to respond.

If an answer or objection has been served, the requesting party may move to determine the sufficiency of the response or objection.\footnote{Id. 215(4)(b).} Unless an objection is found to be justified, an answer must be served. If an answer does not comply with rule 169,\footnote{Id. 169.} the trial court may order either that the matter is admitted or that an amended answer be served.\footnote{Id. 215(4)(c).}

Finally, if a party fails to admit a request, the requesting party may recover reasonable expenses incurred in proving the truth of the matter.\footnote{Id. 215(4)(c).}

The trial court is required to award such expenses unless: (1) the request was objectionable; (2) the admission sought was of no substantial importance; (3) the responding party had reasonable ground to believe he might prevail on the matter; or (4) there was other good reason for failure to admit.\footnote{Id. 215(4)(c).}

\textit{Depositions.} A number of the amendments to the rules affect deposition procedure. Under rule 200, a notice of deposition may now be given upon reasonable notice and the mandatory ten-day time limit no longer need be observed.\footnote{Id. 202(2).} In addition, a new rule has been added that authorizes the use of depositions by telephone.\footnote{Id. 202(2).} Finally, a comprehensive scheme for taking depositions in foreign jurisdictions has also been enacted.\footnote{Id. 188.}

The rules now clarify the practice regarding objections made at the taking of the deposition. In the case of objections to the form of a question or the nonresponsiveness of an answer, those types of objection are waived if not
made at the time of the taking of the oral deposition.\textsuperscript{217} Other types of objections, however, are not waived and may be made at the time of trial.\textsuperscript{218}

Finally, the amendments also make significant changes to the practice regarding return of depositions. If a witness does not sign and return a deposition within twenty days after its submission to him or his counsel, the officer taking the deposition shall sign it and the deposition may be used fully as though signed, unless the court finds that the reasons for refusal to sign are justified.\textsuperscript{219}

Apart from the rule amendments, two cases discussed issues regarding depositions. Having been ordered to produce seven overseas employees for depositions in Houston, the defendant in \textit{Dresser Industries, Inc. v. Solito} \textsuperscript{220} sought a writ of mandamus to overturn that order by the trial court. With respect to this issue the court of appeals noted that, in cases involving international parties and witnesses, the trial court must be "especially sensitive to the (1) actual need for the requested depositions and (2) alternative means of taking the depositions."\textsuperscript{221} In view of probable alternative sources of information and the lack of relevant information contained in depositions of similar witnesses taken previously in the case, the court of appeals held that the trial court abused its discretion by requiring the overseas witnesses to appear in Houston.\textsuperscript{222} The central issue in \textit{De Forest v. Dear} \textsuperscript{223} was whether the deposition of an absent defendant could be excluded from evidence simply because it had not been on file one day prior to trial. Although the deposition in the case had been filed after the trial began, the court of appeals concluded that the deposition should not be excluded for that reason.\textsuperscript{224}

\textit{Production of Documents.} As obtained under prior practice, a party may secure production of documents and other tangible matters that are within a person’s possession, custody, or control.\textsuperscript{225} Significantly, the new discovery rules define "possession, custody, or control" as including a situation where a person has a "superior right to compel the production from a third party (including an agency, authority or representative)."\textsuperscript{226} In addition, rule 167 states that responses to requests for documents must be served within thirty days after service, and not from the date of the receipt of the request.\textsuperscript{227} Rule 167 also specifies that a request shall describe each item or category of

\begin{footnotes}
\textsuperscript{217} Id. 204(4).
\textsuperscript{218} Id.
\textsuperscript{219} Id. 205.
\textsuperscript{220} 668 S.W.2d 893 (Tex. App.—Houston [14th Dist.] 1984, no writ).
\textsuperscript{221} Id. at 895.
\textsuperscript{222} Id. at 895-96; see also Hyam v. American Export Lines, Inc., 213 F.2d 221 (2d Cir. 1954) (actual need for oral examination at the forum must be weighed against the burden to the opposing party).
\textsuperscript{223} 659 S.W.2d 90 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).
\textsuperscript{224} Id. at 91. \textit{Contra} Zamora v. Romero, 581 S.W.2d 742, 748 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).
\textsuperscript{225} TEX. R. Civ. P. 166b(2)(b), 167.
\textsuperscript{226} Id. 166b(2)(b).
\textsuperscript{227} Id. 167(2).
\end{footnotes}
items requested with reasonable particularity.\textsuperscript{228}

\textbf{Orders Compelling Discovery and Sanctions.} Under new rule 215\textsuperscript{229} all provisions regarding sanctions are now set forth in a single, comprehensive rule. With respect to motions for orders compelling discovery, the rule specifies that an application for such an order may be made to the trial court in which the action is pending or, on matters relating to depositions, to the trial court in the district where the deposition is being taken.\textsuperscript{230} An application for an order directed to a nonparty deponent must be made to a court in the district where the deposition is being taken.\textsuperscript{231}

The most important amendment to the new rule is the specific provision regarding sanctions for a party's failure to supplement discovery as required by rule 166b.\textsuperscript{232} The rule also provides that if a party fails to respond to discovery, such as interrogatories, requests for admissions, or depositions, the opposing party may move for an order compelling discovery or seek sanctions without the necessity for first having obtained a court order compelling such discovery.\textsuperscript{233} An evasive or incomplete answer to a discovery request is treated as a failure to answer.\textsuperscript{234} In addition to the sanctions for failing to comply with a discovery request or an order compelling discovery, a party is also subject to sanctions under rule 215 on two grounds. The first ground is that he is found to be abusing the discovery process in seeking, making, or resisting discovery, the second is that the court finds an interrogatory or request for inspection or production to be unreasonably frivolous, oppressive, or harassing, or a response or answer to be unreasonably frivolous or made for purposes of delay.\textsuperscript{235}

The types of sanctions that may be imposed against parties are similar to those that were available under prior practice. Importantly, the trial court may make orders regarding sanctions as are just,\textsuperscript{236} and the list of sanctions in rule 215 is not an exclusive one.\textsuperscript{237}

\textsuperscript{228} Id. 167(1)(c).
\textsuperscript{229} Id. 215.
\textsuperscript{230} Id. 215(1)(a).
\textsuperscript{231} Id. Presumably, a motion for protective order filed by a nonparty deponent with respect to his proposed deposition, being a mirror image of a motion to compel discovery, may be presented to the court in the district where the deposition is proposed to be taken. \textit{See In re Subpoena Addressed to InterFirst Bank Dallas, N.A., No. 84-7251-M (Dist. Ct. Dallas County, 298th Judicial District of Texas, June 4, 1984) (order granting motion to quash subpoena or for protective order).}
\textsuperscript{232} TEX. R. CIV. P. 166b. For a discussion of the sanctions for failure to supplement, see supra notes 198-202 and accompanying text.
\textsuperscript{233} TEX. R. CIV. P. 215(1)(b).
\textsuperscript{234} Id. 215(1)(c).
\textsuperscript{235} Id. 215(3).
\textsuperscript{236} Id. 215(2)(b).
\textsuperscript{237} Examples of the types of available sanctions include:

(1) An order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) An order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(3) An order that the matters regarding which the order was made or any
Although decided prior to the recent amendments to the discovery rules, *Brantley v. Etter* is pertinent to the subject of sanctions. In that case the appellant failed to appear for her deposition. The trial court entered an order striking her pleadings, granting an interlocutory default judgment, and ordering her specifically to perform a contract that was in controversy. Prior to an evidentiary hearing on the remaining issue of the amount of attorney's fees, the appellant requested a jury, but the trial court proceeded to try the issue without a jury. Although concluding that the appellant was not entitled to a jury trial at the hearing on a motion for sanctions, the court of appeals did find error in the denial of a jury trial at the final hearing on attorney's fees. In this connection, the court stated that the entry of a default judgment, as a sanction for failure to permit discovery, "does not dispense with the necessity of a jury trial, if one has been demanded, on an unliquidated claim."

**Protective Orders.** Rule 166b now gives trial courts the authority to enter any order in the interest of justice necessary to protect any person from discovery that constitutes an "undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights." Significantly, trial courts are not limited to any particular types of protective orders. Their authority includes, but is not limited to:

a. ordering that requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified.

b. ordering that the discovery be undertaken only by such method

other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(6) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(7) When a party has failed to comply with an order under Rule 167a(a) requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination;

(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

*Id.*

238. 662 S.W.2d 752 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).
239. *Id.* at 756.
240. *Id.*
241. TEX. R. CIV. P. 166b(4).
or upon such terms and conditions or at the time and place directed by
the court.

c. ordering that results of discovery be sealed or otherwise ade-
quately protected; that its distribution be limited; or that its disclosure
be restricted.242

In connection with litigation over the construction and engineering of a
south Texas nuclear project, *Houston Chronicle Publishing Co. v. Hardy*243
discussed a trial court's power to permit public dissemination of pretrial dis-
covery material. Based on the potential impact of the disclosure of discovery
information to the litigants' right to a fair trial, the trial court entered an
order that required the parties, their attorneys, and assistants to refrain from
disclosing to third parties information obtained through the discovery pro-
cess and placed under seal the depositions, interrogatory answers, and other
documents that were obtained in discovery. In addition, the order specifi-
cally provided that it placed no limitation on: access by third parties to
hearings or evidence that might be offered therein; the media's right to pub-
lish information that was obtained or might be obtained from other sources;
and the attorneys' right to communicate with their clients. Finally, the trial
court offered in its order to entertain reasonable requests to modify its terms
in the future.

Dissatisfied with this order, the newspaper and two cities sought writs of
mandamus from the court of appeals to have the order set aside. With re-
spect to the newspaper's contentions, the court of appeals noted that the
question of whether the press has a right of access to trials was not
presented. The issue was whether the media representatives had a "right to
root through a tremendous pile of undigested documentary evidence assem-
bled during pretrial discovery proceedings."244 Finding that the trial court
had acted in an effort to ensure a fair trial, the appellate court concluded
that the order did not constitute an impermissible prior restraint upon the
rights of any of the parties.245

With respect to the cities' contentions, the court of appeals held that the
order did not interfere with their ability to prepare for trial nor did the order
impermissibly interfere with any alleged right of the cities to communicate
about the lawsuit with their citizens.246 The court of appeals instead deter-
mained that the order did not prohibit any attorney from communicating
with his clients or prospective witnesses concerning discovery material. The
order rather was intended to seal the lips of prospective witnesses and parties
to prevent them from discussing such material with third parties outside the
case.247 In sum, the court of appeals found no error had been committed by
the trial judge in entering the protective order.

242. *Id.* 166b(4)(a), (b), (c).
243. 678 S.W.2d 495 (Tex. App.—Corpus Christi 1984, no writ).
244. *Id.* at 499.
245. *Id.* at 500.
246. *Id.* at 508.
247. *Id.* at 505.
Miscellaneous. For the practitioner who is tempted to sign an affidavit in support of his client's case, *Hilliard v. Heard* is a warning that the attorney may become a deponent as a result. In this case the defendant's attorney filed a controverting affidavit to certain affidavits filed by the plaintiffs concerning the reasonableness and necessity of goods sold to them. The plaintiffs then sought to take the deposition of the defendant's attorney, but the trial court refused to allow the deposition to proceed. In a subsequent mandamus proceeding, the court of appeals determined that the trial court had clearly abused its discretion because, due to the filing of the controverting affidavit, the attorney had injected himself into the lawsuit and subjected himself to deposition as a witness.

IX. DISQUALIFICATION OF JUDGES

Since 1981, rule 18a has governed the procedure for seeking disqualification of a district judge. No companion procedures existed, however, for disqualifying other judges, such as judges of the county or justice courts, or a justice of an appellate court. Recently enacted changes to the rules of civil procedure have eliminated these gaps. Rule 18a, as amended effective April 1, 1984, applies to all courts other than a court of appeals or the Texas Supreme Court. Apart from the change in its scope, however, the rule remains unaltered, and a party seeking to disqualify any judge must file a motion for recusal at least ten days before the date set for hearing or trial.

Rule 18b, an entirely new rule that was added in 1984, establishes a procedure for recusing or disqualifying justices of the supreme court or the courts of appeal. A motion for disqualification of an appellate justice must be filed within thirty days after a proceeding is filed in the appellate court. Copies of the motion must be served on all other parties or counsel on the date that the motion is filed, "together with notice that movant expects the motion to be presented to the justice ten (10) days after the filing of such motion unless otherwise ordered by the justice." Once a motion is properly filed and served, the justice against whom the motion is directed must either recuse himself or certify the matter to the entire court for a decision.
by a majority of the justices sitting en banc. The justice who is challenged does not participate in the court's en banc consideration. A decision granting the motion to recuse or disqualify is not reviewable; if the motion is denied, however, the normal appeal process applies.

Three cases decided during the survey period provided courts with an opportunity to employ the new procedure described in rule 18b. In *Manges v. Guerra* the Texas Supreme Court, upon rehearing, considered and rejected a motion to recuse that had been filed after the original judgment was rendered. Since the decision makes no mention of the thirty-day filing period, it is unclear whether the motion was grounded on new facts, which were undiscovered by the movant earlier, or the court treated the motion for rehearing as the filing of a proceeding that triggered a new thirty-day period.

Similarly, *River Road Neighborhood Ass'n v. South Texas Sports, Inc.* concerned a motion to recuse two justices of the court of appeals on the basis that one justice had received 17.1% of the total reported contributions to his campaign from one of the appellees and the second justice had received 21.7% of the total reported contributions to his campaign from appellees' counsel. The challenged justices refused to recuse themselves and, in accordance with rule 18b, the matter was referred to the other five members of the court for decision. Concluding that the receipt of campaign contributions by the two justices did not establish an interest on their part in the outcome of the case, the remaining members of the court rejected the requested disqualification.

The procedure used by the court of appeals to consider a recusal motion in *Rocha v. Ahmad* also conformed to the requirements of rule 18b, although the new rule was not even proposed at the time the case was decided. The prescient *Rocha* court reiterated that justices are not subject to disqualification solely on the basis that they received campaign contributions from an attorney representing one of the parties to the appeal.

Rule 18a also attracted the attention of some courts during the survey period. In *Greenberg, Fisk & Fielder v. Howell* the appellate court held that a trial judge who is challenged by a motion to recuse may not himself deny the motion because of alleged procedural insufficiency. Acordingly, the court granted a writ of mandamus requiring the trial judge to enter an...
appropriate order either recusing himself or referring the motion to the presiding judge of the administrative district for further treatment.\textsuperscript{269} The court also granted the writ of prohibition requested by the petitioner to restrain the trial judge from presiding at the trial of the action, which was promptly scheduled by the judge soon after the filing of the motion to recuse.\textsuperscript{270}

\textit{Gonzalez v. Gonzalez}\textsuperscript{271} reemphasized a well-recognized, but narrow, exception to the rule enunciated in \textit{Howell}. If the motion to disqualify is not timely filed, the trial judge may overrule it himself without requesting appointment of another district judge to hear the motion.\textsuperscript{272}

\section*{X. DISQUALIFICATION OF COUNSEL}

Disciplinary Rule 5-101 provides that a lawyer shall not, unless one of four exceptions applies, “accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness.”\textsuperscript{273} If the necessity for testifying appears after the lawyer has already undertaken the representation, the lawyer must withdraw from the conduct of the trial.\textsuperscript{274} In two cases decided during the survey period, courts held that a writ of mandamus will lie to correct a clear abuse of discretion by the trial court in its enforcement of these rules.

The plaintiff in \textit{Bert Wheeler’s, Inc. v. Ruffino}\textsuperscript{275} filed a motion to disqualify the defendant’s attorney, alleging that the attorney would be a witness in the case. After a hearing in which the attorney acknowledged his intent to appear as a witness in the case, the trial court granted the plaintiff’s motion. The attorney later informed the trial court that he no longer intended to appear as a witness in his client’s case and sought reinstatement on that basis. The plaintiff resisted the motion, declaring that it would call the defendant’s attorney as a witness, whereupon the court denied the motion to reinstate the defendant’s attorney. In denying the defendant’s writ of mandamus seeking to compel the attorney’s reinstatement, the court of appeals held that a trial court has a duty to enforce disciplinary rules.\textsuperscript{276} The court acknowledged, however, that a writ of mandamus would issue to correct a clear abuse of discretion by the trial court in its enforcement of those

\begin{itemize}
  \item 269. \textit{Id.}
  \item 270. \textit{Id.}
  \item 271. 659 S.W.2d 900 (Tex. App.—El Paso 1983, no writ).
  \item 272. \textit{Id.} at 901-02; see, e.g., \textit{Autry v. Autry}, 646 S.W.2d 586, 588 (Tex. App.—Tyler 1983, no writ); \textit{Limon v. State}, 632 S.W.2d 812, 815 (Tex. App.—Houston [14th Dist.] 1982, no writ).
  \item 273. \textit{Supreme Court of Texas, Rules Governing the State Bar of Texas}, art. XII, § 8 (Code of Professional Responsibility) DR 5-101(B) (1973) [hereinafter cited as \textit{Texas Code of Professional Responsibility}].
  \item 274. \textit{Id.} DR 5-102(A).
  \item 275. 666 S.W.2d 510 (Tex. App.—Houston [1st Dist.] 1983, no writ).
  \item 276. \textit{Id.} at 513; see \textit{State Bar v. Edwards}, 646 S.W.2d 543, 546 (Tex. App.—Houston [1st Dist.] 1982, writ ref’d n.r.e.) (trial judge may not impose a sanction for attorney misconduct not provided for in State Bar Rules).\end{itemize}
The court nevertheless found no abuse of discretion since it was the trial judge's duty to decide whether an exception to DR5-101 or DR5-102 existed under the attendant facts.278

Nearly identical facts were involved in United Pacific Insurance Co. v. Zardenetta.279 In that case the appellate court found that the trial judge abused his discretion in refusing to disqualify the plaintiff's attorney, whom opposing counsel planned to call as a witness at trial.280 The court also frowned on efforts by the plaintiff's attorney to eliminate legitimate causes of action belonging to his client in order to eliminate the need for his testimony so he could remain in the case.281 According to the appellate court, a client cannot waive the application of DR 5-102(B),282 and the trial court has broad discretion in such circumstances to disqualify trial counsel if he refuses to withdraw voluntarily.283 Moreover, the court considered it immaterial that the plaintiffs' attorney would no longer need to appear as a witness on behalf of his client; the defendants intended to call the attorney as a witness in their case, and the prohibitions of DR 5-102 are not limited to attorneys testifying on behalf of their own clients.284

A different standard governs review of the trial court's decision on disqualification if no relief in the appellate courts is sought until after the trial on the merits. The appellant in Bullock v. Kehoe285 learned this fact when he claimed error on appeal in the trial court's refusal to disqualify appellee's law firm because several members of the firm were material witnesses in the suit. Finding no indication in the record that the trial court's action harmed appellant or caused the entry of an improper judgment, the appellate court refused to consider whether the disciplinary rules had indeed been violated.286

Finally, in National Western Life Insurance Co. v. Jones287 the court held that an attorney could represent a client in litigation against a former client if the matters involved in the dispute were not substantially related to the attorney's past representation of the former client.288 Since the facts regarding the relationship between the current and previous representation were

277. 666 S.W.2d at 512 (citing West v. Solito, 563 S.W.2d 240 (Tex. 1978); Crane v. Tunks, 160 Tex. 182, 328 S.W.2d 434 (1959)).
278. 666 S.W.2d at 514-15.
279. 661 S.W.2d 244 (Tex. App.—San Antonio 1983, no writ).
280. Id. at 246.
281. Id. at 247.
282. TEXAS CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102(B) provides that an attorney who learns that he may be called as a witness other than on behalf of his client may continue the representation until it is apparent that his testimony is or may be prejudicial to his client. Id.
283. 661 S.W.2d at 248.
284. Id. at 249. The court recognized, however, that the "mere announcement by an adversary of his intention to call opposing counsel as a witness is insufficient to orchestrate counsel's disqualification." Id. at 248. Instead, the party moving to disqualify opposing counsel must demonstrate a genuine need for the attorney's testimony. Id.
285. 678 S.W.2d 558 (Tex. App.—Houston [14th Dist.] 1984, no writ).
286. Id. at 560.
287. 670 S.W.2d 752 (Tex. App.—Austin 1984, no writ).
288. Id. at 754; see Howard Hughes Med. Inst. v. Lummis, 596 S.W.2d 171, 175 (Tex. Civ.
disputed, the court of appeals refused to issue the writ of mandamus, noting that the relator could later challenge the trial court’s decision on appeal.289

XI. SUMMARY JUDGMENT

Unlike most of the other major rules governing pretrial procedure, the summary judgment rule290 escaped serious attention from those responsible for the rule amendments that became effective on April 1, 1984. Apart from minor additions to the types of evidence that may be considered by a trial court in ruling on a motion for summary judgment, rule 166-A remains unchanged.291

Summary judgment evidence was also a frequent concern among the courts last year. For example, in Martens v. Prairie Producing Co.292 the court held that mere statements of opinion or conclusion about the other party’s state of mind were insufficient, even though sworn to, to raise an issue of fact precluding summary judgment.293 The affidavit filed by the summary judgment opponent in Brownlee v. Brownlee294 was defective for the same reason.295 The court in Brownlee held that the affidavit was also insufficient since its allegations were neither direct nor unequivocal, and lacked the necessary factual specificity.296 Finally, in reversing the trial court’s grant of a summary judgment, the court of appeals in Bryant v. INA of Texas297 was able to rely on appellant’s deposition, which was not filed until four days before the summary judgment hearing. Because the summary judgment expressly recited that it was based in part on the trial court’s consideration of the deposition, the court of appeals opined that the late filing occurred with leave of court.298 The court even considered hearsay evidence contained in the deposition due to appellee’s failure to register an appropriate objection.299
Rule 277 expressly prohibits the submission of inferential rebuttal issues. One of the classic examples of an inferential rebuttal issue is an unavoidable accident issue in a negligence case. In *Lemos v. Montez* the supreme court considered whether the trial court had in effect submitted an unavoidable accident issue in an automobile collision case. In this regard, the trial court had submitted an issue that inquired of the jury as to whose negligence proximately caused the collision in question. The jury was requested to answer with one of the following: (a) the defendant; (b) the plaintiff; (c) both; or (d) neither. In response, the jury answered "neither." Finding that the answer "neither" was tantamount to the submission of an unavoidable accident issue and that it compelled the plaintiff to negate an unavoidable accident, the supreme court concluded that the trial court had erred by providing this answer as an alternative. In addition, the trial court in *Lemos* also instructed the jury that "the mere happening of a collision . . . is not evidence of negligence." Finding that the instruction was an impermissible comment that tended to "tilt or nudge" the jury, the supreme court concluded that the instruction should not have been submitted.

Rule 277 also provides that "[t]he court shall not in its charge comment directly on the weight of the evidence or advise the jury of the effect of their answers." Claiming that the trial court had commented on the weight of the evidence, the defendant in *Alvarez v. Missouri-Kansas-Texas Railroad* sought a reversal on that basis. The trial court had submitted a negligence issue that inquired as to whether the defendant railroad was negligent (a) in its speed, (b) in not timely applying the brakes, (c) in its lookout, or (d) in failing to sound the train whistle or horn. On appeal, the court of appeals concluded that the use of the words "in not timely applying" constituted an impermissible comment on the weight of the evidence because of the inherent assumption that the defendant had, indeed, not timely applied the brakes. Although recognizing on subsequent review that the special issue could have been better worded, the supreme court concluded that, even if the wording of the issue constituted an implied comment, it was a harmless one. In support of its holding, the supreme court noted that it was undis-

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300. TEX. R. CIV. P. 277.
301. See Yarborough v. Berner, 467 S.W.2d 188, 190 (Tex. 1971) (unavoidable accident occurs when event was not proximately caused by negligence of any party).
302. 680 S.W.2d 798 (Tex. 1984).
303. Id. at 801.
304. Id. at 799.
305. Id. at 801; see also Acord v. General Motors Corp., 669 S.W.2d 111, 113-14 (Tex. 1984) (jury should not be burdened with surplus instructions); Gulf Coast State Bank v. Emenhiser, 562 S.W.2d 449, 453 (Tex. 1978) (not permissible for trial court to marshal party's contentions in instructions or instruct jury to find for that party if they believed certain facts to be true).
306. TEX. R. CIV. P. 277.
307. 683 S.W.2d 375 (Tex. 1984).
308. Id. at 377.
309. Id. at 378.
puted that there was a delay in applying the brakes during the incident in question and, considering the charge as a whole, the word "timely" was merely mentioned in the body of the issue and did not necessarily cause the jurors to treat the issue as an instruction that the defendant had not exercised due care.\textsuperscript{310}

In \textit{Acord v. General Motors Corp.},\textsuperscript{311} the supreme court again discussed the type of issues and instructions that should be submitted in a products liability case.\textsuperscript{312} The trial court had asked the jury if the product in question was defectively designed. On the basis of a prior supreme court decision,\textsuperscript{313} the jury was instructed that the term "defectively designed" meant "a product that is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use."\textsuperscript{314} The trial court, however, also added an instruction to the effect that: (1) the manufacturer is not an insurer of the product he designs; (2) the law does not require that the design be perfect or render the product accident proof or incapable of causing an injury; and (3) it is not necessary to incorporate the ultimate safety features in a product. Although the additional instruction was a correct statement of law, the supreme court concluded that such instruction amounted to a comment on the weight of the evidence.\textsuperscript{315} Since the instruction stated that the defendant was neither an insurer nor a guarantor in a closely contested case, the supreme court concluded that the instruction constituted harmful error.\textsuperscript{316}

In addition to the foregoing, the \textit{Acord} decision also contains a discussion regarding preservation of error with respect to special issues and instructions. In this instance, the plaintiff had led off with his objections to the charge; without any ruling thereon by the trial court, one of the defendants immediately followed with his objections. At the conclusion of these objections, the trial court remarked "overruled." The supreme court concluded that the plaintiff had preserved his objections to the jury charge because the trial court did not sustain any of the objections made by either party and, therefore, the "overruled" was assumed to apply to the objections of both parties.\textsuperscript{317} The supreme court further noted the presumption under rule 272\textsuperscript{318} that objections were presented at the proper time and that the trial court ruled on the objections, unless something in the record indicates to the contrary.\textsuperscript{319} Applying rule 272, the supreme court concluded that if an ob-

\textsuperscript{310} Id.
\textsuperscript{311} 669 S.W.2d 111 (Tex. 1984).
\textsuperscript{312} See Fleishman v. Guadiano, 651 S.W.2d 730, 731 (Tex. 1983) (jury instruction should ask if product is defectively designed and not deflect jury's attention to any contributory negligence); Turner v. General Motors Corp., 584 S.W.2d 844, 851-52 (Tex. 1979) (jury may be instructed that the product is defectively designed if it is unreasonably dangerous as designed, taking into consideration the utility of the product and risk involved in its use).
\textsuperscript{313} Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979).
\textsuperscript{314} Id. at 113.
\textsuperscript{315} Id. at 116.
\textsuperscript{316} Id.
\textsuperscript{317} Id. at 114.
\textsuperscript{318} TEX. R. Civ. P. 272.
\textsuperscript{319} 669 S.W.2d at 115.
jection is articulated and the trial court makes no change to the charge, the objection is deemed overruled.\textsuperscript{320} In comparison, the court in \textit{Caterpillar Tractor Co. v. Boyett}\textsuperscript{321} held that the defendant waived any error in the charge when the trial court did not rule or comment on its objections.\textsuperscript{322} The court further held that the defendant's submission of requested issues and instructions covering the same areas of objection, which were denied by the trial court, did not preserve the error.\textsuperscript{323} In \textit{Dawson v. Garcia}\textsuperscript{324} the trial court improperly submitted a single issue inquiring into elements of damages that were both recoverable and nonrecoverable. The counsel for defendant objected because "the jury's finding as it's now arranged would be impossible to divide with regard to what portion relates to nonrecoverable items and damage and what-not."\textsuperscript{325} The plaintiff, on appeal, contended that the defendant had not pointed out distinctly the matter to which he objected in the special issue as required by rule 274.\textsuperscript{326} Disagreeing, the court of appeals concluded that the language of defendant's counsel in the context of this particular trial was sufficient to comply with rule 274.\textsuperscript{327} Finally, rule 292 provides that a verdict may be rendered by the concurrence of the same ten members of the original jury of twelve persons.\textsuperscript{328} In a workers' compensation case, the court in \textit{McCawley v. Charter Oak Fire Insurance Co.}\textsuperscript{329} had the opportunity to apply the provisions of rule 292. In this case, the jury was asked in the first two issues to determine whether (1) the plaintiff had received an injury, and (2) whether he received such injury in the course of his employment with the defendant. Conditioned on affirmative answers to the first two issues, the jury was then asked whether the injury was (3) a producing cause of any total incapacity, and (4) whether the injury was a producing cause of any partial incapacity. In response, ten of the jurors found in the affirmative with respect to the first two issues. Ten different jurors found in favor of the defendant with respect to the third and fourth issues. On appeal, the defendant contended that, irrespective of whether the same ten jurors agreed to all the issues submitted, the error was harmless because answers to the first two issues were immaterial. Disagreeing with that conclusion, the court of appeals held that the first two issues were material because they were conditions precedent to the jury's answering the remaining issues and rule 292 imposes a mandatory requirement that the same ten jurors answer all of the issues.\textsuperscript{330}

\textsuperscript{320} \textit{Id.} at 114. To the extent they were contrary, the court overruled its decisions in Cosburn v. Harbour, 657 S.W.2d 432 (Tex. 1983), and Hernandez v. Montgomery Ward & Co., 652 S.W.2d 923 (Tex. 1983).

\textsuperscript{321} 674 S.W.2d 782 (Tex. App.—Corpus Christi 1984, no writ).

\textsuperscript{322} \textit{Id.} at 789.

\textsuperscript{323} \textit{Id.} at 788.

\textsuperscript{324} 666 S.W.2d 254 (Tex. App.—Dallas 1984, no writ).

\textsuperscript{325} \textit{Id.} at 261.

\textsuperscript{326} TEX. R. CIV. P. 274.

\textsuperscript{327} 666 S.W.2d at 261.

\textsuperscript{328} TEX. R. CIV. P. 292.

\textsuperscript{329} 660 S.W.2d 863 (Tex. App.—Tyler 1983, writ ref'd n.r.e.).

\textsuperscript{330} \textit{Id.} at 865.
XIII. JURY PRACTICE

As most trial attorneys are aware, the number of peremptory challenges that are available in multiple party suits depends upon the alignment of the parties. Previously, the principles governing the alignment of the parties and the peremptory challenges available in multiparty cases were specified primarily by the case law.\(^{331}\) The applicable procedural rule, however, was amended to codify those decisions. Rule 233 now provides that, in multiple party cases, the trial court first is to decide whether any of the litigants aligned on the same side of the docket are antagonistic with respect to any issue to be submitted to the jury.\(^{332}\) As used in the rule, the term “side” is not synonymous with party, litigant, or person.\(^{333}\) Instead, the term “side” means one or more litigants who have common interests on the matters with which the jury is concerned.\(^{334}\) Upon motion of any litigant made prior to the exercise of peremptory challenges, the trial court has the duty to equalize the number of peremptory challenges so that no litigant or side is given an unfair advantage “as a result of the alignment of the litigants and the award of peremptory challenges to each litigant or side.”\(^{335}\) In determining the allocation of peremptory challenges, the trial court is required to consider any matter brought to its attention “concerning the ends of justice and the elimination of an unfair advantage.”\(^{336}\)

Jury misconduct was the subject of two decisions during the survey period. In *Texas General Indemnity Co. v. Watson*\(^{337}\) two jurors were in effect excluded from further deliberations after they had voted contrary to the majority of the jurors on another issue. Finding that the appellant was entitled to have the benefits of the opinions and votes of the excluded jurors, the Fort Worth court of appeals held that the exclusion of the jurors was misconduct and warranted a new trial.\(^{338}\) In *Living, Inc. v. Redinger*,\(^{339}\) a personal injury case, five jurors discussed liability insurance, the financial ability of a defendant to pay his share of the judgment, and the manner in which attorney fees would be paid. Concluding that these discussions constituted material misconduct and probably resulted in harm to the defendants, the Houston court of appeals remanded the case for a new trial.\(^{340}\) Although the improper discussions only occurred in connection with the jury’s determination of issues related to damages, the court of appeals decided that the

\(^{331}\) E.g., Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 917 (Tex. 1979) (party to lawsuit must show antagonistic interests to use peremptory strike); Shell Chem. Co. v. Lamb, 493 S.W.2d 742, 743 (Tex. 1973) (party to lawsuit not automatically entitled to six peremptory strikes of jurors).

\(^{332}\) Id.

\(^{333}\) Id.

\(^{334}\) Id.

\(^{335}\) Id.

\(^{336}\) Id.

\(^{337}\) 656 S.W.2d 612 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.).

\(^{338}\) Id. at 616-17.

\(^{339}\) 667 S.W.2d 846 (Tex. App.—Houston [1st Dist.] 1984, writ granted).

\(^{340}\) Id. at 854; see also White Cabs v. Moore, 146 Tex. 101, 102, 203 S.W.2d 200, 202-03 (1947) (jury’s discussion of attorney’s fees was material misconduct and entitled defendants to a new trial).
entire action must be retried.\textsuperscript{341}

Many prior jury misconduct decisions, including those mentioned above, focused on discussions that occurred during deliberations.\textsuperscript{342} In the future, however, jury misconduct may be difficult or impossible to establish on the basis of statements made during the course of the jury's deliberation. Rule 327\textsuperscript{343} was amended to incorporate the provisions of rule 606(b)\textsuperscript{344} of the Texas Rules of Evidence. Under amended rule 327 and evidence rule 606(b), a juror may not testify as to any matter or statement that occurred during the course of the jury's deliberations. Further, a juror may not testify as to the effect of anything upon his or another juror's mind or emotions "as influencing him to assent to or dissent from the verdict concerning his mental processes in connection therewith."\textsuperscript{345} A juror may, however, testify whether any outside influence was improperly brought to bear upon any juror. Finally, amended rule 327 also provides that when jury misconduct is a ground for a motion for new trial, an affidavit must support the misconduct before the trial judge is required to conduct a hearing on the issue.\textsuperscript{346}

In a wrongful death action, the defendant in \textit{Gulf State Utilities Co. v. Reed}\textsuperscript{347} sought to ask prospective jurors during voir dire if they knew plaintiff by any of her former married names. The trial court refused to allow the inquiry, and, on appeal, the court of appeals determined that the trial court was correct.\textsuperscript{348} In this connection, the appellate court noted that the scope of voir dire is subject to the trial court's discretion\textsuperscript{349} and the prejudicial effect of introducing the plaintiff by several former names "could be easily perceived as outweighing any benefits to [defendants] during voir dire."\textsuperscript{350}

As noted in the last \textit{Survey},\textsuperscript{351} the supreme court has concluded that the trial court is required to send all exhibits admitted into evidence to the jury room during the deliberations.\textsuperscript{352} In addition to this holding, rule 281 now provides that the jury on request shall take with them the charge and any written evidence, except depositions of witnesses and special issues that have been refused.\textsuperscript{353} Finally, the jury "foreman" no longer exists under Texas practice. In apparent deference to the women's liberation movement, rule 280 now requires that the jury appoint one of their body as "presiding

\textsuperscript{341} See \textit{Tex. R. Civ. P. 434}.\textsuperscript{342} Indeed, a leading supreme court decision on jury misconduct, \textit{Flores v. Dosher}, 622 S.W.2d 573 (Tex. 1981), was concerned with a juror's statements made during deliberations.\textsuperscript{343} \textit{Tex. R. Civ. P. 327}.\textsuperscript{344} \textit{Tex. R. Evid. 606(b)}.\textsuperscript{345} \textit{Tex. R. Civ. P. 327(b)}.\textsuperscript{346} \textit{Id. 327(a)}.\textsuperscript{347} 659 S.W.2d 849 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).\textsuperscript{348} \textit{Id. at 855.}\textsuperscript{349} \textit{Id. at 853}; see \textit{Texas Employers' Ins. Ass'n v. Loesch}, 538 S.W.2d 435, 436 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.) (trial judge's discretion as to voir dire will only be reviewed if clearly abused); \textit{Johnson v. Reed}, 464 S.W.2d 689, 692 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.) (voir dire is not unlimited).\textsuperscript{350} 659 S.W.2d at 855-56.\textsuperscript{351} 1984 Annual Survey, supra note 4, at 452.\textsuperscript{352} \textit{First Employees Ins. Co. v. Skinner}, 646 S.W.2d 170, 174 (Tex. 1983).\textsuperscript{353} \textit{Tex. R. Civ. P. 281}.\textsuperscript{354}
XIV. JUDGMENTS, DISMISSALS, AND MOTIONS FOR NEW TRIAL

In an apparent effort to avoid unfairness to parties who do not receive notice of judgments, rule 306a\textsuperscript{355} was amended to provide that the clerk shall immediately give notice of the signing of a final judgment or other appealable order to the parties or their attorneys by mail.\textsuperscript{356} If, within twenty days after the judgment or other appealable order is signed, neither the party nor his attorney has received such notice from the clerk or acquired actual knowledge of the judgment or order, then the appeal period for that party begins on the date he or his attorney receives notice or acquires actual knowledge of the signing, whichever occurs first.\textsuperscript{357} In no event, however, is the appeal period to begin more than ninety days after the original judgment or other appealable order is signed. In order to extend the period of appeal based on a lack of notice, the adversely affected party is required to prove in the trial court, by sworn motion, the date on which the party or his attorney first received notice of the judgment or acquired actual knowledge of its signing and that the date was more than twenty days after the judgment was signed.\textsuperscript{358}

Previously, a motion for new trial was a prerequisite to a point of error on appeal regarding jury misconduct, newly discovered evidence, or the failure to set aside a default judgment.\textsuperscript{359} In addition to these grounds, rule 324 now specifies that a motion for new trial is also a prerequisite to complaints on appeal regarding the factual insufficiency of evidence to support a jury finding, a jury finding that is against the overwhelming weight of the evidence, the inadequacy or excessiveness of the damages found by the jury, and incurable jury argument, if not otherwise ruled upon by the trial court.\textsuperscript{360}

Rule 329b provides that a motion for new trial, if not determined by written order signed within seventy-five days after the judgment is signed, is considered to be overruled by operation of law.\textsuperscript{361} The same rule further provides that a motion to modify, correct, or reform a judgment is also overruled by operation of law if not determined by the trial court within seventy-five days after the judgment is signed.\textsuperscript{362} In \textit{Taack v. McFall},\textsuperscript{363} the supreme court applied the provisions of rule 329b to a motion for new trial. In that case the trial court entered a divorce decree on October 8, 1982. The defendant filed a timely motion for new trial, and a hearing was held on November

\textsuperscript{354} Id. 280.
\textsuperscript{355} Id. 306a.
\textsuperscript{356} Id. 306a(3).
\textsuperscript{357} Id. 306a(4).
\textsuperscript{358} Id. 306a(5).
\textsuperscript{360} TEX. R. CIV. P. 324(b).
\textsuperscript{361} Id. 329b(c).
\textsuperscript{362} Id.
\textsuperscript{363} 661 S.W.2d 923 (Tex. 1983).
3, 1982. At that time, the trial court orally granted the defendant's motion for new trial and noted the action on its docket sheet. The trial court, however, did not enter a written order granting the motion for new trial. Finding that the trial court's oral pronouncement and docket entry did not substitute for a written order as required by rule 329b, the supreme court concluded that the motion for new trial was in fact overruled by operation of law within seventy-five days after the divorce decree was signed, and the judgment became final thirty days later.364

In Newman Oil Co. v. Alkek365 plaintiff filed a timely motion for nonsuit, but the trial court did not enter an order of dismissal. Subsequent to the filing of the motion for nonsuit, a summary judgment was entered in favor of the defendant. The court of appeals, however, held that the trial court was not authorized to rule on the summary judgment motion and had lost jurisdiction of the entire case when the motion for nonsuit was filed.366 With respect to nonsuits, rule 164 was amended to provide that, when a motion for sanctions is pending or an order imposing sanctions has been entered, the taking of a nonsuit shall have no effect upon liability for sanctions.367

XV. Appellate Procedure

Although the rules governing appellate procedure sustained no major changes, the supreme court did make several revisions worthy of note. The amount of a cost bond or cash deposit necessary to perfect an appeal has been increased to $1,000.368 Previously, rule 354 provided that the amount of the bond or deposit could be increased on the motion of any party or by any officer of the court.369 Pursuant to an amendment, the trial court on its own motion may also increase or decrease the amount of the bond or deposit required.370 Further, rule 354 now specifies that the failure of appellant's counsel to give notification of the filing of a cost bond or certificate of deposit shall be grounds for dismissal of the appeal or other appropriate action if appellee is prejudiced by such failure.371 Finally, in an apparent effort to ensure that court reporters are paid for their services, rule 354(e) imposes an obligation upon the appellant either to pay or make arrangements to pay the court reporter upon completion and delivery of the statement of facts, even if a cost bond is filed or deposit in lieu of a bond is made.372

Rule 364,373 which governs the procedure for superseding a judgment

364. Id. at 924.
365. 657 S.W.2d 915 (Tex. App.—Corpus Christi 1983, no writ).
366. Id. at 920.
367. TEX. R. CIV. P. 164.
368. Id. 354(a), (b).
370. TEX. R. CIV. P. 354(c).
371. Id. 354(d).
372. Id. 354(e). Rule 354(e) apparently overturns decisions that had held that a court reporter must prepare a statement of facts upon request and cannot insist upon payment as a condition when a cost bond has been filed. See, e.g., Fine v. Page, 572 S.W.2d 577, 581 (Tex. Civ. App.—Eastland 1978, writ dism'd).
373. TEX. R. CIV. P. 364.
during appeal, now allows the trial court to decline to permit certain types of judgments to be suspended during an appeal.\textsuperscript{374} Those types of judgments are ones for “other than money or property or foreclosure.”\textsuperscript{375} An amendment to rule 465\textsuperscript{376} states that the sufficiency of a cost or supersedeas bond and deposit shall be reviewable by the appellate court for excessiveness as well as, under the prior rule, for insufficiency.\textsuperscript{377}

Rule 376 provides that a party may designate the filed papers to be included in the transcript on appeal.\textsuperscript{378} Pursuant to an amendment, the same rule specifies that the clerk shall disregard any general designation by a party, such as one for all papers filed in the cause.\textsuperscript{379} In addition, the amended rule also imposes a mandatory obligation upon the clerk to prepare a transcript without waiting for any designation by the parties.\textsuperscript{380} With respect to the statement of facts, rule 377, as amended, requires the appellant at or before the time prescribed for perfecting an appeal to make a written request to the court reporter for the statement of facts.\textsuperscript{381} Applying amended rule 377, the San Antonio court of appeals in \textit{Odom v. Olafson}\textsuperscript{382} concluded that the appellant could not obtain an extension for the filing of a statement of facts because he did not make a request to the court reporter for the statement of facts prior to the time prescribed for perfecting the appeal.\textsuperscript{383}

Previously, the rules had contained no specific provision regarding the effect of filing a premature appeal. New rule 377a\textsuperscript{384} was promulgated to cover this subject. The rule specifies that proceedings related to an appeal will not be considered ineffective due to prematurity “if a subsequent appealable order has been signed to which the premature proceedings may properly be applied.”\textsuperscript{385} In connection with appeals that are premature due to the lack of a final order, the appellate court may permit the defects to be cured and any subsequent proceedings to be shown in a supplemental record.\textsuperscript{386} If the trial court signs an order modifying, correcting, or reforming an order from which an appeal has been taken or has vacated that type of order and signed another, rule 377a states that proceedings related to the appeal of the first order may be considered applicable to the second but “shall not prevent any party from appealing from the second order.”\textsuperscript{387}

The time period has been changed for perfecting an appeal from an interlocutory judgment or order. Under rule 385 the appeal must be perfected

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\item \textsuperscript{374} \textit{Id.} \textsuperscript{364(f)}.
\item \textsuperscript{375} \textit{Id.} \textsuperscript{364(e)}.
\item \textsuperscript{376} \textit{Id.} \textsuperscript{365}.
\item \textsuperscript{377} \textit{Id.}
\item \textsuperscript{378} \textit{Id.} \textsuperscript{376}.
\item \textsuperscript{379} \textit{Id.}
\item \textsuperscript{380} \textit{Id.}
\item \textsuperscript{381} \textit{Id.} \textsuperscript{377}.
\item \textsuperscript{382} 675 S.W.2d 581 (Tex. App.—San Antonio 1984, writ dism'd).
\item \textsuperscript{383} \textit{Id.} at 582.
\item \textsuperscript{384} Tex. R. Civ. P. 377a.
\item \textsuperscript{385} \textit{Id.}
\item \textsuperscript{386} \textit{Id.} \textsuperscript{377a(b)}.
\item \textsuperscript{387} \textit{Id.} \textsuperscript{377a(c)}.
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within twenty days after the judgment or order is signed by the trial court. In addition, new rule 385b now clarifies a number of points concerning the effect of an interlocutory appeal. First, no order denying interlocutory relief is suspended or superseded by an appeal. The pendency of an appeal, however, from an order certifying a class action does operate to suspend that order and also the trial on the merits. Except for an order certifying a class action, the mere pendency of an appeal alone from an order granting interlocutory relief will not suspend the operation of the order. The trial court, however, may permit an interlocutory order to be suspended pending an appeal by the filing of a supersedeas bond or by making an equivalent cash deposit. During an appeal from an interlocutory order, the trial court continues to have jurisdiction over the action and may issue further orders, including dissolution of the order appealed from, but the trial court may not enter: (1) an order granting substantially the same relief as that granted by the order appealed from; (2) an order contrary to temporary orders of the appellate court; or (3) an order that would interfere with or impair the effectiveness of any relief sought or granted on appeal. The trial court is authorized to proceed with the trial on the merits, except for cases in which a class action is certified. With respect to enforcement of temporary orders that are the subject of appeal, those orders may be enforced only by the appellate court in which the appeal is pending, except that the appellate court may refer any enforcement proceeding to the trial court. The disposition by the appellate court of an interlocutory appeal takes effect when the mandate is issued. The court of appeals may issue the mandate immediately on announcing its decision or it may delay the mandate until final disposition of the appeal. With respect to a rehearing, the appellate court has the discretion to deny the right to file a motion for rehearing or to shorten the time for filing. If the appellate court takes that action, then the motion for rehearing shall not be a prerequisite to any review available in the supreme court.

Rule 386 was amended to conform with the supreme court's decision in B.D. Click v. Safari Drilling Corp. As noted in a prior survey, the Click decision held that a court of appeals does not have authority to grant a motion to extend the time for filing of the record in the absence of a timely rule 21c motion. Rule 386 specifies that the court of appeals "shall have no authority to consider a late filed transcript or statement of facts, except as per-

388. Id. 385.
389. Id. 385b.
390. Id. 385b(a).
391. Id. 385b(b).
392. Id. 385b(d).
393. Id. 385b(e).
394. Id. 385b(g).
395. Id. 385b(h).
396. Id. 386.
397. 638 S.W.2d 860 (Tex. 1982).
mitted by rule 21c. Considering an analogous issue, the court in Better Construction, Inc. v. H.E. Reeves, Inc. held that, when a third motion for extension to file the statement of facts was not made on a timely basis in accordance with rule 21c, the court of appeals had no authority to grant an extension for a third time.

Rule 413 was rewritten to clarify that the burden is on the appellant, or other parties seeking review, to see that a sufficient record is provided to show error requiring reversal. With respect to oral argument in the court of appeals, rule 423 now specifies a uniform time limit. Formerly, the time limits depended upon the local rules of each court of appeals. Under amended rule 423, each side is allowed thirty minutes in argument, with fifteen more minutes for rebuttal by the appellant; in cases involving difficult questions, the time limit may be extended, provided application is made before argument begins.

The practice regarding certification of questions of law from the court of appeals to the supreme court has also been modified. Under rule 461, the court of appeals may certify one or more controlling questions of law to the supreme court "[i]n exceptional cases urgently requiring accelerated disposition on the appeal." The supreme court may of course decline to decide the certified question. In connection with motions to certify questions of law to the supreme court, rule 462 specifies that such motions must be made within fifteen days after the judgment in the court of appeals rather than on the date the motion for rehearing is overruled.

Certain changes were also made to the rules governing supreme court practice. Amended rule 469 permits, to some extent, broader points of error to be presented to the supreme court. The new provision in rule 469 specifies that "[p]oints will be sufficient if they direct the attention of the court to the error relied upon," and "[c]omplaints about several issues or findings related to one element of recovery or defense may be combined in one point, if separate record references are made." Rule 496 provides that briefs in response to applications of writ of error shall follow the general form of the requirements for the application. The respondent, however, may rely upon his brief in the court of appeals and, in that event, he is responsible for filing twelve copies of such brief with the clerk of the

399. TEX. R. CIV. P. 386.
400. 675 S.W.2d 612 (Tex. App.—San Antonio 1984, no writ).
401. TEX. R. CIV. P. 21c.
402. 675 S.W.2d at 613. Contra Gibraltar Savings Ass'n v. Hamilton Air Mart, Inc., 662 S.W.2d 632, 635 (Tex. App.—Dallas 1983, no writ) (court has jurisdiction to consider second motion for an extension even though filed 15 days after time allowed).
403. TEX. R. CIV. P. 413.
404. Id. 423(d).
405. Id.
406. Id. 461.
407. Id. 462.
408. Id. 469(e).
409. Id.
410. Id. 496.
In connection with oral argument, rule 498 permits the supreme court to shorten the time for oral argument and also align the parties for purposes of presenting oral argument. Rule 498 also contains a new provision governing argument by amicus curiae and, in general, the rule provides that counsel for amicus curiae may not present oral argument, except if one of the parties to the case agrees to share oral argument time and if leave of court is obtained.

A number of decisions considered questions related to the preservation by an appellee of cross-points of error. In Cameron County v. Velasquez the appellee, by cross-point, attacked the constitutionality of the Texas Tort Claims Act. Recognizing that to preserve a cross-point the appellee must have in some manner apprised the trial court of his dissatisfaction with the judgment, the court of appeals decided that the cross-point could not be considered in light of appellee's lack of exception to the trial court's judgment. Reaching a similar result, the court in Stendebach v. Campbell held that the plaintiff-appellee could not attack a directed verdict in favor of one of the defendants due to the lack of an objection or exception by appellee to the judgment. In contrast to the above decisions, the appellee in Texas Employers Insurance Association v. Perez did preserve his cross-point for appellate review. Claiming that the trial court erred in failing to accumulate damage awards for his injuries, the plaintiff-appellee submitted a proposed form of judgment that granted such cumulative relief. The appellate court found that the submission of the proposed form of judgment sufficiently apprised the trial court of appellee's request for a cumulative award and thereby preserved the cross-point for appellate consideration.

Considering an issue of first impression in Texas, Taliaferro v. Texas Commerce Bank holds that an interpleader action is appealable. In this

411. Id.
412. Id. 498.
413. Id.
414. 668 S.W.2d 776 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).
416. 668 S.W.2d at 781; see Saenz Motors v. Big H. Auto Auction, Inc., 653 S.W.2d 521, 522 (Tex. App.—Corpus Christi 1983) (court of appeals lacks jurisdiction to consider cross-point when appellee failed to apprise trial court of objection), aff'd, 665 S.W.2d 756 (Tex. 1984); Tennegasco Gas Gathering Co. v. Fisher, 653 S.W.2d 469, 470 (Tex. App.—Corpus Christi, writ ref'd n.r.e.) (appellee must apprise trial court of his dissatisfaction to preserve appeal of cross-point).
417. 668 S.W.2d at 781.
418. 665 S.W.2d 557 (Tex. App.—El Paso 1984, writ ref'd n.r.e.).
419. Id. at 560.
420. 673 S.W.2d 669 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).
421. Id. at 673.
422. 660 S.W.2d 151 (Tex. App.—Fort Worth 1983, no writ).
423. Id. at 154; cf. Republic of China v. American Express Co., 190 F.2d 334, 335 (2d Cir. 1951) (interpleaded action is appealable once a final order has been made); Newkirk Constr. Corp. v. Gulf County, 366 So. 2d 813, 819 (Fla. App. 1979) (final judgment in interpleader action is appealable by all parties); Lafayette-South Side Bank & Trust v. Siebert, 233 Mo. App. 431, 18 S.W.2d 572, 574 (1929) (bill of interpleader could be appealed); Strassen v. Commercial Nat'l Bank, 60 N.W.2d 672, 675 (Neb. 1953) (order granting interpleader is final and appealable); National Bank v. White, 93 N.J. Eq. 109, 115 A. 533, 534 (1921) (interlocutory decree in an interpleader suit is final between complainant and defendants).
case, the judgment appealed from was one which (1) granted a bill of interpleader, (2) allowed certain interpleading banks to deposit the proceeds of accounts in the court’s registry, (3) awarded attorneys’ fees to the banks, and (4) dismissed them from the suit. The court of appeals concluded that, once the bill of interpleader was granted, the only real controverted issue that affected the interpleading banks had been finally adjudicated. There was thus a final, appealable judgment. With respect to the finality of judgments for appeal purposes, Baker v. Hansen should also be considered. In this landlord-tenant dispute, the tenant sued the landlord for damages under several theories. The landlord counterclaimed for rent and other monetary relief. The trial court dismissed the tenant’s claims for affirmative relief because of her failure to comply with a ruling requiring her to post security for costs. Since the order of dismissal did not dispose of the landlord’s counterclaims, the supreme court ruled that the order was interlocutory and could not provide the basis for appeal.

XVI. MISCELLANEOUS

Local Rules. The courts of appeals and district and county courts have the authority to enact local rules governing their practice that are not inconsistent with the rules of civil procedure. Pursuant to an amendment, rule 3a now requires that such local rules be approved by the supreme court.

Continuance. Rule 252 specifies that when the ground for a motion for continuance is based on a want of testimony, the applying party is required, among other things, to show his due diligence in attempting to procure such testimony. A recent addition to rule 252 clarifies that the failure to obtain a deposition of a witness residing within a hundred miles of the courthouse in which the suit is pending “shall not be regarded as want of diligence when diligence has been used to secure the personal attendance of such witness.” The rule further provides, however, that if such a witness is disabled from attending trial, then the failure to obtain a deposition of such witness may in fact be regarded as a want of diligence.

Findings of Fact and Conclusions of Law. Rule 297 formerly provided that, when demand was made, the trial court was required to prepare and file its findings of fact and conclusions of law within thirty days after the judgment.

424. 660 S.W.2d at 155; see Fisher v. Williams, 160 Tex. 342, 344, 331 S.W.2d 210, 213 (1960).
425. 660 S.W.2d at 155.
426. 679 S.W.2d 480 (Tex. 1984).
428. 679 S.W.2d at 481; accord Steeple Oil & Gas Corp. v. Amend, 394 S.W.2d 789, 790 (Tex. 1965); Pan Am. Petroleum Corp. v. Texas Pac. Coal & Oil Co., 159 Tex. 550, 551, 324 S.W.2d 200, 202 (1959).
430. Id. 3a.
431. Id. 252.
432. Id.
433. Id.
or order overruling a motion for new trial was signed or the motion was overruled by operation of law.\textsuperscript{434} As amended, rule 297 now specifies that the trial court is required to prepare and file its findings of fact and conclusions of law within thirty days after the judgment is signed.\textsuperscript{435}

\textit{Res Judicata.} \textit{Reese v. Reese}\textsuperscript{436} considered the effect of a judgment entered in a forcible detainer proceeding on the prosecution of a subsequent trespass to try title suit in district court. In this case, the plaintiffs filed a trespass to try title suit, alleging they held fee simple title in a house and that the defendant unlawfully entered into possession of the premises. In response, the defendant claimed that a final judgment in a prior forcible detainer suit in her favor had adjudicated the issue of possession. Although stating that the judgment in the prior forcible detainer proceeding would bar another suit in the justice court for possession of the same premises, the court of appeals concluded that such judgment did not preclude relitigation of the issue of possession in the district court.\textsuperscript{437}

\begin{footnotes}
\footnote{435. Tex. R. Civ. P. 297.}
\footnote{436. 672 S.W.2d 1 (Tex. App.—Waco 1984, no writ).}
\footnote{437. Id. at 2-3; see Tex. Rev. Civ. Stat. Ann. art. 2226a (Vernon Supp. 1985) (determination of law in justice of the peace court shall not constitute basis for estoppel in district court).}
\end{footnotes}