POST-VERDICT LANDMINES:
A SURVIVAL GUIDE

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Nina Cortell is a partner in Haynes and Boone's appellate section. She has 28 years of experience representing clients in complex litigation and appeals at the state and federal level. She is a member of the Texas Supreme Court Advisory Committee which advises the Texas Supreme Court in connection with its rule-making authority. In 2003, she represented four public school districts and secured from the Texas Supreme Court the right to challenge the constitutionality of the Texas public school finance system. That same year she served as the chair of the State Bar Advanced Appellate Course and the Dallas County Bench/Bar Conference. Also in 2003, she chaired a committee at the request of Chief Judge Joe Fish overseeing the appointment of a U.S. magistrate, and she previously chaired, at the request of then-Chief Judge Barefoot Sanders, a task force charged with studying the efficiency of the federal courts in North Texas. Ms. Cortell is a member of the American Law Institute, a master in the Patrick E. Higginbotham Inn of Court, and a member of the Board of Directors of the Texas Law Review.

Ms. Cortell was named as one of five women in the top 100 "Texas Super Lawyers" by *Texas Monthly* in 2003 and as one of the top seven appellate lawyers in Dallas by *D Magazine* in 2003. She is a recipient of the Louise B. Raggio Award, given in recognition of significant contributions toward the advancement of women in the legal profession. She continues her work mentoring women attorneys in her role as an advisory board member of the Dallas Women Lawyers Association.

Ms. Cortell is married to Dr. Robert L. Fine and they are the proud parents of Lauren (a singer/songwriter who will be attending medical school at the University of Pennsylvania), Rachel (a philosophy major at the University of Colorado at Boulder) and Becca (who is starting high school and thankfully still resides at home with her aging parents!).

Recent Representative Cases:

Set aside $7.75 million punitive damage award. *Millichamp v. Baylor University Medical Center* (101st District Court 2004).

Obtained ruling allowing constitutional challenge of Texas public school finance system. *West Orange-Cove Consolidated I.S.D. v. Felipe Alanis, Com'r of Education*, 107 S.W.3d 558 (Tex. 2003).

Reversed and vacated $7.5 million products liability judgment. *Anderson v. Siemens Corp.*, 335 F.3d 556 (5th Cir. 2003).

Reversed $12 million damage award and procured right to own hospital and operate hospital's pharmacy. *In re Liljeberg Enterprises, Inc.*, 304 F.3d 410 (5th Cir. 2002).

Reversed $34 million lost profits award. *Exxon Corporation v. Breezevale, Ltd.*, 82 S.W.3d 429 (Tex. App.–Dallas 2002, pet. denied).

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Legal Experience

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Recent Articles

Co-Author, *Preserving Error under Amended Federal Rule of Civil Procedure 51*, The Online Journal of the ABA Council of Appellate Lawyers, May 2004

Author, *Instructing the Jury Under Amended Federal Rule of Civil Procedure 51*, The FBA Newsletter (Dallas Chapter), February 2004

Author, *Texas Supreme Court Update*, Headnotes, December 1, 2003

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Post-Verdict Landmines: A Survival Guide

I. Introduction.

This paper attempts to provide a guide for handling that intense period of time between verdict and the expiration of jurisdiction in the trial court, from the perspective of the losing defendant. Different practitioners will have different approaches; this paper just represents conclusions drawn by two practitioners built upon many years of experience. The main point is this: although preservation of points for appeal is a critical piece, that should not be your only goal. You should also be attentive to ways to address all of your client's needs (*e.g.*, protection of assets and/or public relations) and you should focus upon ways to obtain relief (even if partial) in the trial court. This is the first stage of the appeal and some of your best appellate work should be done at this point, both in terms of obtaining relief and in setting the stage for your approach to the appellate court.

II. The first 48 hours.

A. First call is to the court regarding scheduling of the hearing on the entry of judgment. Try to avoid a rush to judgment. Many courts will allow time for you to prepare and file, in advance of the hearing, objections to the proposed form of judgment and your jnov motion.[1]

B. Second call is to the court reporter to request the charge conference, followed by a request for the closing argument (as it typically provides an excellent overview of the case, as presented to the jury). (Further requests to the court reporter will depend upon what portions of the trial you most need for the points you plan on emphasizing in your post-verdict motions.)

C. Next 3 calls: to the client, client's trial counsel, and opposing counsel. Be prepared to listen carefully and take good notes.

D. Checklist for your first client meeting.

1. Inform your client of "the new reality."

   a. Standard of review.
   b. General reversal statistics. *See* Liberato and Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 44 S. TEX. L. REV. 431 (Spring 2003).

[1] The use of the term "jnov motion" in this paper refers to both a jnov motion and a motion to disregard jury findings. The difference between the two lies in their scope. A jnov motion challenges the entire verdict; a motion to disregard challenges only certain findings. *See*, on this point and the general topic area, the paper "*Preservation – Post-Trial,*" presented by Nissa Sanders of Crofts & Callaway, P.C. at the State Bar Appellate Boot Camp, September 8, 2004.

c. Enforcement mechanisms that might be available to the plaintiff upon signing of judgment – *e.g.,* filing of abstracts to create judgment liens on property, garnishment, turnover, injunction.

d. Ability of plaintiff to execute on the judgment once it becomes final.

e. The ability of the plaintiff to immediately pursue post-judgment discovery.

2. Discuss ways to protect your client in the event of an adverse judgment.

a. Insurance audit.

b. Supersedeas bond. Note HB4 changes.

c. Motion to stay enforcement.

d. Bankruptcy protection.

e. Public relations.

3. Be prepared to discuss:

a. The judges at each level: trial court, court of appeals, Texas Supreme Court, and, if appropriate, United States Supreme Court. Also, take into account the possibility that your case, at the court of appeals level, might be transferred.

b. Appellate timetable, including expected duration of appeal.

c. What a judgment might look like, including prejudgment and postjudgment interest.

d. Your appellate strategy (more on this below).

e. Appellate costs.

f. Mediation/settlement options and timing. (Most appellate docketing statements require your position to be stated in the filing and, in the Fifth Circuit, you might be dealing with a mediation attorney fairly quickly.)

4. Look beyond the legal issues presented by the case and assess your client's overall needs and goals. Do not automatically assume that a two-to-three year appeal is the best thing for your client. Questions to consider:

a. Is your client willing to assume risk or is your client risk-averse?

b. What is the economic and/or business impact on your client of a judgment and appeal?

c. What is the collateral estoppel or res judicata effect of a judgment? Are there other cookie-cutter suits waiting in the wings?

d. What is the public relations impact on your client of a judgment and appeal?

E. A checklist for your first meeting with your client's trial counsel.

1. Debrief, and develop a partnership with, trial counsel.

   a. Get an initial overview of the trial (and later, if possible, obtain a more detailed review).
   b. Get trial counsel's views on appellate points and post-verdict motions (although consider this the beginning and not the end-point of that analysis). Immediately start a list of jnov and new trial points.
   c. Get trial counsel's views on what portions of the record to prioritize (including trial transcripts, hearing transcripts, and pleadings).

2. Documents to request: first wave.

   a. Operative pleadings: latest petition/answer/counterclaim, etc.
   b. Verdict.
   c. Charge conference.
   d. Charge filings.

3. Documents to request: second wave.

   a. "Law motions," such as motions for directed verdict, motions for mistrial, and summary judgment filings.
   b. Significant court orders.
   c. Closing argument.
   d. Docket sheet.

4. Documents to request: final wave – everything else. (And compare against court's docket sheet to ensure you have a complete file.)

F. Pay a lot of attention to your first impressions as they are often the best indicator of how an appellate court might react. Once you become more involved, you tend to become more biased or, as one practitioner puts it, "You start to believe your own B.S."

III. The first 7 days.

A. Review the entire file and, to the extent available, the trial transcript.

1. Catalogue all claims and defenses (with cites to all pleadings, briefing, and memoranda re same).
2. Create a chronology (with record cites, to the extent available).
3. Create a witness list (briefly describing each witness and that witness's testimony, in the order the witnesses testified at trial).
4. Create an exhibit list.

5. Pay particular attention to all court charge filings.

B. Get up to speed on the substantive law claims.

C. Start a list of appellate issues, remembering to think in terms of (1) whether error was preserved and (2) whether the error was harmful (or whether a showing of harm is required).

IV. Developing a post-verdict strategy.

A. Threshold questions.

1. Is there a likelihood of getting relief in the trial court or are you better off with a quick exit? In the great majority of cases, it pays to take your time, extend the appellate timetable, and push for all available relief in the trial court. But there are those rare instances where you simply want to preserve error, cut your losses, and "get out of Dodge!"

2. Should you file your jnov and new trial motions together or separately? Reason for contemporaneous filing: you generally get just "one bite at the apple."[2] Reason for two-pronged approach? (1) It is advantageous if you can have the court consider the jnov motion before entering judgment because, once judgment is entered, the court might consider its work done, and (2) there is usually insufficient time to prepare a solid motion for new trial before entry of judgment.

B. Things not to do.

1. Do not move for judgment against your client. If you do, waiver can result. *See First National Bank of Beeville v. Fojtik*, 775 S.W.2d 632 (Tex. 1989) and related cases. You can usually accomplish the same objective through the filing of objections to the judgment.

2. Do not rely exclusively upon the unofficial record: it may well be wrong.

3. Do not forget to pay the filing fee for your motion for new trial. If you do, waiver can result. *Garza v. Garcia*, 137 S.W.3d 36 (Tex. 2004).[3]

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[2] Even if you decide to file the jnov motion and the new trial motion contemporaneously, you still might want to file objections to the form of judgment to address problems with the proposed judgment.

[3] In *Garza v. Garcia*, the Texas Supreme Court addressed two questions related to a motion for new trial filed without the required fee: (1) Does such a "conditional" motion extend the appellate timetables? (2) Does a fee-less motion for new trial preserve factual sufficiency points? 137 S.W.3d at 37-39. The Court eliminated one potential landmine by holding that when a motion for new trial is conditionally filed without a fee – and that fee is never paid – the appellate deadlines are extended as in any other motion for new trial filing. *Id*. at 37; TEX. R. APP. P. 26.1(a)(1) (stating that a notice of appeal must be filed within 90 days of the judgment if a party timely files a motion for new trial as opposed to 30 days if no such motion is filed). *However*, the Court's opinion creates a

4. Do not go to hearings without trial counsel, if you can avoid it. Otherwise, you are vulnerable to the retort: "Your Honor, Ms. Appellate Attorney doesn't know what she's talking about because she was not here for the 12 weeks of trial!"

5. Do not assume defeat! Have a can-do/can-achieve attitude.

C. Think creatively and think big.

1. If your case were on CNN Headline News, what would the headline be? Use it.

2. Identify issues that will be of interest to the Texas Supreme Court.

   a. Use Molly Hatchell's website: www.hatchellreport.com.
   b. Do not assume that a cause of action has been adopted absent a Texas Supreme Court holding on point.
   c. Look at what is happening in other states and in the federal courts.
   d. Look at your case in terms of the Restatement.
   e. Look at case trends.[4]

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landmine for parties who rely on a fee-less motion for new trial and seek to present factual sufficiency points to the court of appeals. Because a "factual sufficiency complaint had to be raised in a motion for new trial, but because [the complaining party] never paid the [required] $15 fee, the trial court was not required to review it." *Garza*, 137 S.W.3d at 38. Accordingly, the court of appeals "correctly never addressed" the factual sufficiency point. *Id*.

[4] In light of recent Texas Supreme Court cases further restricting the use of broad-form submission, the issue of conflicting jury answers may re-emerge. *See Harris County v. Smith*, 96 S.W.3d 230, 239 (Tex. 2002) (O'Neill, J., dissenting) ("We adopted the current version of Rule 277 to eliminate many of the ill effects of the former special-issues practice, under which appeals proliferated because of inevitable conflicts in jury answers."). If a jury's findings are capable of two constructions, one of which would reconcile the findings in favor of the trial court's judgment, the court must reconcile the findings in favor of the judgment rendered on the verdict. *Huber v. Ryan*, 627 S.W.2d 145, 145-46 (Tex. 1981) (stating that a court must reconcile a jury's findings if possible); *Great Am. Prods. v. Permabond Int'l*, 94 S.W.3d 675, 681 (Tex. App.—Austin 2003, pet. denied); *Materials Mktg. Corp. v. Spencer*, 40 S.W.3d 172, 176 (Tex. App.—Texarkana 2001, no pet.). The court must reconcile apparent conflicts in findings if it is reasonable in light of the evidence and pleadings, the charge submission, and the other findings considered as a whole. *Bender v. S. Pac. Transp. Co.*, 600 S.W.2d 257, 260 (Tex. 1980). A conflict in the jury's findings does not preclude the rendition of judgment unless the findings – considered separately and taken as true – would compel the rendition of separate judgments. *Tex & Pac. Ry. Co. v. Snider*, 321 S.W.2d 280, 282 (Tex. 1959). The issue is not whether the findings are conflicting but whether there is any reasonable basis upon which to reconcile the findings. *Bender*, 600 S.W.2d at 260. If conflicting findings are identified before the trial court accepts the verdict, the trial court must instruct the jury about the nature of the conflict – in writing and in open court, provide the jury additional instructions, and retire the jury for further deliberations. TEX. R. CIV. P. 295. However, if the trial court accepts the verdict before the findings are determined to be in conflict, the court should attempt to reconcile the apparently conflicting findings. *See Calabrian Chems. Corp. v. Bailey-Buchanan Masonry, Inc.*, 44 S.W.3d 276, 282 (Tex. App.—Beaumont 2001, pet. denied). If the jury's findings fatally conflict (*e.g.*, when the findings would not support a verdict for either party), the findings amount to no verdict and require a new trial. *Id*.; *Bell Cab Co. v. Vasquez*, 434 S.W.2d 714, 719 (Tex. Civ. App.—San Antonio 1968, writ ref'd n.r.e).

3. Identify those issues that might be of concern to the trial court – *e.g.,* a runaway verdict.

4. Feel free to "connect the dots" in a different way.

5. Follow every lead. *See, e.g., Anderson v. Siemens Corp.*, 335 F.3d 556 (5th Cir. 2003) (appellate team determined after trial that death certificate was improperly certified; Fifth Circuit reversed on that ground).

6. You may not be limited to the trial record. *E.g.,* there might be items of which judicial notice can be taken. *See In re Liljeberg Enterprises, Inc.*, 304 F.3d 410 (5th Cir. 2002).

7. Think of creative ways to make your points – *e.g.,* surveys of comparable verdicts, timelines, graphics.

8. If circumstances warrant, investigate possible irregularities – *e.g.,* jury misconduct, juror disqualification,[5] recusal, irregularities in judicial oath.

D. Think ahead.

1. While working on your jnov motion, think ahead to the fact that your new trial motion will be due 30 days after judgment, which does not give you much time to assess jury misconduct or locate newly discovered evidence. So, this work must begin immediately.

2. Make sure the trial record contains everything you will need for appeal. If it's not in the record, figure out a way to get it into the record.

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[5] Texas Government Code section 62.102 sets out the standards for juror disqualification:

> A person is disqualified to serve as a petit juror unless he:
> (1) is at least 18 years of age;
> (2) is a citizen of this state and of the county in which he is to serve as a juror;
> (3) is qualified under the constitution and laws to vote in the county in which he is to serve as a juror;
> (4) is of sound mind and good moral character;
> (5) is able to read and write;
> (6) has not served as a petit juror for six days during the preceding three months in the county court or during the preceding six months in the district court;
> (7) has not been convicted of a felony; and
> (8) is not under indictment or other legal accusation of misdemeanor or felony theft or any other felony.

V. Drafting the motions.

A. General rules.

1. Preservation document vs. persuasive document. General rule: draft motions as preservation documents and use accompanying brief to persuade on key points.

2. There's no such thing as waiver in the trial court. Assert all points, whether or not preserved. If the trial judge believes error was committed, he may want to fix it regardless of whether there was a technical waiver. Also, you might get lucky – perhaps no objection was necessary. *See Coastal Transport Co. v. Crown Central Petroleum Corp.*, 136 S.W.3d 227, 231-33 (Tex. 2004).[6]

3. It's never too early to develop a theme.

B. Checklist for jnov motion.

1. There is no evidence or legally insufficient evidence to support the finding. *See Juliette Fowler Homes, Inc. v. Welch Asocs., Inc.,* 793 S.W.2d 660, 666 (Tex. 1990).

2. The finding is immaterial.

3. The opposite finding is established as a matter of law.

4. All other matter of law points.

C. Checklist for new trial motion.

1. Required grounds set out in Rule 324(b). Failure to assert these grounds will result in waiver. Also remember:

a. If the finding you are complaining about is one on which your opponent has the burden of proof, then the new trial point is that the evidence is factually insufficient to support the finding. *See* TEX. R. CIV. P. 324(b)(2); *Wayne v. A.V.A. Vending, Inc.*, 52 S.W.3d 412, 419 (Tex. App. – Corpus Christi 2001, pet. denied).

[6] This case involved whether there was legally sufficient evidence to support the jury's gross negligence finding. Coastal argued that the plaintiff's expert testimony was "nothing more than a 'bare conclusion' that was 'factually unsubstantiated'" and thus was no evidence to support the gross negligence claim. 136 S.W.3d at 231-32. The plaintiff countered that, because Coastal did not object to the expert testimony, Coastal waived the no-evidence challenge. The Texas Supreme Court held that no objection is necessary to preserve a legal insufficiency challenge to "conclusory expert testimony." *Id*. at 232.

But if you are complaining about a finding on which you have the burden of proof, then the proper complaint is that the jury's finding is against the overwhelming weight of the evidence. *See* Tex.R.Civ.P. 324(b)(3); *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001).

b. Although a party may assert a legal insufficiency point in the motion for new trial rather than in a jnov motion, the appellate court may only remand for a new trial rather than render judgment on that point. *J. Weingarten Inc. v. Razey*, 426 S.W.2d 538, 540-01 (Tex. 1968).

2. For other possible grounds, *see* 10 WILLIAM V. DORSANEO, III, TEXAS LITIGATION GUIDE § 141.100 (including evidentiary error, charge error, juror misconduct,[7] juror disqualification, pretrial motions, and newly discovered evidence[8]). It is recommended that all grounds, not just those listed in Rule 324(b), be raised to avoid an argument that grounds not raised have been waived.

3. Pay your filing fee. *See* discussion of *Garza v. Garcia*, *supra.*

4. *See* case discussions below for emerging issues.

D. Significant cases presenting potential landmines.

1. ***Greater specificity required in the motion.*** The Dallas court of appeals in *Arkoma Basin Exploration Co. v. FMF Associates*, 118 S.W.3d 445 (Tex. App.—Dallas 2003, full briefing requested) held that a basic statement in a post-trial motion that no evidence supports a particular finding does not

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[7] Although establishing juror misconduct is difficult because of the injury standard and the rules governing the admissibility of evidence, if there are reasons to pursue juror misconduct as a basis for a new trial, aggressive and quick action is needed. To obtain a new trial based on juror misconduct, the moving party must establish: (1) misconduct occurred; (2) the misconduct was material; and (3) the misconduct probably caused injury. *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 372 (Tex. 2000). The injury standard is difficult to satisfy: "[T]here must be some indication in the record that that the alleged misconduct most likely caused a juror to vote differently than he 'would otherwise have done on one or more issues vital to the judgment.'" *Pharo v. Chamber County, Tex.*, 922 S.W.2d 945, 950 (Tex. 1996); *see also* TEX. R. CIV. P. 327(a) (noting that the moving party must show that "from the record as a whole that injury probably resulted to the complaining party"). Rule 327(b) imposes strict limitations regarding the issues on which the juror may testify in the jury misconduct context: "A juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his any other juror's mind or emotions as influencing him to assent to or dissent from the verdict concerning his mental processes in connection therewith, *except* that a juror may testify whether any *outside influence* was improperly *brought to bear* upon any juror." TEX. R. CIV. P. 327(b) (emphasis added).

[8] A party seeking a new trial on the ground of newly-discovered evidence must show the trial court that: 1) the evidence has come to his knowledge since the trial; 2) it was not owing to the want of due diligence that it did not come sooner; 3) it is not cumulative; and 4) it is so material that it would probably produce a different result if a new trial were granted. *See GJR Mgmt. Holdings, Ltd. v. Raus Ltd.*, 126 S.W.3d 257, 260-61 (Tex. App.—San Antonio 2003, pet. denied).

preserve a legal sufficiency issue for appeal. Under this case, to preserve a no-evidence issue, the party must explain the reasons why the evidence is factually or legally insufficient. That is, the complaint must be "specific enough to call the trial court's attention to the precise lack of sufficiency asserted on appeal." 118 S.W.3d at 457. To state the obvious, it can be very difficult to meet this heightened standard when time is short and a full record is usually not available.

2. ***Filing of an untimely amended motion for new trial may be considered.*** A party may file an amended motion for new trial before an earlier motion for new trial is overruled and within 30 days after judgment. *Moritz v. Preiss*, 121 S.W.3d 715, 719 (Tex. 2003); *see* TEX. R. CIV. P. 329b(b). An amended motion for new trial filed more than the 30 days after the trial court's judgment is untimely, and the court has no authority to enlarge the time for filing an amended motion. *Moritz*, 121 S.W.3d at 720. Thus, a trial court's order overruling an untimely (amended or not) motion for new trial is not subject to appellate review. *Id. However,* this does not mean that a party should never file an untimely amended motion for new trial because "the trial court may, at its discretion, consider the grounds raised in an untimely motion and grant a new trial under its inherent authority before the court loses plenary power." *Id.*

3. ***Evidence in support of a motion for new trial.*** *Wal-Mart v. Kelley*, 103 S.W.3d 642, 644 (Tex. App.—Fort Worth 2003, no pet.): The plaintiff obtained a default judgment against Wal-Mart. Wal-Mart moved for a new trial under *Craddock*, arguing that it had a meritorious defense based on the Texas Workers' Compensation Commission's prior decision in the case. Wal-Mart incorporated that decision by reference (which was also attached to the plaintiff's petition) in its motion for new trial. Nevertheless, the court held that because Wal-Mart only incorporated the TWCC's decision by reference and presented no evidence at the hearing, Wal-Mart did not show a meritorious defense. *But see* 103 S.W.3d at 645 (Cayce, J., dissenting). Under this decision, the party moving for a new trial should attach its evidence to the motion itself and/or present the evidence at the hearing.

4. ***Is a second motion for new trial needed?*** In *Wilkins v. Methodist Health Care System*, 108 S.W.3d 565 (Tex. App.—Houston [14th Dist.] 2003, pet. granted), the Texas Supreme Court is considering the court of appeals' holding that "[i]f a trial court modifies a judgment after one motion for new trial has been filed, a second motion is not needed to extend the deadlines if the first motion 'assails' the modified judgment." 108 S.W.3d at 567-68.

5. ***Is the grant of a motion for new trial subject to appellate review?*** This issue is raised in *Volkswagen of America, Inc. v. Ramirez*, 79 S.W.3d 113

(Tex. App.—Corpus Christi 2002, pet. granted) and is currently pending before the Texas Supreme Court.

6. ***Cases relating to the appellate timetable.***

The judgment, not a ruling on a motion for judgment, determines when the notice of appeal must be filed. *Naaman v. Grider*, 126 S.W.3d 73 (Tex. 2003). Four weeks after the trial court rendered a final judgment for the defendant, the court granted the defendant's motion for judgment. The plaintiff filed a notice of appeal, relying on the date of the trial court's ruling on the motion for judgment. The Court observed, '[a]n order that merely grants a motion for judgment is in no sense a judgment itself. It adjudicates nothing." 126 S.W.3d at 74. The Texas Supreme Court held that the notice of appeal was untimely and therefore dismissed the appeal. *Id.* at 74-75.

Appellate timetable extended in appeal from a plea to the jurisdiction because the trial court took evidence on the plea and made findings that the appellate court could consider. *Gene Duke Builders, Inc. v. Abilene Housing Authority*, 138 S.W.3d 907 (Tex. 2004) (per curiam). The trial court granted the defendant's plea to the jurisdiction and dismissed the case because the plaintiff did not first bring a claim under the administrative procedure contained in chapter 2260 of the Texas Government Code. The plaintiff filed a request for findings of fact and conclusions of law within 20 days of the dismissal order, which the trial court entered. The plaintiff filed its notice of appeal 85 days after the trial court had dismissed the case. The court of appeals held that because the trial court did not conduct an evidentiary hearing, the request for findings of fact and conclusions of law did not extend the appellate timetable. The court of appeals therefore dismissed the appeal for want of jurisdiction. *Id.* The Texas Supreme Court reversed and held that because (1) the trial court took evidence on the plea to the jurisdiction, and (2) the trial court's findings "could properly be considered by the appellate court," the appellate timetable was extended. 138 S.W.3d at 908; *see* TEX. R. APP. P. 26.1.

Motion for new trial did not extend timetable in interlocutory appeal from order granting special appearance. *Digges v. Knowledge Alliance, Inc.*, 2004 WL 1902582, at * 1 (Tex. App.—Houston [1st Dist.] August 26, 2004, no pet. h.): In this interlocutory appeal of the trial court's granting of a special appearance, the appellant filed his notice of appeal 69 days past the filing deadline (which is 20 days in an interlocutory appeal). *See* TEX. R. APP. P. 26.1(b). The appellant filed a motion for new trial, but the court noted that such a motion does not extend the appellate timetables in an interlocutory appeal. *Id.*, *citing* TEX. R. APP. P. 28.1. The notice of appeal included a challenge to the trial court's denial of the appellant's

motion for reconsideration of the special appearance order. However, the denial of the motion for reconsideration is not appealable under the interlocutory appeal statute. *Id.*, *citing* TEX. CIV. PRAC. & REM. CODE § 51.004(7). Because the notice of appeal was not timely filed, the court dismissed the interlocutory appeal for want of jurisdiction. *Id.*

Timetable extended even if filing fee not paid with respect to motion for new trial. *See* discussion of *Garza v. Garcia*, *supra.*

VI. Perfection of appeal.

A. When in doubt, perfect.

B. Pros and cons of early perfection if both sides are appealing.

1. Pros: get bragging rights and might be in a better position to open and close at oral argument.

2. Cons: trial judge may prematurely conclude that his work is done and there might be some confusion re scheduling in the appellate court.

VII. Mediation/settlement.

A. Timing considerations.

1. Try to avoid mediation too early in the process.

2. But also try to set before parties get too fixed upon, and proud of, their respective positions.

3. Once you are in the court of appeals, you might lose control of the timing of mediation since the court might order mediation and set the timetable.

B. Selection of a mediator: generally an appellate specialist is preferred.

C. How to present your case: Evaluate your audience: generally, parties are not very swayed by appellate argument and you might trigger a back-lash if you go that direction. If you're speaking directly to the plaintiff's appellate attorney, that's another story.

D. How to analyze your case:

1. Never forget the general appellate odds.

2. Take into account a Texas Supreme Court in transition and the possible unknown of which 3 judges you will draw at the court of appeals as well

as the possibility that your case will be transferred to another court of appeals.

3. If your best appellate case will yield a new trial (and not a rendition), then assess the likely outcome of a new trial.

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