



## PRESERVATION OF ERROR

### I. INTRODUCTION

An old adage maintains that “lawyers who try their cases with an eye on appeal generally have to.” The wisdom of this saying has proved true through the years; however, a successful trial lawyer must not only be able to persuade at trial, but must present cases in such a manner that successes are defensible and losses are reversible. For better or worse, the burden to protect the record occurs during the heat of trial, when the niceties of appellate review are all but forgotten. The purpose of this article is to point out appellate pitfalls that develop at trial and provide a quick reference guide to the most common preservation dangers.

The authors owe many debts of gratitude. As will all seminar papers, this article relies extensively on works of others. The first is the 1986 St. Mary’s Law Journal article which gave a more in-depth review of this subject matter. Keltner & Burke, *Protecting the Record for Appeal: A Reference Guide in Texas Civil Cases*, 17 ST. MARY’S L.J. 273 (1986). The second is an excellent law review article on the same subject by Helen Cassidy and Joann Storey written for the 1999 Advanced Civil Trial Course and entitled *Non-Charge Preservation of Error*. We also relied upon an update of that article written by Nissa Sanders and Michael Murray for the 2002 Advanced Civil Trial Course. The extensive court’s charge section comes, in large part, from an excellent article by Karen Precella entitled *The Court’s Charge: The State of Payne and the Progeny of Casteel*. That paper has been presented to the Texas College for the Judiciary, the Advanced Appellate Practice Course and other courses. Ms. Precella remains one of the foremost authorities in Texas on the court’s charge.

### II. PRE-TRIAL RULINGS

#### A. JURISDICTION

##### 1. Motion to Quash Service of Process

Motion to quash service of process is used when defects or irregularities occur in actual service. Technically, the motion is not jurisdictional; but, it must be filed before all other matters that might give rise to a general appearance. Filing an answer waives the necessity for service and defects in the citation. TEX. R. CIV. P. 121; *Burrow v. Arce*, 997 S.W.2d 229, 246 (Tex. 1999); *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 202 (Tex. 1985); also see *In re \$475,001.16*, 96 S.W.3d 625, 628-29 (Tex. App.—Houston [1st Dist.]

2002, no pet.). However, filing an answer or a general appearance does not waive defects in service when the defects reveal that the applicable limitations period has expired. *Ramirez v. Consolidated HGM Corp.*, 124 S.W.3d 914, 917 (Tex. App.—Amarillo 2004, no pet.); *Taylor v. Thompson*, 4 S.W.3d 63, 66 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

There is no appeal from a ruling either way on this motion. If the motion to quash is overruled, the movant must answer according to the original time schedule. If the motion is sustained, the movant is deemed to have appeared and must answer on the Monday next at the expiration of twenty days from the date of the order. TEX. R. CIV. P. 122; *Kawasaki Steel Corp.*, 699 S.W.2d at 202. Why do it unless limitations are involved?!

#### 2. Special Appearance

**a. TEX. R. CIV. P. 120a:** A special appearance motion objects to jurisdiction over the defendant’s person or property on the grounds that such is not amenable to process. TEX. R. CIV. P. 120a.

This rule does not authorize a special appearance for the purpose of challenging *subject matter* jurisdiction. *Laykin v. McFall*, 830 S.W.2d 266, 267 n.1 (Tex. App.—Amarillo 1992, no writ). In fact, pleas to subject matter may be made at any stage of the proceeding, including appeal. *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 850 (Tex. 2000). See *infra* at p. 5.

**b. Due Order:** A special appearance motion must be made in due order of pleading and filed before any “motion to transfer venue or other plea, pleading or motion.” TEX. R. CIV. P. 120a(2); *Experimental Aircraft Ass’n, Inc. v. Doctor*, 76 S.W.3d 496, 502 n.1 (Tex. App.—Houston [14th Dist.] 2002, no pet.). Failure to observe this rule results in a general appearance. TEX. R. CIV. P. 120a.

The Supreme Court addressed this due order of pleading issue in *Dawson-Austin v. Austin*, 968 S.W.2d 319, 322-23 (Tex. 1998). There, a party filed a motion to quash, plea to the jurisdiction and plea in abatement in the same instrument as the special appearance motion. While these various motions followed the special appearance motion in the instrument, none were expressly made “subject to” the special appearance. Nonetheless, the court held that Rule 120a makes “matters in the same instrument and subsequent matters subject to the special appearance without an express statement to that effect for each matter.” *Id.* at 322.

The *Dawson-Austin* rule was recently reaffirmed in 2004 by the Fort Worth Court of Appeals in *HMS Aviation v. Layale Enterprises, Ltd., S.A.*, 149 S.W.3d 182, 189 (Tex. App.—Fort Worth 2004, no pet.).

These decisions are a welcome departure from the former strict rule in *Liberty Enter., Inc. v. Moore Transp. Co. Inc.*, 679 S.W.2d 779, 783 (Tex. App.—Fort Worth 1984), *aff'd in part and rev'd in part*, 690 S.W.2d 570 (Tex. 1985) (unqualified representation in motion for new trial, filed subject to and after the special appearance, that party was ready for trial waived his special appearance). However, practitioners must still be cautious of the practical problems involved with the due order of special appearances. See *Landry v. Daigreport*, 35 S.W.3d 265, 267 (Tex. App.—Corpus Christi 2000, no pet.) (party waived his special appearance by arguing his motion for new trial before the special appearance and approving trial court's order on new trial before obtaining a ruling on special appearance); *Lang v. Capital Resources Investments, I, LLC*, 102 S.W.3d 861, 864 (Tex. App.—Dallas 2003, no pet.) (no waiver of special appearance where defendant filed motion for new trial subject to special appearance and first objected to trial court's decision to rule on motion for new trial before his special appearance motion).

**c. Burden of Proof:** The non-resident defendant has the burden of proof to negate all bases of personal jurisdiction. *Kawasaki Steel*, 699 S.W.2d at 203; *Le Meridien Hotels v. LaSalle Hotel Operating Partnership*, 141 S.W.3d 870, 879 (Tex. App.—Dallas 2004, no pet.).

Engaging in discovery is not a waiver of the due order of pleading rule. *Letersky v. Letersky*, 820 S.W.2d 12, 14 (Tex. App.—Eastland 1991, no writ). Additionally, objecting to discovery before filing a special appearance does not result in waiver. *Moore By and Through Moore v. Elektro-Mobil Technik GmbH*, 874 S.W.2d 324, 328 (Tex. App.—El Paso 1994, writ denied).

**d. The Proof:** The trial court determines the special appearance on the basis of the pleadings, any stipulations, affidavits filed by the parties, the results of discovery process, and any oral testimony. TEX. R. CIV. P. 120a(3). In turn, appellate courts review all evidence before the trial court in reviewing special appearances. *Linton v. Airbus Indus.*, 934 S.W.2d 754, 757 (Tex. App.—Houston [1st Dist.] 1996, writ denied).

Affidavits must be served at least seven days in advance of the special appearance hearing and must be

the same quality as those used in summary judgment proceedings. *Franklin v. Geotechnica Services, Inc.*, 819 S.W.2d 219, 222-23 (Tex. App.—Fort Worth 1991, writ denied). Affidavits not timely served may not be considered by the trial court or the court of appeals for purposes of a special appearance. *Tempest Broadcasting Corp. v. Imlay*, 150 S.W.3d 861, 869-70 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2004, no pet.).

Additionally, affidavits based on mere speculation or belief are insufficient to support a summary judgment and insufficient to support a special appearance. *Slater v. Metro Nissan of Montclair*, 801 S.W.2d 253, 255 (Tex. App.—Fort Worth 1990, writ denied); also see *Hall v. Stephenson*, 919 S.W.2d 454, 456 (Tex. App.—Fort Worth 1996, writ denied).

**e. Appeal:** The Texas Civil Practice and Remedies Code provides for an appeal from a trial court's interlocutory order that grants or denies the special appearance of a defendant under Rule 120a, except in suits brought under the Family Code. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon Supp. 2004).

Generally, jurisdiction over interlocutory appeals is final in the courts of appeal, and thus, the Supreme Court has no jurisdiction to hear such cases. TEX. GOV'T CODE ANN. § 22.225(b)(3) (Vernon 2004). However, § 22.225(c) vests jurisdiction in the Supreme Court over interlocutory appeals, if the justices of the court of appeals disagree (*i.e.* dissenting opinion), or if the court of appeals' decision conflicts with a decision of the Texas Supreme Court or a sister court of appeals. *Id.* at § 22.225(c).

**f. Standard of Review:** In *BMC Software v. Marchand*, the Supreme Court resolved the confusion in appellate courts regarding the applicable standard of review for reviewing a special appearance—rejecting the abuse of discretion standard. 83 S.W.3d 789, 794 (Tex. 2002). The court in *BMC Software* stated:

This Court has never clearly articulated the standard for reviewing a trial court's order denying a special appearance. The Fourth Court of Appeals has held that, because personal jurisdiction involves both legal and factual questions, appellate courts should review the trial court's decision for an abuse of discretion. However, other courts of appeals review the trial court's factual

findings for legal and factual sufficiency and review the trial court's legal conclusions *de novo*. We agree with the latter view and disapprove of those cases applying an abuse of discretion standard only. [citations omitted].

*Id.* at 794; also see *Le Meridien*, 141 S.W.3d at 877 (citing and applying standard of review set forth in *BMC Software*). The court in *BMC Software* further explained that when a trial court does not issue findings of fact with its ruling, all facts necessary to support the judgment are implied. *Id.* at 795. If no reporter's record is provided—the appellate court must presume the evidence is sufficient to support all findings of fact necessary to support the judgment. *Lassiter v. Bliss*, 559 S.W.2d 353, 358 (Tex. 1977).

### 3. Plea to the Jurisdiction

Although seldom used, a plea to the jurisdiction challenges subject matter jurisdiction, rather than personal jurisdiction and seeks dismissal of the proceeding. *Texas Highway Dept. v. Jarrell*, 418 S.W.2d 486, 488 (Tex. 1967).

**a. Types of Cases:** The plea to the jurisdiction almost always involves legal questions. For example, a plea is appropriate when the damages are below or exceed the jurisdictional limit of the court. *Bee v. Fireman's Fund Ins. Co.*, 331 S.W.2d 910, 917 (Tex. 1960). The plea is also appropriate if exclusive jurisdiction lies in another court, or administrative remedies have not been exhausted. See *Geary v. Peavy*, 878 S.W.2d 602, 604 (Tex. 1994); *Southland Life Ins. Co. v. Estate of Small*, 806 S.W.2d 800, 801 (Tex. 1991).

Increasingly, pleas to the jurisdiction have been used in governmental immunity cases where the state enjoys immunity unless the state expressly consents to the suit by statute. *Texas Dept. Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). Some special rules apply to the governmental immunity cases. First, the courts have determined that it is an affirmative defense that can be waived. *Davis v. City of San Antonio*, 752 S.W.2d 518 (Tex. 1988). Second, if a governmental entity is unsuccessful, it can take an interlocutory appeal. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8).

Interestingly, a governmental entity can dispute subject matter jurisdiction through a summary judgment. However, by doing so, it forfeits its right to the interlocutory appeal because the statute limits the appeal

to “denial of a plea to the jurisdiction.” *Id.*

In some instances, a plea to the jurisdiction is appropriate when a defendant alleges that a plaintiff does not have standing to bring the suit. *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 441 (Tex. 1993).

**b. Raised at Any Time:** Subject matter jurisdiction may be raised at any time during the proceedings—even for the first time on appeal. *Id.* at 443. A court may even raise the issue on its own accord without an objection or motion by the party. As mentioned above, the exception is governmental liability.

**c. Appeal:** If the court grants a plea to the jurisdiction, the cause of action or case must be dismissed and an appealable judgment results. *Liberty Mut. Life Ins. Co. v. Sharp*, 874 S.W.2d 736, 737 (Tex. 1994). On the other hand, a final judgment does not result if the plea is denied. Additionally, the mandamus is not available to challenge rulings on a plea to the jurisdiction. *Bell Helicopter Textron, Inc. v. Walker*, 787 S.W.2d 954, 955 (Tex. 1990). However, the Texas Supreme Court has allowed mandamus in one proceeding in which two courts were exercising jurisdiction over the same child custody dispute. *Geary*, 878 S.W.2d at 603.

**d. Record v. Pleadings:** For some period of time, it was well established that a trial court should determine the issue of subject matter jurisdiction solely by the allegations in the plaintiff's pleadings. However, the Supreme Court reversed course in *Bland I.S.D. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). There, the Court held that the trial court could look past the pleadings to the evidence in order to resolve jurisdictional issues. *Id.*

The Supreme Court continues to urge courts to look past the face of the pleadings in pleas to the jurisdiction—especially in cases involving governmental immunity. In a recent plurality opinion, the court held if a plaintiff's allegations that a governmental entity waived sovereign immunity are challenged by factual evidence in the government's plea to the jurisdiction—a plaintiff must offer enough evidence to raise a fact issue. *Tex. Dep't of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 221-25 (Tex. 2004). The *Miranda* decision disapproved of a long line of cases stating factual allegations in pleadings were enough to establish jurisdiction. *Id.* Thus, parties must marshal some evidence when a plea to the jurisdiction is supported by record evidence—similar to a summary judgment standard. *Id.*

## B. VENUE

### 1. Texas Venue Statutes

**a. Mandatory Venue:** There are eleven mandatory venue provisions in the Civil Practice and Remedies Code. TEX. CIV. PRAC. & REM. CODE ANN. § 15.011-019. To invoke mandatory venue, a defendant must object to the plaintiff's initial venue choice. A court must transfer from a proper county to a mandatory county on defendant's motion.

Mandamus is an available remedy to enforce a mandatory venue statute. *In re Continental Airlines*, 988 S.W.2d 733, 736 (1998).

**b. Permissive Venue:** When no mandatory venue applies, a plaintiff may select any proper county of venue. These so-called "permissive" venues include: (1) the county where all or a substantial part of the events giving rise to the claim occurred, (2) the county where the defendant resided at the time the action accrued, or (3) if the defendant is not a natural person, the county the county of the defendant's principal office, or if none of the above applies, (4) the county where the plaintiff resided at the time the cause of action accrued. TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a).

Additionally, "for the convenience of the parties and witnesses and in the interest of justice," a court may transfer venue. TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(b). This transfer must be based on the motion of a defendant. *Chiriboga v. State Farm Mut. Ins. Co.*, 96 S.W.3d 673, 683 (Tex. App.—Austin 2003, pet. denied) (forbidding convenience transfer by plaintiffs). By statute, a defendant must demonstrate the following: (1) maintenance of the suit in the current county would work an injustice on the defendant, (2) the balance of interests of all parties favors transfer to another county, and (3) transfer would not work an injustice to any other party. TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(b). Importantly, a court's ruling on a motion to transfer based on convenience is not reviewable by mandamus or appeal. *Id.* at § 15.002(c).

**c. Multiple Claims and Parties:**

If venue is proper for one of several claims against a defendant, then venue is proper for all of them. *Middlebrook v. David Bradley Mfg. Co.*, 26 S.W. 935 (Tex. 1894). If mandatory venue controls one claim, then it controls all claims joined in any lawsuit arising from

the same transaction or occurrence. TEX. CIV. PRAC. & REM. CODE ANN. § 15.004; *In re Windstorm Ins. Ass'n*, (Tex. App.—Beaumont 2003, orig. proceeding).

Similarly, if venue is proper for one defendant, then it is proper for all defendants joined in claims arising from the same transaction or occurrence. *Id.* at § 15.005.

When multiple and intervening plaintiffs are involved, each plaintiff must establish that venue is proper for its claims independent of any other plaintiff. A plaintiff cannot join a lawsuit unless he can establish venue in the county of the suit. *Id.* at § 15.003. Section 15.003 was added in 1995 to eliminate forum shopping and to eliminate "tag-along" or "piggy-back" plaintiffs with no connection to the forum. *Electronic Data Sys. Corp. v. Pioneer Electronics (USA) Inc.*, 68 S.W.3d 254, 256-57 (Tex. App.—Fort Worth 2002, no pet.). There is a limited right to interlocutory appeal in a case involving multiple plaintiffs under section 15.003, but only as to the issues of joinder and intervention—not venue. *Id.*

**d. Venue Selection Clauses:** The fixing of venue by contractual agreement is generally not permitted when it encroaches on the statutory scheme for establishing venue. *Fidelity Union Life Ins. Co. v. Evans*, 477 S.W.2d 535, 537 (Tex. 1971); *Bristol Myers Squibb Co. v. Goldston*, 957 S.W.2d 671, 674 (Tex. App.—Fort Worth 1997, writ denied). This should not be confused with forum selection clauses—which involve contractual agreements to the jurisdiction and venue of another state.

However, two kinds of venue selection clauses are allowable by statute. First, parties may make venue agreements where the obligation sued upon is to be performed in a specific named county or a specific designated place in that county. TEX. CIV. PRAC. & REM. CODE ANN. § 15.035(a); *WTFO, Inc. v. Braithwaite*, 899 S.W.2d 709, 716 (Tex. App.—Dallas 1995, no writ). Second, parties may make venue agreements in actions arising from "major transactions" where the consideration is equal to or greater than one-million dollars. *Id.* at § 15.020(b). The statute also enables the parties to agree that suit be avoided in particular counties. *Id.* at § 15.020(c).

In 2005, the Texas Supreme Court addressed § 15.020 for the first time in *In re Texas Ass'n of School Boards, Inc.* and held that a school district's participation agreement with a risk management pool for liability and property insurance was not a "major transaction" within the meaning of the venue statute. 169 S.W.3d 653 (Tex. 2005). There, "major transaction" was determined by the

“aggregate stated value” of the pool’s promised annual premium payment, not the coverage limits. *Id.* at 657. The aggregate value of the annual premium did not exceed one million, and thus, the venue provision of the parties’ agreement was unenforceable. *Id.*

**e. Venue Under Chapter 15 of the CPRC Trumps Venue Under Texas Probate Code:**

The Texas Supreme Court has held that in wrongful death or personal injury cases the venue provisions in Chapter 15 of the Civil Practice and Remedies Code take precedence over any venue provisions in the Texas Probate Code. *In re Columbia/St. David’s Healthcare Sys., L.P.*, 178 S.W.3d 781 (Tex. 2005); *In re Reliant Energy, Inc.*, 159 S.W.3d 624 (Tex. 2005); TEX. CIV. PRAC. & REM. CODE ANN. § 15.007.

**2. The Motion to Transfer Venue**

**a. Requisites of Motion:** In order to challenge the plaintiff’s chosen venue, a defendant must file a motion to transfer venue to a specific county. TEX. R. CIV. P. 86(3). Without a motion, the trial court may not transfer venue. *In re Masonite Corp.*, 997 S.W.2d 194, 198 (Tex. 1999).

The motion must request a transfer to another proper county because: 1) the plaintiff’s choice of venue is improper, or 2) the statute provides mandatory venue in another county. TEX. R. CIV. P. 86(3). A defendant can also move to transfer venue if a party would be deprived of a fair trial in the chosen venue or on grounds of “convenience.” TEX. CIV. PRAC. & REM. CODE ANN. §§ 15.063, 15.002. Additionally, the defendant’s motion should specifically deny the venue facts of the plaintiff’s petition, or they are taken as true. TEX. R. CIV. P. 87(3)(a); *Sans v. Clark*, 25 S.W.3d 800, 803 (Tex. App.—Waco 2000, pet. denied).

The motion to transfer should be filed with affidavits supporting the venue facts alleged in the motion. *GeoChem Tech Corp. v. Verseckes*, 962 S.W.2d 541 (Tex. 1998); TEX. R. CIV. P. 86(3)(8).

The courts of appeal are insistent that each venue fact disputed must be “specifically denied.” Only then does the burden shift to the plaintiff to make prima facie proof of the venue facts alleged in the position. *Bleeker v. Villarreal*, 941 S.W.2d 163, 167-68 (Tex. App.—Corpus Christi 1996, writ dism’d by agr’t).

**b. Due Order of Pleadings:** The

motion to transfer venue must be filed in due order of pleading, after a special appearance, but before any other pleading or motion. *Tex. Dep’t of Pub. Safety v. Scanio*, 159 S.W.3d 712, 715 (Tex. App.—Corpus Christi 2004, pet. denied). A party waives the right to challenge venue if not properly pleaded in due order. *Sutton v. State Bar*, 750 S.W.2d 853, 855 (Tex. App.—El Paso 1988, writ denied); TEX. R. CIV. P. 86; *also see* TEX. CIV. PRAC. & REM. CODE ANN. § 15.063.

**c. Plaintiff’s Response:** As a general rule, the plaintiff’s response to the motion to transfer venue must be filed at least thirty days before a hearing on the motion. TEX. R. CIV. P. 87(1). The defendant may reply no later than seven days before the hearing. Both parties are entitled to reasonable discovery before the hearing on transferring venue. *Bridgestone/Firestone, Inc. v. Thirteenth Court of Appeals*, 929 S.W.2d 440, 442 (Tex. 1996).

If the defendant specifically denied the plaintiff’s venue facts, the plaintiff must make a prima facie case of those facts through sworn proof. *GeoChem Tech Corp.*, 962 S.W.2d at 543. However, the plaintiff is not required to offer proof of his cause of action. TEX. R. CIV. P. 87(2)(b), (3)(a).

**d. Hearing:** The defendant must request a setting. TEX. R. CIV. P. 87(1). Additionally, the defendant has an obligation to have his venue motion heard in a reasonable time before trial and obtain a ruling, or risk waiver. TEX. R. CIV. P. 87(1); *Whitworth v. Kuhn*, 734 S.W.2d 108, 111 (Tex. App.—Austin 1987, no writ). In *Whitworth*, the defendant moving for transfer of venue waited over a year before filing his motion. *Id.* at 111. The court of appeals stated that the defendant’s lack of diligence was inconsistent with the stated purpose of the rules. *Id.*; *but see Bristol v. Placid Oil Co.*, 74 S.W.3d 156, 159 (Tex. App.—Amarillo, 2002, no pet.) (Thirty-two month delay between motion to transfer and ruling not fault of the defendant who requested a hearing).

If, for some reason, the trial court refuses to set the motion for hearing, the movant need not reurge the request to avoid waiver. *Marshall v. Mahaffey*, 974 S.W.2d 942, 946 (Tex. App.—Beaumont 1998, pet. denied).

**e. Potential Waiver:** Both the Amarillo and San Antonio Courts of Appeal have held that the failure to make subsequent pleadings and motions subject to the motion of transfer venue may constitute a waiver. *Bristol*, 74 S.W.3d at 160; *General*

*Motors Corp. v. Castaneda*, 980 S.W.2d 777, 783 (Tex. App.—San Antonio 1998, pet. denied).

### 3. Appeal and Mandamus of Venue Rulings

Generally, there is no interlocutory appeal from a trial court's determination of venue. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(a); *Electronic Data Sys. Corp.*, 68 S.W.3d at 257. Thus, a party must normally wait until final judgment to appeal a venue ruling. *American Home Prods. Corp. v. Clark*, 38 S.W.3d 92, 95 (Tex. 2000). However, there are exceptions. For example, the Legislature amended § 51.014 of the TEX. CIV. PRAC. & REM. CODE, allowing interlocutory appeal by the agreement of the parties. See § 51.014 (d). An appeal under §51.014 (d) will not stay the proceedings unless there is an agreement, or the court of appeals orders a stay of the proceedings.

**a. Standard of Review:** After a final judgment, when an appeal is taken on the venue issue the standard of review is as follows:

(1) If there is any probative evidence in the entire record that venue was proper, the appellate court must uphold the trial court's venue determination. *Bonham State Bank v. Beadle*, 907 S.W.2d 467, 471 (Tex. 1995).

(2) If there is no evidence that venue was proper, the appellate court must reverse the trial court's judgment and order a new trial. *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 382 (Tex. 1998).

The appellate court's review is a *de novo* one that considers the entire record, including the trial on the merits. Therefore, the record on appeal may be different from that which existed at the time of the venue ruling. *Excel Corp. v. Porras*, 14 S.W.3d 307 (Tex. App.—Corpus Christi 1999, pet. denied).

**b. Convenience Rulings Not Reviewable:** The permissive venue statute specifically states that a court's ruling to grant or deny transfer on "convenience" grounds in Section 15.002(b) is not grounds for appeal or mandamus and is not reversible error. TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(c). The Supreme Court recently addressed this issue in *Garza v. Garcia*, 137 S.W.3d 36 (Tex. 2004). In *Garza*, the defendant's motion asserted both "improper" venue

and "inconvenience," which the trial court granted without specifying the grounds. *Id.* at 37. On appeal, the Corpus Christi Court found that to be exempt from review under § 15.002(c) a venue order must specifically state that the cause is or is not transferred on convenience grounds—thus allowing appellate review of the general transfer order on such grounds in this case. The Supreme Court disagreed, in a strict interpretation of the statutory language at issue.

The Supreme Court held that because the motion asserted convenience as one ground for transferring venue, and the statute specifically precludes reversal of any ruling made on convenience grounds, the court of appeals erred in considering and reversing the trial court's general venue order. *Id.* at 38-39. The court acknowledged that the Legislature must have intended that these general venue orders would be "immune from review" when convenience was one of the grounds sought for transfer. *Id.* at 39. The result of the *Garza* holding is that there is absolutely no appellate review of any general order denying or granting transfer when the motion advances convenience as one of the grounds for transfer.

The dissenting opinion by Justice Phillips points out that the majority decision runs afoul of the legislative intent of the statutory venue scheme and turns appellate review standards upside-down. *Id.* at 42-43. Importantly, the court pointed out that under the majority's rationale, any lawyer adding the words "convenience of the parties" to his motion will insulate the trial court's venue determination from review on appeal.

**c. Mandamus for Mandatory Venue:** Regarding mandatory venue, mandamus is still an available remedy to challenge venue in order "to enforce the mandatory [venue] provisions." *In re Missouri Pac. R.R.*, 998 S.W.2d 212, 215 (Tex. 1999). The standard is abuse of discretion. *Id.* Interestingly, Section 15.0642 allows mandamus review without a showing that there is no adequate remedy by appeal. *Id.* at 216.

**PRACTICE NOTE:** In the similar issue of transfer of cases involving multi-district litigation (MDL), the Austin Court of Appeals recently held that a party can waive the right to transfer a case to the MDL court by failing to assert the right to transfer in a timely fashion. *In re Fluor Enterprises, Inc.*, \_\_\_S.W.3d\_\_\_, 2006 WL 504996 (Tex. App.—Austin Feb. 27, 2006).

## C. PLEADINGS

Pleadings frame the parameters of the lawsuit. *Murray v. O&A Express, Inc.*, 630 S.W.2d 633, 636 (Tex. 1982). Increasingly, pleadings also form the basis for appellate review, and as a result, should be drafted carefully to cover all relief and all defenses sought by the pleader.

### 1. Fair Notice Standard

Texas follows a “fair notice” standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000); TEX. R. CIV. P. 45. A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claims. *UMLIC VP LLC v. T&M Sales & Env. Sys., Inc.*, 176 S.W.3d 595, 608-09 (Tex. App.—Corpus Christi 2005, pet. denied). The purpose of this rule is to give the opposing party information sufficient to enable him to prepare a defense. *Id.*; *Auld*, 34 S.W.3d at 897 (citing *Roark v. Allen*, 663 S.W.2d 804, 810 (Tex. 1982)); also see *F.S. New Products Inc.*, 129 S.W.3d 606, 630 (Tex. App.—Houston [1st Dist.] 2004, pet. granted Jan. 21, 2005) (petition by axle manufacturer sufficient to put defendants on notice of injunctive relief sought by manufacturer).

### 2. Absence of Special Exceptions

In absence of special exceptions, a petition is liberally construed in favor of the pleader. *Horizon/CMS Healthcare Corp.*, 34 S.W.3d at 897.

The Supreme Court’s decision in *Horizon/CMS Healthcare Corp. v. Auld*, exemplifies its liberal view on pleadings. There, Auld challenged the court of appeals capping of statutory punitive damages—arguing that Horizon had, in fact, plead the incorrect and outdated version of the punitive damage cap statute. *Id.* at 896. The Supreme Court, however, held that there was no error because Auld never specially excepted to this defect, and therefore, Horizon’s pleadings must be liberally construed in its favor. Further, the court found no error because Horizon plead information specific enough to provide Auld with notice of the punitive damage cap statute found in Chapter 41 of the Civil Practice and Remedies Code. *Id.* at 897.

### 3. Individual Pleadings

#### a. Prayer for General Relief:

Many lawyers include a prayer for general relief in their

pleadings, such as “for all relief, both in law and in equity, to which the plaintiff may show himself justly entitled.” TEX. R. CIV. P. 47(c). However, courts have long-held that such prayers cannot create new or alternative causes of action. *Kissman v. Bendix Home Sys.*, 587 S.W.2d 675, 677 (Tex. 1979). In truth, only relief consistent with the facts and pleaded theories may be granted under a general prayer. *Holstrom v. Lee*, 26 S.W.3d 526, 532-33 (Tex. App.—Austin 2000, no pet.).

*Kissman* represents the danger in praying for general relief. In that deceptive trade practices case, the plaintiff asked for a recovery for the market value of a mobile home. *Kissman*, 587 S.W.2d at 677. However, the only evidence regarding the value of the home was cost of repair. The Supreme Court ruled that the prayer for general relief did not allow the plaintiff to recover under the alternative theory of cost of repair. *Id.*; but see *Holstrom*, 26 S.W.3d at 532-33 (while relief granted was more limited than plaintiffs had wished, relief was appropriate under the facts alleged and proven at trial).

#### b. Prejudgment Interest:

There are two legal sources for an award of prejudgment interest: (1) general principles of equity, and (2) an enabling statute. *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 528 (Tex. 1998) (very good explanation of purpose and history of prejudgment interest).

Prejudgment interest is required by statute, for example, in certain cases of wrongful death, personal injury and property damage. TEX. FIN. CODE § 304.102 (Vernon Supp. 2004). Courts have held that statutorily authorized interest may be predicated on a general prayer for relief. *Olympia Marble & Granite v. Mayes*, 17 S.W.3d 437, 441 (Tex. App.—Houston [1st Dist.] 2000, no pet.). Therefore, even if a personal injury, wrongful death or property damage plaintiff fails to specifically plead prejudgment interest, because his claims fall within the scope of the statute authorizing prejudgment interest, the plaintiff is entitled to prejudgment interest on a prayer for general relief alone. *Id.*

However, some courts have held that a general prayer did not entitle the plaintiff recovery of prejudgment interest on his contract claims when the plaintiff failed to specify the correct legal grounds for recovery of interest. See *Trinity Universal Ins. Co. v. Brainard*, 153 S.W.3d 508 (Tex. App.—Amarillo 2004, pet. granted March 11, 2005) (where prejudgment interest sought by general prayer did not identify the statute or contractual provision supporting interest, plaintiff is not entitled to recover interest on claims grounded in contract

instead of tort); *Mobil Producing Texas & N.M., Inc. v. Cantor*, 93 S.W.3d 916, 920 (Tex. App.—Corpus Christi 2002, no pet.) (same).

**c. Amended Pleadings and Trial**

**Amendments:** Amended pleadings offered more than seven days from a trial date do not require leave of court in the absence of a docket control order to the contrary. TEX. R. CIV. P. 63. However, those offered within seven days of trial may be filed only after obtaining leave from the court—which shall be granted unless there is a showing of surprise or prejudice to the opposing party. *Id.* Trial amendments, on the other hand, are freely allowed when the presentation of the merits will be subserved thereby and the objecting party fails to demonstrate that an amendment would cause prejudice in maintaining a defense or action on the merits. TEX. R. CIV. P. 66.

The Supreme Court has held that, under Rules 63 and 66, a trial court has no discretion to refuse an amendment unless: (1) the opposing party presents evidence of surprise or prejudice, or (2) the amendment asserts a new cause of action or defense, and is thus prejudicial on its face, and the opposing party objects to the amendment. *Chapin & Chapin, Inc. v. Texas Sand & Gravel Co., Inc.*, 844 S.W.2d 664, 665 (Tex. 1992). A party opposing the amendment does not have to show prejudice if the amendment is substantive, which would change the nature of the trial. *Id.*

Several courts have addressed the issue of amendments. In *Shepard v. Boone*, the plaintiff’s third amended “original” petition sought attorneys fees specifically pursuant to “16 C.F.R. 433 and/or TEX. CIV. PRAC. & REM. CODE 38.001.” 99 S.W.3d 263, 266 (Tex. App.—Eastland 2003, no pet.). On the day of the hearing for attorneys fees, however, the plaintiff’s filed a “supplemental” third amended petition—seeking attorneys fees under a section of the Declaratory Judgment Act. The appellate court held that the supplemental amended petition asserted a new cause of action for attorneys fees under the Declaratory Judgment Act, and thus, was prejudicial on its face and remanded the attorney fees issue to the trial court for reconsideration. *Id.*

*In re Marriage of Loftis* involved a divorce in which the trial court suggested at trial that one spouse amend her pleadings to include a plea for a resulting trust. 40 S.W.3d 160, 163 (Tex. App.—Texarkana 2001, no pet.). The husband objected, claiming surprise, but the trial court granted the trust. *Id.* The appellate court ruled that amendment was not prejudicial on its face and

did not alter the nature of the trial—reasoning that the purpose of the case was to divide the assets and finalize the divorce. *Id.* at 164.

The Houston Court of Appeals in *Stephenson v. LeBoeuf* held that a trial court abused its discretion by failing to allow an amendment. 16 S.W.3d 829, 839-40 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). There, the court found that a previously unplead claim to escrow funds was a substantive matter; but, was not prejudicial, on its face, to the opposing party. *Id.* The court reasoned that the opposing party should have anticipated such an issue, and thus, suffered no prejudice or surprise from the amendment sought. *Id.* The court of appeals explained that the party seeking the amendment had previously asserted a claim to the escrow funds in his first amended answer and had prayed for the same relief in his subsequent answer. *Id.*

In *Celotex Corp. v. Gracy Meadow Owner’s Ass’n, Inc.*, the Austin court held a party’s diligence, or lack thereof, may be considered by the trial court when deciding whether to grant a trial amendment. 847 S.W.2d 384, 387 (Tex. App.—Austin 1993, writ denied). Prejudice, of course, is another factor. *Id.* Thus, mere surprise is not sufficient grounds to oppose the amendment. Instead, the opposing party must demonstrate some prejudice such as the inability to present a defense because no evidence was procured. *Id.* at 388.

**d. Dismissal for Failure to Replead:**

In *Ford v. Performance Aircraft Servs., Inc.*, 178 S.W.3d 330 (Tex. App.—Fort Worth 2005, pet. denied) the court upheld a trial court’s dismissal of an entire cause based on the plaintiff’s failure to replead. The Fords filed suit and the defendants’ filed special exceptions on grounds that the petition failed to provide fair notice of claims – including a failure to state specific facts against the corporate president individually and failure to state the maximum amount of monetary damages. *Id.* at 335-36. The trial court sustained the special exceptions, gave the Fords nine months to replead and stated the cause would be dismissed for failure to do so. Eleven days after the nine month period, the Fords sought an extension of time to replead; the court, however, dismissed to action.

In affirming dismissal in *Ford*, the court of appeals pointed out first that the special exceptions were proper. *Id.* at 336. Next, the court held that because the court gave ample time to amend, there could be no abuse of discretion in dismissing the cause under the

circumstances. *Id.*

**e. Trial by Consent:** A party that allows an issue to be tried by consent and who fails to raise the lack of a pleading before submission of the issue cannot later raise the deficiency for the first time on appeal. *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494 (Tex. 1991).

Trial by consent is meant to cover the exceptional case where it appears that from the record the parties tried an unplead issue. *RE/MAX, Inc. v. Katar Corp.*, 961 S.W.2d 324, 328 (Tex. App.—Houston [1st Dist.] 1997) *pet. denied*, 989 S.W.2d 363 (Tex. 1999). A trial amendment may be granted at the close of the evidence if evidence supporting the amended pleading was tried by consent. In determining if an issue has been tried by consent, the court must examine the record for evidence specifically related to the unplead issue. *Id.* If the evidence also relates to an issue that was plead—it cannot be considered.

In *RE/MAX*, a franchisor claimed the trial court erred by not finding that its breach of contract was excused by the franchisee's default. *Id.* Excuse, an affirmative defense, must be plead or tried by consent or it is waived. The franchisor in this case failed to plead the affirmative defenses on which it relied upon at the court of appeals, but there was a question raised whether its affirmative defenses were tried by consent. The court held that the trial court had no authority to rule on the franchisor's excuse defense to breach of contract where this defense was not raised in the pleadings, there was no evidence to establish excuse, no trial was amendment sought on the defense and no findings of fact were made on the defense. *Id.*

A recent case involving a tenant's counterclaim for quantum meruit to a landlord's claim for unpaid rent, confirms that when neither party introduced evidence on an issue it cannot be said to have been tried by consent. In *Frazier v. Havens*, the affirmative defense of limitations was argued by Havens to have been tried by consent. 102 S.W.3d 406, 411 (Tex. App.—Houston [14th Dist.] 2003, no pet.). However, Havens could point to no evidence directly related to the limitations issue admitted over objection. The only evidence admitted touched on an issue that was plead as well as the limitations issue. Accordingly, the court of appeals held that the limitations issue was not tried by consent and that the trial court erred in applying the statute of limitations to the counterclaims. *Id.* at 412.

The Fort Worth Court of Appeals also recently held that in cases tried by consent, a trial amendment to the pleadings is still required to submit affirmative issues or defenses to the jury. *Gibbins v. Berlin*, 162 S.W.3d 335, 341-42 (Tex. App.—Fort Worth 2005, no pet.).

Factually, *Gibbins* involved a bar fight. The defendant answered with a general denial and counterclaim, but never affirmatively plead his self-defense theory. Even after some evidence at trial was adduced by the defendant of self-defense, no trial amendment was sought by the defendant. Thus, the trial court refused the defendant's request to submit the unplead self-defense issue as a question to the jury. This is because all affirmative issues and defenses must be supported by pleadings and evidence – even when tried by consent. *Id.* The court of appeals agreed and affirmed. *Id.*

#### 4. Waiver of Pleading Deficiencies

**a. Special Exception:** A party waives any defect in a pleading that is not specifically pointed out by a special exception. TEX. R. CIV. P. 90. When the pleading deficiency was one that could have been attacked by special exception and thereafter cured by repleading, the failure to specially except may result in waiver of the defect. *Jones v. Ray Ins. Co.*, 59 S.W.3d 739, 751 (Tex. App.—Corpus Christi 2001), *pet. denied*, 92 S.W.3d 530 (Tex. 2002) (insurer waived complaint that insured failed to specify code violation where no special exception filed); *Herrmann v. Lindsey*, 136 S.W.3d 286 (Tex. App.—San Antonio 2004, no pet.) (vendors waived complaint that purchaser brought summary judgment pursuant to incorrect portion of summary judgment rule where vendors failed to file any special exceptions to pleadings).

Additionally, when a party fails to file special exceptions, the pleadings are liberally construed in favor of the pleader. *Horizon/CMS Healthcare Corp.*, 34 S.W.3d at 897. In the absence of a special exception, the court will uphold the pleading even if an element of the cause of action is omitted. *Attorney General of Texas v. Lavan*, 833 S.W.2d 952, 954 (Tex. 1992). On the other hand, if the plaintiff omits an entire cause of action or defense, there is no duty to file a special exception. *Golden v. McNeal*, 78 S.W.3d 488, 492 (Tex. App.—Houston [14th Dist.] 2002, *pet. denied*).

Generally, the lack of special exception becomes important when there are variances between pleading and proof. If special exceptions are filed to seek clarification

and more specificity—the error is preserved. In the absence of that type of special exception—the variances generally are allowed.

In most instances, variances do not result in reversible error. However, there are some notable exceptions. For example, the Texas Supreme Court upheld a ruling that a pleading for the market value of the structure did not give fair notice for the claim for reasonable and necessary costs of repairs. *Kissman v. Bendix Home Systems, Inc.*, 587 S.W.2d 675, 677 (Tex. 1979).

The failure to obtain a ruling on special exceptions also waives any complaint concerning pleading deficiencies. *Smith v. Grace*, 919 S.W.2d 673, 678 (Tex. App.—Dallas 1996, writ denied), *cert. denied*, 519 U.S. 1119 (1997).

**b. Evidence:** Waiver may be avoided by objecting to the evidence that is at variance with the pleading. This objection will prevent an issue from being tried by consent. TEX. R. CIV. P. 67; *Frazier*, 102 S.W.3d at 411 (party prevented trial by consent on limitations by objecting to evidence unrelated to limitations issue).

**c. Court's Charge:** A party may object to the court's charge due to a variance between the pleading and the issue submitted by the court. *Eldridge v. Collard*, 834 S.W.2d 87, 90 (Tex. App.—Fort Worth 1992, no writ) (error that pleadings did not support jury question on acknowledgment of indebtedness sufficiently preserved by written objection to the court's charge); *but see Walzier v. Newton*, 27 S.W.3d 561, 563-64 (Tex. App.—Amarillo 2000, no pet.) (observing that an inferential rebuttal defense need not be plead as a condition of putting on evidence of the defense).

## 5. Verified Pleas

Rule 93 lists those defenses that must be verified in the defendant's pleadings. TEX. R. CIV. P. 93. If not verified, the defense is of no effect and waived both at trial and on appeal. *WHM Properties, Inc. v. Dallas County*, 119 S.W.3d 325, 330-31 (Tex. App.—Waco 2003, pet. filed) (where a party fails to raise the issue of his opponent's corporate status by means of a verified plea, the issue is waived); *also see Miller v. Estate of Self*, 113 S.W.3d 554, 556 (Tex. App.—Texarkana 2003, no pet.) (estate waived issue that there was a defect in parties where it failed to make verified plea).

## D. PLEA IN ABATEMENT

A plea in abatement is used to allege facts, not evident from the face of the pleadings, that demonstrate why the pleader should not recover or why the case should not go forward. *Martin v. Dosohs I, Ltd, Inc.*, 2 S.W.3d 350, 354 (Tex. App.—San Antonio 1999, pet denied).

If the trial court grants abatement and the plaintiff fails to cure the defect, the suit may be dismissed without prejudice. *M&M Const. Co. v. Great Am. Ins. Co.*, 747 S.W.2d 552, 555 (Tex. App.—Corpus Christi 1988, no writ). However, the court must first allow the plaintiff an opportunity to amend before dismissal. *Martin*, 2 S.W.3d at 354.

Mandamus relief may be available from an order sustaining a plea in abatement. The appellate courts have granted mandamus to review abatement orders in a number of circumstances. *Hall v. Lawlis*, 907 S.W.2d 493, 494 (Tex. 1995) (trial court refused to acknowledge abatement ruling from another court and interfered with jurisdiction of that court); *In re Mendoza*, 83 S.W.3d 233, 236 (Tex. App.—Corpus Christi 2002, orig. proceeding) (same); *Gebhardt v. Gallardo*, 891 S.W.2d 327, 333 (Tex. App.—San Antonio 1995, orig. proceeding) (trial court abated indefinitely). Because the amended Civil Practice and Remedies Code Section 51.014 allows parties to agree to an interlocutory appeal, the need for review by mandamus may be reduced.

It is unnecessary to formally object to the trial court's denial of a plea in abatement to preserve error. *Rodriguez v. Gonzales*, 830 S.W.2d 799, 801 (Tex. App.—Corpus Christi 1992, no writ).

There are several pitfalls in plea in abatement practice. First, a plea in abatement must be raised in a timely manner, or it is waived. *Lopez v. Texas Workers' Comp. Ins. Fund*, 11 S.W.3d 490, 493 (Tex. App.—Austin 2000, pet. denied). Second, the plea in abatement must be verified. TEX. R. CIV. P. 93; *but see Southern County Mut. Ins. Co. v. Ochoa*, 19 S.W.3d 452, 461-62 (Tex. App.—Corpus Christi, 2000, no pet) (verification excused where defendant filed other verified pleadings with his plea in abatement). Third, a defendant bears the burden of proving the specific grounds on which a suit has been improperly brought. *Upchurch v. San Jose*, 5 S.W.3d 274, 277 (Tex. App.—Amarillo 1999, no pet.); *Bernal v. Garrison*, 818 S.W.2d 79, 82 (Tex. App.—Corpus Christi 1991, writ denied).

## E. DEFAULT JUDGMENT

Default judgment practice is controlled by TEX. R. CIV. P. 239. Each year, practitioners make a substantial number of errors in this area of the law which results in waiver.

### 1. Requisites for Default

**a. Service:** If a default judgment is not based on proper service, it is void. *Ackerly v. Ackerly*, 13 S.W.3d 454, 458 (Tex. App.—Corpus Christi 2000, no pet.). Actual notice is not a substitute for proper service. *Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990). The officer's return service must be on file with the clerk of the court for ten days, exclusive of the day of filing and the day of judgment. TEX. R. CIV. P. 239.

**b. Plaintiff's Petition:** A default judgment must still be supported by the pleadings. *Stoner v. Thompson*, 578 S.W.2d 679, 682 (Tex. 1979). The defendant must have fair notice of the plaintiff's cause of action and the relief sought. *McKnight v. Trogdon McKnight*, 132 S.W.3d 126, 131-32 (Tex. App.—Houston [14th Dist.] 2004, no pet.). In a default judgment action, defects in the petition are not waived absent special exceptions and may be raised for the first time on appeal. *Stum v. Stum*, 845 S.W.2d 407 (Tex. App.—Fort Worth 1992, no writ).

### 2. Is Evidence Necessary?

No evidence is necessary to support a default judgment when the claim is liquidated or proved by a duly authenticated written instrument. TEX. R. CIV. P. 243. Claims for unliquidated damages must be supported by evidence. *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80 (Tex. 1992). A claim is liquidated if the amount of damages can be accurately calculated by the court from the factual allegations (not conclusory allegations) in the petition. *Novosad v. Cunningham*, 38 S.W.3d 767, 773 (Tex. App.—Houston [14th Dist.] 2001, no pet).

### 3. Is a Record Necessary?

If the claim is liquidated, no record is necessary. Unliquidated claims, however, necessitate a record as the trial court hears pleadings, evidence and arguments of counsel. *Alvarado v. Reif*, 783 S.W.2d 303, 304-05 (Tex. App.—Eastland 1989, writ denied). In *Alvarado*, the court reversed a default judgment where there was no record of unliquidated damages and no reporter's record made. *Id.*

### 4. What is an Answer?

The appellate courts are conflicting as to what constitutes an answer. The courts have deemed the following filings sufficient to constitute an answer: *Custom-Crete, Inc. v. K-Bar Servs., Inc.*, 82 S.W.3d 655, 658 (Tex. App.—San Antonio 2002, no pet.) (an answer signed by a non-lawyer); *Smith v. Lippmann*, 826 S.W.2d 137, 138 (Tex. 1992) (letter from pro se defendant to court); *Alcala v. Williams*, 908 S.W.2d 54, 56 (Tex. App.—San Antonio 1995, no writ) (filing a plea in abatement).

However, other courts have found the following filings insufficient to constitute an answer: *Cotton v. Cotton*, 57 S.W.3d 506, 511-12 (Tex. App.—Waco 2001, no pet.) (letter from pro se defendant to plaintiff's attorney filed with clerk); *First State Bldg. & Loan Ass'n v. B.L. Nelson & Assocs.*, 735 S.W.2d 287, 289 (Tex. App.—Dallas 1987, no writ) (a motion for new trial).

### 5. Post-Answer Default

A default resulting from failure to answer should not be confused with a post-answer default. Post-answer default judgments occur when a defendant has answered but fails to appear at trial. *Stoner*, 578 S.W.2d at 682.

Unlike no answer default judgments, post-answer defaults cannot be entered on the pleadings, but rather, a plaintiff must offer evidence and prove his case as in a judgment at trial and obtain a record. *Sharif v. Par Tech, Inc.*, 135 S.W.3d 869 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *Wallace v. Ramon*, 82 S.W.3d 501, 503 (Tex. App.—San Antonio 2002, no pet.). Without a record, the defendant may be entitled to a new trial.

Notice of the trial setting does not have to appear in the record to support a post-answer default judgment. However, failure to notify the defendant of a post-answer default judgment proceeding violates due process. *Pessel v. Jenkins*, 125 S.W.3d 807, 809 (Tex. App.—Texarkana 2004, no pet.).

### 6. Setting Aside a Default Judgment

Under the *Craddock* test, a default judgment may be set aside when: (1) there is no negligence or conscious indifference in allowing the default to occur; (2) a meritorious defense to the cause exists; and (3) overturning the judgment will not result in any delay or injury to the party taking the default. *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 685 (Tex. 2002) (citing *Craddock v. Sunshine Bus Lines*, 134 Tex. 388, 133 S.W.2d 124, 126 (1939)). The *Craddock* test also applies to post-answer defaults. *Comanche*

*Nation v. Fox*, 128 S.W.3d 745, 749 (Tex. App.—Austin 2003, no pet.).

However, the *Craddock* requirement that a defendant show a meritorious defense amounts to a denial of due process when the record reflects that the defendant had no notice of the suit. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 180 S. Ct. 896, 899 (1988).

The Texas Supreme Court has considered a case in which the defendant filed a pro se motion to dismiss for lack of personal jurisdiction, but failed to file an answer. *LBL Oil Co. v. International Power Serv., Inc.*, 777 S.W.2d 390 (Tex. 1987). The plaintiff moved for default judgment on grounds that the motion to dismiss constituted a general appearance. The Supreme Court reversed the default judgment on grounds that the procedure conflicted with *Peralta*. *Id.* at 390-91. Once a defendant has made an appearance, he is entitled to a notice as a matter of due process. *Id.*; also see *Bryant v. Gamblin*, 829 S.W.2d 228, 229 (Tex. App.—Eastland 1991, writ denied).

Finally, when a default judgment is attacked, there is no presumption in favor of valid service of citation.

## F. SEPARATE TRIALS, SEVERANCE, CONSOLIDATION AND JOINDER

### 1. Severance

A trial court has the authority to sever any claim against a party and proceed with that claim separately, or order a separate trial of any claim or issue. TEX. R. CIV. P. 41; 174(b).

Severance of a claim is proper only if: (1) the lawsuit involves more than one separate and distinct cause of action; (2) the severed claim is one that would be the proper subject of a lawsuit if asserted independently; and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues. *State Dept. Of Highways & Public Transp. v. Cotner*, 845 S.W.2d 818, 819 (Tex. 1993); *Dalisa, Inc. v. Bradford*, 81 S.W.3d 876, 879-80 (Tex. App.—Austin 2002, no pet.). The effect of severance divides the lawsuit into two or more independent actions, and each results in an appealable final judgment. *Dalisa, Inc.*, 81 S.W.3d at 879. However, severance is never proper for the purpose of enabling the parties to obtain early appellate ruling on the trial court's determinations of issues in one case. *Id.* at 880 (citing *Pierce v. Reynolds*, 160 Tex. 198, 329 S.W.2d

76, 79 n.1 (Tex. 1959). The controlling reasons for severance are to promote justice, avoid prejudice and further the convenience of trials. *Guaranty Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex. 1990).

An order granting or denying severance is an interlocutory order and not appealable until final judgment. *Finder v. E.L. Cheeney Co.*, 368 S.W.2d 62, 64 (Tex. App.—Beaumont 1963, no writ).

### 2. Separate Trials

The court may order a separate trial of any claim to avoid prejudice or promote convenience under Rule 174(b). See *In re B.L.D.*, 113 S.W.3d 340, 345 n.3 (Tex. 2003) (noting that severance and separate trial are distinct and seek different relief). A separation pursuant to Rule 174(b) results in separate trials that are interlocutory and unappealable until all of the separated claims and issues in the suit have been litigated. *Van Dyke v. Boswell, O'Toole, Davis & Pickering*, 697 S.W.2d 381, 383 (Tex. 1985).

### 3. Joinder

Likewise, consolidation of issues is appropriate where cases involve a common question of law or fact. TEX. R. CIV. P. 174(a); *Owens-Corning Fiberglas Corp. v. Martin*, 942 S.W.2d 712, 716 (Tex. App.—Dallas 1997, no writ).

Consolidation and separation of issues under Rule 174 are reviewed under an abuse of discretion standard on appeal. *Guaranty Fed. Sav. Bank*, 793 S.W.2d at 658; *VanDyke*, 697 S.W.2d at 384; also see *South West Prop. Trust, Inc. v. Dallas County Flood Control Dist. No. 1*, 136 S.W.3d 1 (Tex. App.—Dallas 2001, supplemental op. on rehearing April 4, 2002) (trial court did not abuse its discretion denying consolidation absent showing of harm).

## G. NON-SUITS

Rule 162 provides for the dismissal or non-suit of a cause of action. TEX. R. CIV. P. 162. Under this rule, a plaintiff can non-suit anytime before he or she has introduced all evidence other than rebuttal evidence.

The general rule is the plaintiffs have the right to take a non-suit at any time until they introduce all evidence other than rebuttal evidence. *Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 854 (Tex. 1995); *Le v. Kilpatrick*, 112 S.W.3d 631, 633 (Tex. App.—Tyler

2003, no pet.); TEX. R. CIV. P. 162. The effect of the non-suit may be to eliminate earlier interlocutory or procedural orders. *Id.* However, the decision on the merits, such as a summary judgment, is not eliminated by the filing of a non-suit. *Id.* at 855. This is true even if the summary judgment is partial and therefore, interlocutory. *Id.* In other words, once a judge announces a decision that adjudicates a claim, or a part of a claim—that claim is no longer subject to the plaintiff’s right to non-suit. *Id.*

However, dismissal does not prejudice the right of an adverse party to be heard on pending claims for affirmative relief, payment of costs, sanctions and attorney fees. *See Puls v. Columbia Hosp. at Medical City Dallas*, 92 S.W.3d 613, 618 (Tex. App.—Dallas 2002, pet. denied); *Falls County v. Perkins and Cullum*, 798 S.W.2d 868, 870-71 (Tex. App.—Fort Worth 1990, no writ). Nevertheless, a sanction imposed in the previous suit, resulting in the exclusion of certain testimony, will have no effect on a subsequent suit. *Aetna Cas. & Surety Co. v. Specia*, 849 S.W.2d 805 (Tex. 1993).

If the defendant’s counterclaim merely restates the defenses to the plaintiff’s claim, the plaintiff’s right to take nonsuit is absolute. *BHP Petroleum Co., Inc. v. Millard*, 800 S.W.2d 838, 840-41 (Tex. 1990); *Anderson v. New Property Owners’ Ass’n of Newport, Inc.*, 122 S.W.3d 378, 391 (Tex. App.—Texarkana 2003, pet. denied).

## H. INTERVENTION AND THIRD-PARTY PRACTICE

### 1. Intervention

Any persons may intervene in an ongoing lawsuit “by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party.” TEX. R. CIV. P. 60. Such persons have the right to intervene if they could have brought the same action, or any part thereof, in their own name. *Guaranty Fed. Sav. Bank*, 793 S.W.2d at 657. A petition in intervention may be filed at any time prior to the signing of a final judgment, without leave of court. *Id.* Review of a trial court’s ruling on a motion to strike a petition in intervention is for abuse of discretion. *Id.* A trial court abuses its discretion when it strikes a petition in intervention that: (1) meets the above test, (2) will not complicate the case by “an excessive multiplication of the issues,” and (3) is “almost essential to effectively protect the intervenor’s interest.” *Id.*

Additionally, a trial court may not strike a petition in intervention *sua sponte*, but may do so only after a party files a motion to strike the petition. *Id.* Once a motion to strike is filed, the burden shifts to the intervenor to demonstrate a legal or equitable interest in the lawsuit.

The Texas Supreme Court in March of 2006 addressed a party’s attempt to intervene on appeal under the “virtual representation” doctrine. *In re Lumbermens Mut. Cas. Co.*, \_\_S.W.3d\_\_, 2006 WL 249979 (Tex. 2006). There, on appeal an insured party abandoned a choice of law issue following a jury verdict. The party’s excess insurer, Lumbermens, had posted the supersedeas bond for the appeal. Because the insured failed to appeal the choice of law ruling, Lumbermens intervened on appeal and argued it was entitled to appeal a choice of law ruling under the virtual representation doctrine. The court of appeals denied intervention.

However, the Supreme Court in *Lumbermens* reversed – holding Lumbermens was entitled to raise the choice of law issue abandoned by the insured under the virtual representation doctrine. *Id.* at \*3-9. Ultimately, even non-parties may intervene under certain circumstances if it is demonstrated that they must preserve their own interests through intervention, or else be bound by adverse judgments.

Recently the Fort Worth Court of Appeals dealt with an intervention that would excessively complicate the principal issues in the case. *Law Offices of Windle Turley, P.C. v. Ghiasinejad*, 109 S.W.3d 68, 71-72 (Tex. App.—Fort Worth 2003, no pet.). There, the principal lawsuit was medical negligence, but the intervening party sought to raise issues of breach of contract and breach of fiduciary duty into the lawsuit. The court of appeals agreed with the trial court’s decision to strike the intervention—holding that injecting these new issues into the lawsuit might cause unnecessary confusion. *Id.*

Rule 60 does not establish a time limit for intervention or motion to strike, however, the court through its equitable power may consider the timeliness of either action. *Atchley v. Spurgeon*, 964 S.W.2d 169, 172-73 (Tex. App.—San Antonio 1998, no pet.) (no abuse of discretion in refusing intervention in effectively settled case). Nonetheless, the court is powerless to allow intervention after a judgment is rendered. *Highlands Ins. Co. v. Lumbermen’s Mut. Cas. Co.*, 794 S.W.2d 600, 604 (Tex. App.—Austin 1990, no writ).

An order granting intervention is interlocutory and not appealable until final judgment. *Metromedia*

*Long Distance, Inc. v. Hughes*, 810 S.W.2d 494, 499 (Tex. App.—San Antonio 1991, writ denied); *but see American Home Prod. Corp. v. Clark*, 38 S.W.3d 92, 94 (Tex. 2000) (under CPRC section 15.003, a venue order granting or denying joinder of person who cannot independently establish venue is appealable by statute).

## 2. Third-Party Claims

Rule 38 allows any party to file claims against third-parties who may be liable for any or all parts of the claims asserted in a cause of action. TEX. R. CIV. P. 38. A defendant may bring third-parties into the suit without leave of court if the petition is filed not later than thirty days after the original answer is filed. *Id.* Otherwise leave of court is required. *Valley Indus., Inc. v. Martin*, 733 S.W.2d 720, 721 (Tex. App.—Dallas 1987, no writ). While the trial court is afforded great discretion in these matters, leave should be liberally granted. *In re Arthur Andersen L.L.P.*, 121 S.W.3d 471, 483 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

As in interventions, courts can consider the timeliness of the third party request in ruling on the motion to leave to file. *Id.* at 483-84 (considering whether fairness outweighs potential delay and ruling in favor of joinder).

## I. DISCOVERY

Discovery is beyond the scope of this presentation. However, the 1999 amendments to the Texas Rules of Civil Procedure made radical changes in discovery. Two of those changes are important. First, Rule 193.4(c) provides that a party may not use, at either a hearing or trial, information withheld from discovery under a claim of privilege without timely amending or supplementing the party's response to give that discovery. Additionally, the failure to respond, amend or supplement a discovery request may result in the exclusion of evidence or testimony that was timely identified. TEX. R. CIV. P. 193.6. This rule prevents undisclosed witnesses and evidence from being introduced at trial unless there is a showing of good cause for the failure to timely make, amend, supplement the discovery response or the failure will not unfairly surprise or prejudice the other parties. The burden of establishing these exceptions is on the party seeking to introduce the evidence. *Id.* at 193.6(2).

## J. CONTINUANCE

The grant or denial of a motion for continuance is seldom reversed on appeal. Of those reviewed, most

are decided on the grounds that the record was not protected because the strict rules regarding continuances were not followed. TEX. R. CIV. P. 251-254. The grounds for continuance set forth by the rules include lack of testimony, absence of a witness, absence of counsel, and attendance at the legislature. *Id.*

The general rule on appeal is that a trial court does not abuse its discretion in denying continuance if a motion does not strictly conform with the rules. *In re E.L.T.*, 93 S.W.3d 372 (Tex. App.—Houston [14th Dist] 2002, no pet.) (presumed that the trial court did not abuse its discretion where motion was not in writing or verified pursuant to Rule 251); *Favoloro v. Comm. for Lawyer Discipline*, 13 S.W.3d 831, 838 (Tex. App.—Dallas 2000, no pet.) (presumed that the trial court did not abuse its discretion where motion for continuance was only made orally); *also see Landers v. Adelson*, 788 S.W.2d 940, 941-42 (Tex. App.—Fort Worth 1990, no writ) (where party had four months to obtain new counsel after former counsel withdrew, the trial court did not abuse its discretion denying continuance).

## K. MOTIONS FOR SUMMARY JUDGMENT

### 1. Purpose

The purpose of Rule 166a is to permit either party to obtain a prompt disposition of a case involving “unmeritorious claims” or “untenable defenses.” *Texas Miranda*, 133 S.W.3d at 228 (Tex. 2004); *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989). In 1978, the Supreme Court amended Rule 166a to ensure that more cases were disposed of by summary judgment proceedings. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 675 (Tex. 1979). In 1997, the Legislature added Rule 166a(i) authorizing “no evidence” summary judgment motions in Texas where a party can assert there is no evidence to support one or more of the specified elements of a claim or defense. TEX. R. CIV. P. 166a(i).

### 2. Requisites of Motion

The motion itself, not the supporting brief, must state the specific grounds for summary judgment. *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 912 (Tex. 1997); *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993). In general, the grounds for summary judgment are sufficiently specific if they give the non-movant “fair notice” of the claim asserted. *City of Roanoke v. Town of Westlake*, 111 S.W.3d 617, 633-34 (Tex. App.—Fort Worth 2003, pet. denied). Where grounds asserted are ambiguous or

unclear, the non-movant must specially except before raising that complaint on appeal. *McConnell*, 858 S.W.2d at 341; *City of Roanoke*, 111 S.W.3d at 634.

The basis of a traditional motion for summary judgment is the movant's contention that no genuine issue exists for any material fact and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). The party without the burden may also file a motion for summary judgment urging there is no evidence to support the opponent's claims or defenses. TEX. R. CIV. P. 166a(i).

Additionally, each separate party seeking summary disposition must file its own separate summary judgment motion or affirmatively file pleadings joining a co-parties' motion. *Heil Co. v. Polar Corp.*, \_\_\_ S.W.3d \_\_\_, 2006 WL 908739 \*10 (Tex. App.—Fort Worth, April 6, 2006) (trial court could not grant summary judgment to seller, where seller did not make its own motion or join other seller's motion).

### 3. Summary Judgment Proof

**a. Admissible as Evidence at Trial:** Summary judgment evidence must be presented in a form that would be admissible at a conventional trial proceeding. *Hou-Tex. Printers, Inc. v. Marbach*, 862 S.W.2d 188, 191 (Tex. App.—Houston [14th Dist.] 1993, no writ).

**b. Affidavits:** An affidavit must demonstrate from its face that it is based on "personal knowledge" of the affiant. *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996). The affidavit itself must set forth how the affiant came to have knowledge of the facts and show the affiant's competency. *Wolfé v. C.S.P.H., Inc.*, 24 S.W.3d 641, 646 (Tex. App.—Dallas 2000, no pet.); *Radio Station KSCS v. Jennings*, 750 S.W.2d 760 (Tex. 1988). Whether an affiant has personal knowledge should be determined by reading the entire affidavit. *Grand Prairie Indep. Sch. Dist. v. Vaughn*, 792 S.W.2d 944 (Tex. 1990).

Affidavits cannot be conclusory or based on subjective beliefs. *Ryland Group*, 924 S.W.2d at 122; also see *Shelton v. Sargent*, 144 S.W.3d 113, 126 (Tex. App.—Fort Worth 2004, pet. denied). As one court has held, conclusory affidavits do not raise fact issues because they are neither credible nor susceptible of being controverted. *Id.* Instead, affidavits must set forth the facts.

Defects in the form of affidavits or attachments

will not be grounds for reversal on appeal unless the party objects to the specific defect, and the opposing party refuses to amend. *Trusty v. Strayhorn*, 87 S.W.3d 756, 763 (Tex. App.—Texarkana 2002, no pet.).

**PRACTICE TIP:** Because various courts disagree as to whether language such as "I believe" or "to the best of my knowledge" is proper for affidavits, the better practice is to avoid such phrases altogether. See *Campbell v. Fort Worth Bank & Trust*, 705 S.W.2d 400, 402 (Tex. App.—Fort Worth 1986, no writ) (such statements are no evidence at all). However, phrases such as "on or about" and have been approved by the courts. See *Grand Prairie Indep. Sch. Dist.*, 792 S.W.2d at 945.

**c. Pleadings:** In the truest sense, pleadings themselves are not summary judgment evidence—even if verified. *Thomas v. Omar Investments, Inc.*, 129 S.W.3d 290, 294 (Tex. App.—Dallas 2004, n.p.h.); *Shawell v. Pend Oreille Oil & Gas Co.*, 823 S.W.2d 336, 338 (Tex. App.—Texarkana 1991, writ denied).

**d. Depositions:** Deposition testimony referred to in a summary judgment motion or response is proper summary judgment evidence upon which either party may rely. *Wilson v. Burford*, 904 S.W.2d 628, 629 (Tex. 1995). Deposition excerpts need no authentication and copies of the specific pages alone are sufficient. *McConathy v. McConathy*, 869 S.W.2d 342 (Tex. 1994) (per curiam).

Generally, deposition testimony, even when more detailed than an affidavit, has no controlling effect over the affidavit. *Randall v. Dallas Power & Light Co.*, 752 S.W.2d 4, 5 (Tex. 1988); also see *Shaw v. Maddox Metal Works, Inc.*, 73 S.W.3d 472, 478 (Tex. App.—Dallas 2002, no pet.). Therefore, when a witness makes conflicting statements (one in an affidavit and one in deposition) a fact issue is created—precluding summary judgment. *Id.*

**e. Interrogatories and Admissions:** Answers to interrogatories and admissions must be presented in form admissible at trial. *Farmer v. Ben E. Keith Co.*, 919 S.W.2d 171, 175 (Tex. App.—Fort Worth 1996, no writ). Like admissions, answers to interrogatories may only be used against the party filing them. *Yates v. Fisher*, 988 S.W.2d 730, 731 (Tex. 1998).

An unanswered admission is automatically deemed admitted. TEX. R. CIV. P. 198.2(c). However, to be considered as proper summary judgment evidence, the

request must be on file with the court at the time of the summary judgment hearing. *Longoria v. United Blood Servs.*, 907 S.W.2d 605, 609 (Tex. App.—Corpus Christi 1995), *rev'd on other grounds*, 938 S.W.2d 29 (Tex. 1997) (per curiam).

#### 4. Response to the Motion

**a. Necessity of Written Response to a Traditional Motion:** The rule in Texas has long been that issues that are not expressly presented to the trial court by written motion, answer or other response cannot be considered on appeal as grounds for reversal. *City of Houston*, 589 S.W.2d at 677; *also see* TEX. R. CIV. P. 166a(c).

Additionally, defects in the form of affidavits or attachments cannot be grounds for reversal unless specifically pointed out by objection, allowing the moving party a chance to amend. *Youngblood v. U.S. Silica Co.*, 130 S.W.3d 461, 468 (Tex. App.—Texarkana 2004, pet. filed); *Wyatt v. McGregor*, 855 S.W.2d 5, 17 (Tex. App.—Corpus Christi 1993, writ denied).

Thus, if no response to a traditional motion for summary judgment is filed, the only issue for appeal is whether the movant's grounds and proof are sufficient to support the judgment as a matter of law. *McConnell*, 858 S.W.2d 337; *City of Houston*, 589 S.W.2d at 678; *Equisource Realty Corp. v. Crown Life Ins. Co.*, 854 S.W.2d 691 (Tex. App.—Dallas 1993, no writ). Therefore, it is important to challenge a motion for summary judgment on every ground possible. *Id.* As a practical matter, a respondent should always file a written response to a traditional summary judgment motion even though the movant's summary judgment evidence is legally insufficient. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000).

**b. Necessity of Written Response to a No Evidence Motion:** Rule 166a(i) explicitly provides that in response to a no evidence summary judgment motion, the respondent must present some summary judgment evidence raising a genuine issue of material fact on the element attacked. *In re Mohawk Rubber Co.*, 982 S.W.2d 494, 498 (Tex. App.—Texarkana 1998, orig. proceeding). However, a party is not required to marshal all of its evidence in response to a summary judgment motion. *Id.* The respondent's evidence must meet the requirements for proper summary judgment proof.

The necessity for a response, of course, is greater when the movant files a "no evidence" motion for

summary judgment because the court must grant the motion if the respondent fails to raise a fact issue. TEX. R. CIV. P. 166a(i). In short, a response must be filed to survive the proper "no evidence" summary judgment motion.

#### 5. Time and Notice Requirements

The summary judgment motion and supporting evidence must be filed at least twenty-one days before the date of the hearing, unless leave of court is granted. TEX. R. CIV. P. 166a(c); *Chadderdon v. Blaschke*, 988 S.W.2d 387 (Tex. App.—Houston [1st Dist.] 1999, no pet.). The applicable time period increases to twenty-four days if the non-movant is served by mail. *Id.* In turn, a non-movant must respond in writing at least seven days before the summary judgment hearing. TEX. R. CIV. P. 166a(c).

The twenty-one day rule is mandatory and strictly construed against the movant and protects the non-movant from being deprived of a full opportunity to respond on the merits. *Martin v. Martin, Martin & Richards, Inc.*, 991 S.W.2d 1, 11-13 (Tex. App.—Fort Worth 1997) *rev'd on other grounds*, 989 S.W.2d 357 (Tex. 1998).

Accordingly, "[i]f a non-movant receives late notice of the summary judgment motion and hearing, he may file a motion for continuance to obtain the full twenty-one (21) days notice before the hearing and to have time to prepare an adequate response." *Rios v. Texas Bank*, 948 S.W.2d 30, 32 (Tex. App.—Houston [14th Dist.] 1997, no pet). However, a non-movant waives error if he appears at a hearing and does not either object to the hearing or request a continuance. *Sanders v. Capital Area Council*, 930 S.W.2d 905, 911 (Tex. App.—Austin 1996, no writ).

#### 6. Appeal and Standard of Review

Naturally, an order granting a motion for summary judgment results in a final appealable judgment unless partial judgment is granted. Conversely, an order denying summary judgment is not appealable. *Hood v. Amarillo Nat'l Bank*, 815 S.W.2d 545, 547 (Tex. 1991). One exception to this rule is when both parties have filed motions for summary judgment. In that circumstance, the appellate court may determine all questions presented, including the propriety of the order overruling the losing party's motion. *Bradley v. State ex rel. White*, 990 S.W.2d 245, 247 (Tex. 1999).

If the order granting summary judgment does not

specify the grounds, the appellate court can affirm summary judgment if any of the grounds advanced in the motion are meritorious. *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 627 (Tex. 1996). In that case, the complaining party must complain that none of the grounds stated in the motion will support the judgment.

In *Nixon v. Mr. Property Management Co.*, the Supreme Court set forth the standard for reviewing a summary judgment on appeal. The rule is as follows:

- (1) the movant bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law;
- (2) evidence favorable to the non-movant will be taken as true in deciding disputed fact issues precluding summary judgment; and
- (3) every reasonable inference must be drawn in favor of the non-movant and any doubts resolved in his favor.

690 S.W.2d 546, 548-49 (Tex. 1985). Thus, contrary to an appeal from a trial on the merits, in an appeal from summary judgment the presumptions run against the judgment.

The standard for reviewing traditional motions for summary judgment first set forth in *Nixon* is still the standard today. See *Ernst & Young, L.L.P. v. Pacific Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001); also see *Bergen v. Texas New-Mexico Power*, 130 S.W.3d 379, 380 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

When reviewing a “no evidence” summary judgment, courts apply the legal sufficiency standard of a directed verdict. *Berry v. City of Reno*, 107 S.W.3d 128, 132 (Tex. App.—Fort Worth 2003, no pet.); *Moore v. K-Mart Corp.*, 981 S.W.2d 266, 269 (Tex. App.—San Antonio 1998, pet. denied). The court reviews the evidence in the light most favorable to the non-movant, disregarding all contrary evidence and inferences. *Id.* Under this standard, a no evidence summary judgment is not proper if the non-movant raised more than a scintilla of evidence that raises a genuine issue of material fact. *Id.*

## L. TRIAL BY JURY

Contrary to popular belief, the right to a trial by

jury is not absolute in all civil cases. It is absolute only in instances where it is timely requested and a jury fee is paid. TEX. R. CIV. P. 216.

Rule 216 provides that a request for a jury trial should be made on or before the appearance day, or any reasonable time before the date set for trial, but not less than thirty days in advance of the trial setting. *Halsell v. Dehoy*, 810 S.W.2d 371, 371 (Tex. 1991); *Taylor v. Taylor*, 63 S.W.3d 93, 100 (Tex. App.—Waco 2001, no pet.). A request made in advance of the thirty day deadline under Rule 216 is presumed reasonable. *Id.* The opposing party, however, may rebut this presumption by showing that the granting of a jury trial would operate to injure the opposing party, disrupt the court’s docket, or impede the ordinary handling of the court’s business. *Id.*

The Supreme Court in *Halsell* stated that an untimely jury demand may become timely if a continuance of the initial trial setting is granted, thereby providing the requisite thirty day period. *Halsell*, 810 S.W.2d at 371-72. The trial court’s refusal to grant a jury trial will be reversed only if the record shows that material issues of fact existed and an instructed verdict would not have been justified, thereby causing harmful error. *Id.* at 372; also see *Taylor*, 63 S.W.3d at 102.

The Waco Court of Appeals held in *Taylor* that an incarcerated husband who filed a timely jury trial request in his divorce proceeding was entitled to a jury trial. There, the husband, along with his timely request for a jury trial, filed a declaration of his inability to pay the fee and requested a bench warrant to be present at the trial. *Taylor*, 63 S.W.3d at 101-02. The opposing party failed to rebut the presumption of his reasonable request with any evidence. The court of appeals ruled that the trial court’s denial of the husband’s request for a jury trial was an abuse of discretion. *Id.* at 101-02.

## M. STIPULATIONS AND AGREEMENTS

### 1. TEX. R. CIV. P. 11

Rule 11 provides that unless otherwise provided in the rules, no agreement between parties or attorneys touching any pending suit will be enforced unless it is in writing, signed and filed as part of the record, or made in open court. TEX. R. CIV. P. 11.

In *Kennedy v. Hyde*, 682 S.W.2d 525 (Tex. 1984), the Supreme Court held that compliance with Rule 11 was a prerequisite for any judgment enforcing an agreement in a pending lawsuit. This decision rejected

the notion that a settlement agreement that fails to comply with Rule 11 is enforceable as a contract. The Texas courts continue to hold that a settlement agreement must comply with Rule 11 in order to be enforceable.

## N. MASTER IN CHANCERY

### 1. Referral

Under Rule 171, a trial court may refer to a master only specific, pending matters in exceptional cases for good cause. TEX. R. CIV. P. 171; *In re Sheets*, 971 S.W.2d 745 (Tex. App.—Dallas 1998, orig. proceeding). However, if the parties agree, the court can make a referral without Rule 171's requirement. *Simpson v. Canales*, 806 S.W.2d 802, 810-11 (Tex. 1991).

A party who complains of a referral must timely object to the referral before taking part in the proceedings before the master. *Owens-Corning Fiberglass Corp. v. Caldwell*, 830 S.W.2d 622, 625 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding). Additionally, a party whose objection was overruled may seek mandamus relief. However, it must do so in a timely fashion. *In re Xeller*, 6 S.W.3d 618, 624 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding) (holding that a delay of sixteen months in challenging the master's appointment constituted a waiver).

## O. JUDICIAL NOTICE

The rules of evidence allow the court to take judicial notice of facts that are not subject to reasonable dispute. TEX. R. EVID. 201; *Hernandez v. Houston Lighting & Power Co.*, 795 S.W.2d 775, 776-77 (Tex. App.—Houston [14th Dist.] 1990, no writ).

### 1. When and How

Judicial notice can be taken at any time during the proceedings. TEX. R. EVID. 201(f). The burden convincing the court to take judicial notice is simple. It simply requires a request to the court, with an opportunity for the other side to respond, and supplying the court with the necessary information. TEX. R. EVID. 201(d).

### 2. Appeal

The court's decision of taking judicial notice is subject to appeal as any other evidentiary ruling. As a result, it is also subject to the harmless error rule. *Drake v. Holstead*, 757 S.W.2d 909, 911 (Tex.

*See Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex. 1995); *also see West Beach Marina, Ltd. v. Erdeljac*, 94 S.W.3d 248, 255 (Tex. App.—Austin 2002, no pet.).

App.—Beaumont 1988, no writ).

### 3. Foreign Law

Judicial notice is often used to prove-up the law of other states or foreign countries. This is entirely appropriate under Rule 202 & 203; but, is distinct from asking the court to make a choice-of-law determination. *See Pittsburgh Corning Corp. v. Walters*, 1 S.W.3d 759, 768 (Tex. App.—Corpus Christi 1999, pet. denied).

While the request to take judicial notice may be raised at any time, asking the court to apply the law of a foreign jurisdiction is subject to different rules. *Id.* The party requesting to apply the law of a foreign state or country must demonstrate the choice-of-law considerations, make a probable request to trial court and ask the court to take judicial notice of the foreign state's laws (including sufficient information for a court to be able to determine the law). *General Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 919-20 (Tex. 1983).

This exercise is even more difficult when one of the parties seek to have the court take judicial knowledge of the law of a foreign country. In that situation, the requesting party must furnish copies of all material used as proof of the foreign law both in the foreign language text and in the English translation. TEX. R. EVID. 203. Likewise, the notice must be provided at least 30 days before trial. *Exxon Corp. v. Breezedale Ltd.*, 82 S.W.3d 429, 437 (Tex. App.—Dallas 2002, pet denied).

The trial court's determination of what law to apply is subject to an appeal after final judgment. It is purely a question of law.

### 4. Texas Ordinances and Texas Register

Rule 204 allows the court to take judicial notice of the ordinances of the municipalities and counties in the State of Texas, the contents of the Texas Registry and the codified rules of state agencies published in the Administrative Code. TEX. R. EVID. 204.

## P. MOTIONS IN LIMINE

The general rule is that trial court's refusal to grant a motion in limine is not reversible error and preserves nothing for review. *Acord v. General Motors Corp.*, 669 S.W.2d 111, 116 (Tex. 1984). Instead, the

party must object when the evidence is actually offered at trial. On the other hand, the party seeking to introduce the evidence must introduce the evidence at trial even if the motion in limine is sustained. *Hartford Accident & Indemn. Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963).

In short, the mere granting of a motion in limine does not preserve error. A successful moving party must still object and obtain a ruling. *Norfolk Southern Ry. Co. v. Bailey*, 92 S.W.3d 577, 583 (Tex. App.—Austin 2002, no pet.).

A recent case demonstrates some of the problems with what we generally think of as pretrial motions in limine. *Huckaby v. A.G. Perry & Son, Inc.*, 20 S.W.3d 194 (Tex. App.—Texarkana 2000, pet. denied). In that case, the court denied a plaintiff's motion in limine and granted the plaintiff's counsel a running objection to the evidence from a specific witness. After an adverse judgment, the plaintiff appealed complaining of the admission of the evidence. The court of appeals recognized that motions in limine do not preserve error, but characterized the pretrial motion to exclude evidence as a "pretrial ruling on the admissibility of evidence." *Id.* at 204. Therefore, the court held that the pretrial motion preserved error.

### III. SELECTING A JURY

Much of the work of selecting jury panels happens behind the scenes. For example, petit juries may be selected in various ways pursuant to TEX. GOV'T CODE ANN. § 62.001-62.021. After these jurors are selected and summoned—the courts eliminate those jurors who are disqualified from serving, those who are entitled statutory exemptions and those few who may be excused due to a judge's discretion. The way that this is accomplished varies depending on whether the county is one with interchangeable juries (multiple courts) or counties without interchangeable juries (smaller counties).

#### A. CHALLENGE TO THE ARRAY

A challenge to the array is an obscure complaint that is made to protest a group of jurors drawn from either a jury wheel or other mechanical means. Rule 221 allows a challenge to be made in writing and supported by an affidavit, before a jury panel is drawn from the array. This technique is seldom used and is generally used only when unusual numbers of excuses are given to prospective jurors. The complaint must be made to the judge in charge of organizing and empaneling jurors at

the time the irregularity occurs. *State ex rel. Hightower v. Smith*, 671 S.W.2d 32, 36 (Tex. 1984). This generally happens behind the scenes in central jury rooms where counsel is seldom invited.

However, the Fort Worth Court of Appeals allowed the complaint to be made to the trial judge when it was discovered that the jury panel consisted largely of teachers who had been granted transfers of their jury service from March, April and May until June. *Mendoza v. Ranger Ins. Co.*, 753 S.W.2d 779, 780 (Tex. App.—Fort Worth 1998, writ denied). In that case, the court held that Rule 220 put an unreasonable and impracticable burden on a party who was asserting the constitutional complaint that the jury panel was impermissibly selected. *Id.*

In reality, bad things can happen with the full jury array in the central jury room. A good example is *Valezula v. St. Paul Ins. Co.*, 878 S.W.2d 667 (Tex. App.—San Antonio 1994, no writ). In that case, a judge, who was qualifying the array, and handling the exemptions and excuses, made "unfortunate" remarks about juries being tough on crime and "lawsuit abuse." *Id.* at 669.

#### B. JURY SHUFFLE

In counties with interchangeable juries, any party may demand that the jury panel be shuffled after assignment to a particular court and before voir dire. TEX. R. CIV. P. 223. A motion for shuffle must be granted, even if the clerk's office has scrambled or shuffled the juror's name before the assignment to a particular court. *S.C. v. State*, 715 S.W.2d 379, 382 (Tex. App.—San Antonio 1986, no writ). However, there is only one shuffle per case.

A denial of the jury shuffle is not automatically reversible error. Instead, the harmless error rule applies. *See Rivas v. Liberty Mut. Ins. Co.*, 480 S.W.2d 610, 611-12 (Tex. 1972).

The motion for shuffle must occur before voir dire begins. Otherwise, error is waived.

#### C. VOIR DIRE EXAMINATION

##### 1. Trial Court Discretion

No rule of procedure governs the content or time allowed for voir dire. Instead, control of voir dire is left to the trial court. *Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 91-92 (Tex. 2005); *Babcock v. Northwest*

*Mem. Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989); *TEIA v. Loesch*, 538 S.W.2d 435, 440 (Tex. Civ. App.—Waco 1976, writ ref’d n.r.e). The trial court does not abuse its discretion when not allowing counsel to ask all the questions he or she intended to ask, if counsel was given a fair opportunity to question the jury panel. *McCoy v. Wal-Mart Stores, Inc.*, 59 S.W.3d 793, 797 (Tex. App.—Texarkana 2001, no pet.).

**2. Determining Bias and Prejudice**

A juror is disqualified, by law, if he or she is biased or prejudiced in favor or against a party to a case. TEX. GOV’T CODE ANN. § 62.105(4). This bias, which disqualifies a prospective juror, against or in favor of a party, has been extended by judicial interpretations be bias for or against the subject matter of the suit. *Compton v. Henrie*, 364 S.W.2d 179, 182 (Tex. 1963).

However, proper bias inquiries has not been extended to the facts of a case so that a potential juror is disqualified for the weight he or she would give certain facts. See *Hyundai Motor Co. v. Vasquez*, 49 Tex. S.Ct. J. 420, 2006 WL 572207 (March 10, 2006); *Lassiter v. Bouche*, 41 S.W.2d 88, 90 (Tex. Civ. App.—Dallas 1931, writ ref’d). In *Hyundai*, the Texas Supreme Court noted that while broad latitude should be given to ferret out bias or prejudice – voir dire is not an opportunity to preview the facts of a case to the venire and use the process to seat a panel favoring only one side over another. *Hyundai Motor Co.*, 2006 WL 572207 at \*3. In that case, the court ultimately held a trial court does not abuse its discretion by refusing to permit improper commitment questions designed to pre-test the weight a potential juror might give a specific fact. *Id.* at \*5.

The record must conclusively establish a potential juror’s disqualification. *Buls v. Fuselier*, 55 S.W.3d 204, 210 (Tex. App.—Texarkana 2001, no pet.). Neither bias nor prejudice is presumed. Instead, even if potential jurors acknowledge the possibility of not being fair—the matter must be pursued until the court has good grounds to believe that the juror has a bias against one of the parties. *Id.* at 209.

The Texas Supreme Court recently ruled that verniremembers can be “rehabilitated” by counsel—even after expressing an apparent bias. *Cortez*, 159 S.W.3d at 91-92.

**3. Permissible Inquiries During Voir Dire**

- Prospective juror’s bias and prejudice in

favor or against a party in the case. TEX. GOV’T CODE ANN. § 62.105(4)(b).

- A party’s feeling on publicity generated by the debate over “tort reform” and “lawsuit crisis.” *Babcock*, 767 S.W.2d at 706.
- The statement of the facts from either party’s point of view. *Dallas Ry. Co. & Terminal Co. v. Flowers*, 284 S.W.2d 160, 163 (Tex. Civ. App.—Waco 1955, writ ref’d n.r.e.); *Lubbock Bus Co. v. Pearson*, 277 S.W.2d 186, 190 (Tex. Civ. App.—Amarillo 1955, writ ref’d n.r.e.).
- The potential juror’s likelihood of giving greater credibility to testimony from certain individuals rather than others. *Travelers Ins. Co. v. Beisel*, 382 S.W.2d 515, 518 (Tex. Civ. App.—Amarillo 1964, no writ).
- Prospective juror’s attitudes towards the purpose of punitive damages. *Haryanto v. Saeed*, 860 S.W.2d 913, 918 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

**4. Impermissible Inquiries During Voir Dire**

- Mention of matters that are not admissible into evidence. *Travelers Ins. Co. v. Deleon*, 456 S.W.2d 544, 545 (Tex. Civ. App.—Amarillo 1970, writ ref’d n.r.e.).
- Whether a party is or is not insured. *Dennis v. Hulse*, 362 S.W.2d 308, 309 (Tex. 1962).
- Comments which inform the jury the legal effect of their answers to certain questions. *Robinson v. Lovell*, 238 S.W.2d 294, 297-98 (Tex. Civ. App.—Galveston 1951, writ ref’d n.r.e.).
- Commitment Questions: As recently reaffirmed in the 2006 decision in *Hyundai Motor Co.*, Texas courts have

long held that it is improper to attempt to commit potential jurors to a particular verdict or damage figure. *Hyundai Motor Co.*, 2006 WL 572207 at \*3-8; *Cortez*, 159 S.W.3d at 94; see *Campbell v. Campbell*, 215 S.W. 134, 137 (Tex. Civ. App.—Dallas 1999, writ ref'd); *Texas General Indem. Co. v. Mannhalter*, 290 S.W.2d 360, 365 (Tex. Civ. App.—Houston 1956, no writ).

- Pretesting the Weight a Potential Juror Would Give Certain Evidence: Texas courts have also condemned attempts by advocates to learn the weight that a potential juror might give certain critical evidence. *Hyundai Motor Co.*, 2006 WL 572207 at \*3-8; *Lassiter*, 41 S.W.2d at 90.

## 5. Equalizing Peremptory Challenges

Each party is entitled to six peremptory challenges in the district court and three in the county court. TEX. R. CIV. P. 233. In multiple party cases, the trial judge must determine whether any of the parties aligned on the same side of the docket are antagonistic with respect to any issue to be submitted to the jury. TEX. R. CIV. P. 233. This determination must be made before the exercise of peremptory challenges.

If the court determines from the pleadings, pretrial discovery and other information brought to the attention of the court, that antagonism exists—the court may equalize the strikes to each “side” to avoid unfairness. *Id.*; *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914, 917 (Tex. 1979). The determination of antagonism is one of law. *Id.* If no antagonism exists, each side (not party) must receive the same number of strikes. On the other hand, if antagonism does exist—the court may equalize strikes on the motion of any party. See *Garcia v. Central Power & Light Co.*, 704 S.W.2d 734, 736 (Tex. 1986).

The determination of antagonism can be difficult for a trial judge and some zealous advocates have been able to successfully conceal the lack of antagonism until after jury selection. *Van Allen v. Blackledge*, 35 S.W.3d 641, 644-45 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). In that case, the defendants claimed antagonism and each received six strikes giving the defense twelve peremptory challenges. However, the defendants evidently made an agreement in exercising the peremptory challenges. One started from the top of the

venire list while the other exercised its strikes from the bottom. *Id.* As a result, there were no double strikes. Understandably, the plaintiff’s lawyer objected and asked for a mistrial. The Houston Court found that the request for a mistrial, which came after the strikes were exercised was not too late to preserve error.

## 6. Preservation of Error

**a. Challenges for Cause:** An objection to a challenge for cause must be made before the parties make their peremptory strikes. *Carpenter v. Wyatt Constr. Co.*, 501 S.W.2d 748, 750 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref’d n.r.e.). In this regard, Rule 228 requires the trial court to decide a challenge for cause before peremptory challenges are made.

**i. Grant for a Challenge for Cause:** If a court grants a challenge for cause—a party must object before peremptory challenges and provide a record to the appellate court that demonstrates that no challenge for cause was necessary.

**ii. Overruling a Challenge for Cause:** If a court overrules a challenge for cause, a party must object after the conclusion of voir dire but before the jury is seated. The complaining party must exhaust all of its peremptory challenges and advise the court that a peremptory strike is being used to strike the potential juror who should have been disqualified for cause. Then the party must inform the court that the peremptory challenge would otherwise have been used to strike a specific panel member who will now be seated as a juror. *Cortez*, 159 S.W.3d at 90-91; *Hallet v. Houston Northwest Med. Center*, 689 S.W.2d 888, 890 (Tex. 1985).

**b. Equalization of Peremptory Strikes:** A complaint about a challenge for cause after peremptory challenges have been exercised comes too late. The best example is *Dunlap v. Excel Corp.*, 30 S.W.3d 427 (Tex. App.—Amarillo 2000, no pet.). In that case, the parties exercised their peremptory challenges. One party renewed its objection to the failure to discharge one juror for cause. The judge reconsidered and granted an additional peremptory challenge to the party. The court of appeals ruled this objection came too late and reversed the trial court’s judgment. *Id.* at 433.

The complaining party should raise concerns with the trial court about the equalization of the strikes and indicate to the court which jurors it will be forced to take if it cannot use the additional strikes. Only a few

complaints on appeal have been successful. In order to prevail, a party must show that the allocations of strikes was “materially unfair.” *Lopez v. Foremost Paving, Inc.*, 709 S.W.2d 643, 644-45 (Tex. 1986). To make such a showing, the court looks at the entire record to determine whether an error in awarding strikes resulted in an unfair trial.

## 7. Batson Challenges

In 1986, the United States Supreme Court determined that the equal protection clause forbids that prosecutors challenge to potential jurors solely on the account of their race. *Batson v. Kentucky*, 476 U.S. 79 (1986). In 1991, the United States Supreme Court applied *Batson* to civil cases. *Edmonson v. Leesville Concrete, Inc.*, 500 U.S. 614 (1991).

Naturally, a Batson complaint does not become necessary until after the peremptory challenges are exercised. However, before the jury is seated—the objection must be made. In other words, if an objection is raised after the remainder of the venire panel is discharged—the Batson challenge is waived. *Pierson v. Noon*, 814 S.W.2d 506, 508 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

Once the objection is raised, the Batson proceeding must be held in open court and the court must afford the parties an opportunity to fairly present their positions. *Goode v. Shoukfeh*, 943 S.W.2d 441, 445-46 (Tex. 1997). In *Goode*, the Texas Supreme Court explained the three steps of the Batson process.

**a. Step One:** The complaining party must establish that the peremptory challenge was directed towards a venire person who is a member of a minority or other protected class. The complaining party must also demonstrate that the peremptory challenge itself raises an inference that the opposing party used the strike to exclude veniremen on account of their protected class. In doing so, the complaining party can point out that the opposing party struck all members of a protected class or that the examination revealed an intent to exclude members of the protected class. In analyzing this step, courts tend to look at the pattern of peremptory strikes. If they are made primarily against members of a protected class—a prima facie case is made. *Texas Tech Univ. Health Science Ctr. v. Apodaca*, 876 S.W.2d 402, 408-09 (Tex. App.—El Paso 1994, writ denied).

**b. Step Two—Neutral Explanation:** If the complaining party provides a prima facie case of discrimination, the burden shifts to the party who

exercised the strike to come forward with a race-neutral explanation.

The issue at this stage is the facial validity of the explanation—not whether the court believes it. A neutral explanation is one that explains the challenge was based from something other than the juror’s status in a suspect class. Such neutral explanations have been contradictions in answers to voir dire questions, juror attentiveness, and friendship or acquaintance with party or counsel.

**c. Step Three—Determining Purposeful Discrimination:** In the third step, the trial court must determine whether the explanation offered by the party who exercised their peremptory challenge is plausible or is pretext for purposeful discrimination. *Goode*, 943 S.W.2d at 445-46. In making this determination, the court can look to many things, including (1) the reason given for the peremptory challenges as related to the facts of the case; (2) whether there was a lack of questioning to challenge a juror or (3) whether the responses of various veniremen to voir dire questions were given disparate treatment. *Id.*

## 8. Preserving Error on the Trial Court’s Refusal to Allow Further Questioning

A trial court may not foreclose a proper line of voir dire questioning, presuming the questions are proper. *Hyundai Motor Co.*, 2006 WL 572207 at \*8. The Texas Supreme Court in *Hyundai* stated to preserve a complaint that the trial court improperly restricted voir dire, a party must timely alert the trial court as to the specific manner in which he intends to pursue further questioning. *Id.* In *Hyundai*, following plaintiff’s general voir dire questioning about seat belt usage, the defendant objected to the plaintiff’s proposed line of questions involving case-specific facts about seat belts. The defendant claimed such questions were an attempt to pretest the jurors on an ultimate issue in the case involving seat belts. *Id.* at \*6. The trial court sustained the objection and elected to close any further questioning on seat belt usage whatsoever. *Id.*

The plaintiff complained that the trial court, in contradiction to a earlier rulings, improperly restricted all further questioning on the topic of seat belts to the individual veniremen. *Id.* at \*8. However, the Supreme Court ruled the plaintiff did not identify the specific manner in which she intended to pursue further inquiry on this seat belt topic. *Id.* The Court held that when the trial court restricts further questions because the subject is confusing or attempts to pre-test the jurors, a party

must propose a different question or different area of inquiry; absent such effort, the trial court is not required to formulate the question for them. *Id.* Accordingly, error is not preserved. *Id.*

In sum, under *Hyundai*, if the trial court restricts a line of questioning, to preserve error counsel must adequately identify at that time what line questions it intends to pursue. Otherwise, the trial court cannot evaluate whether the specific line of proposed questions is objectionable.

#### IV. TRIAL RULINGS

##### A. EXCLUSION AND ADMISSION OF EVIDENCE

###### 1. Objections

**a. Specific Objections:** Generally, an erroneous admission of evidence requires a timely and specific objection to preserve error for appeal. TEX. R. APP. P. 33.1; *Warrantech Corp. v. Computer Adapters Servs. Inc.*, 134 S.W.3d 516, 529 (Tex. App.—Fort Worth, 2004) *rule 53.7(f) motion granted* (May 27, 2004). The objection must clearly state the grounds of the objection and the evidence it seeks to exclude. TEX. R. APP. P. 33.1. The test of specificity is whether the objection can be clearly understood by the court and opposing party. Ultimately, an objection to evidence cannot be heard for the first time on appeal. *Prati v. New Prime, Inc.*, 949 S.W.2d 552, 554 (Tex. App.—Amarillo 1997, pet. denied) (objection to expert testimony is not preserved for appellate review even though admission violated the limine order).

**b. Partly Admissible Evidence:** The burden is on the offering party to remove inadmissible portions of the evidence before the offer can be allowed. The landmark case of *Hurtado v. Texas Employers' Ins. Ass'n*, 574 S.W.2d 536 (Tex. 1978) demonstrates this issue. In *Hurtado*, the insurance company offered into evidence four exhibits of complete medical records of the plaintiff containing a plethora of notes, reports and medical documents. *Id.* at 537. The plaintiff objected that the offer included matters of hearsay, inadmissible opinion, and suggested it was incumbent upon the offeror to eliminate those items. Defense counsel suggested that the plaintiff should object to the specific material he found objectionable. *Id.* The trial court allowed the evidence to be admitted for all purposes. *Id.* at 538. The Supreme Court, reviewing the evidence, found many entries in the medical records

inadmissible, but also found a substantial portion of the offer to be admissible. However, the court ruled the records as a whole were inadmissible—indicating that it is incumbent on the offeror to weed out inadmissible evidence. *Id.* Otherwise, the entire offer might fail.

###### c. Limited Purpose Doctrine:

Evidence admitted without objection or limitation is an offer for all purposes. *Owens-Corning Fiberglass Corp. v. Keeton*, 922 S.W.2d 658, 660 (Tex. App.—Austin 1996, pet. denied). On the other hand, if evidence is admissible for one purpose and not another, the offeror bears the burden of obtaining a limiting instruction. *Larson v. Cactus Utility Co.*, 730 S.W.2d 640, 642 (Tex. 1987). If the offeror fails to limit his own offer, no error is preserved. *Id.*

**d. Timeliness:** The general rule is that objections must be made at the earliest opportunity. *Hoxie Implement Co., Inc. v. Baker*, 65 S.W.3d 140, 145 (Tex. App.—Amarillo 2001, pet. denied). Despite this rule, some complications can result. For example, when prior similar testimony is admitted without objection, a later objection to similar testimony will be unsuccessful. *Ramirez v. H.E. Butt Grocery Co.*, 909 S.W.2d 62, 69 (Tex. App.—Waco 1995, writ denied). By the same token, objections to testimony must be made each time an attempt is made to introduce the evidence—and a prior objection will not preserve error. *Bushell v. Dean*, 803 S.W.2d 711, 712 (Tex. 1991). The exception is the well-known “running objection.” See *Leaird's Inc. v. Wrangler, Inc.*, 31 S.W.3d 688, 690 (Tex. App.—Waco 2000, pet. denied). Running objections can be dangerous; however, if there is confusion as to the exact line of questioning or specific witnesses to which the running objection applies. *Id.*; *Davis v. Stallones*, 750 S.W.2d 235, 238 (Tex. App.—Houston [1st Dist.] 1987, no writ). As a result, the best practice might be to have an agreement with the court that a running objection to a particular line of questioning or witness is acceptable, and obtain a ruling sustaining the running objection on the record. *Freedman v. Briarcroft Prop. Owners, Inc.*, 776 S.W.2d 212, 217 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

**e. Necessity of a Ruling:** It is axiomatic that there must be a ruling expressly overruling the objection in order to preserve the point for appellate review. TEX. R. APP. P. 33.1(a)(2)(A). In short, to preserve error, both the objection and ruling must appear in the record. *Rodriguez v. Hyundai Motor Co.*, 944 S.W.2d 757, 768 (Tex. App.—Corpus Christi 1997), *rev'd on other grounds*, 995 S.W.2d 661 (Tex. 1999). However, difficulty arises when trial judges are slow to

rule or ignore the objection in hopes that a witness' answer will cause the objection to "disappear." Nonetheless, the court has a duty to rule promptly on all objections. Counsel should therefore tactfully press for a ruling from the court to properly preserve error. A ruling is implicit; however, if it is unexpressed but capable of being understood from something else. *Well Solutions Inc. v. Stafford*, 32 S.W.3d 313, 316 (Tex. App.—San Antonio 2000, no pet).

## 2. Evidence Not Disclosed in Discovery

The 1999 amendments to the Rules of Civil Procedure significantly changed the standards of admitting evidence not disclosed in discovery. TEX. R. CIV. P. 193.4(c); 193.6.

Under Rule 193.6, evidence not timely disclosed in response to a proper discovery response is not admissible unless the court finds either: (1) good cause for the failure to timely make, amend or supplement discovery responses; or (2) the failure to timely make, amend or supplement discovery responses will not surprise or unfairly prejudice other parties. TEX. R. CIV. P. 193.6. The unfair surprise element lessens the burden on the party failing to disclose. *Elliott v. Elliott*, 21 S.W.3d 913, 921 n.7 (Tex. App.—Fort Worth 2000, pet. denied).

Courts are still struggling to determine what constitutes unfair surprise under the new rules. *Ersek v. Davis & Davis, P.C.*, 69 S.W.3d 268, 271-72 (Tex. App.—Austin 2002, pet. denied) (unfair surprise not shown because untimely disclosed expert required for cause of action and because plaintiff offered defendant access to depose expert); *Mares v. Ford Motor Co.*, 53 S.W.3d 416, 418 (Tex. App.—San Antonio 2001, no pet.) (no unfair surprise in incomplete disclosure of experts where all expert opinions had previously been disclosed); *Elliott*, 21 S.W.3d at 921 (plaintiff's pleadings placed mental health at issue and listed health care providers in discovery responses, therefore no surprise or prejudice to plaintiff in defendant's failure to identify medical experts in discovery responses).

On the other hand, Rule 193.4's language is more specific. It simply states that, "A party may not use—at any hearing or trial—material or information withheld from discovery under a claim of privilege . . ." Therefore, if a party makes a claim of privilege for written discovery and therefore withholds the document—it cannot later produce or use that evidence at the time of trial without timely amending or supplementing the discovery response. Arguably, Rule

193.4 only applies to written discovery. Nonetheless, the rule is absolute.

Importantly, the party seeking to limit discovery under Rule 193.4 has the burden of producing evidence to support its privilege. *In re Crestcare Nursing and Rehabilitation Ctr.*, \_\_S.W.3d\_\_, 2006 WL 408226 \*4-5 (Tex. App.—Tyler, Feb. 22, 2006) (trial court did not abuse its discretion in ordering nursing home to turn over personnel files before conducting an *in camera* inspection where nursing home failed to demonstrate evidence to support non-disclosure).

## 3. Offers of Proof

In instances where evidence is suppressed by the trial court, an offer of proof is necessary to preserve error in the of evidence. The purpose of the offer is to demonstrate to the appellate court the substance of the excluded testimony. *Ludlow v. DeBerry*, 959 S.W.2d 265, 26-70 (Tex. App.—Houston [14th Dist.] 1997, no writ); *also see Hooper v. Chittaluru*, \_\_S.W.3d\_\_, 2006 WL 771390 \*2 (Tex. App.—Houston [14<sup>th</sup> Dist.] March 28, 2006) (trial court erred when it prohibited plaintiff from calling medical expert retained by defendants; plaintiff submitted expert's entire deposition as offer of proof over no objection that the offer was cumulative).

Several methods for making the offer of proof are available. For example, it is appropriate to make an offer of proof that is not in the standard question and answer form. Instead, summary judgment evidence may be read into the record rather than a lengthy question and answer testimony. However, the court may request an offer be in question and answer form, and the non-movant may also request the same. TEX. R. EVID. 103(b). In some instances, where the reporter is unavailable, formal bills of exception may be used—although cumbersome and less popular.

## 4. DAUBERT OBJECTIONS

The Supreme Court has recently resolved a simmering debate on whether objections to expert testimony must be made at the trial court in order to preserve a factual sufficiency challenge on appeal. *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.2d 227 (Tex. 2004). The debate originated with the Supreme Court's holding in *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 411 (Tex. 1998). In that case, the Supreme Court held that to preserve a no evidence/insufficient evidence complaint based on a *Daubert* claim—a *Daubert* objection was necessary to the trial court. *Id.* at 409 ("[t]o preserve a complaint that

scientific evidence in unreliable and thus, not evidence, a party must object to the evidence before trial or when the evidence is offered).

In *Coastal*, the complaint on appeal was that the expert's testimony on punitive damages, that the defendant both subjectively and objectively appreciated the extreme risk of harm, was conclusion and speculation. *Coastal*, 136 S.W.3d at 231-32. As a result, the defendant claimed that it amounted to no evidence. The plaintiff countered that the complaint was waived because there had been no objection at trial.

The Supreme Court disagreed and held that no objection "is needed to preserve a no evidence challenge to conclusory expert testimony." *Id.* at 232.

The court explained that *Maritime Overseas* does require an objection if the reliability challenge requires the trial court, "to evaluate the underlying methodology, technique or foundational data used by the expert." *Id.* at 233. This is because the trial court must have the opportunity to conduct that investigation. On the other hand, where the objection is that the expert has reached a conclusion or his opinion was speculation—no trial objection is necessary because, "on the face of the record, the evidence lacked probative value." *Id.*

## B. DIRECTED VERDICT

The trial court may remove the case from the jury and direct or instruct a verdict for either party when reasonable minds cannot differ on the conclusions drawn from the evidence. TEX. R. CIV. P. 268; *Jim Arnold Corp. v. Bishop*, 928 S.W.2d 761, 769 (Tex. App.—Beaumont 1996, no writ). Although scarcely mentioned in the rules, a large body of case law has developed around the directed verdict practice.

### 1. Time for Requesting Directed Verdict

The motion for directed verdict may be made twice at trial. First, the motion may be made at the conclusion of the non-movant's case. If overruled, any complaint of the denial of the first motion is waived when the movant proceeds with his own evidence. *Arroyo Shrimp Farm, Inc. v. Hung Shrimp Farm, Inc.*, 927 S.W.2d 146, 151 (Tex. App.—Corpus Christi 1996, no writ); *Jacobini v. Hall*, 719 S.W.2d 396, 398 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.). Second, the motion may be re-urged at the close of all the evidence. This second motion must be ruled upon before the jury returns a verdict. *Encina Partnership v. Corenergy, L.L.C.*, 50 S.W.3d 66, 68 (Tex. App.—Corpus Christi

2001, pet. denied) (where jury is deadlocked and no mistrial has been entered, trial court may reconsider and order directed verdict); *Nelson v. Data Terminal Sys. Inc.*, 762 S.W.2d 744, 748-49 (Tex. App.—San Antonio 1988, writ denied) (same). Appellate courts have ruled that a motion for directed verdict need not be in writing if the grounds are specifically stated. *Dillard v. Broyles*, 633 S.W.2d 636, 645 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.).

### 2. Review

If a motion for directed verdict is granted, several rules apply. Review of the directed verdict is limited to consideration of the evidence presented at the time the motion was granted and does not necessarily include a review of all the evidence in the case. *Safway Scaffold Co. of Houston, Inc. v. Safway Steel Prods., Inc.*, 570 S.W.2d 225, 229 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.). The standard of review for the granting of a motion for directed verdict is strict. The court must consider all evidence in the light most favorable to the non-movant, disregarding all contrary evidence and inferences. *S.V. v. R.V.*, 933 S.W.2d 1, 8 (Tex. 1996). When the trial court directs a verdict against the party bearing the burden of proof, the burden is on that party to demonstrate that evidence was presented on each and every element of the cause alleged in the pleadings. See *Jim Arnold Corp.*, 928 S.W.2d at 770.

### 3. Preserving Counterclaims

Additionally, defendants moving for directed verdict may waive their right to recover on counterclaims under certain circumstances. *Perl v. Patrizi*, 20 S.W.3d 76, 81 (Tex. App.—Texarkana 2000, pet. denied). In *Perl*, the defendants moved for a directed verdict at the close of the plaintiff's case. However, the defendants had also filed counterclaims—which they failed to support with proof. *Id.* The trial court granted the defendants a directed verdict that the plaintiffs take nothing and dismissed the jury. On appeal, the defendants urged that the trial court should have rendered judgment on its counterclaims. The court of appeals disagreed. The appellate court held that the defendants waived a right to recover on counterclaims by requesting directed verdict before presenting evidence of counterclaims to the jury, informing the court of desire to proceed on counterclaims and failing to request severance of counterclaims. *Id.*

## V. PRESERVATION OF CHARGE ERROR

The general rules on preserving charge error have

not changed. Practitioners and courts, however, continue to struggle with how to apply those rules in practice. This section discusses the basic requirements of preservation and recent decisions construing those provisions.

**A. FUNDAMENTAL ERROR DOES NOT ELIMINATE THE BURDEN TO PRESERVE ERROR**

In a series of termination of parental rights cases, parties argued that broad-form issues did not require ten-juror agreement on the same grounds of termination and thus denied constitutional due process guarantees. In that set of cases the parties argued that such error was so fundamental as to not require preservation. The Supreme Court, in a well-reasoned opinion, rejected that fundamental error argument and held unpreserved charge error (including alleged error as to broad-form issues) will not be reviewed on appeal. *In re B.L.D.*, 113 S.W.3d 340, 354-55 (Tex. 2003). Instead, traditional rules of preservation apply even in the constitutional context. *Id.*

**B. PRESERVING COMPLAINTS ABOUT THE CONTENT OF THE CHARGE**

**1. The Rules of Procedure**

The Texas Rules of Civil Procedure set forth the following seemingly simple rules of preservation:

- a. *Defective* Question, Definition, or Instruction: Object
- b. *Omitted* Definition or Instruction: Request
- c. *Omitted* Question—
 

Party’s Burden:	Request
Opponent’s Burden:	Object

TEX. R. CIV. P. 274, 278, 279; *see Lyles v. TEIA*, 405 S.W.2d 725, 727 (Tex. Civ. App.—Waco 1966, writ ref’d n.r.e.) (explaining requirements of rules); *see also Mason v. Southern Pac. Transp. Co.*, 892 S.W.2d 115, 117 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (written request serves same purpose as objection and thus in case of omitted question on which party does not hold the burden, request suffices).

Prior to *State Dept. of Highways & Public Transp. v. Payne*, 838 S.W.2d 235 (Tex. 1992), some courts held that the Rules require that a party request *and* object, at least in certain situations. *See, e.g., Jim Howe Homes, Inc. v. Rogers*, 818 S.W.2d 901, 903 (Tex. App.—Austin 1991, no writ) (party who would benefit

from addition of limiting instruction to damage question must object to deficiency as submitted and request limiting instruction); *Wright Way Constr. Co. v. Harlingen Mall Co.*, 799 S.W.2d 415, 418 (Tex. App.—Corpus Christi 1990, writ denied) (party who requests question, definition or instruction on which that party relies must also object).

Those courts generally relied on two rules to require an objection and a request: (1) Rule 274 provides that “[a]ny complaint . . . on account of an omission . . . is waived unless specifically included in the objections,” and (2) Rule 278 requires a party relying on a question to submit a request. *See, e.g., Wright Way*, 799 S.W.2d at 418. Moreover, when a party will benefit from a question, instruction or definition, courts have generally required the relying or benefitting party to make the trial court aware of the complaint by an articulated objection to avoid building error in the record with unexplained requests. *See Id.*

As a result, knowing when to object and/or request (particularly in a broad-form context) was historically a difficult task. Some practitioners chose to always do both—object and request. Although *Payne* sought to eliminate some of the procedural difficulty associated with preservation, even under *Payne*, parties may want to continue to object and request, at least in some circumstances.

**2. Preservation by Request**

**a. Separate from Objections:** “A request by either party for any questions, definitions, or instructions shall be made separate and apart from such party’s objections to the court’s charge.” TEX. R. CIV. P. 273; *see Woods v. Crane Carrier Co.*, 693 S.W.2d 379-80 (Tex. 1985) (request dictated into record during objections did not preserve complaint).

**b. Tendered to the Court in Writing:** All requests must be tendered to the court in writing. TEX. R. CIV. P. 278; *see Woods*, 693 S.W.2d at 379-80 (request dictated into record did not preserve complaint).

**c. In Substantially Correct Wording:** All written requests must be tendered to the trial court in substantially correct wording. TEX. R. CIV. P. 278; *Placencio v. Allied Indus. Int’l, Inc.*, 724 S.W.2d 20, 21 (Tex. 1987) (“[Substantially correct] means one that in substance and in the main is correct, *and that is not affirmatively incorrect*”); *see also Union Pac. R.R. Co. v. Williams*, 85 S.W.3d 162, 169-70 (Tex. 2002) (8th

Circuit pattern charge on foreseeability in substantially correct form); *Town of Flower Mound v. Teague*, 111 S.W.3d 742 (Tex. App.—Fort Worth 2003, pet. denied) (requested instructions that misstated causation standard for whistleblower claim and failed to track statute not in substantially correct form); *Saenz v. David & David Constr. Co.*, 52 S.W.3d 807 (Tex. App.—San Antonio 2001, pet. denied) (holding premises defect request not in substantially correct wording without instruction or question on control of independent contractor); *Perez v. Weingarten Realty Investors*, 881 S.W.2d 490, 493 (Tex. App.—San Antonio 1994, writ denied) (instruction too vague renders it affirmatively incorrect); *Greenstein, Logan & Co. v. Burgess Mktg., Inc.*, 744 S.W.2d 170, 180 (Tex. App.—Waco 1987, writ denied) (failure to fix burden of proof affirmatively incorrect). Relying on *Payne*, some courts (particularly if other parts of the record demonstrate the trial court understood the issue) may now give a slightly broader latitude as to how correct a request must be.

**d. Not Obscured or Concealed with Minute Variations and Numerous Unnecessary Requests:** “When the complaining party’s . . . requested question, definition, or instruction is, in the opinion of the appellate court, obscured or concealed by . . . minute differentiations or numerous unnecessary requests, such . . . request shall be untenable.” TEX. R. CIV. P. 274.

Relying upon *Payne*’s preservation test, the Supreme Court held that a pre-trial submission of a complete charge did not necessarily “obscure” a request but, could instead suffice to preserve error. *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 451 (Tex. 1995). The trial court, however, had submitted part of the proposed charge, which the Supreme Court found made it clear that the trial court was aware of the plaintiff’s request for a finding on future lost profits. The plaintiff also objected to the omission. *Id.*

Without the separate oral reference, some courts continue to reject “en masse” filings to preserve error—reasoning that such filings do not make the trial court aware of the complaint. *Luensmann v. Zimmer-Zampese & Assocs., Inc.*, 103 S.W.3d 594, 599 (Tex. App.—San Antonio 2003, no pet.) (written objections with check marks and oral statement that no objections other than written insufficient to preserve error); *Riddick v. Quail Harbor Condominium Ass’n*, 7 S.W.3d 663, 673 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (submitting entire charge not sufficient to preserve error under *Alaniz* or *Liedeker* when record did not show court ruled, in writing or orally, or was otherwise aware of the proposed requests).

In other words, an appellate court might find preservation if the record is clear as to a party’s complaint but no modification to eliminate the complaint was made to the charge (which is another reason a party may choose to both object and request).

**e. Signed as Refused:** To preserve error, a judge should endorse requests as “Refused” or “Modified as follows:” and sign the same officially. TEX. R. CIV. P. 276. Endorsement is the preferred, but perhaps not the only, means of preserving error for refusing a request. *Dallas Market Ctr. Dev. Co. v. Liedeker*, 958 S.W.2d 382, 386-87 (Tex. 1997) (finding that trial court’s statement on the record that the court would note its refusal on the requests preserved error despite the fact that the court never endorsed and signed the requests). This potential fall-back explains why a party may still choose to object with a request—even if the requests somehow end up unsigned, the party may still have the error preserved by also objecting on the record.

### 3. Preservation by Objection

**a. Separate from Requests:** “A request by either party for any questions, definitions, or instructions shall be made separate and apart from such party’s objections to the court’s charge.” TEX. R. CIV. P. 273.

**b. In Writing or on the Record:** “[O]bjections shall in every instance be presented to the court in writing, or be dictated to the court reporter in the presence of the court and opposing counsel, before the charge is read to the jury.” TEX. R. CIV. P. 272.

**c. Pointing out the Objectionable Matter:** An objection “must point out distinctly the objectionable matter.” TEX. R. CIV. P. 274. That is, the objection must identify *what* part of the question, instruction, or definition is objectionable. *See Castleberry v. Branscum*, 721 S.W.2d 270, 276-77 (Tex. 1986); *Carlton v. Cobank, Inc.*, 2003 WL 1728493 (Tex. App.—Amarillo 2003, pet. denied) (failing to explain how question was erroneously waived error).

**d. Stating the Ground(s):** An objection must point out “the grounds of the objection.” TEX. R. CIV. P. 274. That is, a party must give the reasons *why* the part of the a matter is objectionable.

General objections do not suffice. *See, e.g., City of Brenham v. Honerkamp*, 950 S.W.2d 760, 766 (Tex. App.—Austin 1997, writ denied) (objection that definition “not the law in Texas” insufficient); *Ron Craft*

*Chevrolet, Inc. v. Davis*, 836 S.W.2d 672, 675 (Tex. App.—El Paso 1992, writ denied) (objection that “no pleadings to support the submission” so broad as to be meaningless).

The objection at trial must also match the complaint on appeal. *See, e.g., Celanese Ltd. v. Chem. Waste Mgmt., Inc.*, 75 S.W.3d 593, 600-01 (Tex. App.—Texarkana 2002, pet. denied) (objection that the measure of damage is improper does not match complaint that some elements of damage are omitted and thus does not preserve complaint on omission); *El Paso Ref., Inc. v. Scurlock Permian Corp.*, 77 S.W.3d 374, 383 (Tex. App.—El Paso 2002, pet. denied) (“party confined to jury instruction objection made at trial; any variant complaint on appeal is waived”).

**e. Not Incorporated from One Part of Charge to Apply to Another Part of Charge:** “No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only.” TEX. R. CIV. P. 274. A party should specifically identify by objection for each question, instruction, or definition what is objectionable and why.

**f. Not Obscured or Concealed with Voluminous or Unfounded Objections:** “When the complaining party’s objection . . . is, in the opinion of the appellate court, obscured or concealed by voluminous unfounded objections, . . . such objection . . . shall be untenable.” TEX. R. CIV. P. 274.

**g. Ruled upon by the Court:** The court should “endorse the rulings on the objections if written or dictate the same to the court reporter in the presence of counsel.” TEX. R. CIV. P. 272. Rule 272, though, presumes that “the party making the objections presented the same at the proper time and excepted to the ruling thereon.” TEX. R. CIV. P. 272. As a result, the Supreme Court held that “if an objection is articulated and the trial court makes no change in the charge, the objection is, of necessity, overruled.” *Acord v. General Motors Corp.*, 669 S.W.2d 111, 114 (Tex. 1984).

#### 4. Making the Court Aware of the Complaint—Object and Request?

The Texas Supreme Court adopted the following litmus test (drawn from the above rules read together) for charge error preservation: Did the trial court know of and overrule the substance of the complaint at a time when the court could have (but did not) correct the problem in the charge? *See Payne*, 838 S.W.2d at 235; *see also Liedeker*, 958 S.W.2d at 387 (holding that to

make endorsement sole means of preserving complaint on request would elevate form over substance and would “be ill advised”). Thus, under *Payne*, preservation requires that the record clearly reflect that the trial court understood the complaint but chose not to change the charge. According to some courts, that test still means a party must tender requests in some circumstances.

**a. Repetition at Each Opportunity:** When a pre-charge complaint is necessary, a party may decide to state its complaint whenever it gets the chance—early, often, orally and in writing—all designed to “make the court aware” of the nature of the party’s complaint. For example, in *S.E. Pipe Line Co. v. Tichacek*, 997 S.W.2d 166, 172-73 (Tex. 1999), the Supreme Court held that a trial court’s failure to include a “pre-pooling” limiting instruction rendered the question defective in an oil and gas drainage case. The lessors argued that error was waived by a failure to object to the drainage issue. In deciding whether the error was preserved, the court looked to the entire record, not just the charge conference and requests.

Relying on *Payne*, the court noted that counsel had first raised the issue when asking to bifurcate the drainage issue from a bad-faith pooling claim. *Id.* Counsel further explained in detail the need to segregate the pooling and drainage issues in the charge when the court asked for a proposed charge. *Id.* While noting that those complaints at that early stage alone would not suffice, the court found that a re-urged objection at the charge conference to first submit the pooling issues before determining if any need existed to submit the drainage issue properly preserved the error. *Id.*

In other words, after counsel explained the issue three times to the court, those explanations satisfied *Payne* by making the trial court plainly aware of the impact of the pooling issues on the drainage issue—even though counsel did not object at the charge conference to the form of the drainage question or make a written request to add a limiting instruction to the question.

**b. Objection Only:** Objections continue to suffice for defective submissions. *See, e.g., Holubec v. Brandenberger*, 111 S.W.3d 32, 39 (Tex. 2003) (although request did not “precisely” track the statutory language, objection sufficient to preserve complaint about defect in nuisance question); *Miga v. Jensen*, 96 S.W.3d 207, 212-13 (Tex. 2002) (“Twice during the charge conference [the defendant] asserted that [the plaintiff’s] damages were limited to the value of the stock at the time of breach; the trial court interrupted [the defendant] the second time, saying, ‘you’ve got your

objection on the record.”); *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000) (objection to entire question that plaintiff did not have consumer standing to bring any DTPA-based Article 21.21 claims sufficiently specific to preserve error and objection to each sub-part of same question on identical grounds not necessary to preserve error).

**c. Request with Objection:** Many courts using the less harsh preservation test of *Payne* now look to both the objections and requests (usually in combination) to decide if a party preserved error, particularly when a request clarifies an objection or an objection clarifies a request. In other words, if a party tendered a request, *Payne* is more likely to help preserve error. See, e.g., *Primrose Op. Co. v. Jones*, 102 S.W.3d 188, 198 (Tex. App.—Amarillo 2003, pet. denied) (filed list of questions, instructions and definitions discussed at charge conference sufficient to preserve error); *Samedan Oil Corp. v. Intrastate Gas Gathering, Inc.*, 78 S.W.3d 425, 452-53 (Tex. App.—Tyler 2001, pet. dismissed by agr.) (written objection to proposed charge, oral reference of court to same written objections with final charge, and written request on same all combined to preserve error); *Doe v. Mobile Video Tapes, Inc.*, 43 S.W.3d 40, 50 (Tex. App.—Corpus Christi 2001, no pet.) (citing *Payne* [and pre-*Payne* cases] and finding error preserved by objection, argument to court, and request); *Gen. Agents Ins. Co. of Am., Inc. v. Home Ins. Co. of Am.*, 21 S.W.3d 419, 425 (Tex. App.—San Antonio 2000, pet. dismissed by agr.) (objection that did not clearly state the grounds sufficient to preserve error when request clarified grounds for complaint); *Smith-Hamm, Inc. v. Equipment Connection*, 946 S.W.2d 458 (Tex. App.—Houston [14th Dist.] 1997, no writ) (objections and simple request “made the trial judge aware of its complaint, timely and plainly” when neither the case nor the complaint was difficult).

Discussions at the informal charge conference referenced during the formal charge conference have also assisted with establishing preservation under *Payne*. See *In re Stevenson*, 27 S.W.3d 195, 202 (Tex. App.—San Antonio 2000, pet. denied) (despite court responding to objection with “all right” rather than ruling, record indicated requested instruction discussed with trial court during informal charge conference and read into record during formal charge conference sufficed to preserve error under *Payne*); *Green Tree Fin. Corp. v. Garcia*, 988 S.W.2d 776, 783-84 (Tex. App.—San Antonio 1999, no pet.) (refusing to rely on distinction between informal and formal charge conferences and holding that objection, reference to PJC, and court’s assurance that he had the requisite PJC together established that trial court was

clearly aware of the defendant’s complaint). On the other hand, failure to bring forward a full record can result in a waiver or presumptions that preclude reversal on the basis of charge error. See, e.g., *Munden v. Reed*, 2003 WL 57751 (Tex. App.—Dallas 2003, no pet.) (memo opin.) (partial record precluded review of alleged charge error).

**d. Request Only:** Some courts construe *Payne* as consistent with Rule 278 only by allowing a written request to replace a written or oral objection, but not by allowing an objection alone to preserve error when an obligation to request existed. *Mason v. Southern Pac. Transp. Co.*, 892 S.W.2d 115, 117 (Tex. App.—Houston [1st Dist.] 1994, writ denied); see also *Gragson v. ME&E Welding & Fabrication, Inc.*, 2001 WL 1190087 (Tex. App.—Texarkana 2001, pet. denied) (n.d.p.) (“If a party does not submit that written request, he waives any error by the trial court in not submitting it. Dictating a requested instruction to the court reporter is not sufficient to support an appeal based on the trial court’s refusal to submit requested material.”); *Shamrock Communications, Inc. v. Wilie*, 2000 WL 1825501 (Tex. App.—Austin 2000, pet. denied) (n.d.p.) (citing *Payne* but requiring tender for omitted instruction and finding tendered instruction too narrow to constitute substantially correct wording); *Johns v. Ram-Forwarding, Inc.*, 29 S.W.3d 635, 638 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (finding complaint one of an omitted issue, relying on *Mason* but not *Payne*, and holding waiver occurred when no tender made); *Lewis v. Lewis*, 1999 WL 442176 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (n.d.p.) (finding any error on omitted question waived by failure to tender written request); *Jarrin v. Sam White Oldsmobile Co.*, 929 S.W.2d 21, 24 (Tex. App.—Houston [1st Dist.] 1996, writ denied) (finding complaint one of omitted instruction, relying on *Mason*, and holding waiver occurred in absence of tendered instruction).

*Tichacek*, decided after *Mason*, might alter the analysis used by these courts. Indeed, other cases also indicate the type of error and the record on preservation control the Supreme Court’s analysis of preservation. *Moritz v. Preiss*, 121 S.W.3d 715, 720 (Tex. 2003) (failure to request submission of claims against a party or to object to the charge as submitted supported application of presumed finality rule after trial on the merits); *Holubec v. Brandenberger*, 111 S.W.3d 32, 39 (Tex. 2003) (although request did not “precisely” track the statutory language, objection sufficient to preserve complaint about defect in nuisance question); *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473 (Tex. 2000) (defendant has burden to request instructions on

affirmative defense); *see also Fraser v. Baybrook Bldg. Co.*, 2003 WL 21357316 (Tex. App.—Houston [1st Dist.] 2003, pet. filed) (memo opin.) (citing *Mason* to require request but holding waiver when no objection *or* request). Again, however, this line of cases may provide further reason for a cautious practitioner to both request and object.

**e. Waiver:** Significantly, even under the less harsh test of *Payne*, courts still routinely find waiver of charge error. *See, e.g., City of Weatherford*, 83 S.W.3d 261, 271-72 (Tex. App.—Fort Worth 2002, no pet.) (objection did not clearly direct the court’s attention to the problems with the definitions and the request was not in substantially correct form when it failed to track statute); *Schlaflly v. Schlaflly*, 33 S.W.2d 863, 867 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (finding no objection or other appropriate motion to make trial court aware of complaint that charge failed to resolve correct fact issue); *Riddick v. Quail Harbor Condominium Ass’n*, 7 S.W.3d 663, 673 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (complaint on refused definition waived when party never objected to omission of instruction, never asked judge to rule, and failed to show anywhere in record that judge did rule); *Aboud v. Schlichtemeier*, 6 S.W.3d 742, 750 (Tex. App.—Corpus Christi 1999, pet. denied) (failure to object to purportedly defective definition of malice waived error); *Cal-Tex Lumber Co. v. Owens Handle Co.*, 989 S.W.2d 802, 816 n.12 (Tex. App.—Tyler 1999, no pet.) (lack of objection to broad-form submission, request in series of requests and instructions, and failure to draw court’s attention to request verbally resulted in waiver of any error, even under *Payne*).

**f. Summary:** What is clear from the majority of the post-*Payne* cases is the more often a party has raised an issue in the trial court, the more likely an appellate court will find preservation. So, if a party needs to complain before submission, the party may choose to complain early and at each opportunity to make the record clear that the trial court had an opportunity to deal with the issue about which the party is complaining. But, if the error involves an omission, a party *may* still need to make a request, even with the most eloquent of objections. Like it or not, the “object *and* request” route still probably provides the clearest route to preservation under *Payne* and the Rules.

## C. PRESERVING COMPLAINTS ABOUT THE FORM OF THE CHARGE (BROAD, GRANULATED, AND ALTERNATE THEORIES)

### 1. Predication

One error in form can arise from the predication or conditioning of questions in the charge. Failure to complain about the conditioning can waive error and result in losing the claim or defense. For example, in *Floating Bulk Terminal, LLC v. Coal Logistics Corp.*, 2002 WL 1733670 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (n.d.p.), the jury answered that the defendant had not complied with its fiduciary duty (i.e., “No”) but did not answer the damage issue because it was conditioned on an affirmative finding in the breach question (i.e., “Yes”). The plaintiff moved for a mistrial but did not object to an incomplete verdict. As a result, when the court of appeals reversed the breach of contract recovery, the court held that rendition or remand on the alternate theory of recovery was not possible and instead rendered a take-nothing judgment. *Id.* (citing *Osterberg v. Peca*, 12 S.W.3d 31, 56 (Tex. 2000)).

### 2. Broad or Granulated

The general rule, from which the Supreme Court states it has not retreated, is to use broad-form submission whenever feasible. *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002); *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000); *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 790 (Tex. 1995); *Texas Dept. of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990); *Burk Royalty v. Walls*, 616 S.W.2d 911, 924 (Tex. 1981); *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245 (Tex. 1974). That is, “in any or every instance in which it is capable of being accomplished.” *E.B.*, 802 S.W.2d at 649; *Hyundai Motor Co. v. Chandler*, 882 S.W.2d 606, 616-17 (Tex. App.—Corpus Christi 1994, writ denied); *Missouri Pac. R.R. Co. v. Lemon*, 861 S.W.2d 501, 508 (Tex. App.—Houston [14th Dist.] 1993, writ dism’d by agr.). Unfortunately, that definition provides no real guidance as to what is feasible.

**a. Granulation:** Courts of appeal have always given great deference to a trial court’s decision to submit even a granulated charge. Thus, even with adequate preservation as to error in the failure to submit a broad-form charge, courts frequently find no error or harmless error. *See H.E. Butt Gro. Co. v. Warner*, 845 S.W.2d 258, 259-60 (Tex. 1992) (granulated submission not harmful); *Rosell v. Central West Motor States, Inc.*, 89 S.W.3d 643, 653-54 (Tex. App.—Dallas 2002, pet. denied) (granulated submission of negligent hiring, negligent training and negligent entrustment within court’s discretion to ensure needed answers without confusing jury); *Isern v. Watson*, 942 S.W.2d 186, 191 (Tex. App.—Beaumont 1997, no writ) (citing

*Warner* and holding that trial court had discretion to submit granulated factual bases in negligence theory); *Miller v. Wal-Mart Stores, Inc.*, 918 S.W.2d 658, 663-64 (Tex. App.—Amarillo 1996, writ denied) (trial court had discretion to submit separate question to resolve predicate factual dispute and condition liability question on affirmative finding to predicate issue); *Sanchez v. Excelo Bldg. Maintenance*, 780 S.W.2d 851, 853-54 (Tex. App.—San Antonio 1989, no writ) (court had discretion to submit four elements in two questions when charge was not overly complex or granulated); see also *Diamond Offshore Mgmt. Co. v. Guidry*, 84 S.W.3d 256, 263-64 (Tex. App.—Beaumont 2002, pet. filed) (refusal to use granulated submission of “course and scope” and “in the service of the vessel” not improper particularly when issues represent inferential rebuttal issues). After *Casteel* and *Harris County*, courts of appeal may be more inclined to approve granulated submissions.

**b. Broad-form:**

- i. No fundamental broad-form error: Unpreserved complaints about the broad form of a charge will not be heard, even as fundamental error. *In re B.L.D.*, 113 S.W.3d at 354-55.
- ii. *Casteel* and *Harris County*: The method of preserving error as to a charge submitted in form too broad in some respect is not yet clear but may depend upon the basis of the error.

In *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000), when five of the thirteen independent grounds failed based on consumer status, the Supreme Court held that an objection to each sub-part of same question on identical grounds was not necessary to preserve the error. Instead, the defendant’s objection to the entire question that the plaintiff did not have consumer standing to bring any DTPA-based Article 21.21 claims sufficed to preserve the error. 22 S.W.3d at 389. The objection thus was not specifically to the form but to the substance of the question.

In *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), the Supreme Court held that a no evidence objection to an element of damage preserved error as to the broad-form submission of valid and invalid elements of damage. *Id.* see also *Cathey v. Meyer*, 115 S.W.3d 644 (Tex. App.—Waco 2003, pet. filed Jan. 16, 2004) (majority and dissent disagreeing on whether party adequately objected to broad-form damage finding to allow review of evidence in support of individual

elements).

Finally, in *In re A.V.*, 113 S.W.3d 355, 358 (Tex. 2003), the Supreme Court held that error was not preserved when the complaining party “did not object in the trial court to the form of the charge” and “did not argue to the trial court that because the charge was based on a theory without evidentiary support, the charge should not be submitted in broad form.” That wording suggests the court may require a more specific “form” objection than was relied upon in *Harris County*.

Thus, depending upon the complaint, the Supreme Court may find preservation based on a complaint regarding the substance, the evidence, or the form. Most courts of appeal, however, even after *Casteel* and *Harris County* require a specific objection as to form to preserve a complaint about broad-form submission. *Baribeau v. Gustafson*, 107 S.W.3d 52 (Tex. App.—San Antonio 2003, pet. denied) (failure to object to any improper commingling of fraud theories waived in the absence of a *Casteel* objection); *Haggar Apparel Co. v. Leal Atrium Cos. v. Bethke*, 2002 WL 31892204 (Tex. App.—Dallas 2002, no pet.) (n.d.p.) (finding waiver of any *Casteel* error in linking single knowingly issue to multiple DTPA findings); *Columbia HCA Healthcare Corp. v. Cotter*, 72 S.W.3d 735 (Tex. App.—Waco 2002, no pet.) (failure to object to segregation of damages between past and future waived any issue on point); *El Paso Ref., Inc. v. Scurlock Permian Corp.*, 77 S.W.3d 374, 386-87 (Tex. App.—El Paso 2002, pet. filed) (finding *Casteel* inapplicable without objection to inclusion of invalid theory in charge); *S.W. Bell Tel. Co. v. Garza*, 58 S.W.3d 214 (Tex. App.—Corpus Christi 2001, pet. granted) (any error as to commingling valid and invalid theories waived when not brought to trial court’s attention); *Samedan Oil Corp. v. Intrastate Gas Gathering, Inc.*, 78 S.W.3d 425, 452-53 (Tex. App.—Tyler 2001, pet. dismissed by agr.) (any error from multiple liability/single damage submission waived when no objection made to damage question for predication on multiple theories); *Molina v. Moore*, 33 S.W.3d 323, 328 (Tex. App.—Amarillo 2000, no pet.) (even if *Casteel* extended to require separate answers to elements of damage, party waived error by failing to object to the form). *But cf. Iron Mountain Bison Ranch, Inc. v. Easley Trailer Mfg., Inc.*, 42 S.W.3d 149, 156-57 (Tex. App.—Amarillo 2000, no pet.) (despite lack of objection on broad-form format, court found objection as to lack of evidentiary support sufficient to preserve *Casteel* error).

**D. PRESERVING COMPLAINTS ABOUT SUFFICIENCY OF THE EVIDENCE UNDER LAW THAT DIFFERS FROM THE**

## LAW AS SUBMITTED IN THE CHARGE

The Supreme Court has repeatedly stated that the sufficiency of the evidence will be measured against a defective jury charge—if it is not objected to. *See St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 530 (Tex. 2002) (charge objected to and thus review against proper legal standard); *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 715 (Tex. 2001) (review against charge in absence of objection); *Osterberg v. Peca*, 12 S.W.3d 31, 55-56 (Tex. 2000) (review against charge in absence of objection); *MCN Energy Enters., Inc. v. Omagro De Colombia, LDC*, 98 S.W.3d 766, 771 (Tex. App.—Fort Worth 2003, pet. filed) (unobjected to instruction that defined misrepresentation as by words or conduct did not limit evidence review to affirmative misrepresentations).

Courts of appeal seem to differ on how to apply that rule to a charge with omitted (rather than defective) elements—deemed findings or review without the elements. *Compare Exxon Corp. v. Breezevale Ltd.*, 82 S.W.3d 429, 439 (Tex. App.—Dallas 2002, pet. denied) (omission of writing requirement in promissory estoppel question did not waive need for evidence to support deemed element of claim), *with Perry & Perry Bldrs., Inc. v. Galvan*, 2003 WL 21705248 (Tex. App.—Austin 2003, no pet. h.) (memo opin.) (omission of element not an issue and evidence measured against charge as submitted).

Thus, to preserve review of the evidence under a legal standard that differs from that submitted in the charge, a complaint regarding the law submitted in the charge must be preserved.

### E. PRESERVING COMPLAINTS ABOUT INCOMPLETE OR INCONSISTENT VERDICTS

Because Rule 295 contemplates further deliberation to resolve any error arising from incomplete or inconsistent verdicts, a party must raise any such error to the jury's release. Rule 295 provides the following in regard to conflicting or missing answers:

If [the verdict] is incomplete, or not responsive to the questions contained in the court's charge, or the answers to the questions are in conflict, the court shall in writing instruct the jury in open court of the nature of the incompleteness, unresponsiveness, or conflict, provide the jury such additional instructions as may be proper, and retire the jury for

further deliberations.

TEX. R. CIV. P. 295.

A party cannot allow a court to accept a partial or incomplete verdict and then complain later of error from the partial verdict. In *Osterberg v. Peca*, 12 S.W.3d 31, 55-56 (Tex. 2000), the jury deadlocked on the reasonable amount of attorney's fees incurred in the case. The plaintiff failed to object or request an answer to the question. Instead, the plaintiff "asked the trial court to accept the verdict, and then asked the court to enter judgment as a matter of law for his attorney's fees. The trial court refused . . ." *Id.* Relying upon *Fleet v. Fleet*, 711 S.W.2d 1, 2 (Tex. 1986), and *Continental Casualty Co. v. Street*, 379 S.W.2d 648, 651 (Tex. 1964), the court held that "by failing to object when the jury did not return an answer, [the plaintiff] waived any right to have the trial judge supply his own factfinding or grant a new trial on the issue, and waived his right to appeal a judgment on the issue of attorney's fees." *Id.* The court did so without discussion of whether the issue involved a controverted fact issue.

With conflicts, a party must likewise complain before the jury is discharged to preserve error. Courts routinely hold that "[i]n order to preserve error, the appellant must object to the conflict or inconsistency before the jury is discharged." *Norwest Mortgage, Inc. v. Salinas*, 999 S.W.2d 846, 865 (Tex. App.—Corpus Christi 1999, pet. denied); *see also Griffin v. Watley*, 2001 WL 257801 (Tex. App.—Amarillo 2001, no pet.) (n.d.p.); *Durkay v. Madco Oil Co.*, 862 S.W.2d 14, 23 (Tex. App.—Corpus Christi 1993, writ denied); *Roling v. Alamo Group, Inc.*, 840 S.W.2d 107, 109-110 (Tex. App.—Eastland 1992, writ denied).

If the court decides to order the jury to further deliberate over the objection of one party, that party should ensure that the record clearly reflects the jury's answers from its first *and* its second deliberations. Otherwise, the party might have difficulty showing on appeal the lack of conflict in the original verdict. *See Waltrip v. Bilbon Corp.*, 38 S.W.3d 873, 876 (Tex. App.—Beaumont 2001, pet. denied) (requiring abatement of appeal to determine whether verdict form missing from record and how jury originally answered questions). Or why further deliberation was otherwise inappropriate. *Archer Daniels Midland Co. v. Bohall*, 114 S.W.3d 42, 47 (Tex. 2003) (based on error in predication, jury erroneously ordered to redeliberate).

Re-deliberation may not apply to "errors" in the charge. *Id.* In *Bohall*, the jury found that the decedent

was neither a borrowed employee nor otherwise in the control of the control of the defendant. Yet, because the negligence and following questions were predicated on a “No” (rather than “Yes”) finding to those questions, the jury proceeded to apportion responsibility for negligence and find damages. The defendant moved to accept the verdict, and the court released the jury from its duties. The plaintiff pointed out the erroneous predication (with the jury in the courtroom). The trial court explained to the jury that the court had made an error, prepared a new charge, and asked the jury to deliberate on the second charge. The jury changed its answer to the “control” issue in the second charge, and the trial court ultimately entered judgment for the plaintiff. *Id.*<sup>1</sup>

The court of appeals held that Rule 295 does not apply to “erroneous” charges and that a jury, once released, cannot be ordered to “further” deliberate. The court held that because the “control” issue was decided against the plaintiff the subsequent answers were immaterial (and thus no incomplete or materially conflicting answers existed). *Id.* Nevertheless, citing to *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), and the principles of justice embodied in the idea of ensuring a jury trial on proper instruction, the court of appeals remanded the case for a new trial in the interests of justice—despite a lack of objection prior to the release of the jury.

Similarly, in a bifurcated setting, a party seeking punitive damages may not agree to the release of the jury and then seek punitive damages from a different jury in the same proceeding. *In re Bradle*, 83 S.W.2d 923, 927 (Tex. App.—Austin 2003, orig. proceeding). That is, failure to object before the jury is discharged waives any complaint as to the untried exemplary damage issue. *Id.* (further holding that trial of exemplary damages by separate jury would violate constitutional rights).

Thus, if the verdict includes incomplete, inconsistent, or conflicting answers that can be cured by further deliberation, to preserve any error, a party must object on the record and include any necessary paper trail to reflect the jury’s deliberations.

## F. PRESERVING COMPLAINTS ABOUT IMMATERIAL FINDINGS

As is clear from earlier cases interpreting the

Rules (i.e., object and request) and from the *Payne* line of cases (i.e., “make the court aware”), the more often a party states its complaint to the court the more likely the party is to preserve the error. But a party may sometimes raise a complaint about immaterial findings after the verdict.

The traditional standard provides that a jury finding may be disregarded as immaterial if the answer would not alter the effect of the verdict, could be found elsewhere in the charge, or would be void of legal significance based on other questions. *See City of Brownsville v. Alvarado*, 897 S.W.2d 750, 752 (Tex. 1995); *C. & R. Transport, Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1966); *Hughes v. Aycock*, 598 S.W.2d 370, 374 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref’d n.r.e.).

The Supreme Court recently refined the standard and discussed when a post-verdict/pre-judgment motion preserved error regarding immaterial findings even in the absence of a pre-submission complaint. In *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94-95 (Tex. 1999), the plaintiff sought attorney’s fees, and the trial court submitted an issue as to the amount of reasonable fees. The defendant argued in its motion for judgment notwithstanding the verdict (“JNOV”) that the statute in question did not support a recovery of fees. The court of appeals held that the defendant waived the error by failing to object to submission of the fees issue to the jury. *Id.*

The Supreme Court gave the following test for when a complaint prior to submission is necessary: “A party must lodge an objection in time for the trial court to make an appropriate ruling *without having to order a new trial.*” *Id.* (emphasis added). The court held that the question on the amount of fees was immaterial to the ultimate question of whether fees were recoverable as a matter of law. Thus, the court held that a post-verdict motion asserting non-recoverability “gave the trial court ample opportunity to rule on the availability of attorney’s fees *before an erroneous judgment was entered.*” *Id.* (emphasis added).

The court re-affirmed that test a few months later. In *Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278, 279-80 (Tex. 1999), the plaintiff sought a recovery of compensatory and punitive damages based upon a statutory wrongful discharge claim. The jury found damages for mental anguish, lost credit reputation, and exemplary damages. In response to the motion for judgment, the defendant urged for the first time that the

<sup>1</sup> Cf. *Ray v. Robb*, 2002 WL 31835725 (Tex. App.—Dallas 2002, no pet.) (n.d.p.) (incidentally informing jury of effect of its answers through conditioning or predication not improper).

statute allowed only equitable relief, not compensatory or punitive damages. The trial court nevertheless entered a judgment awarding the damages. The defendant again complained by JNOV that the statute did not support the damage awards. *Id.* The court of appeals found that the defendant had waived error by failing to object to the submission of the damage issues.

The Supreme Court again held that post-verdict preservation suffices when the trial court submitted an immaterial question. *Id.* That is, the jury's findings of the amount of damages was immaterial to the legal issue of whether such damages were available. *Id.* Thus, citing *Holland*, the court held that the post-verdict complaints gave the trial court the opportunity to resolve the legal issues *prior to rendering judgment*. *Id.*

In short, if the complaint goes to something that could be added to or corrected in the charge, *Holland* and *MacKenzie* suggest a party should make the trial court aware of the complaint prior to submission. Only if the charge makes no difference to the complaint is post-submission preservation a potential option. *See also Coronado Paint Co. v. Global Drywall Sys., Inc.*, 47 S.W.3d 28, 33 n.8 (Tex. App.—Corpus Christi 2001, pet. denied) (n.d.p.) (citing *Osterberg* and *Holland*, holding JNOV appropriate method by which to preserve error when “the court can determine as a matter of law that a claim or defense included in the jury charge is or is not viable”).

Because a court might find a defect (rather than immateriality) or may simply not follow the *Holland* rule, a party may choose to raise even immaterial finding complaints prior to submission. *See Geodyne Energy Income Prod. P'ship I-E v. Newton Corp.*, 97 S.W.3d 779, 785 (Tex. App.—Dallas 2003, pet. filed) (jury finding on rescission—a question of law—immaterial); *Great Am. Prods. v. Permabond Int'l*, 94 S.W.3d 675, 683 (Tex. App.—Austin 2003, pet. denied) (holding that JNOV proper means of raising warranty disclaimer impliedly found by finding parties bound by terms in invoices rendered immaterial breach of warranty finding). *But cf. Frost v. Crushed Stone Co. v. Odell Geer Constr. Co.*, 110 S.W.3d 41, 47 (Tex. App.—Waco 2002, no pet.) (failure to object to charging jury on attorneys' fees in promissory estoppel case waived any error). *DeLeion v. Furr's Supermarkets, Inc.*, 31 S.W.3d 297, 299 (Tex. App.—El Paso 2000, no pet.) (ultimately deciding comparative responsibility submissions to be improper in nonsubscriber case and modifying judgment to award unreduced recovery but not before analyzing [without citation to *Holland*] whether objections to charge

properly preserved complaint); *Enax v. Noack*, 12 S.W.3d 609 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (holding in unpublished portion of opinion) (citing *Payne* and holding that complaint that “no cause of action exists in Texas for failure to discharge one's guardian duties” waived by failure to object to inclusion of question in charge).

So, rather than relying on a post-verdict complaint, a party most likely wants to complain pre-submission and only rely on *Holland* when the argument first arises after verdict.

## VI. POST TRIAL MOTIONS

### A. JUDGMENT NOTWITHSTANDING THE VERDICT

After a verdict, the court may render a judgment notwithstanding the verdict (“JNOV”) or disregard any jury finding upon motion and reasonable notice. TEX. R. CIV. P. 301. The standard for JNOV is whether a directed verdict after the close of the evidence would have been proper. *Rush v. Barrios*, 56 S.W.3d 88, 94 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). In most instances, motions for JNOV are entered when special issue findings appear to have no support in the evidence. Thus, the court must determine conclusively that there is “no evidence” of probative value upon which the jury could have based their findings. *Brown v. Bank of Galveston*, 930 S.W.2d 140, 143 (Tex. App.—Houston [14th Dist.] 1996), *aff'd* 962 S.W.2d 511 (Tex. 1998).

The court may also disregard immaterial jury findings. *Spencer v. Eagle Star Ins. Co. of America*, 876 S.W.2d 154, 157 (Tex. 1994). An immaterial finding is one that should not have been submitted or was rendered immaterial by other findings. *Id.* When findings conflict, however, an objection to the conflicting answers must be made before the jury is discharged or else it is waived. *Zimmerman v. Massoni*, 32 S.W.3d 254, 259 (Tex. App.—Austin 2000, pet. denied).

#### 1. Review

In reviewing a motion for JNOV, the court considers all evidence in the light most favorable to the non-movant, disregarding all contrary evidence and inferences. *Brown*, 930 S.W.2d at 143. If the trial or appellate court finds more than a scintilla of evidence to support the jury's answer to special issues, a JNOV is improper. *Id.*

#### 2. Time Periods

Because the rules prescribe no time limit, the motion for JNOV may be filed at any time before or after judgment is entered, but before judgment becomes final. *Kirschberg v. Lowe*, 974 S.W.2d 844, 846 (Tex. App.—San Antonio 1998, no pet.). Thus, a Rule 301 motion may be filed before or after the judgment is signed. *Id.* A trial court is without power to render a JNOV on its own motion. *Rush*, 56 S.W.3d at 93. As a result, it is necessary to make a motion for JNOV to perfect the record for appeal. In order to preserve the right to appeal denial of a JNOV, that motion must be acted upon before the trial court's ruling on a motion for new trial and before the new trial motion is overruled by operation of law. *See Spiller v. Lyons*, 737 S.W.2d 29, 29 (Tex. App.—Houston [14th Dist] 1987, no writ).

The Supreme Court recently recognized that any timely filed post-judgment motion that seeks a substantive change in the judgment qualifies as a motion to modify under Rule 329b—thus extending the appellate timetable. *See Lane Bank Equip. Co. v. Smith So. Equip., Inc.*, 10 S.W.3d 308, 312 (Tex. 2000). Because Rule 301 motions filed after judgment seek to substantively change the judgment, they should also serve to extend the appellate timetables under *Lane Bank*.

### 3. Preserving Respondent's Cross-Points

If the motion is granted, the respondent should bring forth any cross-points it wishes to appeal in a motion for new trial. A respondent's failure to raise cross-points may result in waiver on appeal. *Cobb v. Justice*, 954 S.W.2d 162, 167 (Tex. App.—Waco 1997, pet. denied).

## B. MOTION FOR NEW TRIAL

Generally, a motion for new trial is the last chance to convince the trial court that error occurred, causing the rendition of an improper judgment. Rule 324 states that a point in a motion for new trial is not a prerequisite to a complaint on appeal unless the complaint involves: (1) newly discovered evidence; (2) factual insufficiency or a finding is against the great weight of the evidence; (3) incurable jury argument not otherwise ruled on by the trial court; or (4) inadequacy or excessiveness of the damages found by the jury. TEX. R. CIV. P. 324; *also see J.M. Krupar Const. Co., Inc. v. Rosenberg*, 95 S.W.3d 322, 335-36 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (contractor failed to preserve factual insufficiency issue for appeal where contractor failed to file a motion for new trial).

The filing of a motion for new trial to extend the appellate timetable is a matter of right, whether or not there is any reasonable basis for concluding that any further motion is necessary. *Old Republic Ins. Co. v. Scott.*, 846 S.W.2d 832, 833 (Tex. 1993).

### 1. Form

There is no general rule on how detailed the grounds must be in a motion for new trial. However, Rule 321 states that each point in the motion must refer to the ruling of the court, "in such a way that the objection can be clearly identified and understood by the court." TEX. R. CIV. P. 321. Further, Rule 322 states that objections cast in general terms shall not be considered by the court. TEX. R. CIV. P. 322. In fact, courts have refused to consider grounds in a new trial motion that were too general. *Marino v. Hartsfield*, 877 S.W.2d 508, 512 (Tex. App.—Beaumont 1992, writ denied) (appellants merely stated in motion for new trial that take-nothing judgment entered against them was against great weight and preponderance of the evidence).

Generally, there is no need to verify a motion for new trial. However, when errors complained of concern matters outside of the trial proceedings, and thus outside of the knowledge of the court, the record needs to be verified and presented to the trial court for consideration. *Smith v. Mike Carlson Motor Co.*, 918 S.W.2d 669, 672 (Tex. App.—Fort Worth 1996, no writ) (party's motion for new trial alleging no notice of summary judgment hearing required verification by affidavit, otherwise, it is merely an assertion).

Further, any order granting a new trial or modifying, correcting, or reforming a judgment must be written and signed. *Faulkner v. Culver*, 851 S.W.2d 187, 188 (Tex. 1993). Trial court's oral pronouncement granting a motion for new trial cannot substitute the written order requirement. *Id.*

### 2. Time Periods

The motion for new trial must be filed within thirty days after the judgment or other order complained of is signed. TEX. R. CIV. P. 329b(a); *S & A Restaurant Corp. v. Leal*, 892 S.W.2d 855, 858 (Tex. 1995) (distinguishing date of rendition from date of signing). A motion for new trial filed outside of thirty days after the signed judgment is void and preserves nothing therein for appellate court review. *North Carolina Mut. Life Ins. Co. v. Whitworth*, 124 S.W.3d 714, 717 (Tex. App.—Austin 2003, pet. denied) (motion filed 31 days after judgment was untimely; no exceptions provided).

under the rules). A trial court is forbidden from enlarging that time period.

An amended motion for new trial may be filed without leave of court—as long as it is within the original thirty day period from the signed judgment or order. *But see Kalteyer v. Sneed*, 837 S.W.2d 848, 850-51 (Tex. App.—Austin 1992, writ denied) (amended motion for new trial filed after 30 days from signing of judgment is untimely). Filing an amended motion does not extend the court’s plenary power. *In re Dickason*, 987 S.W.2d 570, 571 (Tex. 1998).

Any motion for new trial is overruled by operation of law after the passage of seventy-five days after the judgment was signed. TEX. R. CIV. P. 329b(c). This rule takes effect if the trial court issued no written order within that seventy-five day period. *In re Dickason*, 987 S.W.2d at 571. There is no extension of this seventy-five day rule, and any attempts to extend the time period is a nullity. *See Maddox v. Texas Dept. of Protective and Regulatory Servs.*, 45 S.W.3d 210, 214 (Tex. App.—El Paso 2001, no pet.). However, the court does retain plenary power to enter additional orders—even after a motion for new trial is overruled by operation of law. Under Rule 329b(e), the court has plenary power for an additional thirty days after all timely filed motions for new trial are overruled. TEX. R. CIV. P. 329b(e); *In re Dickason*, 987 S.W.2d at 571.

Thus, the trial court can use its plenary power to reform, vacate, modify or correct the judgment for one-hundred and five (105) days following the signed judgment or order. *Id.*; *but see Maddox*, 45 S.W.3d at 214 (trial court lacked jurisdiction to enforce order on new trial issue where order was signed after the expiration of court’s plenary power).

However, the trial court’s authority to “un-grant” its order granting a new trial continues in effect for only seventy-five days after the date of the original signed judgment. *In re Luster*, 77 S.W.3d 331, 334 (Tex. App.—Houston [14th Dist.] 2002, orig. proceeding). The *Luster* decision is based on a strict interpretation of the court’s plenary powers under Rule 329b(e).

If the trial court modifies the judgment, the appellate timetables start over from the date of the signed modified judgment. *Mackie v. Mackenzie*, 890 S.W.2d 807, 807 (Tex. 1994).

## VII. CONCLUSION

The rules developed by courts for preservation of error are sometimes difficult to understand and almost always difficult to remember. Hopefully, this paper will give trial lawyers an easy reference guide to preservation of error.