# PRESERVATION OF ERROR: PRE-TRIAL AND TRIAL

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# PRESERVATION OF ERROR: Trial and Pre-Trial©

by

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**I. INTRODUCTION AND SCOPE** This article covers preservation of error from the filing of a lawsuit through post-judgment motions, with a brief addendum relating to preservation on appeal. The Author wishes to acknowledge the kind permission of Alene Levy and John Nichols, both attorneys from Houston, to adapt and update their article on preservation of error. In this article, the Texas Rules of Appellate Procedure are called "TRAPs." The new Texas Rules of Evidence are called "TRE."

**II. THE GENERAL RULE - New TRAP 33.1** The general requirement for preserving, in the trial court, the right to complain on appeal is new TRAP 33.1.

**RULE 33. PRESERVATION OF APPELLATE COMPLAINTS**

**33.1 Preservation; How Shown.**

> **(a) In general.** As a prerequisite to presenting a complaint for appellate review, the record must show that:
>
> (1) the complaint was made to the trial court by a timely request, objection, or motion that:
>
> (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and
>
> (B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and
>
> (2) the trial court:
>
> (A) ruled on the request, objection, or motion, either expressly or implicitly; or
>
> (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.
>
> **(b) Ruling by operation of law.** In a civil case, the overruling by operation of law of a motion for new trial or a motion to modify the judgment preserves for appellate review a complaint properly made in the motion, unless taking evidence was necessary to properly present the complaint in the trial court.
>
> **(c) Formal exception and separate order not required.** Neither a formal exception to a trial court ruling or order nor a signed, separate order is required to preserve a complaint for appeal.

Error is not preserved for appellate review where a party fails to present a timely request, objection or motion, state the specific grounds therefor, and obtain a ruling. *Bushell v. Dean*, 803 S.W.2d 711 (Tex. 1991); *Celotex Corp. v. Tate*, 797 S.W.2d 197 (Tex. App.--Corpus Christi 1990, no writ).

## III. STEPS TO PRESERVATION OF ERROR

### A. Valid Complaint

1. To be valid, specific grounds for the objection must be stated or must be apparent from the context of the objection. *Miller v. Kendall*, 804 S.W.2d 933 (Tex. App.--Houston [1st Dist.] 1990, no writ); *Olson v. Harris County*, 807 S.W.2d 594 (Tex. App.--Houston [1st Dist.] 1990, writ denied); *McCormick v. Texas Commerce Bank Nat. Ass'n.*, 751 S.W.2d 887 (Tex. App.--Houston [14th Dist.] 1988, writ denied), *cert. denied*, 491 U.S. 910; *Greenstein, Logan & Co. v. Burgess Marketing, Inc.*, 744 S.W.2d 170 (Tex. App.--Waco 1987, writ denied).

2. The complaint raised on appeal must be the same as that presented to the trial court. *Commonwealth Lloyd's Ins. Co. v. Thomas*, 825 S.W.2d 135 (Tex. App.--Dallas 1992), *agreed motion to dismiss and vacate granted*, 843 S.W.2d 486 (1993); *Pfeffer v. Southern Texas Laborers' Pension Trust Fund*, 679 S.W.2d 691 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

3. Global objections, profuse objections, or those overly general or spurious in nature, preserve no error for review. *Smith v. Christley*, 755 S.W.2d 525 (Tex. App.--Houston [14th Dist.] 1988, writ denied).

4. An objection is sufficiently specific if it allows the trial court to make an informed ruling and the other party to remedy the defect if he can. *Lassiter v. Shavor*, 824 S.W.2d 667 (Tex. App.--Dallas 1992, no writ).

### B. Timely Asserted

1. Failure to object as soon as preliminary hearing evolved into bench trial of merits of case waived error. *Lemons v. EMW Mfg, Co.*, 747 S.W.2d 372, 373 (Tex. 1988).

2. To argue on appeal that the trial court did not follow the law, the complaining party must have presented the legal argument in the trial court. *Hardeman v. Judge*, 931 S.W.2d 716, 720 (Tex. App.--Fort Worth 1996, writ denied) (failure to argue in trial court applicability of Probate Code § 821 precluded arguing that point on appeal). Objections to trial court's actions creating a constructive trust, and awarding attorney's fees, raised for first time on appeal, were too late. *Murphy v. Canion*, 797 S.W.2d 944 (Tex. App.--Houston [14th Dist.] 1990, no writ). *See also Mark Products U.S.. Inc. v. Interfirst Bank Houston, N.A.*, 737 S.W.2d 389 (Tex. App.--Houston [14th Dist.] 1987, writ denied) (motion to compel answers to deposition questions waived by failing to request continuance of summary judgment hearing).

3. An objection to evidence previously admitted without objection is too late. *Port Terminal R.R. Assn. v. Richardson*, 808 S.W.2d 501 (Tex. App.--Houston [14th Dist.] 1991, writ denied).

4. But a "one question delay" in making objection, to avoid calling attention to plaintiff's reference to insurance and thereby aggravating the harm, was acceptable. *Beall v. Ditmore*, 687 S.W.2d 791 (Tex. App.--El Paso 1993, writ denied).

5. Object each time the evidence is offered. *Celotex Corp. v. Tate*, 797 S.W.2d 197 (Tex. App.--Corpus Christi 1990, no writ).

6. It is possible to object too early. *Bushell v. Dean*, 803 S.W.2d 711 (Tex. 1991) (objection to entirety of expert's testimony at outset did not preserve error where trial court asked counsel to reurge later).

**C. Secure Ruling** An objection must be overruled in order for it to preserve error for review. *Perez v. Baker Packers*, 694 S.W.2d 138, 141 (Tex. App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.); *Cusack v. Cusack*, 491 S.W.2d 714 (Tex. Civ. App.--Corpus Christi 1973, writ dism'd); *Webb v. Mitchell*, 371 S.W.2d 754 (Tex. Civ. App.--Houston 1963, no writ).

### D. Let the Record Reflect

1. The party complaining on appeal must see that a sufficient record is presented to the appellate court to show error requiring reversal. New TEX. R. APP. P. 33.1(a). *Petitt v. Laware*, 715 S.W.2d 688 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.).

2. Without a written motion, response, or order, or a statement of facts containing oral argument or objection, the appellate court must presume that the trial court's judgment or ruling was correct and that it was supported by the omitted portions of the record. *Christiansen v. Prezelski*, 782 S.W.2d 842 (Tex. 1990). *See also J-IV Investments v. David Lynn Mach., Inc.*, 784 S.W.2d 106 (Tex. App.--Dallas 1990, no writ).

3. Ordinarily an oral ruling by the trial court, that is reflected in the statement of facts, preserves appellate complaint. However, in *Soto v. Southern Life & Health Ins. Co.*, 776 S.W.2d 752, 754 (Tex. App.--Corpus Christi 1989, no writ), and in *Pierce v. Gillespie*, 761 S.W.2d 390, 396 (Tex. App.--Corpus Christi 1988, no writ), the appellate court declined to review the trial court's oral denial of a motion for instructed verdict, because that action was not reflected in a written order or in the judgment. This anomolie has been cured by new TRAP 33.1(c), which provides: "Neither a formal exception to a trial court ruling or order nor a signed, separate order is required to preserve a complaint for appeal."

## IV. PREREQUISITES TO FILING SUIT

### A. Statutory Notices and Exemptions

IN GENERAL

1. Plaintiff: A global allegation that plaintiff has complied with all prerequisites to the filing of suit, or that all conditions precedent have been performed or have occurred, is sufficient to support a judgment in the absence of special exceptions. TEX. R. CIV. P. 54.

2. Defendant: File special exceptions to object to plaintiff's failure to allege that the required notice has been given, or you waive the complaint. File a motion to abate, in the due order of pleading, to object to plaintiff's failure to give the required notice.

### B. D.T.P.A.

NOTICE

1. As a prerequisite to filing suit under the Texas Deceptive Trade Practices Act, a consumer must give at least 60 days' written notice to the offending party advising the party in reasonable detail of the consumer's complaint and the amount of actual damages and expenses claimed, including attorneys' fees reasonably incurred in asserting the claim. TEX. BUS. & COM. CODE ANN. § 17.505 (Vernon Supp. 1998).

2. The consumer must plead and prove compliance with this notice requirement. *Investors, Inc. v. Hadley*, 738 S.W.2d 737 (Tex. App.--Austin 1987, writ denied). A plaintiff's failure to plead and prove compliance precludes recovery when error is preserved by proper objection. *HOW Ins. Co. v. Patriot Financial Serv. of Texas, Inc.*, 786 S.W.2d 533 (Tex. App.--Austin 1990, writ denied).

3. Object to consumer's failure to give the required notice, or the complaint is waived. *Bolton v. Alavarado*, 762 S.W.2d 215 (Tex. App.--Houston [1st Dist.] 1988, writ denied). To preserve your objection, file a plea in abatement. *HOW Ins. Co.*, 786 S.W.2d at 537.

4. Non-compliance with notice requirements is cured by abating the suit for 60 days. *Star-Tel, Inc. v. Nacogdoches Telecommunications, Inc.*, 755 S.W.2d 146 (Tex. App.--Houston [1st Dist.] 1988, no writ); *Moving Co. v. Whitten*, 717 S.W.2d 117 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.).

EXCEPTION TO NOTICE REQUIREMENT

5. If the giving of 60 days' notice is not practical, because the statute of limitations on the consumer's claim will expire within the 60-day notice period or because the consumer's

claim is asserted by way of counterclaim, then notice is not required. TEX. BUS. & COM. CODE ANN. § 17.505(b) (Vernon Supp. 1998).

6. Burden to plead and prove circumstances warranting excuse of notice is on the consumer. *HOW Ins. Co. v. Patriot Financial Serv. of Texas, Inc.*, 786 S.W.2d 533 (Tex. App.--Austin 1990, writ denied).

7. If notice is excused, the defendant may tender offer of settlement within 60 days after the filing of the suit or counterclaim to preserve entitlement to the protections offered by Section 17.505(d). TEX. BUS. & COM. CODE ANN. § 17.505(b). (Vernon Supp. 1998).

**C. Medical Liability and Insurance Improvement Act**

NOTICE

1. A party asserting a health care liability claim must give written notice of the claim by certified mail, return receipt requested, to each physician or health care provider against whom the claim is being made at least 60 days before filing suit. *Schepps v. Presbyterian Hosp. of Dallas*, 652 S.W.2d 934 (Tex. 1983); TEX. REV. CIV. STAT. ANN. art. 4590i § 4.01 (Vernon Supp. 1998).

2. Notice is effective when mailed, not when received. *McClung v. Komorn*, 629 S.W.2d 813 (Tex. App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.).

3. The claimant must plead compliance with this notice requirement. *Hutchinson v. Wood*, 657 S.W.2d 782 (Tex. 1983); *Salcedo v. Diaz*, 647 S.W.2d 51 (Tex. App.--El Paso 1983), *writ granted*, 650 S.W.2d 67, *rev'd in part on other grounds*, 659 S.W.2d 30 (1983).

4. On proper motion, abatement, not dismissal, is the remedy for plaintiff's failure to give the required notice. *Schepps v. Presbyterian Hosp. of Dallas*, 652 S.W.2d 934 (Tex. 1983).

5. Defendant's failure to file special exceptions or motion to abate waives any complaint regarding lack of notice. *Rhodes v. McCarron*, 763 S.W.2d 518 (Tex. App.--Amarillo 1988, writ denied); *Salcedo*, 647 S.W.2d at 51.

6. TEX. REV. CIV. STAT. ANN. Art. 4590i § 10.01 (Vernon Supp. 1998) is unconstitutional as applied to minors. *Wasson v. Weiner*, 900 S.W.2d 316 (Tex. 1995).

## V. PLEADINGS

**A. Plaintiff's Pleadings** - TEX. R. CIV. P. 47

1. Plaintiff's original petition must give fair notice of plaintiff's claims by setting out the elements of plaintiff's cause(s) of action and the relief sought. *Stoner v. Thompson*, 578 S.W.2d 679 (Tex. 1979); *Roarke v. Allen*, 633 S.W.2d 804 (Tex. 1982); *State Fidelity Mortgage Co. v. Varner*, 740 S.W.2d 477 (Tex. App.--Houston [1st Dist.] 1987, writ denied).

2. A pleading for unliquidated damages must contain the allegation that "the damages sought are within the jurisdictional limits of the court," not that they exceed the limits. TEX. R. CIV. P. 47(b).

3. However, any error in pleading of unliquidated damages is waived if no special exception is filed. *See Peek v. Equipment Service Co.*, 779 S.W.2d 802 (Tex. 1989).

4. When trial court denies recovery of properly pleaded damages, preserve error by a motion for new trial. *Home Interiors & Gifts, Inc. v. Veliz*, 725 S.W.2d 295 (Tex. App.--Corpus Christi 1986, no writ); TEX. R. CIV. P. 329b.

**B. Defendant's Pleadings**

VERIFIED PLEADINGS AND AFFIRMATIVE DEFENSES - TEX. R. CIV. P. 93, 94.

1. Failure to specifically plead the affirmative defenses listed in Rule 94 and failure to verify defensive pleadings as required by Rule 93 results in waiver of the subject matter of the defense at trial and on appeal. *Beacon Natl. Ins.*

*Co. v. Reynolds*, 799 S.W.2d 390 (Tex. App.--Fort Worth 1990, writ denied).

2. However, plaintiff must object to defendant's failure to verify a defense as required by Rule 94 or the defense will have been tried by consent and error is waived. *Roarke v. Allen*, 633 S.W.2d 804 (Tex. 1982); *Echols v. Bloom*, 485 S.W.2d 798 (Tex. Civ. App.--Houston [14th Dist] 1972, writ ref'd n.r.e.).

3. *But see Jones v. Kinder*, 807 S.W.2d 868 (Tex. App.--Amarillo 1991, no writ) (defendant's failure to object to plaintiff's failure to verify supplemental interrogatory answers did not amount to waiver of the defect; a party has no duty to remind the other party to abide by the rules of civil procedure, *citing Sharp v. Broadway National Bank*, 784 S.W.2d 669 (Tex. 1990)). (Note that the *Jones* case also holds that supplemental answers to interrogatories need not be verified. Would the result have been different if the original answers were involved?)

4. Affirmative defense of abandonment could not be raised on appeal when there were no pleadings or evidence to support it in the trial court. *Tropoli v. Markantonis*, 740 S.W.2d 563 (Tex. App.--Houston [1st Dist.] 1987, no writ).

5. However, affirmative defenses under Tort Claims Act were questions of law and could be challenged for first time on appeal. *Trevathan v. State*, 740 S.W.2d 500 (Tex. App.--Houston [1st Dist.] 1987, writ denied).

SPECIAL EXCEPTIONS - TEX. R. CIV. P. 90, 91

1. A defendant may file special exceptions to object to non-jurisdictional defects apparent on the face of the opponent's pleadings and to force the pleader to clarify the statement of his claim. *Agnew v. Coleman County Elec. Cooperative Inc.*, 153 Tex. 587, 272 S.W.2d 877, 879 (1954); *Fort Bend County v. Wilson*, 825 S.W.2d 251 (Tex. App.--Houston [14th Dist.] 1992, no writ).

2. File special exceptions when the defects complained of are apparent on the face of your opponent's pleadings. If you must rely on information extrinsic to the pleadings themselves to raise your objections, special exceptions are not proper. *Augustine v. Nusom*, 671 S.W.2d 112 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.); *Travelers Indemnity Co. v. Holt Mach. Co.*, 554 S.W.2d 12, 15 (Tex. Civ. App.--El Paso 1977, no writ).

3. To preserve error, the special exception must specifically state how the pleading is defective. *Huff v. Fidelity Union Life Ins. Co.*, 312 S.W.2d 493 (Tex. 1958); *Dierlam v. Clear Lake Hospital*, 593 S.W.2d 774 (Tex. Civ. App.--Houston [14th Dist.] 1979, no writ).

4. To avoid waiver, you must obtain a (nonevidentiary) hearing, bring the special exceptions to the attention of the trial judge before the instructions or charge to the jury or, in a non-jury case, before the judgment is signed, and obtain a ruling. TEX. R. CIV. P. 90. Local rules sometimes advance that date.

5. Failure to specially except waives pleading deficiencies that can be cured by repleading, and the issues raised by the defective pleadings will be tried by consent. *Roarke v. Allen*, 633 S.W.2d 804 (Tex. 1982); *Centennial Ins. Co. v. C.U. Ins.*, 803 S.W.2d 479 (Tex. App.--Houston [14th Dist.] 1991, writ denied); *Abramcik v. U.S. Home*, 792 S.W.2d 822 (Tex. App.--Houston [14th Dist.] 1990, writ denied); *Echols v. Bloom*, 485 S.W.2d 798 (Tex. Civ. App.--Houston [14th Dist] 1972, writ ref'd n.r.e.).

6. In the absence of special exceptions, pleadings will be liberally construed in favor of the pleader. *Roark v. Allen*, 633 S.W.2d at 809.

7. However, plaintiff is not required to specially except to a defective plea of payment that does not include an account stating distinctly the nature of the payment. *Rea v. Sunbelt Savings*, 822 S.W.2d 370 (Tex. App.--Dallas 1991, no writ). TEX. R. CIV. P. 95.

8. If the trial court sustains the special exceptions, the offending party may replead or

he may elect to stand on his pleadings, suffer dismissal of the case, and test the trial court's order on appeal. *D.A. Buckner Constr., Inc. v. Hobson*, 793 S.W.2d 74 (Tex. App.--Houston [14th Dist.] 1990, orig. proceeding). *See Fernandez v. City of El Paso*, 876 S.W.2d 370 (Tex. App.--El Paso 1993, writ denied) (regarding dismissal after special exceptions were granted.)

9. The pleader who repleads waives any error by the trial court in sustaining the special exceptions. *Long v. Tascosa Natl. Bank*, 678 S.W.2d 699, 703 (Tex. App.--Amarillo 1984, no writ).

*Caveat*: In *Troutman v. Traeco Bldg. Sys., Inc.*, 724 S.W.2d 385 (Tex. 1987), the Supreme Court appeared to place a burden on the defendant to file special exceptions to determine whether the plaintiff intended to seek relief on any unplead theories of recovery that might arise out of the facts alleged. Troutman sued for breach of warranty and negligence when a metal building collapsed, but sought and obtained jury issues and findings on DTPA violations as well. The Supreme Court affirmed recovery on the unpleaded theories. Liberally construing the pleadings, the Court found Troutman's mention of the DTPA and his pleading of the facts from which the claim arose were sufficient to support recovery. The Court said "if there were a pleading defect, it would be properly attacked by special exception." *Troutman*, 724 S.W.2d at 387.

**C. Amendments** - TEX. R. CIV. P. 63

1. Either party must obtain leave of court to amend pleadings within seven days of trial setting. *Carr v. Houston Business Forms, Inc.*, 794 S.W.2d 849 (Tex. App.--Houston [14th Dist.] 1990, no writ) (amended petition filed less than seven days before date trial was set to begin was too late, even though trial did not actually begin on that date).

2. To preserve your right to complain when a pleading is untimely filed, move to strike. *See Forscan Corp. v. Dresser Ind.*, 789 S.W.2d 389 (Tex. App.--Houston [14th Dist.] 1990, writ denied).

3. To preserve the right to complain about the court's error in granting your opponent leave to amend, move for a continuance alleging surprise and seek attorney's fees. *National Mtg. Corp. of America v. Stephens*, 723 S.W.2d 759, 762 (Tex. App.--El Paso 1986) *rev'd on other grounds*, 735 S.W.2d 474 (Tex. 1987); TEX. R. CIV. P. 70.

4. In the absence of evidence that party obtained leave of court to file late pleading, when the record reflects that the trial court considered the late-filed pleading, it will be presumed that leave to file was granted. *Goswami v. Metropolitan Sav. & Loan Ass'n*, 751 S.W.2d 487 (Tex. 1988).

5. When special exceptions are granted, leave to amend must also be granted. *Young v. Vance Godbey Co.*, 610 S.W.2d 251 (Tex. Civ. App.--Fort Worth 1980, no writ).

6. When a party objects to evidence at trial on grounds that it is not raised by the pleadings, trial court may permit a trial amendment if amendment would subserve presentation of the merits and does not unfairly surprise or prejudice the objecting party. Therefore, opposing party should object and show prejudice to preserve error. *State Bar of Texas v. Kilpatrick*, 874 S.W.2d 656 (Tex. 1994).

7. When court grants leave to file trial amendment, the amended pleading must be tendered before charge is given to jury. *Texas Gen. Indem. Co. v. Ellis*, 888 S.W.2d 830 (Tex. App.--Tyler 1994, no writ).

8. A post-verdict amendment to conform pleadings to award of exemplary damages was proper where it raised no new matters of substance *and where defendant did not object*. Failure of the record to reflect that leave to file the amendment was sought or granted was harmless where trial court would have been required to grant leave had it been sought. *Texas Health Enter. v. Krell*, 828 S.W.2d 192 (Tex.

App.--Corpus Christi) *writ granted, remand for settlement*, 830 S.W.2d 922 (1992).

**VI. REQUEST FOR JURY TRIAL** - TEX. R. CIV. P. 216

TIMELINESS OF REQUEST

1. To preserve the right to jury trial, you must timely file a written request and pay the jury fee. *Huddle v. Huddle*, 696 S.W.2d 895 (Tex. 1985).

2. There is an absolute right to jury trial if demand is made and the fee is paid within a reasonable time before case is set on non-jury docket. *Wittie v. Skees*, 786 S.W.2d 464 (Tex. App.--Houston [14th Dist.] 1990, writ denied).

3. Written request must be filed in no event later than 30 days in advance of the trial setting. *Halsell v. Dehoyos*, 810 S.W.2d 371 (Tex. 1991).

4. The granting of a continuance may render an otherwise untimely request for jury trial timely. *Halsell, supra*.

5. A request made no less than 30 days in advance of the trial setting raises a rebuttable presumption that the demand was made within a reasonable time. *Halsell, supra.*

6. The presumption may be rebutted by a showing that granting a jury trial would injure the adverse party, disrupt the court's docket, or otherwise impede the handling of the court's business. *Halsell*, 810 S.W.2d at 371; *Six Flags Over Texas, Inc. v. Parker,* 759 S.W.2d 758 (Tex. App.--Fort Worth 1988, no writ).

7. After a case is certified for trial on the non-jury docket, the granting or denial of a jury trial is within the trial court's discretion. *See Olson v. Texas Commerce Bank*, 715 S.W.2d 764, 767 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.).

8. Plaintiff was entitled to jury trial where case was set on jury docket by defendant, was reset twice on jury docket by agreement, and there was no showing that defendants were injured by late-granting of plaintiff's formal request for jury trial. *Ferguson v. DRG/Colony North, Ltd.*, 764 S.W.2d 874 (Tex. App.--Austin 1989, writ denied).

REVIEW

1. To preserve error on the denial of jury trial present a record that shows: (a) jury was available, *Six Flags Over Texas, Inc. v. Parker*, 759 S.W.2d 758 (Tex. App.--Fort Worth 1988, no writ), and (b) the granting of a jury trial would not have prejudiced your opponent or caused disruption to the trial court. *Halsell v. Dehoyos*, 810 S.W.2d 371 (Tex. 1991).

2. Refusal to grant a jury trial on proper request will be considered harmless error only if the record shows that no material issues of fact existed and an instructed verdict would have been justified. *Halsell*, 810 S.W.2d at 372; *Whiteford v. Baugher*, 818 S.W.2d 423 (Tex. App.--Houston [1st Dist.] 1991, writ denied); *see also Olson v. Texas Commerce Bank*, 715 S.W.2d 764, 767 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.).

**VII. JURISDICTION/VENUE**

**A. Special Appearance** - TEX. R. CIV. P. 120a

1. A complaint that the defendant is not amenable to process in Texas should be preserved by a special appearance filed under TEX. R. CIV. P. 120a. *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199 (Tex. 1985). A special appearance is not appropriate for challenging subject matter jurisdiction. *Oliver v. Boutwell*, 601 S.W.2d 393, 395 (Tex. App.--Dallas 1980, no writ).

2. The special appearance must be filed before any other plea, pleading or motion, and any other pleading must be urged subject to the special appearance or the special appearance is waived. TEX. R. CIV. P. 120a.

3. The special appearance must be verified and factual allegations should be supported by affidavit. TEX. R. CIV. P. 120a(1)(3).

4. The trial court determines the special appearance on the basis of the pleadings, stipulations, affidavits and attachments, discovery products, if any, and testimony. TEX. R. CIV. P. 120a(3). Get a ruling on the special appearance or it is waived.

5. Any affidavits must be based on personal knowledge and filed at least seven days before the hearing. *Slater v. Metro Nissan of Montclair*, 801 S.W.2d 253 (Tex. App.--Fort Worth 1990, writ denied).

6. Make a record. The appellate court will consider all the evidence that was before the trial court at the hearing on the motion. Without a statement of facts, the court must presume that the evidence was sufficient to support the trial court's judgment. *Matthews v. Proler*, 788 S.W.2d 172 (Tex. App.--Houston [14th Dist.] 1990, no writ).

7. Findings of fact and conclusions of law may be requested but aren't required on appeal. *See Matthews v. Proler*, 788 S.W.2d 172 (Tex. App.--Houston [14th Dist.] 1990, no writ).

8. Each defendant must establish lack of jurisdiction as to it. *General Elec. Co. v. Brown & Ross, Int'l. Distrib.*, 804 S.W.2d 527, 529 (Tex. App.--Houston [1st Dist.] 1990, writ denied).

9. The trial court will decide the special appearance on the basis of the standard set out in *Schlobohm v. Schapiro*, 784 S.W.2d 355 (Tex. 1990).

10. Under a new statute passed in 1997, an order denying a special appearance is subject to interlocutory appeal, except in family law cases. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(7) (Vernon Supp. 1998).

**B. Motion to Transfer Venue** - TEX. R. CIV. P. 86-89; TEX. CIV. PRAC. & REM. CODE ANN. § 15.001-15.065 (Vernon 1986 & Vernon Supp. 1998)

1. Plead all venue facts. Plaintiff's original petition is the only pleading available to establish the venue facts to sustain the plaintiff's choice of forum. TEX. R. CIV. P. 87(2)(b). Absent a specific denial of venue facts by the defendant, the trial court will consider only plaintiff's petition in deciding where venue is proper. TEX. R. CIV. P. 87(3)(a).

2. The defendant must object to plaintiff's choice of venue by filing a motion to transfer in due order of pleading, that is, concurrently with or prior to any other plea, pleading or motion except a special appearance, otherwise the objection is waived. *Industrial State Bank of Houston v. Eng'g Serv. and Equip. Inc.*, 612 S.W.2d 661 (Tex. App.--Dallas 1981, no writ). TEX. R. CIV. P. 6(1)(2); TEX. CIV. PRAC. & REM. CODE ANN. § 15.063 (Vernon 1986).

3. The motion should be accompanied by affidavits supporting the venue facts alleged, but it need not be verified. *See Malone v. Shoemaker*, 597 S.W.2d 473 (Tex. Civ. App.--Tyler 1980, no writ); TEX. R. CIV. P. 86(3).

4. The motion must specifically deny the facts pleaded by the plaintiff and state the legal and factual basis asserted for the transfer by: (a) specifying the county of proper venue, and stating (b) that the county chosen by the plaintiff is not proper, or (c) that venue is mandatory in the allegedly proper county by virtue of a specific statute, which must be clearly indicated in the motion. TEX. R. CIV. P. 87(3)(a).

5. If the defendant specifically denies the plaintiff's venue facts, then the plaintiff must make prima facie proof, by way of affidavit(s) and/or attachments, of those facts denied. TEX. R. CIV. P. 86(4), 87(3)(a). The plaintiff should also specifically deny any venue facts pleaded by the defendant. A global denial is ineffective. *Maranatha Temple, Inc. v. Enterprise Prods.*

*Co.*, 833 S.W.2d 736 (Tex. App.--Houston [1st Dist.] 1992, writ denied).

6. The movant must obtain a hearing on the motion to transfer and give all parties at least 45 days' notice of it. The trial court abuses its discretion in ruling on a motion to transfer in the absence of the required notice. *Henderson v. O'Neill*, 797 S.W.2d 905 (Tex. 1990); TEX. R. CIV. P. 87(1).

7. Except on leave of court, any response or opposing affidavits must be filed at least 30 days before the hearing. Any reply by movant, including additional affidavits, must be filed at least seven days before the hearing date. TEX. R. CIV. P. 87(1).

8. No evidentiary hearing. In making its venue determination, the trial court will consider the pleadings, including the motion to transfer and response, all affidavits, and discovery products, if any, on file. TEX. R. CIV. P. 87(3)(a),(b); 88. *But see Flores v. Arietta*, 790 S.W.2d 75 (Tex. App.--San Antonio 1990, writ denied) (statement of facts was required for appellate review).

## VIII. DISMISSAL

**A. Dismissal for Want of Prosecution** TEX. R. CIV. P. 165a

1. Upon notice that a case is going to be dismissed for want of prosecution, file a motion to retain and obtain a hearing. A showing of good cause is required for the court to retain the case on the docket. *See Armentrout v. Murdock*, 779 S.W.2d 119 (Tex. App.--Houston [1st Dist.] 1989, no writ). If the case is retained, the court must enter a pretrial order and assign a trial date. TEX. R. CIV. P. 166.

2. Court may consider entire history of case in exercising its discretion to dismiss. *Armentrout*, 779 S.W.2d at 121. Diligence in prosecution constitutes good cause for reinstatement. *See Fedco Oil Co. v. Pride Refining Co., Inc.*, 787 S.W.2d 572 (Tex. App.--Houston [14th Dist.] 1990, no writ); *Stromberg Carlson Leasing Corp. v. Central Welding Supply Co.*, 750 S.W.2d 862 (Tex. App.--Houston [14th Dist.] 1988, no writ).

3. To support reinstatement of a case dismissed for failure of a party or counsel to appear at a hearing or trial, it is appropriate to show that the failure to act was not intentional or the result of conscious indifference, but was due to accident or mistake. TEX. R. CIV. P. 165a(3). However, this showing is not sufficient to support reinstatement after dismissal for want of diligent prosecution. *Eustice v. Grandy's*, 827 S.W.2d 12 (Tex. App.--Dallas 1992, no writ).

4. If the case is dismissed for want of prosecution, file a verified motion to reinstate within 30 days of the dismissal, or within the time periods established by rule 306a, and request a hearing. TEX. R. CIV. P. 165a(3). Verified motion to reinstate is the exclusive remedy upon DWOP. *City of McAllen v. Ramirez*, 875 S.W.2d 702 (Tex. App.--Corpus Christi 1994, no writ).

*Caveat*: If you do not receive timely notice of the DWOP, refer to rule 306a(4). The Supreme Court has clarified that rule 306a provides at most a 90-day period from the date of the dismissal in which to file for reinstatement, NOT, as some appellate courts had held, a 120 day period. *Levit v. Adams*, 850 S.W.2d 469 (Tex. 1993). Appellate timetable runs from date trial court finds appellant first had notice of judgment. *Vineyard Bay Dev. Co. v. Vineyard on Lake Travis*, 864 S.W.2d 170 (Tex. App.--Austin 1993, writ denied).

5. Failure to verify the motion to reinstate is a jurisdictional defect. *McConnell v. May*, 800 S.W.2d 194, 195 (Tex. 1990). An unverified motion to reinstate does not extend the appellate timetable. *Owen v. Hodge*, 874 S.W.2d 301 (Tex. App.--Houston [1st Dist.] 1994, no writ).

6. The trial court must set a hearing on the verified motion as soon as practical. *NASA 1 Business Center v. American Nat. Ins. Co.*, 747 S.W.2d 36 (Tex. App.--Houston [1st Dist.]) *writ den. per curiam*, 754 S.W.2d 152 (Tex. 1988).

7. Plaintiff may waive the hearing, however. *Stromberg Carlson Leasing Corp. v. Central Welding Supply Co.*, 750 S.W.2d 862, 866 (Tex. App.--Houston [14th Dist.] 1988, no writ).

8. If the motion to reinstate is not decided by signed written order within 75 days after the dismissal is signed, it is overruled by operation of law. *Intercity Management Corp. v. Chambers*, 820 S.W.2d 811 (Tex. App.--Houston [1st Dist.] 1991, orig. proceeding) *mand. overruled* (1992).

9. However, if the motion was filed timely, the trial court retains plenary power to reinstate the case until 30 days after the motion is overruled, either by signed written order or by operation of law, whichever occurs first. *Emerald Oaks Hotel/Conference Center, Inc., v. Zardenetta*, 776 S.W.2d 577 (Tex. 1989); *Aetna Casualty v. Harris*, 682 S.W.2d 670 (Tex. App.--Houston [1st Dist.] 1984, orig. proceeding).

**B. Dismissal as a Discovery Sanction**

1. While a trial court may impose discovery sanctions sua sponte, an oral, unrecorded order made by the trial court during pretrial conference that was not reduced to writing could not support the sanction of dismissal. *Lassiter v. Shavor*, 824 S.W.2d 667 (Tex. App.--Dallas 1992, no writ); *FDIC v. Finlay*, 832 S.W.2d 158 (Tex. App.--Houston [1st Dist.] 1992, writ denied) (opin. on rehearing).

2. The order must be reduced to writing and signed by the court. *Id*.

3. The trial judge is obligated to consider sanctions less stringent than dismissal as prescribed by *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991).

**C. Dismissal for Failure to State a Cause of Action**

1. The Texas Rules of Civil Procedure contain no provision analogous to Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. File special exceptions to challenge the plaintiff's failure to clearly plead: (1) the elements of a cause of action; or (2) the factual basis for the asserted cause of action. See "Special Exceptions" Page 4 of this Article.

2. Absent an order sustaining special exceptions and an opportunity to amend, a trial court's dismissal for failure to state a cause of action must be reversed on appeal. *Texas Dept. of Corrections v. Herring*, 513 S.W.2d 6 (Tex. 1974); *Fort Bend County v. Wilson*, 825 S.W.2d 251 (Tex. App.--Houston [14th Dist.] 1992, no writ).

## IX. SUMMARY JUDGMENT

**A. Denial or Granting of Motion** Where a summary judgment is denied, ordinarily there is no right to appeal. However, the denial of a motion for summary judgment is appealable when it is based on an assertion of governmental immunity by a state employee, or where the movant is part of the electronic or print media and the issue raised is free speech or free press. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(5) & (6) (Vernon Supp. 1997). It is not necessary to preserve error in denying the motion for summary judgment beyond presenting the motion and reducing the denial to writing. Where a summary judgment is granted, no steps are necessary to preserve appellant complaint other than reducing the order to writing.

**B. Pleadings Defects** Pleadings defects must be raised in the trial court or they are waived. *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494 (Tex. 1991). If the pleadings do not support the requested summary judgment, file a summary judgment response asserting that deficiency.

**C. Evidentiary Objections** Objections that a summary judgment motion or a response contains inadmissible evidence must be preserved by written objection filed in the court. *Dolenz v. A.B.*, 742 S.W.2d 82, 83-84 n.2 (Tex. App.--Dallas 1987, writ denied).

**D. Grounds of Recovery or Defenses** Regardless of what is contained in the parties' pleadings, the summary judgment will be

evaluated on appeal by the issues that are raised in the motion and response. Legal contentions to be raised on appeal must first be included in the motion for summary judgment or response.

**E. Trial Court's Ruling** The ruling of the trial court, about which complaint is made on appeal, must be in writing and reflected in the transcript, or error is not preserved. The grant or denial of the summary judgment will be reflected in the order. However, if you lose a motion for summary judgment, be sure that all ancillary rulings of the trial court are included in the summary judgment order, or a separate order setting out the ruling. Failing that, include the ruling in a formal bill of exception. New TEX. R. APP. P. 33.2.

## X. PRETRIAL MOTIONS AND HEARINGS

**A. In General** File a response to any pretrial motions, oppose the motion at hearing, and obtain a record. *See Moore v. Wood*, 809 S.W.2d 621 (Tex. App.--Houston [1st Dist.] 1991, orig. proceeding).

WRITTEN MOTIONS

Many rules require the filing of written motions. Even if not specifically required by the rules, the better practice is always to file a written motion to preserve your requests or objections on appeal.

VERIFIED MOTIONS

Some pleadings must be verified. However, even if the rules do not require verification, if the motion depends on facts outside the record, the better practice is to verify the motion or attach an affidavit.

HEARINGS

1. If there is no evidence presented, error is not waived by failure to obtain a hearing on the motion. *See Martin v. Cohen*, 804 S.W.2d 201, 203 (Tex. App.--Houston [14th Dist.] 1991, no writ).

2. If the motion requires presentation of evidence, and no hearing is held, any error is waived.

3. If your opponent failed to obtain a hearing in a situation where one was necessary, file an affidavit with the appellate court stating that no hearing was held. *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988).

4. You may be entitled to findings of fact and conclusions of law when the trial court grants a pretrial motion. *Hopkins v. NCNB Texas Nat'l Bank*, 822 S.W.2d 353 (Tex. App.--Fort Worth 1992, no writ). To be on the safe side, present the appellate court with a record reflecting a timely request for findings and conclusions and, if necessary, a reminder. TEX. R. CIV. P. 296-ff.

RECORD

1. Make a record of all evidentiary hearings. On appeal, the appellant has the burden to present a record showing error requiring reversal. New TEX. R. APP. P. 33.1(a).

2. Absent a statement of facts, the evidence is presumed to support the trial court's order. *Pyles v. United Services Auto. Assn.*, 804 S.W.2d 163 (Tex. App.--Houston [14th Dist.] 1991, writ denied); *Salley v. Houston Lighting and Power, Co.*, 801 S.W.2d 230 (Tex. App.--Houston [1st Dist.] 1990, writ denied).

*Caveat*: In a complaint arising out of the granting or denial of a pretrial motion, if the trial court's order recites that the trial court considered the pleadings, evidence, and argument of counsel, and no statement of facts from the hearing is filed on appeal, the appellate court will presume that evidence was heard and that it was sufficient to support the order. *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988); *Delgado v. Kitzman*, 793 S.W.2d 332 (Tex. App.--Houston [1st Dist.] 1990, orig. proceeding). Conversely, if the order does not state that evidence was heard, the appellate court will presume that the trial court's ruling was based only on the motion, pleadings, and argument of counsel unless the record demonstrates otherwise. *Id*.

**B. Motion for Continuance** - TEX. R. CIV. P. 247, 251-254

1. The motion for continuance must be in writing, and must strictly comply with the rules. *City of Houston v. Blackbird*, 658 S.W.2d 269 (Tex. App.--Houston [1st Dist.] 1983, writ dism'd).

2. It must be verified or accompanied by affidavits. Failure to verify is fatal. *Blackbird*, 658 S.W.2d at 272.

3. Any opposition to a motion for continuance should be affirmatively reflected in the record: (a) file a response; (b) appear at the hearing on the motion; and (c) argue against continuance on the record. On appeal, if a verified motion for continuance that substantially complies with the rules is uncontested, the appellate court may take as true the statements in the motion. Under these circumstances, there is no presumption in favor of the trial court's discretion. *Verkin v. Southwest Center One, Ltd.*, 784 S.W.2d 92 (Tex. App.--Houston [1st Dist.] 1989, writ denied).

4. To preserve error regarding a motion for continuance sought to complete discovery (including the absence of a witness), include the following in the motion: (a) allege and prove the testimony is material; (b) show your diligence in attempting to obtain it; (c) explain the cause of your failure to obtain it, if known; (d) show the evidence is not available from other sources; and (5) state that the continuance is not for delay only, but so that justice will be done. *Verkin v. Southwest Center One, Ltd.*, 784 S.W.2d 92 (Tex. App.--Houston [1st Dist.] 1989, writ denied).

5. To preserve error on the denial of a motion for continuance based on the absence of counsel, show: (a) counsel's absence was not the party's fault and did not occur through his lack of diligence, *State v. Crank*, 666 S.W.2d 91 (Tex. 1984), 105 S.Ct. 124; *Gendebien v. Gendebien*, 668 S.W.2d 905 (Tex. App.--Houston [14th Dist.] 1984, no writ); and (b) no other attorney could handle the case. *Echols v. Brewer*, 524 S.W.2d 731 (Tex. Civ. App.--Houston [14th Dist.] 1975, no writ).

**XI. DISCOVERY** To obtain review of discovery matters generally, as in other areas, the appellant must present to the appellate court a record reflecting: (a) a timely motion, request for ruling, or objection to the ruling; (b) stating the precise grounds for the ruling it wants the trial court to make; and (c) the ruling made by the trial court. TEX. R. APP. P. 33. **CAUTION:** The specific procedures for discovery will radically change on January 1, 1999, because new discovery rules will go into effect at that time. The following descriptions will no longer be completely accurate after December 31, 1998.

**A. By the Party Seeking Discovery**

1. Serve an appropriate discovery request seeking information within the scope of rule 166b(2). *See Loftin v. Martin*, 776 S.W.2d 145 (Tex. 1989).

2. If the desired information is not forthcoming, file a motion to compel and obtain a hearing on any objections filed by your opponent. *McKinney v. National Union Fire Ins. Co.*, 772 S.W.2d 72 (Tex. 1989) (failure of resisting party to obtain a hearing does not waive the party's objection at trial, so unless you get a hearing, the resisting party may successfully avoid the duty to answer and supplement pretrial discovery requests and then present the undisclosed evidence at trial).

3. Obtain a record of the hearing and present it to the reviewing court in the appeal or mandamus. *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992). If no hearing is held, file an affidavit to that effect. *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988).

4. If a hearing is held but no court reporter is present to make a record, be sure that trial court's order reflects whether evidence was presented to or considered by the court, or file an affidavit stating whether the court considered evidence. *Walker*, 827 S.W.2d at 837 (appellate court cannot determine whether abuse of

discretion occurred when record does not reveal basis for trial court's order); *Delgado v. Kitzman*, 793 S.W.2d 332, 333-34 (Tex. App.--Houston [1st Dist.] 1990, orig. proceeding) (when order states that trial court considered the pleadings, evidence and argument of counsel, absent a showing to the contrary, appellate court will presume that the evidence was sufficient to support the order).

5. Plead waiver of any unproven exemption asserted by your opponent or you may waive the issue yourself. *Loftin*, 776 at 148; *H.E. Butts Grocery Co. v. Williams*, 751 S.W.2d 554 (Tex. App.--San Antonio 1988, orig. proceeding); *Southwestern Inns, Ltd., v. General Elec. Co.*, 744 S.W.2d 258, 261-62 (Tex. App.--Houston [14th Dist.] 1987, writ denied). *See also Miller v. O'Neill*, 775 S.W.2d 56, 59 (Tex. App.--Houston [1st Dist.] 1989, orig. proceeding) (waiver for failure to present evidence); *Gulf Oil Corp. v. Fuller*, 695 S.W.2d 769 (Tex. App.--El Paso 1985, orig. proceeding); TEX. R. EVID. 511 (waiver through voluntary disclosure).

6. On appeal, the requesting party must show that the denial of the discovery was harmful. *See Walker*, 827 S.W.2d at 842-43; new TEX. R. APP. P. 44.1, 61.1.

7. If documents were examined in camera, move that they be carried forward under seal for review by the appellate court. *Pope v. Stephenson*, 787 S.W.2d 953 (Tex. 1990); see also *Southwest Inns, Ltd. v. General Elec. Co.*, 744 S.W.2d 258 (Tex. App.--Houston [14th Dist.] 1987, writ denied).

**B. Steps to be Taken by the Party Resisting Discovery**

1. Timely file any objections to discovery, *Hobson v. Moore*, 734 S.W.2d 340 (Tex. 1987), and plead specifically the immunity or exemption relied on. *Peeples v. Hon. Fourth Supreme Judicial Dist.*, 701 S.W.2d 635, 637 (Tex. 1985) (orig. proceeding). Timely filed objections toll the obligation to answer. *McKinney v. National Union Fire Ins. Co.*, 772 S.W.2d 72 (Tex. 1989). It is unclear whether they also toll the obligation to supplement.

2. An objection is timely if filed no later than the date on which answers are to be filed. *Hobson v. Moore*, 734 S.W.2d 340 (Tex. 1987); *Overstreet v. Home Indem. Co.*, 747 S.W.2d 822 (Tex. App--Dallas 1987, orig. proceeding, writ denied); TEX. R. CIV. P. 166b(4).

3. An objection to discovery requests framed by categories of documents, without identifying each specific document, is not deficient. *Green v. Lerner*, 786 S.W.2d 486 (Tex. App.--Houston [1st Dist.] 1990, orig. proceeding).

4. An objecting party must present evidence to support a claim of privilege, immunity, or exemption. *Loftin v. Martin*, 776 S.W.2d 145 (Tex. 1989); *Giffin v. Smith*, 688 S.W.2d 112 (Tex. 1985). The trial court commits reversible error by sustaining an objection to discovery that is not supported by pleading and proof. *Loftin*, 776 S.W.2d at 148.

5. It is no longer necessary to file a motion for a protective order to preserve error. TEX. R. CIV. P. 166b(4).

6. Although the objecting party has no burden to obtain a hearing, *McKinney*, 772 S.W.2d at 74-75, by obtaining a hearing, the resisting party reduces the risk that a plaintiff who is forced to file a motion to compel may seek and obtain sanctions. *See Owens-Corning Fiberglas Corp. v. Caldwell*, 807 S.W.2d 413, 414-15 (Tex. App.--Houston [1st Dist.] 1991, orig. proceeding); *Wright v. Cardox Corp.*, 774 S.W.2d 407 (Tex. App.--Houston [14th Dist.] 1987, writ denied); TEX. R. CIV. P. 215(2)(b).

7. The trial court has no duty to conduct an in camera inspection merely because a privilege is pleaded. *See Barnes*, 751 S.W.2d at 495.

8. However, once a party presents evidence (affidavits, testimony, etc.) that establishes, prima facie, the application of a privilege, the trial court must conduct an in camera inspection if it determines that an inspection is necessary to establish whether the relief sought is justified. *Peeples v. Hon. Fourth Supreme Judicial Dist.*, 701 S.W.2d 635, 637 (Tex. 1985) (orig.

proceeding); *Ryals v. Canales*, 767 S.W.2d 226, 229 (Tex. App.--Dallas 1989, orig. proceeding).

9. When only the document(s) themselves can establish a claim of privilege, request an in camera inspection and tender them, otherwise the claim is waived. *Peeples*, 701 S.W.2d at 637. The trial court must conduct an inspection under these circumstances. *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988); *Weisel Enter., Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex. 1986). An unequivocal offer to submit all the documents preserves error, but all the documents need not actually be delivered. *Nat'l. Union Fire Ins. Co. v. Hoffman*, 746 S.W.2d 305 (Tex. App.--Dallas 1988, orig. proceeding).

10. Affidavits presented as evidence must be filed at least seven days before the hearing, TEX. R. CIV. P. 166b(4), and must contain more than mere conclusory statements that the documents are privileged, including facts other than those ascertainable from the documents themselves. *Barnes*, 751 S.W.2d at 495.

11. Evidence is also required to support a claim that discovery requests are burdensome or harassing. *Independent Insulating Glass/Southwest, Inc. v. Street*, 722 S.W.2d 798, 802 (Tex. App.--Fort Worth 1987, writ dism'd).

12. When considering an objection on the basis of undue burden, unnecessary expense, harassment or annoyance, or on the basis of invasion of personal, constitutional, or property rights, the decision whether to conduct an in camera inspection is within the trial court's discretion. *Hoffman v. Fifth Court of Appeals*, 756 S.W.2d 723 (Tex. 1988).

13. The order sustaining your discovery objections should affirmatively recite that the trial court considered evidence at the hearing. *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988). Otherwise, the appellate court will presume that evidence was not presented or considered. *Delgado v. Kitzman*, 793 S.W.2d 332, 333-34 (Tex. App.--Houston [1st Dist.] 1990, orig. proceeding).

14. If the opposing party alleges that you have waived an objection by prior disclosure, you must negate the claim of waiver. *Jordan v. Fourth Court of Appeals*, 701 S.W.2d 644 (Tex. 1986); *H.E. Butts Grocery Co. v. Williams*, 751 S.W.2d 554 (Tex. App.--San Antonio 1988, writ denied); TEX. R. EVID. 512.

15. On appeal of discovery orders, the record should contain the discovery requests, all relevant objections and motions, a record of all evidence presented at any hearings, including affidavits and depositions, and the trial court's ruling or order. *H.E. Butts Grocery Co. v. Williams*, 751 S.W.2d 554 (Tex. App.--San Antonio 1988, writ denied).

16. Be certain that any depositions that are to be considered by the appellate court are offered into evidence in the trial court. TEX. R. CIV. P. 166a(d).

### C. Discovery and Disclosure of Experts and Other Witnesses

EXPERTS

1. Upon proper request, a party must, as soon as practical, but no later than 30 days before trial, disclose the identity, mental impressions, and opinions of (a) all testifying experts, (b) all consulting experts whose work is reviewed (whether "relied on" or not) by testifying experts, and (c) all consulting experts (testifying or not) who were not hired in anticipation of litigation, or risk losing the expert's testimony. *Builders Equip. Co. v. Onion*, 713 S.W.2d 786 (Tex. App.--San Antonio 1986, orig. proceeding)("as soon as practical" may mean more than 30 days before trial). *See also Axelson Inc. v. McIlhany*, 798 S.W.2d 550 (Tex. 1990) (consulting-only experts). *But see Mother Frances Hosp. v. Coats*, 796 S.W.2d 566 (Tex. App.--Tyler 1990, orig. proceeding) (disagreeing with *Builders Equip. v. Onion)* (a party is not required to show good cause for designating an expert witness unless designation is made less than 30 days before trial); in the absence of a specific order, there is nothing in the rules that requires a party to seek out its expert witnesses at any particular time during

the pretrial process). *Accord*, *Pedraza v. Peters*, 826 S.W.2d 741 (Tex. App.--Houston [14th Dist.] 1992, no writ) (a trial judge acts improperly in compelling designation of experts more than 30 days before trial). *See also Williams v. Crier*, 734 S.W.2d 190 (Tex. App.--Dallas 1987, orig. proceeding) (addressing a lack of evidence to support the trial court's finding that designation was not made as soon as practical). *See also Green v. Lerner*, 786 S.W.2d 486 (Tex. App.--Houston [1st Dist.] 1990, orig. proceeding).

2. The trial court may alter these time limits for good cause shown in the record. *Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669 (Tex. 1990). Good cause does not include the importance of the witness to the proponent's case, *Clark v. Trailways, Inc.*, 774 S.W.2d 644 (Tex. 1989) 110 S.Ct. 1122; 794 S.W.2d 479 (writ den'd), or counsel's belief that the case will settle before trial. *Rainbo Baking Co., v. Stafford*, 787 S.W.2d 41, 41-42 (Tex. 1990). TEX. R. CIV. P. 166b(6); 215(5). A party whose experts were not disclosed early enough should request a "good cause hearing," and should develop evidence as to what good cause should permit the late disclosure of the expert. Have a court reporter record the hearing.

3. Trial court abused discretion in striking expert designated 32 days before trial on ground expert had not been designated "as soon as practical" when there was no evidence that designation at an earlier date would have been practical. *Mentis v. Barnard*, 870 S.W.2d 14 (Tex. 1994). *See also Tinsley v. Downey*, 822 S.W.2d 784 (Tex. App.--Houston [14th Dist.] 1992, orig. proceeding, mand. motion overruled). The party seeking exclusion of witnesses should develop evidence, in a hearing on the issue, to establish that designation was not as soon as practical.

FACT WITNESSES

1. Witness undisclosed at least thirty days prior to trial cannot testify. The sanction is automatic. *Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669 (Tex. 1990); *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex. 1986).

2. Exception may be made when the party demonstrates good cause on the record. *Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394 (Tex. 1989). *But see Tri-State Motor Transit Co. v. Nicar*, 765 S.W.2d 486 (Tex. App.--Houston [14th Dist.] 1989, no writ) (implied finding of good cause). The party seeking permission to disclose a witness after the deadlines should request a "good cause hearing" and develop evidence of good cause for late disclosure.

3. The fact that the witness is called in rebuttal does not constitute good cause for failing to identify him sooner. *Alvarado v. Farah Mfg. Co., Inc.*, 830 S.W.2d 911 (Tex. 1992). Neither does the importance of the witness to the party's case. *Clark v. Trailways, Inc.*, 774 S.W.2d 644 (Tex. 1989) 110 S.Ct. 1122; 794 S.W.2d 479 (writ den'd). Lack of surprise is not the standard but it may be a factor in the trial court's decision. *Gee*, 765 S.W.2d at 395, n. 2.

4. The automatic exclusion of testimony under Rule 215(5) for failure to timely identify witnesses does not carry over if the trial is reset for more than 30 days after the original trial date. The party must be allowed to supplement. *H.B. Zachry Co. v. Gonzalez*, 847 S.W.2d 246 (Tex. 1993).

*Practice Note*: The Supreme Court has suggested a procedural alternative to automatic exclusion of an unidentified witness's testimony: the court may "postpone trial and, under rule 215.3 impose an appropriate sanction upon the offending party for abuse of the discovery process." Such a sanction, including an award of attorney's fees, may be used to compensate the opposing party for the wasted expense in preparing for trial. *Alvarado v. Farah Mfg. Co. Inc., supra*. So, if you are the offending party, make the trial court aware of this option. If you are the opposing party, argue that you will be prejudiced by any delay.

**D. Supplementation**

1. Failure to timely supplement discovery responses when identity or subject matter of expert's testimony has not been previously

disclosed will result in automatic exclusion of the expert's testimony. TEX. R. CIV. P. 215(5).

2. The duty to supplement discovery responses applies to discovery requested in connection with a subpoena issued for deposition testimony. Failure results in exclusion of the evidence. *Foster v. Cunningham*, 825 S.W.2d 806 (Tex. App.--Fort Worth 1992, writ denied).

3. However, supplemental responses need be no broader than the interrogatory. *Yarborough v. Tarrant Appraisal Dist.*, 846 S.W.2d 552 (Tex. App.--Fort Worth 1993, no writ) (where interrogatory requested expert's identity only, responding party need not supplement to provide subject matter of expert's testimony).

4. Some cases say that supplemental answers to interrogatories need not be verified. *See Jones v. Kinder*, 807 S.W.2d 868, 872 (Tex. App.--Amarillo 1991, no writ); *Soefje v. Stewart*, 847 S.W.2d 311, 314 (Tex. App.--San Antonio 1992, writ denied). Others say they must: *Ramirez v. Ramirez*, 873 S.W.2d 735, 740 (Tex. App.--El Paso 1994, no writ); *Varnes v. Howe*, 860 S.W.2d 458 (Tex. App.--El Paso 1993, no writ). This issue will probably be decided in *Dawson-Austin v. Austin*, 920 S.W.2d 776 (Tex. App.--Dallas 1996), *rev'd on other grounds*, 968 S.W.2d 319 (Tex. 1998). The new proposed discovery rules, which become effective on January 1, 1999, provide that the supplemental answers be sworn whenever the original interrogatory answers were required to be sworn.

5. Some cases say that a written supplemental response to interrogatories may be verified by the party's attorney rather than the party herself. Rule 168(5) requires a party's verification only of original answers to interrogatories. *Circle Y of Yoakum v. Blevins*, 826 S.W.2d 753 (Tex. App.--Texarkana 1992, writ denied).

6. But see *Soefje v. Stewart*, 847 S.W.2d 311, 314 (Tex. App.--San Antonio 1992, writ denied) (suggesting that no formalities are required for supplemental answers). *Contra*, *Ramirez v. Ramirez*, 873 S.W.2d 735, 740 (Tex. App.--El Paso 1994, no writ); *Varnes v. Howe*, 860 S.W.2d 458 (Tex. App.--El Paso 1993, no writ).

7. Failure to obtain a pretrial ruling on discovery disputes that exist before commencement of trial constitutes a waiver of any claim for sanctions based on that conduct. *Remington Arms Co., Inc. v. Caldwell*, 850 S.W.2d 167, 170 (Tex. 1993); *Smith v. O'Neal*, 850 S.W.2d 797, 799 (Tex.App.--Houston [14th Dist.] 1993, no writ). Failure to file a motion for sanctions or a motion to compel waives any right to exclude testimony. *Smith*, 850 S.W.2d at 799. *See Lucas v. Titus County Hosp. Dist.*, 964 S.W.2d 144 (Tex. App.--Texarkana Oct. 24, 1997, pet. filed) (when plaintiff's counsel knew in advance of trial witnesses' intent to deviate from their deposition testimony, but failed to request a pretrial hearing on exclusion as a discovery sanction, error was waived; however, rule doesn't apply if discovery problem is first discovered after trial has begun).

**E. Admissions**

1. When requests for admissions are not answered within 30 days after service, the matters sought to be admitted are deemed admitted. TEX. R. CIV. P. 169(1). Requests for admissions denied but unsigned are deemed admitted. *Osteen v. Glynn Dodson, Inc.*, 875 S.W.2d 429 (Tex. App.--Waco 1994, writ denied).

2. However, under Rule 169(2) and upon a showing of good cause the trial court may allow a party to withdraw deemed admissions. TEX. R. CIV. P. 169(2). Belief in an alleged "oral agreement" with opposing counsel does not constitute good cause. *Hoffman v. Texas Commerce Bank*, 846 S.W.2d 336, 339 (Tex. App.--Houston [14th Dist.] 1993, writ denied).

3. Immediately upon discovery that admissions have been deemed against you, file a motion to withdraw or amend admissions. *See Employers Ins. of Wausau v. Halton*, 792 S.W.2d 462 (Tex. App.--Dallas 1990, writ denied).

4. The motion should allege: (a) that there is good cause for your failure to respond to the

request on time; (b) that allowing withdrawal will not unduly prejudice the party relying on the deemed admissions; and (c) that the case can be fully presented on the merits following withdrawal. *See Employers Ins. of Wausau v. Halton*, 792 S.W.2d 462 (Tex. App.--Dallas 1990, writ denied); *Curry v. Clayton*, 715 S.W.2d 77 (Tex. App.--Dallas 1986, no writ); TEX. R. CIV. P. 169(2).

5. Support the factual allegations in your motion with affidavits and file the answers to the requests for admissions that you would have filed. *Halton*, 792 S.W.2d at 463.

6. Obtain a hearing and make a record of the evidence presented. *Laycox v. Jaroma, Inc.*, 709 S.W.2d 2, 3 (Tex. App.--Corpus Christi 1986, writ ref'd n.r.e.). Get a ruling on the motion.

7. If admissions are deemed in your favor, make them part of the trial record by filing them with the court. *Red Ball Motor Freight, Inc. v. Dean*, 549 S.W.2d 41, 43 (Tex. Civ. App.--Tyler 1977, writ dism'd).

8. Admissions, deemed or otherwise, are judicial admissions and cannot be controverted by testimony or other evidence. *Shaw v. Nat'l County Mut. Fire Ins. Co.*, 723 S.W.2d 236 (Tex. App.--Houston [1st Dist.] 1986, no writ).

9. However, if no objection is raised when controverting evidence is offered at trial, objection is waived. Failure to object waives the right to rely on the admission and the evidence comes in. *Marshall v. Vise*, 767 S.W.2d 699 (1989).

### F. Sealing Court Records Under Rule 76a

1. In *General Tire, Inc. v. Kepple*, 970 S.W.2d 520 (Tex. 1998), the Supreme Court clarified the interaction between a protective order under TEX. R. CIV. P. 166b and a sealing order under TEX. R. CIV. P. 76a, as applied to unfiled discovery. A party may seek a protective order under TRCP 166b(5)(c), and if no party or intervenor contends that the records in question are court records, the trial court makes a threshold determination of whether the unfiled discovery is a "court record." If the court determines that the records are court records, then Rule 76a notice and hearing must be given. Otherwise, the issue is treated as an ordinary discovery matter. *Kepple* makes clear that non-parties may intervene and raise the "court record" issue at any time, even before the preliminary determination is made by the trial court.

2. Under TEX. R. CIV. P. 76a, court records are presumed to be open to the general public and may be sealed only upon a showing of the exceptions outlined in the rule. TEX. R. CIV. P. 76a(1). *See Garcia v. Peebles*, 734 S.W.2d 343 (Tex. 1987).

3. A motion to seal records is the proper procedure when seeking to limit the dissemination of information requested during discovery and to preserve error for appeal. TEX. R. CIV. P. 76a(1)(3).

4. To be presumed "open," documents, including unfiled discovery, must be shown to be "court records" within the definition of the rule. *Lilly v. Biffle*, 868 S.W.2d 806 (Tex. App.--Dallas 1993, no writ). T.R.C.P. 76a(1); 76a(2). The party seeking disclosure has the burden to prove that unfiled documents are "court records." *Biffle*, 868 S.W.2d at 808-809. *See also Texans United*, 858 S.W.2d at 40; *Benson* 846 S.W.2d at 491.

5. At the mandatory hearing, the party seeking to seal records must show (a) a "specific, serious and substantial interest" that (b) outweighs openness and the adverse effect sealing would have on public health or safety, and (c) no less restrictive means than sealing would adequately protect the records. TEX. R. CIV. P. 76a(1)(a)(b).

## XII. PRETRIAL ORDERS/DOCKET CONTROL ORDERS

### A. Separate Trials/Bifurcation/Severance/ Consolidation

**Rule 174 Consolidation; Separate Trials**

> (a) Consolidation. When actions involving a common question of law of fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.
>
> (b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

1. An order of severance or consolidation is reviewed on an abuse of discretion standard. *Guaranty Federal Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652 (Tex. 1990) (severance); *Cherokee Water Co. v. Forderhouse*, 641 S.W.2d 522 (Tex. 1982) (consolidation); *Ryland Group, Inc. v. White*, 723 S.W.2d 160 (Tex. App.--Houston [1st Dist.] 1986, no writ).

2. The same standard applies in bifurcation. *Miller v. O'Neill*, 775 S.W.2d 56 (Tex. App.--Houston [1st Dist.] 1989, orig. proceeding).

3. Preserve all arguments in favor of or in opposition to the trial court's actions by way of written motion or response.

4. In all punitive damages cases, bifurcation of the issue of the amount of punitive damages is required, upon motion by the defendant. TEX. CIV. PRAC. & REM. CODE ANN. § 41.009 (Vernon 1997); *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994).

**B. Intervention** TEX. R. CIV. P. 60.

> **Rule 60. Intervenor's Pleadings**
> Any party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party.

1. An intervening party must file a petition in intervention stating the basis for the intervention. Any party who opposes the intervention must file a motion to strike or opposition is waived. *Guaranty Federal Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652 (Tex. 1990). Written pleadings are required and intervention may not be "tried by consent." *Diaz v. Attorney General of Texas*, 827 S.W.2d 19 (Tex. App.--Corpus Christi 1992, no writ).

2. A trial court abuses its discretion in refusing to allow an intervention if: (a) the intervenor meets the requirements of TEX. R. CIV. P. 60; (b) the intervention will not complicate the case by excessive multiplication of issues; and (c) the intervention is essential to effectively protect the intervenor's interest. *Guaranty Federal Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d at 657.

3. If the trial court strikes the intervention without a motion to strike, it abuses its discretion. *Id*. If a motion to strike is filed, the burden shifts to the intervenor to show a legal or equitable interest in the lawsuit. *Mendez v. Bower*, 626 S.W.2d 498 (Tex. 1982).

4. There is no appeal from an order granting intervention until a final judgment is rendered in the case. *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 615 S.W.2d 947 (Tex. Civ. App.--Austin), *writ ref'd*, 622 S.W.2d 82 (Tex. 1981).

5. In reviewing the trial court's action for an abuse of discretion, the appellate court will consider the action in light of the record before the trial court at the time it acted. *Armstrong v. Tidelands Life Ins. Co.*, 466 S.W.2d 407 (Tex. Civ. App.--Corpus Christi 1971, no writ).

### C. Referral to ADR

MEDIATION

1. Courts are admonished to encourage litigants to peaceably resolve their differences and may, on their own motion, refer a dispute to an ADR procedure. *Decker v. Lindsay*, 824 S.W.2d 247 (Tex. App.--Houston [1st Dist.] 1992, orig. proceeding); TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon 1997).

2. If a party objects, however, and asserts a reasonable basis for the objection, the court may not refer the case to ADR unless it finds no reasonable basis for the objection. *Decker*, 824 S.W.2d at 250; TEX. CIV. PRAC. & REM. CODE ANN. § 154.022(c) (Vernon 1997).

3. A facilitator of an ADR proceeding has no authority to compel the parties to mediate or to coerce the parties into settlement. *Decker*, 824 S.W.2d at 251.

4. Neither can the court require the parties to negotiate in good faith or to attempt to settle the case during mediation unless they voluntarily agree to do so. *Id*.

5. A party's reluctance or refusal to sign a binding agreement the same day it was drafted was not a breach of good faith in the mediation. *Rizk v. Millard*, 810 S.W.2d 318, 321 (Tex. App.--Houston [14th Dist.] 1991, no writ).

6. Trial court cannot sanction party for failure to pay pursuant to settlement made during mediation. *Island Entertainment v. Castaneda*, 882 S.W.2d 2, 5 (Tex. App.--Houston [1st Dist.] 1994, writ denied).

ARBITRATION

1. Under the provisions of the Federal Arbitration Act, 9 U.S.C.A. 3, a party's repudiation or breach of a contract does not preclude the right to arbitrate under provisions of the contract. *USX Corp. v. West*, 759 S.W.2d 764 (Tex. App.--Houston [1st Dist.] 1988, orig. proceeding).

2. If the parties have agreed by contract to arbitrate, file a motion to compel arbitration under TEX. CIV. PRAC. & REM. CODE ANN. § 171.001 (Vernon Supp. 1998). *USX Corp. v. West*, *supra*.

3. A trial court has no discretion in ordering arbitration under a valid agreement to arbitrate. Because there is no adequate remedy by way of appeal, mandamus is proper when the court refuses to order arbitration mandated by contract. *USX Corp.*, 781 S.W.2d at 455; *Shearson Lehman Hutton, Inc. v. McKay*, 763 S.W.2d 934 (Tex. App.--San Antonio 1989, orig. proceeding).

4. The trial court may stay arbitration proceedings while determining the validity of the arbitration agreement if it is challenged. *Gulf Interstate Engineering Co. v. Pecos Pipeline & Producing Co.*, 680 S.W.2d 879 (Tex. App.--Houston [1st Dist.] 1984, writ dism'd); TEX. REV. CIV. STAT. ANN. art. 225.

5. Mandamus will not lie to challenge a trial court order *compelling* arbitration. *Tenneco Inc. v. Salyer*, 739 S.W.2d 500 (Tex. App.--San Antonio 1985, orig proceeding).

6. If the trial court erroneously orders arbitration, seek injunctive relief. *See Lost Creek Util. v. Travis Ind. Painters*, 827 S.W.2d 103 (Tex. App.--Austin 1992, writ denied). The denial of the injunction is appealable. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon Supp. 1998).

7. A party can waive his right to compel arbitration if he first "substantially invokes" the judicial process to the detriment of the other party. *Marble Slab Creamery, Inc. v. Wesic, Inc.*, 823 S.W.2d 436 (Tex. App.--Houston [14th Dist.] 1992, no writ). (Plaintiff conducted extensive pretrial discovery and even obtained an injunction against the defendant before filing a motion to compel arbitration. Attorney's fees and discovery costs were evidence of harm and prejudice supporting denial of arbitration.)

8. An appellate court has no jurisdiction to review an arbitration award absent allegation of

one of the statutory or common law grounds for vacating an award. *Powell v. Gulf Coast Carriers*, 872 S.W.2d 22 (Tex. App.--Houston [14th Dist.] 1994, no writ).

## XIII. REMOVAL TO FEDERAL COURT/ REMAND

**A. Automatic Removal** 28 U.S.C. § 1441 et seq.

1. Defendant must file notice of removal within 30 days after receipt by defendant, *through service or otherwise*, of a copy of the first pleading in the state action that sets forth a removable claim. 28 USC §1446(b). *Kulbeth v. Woolnought*, 324 F.Supp. 908 (S.D. Tx. 1971). *See also Silverwood Estates Dev. Ltd. v. Adcock*, 793 F.Supp. 226 (N.D. Ca. 1991); *Tyler v. Prudential Ins. Co.*, 524 F.Supp. 1211, 1213 (W.D. Pa. 1981).

2. Removability may be apparent from some earlier filed pleading such as an application for a TRO. Failure to remove within 30 days from receipt of that pleading will result in waiver of the right to remove. *See Kiddie Rides USA, Inc. v. Elecktro-Mobiltechnik*, 597 F.Supp. 1476 (C.D. Il. 1984). Even a non-pleading may disclose removability. *See Williams v. Beyer*, 455 F.Supp. 482 (D. N.H. 1978).

3. The 30-day period runs for *all* defendants from the date the first defendant receives the original complaint. *Getty Oil Corp.,v. Ins. Co. of N. Amer.*, 841 F.2d 1254 (5th Cir. 1988).

4. After 30 days, no new grounds for removal may be added. *Filho v. Pozos Int'l Drilling Serv. Inc.*, 662 F.Supp. 94, 96 n.2 (S.D. Tex. 1987).

5. The notice of removal is signed pursuant to rule 11 and no longer need be verified. 28 U.S.C. 1446(a).

6. Don't forget that most federal districts have local rules on removal that must be observed.

**B. Remand to State Court**

1. File a motion to remand within 30 days. 28 U.S.C. § 1447(c).

2. Attorney's fees may be recoverable for improper removal. *FDIC v. Loyd*, 955 F.2d 316 (5th Cir. 1992).

## XIV. MOTION IN LIMINE; ADMISSION/ EXCLUSION OF EVIDENCE

**A. Review**

1. Granting or denying motion in limine does not preserve error. *Redding v. Ferguson,* 501 S.W.2d 717 (Tex. Civ. App.--Ft.Worth 1973, writ ref'd n.r.e.).

2. Denying a motion in limine is not reversible error. *Hartford Acc. & Indem. Co. v. McCardell*, 369 S.W.2d 331 (Tex. 1963).

3. Granting motion in limine is not reversible error; it is the subsequent exclusion or admission of relevant evidence pursuant to its action on motion in limine that may constitute reversible error. *Schutz v. Southern Union Gas Co.*, 617 S.W.2d 299, 303 (Tex. Civ. App.--Tyler 1981, no writ).

**B. Preservation of Error**

1. The party opposing **admission** of certain evidence has the burden of interposing timely and specific objection and to evidence offered. *Wilkins v. Royal Indem. Co.*, 592 S.W.2d 64 (Tex. Civ. App.--Tyler 1979, no writ). *See* TEX. R. EVID. 103.

2. Preservation of error on **exclusion** of evidence requires the complaining party to offer the evidence and secure an adverse ruling from the court. *Roberts v. Tatum*, 575 S.W.2d 138 (Tex. Civ. App.--Corpus Christi 1979, writ ref'd n.r.e.). Then, outside the presence of the jury, the proponent must make an offer of proof. TEX. R. EVID. 103(b).

## XV. VOIR DIRE

### A. Comments During Voir Dire

1. Absent a record of the voir dire, rulings are presumptively correct. *Lauderdale v. Insurance Co. of North America*, 527 S.W.2d 841 (Tex. Civ. App.--Fort Worth 1975, writ ref'd n.r.e.); *Fenton v. Wade*, 303 S.W.2d 816 (Tex. Civ. App.--Fort Worth 1957, writ ref'd n.r.e.).

2. Claimed error may be presented by bill of exception. *Tumlinson v. San Antonio Brewing Assn.*, 170 S.W.2d 620 (Tex. Civ. App.--San Antonio 1943, writ ref'd w.o.m.).

3. Prompt objection and instruction to disregard is required on "curable" voir dire. *T.E.I.A. v. Loesch*, 538 S.W.2d 435 (Tex. Civ. App.--Waco 1976, writ ref'd n.r.e.).

4. Voir dire is "curable" if instruction will give adequate relief. *Griffin v. Eakin*, 656 S.W.2d 187 (Tex. Civ. App.--Austin 1983, writ ref'd n.r.e.); *American Home Assurance Co. v. Coronado*, 628 S.W.2d 818 (Tex. Civ. App.--Amarillo 1981, writ ref'd n.r.e.).

5. "Incurable" voir dire is that which is so prejudicial and inflammatory that instruction will not be adequate relief. *Otis Elevator Co. v. Wood*, 436 S.W.2d 324 (Tex. 1968); *American Home Assurance Co. v. Coronado*, 628 S.W.2d 818 (Tex. Civ. App.--Amarillo 1981, writ ref'd n.r.e.).

### B. Challenge for Cause

1. To preserve error, develop grounds for challenge in the statement of facts. Move to strike the juror for cause. State to court before strike list is turned in to the clerk the names of the objectionable jurors unsuccessfully challenged for cause that party is required to take. *Hallett v. Houston Northwest Medical Center*, 689 S.W.2d 888 (Tex. 1985); *Sullemon v. U.S. Fidelity & Guaranty Co.*, 734 S.W.2d 10 (Tex. App.--Dallas 1987, no writ). Request additional peremptory challenges to make up for the ones you had to use on the targeted panel members. *See Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc.*, 937 S.W.2d 60, 64 (Tex. App.--Houston [14th Dist.] 1997) *modified on other grounds and aff'd*, 1998 WL 352942 (Tex. July 3, 1998) (failure to request additional peremptory strikes was one aspect of waiver of complaint for denying challenge for cause.

2. To preserve error in trial courts' failure to strike jurors for cause, the record must reflect that the complaining party put the trial court on notice, before using their peremptory strikes, that they would exhaust their peremptory strikes and be forced to seat specific objectionable jurors. Lopez *v. So. Pacific Transp. Co.*, 847 S.W.2d 330 (Tex. App.--El Paso 1993, no writ).

### C. Preemptory Challenges

1. Made without assigning a reason therefor. TEX. R. CIV. P. 232.

2. Each party entitled to six in a civil district court case. TEX. R. CIV. P. 233.

EQUALIZING STRIKES

3. A two step process for allocating number of challenges is required in multi-party cases. *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914 (Tex. 1979); *Lorusso v. Members Mutual Insurance Co.*, 603 S.W.2d 818 (Tex. 1980); *Lawyers' Casualty Co. v. Peterson*, 609 S.W.2d 579 (Tex. Civ. App.--Dallas 1980, no writ); *Williams v. Texas City Refining, Inc.*, 617 S.W.2d 823 (Tex. Civ. App.--Houston [14th Dist.] 1981, writ ref'd n.r.e).

a. Trial court must first "align the parties" by grouping the litigants into "parties" and equalize strikes. *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914 (Tex. 1979). Antagonism determines the alignment of the parties and "party" refers to a litigant or a group of litigants having essentially common interests. Id. Antagonism is based on the pleadings, pretrial discovery and other information brought to the attention of the court and is a question of law over which the court and is a question of law over which the court has no discretion. *Id. See*

*Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 5 (Tex. 1987).

b. Court must equalize the strikes, not necessarily numerically, on what "the ends of justice" require to prevent an "unequal advantage." *Patterson Dental Co. v. Dunn, supra.*

(1) Parties entitled to separate strikes may confer in making them. *King v. Maldonado*, 552 S.W.2d 940 (Tex. Civ. App.--Corpus Christi 1977, writ ref'd n.r.e.); *Brown & Root, Inc. v. Gragg*, 444 S.W.2d 656 (Tex. Civ. App.--Houston [1st Dist.] 1969, writ ref'd n.r.e.); *Parker v. Traders and General Ins. Co.*, 366 S.W.2d 107 (Tex. Civ. App.--Eastland), *modified*, 375 S.W.2d 714 (Tex. 1964).

(2) Unqualified agreement in exchange for challenges between parties is prohibited, such as dismissing a party for his strikes, and constitutes reversible error. *General Motors Corp. v. Herbert*, 501 S.W.2d 950 (Tex. Civ. App.--Houston [1st Dist.] 1973, writ ref'd n.r.e.).

(3) Motion for or objection to equalization must be made before strikes are exercised. *Patterson Dental Co. v. Dunn, supra.*

BATSON CHALLENGES

(4) The equal protection clause prohibits discrimination in jury selection on the basis of race, *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, 80 (1986), or gender, *J.E.B. v. Alabama*, ___ U.S. ___, 114 S. Ct. 1419 (1994). A *Batson* complaint must be raised before the jury is sworn. *Edmonson v. Leesville Concrete Co., Inc.* ___ U.S. ___, 114 L.Ed.2d 660, 111 S.Ct. 2077, 2088-89 (1991). The complaining party must make a prima facie showing that the opponent made constitutionally impermissible strikes. *Pierson v. Noon*, 814 S.W.2d 506 (Tex. App.--Houston [14th Dist.] 1991, no writ). If this is done, the burden shifts to the other party to show neutral grounds for the strikes. *Linscomb v. State*, 829 S.W.2d 164, 165 (Tex. Crim. App. 1992). If the defending party gives neutral explanations, the burden shifts back to the complaining party to show purposeful discrimination, by showing that the neutral explanations are mere pretext. *Whitsey v. State*, 796 S.W.2d 707, 713 (Tex. Crim. App. 1989).

## XVI. EVIDENTIARY OBJECTIONS

**A. General Rule** TEX. R. EVID. 103 provides:

> **(a) Effect of Erroneous Ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> ***(1) Objection***. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.
>
> ***(2) Offer of Proof***. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked.
>
> **(b) Record of Offer and Ruling**. The offering party shall, as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the absence of the jury, its offer of proof. The court may add any other or further statement which shows the character of the evidence, the

> form in which it was offered, the objection made, and the ruling thereon. The Court may, or at request of a party shall, direct the making of an offer in question and answer form.
>
> **(c) Hearing of Jury**. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.
>
> [subparagraph (d), on fundamental error in criminal cases, omitted]

**B. Timeliness** Party must have presented to trial court timely request, objection or motion, stating specific grounds for ruling(s) he desired trial court to make, in order to preserve complaint for appellate review. *Celotex Corp. v. Tate,* 797 S.W.2d 197 (Tex. App.--Corpus Christi 1990, no writ); *Haney v. Purcell Co., Inc.*, 796 S.W.2d 782 (Tex. App.--Houston [1st Dist.] 1990, writ denied); *Masi v. Scheel*, 724 S.W.2d 438 (Tex. App.--Dallas 1987, writ ref'd n.r.e.); *MCI Telecommunications v. Tarrant County*, 723 S.W.2d 350, 353 (Tex. App.--Fort Worth 1987, no writ); *Crider v. Appelt*, 696 S.W.2d 55 (Tex. App.--Austin 1985, no writ); *Montes v. Lazzara Shipyard*, 657 S.W.2d 886 (Tex. App.--Corpus Christi 1983, no writ); *Wilfin, Inc. v. Williams*, 615 S.W.2d 242 (Tex. Civ. App.--Dallas 1981, writ ref'd n.r.e); *Zamora v. Romero*, 581 S.W.2d 742 (Tex. Civ. App.--Corpus Christi 1979, writ ref'd n.r.e.); *Moore v. Grantham*, 580 S.W.2d 142 (Tex. Civ. App.--Tyler 1979), *rev'd on other grounds*, 599 S.W.2d 287 (1980); *J.A. Robinson Sons, Inc. v. Wigart*, 420 S.W.2d 474 (Tex. Civ. App.--Amarillo 1967), *reversed*, 431 S.W.2d 327 (1968); *Nelson v. Jenkins*, 214 S.W.2d 140 (Tex. Civ. App.--El Paso 1948, writ ref'd). However, objection to reference to insurance coverage was timely even when made after an additional unrelated question was asked and answered in an effort to avoid drawing jury's attention to the reference to insurance. *Beall v. Ditmore*, 867 S.W.2d 791 (Tex. App.--El Paso 1993, writ denied).

**C. Your Objection Must Be Specific And Not General**

SPECIFIC VS. GENERAL

1. General objection will not suffice. *Seymour v. Gillespie*, 608 S.W.2d 891 (Tex. 1980). General objection to an insufficient predicate waived because of lack of specificity; *Plyler v. City of Pearland*, 489 S.W.2d 459 (Tex. Civ. App.--Houston [1st Dist.] 1972, writ ref'd n.r.e.).

2. Specific objections are required. *Matter of Bates*, 555 S.W.2d 420 (Tex. 1977) (Waiver due to lack of specific objections to proper predicate for the admission of tape recordings of conversations). Specific objections are required whether the evidence is oral or documentary. *Brown & Root v. Haddad,* 180 S.W.2d 339 (Tex. 1944).

3. Objections should be clear and specific so that they may be understood by the court and obviated by the opposing party, if they are capable of being removed by production of other evidence. *Campbell v. Paschall*, 121 S.W.2d 539 (Tex. Comm. App. 1938, opinion adopted).

4. A "specific objection" is one which enables the trial court to understand the precise question and to make an intelligent ruling, affording the offering party the opportunity to remedy the defect if possible. *De Los Angeles Garay v. TEIA*, 700 S.W.2d 657 (Tex. App.-- Corpus Christi 1985, no writ); *Texas Municipal Power Agency v. Berger*, 600 S.W.2d 850 (Tex. Civ. App.--Houston [1st Dist.] 1980, no writ); *University of Texas System v. Haywood*, 546 S.W.2d 147 (Tex. Civ. App.--Austin 1977, no writ).

5. It is incumbent upon the party objecting to the portion of the evidence to make a specific

objection to the inadmissible portion and then request a limiting instruction. *Eubanks v. Winn*, 469 S.W.2d 292 (Tex. Civ. App.--Houston [14th Dist.] 1971, writ ref'd n.r.e.); *Ramirez v. Wood*, 577 S.W.2d 278 (Tex. Civ. App.--Corpus Christi 1978, no writ); *Brazos Graphics, Inc. v. Arvin Industries, Inc.*, 547 S.W.2d 240 (Tex. Civ. App.--Waco 1978), *writ ref'd n.r.e.*, 586 S.W.2d 841 (1979).

6. The trial court has some discretion in deciding which party should specifically point out to the court that part of the record that is objectionable and that part which is not objectionable and thus admissible. *Hurtado v. TEIA*, 563 S.W.2d 360 (Tex. Civ. App.--San Antonio), *rev'd on other grounds*, 574 S.W.2d 536 (1978) [medical records].

7. The addition of the word "prejudicial" to the objection to the admission of evidence did not alter the general rule requiring objections to be specific. *Horn v. Atchison, T. & S. F. Ry. Co.*, 519 S.W.2d 894 (Tex. Civ. App.--Beaumont 1975, writ ref'd n.r.e.).

8. An objection that the evidence was "immaterial" was not specific. *Hunt v. Jones*, 451 S.W.2d 943 (Tex. Civ. App.--Waco 1970, writ ref'd n.r.e.).

9. An objection that the evidence was "prejudicial, irrelevant and immaterial," was a general objection. *Peerless Oil & Gas v. TEAS*, 158 S.W.2d 758 (Tex. 1942); *Bales v. Delhi-Taylor Oil Corp.*, 362 S.W.2d 388 (Tex. Civ. App.--San Antonio 1962, writ ref'd n.r.e.).

10. An objection using an expression which may mean one or more of several specific complaints is usually too general to call the trial court's attention to the point the objector may have in mind. *Hooten v. Dunbar*, 347 S.W.2d 775 (Tex. Civ. App.--Beaumont 1961, writ ref'd n.r.e.).

11. An objection which asserted that the evidence was not admissible for any purpose, and which failed to point out any particular, is too general. *State v. Bernhardt*, 334 S.W.2d 203 (Tex. Civ. App.--Texarkana 1960, no writ).

12. Examples of other objections held to be too general are:

(a) Objection, "immaterial, she's not complaining about her arm." *Hunt v. Jones, supra*.

(b) Objection "to any transaction that happened down there, which does not have any bearing whatsoever on the transaction occurring up here." *Evans v. Henry*, 230 S.W.2d 620 (Tex. Civ. App.--San Antonio 1950, no writ).

(c) Objection "because it would in no wise bind the plaintiff in this case." *Steptoe v. San Antonio Transit Co.*, 498 S.W.2d 273 (Tex. Civ. App.--San Antonio 1974, no writ).

(d) Objection "to any other statement and ask that it all be stricken." *Jones v. Parker*, 193 S.W.2d 863 (Tex. Civ. App.--Texarkana 1946, writ ref'd n.r.e.).

STATEMENT OF GROUNDS

1. A valid objection to the offer of evidence is one that names a particular rule of evidence which will be violated by the admission of the evidence. *Burleson v. Finley*, 581 S.W.2d 304 (Tex. Civ. App.--Austin 1979, writ ref'd n.r.e.).

2. Objection that a "question calls for a present declaration of a past state of mind" was an insufficient statement of grounds. *F.B. McIntire Equip. Co. v. Henderson*, 472 S.W.2d 566 (Tex. Civ. App.--Fort Worth 1971, writ ref'd n.r.e.).

3. Objection to x-ray "that it was not sufficiently identified or proved up" stated insufficient grounds. *Parr v. Herndon*, 249 S.W.2d 162 (Tex. Civ. App.--Fort Worth 1956, no writ).

4. Objections to x-rays on grounds "that photographs were irrelevant and without proper predicate being laid to admit them and that there are no pleadings to support photographs and that they had not been sufficiently identified," were insufficient. *Southern Underwriters v. Weldon*, 142 S.W.2d 574 (Tex. Civ. App.--Galveston 1940, no writ).

"INCOMPETENT, IRRELEVANT AND IMMATERIAL"

Objections that evidence is "incompetent, irrelevant and immaterial" without more is insufficient and amount to no objections at all. *Peerless Oil & Gas Co. v. Teas*, 158 S.W.2d 758 (Tex. 1942); *Bridges v. City of Richardson*, 349 S.W.2d 644 (Tex. Civ. App.--Dallas), *writ ref'd n.r.e.*, 354 S.W.2d 366 (1961); *Traders & General Ins. Co. v. Haney*, 312 S.W.2d 690 (Tex. Civ. App.--Fort Worth 1958, writ ref'd n.r.e.); *Easley v. Brookline Trust Co.*, 256 S.W.2d 983 (Tex. Civ. App.--Amarillo 1953, writ ref'd n.r.e.); *Enfield Realty & Home Bldg. Co. v. Hunter*, 179 S.W.2d 810 (Tex. Civ. App.--Austin 1944, no writ); *Elbins v. Foster*, 101 S.W.2d 294 (Tex. Civ. App.--Amarillo 1937, writ dism'd).

ULTIMATE ISSUES

Objection that evidence offered "invades the province of the jury" is invalid. *Carr v. Radkey*, 393 S.W.2d 806 (Tex. 1965) (in view of the jury's role to believe or disbelieve testimony, the witness could not invade that province if he wanted to). TEX. R. EVID. 704 provides: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

**D. Precise Ruling Required**

1. Defendant must obtain precise ruling on objection, in order to preserve alleged error on appeal. *Perez v. Baker Packers*, 694 S.W.2d 138 (Tex. App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.) (premises liability action). "Let's move along, counsel," is not a ruling!

2. The objecting party must secure a ruling on objections in order to complain an appeal or else error is waived. *Cusack v. Cusack*, 491 S.W.2d 714 (Tex. Civ. App.--Corpus Christi 1973, writ dism'd); *Webb v. Mitchell*, 371 S.W.2d 754 (Tex. Civ. App.--Houston 1963, no writ).

3. Ordinarily a party making an objection to the admission of evidence is entitled to an immediate ruling admitting or excluding the evidence. *Thomas v. Atlanta Lumber Co.*, 360 S.W.2d 445 (Tex. Civ. App.-Texarkana 1962, no writ).

4. An objection to a special issue preserves nothing for review absent an indication in the record of a ruling or order on the objection by the trial court. *North Star Dodge Sales, Inc. v. Luna*, 653 S.W.2d 892 (Tex. App.-- San Antonio 1983), *affirmed in part, reversed in part*, 667 S.W.2d 115 (Tex. 1984), *on remand*, 672 S.W.2d 304 (writ dism'd).

**E. Offer Of Proof On Excluded Evidence**

1. In case the ruling is one excluding evidence, the substance of the evidence must be made known to the court by offer or must be apparent from the context within which the questions were asked. *Rossen v. Rossen,* 792 S.W.2d 277 (Tex. App.--Houston [1st Dist] 1990, no writ); *Foster v. Bailey,* 691 S.W.2d 801 (Tex. App.--Houston [1st Dist.] 1985, no writ).

2. The offering party must, as soon a practicable, but before the court's charge is read to the jury, be allowed to make, in the absence of the jury, its offer of proof. The court may add any and other further statement which shows the character of the evidence, the form in which it was offered, the objection made and the ruling thereon. It may, or at the request of a party, shall, direct the making of an offer in question and answer form. *Moore v. Lillebo,* 772 S.W.2d 683 (Tex. 1986); *Life Insurance Co. of Southwest v. Brister,* 722 S.W.2d 764, 776 (Tex. App.--Fort Worth 1986, no writ).

3. In jury cases proceedings must be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof, or asking questions, in the hearing of the jury. *Foster v. Bailey,* 691 S.W.2d 801 (Tex. App.--Houston [1st Dist.] 1985, no writ).

**F. "Piggyback" Objections** In trials involving multiple defendants, each defendant must make its own objection to evidence if it wishes to preserve error for appeal. *Celotex Corp. v. Tate*, 797 S.W.2d 197 (Tex. App.--Corpus Christi 1990, no writ). However, *Celotex* says that the trial court may in its discretion rule that one defendant's objection preserves error for all defendants. *See Owens-Corning Fiberglas Corp. v. Malone*, 916 S.W.2d 551, 516 (Tex.App.--Houston [1st Dist.] 1996, no writ) (where trial court ordered that objection by one defendant would operate for all defendants, not necessary to separately object).

**G. Renewing Objections**

CASES SAYING THAT OBJECTIONS MUST BE RENEWED

1. The admission of improper evidence is waived when testimony to the same effect has been permitted without objection. *Badger v. Symon,* 661 S.W.2d 163 (Tex. App.--Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Winkel v. Hankins*, 585 S.W.2d 889 (Tex. Civ. App.--Eastland 1979, writ dism'd); *Hundere v. Tracy & Cook*, 494 S.W.2d 257 (Tex. Civ. App.--San Antonio 1973, writ ref'd n.r.e.); *Rowe v. Liles,* 226 S.W.2d 253 (Tex. Civ. App.--Waco 1950, writ ref'd). *Richardson v. Green*, 677 S.W.2d 497, 501 (Tex. 1984), says:

> The general rule is that error in the admission of testimony is deemed harmless if the objecting party subsequently permits the same or similar evidence to be introduced without objection.

2. Waiver does not occur when the witness disclaims any knowledge about the prior improperly admitted testimony. *Glen Falls Ins. Co. v. Yarbrough*, 396 S.W.2d 200 (Tex. Civ. App.--Waco 1965, writ ref'd n.r.e.).

3. *Commercial Union Ins. v. La Villa Sch. D.*, 779 S.W.2d 102, 109-110 (Tex. App.--Corpus Christi 1989, no writ) (party cannot complain on appeal of improper admission of evidence where that party has introduced evidence of a similar character).

4. *City of Houston v. Riggins*, 568 S.W.2d 188 (Tex. Civ. App.--Tyler 1978, writ ref'd n.r.e.). If trial court erred in admitting asserted irrelevant testimony, objection was waived where the proponent of the testimony thereafter introduced without objection testimony from other witnesses to the same effect and the opponent of the testimony cross-examined all witnesses.

5. *Kelso v. Wheeler*, 310 S.W.2d 148 (Tex. Civ. App.--Houston 1958, no writ). Objections should be repeated when a witness testifies to facts which were objected to in a document offered in evidence and admitted over objection, or when another witness is called upon for the same kind of evidence after objection has been made and overruled.

CASES SAYING OBJECTIONS NEED NOT BE RENEWED

6. *Burnett/Smallwood & Co. v. Helton Oil Co*., 577 S.W. 2d 291 (Tex. Civ. App.--Amarillo 1978, no writ). Where party made a proper objection to the introduction of testimony and was overruled, it was entitled to assume that the judge would make the same ruling as to other offers of similar testimony, and it was not required to thereafter repeat the objection.

7. *Crispi v. Emmot*, 337 S.W.2d 314 (Tex. Civ. App.--Houston 1960, no writ). Party who makes proper objection to the introduction of the witness' testimony and is overruled is entitled to assume that the trial judge will make the same ruling as to other offers of similar evidence and is not required to repeat the objection.

MAYBE IT JUST DEPENDS

8. *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 242-43 (Tex. App.--Corpus Christi 1994, writ denied), noted the two opposing lines of authority and said:

> We conclude that the determination of whether a prior objection is sufficient to cover a subsequent offer of similar evidence depends upon a case-by-case analysis, based on such considerations as the proximity of the objection to the subsequent testimony, which party has solicited the subsequent testimony, the nature and similarity of the subsequent testimony as compared to the prior testimony and objection, whether the subsequent testimony has been elicited from the same witness, whether a running objection was requested or granted, and any other circumstances which might suggest why the objection should not have to be reurged.

9. A "running objection" is a request to the court to permit a party to object to a line of questioning without the necessity of objecting to each individual question. Customarily this requires counsel obtaining permission from the court to have a "running objection" to all testimony from a particular witness on a particular subject. *See Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991) ("This Court has held on prior occasions that a continuing or running objection has properly preserved error"). The basis for the running objection be clearly stated in the statement of facts. *See Anderson Development Co., Inc. v. Producers Grain Corp.*, 558 S.W.2d 924, 927 (Tex. Civ. App.--Eastland 1977, writ ref'd n.r.e.) ("'The same objection on that question' and a 'running objection' are general objections where several objections have been made"). And it is necessary that the request and granting of a running objection be reflected in the statement of facts. *See Freedman v. Briarcroft Property Owners, Inc.*, 776 S.W.2d 212, 217-18 (Tex. App.--Houston [14th Dist.] 1989, writ denied). Where a specific and valid objection was followed by "same objection to all that line of testimony," the objection was properly preserved. *Tondre v. Hensley*, 223 S.W.2d 671 (Tex. Civ. App.--San Antonio 1949, no writ).

**H. Evidence Admissible In Part**

1. Error in admitting into evidence of a portion of a chart on damages which was filled in by plaintiff's attorney without any testimony supporting it is waived by the failure of the objector to object to a particular portion of the chart, and a general objection to the admission of the chart as a whole into evidence did not preserve error. *Speier v. Webster College*, 616 S.W.2d 617 (Tex. 1981).

2. Objection to voluminous medical records on grounds of hearsay, opinion and conclusional matters did not require objector to examine each of the 280 pages and segregate the inadmissible items from the admissible items. *Hurtado v. TEIA*, 563 S.W.2d 360 (Tex. Civ. App.--San Antonio), *rev'd on other grounds*, 574 S.W.2d 536 (1978).

3. Where a party offers several items as a unit and the opponent merely objects to the whole offer, if parts of the offer are admissible there is no error in overruling general objection which does not specify specific part to which valid objection could be made. *Ideal Mutual Ins. Co. v. Sullivan*, 678 S.W.2d 98 (Tex. App.--El Paso 1984, writ dism'd).

4. Where the question propounded calls for an answer which is partly admissible and partly inadmissible, the objecting party must point out and distinguish the admissible from the inadmissible and direct objections specifically to that point which is inadmissible. *Lade v. Keller*, 615 S.W.2d 916 (Tex. Civ. App.--Tyler 1981, no writ).

5. The overruling of an objection to or motion to strike testimony as a whole is not error, where part of such testimony is admissible. *Dabney v. Keene*, 195 S.W.2d 682 (Tex. Civ. App.--El Paso 1946, writ ref'd n.r.e.).

**I. Evidence Admissible For Particular Purposes**

1. Where the evidence is admissible for one purpose but inadmissible for another, it may be admitted for the purpose for which it is competent; but the court must upon motion of a party limit the evidence to its proper purposes. In the absence of such a motion, the right to complain of the improper purpose is waived. *Bristol-Myers Co. v. Gonzales*, 548 S.W.2d 416 (Tex. Civ. App.--Corpus Christi), *rev'd on other grounds*, 561 S.W.2d 801 (1976).

2. It is the duty of the party objecting to the introduction of evidence which is admissible for one purpose but not for another to request the court to limit the purpose for which it might be considered. *Fisher Const. Co. v. Riggs*, 320 S.W.2d 200 (Tex. Civ. App.--Houston 1959), *rev'd on other grounds*, 325 S.W.2d 126, *on remand*, 326 S.W.2d 915. Absent such a limiting instruction, the evidence is received for all purposes, even if offered only for a limited purpose. *Cigna Ins. Co. v. Evans*, 847 S.W.2d 417, 421 (Tex. App.--Texarkana 1993, no writ).

3. The sequence is as follows [using hearsay example]:

• Proponent offers hearsay for all purposes.

• Opponent objects based on hearsay, and is sustained.

• Proponent reoffers the hearsay for limited purpose.

• Opponent renews hearsay objection, and is overruled.

• Opponent requests limiting instruction.

*See Walmart-Stores, Inc. v. Berry*, 833 S.W.2d 587, 595 (Tex. App.--Texarkana 1992, writ denied).

**J. Evidence Admissible For Or Against Some Of Several Co-Parties**

1. The opponent against whom the evidence is not admissible must request a limiting instruction. *Griggs v. Curry*, 336 S.W.2d 248 (Tex. Civ. App.--Waco 1960, writ ref'd n.r.e.).

2. In the absence of a request to limit evidence to one of several defendants as to whom such evidence was admissible as a declaration against interest, error was waived. *Amberson v. Wilkerson*, 285 S.W.2d 420 (Tex. Civ. App.--Austin 1956, no writ).

**K. Motion In Limine.**

1. The denial of a motion in limine is not itself reversible error. *See Hartford Accident & Indemnity Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963). Nor can the granting of a motion in limine be claimed as error on appeal. *Keene Corp. v. Kirk*, 870 S.W.2d 573, 581 (Tex. App.--Dallas 1993, no writ).

2. TEX. R. EVID. 103(a)(1) provides that "[w]hen the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections."

3. The difference between a ruling on a motion in limine and an offer of evidence outside the presence of the jury is discussed in *Rawlings v. State*, 874 S.W.2d 740, 742-43 (Tex. App.--Fort Worth 1994, no pet.):

> [A] motion in limine characteristically includes: (1) an objection to a general category of evidence; and (2) a request for an instruction that the proponent of that evidence approach the bench for a hearing on its admissibility before offering it. Conspicuously absent from a motion in limine is a request for a ruling on the actual admissibility of specific evidence.

> In contrast, [old TRAP] 52(b) seems to require both specific objections and a ruling on the admissibility of contested evidence. In fact, we question whether Rule 52(b) comes into play until specific evidence is actually offered for admission. Rule 52(b) only provides that complaints about the admission of evidence are preserved when the court hears objections to offered evidence and rules that such evidence shall be admitted.

## L. Motion To Strike Testimony

1. Court's Motion to Strike. The court may strike testimony on its own motion. *Aquamarine Associates v. Burton Shipyard, Inc.*, 645 S.W.2d 477 (Tex. App.--Beaumont 1982), *rev'd on other grounds*, 659 S.W.2d 820 (1983).

2. Necessity for Motion to Strike when Objection Sustained. Where the objection is made and sustained as to testimony which has been heard by the jury, the testimony is before the jury unless the jury is instructed to disregard it. *Prudential Ins. Co. of America v. Uribe*, 595 S.W.2d 554 (Tex. Civ. App.--San Antonio 1979, writ ref'd n.r.e.).

3. Effect of No Motion to Strike When Objection Sustained. Where an objection is made and sustained but no motion is made to strike the answer or instruct the jury not to consider, the testimony is before the jury for whatever it is worth. *Southwest Title Ins. Co. v. Northland Bldg. Corp.*, 542 S.W.2d 436 (Tex. Civ. App.--Fort Worth 1976), *aff'd in part, rev'd in part*, 552 S.W.2d 425 (1976).

4. Necessity for Motion to Strike on Expert Testimony. Where an objection to expert testimony was made after testimony's admission, any error in admitting such testimony was waived when no motion was made to strike the answer from the record or to instruct the jury not to consider it. *City of Denton v. Mathes*, 528 S.W.2d 625 (Tex. Civ. App.--Fort Worth 1975, writ ref'd n.r.e).

5. Necessity of Motion to Strike Previous Testimony. Where subsequent testimony renders inadmissible previously given testimony, the party who objected to the admission of prior testimony must renew the objection or move to strike out the prior testimony, and failure to do so waives the matter. *F.W. Woolworth Co. v. Ellison*, 232 S.W.2d 857 (Tex. Civ. App.--Eastland 1950, no writ).

6. When Must Motions to Strike Be Made. Ordinarily, a motion to strike out objectionable testimony must be made at the time the testimony is given, if the objection to the testimony is then apparent. *Magnolia Petroleum Co. v. Johnson*, 176 S.W.2d 774 (Tex. Civ. App.--Fort Worth 1944, no writ).

7. Inexcusable Delay on Moving to Strike. Inexcusable delay in moving to strike out the objectionable evidence is ground for denying the motion. *Magnolia Petroleum Co. v. Johnson, supra.*

8. Necessity of Previous Objection. Absent a previous objection to the testimony, it is discretionary with the court to strike out testimony on motion by the opponent of the testimony.

9. No Gambling on the Answer. The objecting party cannot gamble on the answer and then move to strike when the testimony turns out to be unfavorable. *Internat'l Brotherhood of Boiler Makers v. Rodriguez*, 193 S.W.2d 835 (Tex. Civ. App.--El Paso 1945, writ dism'd).

10. Discharge of Witness or Concluding Evidence. The trial court may properly overrule the motion if it is not made until after witnesses have been discharged, or at the close of complaining party's case or at the conclusion of the evidence. *Collins v. Smith*, 175 S.W.2d 407 (Tex. 1943).

11. Motions to Strike "Under Advisement". Where the trial court overrules the objection to testimony "for the present," the objecting party may move to exclude the objectionable evidence at any stage of the proceedings before

the cause is submitted to the jury, and in order to protect his rights must do so. *Johnson v. Hodges*, 121 S.W.2d 371 (Tex. Civ. App.--Fort Worth 1938, writ dism'd).

12. Evidence Admissible in Part. Motion to strike directed at entire testimony of witness, some of which was clearly admissible is insufficient. A limiting motion must be made. *City of Kennedale v. City of Arlington*, 532 S.W.2d 668 (Tex. Civ. App.--Fort Worth 1976, writ dism'd as moot); *Williams v. General Motors Corp.*, 501 S.W.2d 930 (Tex. Civ. App.--Houston [1st Dist.] 1973, writ ref'd n.r.e.).

13. Evidence Elicited by Party Moving to Strike. A party is not permitted to ask questions on cross-examination and then, upon receiving responsive answers stricken from the record. *Cherry v. State*, 546 S.W.2d 922 (Tex. Civ. App.--Dallas 1977, writ ref'd).

14. Examples of when a motion to strike may become necessary:

(a) To exclude an answer of a witness made before an objection could be made. *Biard Oil Co. v. St. Louis Southwestern Ry.*, 522 S.W.2d 588 (Tex. Civ. App.--Tyler 1975, no writ).

(b) To exclude volunteer statements of the witness. *Walgreen-Texas Co. v. Shivers*, 169 S.W.2d 271 (Tex. Civ. App.--Beaumont 1943, writ ref'd w.o.m.).

(c) To exclude non-responsive answers. *Johnson v. Woods*, 315 S.W.2d 75 (Tex. Civ. App.--Dallas 1958, writ ref'd n.r.e.); *American National Ins. Co. v. Nussbaum*, 230 S.W. 1102 (Tex. Civ. App.--1921, writ dism'd).

(d) To exclude prior testimony admitted conditionally upon counsel's promise to connect up the testimony or lay a foundation. *Galveston H & S.A.R. Co. v. Janert*, 49 Tex. Civ. App. 17, 107 S.W. 963 (1908, writ ref'd).

**M. Exceptions To Rulings** Taking exception to the Court's ruling is neither required nor recommended. TEX. R. APP. P. 33.1(c).

**N. Effect Of Failure To Object Or Except**

1. Variance with Pleadings. A party relying on his opponent's pleadings as judicial admissions of fact must protect the record by objecting to the introduction of evidence contrary to that admission of fact and by objecting to submission of any issue bearing on fact admitted. *Houston First American Savings v. Musick*, 658 S.W.2d 764 (Tex. 1983); *Watson v. Bettinger*, 658 S.W.2d 756 (Tex. App.--Fort Worth 1983, writ ref'd n.r.e.).

2. Incompetent Evidence. Incompetent evidence, even when submitted without objection, has no probative force and will not support a judgment. *Aetna Ins. Co. v. Klein*, 325 S.W.2d 376 (Tex. 1959).

3. Failure to Object. Any objection to evidence is waived by the failure to object. *Ryan Mtg. Inv. v. Fleming-Wood*, 650 S.W.2d 928 (Tex. App.--Fort Worth 1983, writ ref'd n.r.e.).

4. Parol Evidence Rule. The "parol evidence rule" is a rule of substantive law, and renders inadmissible any testimony to vary the legal effect of a writing in the absence of any ambiguity, accident, mistake or fraud shown in connection with the contract; inadmissible parol evidence, whether objected to or not, is without probative force and will not support any finding. *Huddleston v. Ferguson*, 564 S.W.2d 448 (Tex. Civ. App.--Amarillo 1978, no writ).

5. "Opening the Door". Failure to object to the other party's eliciting testimony on immaterial or extraneous matters does not "open the door" to examination by the party failing to object. *Texas & N.O. R.R. Co. v. Barham*, 204 S.W.2d 205 (Tex. Civ. App.--Waco 1947, no writ).

6. Dead Man's Statute. May be waived in the absence of proper objection. *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502 (Tex. 1980).

7. Hearsay. Unobjected-to hearsay is admissible and may be considered in arriving at ultimate conclusions. TEX. APP. EVID. 802; *Aatco Transmission Co. v. Hollins*, 682 S.W.2d

682 (Tex. App. [1st Dist] 1984, no writ); *Furr's Supermarket Inc. v. Williams*, 664 S.W.2d 154 (Tex. App.--Amarillo 1983, no writ).

8. Expert and Other Opinion Evidence. A witness is presumed to be qualified to give his opinion when the opinion is admitted without objection. *Wilfin, Inc. v. Williams*, 615 S.W.2d 242 (Tex. Civ. App.--Dallas 1981, writ ref'd n.r.e.).

(a) *Birchfield v. Texarkana Memorial Hosp.*, 747 S.W.2d 361 (Tex. 1987). Testimony of expert witness in medical malpractice action that hospital's conduct constituted "negligence," "gross negligence," and "heedless and reckless conduct," and that certain acts were "proximate causes" of the injury complained of constituted opinions on mixed questions of law and fact and as such were admissible, since they were confined to the relevant issues and based on proper legal concepts.

(b) Objection to "any questions" which may be asked a witness calling for expression of opinion is ineffectual. *Hooten v. Dunbar*, 347 S.W.2d 775 (Tex. Civ. App.-- Beaumont 1961, writ ref'd n.r.e.).

9. Documentary Evidence.

(a) Unobjected-to documentary evidence establishing a claim for liquidated damages obviates the necessity for submitting the matter of liquidated damages to the jury. *Henshaw v. Kroenecke*, 656 S.W.2d 416 (Tex. 1983), *on remand*, 671 S.W.2d 117 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

(b) Pleadings. Pleadings, including sworn pleadings and exhibits attached thereto, do not constitute evidence even when introduced without objection. *Blackwell v. Chapman*, 492 S.W.2d 657 (Tex. Civ. App.--El Paso 1973, no writ); *Cline v. Southwest Wheel & Mfg. Co.*, 390 S.W.2d 297 (Tex. Civ. App.--Amarillo 1965, no writ).

## XVII. DIRECTED OR INSTRUCTED VERDICT

### A. Terminology

1. A directed verdict and an instructed verdict are used interchangeably to describe when a party is entitled to a judgment as a matter of law. *Texas Steel Co. v. Douglas*, 533 S.W.2d 111 (Tex. Civ. App.--Fort Worth 1976, writ ref'd n.r.e.).

2. There is no material difference between the courts instructing a verdict and rendering judgment thereon, and in court's dismissing jury and then rendering judgment. *Shield v. First Coleman Nat'l Bank*, 160 S.W.2d 277 (Tex. Civ. App.--Austin), *aff'd*, 166 S.W.2d 688 (Tex. 1942).

3. The defendant's motion for judgment at the conclusion of the plaintiff's case is not equivalent to motion for directed verdict at the conclusion of plaintiff's case in a jury trial. *Quantel Business Systems, Inc. v. Custom Controls Co.*, 761 S.W.2d 302 (Tex. 1988). A motion for judgment when the plaintiff rests in a non-jury trial permits the trial court to deny the plaintiff relief if the trial court is not persuaded, as a fact finder, that liability of the defendant has been established. *Quantel*, 761 S.W.2d at 304.

### B. Procedure

1. A motion for directed verdict shall state the specific grounds therefor. TEX. R. CIV. P. 268.

2. Failure to state specific grounds is not necessarily fatal if the party is entitled to judgment as a matter of law. If no material fact issues are raised by the evidence, the court may instruct a verdict on its own volition regardless of the sufficiency of the motion. *T.E.I.A. v. Page*, 553 S.W.2d 98, 102 (Tex. 1970); *Walter E. Heller & Co. v. Allen*, 412 S.W.2d 712 (Tex. Civ. App.--Corpus Christi 1967, writ ref'd n.r.e.).

3. The purpose of Rule 268 requiring that the motion for directed verdict state specific grounds is remedial in nature. Its purpose is to require that any attack upon the evidence for

material insufficiency should be raised when the court, under TEX. R. CIV. P. 270, might permit offer of additional evidence. *Red River Valley Pub. Co. v. Bridges*, 254 S.W.2d 854 (Tex. Civ. App.--Dallas 1953, writ ref'd n.r.e.), *overruled on other grounds*, *Flanigan v. Carswell*, 324 S.W.2d 835 (Tex. 1959); TEX. R. CIV. P. 268.

4. Although the better practice is to file a written motion, formal writing is not required. *Castillo v. Euresti*, 579 S.W.2d 581 (Tex. Civ. App.--Corpus Christi 1979, no writ). However, the record on appeal must show that the motion for judgment or for directed verdict was presented to and ruled on by the court. *State v. Dikes, supra*.

**C. Court's Own Initiative**

1. When there are no disputed issues of fact, the trial court can, of its own volition, instruct a verdict for one of the parties. *In Re Price's Estate*, 375 S.W.2d 900 (Tex. 1964); *Castillo v. Euresti, supra.*

2. Regardless of the tender of a motion by one of the parties, the court has the duty to withdraw the case and dispose of it as a matter of law when there is no evidence warranting submission to the jury. *Marlin Assocs. v. Trinity Universal Ins. Co.*, 226 S.W.2d 190 (Tex. Civ. App.--Dallas 1950, no writ).

**D. Time for Motion or Ruling by the Court**

1. Defendant, by electing not to stand on motion for directed verdict made after plaintiff has introduced evidence and rested case, and by proceeding with introduction of his own evidence, waives the motion for instructed verdict unless the motion is re-urged after both sides have rested. *Texas Steel Co. v. Douglas*, 533 S.W.2d 111 (Tex. Civ. App.--Fort Worth 1976, writ ref'd n.r.e).

2. When the plaintiff makes out a prima facie case and the defendant fails or refuses to introduce any evidence, the court is required to instruct a verdict. *Lesiker v. Lesiker*, 251 S.W.2d 555 (Tex. Civ. App.--Galveston 1952, writ ref'd n.r.e.).

3. On reconsideration, the court may sustain a motion even after the jury reports it cannot agree. *Hutchinson v. Texas Aluminum Co.*, 330 S.W.2d 895 (Tex. Civ. App.--Dallas 1959, writ ref'd n.r.e.).

4. The motion may be made after the jury has been discharged because of inability to reach a verdict. *Chasco v. Providence Mem. Hosp.*, 476 S.W.2d 385 (Tex. Civ. App.--El Paso 1972, no writ).

5. If the jury has returned a verdict but has not been discharged, the court may instruct it to render a verdict for the party entitled to it. *Keton v. Silbert*, 250 S.W. 316 (Tex. Civ. App.--Austin 1923, no writ).

**E. Jury Trials**

1. The motion of each party for instructed verdict is not a waiver of jury trial. *Shield v. First Coleman Nat'l Bank, supra*.

2. Since directing a verdict is a question of law solely for the court and not for the jury to consider, counsel is not entitled to inform the jury that the court has directed a verdict in favor of one of the parties. *Rhoden v. Booth*, 344 S.W.2d 481 (Tex. Civ. App.--Dallas 1961, writ ref'd n.r.e.).

**F. Basis for Determination** The motion does not raise questions of factual sufficiency or weight of the evidence, but only raises questions of legal sufficiency of the evidence. *Jones v. Tarrant Util. Co.*, 638 S.W.2d 862 (Tex. 1982); *Collora v. Navarro*, 574 S.W.2d 65 (Tex. 1978); *Triangle Motors v. Richmond*, 258 S.W.2d 60 (Tex. 1953); *Durham v. Uvalde Rock Asphalt Co.*, 599 S.W. 866 (Tex. Civ. App.--San Antonio 1980, no writ); *Great Atl. & Pac. Tea Co. v. Giles,* 354 S.W.2d 410 (Tex. Civ. App.--Dallas 1962, writ ref'd n.r.e.).

**G. Interested Party or Witness** A directed verdict may be based solely upon evidence from an interested party or witness only if the evidence is clear, direct and positive, and devoid of inconsistencies and contradictions, reasonably capable of exact statement, and uncontroverted. *Collora v. Navarro, supra*.

**H. Scintilla of Evidence** If the probative force of the evidence is so weak that it raises nothing more than a scintilla or a suspicion of evidence, it is insufficient to raise an issue for the jury. *Hunter v. Carter*, 476 S.W.2d 41 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.).

**I. Defect in Pleadings** TEX. R. CIV. P. 90 suggests that defects in pleadings must now be pointed out by exception in writing and not by motion for instructed verdict.

**J. Failure to Meet Burden of Proof**

1. Where the circumstances are equally consistent with the existence and non-existence of the ultimate fact, such circumstances are wanting in probative force as any evidence tending to establish the existence of the ultimate fact. *South Tex. Water Co. v. Bieri*, 247 S.W.2d 268 (Tex. Civ. App.--Galveston 1952, writ ref'd n.r.e.).

2. The case is made when the evidence is sufficient to justify, though not strong enough to compel, a finding favorable to the party having the burden of proof. *Robb v. Gilmore*, 302 S.W.2d 739 (Tex. Civ. App.--Fort Worth 1957, writ ref'd n.r.e); *Benoit v. Wilson*, 239 S.W.2d 792, 797 (Tex. 1951) which holds that a verdict should not be aside merely because a jury could have drawn different inferences or conclusions.

**K. Record on Appeal**

1. The record on appeal must show that the motion was presented to and ruled on by the court, otherwise there is no basis for a point of error. *State v. Dikes,* 625 S.W.2d 18 (Tex. Civ. App.--San Antonio, 1981, no writ).

2. The Corpus Christi Court of Appeals requires that the order overruling the motion for directed verdict be in writing in order to preserve error for appeal. *Soto v. Southern Life & Health Ins. Co.*, 776 S.W.2d 752, 754 (Tex. App.--Corpus Christi 1989, no writ). *Accord*, *Steed v. Bost*, 602 S.W.2d 385 (Tex. Civ. App.--Austin 1980, no writ).

3. On issues of law, a motion for instructed verdict may preserve an issue for appeal although no jury issue is submitted thereon. *Ogden v. Gibralter Sav. Ass'n*, 640 S.W.2d 232 (Tex. 1982).

**L. Failure to Re-Urge Motion** By electing not to stand on the motion made after plaintiff has rested case, and by failing to re-urge the motion at the close of one own's case, the defendant waives the motion. *Wenk v. City Nat'l Bank*, 613 S.W.2d 345 (Tex. Civ. App.--Tyler 1981, no writ); *Texas Steel Co. v. Douglas,* 533 S.W.2d. 111 (Tex. Civ. App.--Fort Worth 1976, writ ref'd n.r.e.)

## XVIII. MISTRIAL

**A. Definition** This section except for "jury view" is derived from State Bar of Texas - Civil Trial Handbook § 18 (1984).

1. Termination of trial before judgment, even if it occurs after verdict, is properly called a mistrial. *See Rod Ric Corp. v. Earney*, 651 S.W.2d 407 (Tex. App.--El Paso 1983, no writ); *Nash v. Fisher*, 325 S.W.2d 187 (Tex. Civ. App.--Beaumont 1959, no writ); see also TEX. R. CIV. P. 300.

2. Motion for mistrial is not the same as motion for new trial. Motion for mistrial is decided before judgment; motion for new trial, even if filed prematurely, is effective only from date of judgment. *See Nash v. Fisher*, supra; TEX. R. CIV. P. 306c.

**B. Purpose**

1. If, before trial is completed and judgment rendered, trial court concludes there is some error or irregularity that prevents proper

judgment being rendered, court may declare mistrial. *Cortimeglia v. Herron*, 281 S.W.2d 305 (Tex. Civ. App.--Waco 1925, writ ref'd).

2. To preserve error for review, objections in several forms may be necessary. Motion for mistrial should be made in addition to making prompt objection and requesting instruction to jury to disregard. *See Tanner v. T.E.I.A.*, 438 S.W.2d 395 (Tex. Civ. App.--Beaumont 1969, writ ref'd n.r.e.); §§ 18.4:1-:6. A point in a motion for new trial is prerequisite to complaint on appeal for several major types of complaints. *See* TEX. R. CIV. P. 324; chapter 23 and § 18.5:3 on motions for new trial.

**C. Basis**

1. Generally, errors requiring new trial justify declaration of mistrial. *See* 57 TEX JUR 2d *Trial* § 385 (1964); see also chapter 23 on motions for new trial.

2. If, before trial is completed and judgment rendered, trial court concludes there is some error or irregularity that prevents proper judgment being rendered, court may declare mistrial. *Cortimeglia v.Herron,* 281 S.W. at 306.

3. Jury is generally presumed to obey trial court's instruction to disregard. *See Walker v. T.E.I.A.*, 291 S.W.2d 298 (Tex. 1956).

**D. Procedure**

1. At each instance of prejudicial conduct, counsel should, in addition to making timely objection, move again for mistrial. Failure to do so may constitute waiver of error. *Hammon v. Tex. & N.O. R.R., Co.*, 382 S.W.2d 155 (Tex. Civ. App.--Tyler 1964, writ ref'd n.r.e), 86 S.Ct. 73. *See §§ 18.4:2-:4* concerning form of objections.

2. To preserve error, counsel should make timely objection to each incident an request court to give instruction to jury not to consider it for any purpose or let it affect verdict. *Condra Funeral Home v. Rollin*, 314 S.W.2d 277 (Tex. 1958); *Bagwell v. Skytop Rig Co.*, 468 S.W.2d 939 (Tex. Civ. App.--Corpus Christi 1971, writ ref'd n.r.e.).

3. Error may not be predicated upon ruling that admits or excludes evidence unless substantial right of party is affected, and (1) in case ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating specific ground of objection if specific ground was not apparent from context, or (2) in case ruling is one excluding evidence, substance of evidence was made known to court by offer or was apparent from context within which questions were asked. TEX. R. EV. 103(a)(1)-(2).

4. Better practice is for counsel to audibly and openly make objections to argument even though this does not brief interruption, but failure to do so does not invalidate objections made only to trial court. *Traders & Gen. Ins. Co. v. Rockey*, 278 S.W.2d 490 (Tex. Civ. App.--Amarillo 1955, writ ref'd n.r.e.).

5. Request for instruction to jury to disregard objectionable statement or evidence should be made in addition to making prompt objection and motion for mistrial, in order to preserve error for review. *See Tanner v. T.E.I.A., supra*. However, failure to request instructions was held not to be waiver when objection counsel "did not lay behind the log." Counsel made motion in limine, but court did not rule and carried motion along with case; counsel then dictated objections into record and made motion for mistrial when objectionable statement was made during voir dire. *Industrial Underwriters Ins. Co. v. Delgadillo*, 567 S.W.2d 20 (Tex. Civ. App.--El Paso 1978, writ ref'd, n.r.e.). *See* §§ 18.4:1-:3.

6. Motion for mistrial without point in a motion for new trial may be insufficient to preserve complaint on appeal. See TEX. R. CIV. P. 324; § 18.5:3 and chapter 23 on motions for new trial.

7. If any error could be cured by prompt objection and instruction by judge, failure to make timely objection waives right to complain. *Miller v. Bock Laundry Mach. Co.*, 568 S.W.2d

648 (Tex. 1978). Party cannot fail to object and move for mistrial, wait and take chance with jury, and, after verdict, seek new trial. *Industrial Underwriters v. Delgadillo, supra*; *Phoenix Indem. Co. v. Skinner*, 271 S.W.2d 294 (Tex. Civ. App.--Dallas 1954, writ ref'd n.r.e.).

8. Trial court, on its own motion, may enter order declaring mistrial. *Jones v. Smith*, 470 S.W.2d 305 (Tex. Civ. App.--Houston [1st Dist] 1971, no writ); TEX. R. CIV. P. 300.

9. It would be futile to require trial court to render judgment which it could promptly nullify by granting new trial. *Rod Ric Corp. v. Earney*, 651 S.W.2d 407 (Tex. App.--El Paso 1983, no writ); *Jones v. Smith, supra*; *See* TEX. R. CIV. P. 300.

10. Trial judge is vested with wide discretion in determining manner and method in which objections to evidence are disposed. *North Star Dodge Sales, Inc. v. Luna*, 653 S.W.2d 892, 896 (Tex. Civ. App.--San Antonio 1983) *affirmed in part, reversed in part*, 667 S.W.2d 115 (Tex. 1984), *on remand*, 672 S.W.2d 304 (writ dism'd); *Keith v. Allen*, 153 S.W.2d 636 (Tex. Civ. App.--Galveston 1941, no writ).

**E. Review**

1. Order granting mistrial is not appealable. *Cortimeglia v. Herron,* 281 S.W. 305 (Tex. Civ. App.--Waco 1925, writ ref'd).

2. Mandamus will be granted when trial judge incorrectly grants mistrial solely because of mistaken belief that verdict is insufficient to support judgment. Mandamus has also been granted when court declared mistrial coupled with finding defendant prevailed on only ground of recovery raised in plaintiff's pleadings. Appellate court does not have authority to issue writ under circumstances where trial court has power to exercise sound discretion. *Rod Ric Corp. v. Earney, supra* (quoting *4 R. McDonald*, Texas Civil Practice in District and County Courts § 17.28 (1984).

3. Decision of trial court in denying motion for mistrial or new trial will not be disturbed by appellate court in absence of abuse of discretion. *See Consolidated Underwriters v. Foster*, 383 S.W.2d 829 (Tex. Civ. App.--Tyler 1964, writ ref'd n.r.e.).

4. No ground of error was afforded complaining party because trial judge's instruction to disregard statement was not contemporaneous with initial objection. *North Star Dodge Sales, Inc. v. Luna, supra.*

5. Error, to warrant reversal, must be prejudicial, and when it does not appear with reasonable probability to have been so, it is harmless. *Laughry v. Hodges*, 215 S.W.2d 669 (Tex. Civ. App.--Fort Worth 1948, writ ref'd n.r.e.); TEX. R. CIV. P. 434.

6. Point in motion for new trial is prerequisite to following complaints on appeal:

(a) complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside judgment by default;

(b) complaint of factual insufficiency of evidence to support jury finding;

(c) complaint that jury finding is against overwhelming weight of evidence;

(d) complaint of inadequacy or excessiveness of damages found by jury; or

(e) incurable jury argument, if not otherwise ruled on by trial court. TEX. R. CIV. P. 324(b). See chapter 23 on motions for new trial.

**F. Jury View** A request for a jury view in the presence of the jury is error. Upon proper objection, the court should instruct the jury to disregard the improper suggestion and upon proper motion the court could, in its discretion, declare a mistrial. *Davis v. Huey*, 608 S.W.2d 944 (Tex. Civ. App.--Austin 1980) *rev'd on other grnds* 620 S.W.2d 561 (Tex. 1981).

## XIX. JURY CHARGE

1. The rule regarding preserving error regarding the jury charge is complicated by broad form submission practice ushered in with the 1988 amendment to TEX. R. CIV. P. 277. Hard to say who has duty to do what to preserve error.

2. Objections to the charge must be in writing or dictated to the court report in the presence of opposing counsel or the court, or else the objections are waived. TEX. R. CIV. P. 272.

3. The objecting party must point out distinctly the objectionable matter and the grounds for objection. TEX. R. CIV. P. 274.

4. Any complaint as to a question, definition, or instruction, on account of any defect, is waived unless specifically included in the objections. TEX. R. CIV. P. 274.

5. The party with the burden of proof on a ground of recovery or defense must see that all essential elements of the ground or defense are submitted to the jury. The party must request the question in "substantially correct form." TEX. R. CIV. P. 278. Merely objecting to its absence will not preserve error. *Twelve Oaks Tower I, Ltd. v. Premier Allergy, Inc.*, 938 S.W.2d 102, 112 (Tex. App.--Houston [14th Dist.] 1997, no writ).

6. Where an instruction or definition has been omitted from the charge, *anyone* who wishes to complain about the omission must request the instruction or definition in writing in substantially correct form, in order to complain on appeal. TEX. R. CIV. P. 278. *See Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 538 n. 4 (Tex. 1981); *Waite Hill Services, Inc. v. World Class Metal Works, Inc.*, 935 S.W.2d 197, 202 (Tex. App.--Fort Worth 1996, writ requested). A mere objection will not suffice. Additionally, one case required that, in addition to requesting and objecting, the complaining party must tell the trial judge the specific reasons why the instruction should be submitted to the jury. *Wright Way Const. Co. v. Harlingen Mall Co.*, 799 S.W.2d 415, 418 (Tex. App.--Corpus Christi 1990, writ denied). *Contra*, *Smith-Hamm, Inc. v. Equipment Connection*, 946 S.W.2d 458, 463 (Tex. App.--Houston [14th Dist.] 1997, no writ) (extra step of explaining not necessary).

7. Tex. R. Civ. P. 276 provides for the trial judge to mark "refused" on such a tender, in which event it is conclusively presumed that the tender preserved error. If the judge does not mark the submission "refused," then you should have the record reflect that you specifically called the requested item to the trial judge's attention. Otherwise, the appellate court may conclude that the trial judge did not know that the requested item had been tendered. *See Munoz v. Berne Group, Inc.*, 919 S.W.2d 470, 471 (Tex. App.--San Antonio 1996, no writ) (failure to have tender marked "refused" was not fatal, but failing to call tendered item to trial court's attention waived error).

**XX. POST-VERDICT MOTIONS** The two common post-verdict motions are the motion to disregard the jury's answer to a question, and the motion for judgment n.o.v.

**A. Motion to Disregard** The court can disregard the jury's answer to a question: (i) where it has no support in the evidence; (ii) where it is immaterial to the outcome of the case. "Immaterial" means that the answer can be found elsewhere in the verdict, or that the finding cannot alter the effect of the verdict. *Fleet v. Fleet*, 711 S.W.2d 1, 2 (Tex. 1986). The granting of a motion to disregard based on lack of evidence is tantamount to a judgment n.o.v. *Pearce v. Pearce*, 824 S.W.2d 195, 197 (Tex. App.--El Paso 1991, wit denied).

**B. Motion for JNOV** A motion for judgment n.o.v. can attack the legal sufficiency of the evidence to support a jury's answer. The grant or denial of the motion preserves a legal sufficiency of the evidence challenge for appeal. A motion for judgment n.o.v. can also attack a claim that as a matter of law is conclusively established or is not viable. *Fort Bend County Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 395, 397 (Tex. 1991). For example, a motion for judgment j.n.o.v. can be used to raise a defense of statute of frauds, statute of limitations, or sovereign immunity. *See*

ORSINGER, 6 MCDONALD: TEXAS CIVIL APPELLATE PRACTICE § 8:20 (1992).

## XXI. POST-JUDGMENT PRESERVATION OF ERROR

**A. Motion for New Trial** Tex. R. Civ. P. 324(b) provides that a motion for new trial is required in order to raise the following complaints on appeal:

(a) A complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside a judgment by default;
(b) A complaint of factual insufficiency of the evidence to support a jury finding;
(c) A complaint that a jury finding is against the overwhelming weight of the evidence;
(d) A complaint of inadequacy or excessiveness of the damages found by the jury; or
(e) Incurable jury argument if not otherwise ruled on by the trial court.

It is not necessary to preserve in the trial court a challenge to the sufficiency of the evidence in a non-jury trial. New TEX. R. APP. P. 33, Notes and Comments. *See* ORSINGER, 6 MCDONALD: TEXAS CIVIL APPELLATE PRACTICE § 9:12(b) (1992).

**B. Motion to Modify Judgment** Use a motion to modify judgment to raise complaints which would lead to a modified or new judgment, as opposed to a new trial, with the presentation of new evidence, etc. *See* ORSINGER, 6 MCDONALD: TEXAS CIVIL APPELLATE PRACTICE § 9:18 (1992).

Preserving error by motion to modify judgment was approved by the San Antonio court of appeals in *Bulgerin v. Bulgerin*, 724 S.W.2d 943 (Tex. App.--San Antonio 1987, no writ). The appellee urged by cross-point that she was entitled to prejudgment interest. She had prepared a judgment including it which the trial court denied by deleting the provision from the order. The appellee then filed a motion to modify the judgment specifically including a request for prejudgment interest. Her motion was denied. The appellate court held that the right to recover was waived if not asserted in the trial court, but the filing of the motion to modify was sufficient to preserve error for review.

**C. Findings of Fact**

1. Under Tex. R. Civ. P. 296, a party can request that the trial court make findings of fact in support of the judgment. The request for findings must be made within 20 days of the judgment, and the failure to request findings by the deadline waives complaint as to the failure to filed findings.

2. If findings of fact are timely requested but not filed by the court within 20 days of the request, the requesting party must file a reminder of the duty to file findings. Tex. R. Civ. P. 297. *Avery v. Grande, Inc.*, 717 S.W.2d 891 (Tex. 1986); *Saldana v. Saldana*, 791 S.W.2d (Tex. App.--Corpus Christi 1990, no writ). Otherwise, the right to complain on appeal about the lack of findings is waived. The reminder, entitled a ""Notice of Past Due Findings of Fact and Conclusions of Law," must be filed within thirty days after filing the original request for findings. Tex. R. Civ. P. 297.

3. If findings are given, but they do not address all issues important to the requesting party, the requesting party can, within 10 days of the filing of the findings, file a request for amended or additional findings. Failure to request additional findings waives the right to complain on appeal about the failure to find a certain matter.

**D. Cross-Points and Their Successors** Under the new TRAPs, in most instances cross-points by an appellee are a thing of the past. Under the new TRAPs, any party who wishes to alter the trial court's judgment must perfect his/her/its own appeal, and therefore becomes an appellant *as to that complaint*. General preservation of

error requirements apply to such complaints. Complaints like these, analogous to the cross-points of yesteryear, typically challenge only a minor feature of the judgment, with the proponent wanting to keep the main thrust of the judgment in place, and seeking only to modify part of the outcome. An example would be a perceived miscalculation of pre-judgment interest on an otherwise successful claim. A motion for new trial is not a suitable vehicle to preserve such complaints, since a new trial is not what the proponent wants. However, a motion for new trial is not the only means of preserving error. *Delhi Gas Pipeline Corporation v. Lamb*, 724 S.W.2d 97 (Tex. App.--El Paso 1986, writ ref'd n.r.e.); *Visage v. Marshal*, 632 S.W.2d 667 (Tex. App.--Tyler 1982, writ ref'd n.r.e.); *Dietz v. Dietz*, 540 S.W.2d 418 (Tex. Civ. App.--El Paso 1976, no writ). A motion to modify judgment, or even an objection to the judgment, could be used to preserve error.

**XXII. PRESERVING ERROR IN COURT OF APPEALS BRIEF** An appellate court cannot consider an error that is not complained about in the brief or application filed with the court. *Central Education Agency v. Burke*, 711 S.W.2d 7, 8 (Tex. 1986). The only exception is fundamental error, which can be raised sua sponte by the appellate court. *See* ORSINGER, 6 MCDONALD: TEXAS CIVIL APPELLATE PRACTICE § 48:12 (1992).

**XXIII. PRESERVING ERROR IN MOTION FOR REHEARING** Formerly, the Texas Supreme Court could consider only points of error that were raised in the motion for rehearing filed in the court of appeals. *Doctors Hospital Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177, 178 (Tex. 1988). *See* ORSINGER, 6 MCDONALD: TEXAS CIVIL APPELLATE PRACTICE § 49:4 (1992). However, since September 1, 1997, a motion for rehearing is no longer be a prerequisite to appellate review in the Texas Supreme Court. *See* new TEX. R. APP. P. 49.9.