PART I
Introduction to Civil Litigation for the Paralegal

CHAPTER 1
Litigation and the Paralegal

KEY POINTS

- Civil Litigation in Texas State Courts is regulated by:
  Texas Rules of Civil Procedure
  Texas Rules of Civil Evidence
  Texas Rules of Appellate Procedure
  Texas Civil Practice and Remedies Code
  Local Rules of Court
  Texas Statutes and Codes
  Texas Case Law

WHAT CIVIL LITIGATION IS

FEDERAL COURTS VERSUS STATE COURTS

The litigation practice in Texas state courts is quite similar in many areas to the litigation practice in the federal courts. However, there are many differences between the two systems, including the times for filing or responding and the format of pleadings. The role of the paralegal in a litigation law firm is much the same whether the practice occurs in federal or state court.

ALTERNATIVES AND LIMITATIONS TO LITIGATION

ARBITRATION

The process of arbitration involves submitting a dispute to a third party for resolution. For a number of years, arbitration has increasingly been recognized as a viable alternative to litigation in Texas.

In the 1987 session, the 70th Texas Legislature enacted a number of statutes providing for alternative dispute resolution (ADR). The purpose of the Alternative Dispute Resolution Procedures act is found in the opening words of Tex. Civ. Prac. & Rem. Code Ann. § 154.002: "It is the policy of this state to encourage the peaceable resolution of disputes . . . and the early settlement of pending litigation through voluntary settlement procedures."

The Act permits a court, either on its own motion or on the motion of a party, to refer a pending litigation to ADR and to appoint neutral third parties to preside over the ADR procedures. The court is responsible for conferring with the parties to determine the most appropriate ADR method and subsequently notifying the parties of its determination.

Once the court's notice is received, the parties have ten days to file a written objection to the notice of referral. A provision in the Act allows avoidance of the ADR procedure if the court finds that a reasonable basis exists for a party's objections.

The procedures permitted under ADR are outlined in Tex. Civ. Prac. & Rem. Code Ann. §§ 154.023–.027 and

Exhibit 1-1 Texas Form Books

Stayton Texas Forms with Practice Commentaries, by Stayton (Vernon)
Texas Civil Trial Guide, by Johnson and Dorsaneo (Matthew Bender)
Texas Criminal Practice Guide, by Teague (Matthew Bender)
Texas Forms: Legal and Business
Texas Jurisprudence Pleading and Practice Forms 3d (Lawyers Cooperative Publishing)
Texas Legal Practice Forms, by Stevenson and Taylor (Callaghan)
Texas Litigation Guide, by Dorsaneo (Matthew Bender)
Texas Pattern Jury Instructions (State Bar of Texas)
Texas Special Issues Forms, by Robins (Butterworth)
West's Texas Forms (West)

include, but are not limited to:

1. Mediation;
2. Arbitration;
3. Minitrial;
4. Moderated settlement conference;
5. Summary jury trial.

One important aspect of ADR is the fact that the results of the chosen procedure are not binding on the parties.

The third parties who participate in ADR must adhere to Tex. Civ. Prac. & Rem. Code Ann. § 154.052. This section requires a minimum of forty hours training in dispute resolution and twenty-four additional training hours if the party participates in parent-child disputes. Other training and experience may apply toward these requirements.

Refer to Tex. Rev. Civ. Stat. Ann. art. 235 for additional sources of requirements for arbitration.

SOURCES OF THE LAW

PRIMARY SOURCES

The controlling law for Texas civil litigation is found in the Texas Constitution, Texas cases, Texas statutory codes, and various local rules of court.

SECONDARY SOURCES

Numerous secondary sources exist for litigation practice in the Texas court system. Frequently used, state-specific litigation form books are listed in Exhibit 1-1. The State Bar of Texas has compiled numerous seminar course materials into excellent guidebooks for both attorneys and paralegals.

Many publishers now provide their forms on computer disk, in addition to the written format, in an effort to meet the needs of the computerized law firm.

CHAPTER 2
The Courts and Jurisdiction

KEY POINTS

- The Texas court system is patterned after the federal court system.
- Texas has four types of trial courts: municipal courts, justice of the peace courts, county courts, and district courts.
- The Texas Court of Appeals has jurisdiction over both civil and criminal cases

FEDERAL COURT SYSTEM

UNITED STATES DISTRICT COURTS

Each state has at least one United States district court. Based on the state's population and size, as well as the court's case load, it may have more than one. Texas has four districts. Exhibit 2-1 specifies the composition of the United States district courts in Texas.

UNITED STATES COURTS OF APPEAL

The United States is divided geographically into eleven appellate districts plus the District of Columbia Circuit, which hears appeals from decisions of federal administrative agencies and the specially created Federal Circuit court of appeals. Texas is located in the jurisdiction of the Fifth Circuit court of appeals. The other states in the Fifth Circuit are District of Canal Zone, Louisiana, and Mississippi. The Fifth Circuit court of appeals sits in New Orleans, Louisiana.

The primary function of the federal appeals courts is to review the decisions of the district courts within their circuits. Normally reviews are conducted by three-judge panels. In some instances, however, a party may petition the court for a *hearing en banc*: a hearing before all the judges of the circuit.

STATE COURT SYSTEMS

The state court system in Texas, a dual creation of the Texas Constitution and the Texas Legislature, is patterned after the structure of the federal system. The Texas Constitution created one Supreme Court, one court of criminal appeals, courts of appeals, district courts, county courts, commissioners courts, and courts of justices of the peace.

The Texas Legislature has also exercised its authority to establish additional statutory courts. Exhibit 2-2 illustrates the state court structure in Texas.

TRIAL COURTS

There are four types of trial courts in Texas: municipal courts, justice of the peace courts (often referred to simply as *justice courts* or *JP courts*), county courts, and district courts. A further subdivision of the justice courts is the small claims courts.

MUNICIPAL COURTS. Municipal courts have jurisdiction in criminal cases only. At least one municipal court of record is established for cities with a population of 1.2 million, and additional municipal courts may be created by a municipality's governing body. There are presently over 850 municipal courts in Texas.

Trial in the municipal court is before a judge or six person jury. Either party may request a jury trial.

An appeal may be taken to a county court if a party is dissatisfied with the municipal court's decision. At the county court level, the trial is de novo, that is, a new trial occurs. From the county court level, an appeal is taken to the district court and from there to the state court of appeals. The final appeal is to the Supreme Court of Texas.

JUSTICE OF THE PEACE COURTS. Justice of the peace courts were created by Tex. Const. art. 5, § 19, and Tex. Gov't Code §§ 27.031 and 27.032. Tex. R. Civ. P. 523 et seq. govern the practices of the justice courts. Rule 523 states that: "All rules governing the district and county courts shall also govern the justice courts, insofar as they can be applied, except where otherwise specifically provided by law or these rules."

Texas counties are divided into precincts. A justice of the peace presides over the court at the precinct level. Justice courts are not courts of record, as there is no court reporter recording the proceedings and, therefore, no written record of the proceedings. Cases appealed to county court are tried de novo. At present, there are approximately 900 justice of the peace courts in Texas.

Justice courts are granted original jurisdiction, both civil and criminal, when the amount sued for, exclusive of interest or penalty, does not exceed $5,000.

COUNTY COURTS. In Texas, there are two types of county courts. Tex. Const. art. 5, § 16, created a county court for each county; these are referred to as *constitutional county courts*. That section of the state constitution also authorized the legislature both to create additional courts and to set the jurisdiction for those courts. Courts created by the legislature include county courts at-law, often referred to as *statutory* or *legislative county courts*. There are presently over 400 county courts in Texas.

For additional information on the nature of county courts, refer to the statutes that created a particular court and the general enactments under Tex. Gov't Code Ann. §§ 25.0003 and 25.0013.

DISTRICT COURTS. The third type of court in the state court system is the district court, which was created by Tex. Const. art. 5, § 1. Tex. R. Civ. P. 15–21c govern both county and district courts.

There are presently approximately 400 district courts in Texas. The district courts include special criminal, probate, family, and juvenile courts, all created by statute.

Certain district courts have been established by Tex. Gov't Code Ann. § 24.601(a) to serve as family district courts and hear matters regarding custody, visitation, and child support.

APPELLATE COURTS

Three of the courts depicted in Exhibit 2-2 are appellate courts. The first tier is the Texas court of appeals.

Exhibit 2-1 United States District Courts in Texas

EASTERN DISTRICT OF TEXAS
Room 212, United States Courthouse
Beaumont, TX 77701

BEAUMONT DIVISION (Hardin, Jasper, Jefferson, Liberty, Newton, and Orange Counties)

LUFKIN DIVISION (Angelina, Houston, Nacogdoches, Polk, Sabine, San Augustine, Shelby, Trinity, and Tyler Counties)

MARSHALL DIVISION (Camp, Cass, Harrison, Marion, Morris, and Upshur Counties)

PARIS DIVISION (Delta, Fannin, Hopkins, Lamar, and Red River Counties)

SHERMAN DIVISION (Collin, Cooke, Denton, and Grayson Counties)

TEXARKANA DIVISION (Bowie, Franklin, and Titus Counties)

TYLER DIVISION (Anderson, Cherokee, Gregg, Henderson, Panola, Rains, Rusk, Smith, Van Zandt, and Wood Counties)

NORTHERN DISTRICT OF TEXAS
Room 15C22, United States Courthouse
1100 Commerce Street
Dallas, TX 75242

ABILENE DIVISION (Callahan, Eastland, Fisher, Haskell, Howard, Jones, Mitchell, Nolan, Shackleford, Stephens, Stonewall, Taylor, and Throckmorton Counties)

AMARILLO DIVISION (Armstrong, Briscoe, Carson, Castro, Childress, Collingsworth, Dallam, Deaf Smith, Donley, Gray, Hall, Hansford, Hartley, Hemphill, Hutchinson, Lipscomb, Moore, Ochiltree, Oldham, Parmer, Potter, Randall, Roberts, Sherman, Swisher, and Wheeler Counties)

DALLAS DIVISION (Dallas, Ellis, Hunt, Johnson, Kaufman, Navarro, and Rockwall Counties)

FORT WORTH DIVISION (Comanche, Erath, Hood, Jack, Palo Pinto, Parker, Tarrant, and Wise Counties)

LUBBOCK DIVISION (Bailey, Borden, Cochran, Crosby, Dawson, Dickens, Floyd, Gaines, Garza, Hale, Hockley, Kent, Lamb, Lubbock, Lynn, Motley, Scurry, Terry, and Yoakum Counties)

SAN ANGELO DIVISION (Brown, Coke, Coleman, Concho, Crockett, Glasscock, Irion, Menard, Mills, Reagan, Runnels, Schleicher, Sterling, Sutton, and Tom Green Counties)

WICHITA FALLS DIVISION (Archer, Baylor, Clay, Cottle, Foard, Hardeman, King, Knox, Montague, Wichita, Wilbarger, and Young Counties)

SOUTHERN DISTRICT OF TEXAS
P.O. Box 61010
Houston, TX 77208

BROWNSVILLE DIVISION (Cameron and Willacy Counties)

CORPUS CHRISTI DIVISION (Aransas, Bee, Brooks, Duval, Jim Wells, Kenedy, Kleberg, Live Oak, Nueces, and San Patricio Counties)

GALVESTON DIVISION (Brazoria, Chambers, Galveston, and Matagorda Counties)

HOUSTON DIVISION (Austin, Brazos, Colorado, Fayette, Fort Bend, Grimes, Harris, Madison, Montgomery, San Jacinto, Walker, Waller, and Wharton Counties)

LAREDO DIVISION Jim Hogg, LaSalle, McMullen, Webb, and Zapata Counties)

McALLEN DIVISION (Hidalgo and Starr Counties)

VICTORIA DIVISION (Calhoun, DeWitt, Goliad, Jackson, Lavaca, Refugio, and Victoria Counties)

WESTERN DISTRICT OF TEXAS
Hemisfair Plaza
655 East Durango Boulevard
San Antonio, TX 78206

AUSTIN DIVISION (Bastrop, Bianco, Burieson, Burnet, Caldwell, Gillespie, Hays, Kimble, Lampasas, Lee, Llano, Mason, McCulloch, San Saba, Travis, Washington, and Williamson Counties)

DEL RIO DIVISION (Edwards, Kinney, Maverick, Terrell, Uvalde, Val Verde, and Zavala Counties)

EL PASO DIVISION (El Paso County)

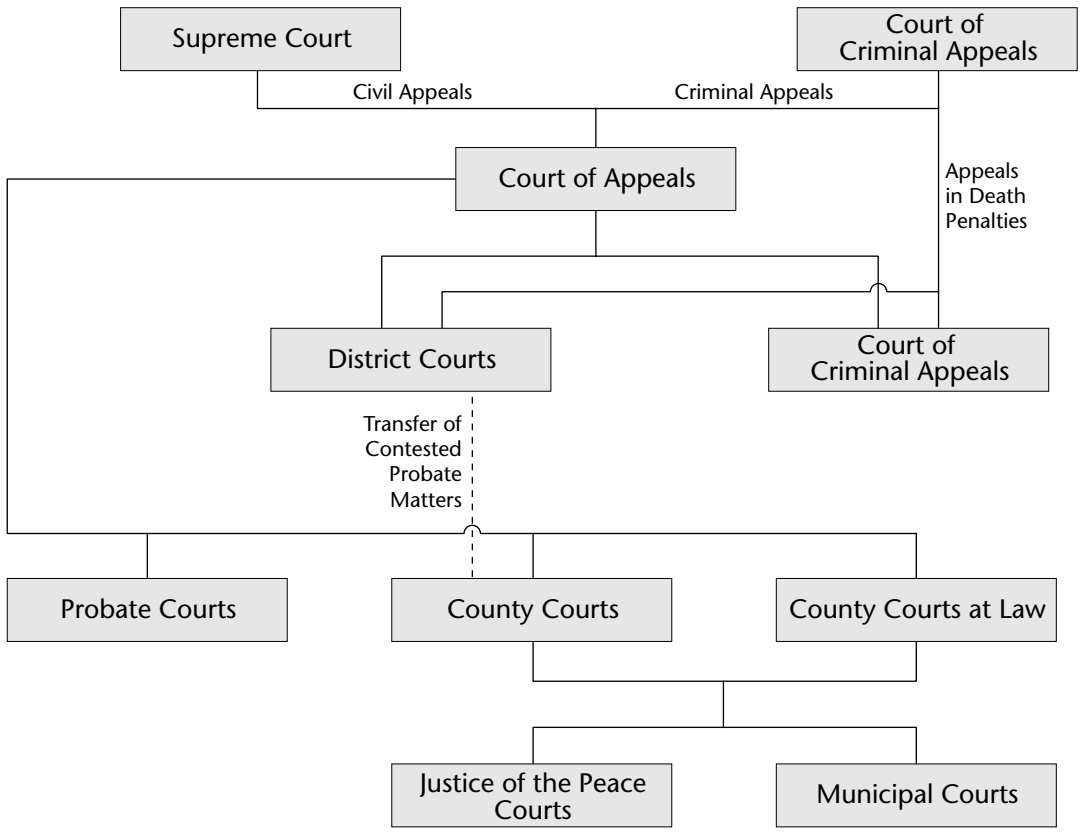
MIDLAND-ODESSA DIVISION (Andrews, Crane, Ector, Martin, Midland, and Upton Counties)

PECOS DIVISION (Brewster, Culberson, Jeff Davis, Hudspeth, Loving, Pecos, Presidio, Reeves, Ward, and Winkler Counties)

SAN ANTONIO DIVISION (Atascosa, Bandera, Bexar, Comal, Dimmit, Frio, Gonzales, Guadalupe, Karnes, Kendall, Kerr, Medina, Real, and Wilson Counties)

WACO DIVISION (Bell, Bosque, Coryell, Falls, Freestone, Hamilton, Hill, Leon, Limestone, McLennan, Milam, Robertson, and Somervell Counties)

Exhibit 2-2 Texas State Court System



There are fourteen district courts of appeals in Texas, as shown in Exhibit 2-2. Each district is referred to as a *Supreme Judicial District*. The only city with more than one court of appeals is Houston.

Appeals are heard by a panel of three justices. Decisions of this panel are normally in written form.

TEXAS SUPREME COURT

The highest civil court in Texas is the Texas Supreme Court, which consists of nine justices, one of whom acts as chief justice. Since the 1980 amendment to the state constitution, the Texas Supreme Court hears only civil cases.

TEXAS COURT OF CRIMINAL APPEALS

For criminal cases, the Texas court of criminal appeals is the court of last resort. After the constitutional amendment in 1980, the Texas court of appeals was authorized to hear both civil and criminal cases. On appeal from the criminal district court, a criminal case may be sent to either the Texas Supreme Court or the Texas court of criminal appeals.

JURISDICTION

Jurisdiction is the authority or power of a court to hear a particular case. The jurisdictional limits are set by statute. The issue of jurisdiction has two prongs. First, the court must have jurisdiction over the subject matter of the case. Second, the court must have jurisdiction over the persons involved in the litigation.

SUBJECT MATTER JURISDICTION IN THE STATE COURT

If a court has subject matter jurisdiction, it has the power to hear a particular type of case. In the absence of that power, any judgment rendered in the case is void. A void judgment is not enforceable and is subject to challenge at any time.

The laws governing the types of cases that can be brought in state court in Texas are often complicated. The following is a summary of the subject matter jurisdiction of the Texas state courts.

MUNICIPAL COURTS. Municipal courts, which are authorized to hear only criminal cases, have been given concurrent jurisdiction with the justice courts in cases in which the maximum penalty to be imposed is $200. (See Tex. Code Crim. Proc. Ann. art. 4.14)

JUSTICE OF THE PEACE COURTS. Justice of the peace courts have exclusive original jurisdiction over a civil case if the amount in controversy is $200, exclusive of interest, unless another court has been granted jurisdiction over the subject matter. If the amount in controversy exceeds $200, but does not exceed $5,000, exclusive of interest, the justice of the peace court shares concurrent original jurisdiction with the district and county courts. Justice of the peace courts have jurisdiction over a criminal case if the fine does not exceed $200.

Original jurisdiction over *forcible entry and detainer cases,* involving eviction from or possession of real estate (but not title to the real estate), is vested in the justice of the peace court regardless of the value of the land in controversy.

The justice courts also have jurisdiction over the following matters:

1. Foreclosure of mortgages and enforcement of liens on personal property if the amount in controversy is within the court's jurisdiction.
2. Issuance of writs of attachment, garnishment, and sequestration.

The issuance of *peace bonds*—orders by the court to prevent one person from approaching another person, based on previous problems between the parties—is an important jurisdictional matter for the justice of the peace courts. A person against whom a bond has been requested is required to post a bond that states that the person will not harm or destroy the property of the other individual for a period of one year from the date of the issuance of the bond. The amount of the bond is at the discretion of the justice of the peace court issuing the bond.

The justice of the peace courts do not have jurisdiction over the following types of actions:

1. Issuance of writs of mandamus or injunction.
2. Suits filed by the State of Texas to recover penalties, forfeitures, and escheats.
3. Suits for divorce.
4. Suits for damages because of slander or defamation of character.
5. Suits for the trial of title to land.
6. Suits for the enforcement of liens on land.

Each justice of the peace also presides over a small claims court. This court shares concurrent jurisdiction with the justice of the peace court in the recovery of money claims not exceeding $5,000.

CONSTITUTIONAL COUNTY COURTS. Tex. Const. art. 5, § 16, grants to the constitutional county courts original jurisdiction over civil cases if the amount in controversy exceeds $200, up to a maximum of $5,000. The constitutional county court also has been given the authority to issue writs of injunction, mandamus, certiorari, and other writs required to enforce its jurisdiction.

The subject matter of the legislative county courts varies, as do the limits on the amount in controversy. Many county courts are authorized to hear cases that do not exceed $5,000. However, others have a limit of $50,000.

In counties without a statutory probate court, county court at-law, or other statutory court with the jurisdiction of a probate court, constitutional county courts are authorized to exercise limited original probate jurisdiction. In the event the probate matter heard in the constitutional county court is challenged, a request may be made by either the judge or any party that the proceeding be transferred to the district court. Once the case is transferred to the district court, the court treats the case as if it had been filed originally in that court. (Tex. Prob. Code Ann. § C, § 5(b)

Dallas, Houston, and several other large cities in Texas have separate probate courts. Smaller cities generally do not have probate courts.

Criminal jurisdiction is granted to a constitutional county court only if there is no statutory criminal court in the county. In such circumstance, the constitutional county court may exercise original jurisdiction over misdemeanors, except for cases involving official misconduct or fines of less than $200.

Concurrent jurisdiction with a district court is granted to a legislative county court if the amount in controversy exceeds the jurisdiction of a constitutional county court.

A constitutional county court also serves as an appellate court for cases arising in either the justice courts or small claims courts when the judgment exceeds $20, exclusive of costs. The review process is a trial de novo.

Both original and appellate judgments from the constitutional county court may be appealed to the intermediate court of appeals if the judgment or amount in controversy exceeds $20, exclusive of interests and costs. (Tex. Civ. Prac. & Rem. Code Ann. § 51.012)

Jurisdiction is denied to the constitutional county court in the following areas, according to Tex. Gov't Code Ann. § 26.043:

1. Suits for the enforcement of a lien on land;
2. Eminent domain matters;
3. Suits for the recovery of land;
4. Suits on behalf of the state for escheat action;
5. Suits for divorce;
6. Suits for the forfeiture of a corporate charter;
7. Suits for the trial of a right to property valued at $500 or more and levied on by a writ of execution, sequestration, or attachment.

DISTRICT COURTS. Tex. Const. art. 5, § 8, grants to the district courts general jurisdiction over all proceedings except those granted exclusively to other courts (probate, family law, etc.). Thus, the majority of litigation in Texas state courts occurs in the district court.

Jurisdiction in the district court may be exclusive, appellate, or original.

Cases in which the amount in controversy exceeds $500 are within the jurisdiction of the district court. There is no maximum limit for matters to be heard in this court. The district court also has concurrent jurisdiction with justice courts if the amount in controversy exceeds $200, up to $5,000.

If the amount in controversy in a case falls within the jurisdictional limits of two or more courts, the case may be filed in any of those courts. (Tex. Gov't Code Ann. §§ 25.0013, 26.04(d), and 27.031)

APPELLATE COURTS. In 1980 the Texas Constitution was amended, effective in 1981, to give the Texas court of appeals jurisdiction over criminal appeals, which had formerly been heard by the Texas court of criminal appeals. This change became necessary because of the heavy backlog of criminal appeals. The one exception is the death penalty case, which may be appealed directly to the Texas court of criminal appeals.

PERSONAL JURISDICTION

Personal jurisdiction over the defendant in a Texas state court action is easily established if the defendant is domiciled within the state. Problems arise when the defendant is domiciled outside the state but has some type of contact with the state so as to satisfy constitutional due process requirements. Texas case law is the best source for determining if the "minimum contacts" requirements to satisfy personal jurisdiction have been met.

NOTICE. The exercise of personal jurisdiction over a defendant is dependent on proper notice of the action or service of process. What constitutes proper service for defendants domiciled in Texas is detailed in Tex. R. Civ. P. 103, 106, and 107. Service of process is discussed more fully in Chapter 5.

STATE LONG-ARM STATUTES. The two major categories of nonresident defendants are (Tex. Rev. Civ. Stat. Ann. art. 2031b):

1. Individuals who are not residents of Texas;
2. Foreign corporations, joint-stock companies, associations, or partnerships

Tests for establishing a nonresident defendant's minimum contacts with Texas include (Tex. Rev, Civ. Stat. Ann. art. 2031b, § 4):

1. The existence of contracts, by mail or otherwise, with any Texas resident when either party is to perform the contract, either in whole or in part, in Texas.
2. The defendant's commission of a tort, in whole or in part, in Texas.
3. Recruitment of Texas residents, either directly or through an intermediary in Texas, for employment in Texas or outside the state.

Service requirements for nonresidents are discussed in Chapter 5.

CHALLENGING PERSONAL JURISDICTION. In Texas, personal jurisdiction must be challenged by a *special appearance,* that is, an appearance made solely for the purpose of challenging the jurisdiction. (Tex. R. Civ. P. 120a) The special appearance must be by sworn motion filed prior to a motion to transfer venue or any other plea, pleading, or motion. However, a motion to transfer venue and any other plea, pleading, or motion may be part of the same instrument or filed subsequent thereto without waiver of such special appearance. "The issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes shall not constitute a waiver of such special appearance." (Tex. R. Civ. P. 120a(l))

The court determines the special appearance on the basis of pleadings, stipulations, affidavits filed by the parties, results of discovery, and any oral testimony. Any affidavits filed on behalf of a special appearance must be served at least seven days before the hearing and must be made on personal knowledge.

VENUE

STATE COURT VENUE

The issue of venue in Texas has undergone drastic changes over the past ten years. New procedural rules were developed to reflect the latest changes. Refer to Tex. R. Civ. P. 86–89. The earlier Texas venue laws were patterned after the Spanish influence on the state and established venue in the county of the defendant's domicile.

Venue law currently is reflected in Tex. Civ. Prac. & Rem. Code Ann. § 15.001:

> VENUE: GENERAL RULE. Except as otherwise provided by this subchapter of Subchapter B or C, all lawsuits shall be brought in the county in which all or part of the cause of action accrued or in the county of defendant's residence if defendant is a natural person.

However, there are numerous exceptions to this general rule setting forth venue in Texas. Refer to Tex. Civ. Prac. & Rem. Code Ann. § 15 for a partial listing of those exceptions. Nonresidents, corporations, partnerships, and counties, for example, enjoy exception status.

This code section also establishes mandatory filing requirements, in the county where the land is located, for actions for recovery of real property; for establishment of interest in real property; for partition of title to real property;

for removal of encumbrances from title to real property; or to quiet title to real property.

Under Tex. Civ. Prac. & Rem. Code Ann. § 15.017, the plaintiff in a libel, slander, or invasion-of-privacy matter may elect to file either: (1) In the county where the plaintiff resides at the time of accrual of the cause of action; (2) in the county where the defendant resides at the time of filing suit; (3) in the county of any defendant's residence; or (4) in the county of domicile of a corporation.

Permissive venue is granted under Tex. Civ. Prac. & Rem. Code Ann, § 15.031 to an executor, administrator, or guardian. Such an action may be brought in the county where the estate is administered or the county in which a negligent act or omission occurred.

Tex. Civ. Prac. & Rem. Code Ann. § 15.032 establishes venue in insurance matters. A suit against a fire, marine, or inland company may be brought in the county where the insured property is situated. In the case of life, accident, or health claims, the suit may be brought in the county where the insurance company's home office is located, the county where the loss occurred, or the county where the policyholder or beneficiary instituting the suit resides.

An action for breach of warranty by a manufacturer may be brought in the county where all or a part of the cause of action accrued; where the manufacturer has an agency, representative, or principal office; or where the plaintiff resides.

Tex. Civ. Prac. & Rem. Code Ann. §15.035 regulates venue for contracts in writing and provides that, unless the contract permits performance in a particular county, suit may be brought in that county or the county in which the defendant is domiciled. If the action is based on the defendant's contractual obligation arising out of the purchase of consumer goods, services, loans, or extensions of credit for personal, household, family, or agricultural use, suit may be filed either in the county where the defendant signed the contract or the county where the defendant resides at the time of the suit.

Venue for a corporation or association is based in the county where its principal office is situated; where all or part of the cause of action arose; or the county of the plaintiff's residence at the time all or part of the cause of action arose if the company has an agency or representative there. However, if the company does not have an agency or representative in the county of the plaintiff's residence at the time all or part of the action arose, then venue is in the county nearest where the plaintiff resided where the company did have an agency or representatives.

In the case of foreign corporations doing business in Texas, suit may be filed in the county where all or part of the action arose or where the foreign corporation has an agency, representative, or principal office. If the business has no such agency, representative, or office in the state, then venue is in the county of the plaintiff's residence.

Texas case law holds that the county where the registered agent is located is the principal office.

Tex. Civ. Prac. & Rem. Code Ann. § 15.061 provides that if the court has venue as to any one defendant, it has venue as to all defendants and claims in that case, unless a mandatory venue provision controls.

Venue of the main action also controls the filing of counterclaims, crossclaims, and third-party claims.

Tex. R. Civ. P. 255 provides that the parties may consent to venue.

CHANGING VENUE

Under the appropriate circumstances, venue can be changed. Tex. R. Civ. P. 86–89 set forth the requirements for a motion to transfer venue and the required accompanying affidavits. See Exhibit 2-3 for a sample motion.

The defendant's motion to transfer must be filed and served concurrently with or prior to the filing of any other plea, pleading, or motion, except for a special appearance.

The motion to transfer must recite the reasons the action should be transferred to another county of proper venue. Reasons for transfer include:

1. The county where the action is pending is not a proper county;
2. Mandatory venue of the action in another county is prescribed by a specific statutory provision, such as those discussed previously.

Verification of the motion to transfer is not required. However, the defendant may supply affidavits based on personal knowledge.

A plaintiff need not respond to a motion to transfer. However, the defendant's sworn allegations are taken as true unless specifically denied by the plaintiff. After venue allegations are denied, the plaintiff has the burden of presenting prima facie proof of the allegations by pleadings or supporting affidavits based on personal knowledge.

Discovery is permitted in transfer-of-venue matters. The hearing is based on prior pleadings, affidavits, and discovery documents. No live testimony is presented.

Exhibit 2-3 Sample Motion to Transfer Venue

[STYLE OF CASE]
MOTION TO TRANSFER VENUE

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant USC INVESTMENT COMPANY (hereinafter "USC"), and files this its Motion to Transfer Venue to Travis County, Texas, a county of proper venue, for the reason that Dallas County, Texas, is not a proper county of suit. As cause therefor, USC would show this Honorable Court as follows:

I.

Defendant specifically denies the existence of a cause of action from the facts stated in Plaintiff's Original Petition, Defendant further specifically denies that Plaintiff's allegations constitute a pleading of venue facts necessary to maintain suit in Dallas County, Texas. Each of the alleged actions occurred in Travis County and Dallas County has absolutely no relationship to these alleged actions or the parties in this suit. USC further specifically denies that it breached any duty to the Plaintiff, contractual or otherwise.

II.

As more fully shown by the affidavit of John Smith, which is attached hereto as Exhibit A and incorporated herein by reference, USC is a domestic corporation residing and having its principal place of business in Travis County, Texas, where it maintains its offices and registered agent. USC has no registered agent or office in any other county in the State of Texas, including Dallas County.

III.

The cause of action, or part thereof, if a cause of action exists, did not accrue in Dallas County, Texas, but in Travis County, Texas, where the account was opened, the funds were deposited, and all transactions between the parties occurred. At no time did any transactions occur, in part or in whole, in Dallas County, Texas.

IV.

USC has never transacted business with Plaintiff in Dallas County, Texas. In fact, Plaintiff alleges in her pleading that she is a resident of New Orleans, Louisiana.

V.

Section 15.036 of the Texas Civil Practice & Remedies Code provides that a private corporation may be sued (1) in the county in which its principal office is situated, (2) in the county in which all or a part of the cause of action arose, or (3) in the county in which the plaintiff resided when all or a part: of the cause of action arose, provided the corporation had an agency or representative in the county or, if the corporation had no agency or representative in the county in which the plaintiff resided, when all or a part of the cause of action arose, then suit may be brought in the county nearest that in which plaintiff resided at that time in which the corporation then had an agency or representative. Provision (3) is not available to Plaintiff since Plaintiff is not a resident of Dallas County, Texas, but is a resident of New Orleans, Louisiana, as shown in her Original Petition. Therefore, under Provisions (1) and (2), Travis County, Texas, is a proper county in which to bring suit, as this county is the location of both Defendant's principal place of business and the only county in which all or a part of the alleged cause of action could have arisen. See Exhibit A attached hereto. Plaintiff has not shown that venue may be established in Dallas County, Texas. In this case, venue is proper in Travis County, Texas, where USC's principal office and only registered agent reside.

VI.

No provision for mandatory venue authorizing venue to be maintained by Plaintiff in Dallas County, Texas, exists.

VII.

No provision for permissive venue authorizing venue to be maintained by Plaintiff in Dallas County, Texas, exists.

continued

Exhibit 2-3 Sample Motion to Transfer Venue *(continued)*

WHEREFORE, PREMISES CONSIDERED, USC requests that this matter be set for hearing after forty-five days from the date of the filing of this Motion, with notice to Plaintiff, and that, upon the completion of the hearing, the Court grant this Motion to Transfer Venue and transfer such cause to Travis County, Texas, taxing costs incurred against Plaintiff, and that Defendant have such other and further relief to which it may be justly entitled.

[Signature block]

[FIAT]
[Certificate of Service]

[Style of Case]
EXHIBIT A

AFFIDAVIT OF JOHN SMITH

STATE OF TEXAS (
(
COUNTY OF DALLAS (

BEFORE ME, the undersigned authority, on this date personally appeared JOHN SMITH, known to me to be the person whose name is subscribed below and who, having been by me duly sworn, stating upon his oath as follows:

1. "My name is John Smith. I am over the age of twenty-one years. I have never been convicted of a felony or other crime. I have personal knowledge of the facts herein stated. I am otherwise competent under law to give this affidavit. I am District Manager of USC Investment Management Company (hereinafter "USC"). USC is a Texas corporation and I make this affidavit in support of USC's Motion to Transfer Venue.
2. "USC is a corporation residing in and having its principal place of business in Travis County, Texas, where it maintains its offices and registered agent. USC has no registered agent or office in Dallas County, Texas.
3. "All transactions regarding Plaintiff's accounts with USC occurred in Travis County and no action related to these transactions occurred in Dallas County. Defendant has never transacted any business with Plaintiff in Dallas County.
4. "Plaintiff represented to USC that she was a resident of New Orleans, Louisiana, as shown on its New Account Application, attached hereto as Exhibit B and incorporated herein by reference" [not included in this sample].

FURTHER, Affiant sayeth not.

_____
JOHN SMITH

[Notary block and seal]

PART II
Initiating Litigation

CHAPTER 3
Preliminary Considerations

KEY POINTS

- An attorney must determine the existence of a cause of action prior to filing suit.
- The statutes should be checked for the limitations on filing a particular type of lawsuit.
- An attorney's conduct is governed by rules promulgated by the State Bar of Texas.
- Paralegals must be supervised by attorneys.
- An attorney may not split fees with a paralegal.

DETERMINING THE EXISTENCE OF A CAUSE OF ACTION

Chapter 3 of the textbook discusses the necessity of determining that a case has merit and is not a "frivolous" lawsuit as defined by Fed. R. Civ. P. 11. State court practice mandates the same careful consideration prior to filing a lawsuit. Rule 3.01 of the state bar rules regulating the professional conduct of attorneys requires that "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous."

The comments to the rule state that a lawsuit is frivolous if it contains knowingly false statements or facts. It is not frivolous simply because the facts have not been first substantiated fully or because the attorney anticipates developing vital evidence only by discovery.

TIME LIMITATIONS

The statutes of limitation adopted by the Fifth Congress of the Republic of Texas on February 5, 1841, were patterned after those of common law states. This concept prescribes certain periods for initiating a particular type of lawsuit.

The time frame within which suit must be brought is contained in the statutes. Exhibit 3-1 lists several types of action and the requisite filing time.

A statute of limitations may be suspended under certain conditions. For example, if a defendant is temporarily absent from the state, the running of the statute of limitations is suspended. (Tex. Rev. Civ. Stat. Ann. art. 16.063) The death of a plaintiff or defendant suspends the running of the statute for twelve months. However, if an executor or administrator of the decedent's estate is approved and qualified by the court, the statute of limitations begins to run again from the time of the court's approval. (Tex. Rev. Civ. Stat. Ann. art. 16.062)

The statutes provide for filing a counterclaim or crossclaim after the time for filing a separate action has expired. (Tex. Rev. Civ. Stat. Ann. art. 16.069)

Exhibit 3-1 Types of Action and Requisite Filing Time

Malicious prosecution, libel, or breach of promise of marriage	One year (Tex. Rev. Civ. Stat. Ann. art. 5524)
Trespass for injury to the property of another, detaining the personal property of another, personal injury, forcible entry and detainer, and accident resulting in death of a person	Two years (Tex. Rev. Civ. Stat. Ann. art. 16.003)
Specific performance; contract for conveyance of real property bond after death; resignation, removal, or discharge of an executor, administrator, or guardian; and partnership agreement	Four years (Tex. Rev. Civ. Stat. Ann. art. 16.04)
Action relating to the sale of goods	Four years (Tex. Bus. & Com. Code § 2.725)

ETHICAL CONSIDERATIONS IN ACCEPTING A CASE

The conduct of attorneys in Texas is governed by the state bar rules relating to professional conduct. An attorney who fails to comply with these rules is subject to the Texas Rules of Disciplinary Procedure. Additional rules regarding ethical considerations for attorneys are found in *The Texas Lawyer's Creed—A Mandate for Professionalism,* adopted November 7, 1989.

ETHICAL CONSIDERATIONS AFTER ACCEPTING A CASE

State Bar Rule 1.15 details the ethical concerns an attorney should consider before accepting a case. An attorney should not accept representation in a case unless the attorney can perform the requisite services competently, promptly, and without improper conflict of interest.

This rule also states the conditions binder which an attorney may resign or be discharged from a representation. These conditions include:

1. The attorney's physical, mental, or psychological condition materially impairs the lawyer's fitness to represent the client.
2. The representation will violate State Bar Rule 3.08 (which prohibits the attorney's representation in certain cases if the attorney knows or believes he or she may also be a fact witness in a case).
3. The client has used the attorney's services to perpetuate a crime or fraud.
4. The client has failed substantially to fulfill an obligation to the attorney, such as payment of agreed-upon attorney fees, and has been given reasonable warning that the attorney will withdraw unless the obligation is fulfilled.

ATTORNEY FEES

Texas Rule of Disciplinary Procedure 1.04 defines "reasonable attorneys' fees" as a fee that would be reasonable for a competent private attorney under the circumstances. Relevant facts that may enter into the definition of "reasonable" include the time and labor required, the difficulty of the question, the requisite skills for that service, a customary fee, the amount of the matter in controversy, the results involved, and the experience, reputation, and ability of the attorney performing the service.

FEE-SHARING

State Bar Rule 5.05 strictly prohibits the unauthorized practice of law. Only licensed attorneys may perform legal services and receive fees therefore. Paralegals may not participate in the fees earned by an attorney.

SUPERVISING NONLAWYER ASSISTANTS

State Bar Rule 5.03 governs the attorney's responsibilities regarding the supervision of paralegals. This rule basically holds the attorney responsible for the paralegal's violation of the State Bar Rules of Professional Conduct if the attorney orders, encourages, or permits the conduct.

CHAPTER 4
Investigation and Evidence

KEY POINTS

- In Texas, partnerships and corporations must furnish the secretary of state with the names and addresses of officers and agents for service of process.
- Assumed-name certificates must be filed in the county in which the business using the fictitious or assumed name is located.
- Interview techniques do not vary from one jurisdiction to another.

LOCATING FACT WITNESSES OR ELUSIVE DEFENDANTS

PARTNERSHIPS AND CORPORATIONS

In Texas, corporations and partnerships are required to provide the secretary of state with the name and address of an agent for service of process. This information is readily available to anyone and can be obtained from the secretary of state's office in Austin, or by Internet services listed in Appendix A.

ASSUMED-NAME CERTIFICATES

When individuals, partners, or corporations operate a business under a fictitious or assumed name, they are required to file an assumed-name certificate with the clerk in the county in which the business operates. This certificate contains the name and address of the principals of the business and the name and address of the corporate agent for service. Information regarding assumed name certificates is also available through Internet services listed in Appendix A. Exhibit 4-1 is an example of an assumed-name certificate.

TECHNIQUES FOR INTERVIEWING FACT WITNESSES

In general, techniques for interviewing fact witnesses do not vary from one jurisdiction to another. Paralegals should be sure to obtain permission when tape recording statements of witnesses because of the criminal implications of tape recording without the prior knowledge and consent of the witness.

EXPERT WITNESSES

Tex. R. Civ. P. 192.3(e) addresses the issue of expert witnesses in discovery and at trial, including the disclosure of the expert's identity and subjects about which the expert will testify. These rules closely parallel their companion federal court rules, particularly in the distinction between *testifying* and *consulting experts*. Rule 192.3(e) provides an exception to the privilege protection generally granted to the expert witness: Rule 192.3(e) contains major changes from the prior discovery rule relating to expert witnesses. This rule does not permit the discovery of the identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert. However, a party may discover the following information regarding an expert whose mental impressions or opinions have been reviewed by a testifying expert:

1. The expert's name, address, and telephone number;
2. The subject matter on which testifying expert will testify;
3. The facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them;
4. Any bias of the witness;
5. The facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was obtained;
6. The expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them;
7. The expert's current resume and bibliography.

Exhibit 4-1 Assumed-name Certificate

OFFICE OF EARL BULLOCK, COUNTY CLERK,
DALLAS COUNTY, TEXAS

ASSUMED NAME CERTIFICATE FOR AN INCORPORATED
BUSINESS OR PROFESSION

NOTICE: "CERTIFICATES" ARE VALID FOR A PERIOD NOT TO EXCEED TEN YEARS FROM THE DATE FILED IN THE COUNTY CLERK'S OFFICE. (CHAPTER 36, SECT. 1, TITLE 4—BUSINESS AND COMMERCE CODE)

THIS CERTIFICATE PROPERLY EXECUTED IS TO BE FILED IMMEDIATELY WITH THE COUNTY CLERK

* * * * * * *

NAME UNDER WHICH BUSINESS OR PROFESSIONAL SERVICES IS OR WILL BE CONDUCTED

_____

(PRINT OR TYPE)

Address: _____

City: _____ State: _____ Zip Code: _____

1. The name of the incorporated business or profession as stated in its Articles of Incorporation or comparable documents is: _____ , and the address of its registered or similar office in that jurisdiction is: _____ _____.
2. The period, not to exceed ten years, during which this assumed name will be used is: _____ _____.
3. The corporation is a (circle one) business corporation, nonprofit corporation, professional corporation, professional association or other type of corporation (specify) _____ or other type of incorporated business, professional, or other association or legal entity (specify): _____.
4. If the corporation is required to maintain a registered office in Texas, the address of the registered office is: _____ and the name of its registered agent at such address is: _____. The address of the principal office (if not the same as the registered office) is: _____.
5. If the corporation is not required to or does not maintain a registered office in Texas, the office address in Texas is: _____ ; and if the corporation is not incorporated, organized, or associated under the laws of Texas, the address of its place of business in Texas is: _____ , and the office address elsewhere is: _____ _____.
6. The county or counties where business or professional services are being or are to be conducted or rendered under such assumed name are (if applicable, use the designation "all" or "all except _____") : _____.
7. If this instrument is executed by the attorney-in-fact, the attorney-in-fact hereby states that he has been duly authorized, in writing, by his principal to execute and acknowledge this instrument.

_____
Signature of office, representative,
or attorney-in-fact or the corporation

THE STATE OF TEXAS
COUNTY OF DALLAS

BEFORE ME, THE UNDERSIGNED AUTHORITY, on this day personally appeared _____ _____ , known to me to be the person whose name(s) is/are subscribed to the foregoing instrument and, under oath, acknowledged to me that _he_ signed the same for the purpose and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, on _____ , 20___
(S E A L)

_____
Notary Public in and for
Dallas County, Texas

CHAPTER 5
The Initial Pleadings

KEY POINTS

- The initial pleading in Texas state courts is a petition.
- The petition must include a statement of the plaintiff's cause of action.
- Service of process is regulated by Tex. R. Civ. P. 99–124.
- Service of process in Texas state courts is through a citation.
- Amendment of a petition must be done at least seven days prior to trial. Special leave of court is required for later amendments.

INITIAL PLEADINGS

The form of pleadings varies greatly among the state courts in Texas. Therefore, special attention should be given to Rule 45(a) and (b) of the Texas Rules of Civil Procedure. Local rules of court and case law also govern.

All pleadings in the district and county courts must be on 8½-by-11-inch pager and signed by the party or the party's attorney. Either the signed original and any verification or a copy of each may be filed with the court. If a copy of the signed original is tendered for filing, the procedural rules require that the party or the party's attorney maintain the original for inspection by the court or any party to the suit if a question is raised as to its authenticity. Tex. R. Civ. P. 45 provides for the filing of pleadings without original signature to permit the filing of pleadings transferred by facsimile (fax) or other electronic means. Tex. R. Civ. P. 57 suggests the inclusion of the attorney's telecopier number on pleadings. Generally, a facsimile number is incorporated into the signature block for pleadings.

No pleading forms are prescribed for use in the Texas courts. However, the form books listed in Exhibit 1-1 offer an excellent selection of state court pleading forms. Local court rules, such as those of the Dallas district courts, require that pleadings be hole-punched at the top before filing.

THE PETITION

The initial pleading in Texas state courts is referred to as a *petition,* rather than the complaint used in federal court. However, these two pleadings are substantially the same.

The petition must "consist of a statement in plain and concise language of the plaintiff's cause of action." Tex. R. Civ. P. 45. A short statement of the cause of action must be sufficient to give fair notice of the claim under Tex. R. Civ. P. 47(a).

Separate causes of action are denoted by separately numbered paragraphs, as mandated by Tex. R. Civ. P. 50.

The clerk of court must designate the suit number by regular consecutive numbers, called *file numbers*. The clerk also notes on the petition the day and time of filing.

PARTIES TO THE LAWSUIT

Section 3 of the Texas Rules of Civil Procedure governs the parties to lawsuits filed in Texas courts. Many of these sections are analogous to the pertinent Federal Rules of Civil Procedure.

MINORS AND INCOMPETENTS

Minors and incompetents who have no legal guardian may file suit through the use of a *next friend,* who has the same rights concerning the lawsuit as a guardian would, but must give security for costs or affidavits in lieu thereof, when required.

PARTNERSHIPS, UNINCORPORATED ASSOCIATIONS, PRIVATE CORPORATIONS, AND ASSUMED NAMES

In Texas a partnership, unincorporated association, private corporation, or individual doing business under an assumed name may file suit in its partnership, assumed name, or common name.

JOINING MULTIPLE PARTIES

Provisions for joinder of parties in a Texas state court action appear in Tex. R. Civ. P. 39 and 40. These rules are similar to the federal rules of permissive and compulsory joinder.

INTERPLEADER

Interpleader in Texas is controlled by Tex. R. Civ. P. 43.

PLEADING JURISDICTION AND VENUE

A petition in state court must state facts that affirmatively show the subject matter jurisdiction of the court in which the lawsuit is filed. Properly pleading venue in the petition is critical because venue is accepted as true unless specifically denied by the defendant. Tex. R. Civ. P. 87(3).

DEMAND FOR RELIEF

A "demand for judgment for all the other relief to which the party deems himself entitled" is required by Tex. R. Civ. P. 47(c). The typical prayer in state court requests the following:

1. Issuance and service of citation;
2. Actual damages;
3. Punitive damages;
4. Equitable relief;
5. Attorney fees;
6. Prejudgment and postjudgment interest at the highest rate allowed by law;
7. Costs;
8. Other and further relief.

DRAFTING THE PETITION

Technical requirements for a petition are found primarily in Tex. R. Civ. P. 45 and 78. A petition must meet the general requirements for all papers filed with the court. As discussed previously, the petition must be in writing, on $8\frac{1}{2}$-by-11-inch paper.

The petition and supplemental petitions must be *endorsed* to show their position in the pleading process, such as "Original Petition" or "Plaintiff's First Supplemental Petition."

When drafting a petition for filing in a Texas court, you must be careful to allege facts that support each element of the cause of action.

Separate causes of action must be numbered in the petition, followed by the prayer, date, state bar number, signature of the attorney, and the attorney's telecopier or facsimile number.

VERIFICATION

A *verification* is a statement under penalty of perjury that the contents of a document are true and correct. In Texas, petitions that must be verified include a suit on sworn account (Tex. R. Civ. P. 185), a request for a temporary restraining order (Tex. R. Civ. P. 682), and an application for sequestration of property (Tex. R. Civ. P. 696).

Either the party, the party's agent, or the party's attorney may verify a state court petition. A sample verification appears at the end of Exhibit 5-1.

FILING THE PETITION

The clerk of court accepts either the original or a fax of the petition for filing (as provided under Tex. R. Civ. P. 21a), assigns a consecutive file number, and endorses the petition with the date and time of filing. You should furnish sufficient copies of the petition for use in serving the parties. Remember that local court rules may require that the petition be two-hole-punched at the top.

THE CITATION

In state court a *citation* instead of a summons is used for service of process. Upon the filing of the petition, the clerk of court issues a citation. The party requesting the citation is responsible for obtaining service of the citation and a copy of the petition. Exhibit 5-2 shows a state court citation,

Exhibit 5-1 Plaintiff's Original Petition

NO. _____

FIRST STATE BANK,	)
Plaintiff,	)
	) IN THE DISTRICT COURT OF
vs.	) DALLAS COUNTY, TEXAS
	) 100TH JUDICIAL DISTRICT
JOHN SMITH,	)
Defendant.	)

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

FIRST STATE BANK, Plaintiff, complains of Defendant JOHN SMITH, and respectively shows the Court the following:

I. PARTIES

1. Plaintiff First State Bank is a state-chartered bank and has its principal place of business in Dallas, Dallas County, Texas.

2. Defendant John Smith is an individual residing in Dallas, Dallas County, Texas.

II. JURISDICTION AND VENUE

3. The amount in controversy, exclusive of interest and costs, exceeds the minimum jurisdictional limits of this court. First State Bank is a resident of Dallas County, Texas, and the cause of action accrued in Dallas County, Texas. Venue is therefore proper pursuant to the Texas Civil Practice & Remedies Code.

III. THE CLAIMS

4. On or about June 13, 2001, Defendant agreed to borrow Three Hundred Fifty Thousand Dollars ($350,000) from Plaintiff and in consideration therefor executed a promissory note payable to the Plaintiff. The Note was due and payable on or before June 13, 2003, two years from the date of the Note. A true and correct copy of said Note is attached hereto as Exhibit "A" [not included in this sample] and incorporated herein by reference for all purposes.

5. First State Bank is the legal owner and holder of the above-described Note. Although all conditions precedent to Plaintiff's right to demand payment of the Note have occurred, and although Plaintiff has presented the Note to Defendant for payment, Defendant has refused and continues to refuse payment of the Note and interest thereon. There is now due, owing, and unpaid from Defendant on the Note the sum of $350,000 in principal, plus interest thereon as provided in the Note, for which sum First State Bank hereby sues.

6. Plaintiff has employed the undersigned attorneys to bring this suit, and has contracted to pay said attorneys a reasonable attorney's fee for such services, which Plaintiff is entitled to recover from Defendant in accordance with Article 2226 of the Revised Civil Statutes of the State of Texas.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that the Defendant be cited to appear and answer herein, and upon final hearing hereof, Plaintiff recover judgment against Defendant as follows:

1. For the principal sum of $350,000 due under the Note plus interest on said sum as provided in the Note to the day of judgment;
2. For reasonable attorney's fees pursuant to the terms of the Note, and/or pursuant to state statute, including all attorney's fees expended in any appeal to the court of appeals, and/or to the Supreme Court of Texas;

continued

Exhibit 5-1 Plaintiff's Original Petition *(continued)*

3. Prejudgment and postjudgment interest on the above amount at the rates provided in the Note and/or at the highest legal rate, whichever is greater, lawful, and applicable;
4. Costs of court; and
5. Such other and further relief both at law and in equity to which Plaintiff may show itself justly entitled.

Respectfully submitted,
[NAME AND ADDRESS]
State Bar, No. 12345678
[FACSIMILE NUMBER]
ATTORNEYS FOR PLAINTIFFS

VERIFICATION

THE STATE OF TEXAS

COUNTY OF DALLAS

BEFORE ME, the undersigned Notary Public in and for said County and State, on this day personally appeared JANE BLACK, known to me, and, after being duly sworn, stated on oath that she is the Executive vice president of FIRST STATE BANK, plaintiff in the foregoing matter, and that the facts set forth in the Plaintiff's Original Petition attached hereto are true and correct to the best of her knowledge, information, and belief.

_____

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority on this the _____ day of _____, 20___.

_____
Notary Public in and for
Dallas County, Texas

My Commission Expires:

_____

SERVICE OF THE PETITION

The rules regarding service of process are covered by Tex. R. Civ. P. 99–124. Acceptable methods of service upon a defendant located within the state include personal service, substituted service, service by mail, and service by publication.

PERSONAL SERVICE

Personal service involves personally delivering a copy of the citation and petition to the defendant. Any sheriff or constable, any person authorized by law, and any person authorized by written court order who is not less than eighteen years of age may serve citations, pursuant to an amendment to Tex. R. Civ. P. 103, effective January 1, 1988. Sheriffs or constables are not restricted to service in their counties.

SUBSTITUTED SERVICE

Substituted service may be used in lieu of personal service under certain conditions. If diligent attempts to serve an individual defendant have been unsuccessful, substituted service can be made. Substituted service involves leaving a true copy of the citation, with petition attached, with anyone over sixteen years of age at the defendant's usual place of business or residence.

SERVICE BY MAIL

Service by mail is made by mailing copies of the citation and petition to the defendant by registered or certified mail, return receipt requested. Any person authorized by Tex. R. Civ. P. 103 to serve the citation in person may institute service by mail. Tex. R. Civ. P. 21a provides that service by mail is complete upon deposit of the petition in a postpaid, properly addressed wrapper in a post office depository of the United States Post Office.

Exhibit 5-2 State Court Citation

CITATION
THE STATE OF TEXAS

TO: (Name of defendant)

You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you. Your answer should be addressed to the clerk of the _____ Judicial District Court at the Dallas County Government Center, Dallas, Texas 75202.

Filed in said Court on the _____ day of _____ , 20___ against _____.

For suit, said suit being numbered _____ , the nature of which demand is as follows:

(Suit on note, etc.)

as shown on said petition, a copy of which accompanies this citation. If citation is not served, it shall be returned unexecuted.

WITNESS: JIM HAMLIN, Clerk of the District Courts of Dallas County, Texas.
Given under my name and the Seal of said Court at office this the _____ day of _____ , 20___.

ATTEST: JIM HAMLIN

Clerk of the District Courts of Dallas County, Texas

By: _____
Deputy Clerk

[NOTE: The cover of the citation contains the style of the case, the date issued, the clerk's name and address, and signature of the deputy clerk, and the name, address, and telephone number of the attorney seeking the issuance of the citation and the party the attorney represents.]

SERVICE BY PUBLICATION

If the defendant cannot be served in another manner, service may be made by publication. (See Tex. R. Civ. P. 109–117a, 244, and 329).

Specific circumstances that warrant service by publication involve:

1. Unknown heirs or stockholders of a defunct corporation. (Tex. R. Civ. P. 111);
2. Unknown owners or claimants of interests in land (Tex. R. Civ. P. 112, 113);
3. Suits for collection of delinquent ad valorem taxes (Tex. R. Civ. P. 117a);
4. Divorce action or annulment of marriage proceeding in which the defendant cannot be notified either by personal service or by service by mail (Tex. Fam. Code Ann. § 3.521);
5. Partition actions when some part of the land to be partitioned is owned by a person who is either unknown to the plaintiff or that person's address is unknown (Tex. R. Civ. P. 758);
6. A defendant's address is unknown and cannot be determined after reasonable diligence, or the defendant is a transient, or the defendant is out of the state or a nonresident of the state and service has been unsuccessful under Tex. R. Civ. P. 108, 109.

SERVICE ON PERSON OUTSIDE THE STATE

Tex. R. Civ. P. 108 provides for the same methods of service on a person outside of Texas as may be utilized under Tex. R. Civ. P. 106.

SERVICE ON A BUSINESS

The manner of service on a business varies according to the type of business. A corporation can be served by serving its *agent,* identified as president, vice president, or registered agent for service. (Tex. Rev. Civ. Stat. Ann. art. 1396-2.07)

Service on a partnership may be effected upon the partner or local agent of the partnership where the local agent transacts business. (Tex. Civ. Prac. & Rem. Code Ann. §§ 17.021, 17.022)

Unincorporated associations may be served through agents, the president, the secretary, or the general agent. (Tex. Civ. Prac. & Rem. Code. Ann. § 17.023) In the case

Exhibit 5-3 Officer's Return

OFFICER'S RETURN

Came to hand on the _____ day of _____ , 20___ at _____ o'clock __.m. Executed at _____ , within the County of _____ at _____ o'clock __.m. on the _____ day of _____ , 20___ , by delivering to the within named _____ each, in person, a true copy of this citation together with the accompanying copy of this pleading, having first endorsed on same date of delivery. The distance actually traveled by me in serving such process was _____ miles and my fees are as follows: To certify which witness my hand.

For serving citation ..... $_____ _____

For mileage ..... $_____ of _____ County, _____

For notary ..... $_____ by _____ Deputy

[Must be verified if served outside the State of Texas.]

Signed and sworn to by the said _____ before me this _____ day of _____ ,20___ , to certify which witness my hand and seal of office.

_____

Notary Public

_____ County, _____

of municipalities, service agents include the mayor, the town clerk, the secretary, or the city treasurer. (Tex. Civ. Prac. & Rem. Code Ann. § 17.024(b)) Service on a school board may be made on either the president of the school board or the superintendent. In cases against the State of Texas, service must be made on its service agent, the secretary of state. (Tex. Civ. Prac. & Rem. Code Ann. § 101.102(c))

PROOF OF SERVICE

The extent of proof of service varies according to the type of service. Personal service returns must include the day and hour on which the citation was received, the day on which the citation was served, and the manner of service. (Tex. R. Civ. P. 105 and 107) Exhibit 5-3 shows a sample return. If service is made by mail, the return must also include the return receipt signed by the addressee. (Tex. R. Civ. P. 107 and 109a)

AMENDING THE PETITION

A petition can be amended to add something or to withdraw something from that which was previously pleaded so as to perfect that which is or may be deficient, or correct that which was incorrectly stated previously, or to plead new matters. Leave of court is required for an amendment.

Amendments should be filed at least seven days before trial. Tex. R. Civ. P. 63 states that special leave of court is necessary for later filing.

CHAPTER 6
Responses to the Initial Pleading

KEY POINTS

- In state court an answer may not be used to challenge personal jurisdiction.
- The demurrer that is used in many states is not permitted in Texas state courts.
- An affirmative defense creates a separate ground to defeat the plaintiff's claim.

RESPONDING TO THE INITIAL PLEADING

TIME LIMITS

The calculation of answer dates in Texas is unique. A defendant must respond to the plaintiff's petition by filing a written answer at or before 10:00 a.m. on the next Monday after the expiration of twenty days after the date of service of the petition. (Tex. R. Civ. P. 99) In computing the answer date, Tex. R. Civ. P. 4 states that the day of service is not to be included in the calculation, but the last day of the period is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period for answer runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. In the event of service by mail, three days are added to the period for answering the petition.

STIPULATIONS ENLARGING TIME

In Texas, the court may at any time in its discretion order the period of time to answer enlarged if application is made before the time for answer elapses, or, upon motion, permit the act to be done after the expiration of the specified period where good cause is shown for the failure to act. (Tex. R. Civ. P. 5)

THE ANSWER

Answers are specifically covered by Tex. R. Civ. P. 83–98. The use of the answer in state court is similar to that in federal court. One exception is that in Texas courts an answer may not be used to challenge personal jurisdiction. Such a challenge must be in the form of a special appearance. The filing of an answer is deemed a general appearance and is construed to be a waiver of defects in personal jurisdiction.

In addition, a demurrer, which is used in many states, is not permitted in Texas, under Tex. R. Civ. P. 90.

GENERAL DENIAL

A *general denial* is a denial of any matters pleaded by the adverse party that are not required to be denied under oath and is sufficient to put the adverse party's allegations in issue. Tex. R. Civ. P. 92 governs the use of a general denial in state court.

SPECIAL EXCEPTIONS

Both plaintiff and defendant may raise as a *special exception* any "defect, omission, or fault in a pleading, either of form or of substance." (Tex. R. Civ. P. 90) Special exceptions are made on a written motion filed with the clerk of court.

A major function of special exceptions is to question the sufficiency of the alleged claims. For example, does the petition state a cause of action or defense? A second function of the special exception is to point out formal defects in allegations, such as omissions, improper matters, or unclear pleadings.

The special exception serves the same purpose as, and is used instead of, a motion to dismiss for failure to state a claim or a motion or more definite statement, which are utilized in federal court.

From a practical standpoint, special exceptions are used in the following cases:

1. When the party does not understand the pleading;
2. To limit the admissibility of evidence;
3. To limit special issues;
4. If the party does not believe the opposition can plead a claim or defense in good faith;
5. To limit discovery;
6. To educate the judge.

From a negative perspective, special exceptions do educate the opponent and waste precious litigation time that might be better spent in aggressively pursuing discovery methods.

The defect, obscurity, duplicity, generality, omission, or other insufficiency in the pleading allegations excepted to must be pointed out with particularity. (Tex. R. Civ. P. 91)

In the prayer for relief, requests should be made to sustain the exceptions, strike the offending allegations, and require the opponent to replead within a specified time.

Following a hearing on the motion for special exceptions, the court will enter an order either denying or granting the special exceptions.

A suit may be dismissed by use of special exceptions if, after striking the offending allegations, no cause of action remains and the plaintiff fails to amend its petition, or amends but does not cure the defect.

SPECIAL DENIAL

Another form of answer available in Texas is the *special denial*, covered by Tex. R. Civ. P. 93.

This rule sets forth special denials that must be verified, including:

1. Denial of partnership or incorporation;
2. Denial of assumed or trade name;
3. Denial of execution of instrument by a party or by the party's authority;

4. Denial of genuineness of endorsement or assignment of written instrument;
5. Denial of sworn account;
6. Denial of the plaintiffs legal capacity to sue or that the defendant does not have the legal capacity to be sued.

Once the defendant meets the burden of pleading special denials, the burden of proof falls on the plaintiff.

PLEA IN ABATEMENT

A *plea in abatement* asks the court to abate or dismiss the plaintiffs case without prejudice. Under Tex. R. Civ. P. 85, the plea in abatement may be on the basis of the plaintiffs lack of capacity, defect of parties, or pendency of another action.

If the basis for a plea in abatement is that the lawsuit is improperly brought, the plea must also recite how the action should have been brought. Some matters in a plea in abatement require an affidavit or verification. Even without the mandatory provision for such a verification, the plea in abatement is normally verified.

Once the court has considered a plea in abatement, the court will not generally order a dismissal of a matter until the plaintiff is given a reasonable time to amend its petition, if it is possible to do so.

AFFIRMATIVE DEFENSES

Tex. R. Civ. P. 94 governs the use of an *affirmative defense*, which creates a separate ground to defeat, in whole or in part, the plaintiffs claim. It does not act as a denial. A defendant is required to plead affirmatively in an answer (Tex. R. Civ. P. 94):

1. Accord and satisfaction;
2. Arbitration and award;
3. Assumption of risk;
4. Contributory negligence;
5. Discharge in bankruptcy;
6. Duress;
7. Estoppel;
8. Failure of consideration;
9. Fraud;
10. Illegality;
11. Laches;
12. License;
13. Payment;
14. Releases;
15. Res judicata;
16. Statute of frauds;
17. Statute of limitations;
18. Waiver;
19. "Any other matter constituting an avoidance or affirmative defense."

The burden of proof is on the party asserting the affirmative defense. The defendant must state the affirmative defenses in sufficient detail that the plaintiff will be aware of the proof required to counter the affirmative defenses.

DRAFTING THE ANSWER

Texas has no prescribed form of answer. The format selected depends to a great extent upon the response options discussed previously.

Generally the format of the answer follows that of the petition. The answer is signed by one attorney of record, with the attorney's State Bar of Texas identification number, address, telephone number, and, if available, a telecopier (fax) number. Exhibit 6-1 is an example of an answer in Texas state court.

SERVICE AND FILING

A copy of the answer may be served either personally on the attorney for the plaintiff or by first-class mail. The certificate of service, as shown in Exhibit 6-1, verifies the date and manner of service.

AMENDING

The answer or other responsive pleadings may be amended at any time so "as not to operate as a surprise to the opposite party." (Tex. R. Civ. P. 63) Any amended answer filed less than seven days before trial requires leave of the court.

COUNTERCLAIMS, CROSSCLAIMS, AND THIRD-PARTY PETITION

COUNTERCLAIMS

Tex. R. Civ. P. 97 discusses both mandatory and permissive counterclaims. *Mandatory counterclaims* consist of any claim against an opposing party within the jurisdiction of the court, not the subject of the pending action, arising out of the same transaction or occurrence. They do not require the presence of third parties over whom the court cannot acquire jurisdiction. The defendant is precluded from recovery in a subsequent action if he or she fails to file a mandatory counterclaim.

Permissive counterclaims consist of "any claim against an opposing party, whether or not arising out of the

Exhibit 6-1 Defendant's Original Answer

NO. 00-05740-J

MELISSA GREEN	)
	) IN THE 100TH JUDICIAL
VS.	) DISTRICT COURT FOR
	) DALLAS COUNTY, TEXAS
ACME TRUCKING CO.	)

DEFENDANT'S ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES ACME TRUCKING CO., Defendant herein, and makes and files this its Defendant's Original Answer, and would show the Court as follows:

I.

Defendant denies each and every, all and singular, the allegations contained in Plaintiff's Original Petition, and demands strict proof thereof.

II.

Plaintiff's injury, if any, and disability or incapacity, if any, was caused solely by a preexisting or subsequent compensable or noncompensable injury and/or compensable or noncompensable condition.

III.

Further answering, Defendant would show that Plaintiff's alleged disability, incapacity, or loss of wageearning capacity, if any, has long since ceased and/or is only partial and not total, and/or temporary and not permanent.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that Plaintiff take nothing by her lawsuit; that Defendant be awarded its costs of court; and for such other and further relief, either at law or in equity, to which Defendant may show itself to be justly entitled.

Respectfully submitted,
[Name and address]
[State bar number]
[Facsimile number]

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing Defendant's Original Answer has been duly served upon counsel of record for Plaintiff, _____ , by depositing same in the United States mail, postage prepaid and properly addressed, on this _____ day of _____ , 20___.

_____

transaction or occurrence that is the subject matter of the opposing party's claim." (Tex. R. Civ. P. 97(b))

The normal rules relating to service of process apply to counterclaims. The plaintiff must either be served with process, waive service, or make an appearance voluntarily, such as coming into court to seek affirmative relief after the counterclaim is filed. Exhibit 6-2 is an example of a counterclaim that might be filed in a Texas court.

CROSSCLAIMS

A pleading may state as a crossclaim "any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein." (Tex. R. Civ. P. 97(e))

Service of the crossclaim is required if the codefendant has not previously made an appearance in the main action. If the codefendant has appeared, that appearance is sufficient for all claims before the court, including crossclaims. Exhibit 6-3 illustrates a crossclaim in a Texas state court.

THIRD PARTY PETITION

Tex. R. Civ. P. 38 governs third-party practice in Texas. This rule provides that a defendant party, as a third-party

Exhibit 6-2 Defendant's Original Answer and Counterclaim

NO. 00-14579-A

RALPH WHITE,	)
Plaintiff	)
	) IN THE 14TH JUDICIAL
vs.	) DISTRICT COURT OF
	) DALLAS COUNTY, TEXAS
MARY THORN,	)
Defendant	)

DEFENDANT'S ORIGINAL ANSWER AND COUNTERCLAIM

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant, MARY THORN, and files this, her Original Answer and Counterclaim to the Original Petition filed by RALPH WHITE, Plaintiff, and respectfully would show:

I.

As authorized by Rule 92 of the Texas Rules of Civil Procedure, Defendant asserts a general denial,

COUNTERCLAIM

II.

Defendant realleges Paragraph 1 as though fully set out herein.

III.

The Defendant, counterclaiming against Plaintiff, says:

1. On September 27, 2000, the Defendant was driving an automobile in an easterly direction on Highway 80 in Monroe, Louisiana, and entered into the intersection of that highway with Highway 165.

2. At the time Plaintiff was driving an automobile in a general southerly direction and entered into the intersection after the Defendant was well within the intersection.

3. The automobiles driven by Plaintiff and Defendant came into contact within the intersection, and in the collision, the Defendant suffered damages to her property and injuries to her person.

4. At or about the time and place of the collision and just prior to it, Plaintiff negligently managed and operated the automobile he was driving. Plaintiff was negligent in the following respects: (1) In carelessly driving at an excessive rate of speed contrary to the statute; (2) In failing to use ordinary care to keep a proper lookout; (3) In failing to use ordinary care to have the automobile he was driving under proper control.

5. As a proximate result of the negligence of Plaintiff, Defendant suffered the following damage and injuries: Defendant's automobile was demolished; the left side of her ribs were broken; she was forced to incur expenses for medical treatment and hospitalization; she suffered great pain and suffering, and was prevented from pursuing her business, thus suffering economic loss.

6. Defendant will be partially disabled for a long period and unable to attend to her usual occupation, and is damaged in the sum of Twenty-Five Thousand Dollars ($25,000).

WHEREFORE, Defendant demands judgment as follows:

1. Dismissing Plaintiff's complaint.
2. Against Plaintiff for Defendant's damages in the sum of Twenty-Five Thousand Dollars ($25,000), together with costs and disbursements; and
3. For such other and further relief as Defendant is justly entitled.

Respectfully submitted,
[Name and address]
[Include state bar no.]
[Facsimile number]

(Certificate of Service and Verification)

Exhibit 6-3 Crossclaim

STYLE OF CASE

ANSWER AND CROSSCLAIM OF DEFENDANT JOHN PAUL SMITH & COMPANY, INC.

(Admissions to the petition)

CROSSCLAIM AGAINST MARY NELL MANUFACTURING COMPANY

1. (Statement re jurisdiction)

2. (List claims)

WHEREFORE, Defendant, John Paul Smith & Company, Inc., requests that a judgment be entered against Mary Nell Manufacturing Company for any loss incurred by John Paul Smith & Company as a result of (list basis for claim again).

Respectfully submitted,
[Name, address, and state bar number of attorney]
[Facsimile Number]

(Certificate of Service)

Exhibit 6-4 Third-Party Petition

(STYLE OF CASE)

THIRD-PARTY PETITION

1. Plaintiff, _____ , has filed a petition against Defendant, _____ , a copy of which is attached hereto as Exhibit "A" [not included in this sample].

2. (List the causes of action which Defendant is entitled to recover from the third party.)

WHEREFORE, _____ demands judgment against Third-Party Defendant _____ _____ , for all sums that may be adjudged against Defendant _____ , in favor of Plaintiff _____.

Respectfully submitted,
[Name, address, and state bar number of attorney]
[Facsimile number]

plaintiff, may at any time after commencement of the action cause a citation and petition to be served upon a person who is not a party to the action who is or may be liable to the defendant or the plaintiff for all or any part of the plaintiff's claim against the defendant.

Permission of the court is not required to file a third-party petition if the third-party petition is filed not later than thirty days after service of the original answer. After that time, a party must prepare a motion for permission to file a third-party petition and give notice to all parties. See Tex. R. Civ. P. 38 for more specifics of third-party practice in Texas. Exhibit 6-4 shows a typical third-party petition in state court.

LEGAL CHALLENGES TO THE PETITION

MOTIONS

The defendant may challenge the propriety of service by a *motion to quash citation*. However, this procedure is only nominally effective, as it merely results in a delay in the appearance day. This motion to quash constitutes a general appearance and should not be used by a nonresident who contests personal jurisdiction. (Tex. R. Civ. P. 122)

FAILURE TO ANSWER

Defaults and default judgments in Texas are controlled by Tex. R. Civ. P. 239–244. The practice in Texas closely resembles federal court motion practice.

If a defendant fails to answer in the time prescribed, the plaintiff may take judgment by default against the defendant, provided that the citation with the officer's return has been on file for the ten-day time period, exclusive of the day of filing and the day of judgment, prescribed by Tex. R. Civ. P. 107.

When (or immediately before) a default judgment is rendered, the plaintiff must certify to the clerk of court in writing the last known mailing address of the party against whom the default judgment is taken. This certificate is then filed with the court. Immediately upon the signing of the default judgment, the clerk mails written notice of the default judgment to the party against whom the default was taken, at the address furnished on the certificate, and indicates the mailing on the court docket. However, a provision in Tex. R. Civ. P. 239a states that failure to comply with the provision of this rule shall not affect the finality of the judgment.

In cases in which there are several defendants, some of whom have answered and some of whom have defaulted, an interlocutory judgment by default may be entered against those who defaulted and the case may proceed as to the others. (Tex. R. Civ. P. 240)

The court assesses damages on liquidated claims that are proved by an instrument in writing and renders final judgment, unless the defendant demands and is entitled to a trial by jury. (Tex. R. Civ. P. 241)

In the event that service was made by publication and no answer was filed nor appearance entered within the prescribed time, the court hears evidence as to damages and renders judgment. (Tex. R. Civ. P. 244)

SETTING ASIDE DEFAULTS

The procedure for setting aside defaults is found in Tex. R. Civ. P. 329b. This rule provides that the trial court has plenary power to vacate, modify, correct, or reform a judgment within thirty days after the judgment is signed.

After the expiration of the time period in which the trial court has plenary power, it cannot set aside a judgment except by bill of review for sufficient cause, filed within the time allowed by law. If a motion to modify, correct, or reform a judgment is not determined by a written order signed within seventy-five days after the judgment was signed, the motion is considered overruled by operation of law.

CHAPTER 7
Motion Practice

KEY POINTS

- Motion practice in state court is similar to that in federal court.
- Unless presented during a hearing or trial, motions must be written, filed with the clerk, and served upon all parties.
- The motion and notice of hearing must be served at least three days prior to a hearing.
- A motion to dismiss is not used to challenge personal or subject matter jurisdiction in state court.
- There is no motion to dismiss for failure to state a claim or motion for a more definite statement in Texas state courts.

MOTIONS GENERALLY

Motion practice in state court does not differ significantly from motion practice in federal court. Motions are discussed in the rules covering the specific subject matters (for example, directed verdict or summary judgment). Local rules of court also apply.

PREPARING, SERVING, AND RESPONDING

The general format for motions is the same as that for pleadings. A notice of hearing on the motion is incorporated into the motion.

MEMORANDUM OF POINTS AND AUTHORITIES

Motions may be supported by a *memorandum of points and authorities*. This memorandum should contain a

statement of the facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and legal authorities cited.

SERVICE AND FILING

Every motion, unless presented during a hearing or trial, must be filed with the clerk of court in writing and must state the grounds for the motion and the relief sought. Motions that require an order and notice of hearing must be served on all parties not less than three days prior to the hearing, unless otherwise provided by procedural rules or shortened by the court. (Tex. R. Civ. P. 21)

Service of a motion is governed by Tex. R. Civ. P. 21a, which provides that a motion may be served by the same method as any pleading. Refer to Chapter 5 of this supplement for state court procedures relating to service.

Failure to serve a motion subjects the attorney presenting the motion to possible sanctions under Tex. R. Civ. P. 215.

COURT PROCEDURES INVOLVING MOTIONS

HEARINGS

A motion and notice of hearing must be served at least three days prior to the court hearing. The court may enter the order presented with the motion, deny the order, or modify the language of the order.

SPECIFIC MOTIONS

The following is a list of commonly used pretrial motions in state court, along with references to procedural rules governing those motions:

Motion	*Tex. R. Civ. P.*
Motion to Amend	63
Motion to Dismiss	162, 165a
Motion for Change of Venue	84 et seq.
Motion to Quash	122
Discovery	190, 215
Motion for Summary Judgment	166a
Motion for Jury Trial	216

These motions are similar to their federal counterparts, with only minor distinctions.

MOTION TO DISMISS

In state practice, unlike federal practice, a motion to dismiss is not used to challenge personal or subject matter jurisdiction. Questions of personal jurisdiction are usually raised by a motion to quash service of citation. (Tex. R. Civ. P. 122)

Motions to dismiss are generally made when a party, usually the plaintiff, unreasonably delays the prosecution of the case. There is no motion to dismiss for failure to state a claim or motion for more definite statement in state court. Special exceptions take the place of these two federal court motions. Exhibit 7-1 is an example of a motion to dismiss in state court.

Exhibit 7-1 Motion to Dismiss

No. 00-05740-J

MELISSA GREEN	)
	) IN THE 100TH JUDICIAL
vs.	) DISTRICT COURT FOR
	) DALLAS COUNTY, TEXAS
ACME TRUCKING CO.	)

MOTION TO DISMISS AND NONSUIT

MELISSA GREEN, Plaintiff, moves this Court for an order dismissing this case against Defendant, Acme Trucking Co., and in support therefore would show:

Plaintiff no longer desires to prosecute this action against Defendant.

WHEREFORE, Plaintiff, Melissa Green, requests this Court to enter an order:

Dismissing this suit without prejudice, with all court costs to be borne by Plaintiff.

Respectfully submitted,
[Name, address, state bar number,
and telephone number of attorney]
[Facsimile number]

DISCOVERY MOTIONS

Motions relating to discovery are discussed in subsequent chapters regarding discovery in Part III of this supplement.

MOTION FOR SUMMARY JUDGMENT

The congestion in the courts accounts for the increased use of the important motion for summary judgment in Texas state courts. Tex. R. Civ. P. 166a controls the motion for summary judgment, which is similar to its federal counterpart. A party seeking to recover upon a claim, counterclaim, or crossclaim, or to obtain a declaratory judgment, may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in whole or in part. A party against whom such a motion is made may also, at any time, move with or without supporting affidavits for partial or complete summary judgment.

The motion for summary judgment should state the specific grounds on which the motion is sought. The motion and any supporting affidavits must be filed and served at least twenty-one days before the time specified for the hearing, except on leave of court, with notice to opposing counsel.

Effective September 1, 1997, Rule 166a was amended to include Rule 166a(i). This new rule provides for a radical new type of summary judgment—a *no evidence* summary judgment. Rule 166a(i) states that after adequate time for discovery, a party may, without presenting summary judgment evidence, move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence.

The court must grant the no evidence summary judgment motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

An adverse party may file and serve opposing affidavits or a written response not less than seven days prior to the day of hearing, unless the court gives permission for a later filing.

Summary judgment may be granted if the pleadings, discovery, affidavits, and stipulations show that, except as to the amount of damages, there is no genuine issue as to any material fact. Exhibit 7-2 gives an example of a motion for summary judgment.

TRIAL AND POSTTRIAL MOTIONS

Trial and posttrial motions are more fully discussed in Chapters 15 and 16 of this supplement.

Trial motions in state court include:

Motion	*Tex. R. Civ. P.*
Nonsuit	162
Instructed Verdict	268
Judgment Notwithstanding Findings	324

Common posttrial motions in state court include:

Motion	*Tex. R. Civ. P.*
Motion for Judgment NOV	301
Motion for New Trial	320 et seq.
Tax Costs	133

Exhibit 7-2 Motion for Summary Judgment

N0. 00-05740-J

MELISSA GREEN	)
	) IN THE 100TH JUDICIAL
vs.	) DISTRICT COURT FOR
	) DALLAS COUNTY, TEXAS
ACME TRUCKING CO.	)

MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES MELISSA GREEN, Plaintiff in the above-captioned cause, and moves for Summary Judgment pursuant to Rule 166-A of the Texas Rules of Civil Procedure, and in support thereof would show the court as follows:

I.

Plaintiff is entitled to Summary judgment as a matter of law because Defendant failed to submit any affirmative defenses and the defense set forth in Defendant's Answer is insufficient as a matter of law, and there are no issues of material fact in dispute.

continued

Exhibit 7-2 Motion for Summary Judgment *(continued)*

II.

(Facts of the Case)

III.

(Facts of the Case)

IV.

This motion is based upon the pleadings and exhibits on file in this cause, upon depositions taken in this cause, and upon supporting affidavits on file.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that this Motion for Summary judgment be granted and that she have judgment against Defendant Acme Trucking Co., in the amount of $_____ , for reasonable attorney's fees, and for costs of court and for such other and further relief as this Court deems just.

Respectfully submitted,
[Name, address, telephone number,
and state bar number of attorney]
[Facsimile number]

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing Motion for Summary Judgment has been duly served upon counsel of record for Defendant, Acme Trucking Co., _____ , by depositing same in the United States mail, postage prepaid and properly addressed, on this _____ day of _____ , 20___.

FIAT

A hearing on the above Motion for Summary judgment is set for the _____ day of _____ , 20___, at _____ o'clock.

_____
Judge

PART III
Discovery

CHAPTER 8
Overview of the Discovery Process

KEY POINTS

- The discovery rules in Texas are patterned after the federal court discovery rules.
- Sanctions for failure to cooperate with discovery are the same as in federal court.
- Protective orders are covered by Tex. R. Civ. P. 192.6.
- Discovery conferences are not specifically provided for in Texas courts. However, discovery matters are generally discussed at the pretrial conference.

THE NATURE OF DISCOVERY

The discovery rules in Texas have been patterned after the rules in federal court and in many respects are quite similar. The basic discovery rules for Texas courts are found in Tex. R. Civ. P. 166–215. Local court rules and case law also play an important role in the law of discovery.

Effective January 1, 1999, the Texas Rules of Civil Procedure were radically modified, with the most extensive revisions relating to the discovery rules. Former Rules 166b, 166c, 167, 167a, 168, 169, 176, 177, 177a, 178, 179, 187, 188, 200, 201, 202, 203, 204, 205, 206, 207, 208, and 209 were repealed. However, the scope of discovery was unchanged. All forms of discovery under the prior rules were retained, and a new one, *disclosure,* was added. Disclosure is not required unless requested. Thus it does not burden the smaller, less complicated cases in which it is not sought. The new rules developed three levels of discovery plans intended to focus courts and parties on both the need for discovery and its cost in each case.

SIGNIFICANT CHANGES CONTAINED IN 1997 DISCOVERY RULES

DISCOVERY CONTROL PLANS—LEVELS 1, 2, AND 3

The new Rule 190, Discovery Limitations, Applies only to cases filed on or after January 1, 1999, and requires that every case be governed by a discovery control plan. A plaintiff must allege in the first numbered paragraph of the original petition whether discovery is to be conducted under Level 1, 2, or 3 of this rule. The parties may agree to change or modify the discovery levels, or the court may change or modify those levels on either a party's motion or on its own.

LEVEL 1. Rule 190.2 relates to Level 1, suits involving $50,000 or less, excluding costs, prejudgment interest and attorneys' fees, and any divorce suit *not involving children,* in which a party pleads that the value of the marital estate is more than zero but not more than $50,000. A pleading, amended pleading, or supplemental pleading that renders this level no longer applicable may not be filed without leave of court less than 45 days before the date set for trial.

Each party is limited to six hours in total to examine and cross-examine all witnesses in oral depositions. The parties may agree to expand this limit to ten hours in total, but no more, except by court order.

Any party may serve on any other party no more than twenty-five written interrogatories, excluding interrogatories asking a party to identify or authenticate specific

documents only. Each discrete subpart of an interrogatory is considered a separate interrogatory.

Discovery in Level 1 ends thirty days before trial.

LEVEL 2. Rule 190.3 regulates discovery for all lawsuits not governed by Rules 190.2 or 190.4 (Level 3). Family law cases involving children are included in this subdivision. The discovery period begins when suit is filed and continues until 30 days before the trial date; in cases under the Family Code, or in other cases, the earlier of thirty days before the trial date, or nine months after the earlier of the date of the first oral deposition or the due date of the first response to written discovery.

Each side is allowed no more than fifty hours in oral depositions to examine and cross-examine parties on the opposing side, experts designed by those parties, and persons who are subject to those parties' control. If one side designates more than two experts, the opposing side may have an additional six hours of total deposition time for each additional expert designated. The interrogatory limitation is the same as for Level 1 cases.

LEVEL 3. Rule 190.4 regulates cases that require special attention. The court must, on a party's motion, and may on its own initiative, order that discovery be conducted in accordance with a discovery control plan tailored to the circumstances of the specific suit. The discovery control plan must include a date for trial or for a conference to determine a trial setting; a discovery period; appropriate limits on the amount of discovery; and deadlines for joining additional parties, amending or supplemental pleadings, and designating expert witnesses.

FILING OF DISCOVERY MATERIALS

DISCOVERY MATERIALS NOT TO BE FILED

The following discovery materials must not be filed:

1. Discovery requests, deposition notices, and subpoenas required to be served only on parties;
2. Responses and objections to discovery requests and deposition notices, regardless on whom the requests or notices were served;
3. Documents and tangible things produced in discovery;
4. statements prepared in compliance with Rule 193.3(b) or (d).

DISCOVERY MATERIALS TO BE FILED

The following discovery materials must be filed:

1. Discovery requests, deposition notices, and subpoenas required to be served on nonparties;
2. Motions and responses to motions pertaining to discovery matters;
3. Agreements concerning discovery matters, to the extent necessary to comply with Rule 11.

RETENTION REQUIREMENTS

Any person required to serve discovery materials not required to be filed must retain the original or exact copy of the materials during the pendency of the litigation and any related appellate proceedings begun within six months after judgment is signed, unless otherwise provided by the trial court.

The clerk of court shall retain and dispose of deposition transcripts and depositions upon written questions as directed by the Supreme Court.

SERVICE OF DISCOVERY MATERIALS

Every disclosure, discovery request, notices, response, and objection required to be served on a party or person must be served on all parties of record.

FORMS OF DISCOVERY

Rule 192 lists permissible forms of discovery:

1. Requests for disclosure;
2. Requests for production and inspection of documents and tangible things;
3. Requests and motions for entry upon and examination of real property;
4. Interrogatories to a party;
5. Requests for admission;
6. Oral or written depositions;
7. Motions for mental physical examination.

The forms of discovery listed above may be combined in the same document and may be taken in any order or sequence.

REQUEST FOR DISCLOSURE—RULE 194

A party may obtain disclosure from another party of the information or material listed in Rule 194.2 by serving the other party, no later than thirty days before the end of any applicable discovery period with a simple request for information described in Rule 194.2 (a)–(k).

Rule 194 introduces a new discovery tool that allows parties to obtain a "laundry list" of basic discoverable information without objection, work product claims, or unnecessary expense, or inconvenience. This discovery procedure is patterned after the federal discovery rules. However, unlike federal disclosures, which are required in every case, regardless of whether the parties want the disclosures or not, Texas disclosures are obtainable only on request, thus avoiding unnecessary burden and expense in cases where they are not needed.

Among materials and information that can be obtained through the request for disclosure are legal theories and, generally, the factual bases of the responding party's claims or defenses, as well as basic damage theories. To encourage parties to disclose their basic legal and factual assertions early in the case, Rule 194.6 provides that responses to disclosures concerning liability and damage contentions cannot be used as admissions if the responses are later changed by amendment or supplementation. Rule 194.6.

SCOPE OF DISCOVERY

Rule 192.3 outlines the scope of discovery. Several changes from the prior discovery rules are found in this rule, including 192.3(c), which allows a party to discover not only the name, address and telephone number of persons having knowledge of relevant facts, but a brief statement of each identified person's connection with the case. The person need not have admissible information or personal knowledge of the acts.

Another change from the prior discovery rules is Rule 192.3(d), which permits discovery of the name, address, and telephone number of any person who is expected to be called to testify at trial. This paragraph does not apply to rebuttal or impeachment witnesses, as the necessity of that testimony cannot reasonably be anticipated before trial.

Under Rule 192.3(h), a party may obtain discovery of the statement of any person with knowledge of relevant facts (*witness statement*) regardless of when the statement was made. Notes taken during a conversation or interview with a witness are not a witness statement.

LIMITATIONS ON SCOPE OF DISCOVERY

Rule 192.4 tracks Rule 26.2 of the Federal Rules of Civil Procedure to proportionately limit the burden of discovery if the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other, more convenient, less burdensome, or less expensive source, or the burden or expense of the proposed discovery outweighs its likely benefit.

WORK PRODUCT

Work product is defined for the first time in Rule 192.5, and its exceptions stated. This definition of work product replaces the prior *attorney work product* and *party communication* discovery exemptions under former Rule 166b.

WORK PRODUCT DEFINED

Work product comprises:

1. Material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
2. A communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

PROTECTION OF WORK PRODUCT

Core work product, the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories, is not discoverable.

Any other work product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable, without undue hardship, to obtain the substantial equivalent of the material by other means.

CHOICE OF DISCOVERY METHODS

In Texas, an attorney may select from the same discovery techniques used in federal court. Exhibit 8-1 summarizes the procedural rules relating to each type of discovery.

AMOUNT OF TIME

Absent a stipulation or court order to the contrary, discovery must be completed thirty days before the trial date. Specific time limits that apply to each method of discovery are discussed in subsequent chapters in this supplement.

ETHICAL CONSIDERATIONS IN DISCOVERY

The discovery rules clearly prohibit unreasonable behavior in requesting or responding to discovery. Tex. R. Civ. P. 215 provides for monetary or other sanctions for this behavior.

Exhibit 8-1 Summary of Texas Rules of Civil Procedure Relating to Discovery

Rule	*Topic*
190	Discovery limitations
191	Modifying discovery procedures and limitations; Conference requirement; Signing disclosures; Discovery requests; Responses and objections; Filing requirements
192	Permissible discovery: Forms and scope; Work product; Protective orders; Definitions
193	Written discovery; Response; Objection; Assertion of privilege; Supplementation and amendment; Failure to timely respond; Presumption of authenticity
194	Requests for disclosure
195	Discovery regarding testifying expert
196	Requests for production and inspection to parties; Requests and motions for entry upon property
197	Interrogatories to parties
198	Requests for admissions
199–203	Depositions
204	Physical and mental examination
205	Discovery from nonparties
215	Abuse of discovery: sanctions

THE EXTENT OF ALLOWABLE DISCOVERY

The extent of discovery in Texas parallels that of federal discovery. Any matter that is relevant to the subject matter of the action and that is admissible or may lead to admissible evidence is discoverable, unless it is privileged. (Tex. R. Civ. P. 192.1)

PROTECTIVE ORDERS

Protective orders are covered in Tex. R. Civ. P. 192.6. Refer to the subsequent chapters on discovery in this supplement for the roles of protective orders in the specific methods of discovery.

COOPERATING WITH DISCOVERY

The Texas rules and courts encourage cooperation among the attorneys involved in the discovery process. Before making a motion to compel discovery, the attorneys must try to resolve the problems amicably.

Tex. R. Civ. P. 215 outlines the court's powers to impose sanctions for failure to cooperate with discovery. The same discovery sanctions are available in Texas courts as in the federal courts.

ORDERS TO COMPEL DISCOVERY

The court has the power to grant or deny orders to compel discovery. Motions to compel are used when a party fails to respond to a discovery request. If a party responds incompletely or improperly, then a motion to compel further response may also be made. Tex. R. Civ. P. 215 governs motions to compel discovery in state court.

SANCTIONS AGAINST NONCOMPLYING PARTIES

Sanctions for discovery abuse in Tex. R. Civ. P. 215 include the award of reasonable expenses and attorney fees to the party who brings the motion for sanctions. In some cases, failure to appear or to answer a deposition question may be considered a contempt of the court.

CHAPTER 9
Depositions

KEY POINTS

- Tex. R. Civ. P. 190–215 regulate depositions in Texas state courts.
- Depositions permitted in Texas courts are:
  the oral deposition;
  the deposition upon written questions;
  the telephone deposition;
  the deposition of an organization;
  the deposition before suit, or to investigate claims and depositions in foreign jurisdictions for use in Texas proceedings and depositions in Texas for use in foreign proceedings before suit;
  the deposition to investigate claims and depositions in foreign jurisdictions for use in Texas proceedings and depositions in Texas for use in foreign proceedings.
- Depositions may be used to obtain information or documents from nonparties.
- Depositions may be taken at any time after commencement of the action.
- Unavailability of a witness at trial is not required for use of a deposition in lieu of live testimony at trial.

THE DEPOSITION

The use of depositions in Texas state courts is governed by Tex. R. Civ. P. 190–215. Exhibit 9-1 outlines these rules and their role in the deposition process.

Depositions in the state courts are quite similar to those in federal court, including both the scope of inquiry and the procedures by which depositions are taken. In Texas, the types of depositions permitted include the oral deposition, the deposition upon written question, the telephone deposition, the deposition of an organization, and the deposition to perpetuate testimony. Depositions may be used to obtain information or documents from parties and nonparties.

TIMING

A party may take the deposition of any person, including another party, after commencement of the action. Leave of court is needed only if the deposition is scheduled prior to appearance day. The court may, upon motion of a party, shorten or enlarge the time for taking depositions.

SANCTIONS

An organization or corporation may be sanctioned for failing to make a designation of a representative for the deposition or for the representative's failure to answer questions as required by Tex. R. Civ. P. 215.

Exhibit 9-1 Summary of Texas Rules of Civil Procedure Relating to Deposition

Rule	*Topic*
190	Discovery limitations
199	Depositions upon oral examination
200	Depositions upon written questions
201	Depositions in foreign jurisdictions for use in Texas proceedings; depositions in Texas for use in foreign proceedings
202	Depositions before suit or to investigate claims
203	Signing, certification and use of oral and written depositions
215	Abuse of discovery; sanctions

THE NATURE OF THE ORAL DEPOSITION

Tex. R. Civ. P. 199 is the primary procedural rules regulating oral depositions in Texas courts.

DOCUMENT PRODUCTION THROUGH DEPOSITION

If a party serves a request for production of documents with a deposition notice to a party, regulated by Rule 199.2(b)(5), the request, response, objections, and privilege claims are governed by the requests for production rule, Rule 197, including the deadline of thirty days for responding, as well as the general standards governing written discovery set forth in Rule 193.

ADVANTAGES OF THE ORAL DEPOSITION

Tex. R. Evid. 801(e)(3) permits depositions to be used in lieu of live testimony, without any requirement that the deponent be unavailable to testify at trial.

A party may read any admissible part of a deposition into evidence during a trial. Additionally, Tex. R. Evid. 607 permits a party to impeach its own witness through deposition testimony.

TRENDS IN ORAL DEPOSITIONS

VIDEOTAPED DEPOSITIONS. Tex. R. Civ. P. 199.1(c) provides for nonstenographic recording of a deposition, including videotape recording, without leave of court. This nonstenographic recording may be used at trial in lieu of reading from a stenographic transcription of the deposition.

The party requesting the nonstenographic recording must give five days' notice of intent to all parties by certified mail, return receipt requested, and must specify in the notice the type of nonstenographic recording that will be used. This information is normally incorporated in the formal notice of intent to take a deposition.

The expense of the videotape may not be taxed as a cost in the case, unless the parties so agree before the deposition or the court orders the taxing as a cost, upon proper motion and notice to the court.

Videotaping the deposition does not dispense with the requirement for a stenographic transcription of the deposition, unless the court allows such a waiver, upon motion and order, before the deposition is taken.

LIMITATIONS ON DEPOSITION CONDUCT

Tex. R. Civ. P. 199 introduced several new provisions designed to reduce dispute in oral depositions, curtail dilatory and obstructive tactics by witnesses and their lawyers, and enable the deposing party to obtain the witness's testimony rather than that of the witness's lawyer. These rules are patterned in part on previous reforms in federal discovery rules.

Rule 199.5(d) mandates that oral depositions are to be conducted in the same manner as if the testimony were being obtained in court at trial. Counsel are admonished to be courteous to each other and the witness, and the witness is admonished not to be evasive or to unduly delay the examination.

Private conferences between the witness and the witness's lawyer are prohibited except for the purpose of determining whether a privilege should be asserted. If the lawyers and the witnesses do not comply with these rules, the court may admit into evidence at trial any statements, discussions or other occurrences that reflect upon the credibility of the witness or the testimony.

Both "coaching" objections and colloquy are strictly prohibited. Objections to questions during the deposition are limited to "objection: form" or "objection: leading" and objections to testimony are limited to "objection: nonresponsive." These objections are waived if not stated as phrased during the deposition.

The witness's attorney may instruct the witness not to answer a question if it calls for privileged information, is abusive, or if any answer to the question would be misleading (Rule 199.5(f)). The deposing party, however, may require the objecting party to give a concise explanation of the basis for the objection or instruction to enable the deposing party to rephrase the question. However, argumentative or suggestive objections or explanations are prohibited, waive the objection, and may be grounds for terminating the deposition (Rules 199.5(e) and (f)).

TIME LIMITS ON DEPOSITIONS

In addition to the aggregate time limits of Rule 190, Rule 199.5(c) limits each side to six hours to examine and cross-examine an individual witness in an oral deposition. Breaks do not count against this limitation. For purposes of this rule, each person designated as a corporate representative under Rule 199.2(b)(1) is a separate witness.

THE PARALEGAL'S ROLE BEFORE THE ORAL DEPOSITION

NOTICE REQUIREMENT

What constitutes the "reasonable notice" required by the state court rule on deposition notice depends on the individual circumstances of a case.

Service of the notice upon the deponent/party's attorney has the same effect as a subpoena served upon the party (Tex. R. Civ. P. 201(3)). This rule also provides that notice is sufficient if the deponent is an agent or employee who is subject to the control of a party.

CONTENT OF NOTICE

Tex. R. Civ. P. 199.2(b)(1) states that the notice of deposition must incorporate the following information:

1. Name of the deponent;
2. Time and place of deposition;
3. Alternative means of conducting and recording;
4. Identity of persons who will attend;
5. Designation of any documents or tangible things to be produced at deposition;
6. If the deponent is a corporation, partnership, association, or governmental agency, a description with reasonable particularity of the matters on which examination is requested.

Exhibit 9-2 shows a deposition notice for Texas state court.

SERVICE OF NOTICE

A party may take the testimony of any person, including a party, after commencement of the action. Leave of court must be obtained if a party seeks to take a deposition prior to the appearance day of any defendant.

SUBPOENA REQUIREMENTS

A subpoena must be served on a nonparty witness to compel attendance at a deposition. Notice must be given to all parties. The clerk or court reporter is normally asked to arrange for service of the subpoena upon the witness.

Tex. R. Civ P. 176 consolidates and clarifies the rules governing trial and discovery subpoenas, which were scattered throughout Rules 176–179 and 201 in the previous discovery rules. This new rule is structured loosely on Fed. R. Civ. P. 45, and effects some important substantive changes. For example, Rule 176.3 reconciles the former rules governing subpoena range. Rule 176 listed a range of 100 miles of the courthouse where the suit is pending, with the 1993 enactment of Tex. Civ. Prac. & Rem. Code § 22.002, which stated the subpoena range was 150 miles from the county where the suit is pending.

Rule 176.4(b) also seeks to reduce costs associated with the issuance of subpoenas by enabling attorneys to issue both trial and discovery subpoenas. This rule expressly permits officers authorized to take depositions to serve the deposition notice along with the subpoena. Rules 176.6 and 176.7 include a new provision expressly permitting not only the person to whom the subpoena is directed, but any person affected by the subpoena, to seek a protective order under Rule 192.6(b).

PREPARATION FOR DEFENDING THE DEPOSITION

MOTION TO QUASH AND MOTION FOR PROTECTIVE ORDER. Tex. R. Civ. P. 199.4 permits a party or witness to object to the time and place designated for an oral deposition by motion for protective order or by motion to quash the notice of deposition. If the motion is filed by the third business day after service of the notice of deposition, an objection to the time and place of a deposition stays the oral deposition until the motion can be determined.

Tex. R. Civ. P. 192.6 establishes the guidelines for obtaining a motion for protective order. The failure of a party to obtain a ruling on any objection or motion for protective order does not waive that objection or motion.

OBJECTIONS. Tex. R. Civ. P. 199.5(e) provides that objections to the form of a question or nonresponsiveness of answers are waived if not made on the record. However, other objections are not waived by failure to make the objections on the record.

MOTION TO COMPEL. If a witness refuses to answer a deposition question, the attorney conducting the deposition may prepare a *motion to compel* an answer to the question. An evasive or incomplete answer is treated as a failure to answer. The attorney asking the question has the option of either completing the examination before applying for an order to compel the answer or recessing the deposition to obtain the order.

THE PARALEGAL'S ROLE DURING THE ORAL DEPOSITION

DEPOSITION EXHIBITS

Tex. R. Civ. P. 203.4 offers two options for deposition exhibits. A party may offer copies of exhibits to be marked for identification. These copies serve as originals, provided that all parties have a fair opportunity to verify the copies by comparing them against the originals.

Alternatively, a party may offer originals to be marked, in which case the court reporter makes copies, annexes the copies to the original deposition, and returns the originals to the parties. If the latter option is selected, the producing witness or party must preserve the original exhibits and produce them for hearing or trial upon seven days' notice from any party.

THE PARALEGAL'S ROLE AFTER THE ORAL DEPOSITION

TRANSCRIPT ARRANGEMENTS

After the original deposition transcript has been prepared, the court reporter places the deposition and exhibits in a wrapper (normally an envelope) containing the name of the action. The reporter then marks the deponent's name on the wrapper and delivers or mails it—postpaid, properly

Exhibit 9-2 Deposition Notice

NO. 03-05740-J

MELISSA GREEN	)	
	)	IN THE 100TH JUDICIAL
vs.	)	DISTRICT COURT FOR
	)	DALLAS COUNTY, TEXAS
ACME TRUCKING CO.	)	

NOTICE OF INTENTION TO TAKE DEPOSITION ON WRITTEN QUESTIONS

TO: (Name and address of counsel for Defendant)

YOU WILL TAKE NOTICE that the deposition upon written questions of James Jones Wayne of Acme Trucking Company, 123 Main Street, Bigtown, Mississippi, will be taken by Stephen Thomas, court reporter, or other competent court reporter duly authorized by law to take depositions in the state of Mississippi, at the offices of Acme Trucking Company, upon the expiration of ten days from the date of service hereof or as soon thereafter as possible. Such witness will be requested and subpoenaed to bring with him all those records of Acme Trucking Co. relating to the automobile accident of _____ , involving a truck owned and operated by Acme Trucking Co. personnel and an automobile in which Melissa Green was a passenger. A copy of the written questions is attached hereto as Exhibit "A." The deposition of such witness will be used in the above-styled and numbered cause and all documents qualifying as business records will be or may be offered into evidence in such cause.

Respectfully submitted,
[Name, address, and state bar number of attorney]
[Facsimile number]

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing Notice of Intention to Take Deposition on Written Questions has been duly served on James Jones Wayne, vice president of Acme Trucking Co., by depositing same in the United States mail, postage prepaid and properly addressed, on this _____ day of _____ , 20___.

_____

EXHIBIT A

WRITTEN DEPOSITION QUESTIONS FOR JAMES JONES WAYNE:

1. State your full name.
2. Give your full residence address.
3. State your age.
4. List your employer and employer's business address.
5. State your position or job title with Acme Trucking Co.
6. State your duties with Acme Trucking Co.
7. What is the nature of the business of Acme Trucking Co.?
8. State whether you have in your custody or subject to your control the business records of Acme Trucking Co. regarding the accident between your employee, John Doe, and the Plaintiff, Melissa Green.
9. Were those records made in the ordinary course of the business of Acme Trucking Co.?
10. Please hand to the notary and court reporter taking this deposition a true and correct copy of the records you have brought with you.
11. State whether the copies you have handed the notary and court reporter taking this deposition are true and correct copies of the records inquired about in this deposition.
12. Do you have personal knowledge of the facts stated herein in response to these questions?
13. If your answer to question number 12 is negative, or partially affirmative, state whether your knowledge of the facts stated herein arise from those records you have given the court reporter.

addressed, wrapped, and certified, with return receipt requested—to the attorney or party who asked the first question in the transcript. The reporter gives notice of the delivery to all parties in the case. Tex. R. Civ. P. 203.3(a).

SIGNATURE OF DEPOSITION

A party has twenty days to make any necessary changes to his or her testimony and sign, under oath, and return to the court reporter the original deposition transcript. If the deponent does not sign the transcript during that time, the court reporter is authorized to sign a true copy of the transcript and state on the record that examination and signature has been waived or the reason for the witness's refusal to sign. The copy of the deposition transcript may then be used at trial as though it had been signed unless, on a motion to suppress, provided for under Tex. R. Civ. P. 203.5, the court determines that the reasons the witness gave for refusing to sign require rejection of part or all of the deposition.

The deponent is not permitted to make erasures or obliterations on the original testimony. The changes and reasons for the changes must be forwarded to the court reporter and must subsequently be attached to the deposition.

Some local rules, such as Rule 6.1 of the Northern District of Texas, provide that depositions are not to be filed with the clerk, but instead should be retained by the party to whom delivered, to be filed at least three days prior to trial.

MOTION TO SUPPRESS

Tex. R. Civ. P. 203.5 specifies that once the deposition is filed with the court, and such notice is given at least one full day before the date the case is called for trial, all objections to the technical sufficiency of the deposition process are waived, unless a motion to suppress the deposition is made before trial begins.

SPECIAL TYPES OF DEPOSITIONS

DEPOSITIONS UPON WRITTEN QUESTIONS

Tex. R. Civ. P. 200 regulates the deposition upon written questions in state court. This type of deposition may be noticed at any time after commencement of the action, but may be taken outside the discovery period only by agreement of the parties or with leave of court. Notice must be served on the witness and all parties at least twenty days prior to the deposition. The party noticing the deposition must also deliver to the deposition officer a copy of the notice and of all written questions to be asked during the deposition.

Rule 200.3 specifies a detailed timetable for objecting to questions or serving responsive questions. Within ten days after the notice and direct questions are served, any party may object to the direct questions and serve cross-questions on all other parties. Within five days after cross-questions are served, any party may object to the cross-questions and serve redirect questions on all other parties. Within three days after redirect questions are served, any party may object to the redirect questions and serve recross questions on all other parties. Objections to recross questions must be served within five days after the earlier recross questions are served or the time of the deposition on written questions.

Objections to the form of a question are waived unless asserted in accordance with Rule 200.3.

Rule 200.4 provides the manner in which the deposition upon written questions must be conducted. The deposition officer must take the deposition on written questions at the time and place designated, record the testimony of the witness under oath in response to the questions, prepare, certify, and deliver the deposition transcript in accordance with Rule 203. The deposition officer has the authority, when necessary, to summon and swear an interpreter to facilitate the taking of the deposition.

DEPOSITIONS IN FOREIGN JURISDICTIONS

Because of the mobile nature of litigation, it is often necessary to take a deposition in another state or even in a foreign country. The procedures for this type of deposition are set out in Tex. R. Civ. P. 188 and include a commission, letter rogatory, or letter of request. These complicated provisions require careful review of the rule.

Any defendant in a foreign country who is served with notice must appear and answer in the same manner and under the same penalties as if the defendant had been personally served with the citation within the state. However, this rule further provides that the method for service of process in a foreign country must be reasonably calculated to give actual notice of the proceedings to the defendant in time to answer and defend.

DEPOSITION TO PERPETUATE TESTIMONY

Tex. R. Civ. P. 202.1(a) sets out lengthy provisions governing depositions to perpetuate testimony. Requirements for the verified petition for such a deposition include:

1. A statement that the petitioner anticipates the institution of an action in which he or she may be a party;
2. The subject matter of the anticipated action and the petitioner's interest in that action;

3. The names and residences, if they are known, or a description of the persons expected to have an interest adverse to that of the petitioner;
4. The names and addresses of the persons to be deposed and the substance of the testimony the petitioner expects to secure;
5. The petitioner's reasons for desiring to perpetuate the testimony;
6. A request for a court order to authorize the deposition.

At least fifteen days before the hearing date, the petitioner must serve the witness and parties with notice of the hearing, together with a copy of the petition.

If the petitioner does not know the address of a potential party, the clerk of court must publish notice in the newspaper of the county of the litigation or a nearby county, once a week for two consecutive weeks.

THE TELEPHONE DEPOSITION

Tex. R. Civ. P. 199.1(b) and 199.5(a)(2) establish new rules for taking depositions by telephone or other remote electronic means (e.g., closed-circuit television or the Internet) and permit lawyers to attend the deposition through those means. Under these new rules, the officer taking the deposition may be located with the party noticing the deposition instead of with the witness, if the witness is placed under oath by a person who is present with the witness and authorized to administer oaths in that jurisdiction.

The party noticing the deposition must make arrangement for all parties to attend the deposition by the same means. If the party noticing the deposition appears in person, any other party may appear by telephone or other remote electronic means if that party makes the necessary arrangements with the deposition officer and the party noticing the deposition.

CHAPTER 10
Interrogatories

KEY POINTS

- Use of interrogatories in Texas state courts is governed by Tex. R. Civ. P. 197.
- Interrogatories may be served upon the plaintiff after commencement of the action and upon any other party with or without service of the citation and petition upon that party.
- Interrogatories may not require more than twenty-five answers.
- Interrogatory answers must be served within thirty days after service, unless the interrogatories were served with the citation, in which case responses are due in fifty days.
- Interrogatory answers must be signed and verified by the party answering, except those concerning persons with knowledge of relevant facts, trial witnesses, and legal contentions.
- Interrogatories must be restated before the response.

INTERROGATORIES

Tex. R Civ. P. 197 governs interrogatories, in conjunction with the overall discovery plan outlined in Rule 190. The key changes from the former rule, Rule 188, is a new provision addressing contention interrogatories. Interrogatories about specific legal or factual assertions—such as whether a party claims a breach of contract—are proper, but an interrogatory that asks a party to state all legal and factual assertions, is improper. As with requests for disclosure, interrogatories may be used to ascertain basic legal and factual claims and defenses, but may not be used to force a party to marshal evidence.

The verification requirement has been changed in recognition of the practical reality that parties often do not have personal knowledge of much of the information in interrogatory responses to which they formerly were required to attest. Under Rule 197.2(d)(2), parties must verify all responses except those concerning persons with knowledge of relevant facts, trial witnesses, and legal contentions. Where an interrogatory response is based on information obtained from other persons, the party may so state.

As is the case with verification of supplemental interrogatory responses, failure to sign or verify initial interrogatory responses is merely a formal defect that may be corrected within a reasonable time after it is pointed out, and not a failure to timely respond that may serve as a basis for exclusion of evidence.

Tex. R Civ. P. 197 sets out the following specific procedures for interrogatories.

SERVICE OF INTERROGATORIES

"A party may serve on another party—no later than thirty days before the end of the discovery period—written interrogatories to inquire about any matter within the scope of discovery except matters covered by Rule 195." (Tex. R. Civ. P. 197)

NUMBER OF INTERROGATORIES

Any party may serve no more than twenty-five written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents, as set out in Rule 190. Each discrete subpart of an interrogatory is considered a separate interrogatory. There is no limit to the number of sets of interrogatories that may be propounded—only the limit on the number of interrogatories.

DRAFTING INTERROGATORIES

FORMAT AND CONTENT OF INTERROGATORIES

There is no mandatory format or content for interrogatories filed in state court. However, custom dictates that the interrogatory format track that of federal court interrogatories, including the caption of the case, title of discovery, the name of the propounding party, the set number, the identity of the responding party, instructions, and definitions.

Exhibit 10-1 is an example of an interrogatory format for use in state court.

INTERROGATORIES THAT IDENTIFY PEOPLE

EXPERT WITNESSES. Rule 192.3(e) contains major changes from the prior discovery rules. This rule

Exhibit 10-1 Interrogatories

NO. 03-21545-B

MARTHA WILSON AND	)	
JOHN SCOTT WILSON	)	
	)	IN THE DISTRICT COURT OF
vs.	)	DALLAS COUNTY, TEXAS
	)	92ND JUDICIAL DISTRICT
JAMES B. JACK, M.D. AND	)	
WESTSIDE MEDICAL CENTER	)	

PLAINTIFFS' FIRST SET OF INTERROGATORIES TO DEFENDANT WESTSIDE MEDICAL CENTER

TO: Westside Medical Center, Defendant,
By and through its attorney of record
Mr. Richard B. Carter, Attorney at Law
Jones, Davidson and Carter, Texas Plaza
12345 Main Street, Dallas TX 75201

Plaintiffs Martha Wilson and John Scott Wilson hereby demand pursuant to Rule 197 of the Texas Rules of Civil Procedure that Westside Medical Center, Defendant, respond to the following interrogatories under oath and in writing within thirty days after service thereof.

I.

INSTRUCTIONS AND DEFINITIONS

[Refer to Chapter 10 of the textbook]

II.

INTERROGATORIES

1. Please state the name, address, telephone number, and title of the person answering these interrogatories.

ANSWER:

2. Please state the procedures that you follow in determining whether to grant staff privileges to a physician.

ANSWER:

continued

Exhibit 10-1 Interrogatories *(continued)*

3. Please state the policies and/or procedures followed by you in reviewing the competency of the physicians to whom you grant staff privileges.

ANSWER:

4. Please state in detail the date Dr. James B. Jack was granted staff privileges at Westside Medical Center and the process utilized to review and evaluate his competency as a physician.

ANSWER:

5. Please state whether Defendant Dr. James B. Jack has ever had his staff privileges at your facility denied, revoked, or suspended. If the answer is affirmative, please state the date such action was taken, the reason therefore, and the date privileges were reinstated.

ANSWER:

6. Please give the name, address, telephone number, and title of each nurse, nursing aide, assistant, or other Westside Medical Center employee who rendered direct patient care or treatment to Plaintiff Martha Wilson from the time she underwent the _____ surgery on_____ .

ANSWER:

7. With regard to each person named in Interrogatory 6 above, please describe the service, treatment, or attention rendered to Plaintiff Martha Wilson by that person.

ANSWER:

* * *

[Additional interrogatories]

Respectfully submitted,
[Name, address, and state bar number of attorney]
[Facsimile number]

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Plaintiffs' First Set of Interrogatories to Defendant Westside Medical Center was mailed to all counsel of record on the _____day of _____ , 20___.

_____
(Attorney's Name)

does not permit the discovery of the identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert. However, a party may discover the following information regarding a testifying expert or a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert:

1. The expert's name, address and telephone number;
2. The subject matter on which a testifying expert will testify;
3. The facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, Regardless of when and how the factual information was acquired;
4. The expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them;
5. Any bias of the witness;
6. All documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony; and
7. The expert's current resume and bibliography.

MOTION TO COMPEL

If a responding party fails to serve answers or objections to interrogatories after proper service of the interrogatories, or fails to answer an interrogatory submitted under Tex. R. Civ. P. 197, the propounding party must make a motion to compel answers. An evasive or incomplete answer to an interrogatory is to be treated as a failure to answer. A motion to compel is regulated by Tex. R. Civ. P. 215.

Exhibit 10-2 is a motion to compel answers to interrogatories in state court.

Exhibit 10-2 Motion to Compel Answers to Interrogatories

NO. 03-21545-B

MARTHA WILSON AND	)	
JOHN SCOTT WILSON	)	
	)	IN THE DISTRICT COURT OF
vs.	)	DALLAS COUNTY, TEXAS
	)	92ND JUDICIAL DISTRICT
JAMES B. JACK, M.D. AND	)	
WESTSIDE MEDICAL CENTER	)	

MOTION TO COMPEL ANSWERS TO INTERROGATORIES TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME MARTHA WILSON and JOHN SCOTT WILSON, Plaintiffs in the above captioned cause, and pursuant to Rule 197 of the Texas Rules of Civil Procedure, file this their Motion to Compel Answers to Interrogatories and for such motion would respectfully show unto the Court as follows:

1. That on the _____ day of _____ , 20___ , and pursuant to Rule 197 of the Texas Rules of Civil Procedure, written interrogatories were served on Westside Medical Center. These interrogatories have not been answered to date.

2. That Westside Medical Center did receive said interrogatories as evidenced by a true and correct copy of the return receipt from a certified letter which is attached hereto and marked Exhibit "A" [not included in this sample].

3. That Westside Medical Center has had sufficient time to answer all of the interrogatories and Plaintiffs have heretofore requested those answers, but Westside Medical Center has failed to answer these interrogatories within the time provided by the Texas Rules of Civil Procedure or within a reasonable time thereafter.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs Martha Wilson and John Scott Wilson pray that this Motion be set for hearing, and that upon final hearing hereof, Westside Medical Center be compelled to answer interrogatories within a period of not more than seven (7) days from the date of this Court's order, and that Westside Medical Center be ordered to pay reasonable attorney's fees of not less than $250 incurred as a result of pursuing this motion and for such other and further relief to which Plaintiff may be justly entitled.

Respectfully submitted,
[Name, address, and state bar number of attorney]
[Facsimile number]
ATTORNEYS FOR PLAINTIFF

FIAT

This Motion to Compel Answers to Interrogatories is set for hearing on the _____ day of _____ , 20___ , at ____:____ __.m.

_____
JUDGE

CERTIFICATE OF CONFERENCE

I do hereby certify that on this _____ day of _____ , 20___ , I had a telephone conference with Attorney for Westside Medical Center, and that he is opposed to the filing of this Motion.

_____
(Attorney's name and state bar number)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion to Compel Answers to Interrogatories was mailed to all counsel of record on the _____ day of _____ , 20___.

_____
(Attorney's Name)

DRAFTING ANSWERS TO INTERROGATORIES

DETERMINING TIME LIMITS

Interrogatory answers must be filed not less than thirty days after service, unless the interrogatories were filed with the citation, in which case responses are due fifty days after service. The court, on motion and notice of good cause, may enlarge or shorten the time for serving answers to interrogatories or objections.

ANSWERING THE INTERROGATORIES

Interrogatory answers may only be used against the party answering the interrogatories.

In Texas state court cases, just as in federal court cases, interrogatories addressed to a public or private corporation, partnership, association, or governmental agency may be answered by an officer or agent, to the extent information to the answer is "available to the party."

The answers must be signed and verified by the party answering; they may not be signed by the attorney.

FORM OF THE ANSWERS

It is necessary to restate the interrogatory before the response in state court. See Exhibit 10-3 for one form of an answer to interrogatories in state court.

FULFILLING THE DUTY TO SUPPLEMENT

Tex. R. Civ. P. 193 moderates the former discovery rules' rigid exclusion of evidence not timely disclosed or supplemented in discovery. Parties are not required to formally supplement materials or information requested in discovery, except for persons with knowledge of relevant facts, trial witnesses, or experts, if the materials or information have previously been made known to other parties in writing, on the record during a deposition or through other discovery responses (Tex. R. Civ. P. 193.5(a)). Where formal supplementation is required, late supplementation can be excused if there is either good cause for the failure to disclose or the failure to timely disclose will not unfairly surprise or unfairly prejudice the other parties (Tex. R. Civ. P. 193.6).

The changes to the supplementation requirements seek only to prevent the exclusion of witnesses or evidence on technical grounds where the information has already been disclosed or exclusion due to relatively minor and inadvertent errors in disclosure of witnesses's telephone numbers or addresses, for example.

USING BUSINESS RECORDS INSTEAD OF A WRITTEN RESPONSE

Tex. R. Civ. P. 197(2)(c) contains a provision similar to that found in Fed. R. Civ. P. 33, permitting a responding party to simply identify and allow inspection of documents that contain answers to interrogatories.

OBJECTING TO INTERROGATORIES

Rule 193.2 imposes a duty upon a responding party to comply with the interrogatory to the extent no objection is made. If the responding party objects to the requested time or place of production, the responding party must state a reasonable time and place for complying with the request and must comply at that time and place without further request or order.

Rule 193.2(f) states that a party should not object to a request for written discovery on the grounds that it calls for production of material or information that is privileged, but should instead comply with Rule 193.3 for the proper method of asserting a privilege.

ASSERTING A PRIVILEGE

Rule 193.3 governs the designation of all privileges, including work product. It dispenses with objections to written discovery requests on the basis that responsive information or materials are protected by a specific privilege from discovery. Instead, the rule requires parties to state that information or materials have been withheld and to identify the privilege upon which the party relies.

Rule 193.3(d) is a new provision that allows a party to assert a claim of privilege to material or information produced inadvertently without intending to waive the privilege. That claim of privilege must be made within ten days (or a shorter period if ordered by the court) after the producing party actually discovers that such production was made by amending the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies, pending any ruling by the court denying the privilege.

PROTECTIVE ORDERS

Rule 192.6 governs protective orders. It is essentially identical to former Tex. R. Civ. P. 166b(7), but with two important modifications. First, a person seeking a protective order now has an affirmative duty to respond to the discovery request at issue to the extent protection is not sought unless it is unreasonable to do so before obtaining a ruling on the motion.

Second, Rule 192.6 clarifies that persons should not move for a protective order when an objection or assertion of privilege under other rules is appropriate, but a motion for protective order does not waive the objection or assertion of privilege.

In addition, in a manner similar to Rule 176.6(e), this rule clarifies that any person affected by discovery, not merely a person or party to whom discovery is directed, may seek a protective order.

Exhibit 10-3 Response to Interrogatories

NO. 03-21545-B

MARTHA WILSON AND	)	
JOHN SCOTT WILSON	)	
	)	IN THE DISTRICT COURT OF
vs.	)	DALLAS COUNTY, TEXAS
	)	92ND JUDICIAL DISTRICT
JAMES B. JACK, M.D. AND	)	
WESTSIDE MEDICAL CENTER	)	

RESPONSE TO PLAINTIFFS' FIRST SET OF INTERROGATORIES TO DEFENDANT

TO: Plaintiffs, Martha Wilson and John Scott Wilson,
By and through their attorney of record
[name and address of attorney].

Defendant, Westside Medical Center, files its answer to the First Set of Interrogatories of Plaintiffs, Martha Wilson and John Scott Wilson, in the above referenced matter, as follows:

II.

INTERROGATORIES

1. Please state the name, address, telephone number, and title of the person answering these interrogatories.

ANSWER: Dr. Weldon Karnes, Director
Westside Medical Center
Medical Plaza, 1234 Main Street
Dallas, TX 75229
(314) 123-4567

2. Please state the procedures that you follow in determining whether to grant staff privileges to a physician.

ANSWER: Refer to Westside Medical Center's "Regulations Governing Staff Privileges," which is attached to these interrogatory answers [not included in this sample].

3. Please state the policies and/or procedures followed by you in reviewing the competency of the physicians to whom you grant staff privileges.

ANSWER: Refer to the answer to interrogatory 2 above.

4. Please state in detail the date Dr. James B. Jack was granted staff privileges at Westside Medical Center and the process utilized to review and evaluate his competency as a physician.

ANSWER: January 6, 1985. Refer to the answer to interrogatory 2 above.

5. Please state whether Defendant Dr. James B. Jack has ever had his staff privileges at your facility denied, revoked, or suspended. If the answer is affirmative, please state the date such action was taken, the reason therefor, and the date privileges were reinstated.

ANSWER: No.

6. Please give the name, address, telephone number, and title of each nurse, nursing aide, assistant, or other Westside Medical Center employee who rendered direct patient care or treatment to Plaintiff Martha Wilson from the time she underwent the _____ surgery on _____.

ANSWER: Refer to the affidavit of Jennifer Morgan, Nursing Supervisor, attached to these answers to interrogatories [not included in this sample].

7. With regard to each person named in Interrogatory 6 above, please describe the service, treatment, or attention rendered to Plaintiff Martha Wilson by that person.

ANSWER: Refer to the answer to number 6 above.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Response to Plaintiffs' First Set of Interrogatories to Defendant Westside Medical Center was mailed to all counsel of record on the _____ day of _____ , 20___.

_____
(Attorney's Name)

(Verification)

CHAPTER 11
Physical and Mental Examinations

KEY POINTS

- Tex. R. Civ. P. 204 regulates physical and mental examinations in Texas state court.
- The Texas state court rule is similar to the federal rule governing physical and mental examinations.
- The requirements for the court's granting a request for a physical or mental examination are good cause and a condition in controversy.

THE PHYSICAL AND MENTAL EXAMINATION

The physical and mental examination is regulated by Tex. R. Civ. P. 204. This rule is similar to the companion federal rule in that it permits the examination of any party or person in the custody, conservatorship, or under the legal control of a party, in any case in which the mental or physical condition of that party is in controversy. An order for such an examination may be made only on motion for good cause and upon notice to the person to be examined and to all parties.

FILING A MOTION FOR COMPULSORY EXAMINATION

A motion for physical and mental examination must be filed no later than thirty days before the end of the discovery period. The motion include the time, place, manner, conditions, and scope of the examination and the identity of the person who is to conduct the examination. The motion and notice of hearing must be served on the person to be examined and on all parties.

With the exception of family law cases covered under Tex. R. Civ. P. 204.4, no examination by a psychologist may be ordered unless the party responding to the motion has identified a psychologist as an expert who will testify. Or has disclosed a psychologist's records for possible use at trial.

The party against whom an order for examination is made may request a detailed written report of the examining physician or psychologist's findings, tests, results, and reports of all earlier examinations of the same condition. Such requests must be honored by the person to whom the requests are made.

However, as is true in federal court, the delivery of such reports entitles the party requesting the examination to ask that the party against whom the order is made furnish similar reports of any examinations either made previously or subsequently, if the reports concern the same condition.

One exception to this rule is if the person being examined is not a party and the party shows that he or she is unable to furnish such a report.

CHAPTER 12
Request for Documents

KEY POINTS

- Tex. R. Civ. P. 196 governs a request or demand to inspect documents.
- Requests for production of documents may be served upon parties or nonparties.
- In Texas state courts, the request for documents to parties may be served upon the plaintiff after commencement of the lawsuit and upon any other party with or after the petition and citation.

- Requests for production and responses to parties are not filed with the court. However, requests for production and responses to nonparties are filed with the court.
- Documents produced in discovery are now presumed to be authentic for use against the party producing them—avoiding cost of proving authentication.

THE REQUEST FOR DOCUMENTS

A request or demand to inspect documents or tangible things in the possession or under the control of a party is governed by Tex. R. Civ. P. 196. A similar request to a nonparty is governed by Rule 205.3. However, this is not the only method of obtaining documents in a case. Documents can also be discovered through the deposition process, as discussed in Chapter 9, or in response to interrogatories, as discussed in Chapter 10.

Requests for production and responses to parties are not filed with the court. However, requests for production and responses to nonparties are filed with the court.

Documents produced in discovery are now presumed to be authentic for use against the party producing them, thus avoiding the cost of proving authentication.

REQUEST FOR DOCUMENTS TO PARTIES

A party may serve on another party no later than thirty days before the end of the discovery period, a request for production or for inspection, to inspect, sample, test photograph, and copy documents or tangible things within the scope of discovery.

REQUEST FOR DOCUMENTS TO NONPARTIES

In Texas, the court may order a person, organizational entity, corporation, or governmental agency that is not a party to the lawsuit to produce documents. (Tex. R. Civ. P. 205.3) Rules 205.1 and 205.2 permit a party to obtain documents from a nonparty without the need for a motion or deposition. A party requesting production of documents from a nonparty, however, must reimburse the nonparty's reasonable cost of production. (Rule 205.3(f))

A notice to produce documents or tangible things under Rule 205.3 must be served at least ten days before the subpoena compelling production is served.

REQUESTING THE PRODUCTION OF DOCUMENTS

FORM AND CONTENT OF THE REQUEST

The request must specify the items to be produced or inspected, either by individual item or by category, and describe with reasonable particularity each item and category. The request must specify a reasonable time (on or after the date on which the response is due) and place for production. If the requesting party will sample or test the requested items, the means, manner, and procedure for testing or sampling must be described with sufficient specificity to inform the producing party of the means, manner, and procedure for testing or sampling. Exhibit 12-1 is an example of a request for production of documents that might be used for an action filed in Texas state court.

SERVICE OF THE REQUEST

Copies of the request for production must be served on all parties to the action. Responses to request for production by parties are not filed with the court. However, responses by nonparties are filed with the court.

RESPONDING TO A REQUEST FOR DOCUMENTS

Texas law requires a written response to a request for production, in addition to actual production of the documents. The written response must be served on all parties within thirty days after service of the request for production, except when the request accompanied the citation, in which case a defendant may serve a written response to the request within fifty days after service of the petition and citation.

The response must include objections to particular items or categories of items in the request and state specific grounds for the objections. A party should not object to a request for written discovery on the grounds that it calls for production of material or information that is privileged, but should instead comply with Rule 193.3. A party who objects to production of privileged material or information does not waive the privilege but must comply with Rule 193.3 when the error is pointed out.

FORMAT OF RESPONSE

Normally the format of the response resembles that of the request. Exhibit 12-2 is an example of the response to the request for production shown in Exhibit 12-1.

ORGANIZATION OF THE DOCUMENTS

The documents may be produced either as they are kept in the usual course of business or according to the categories of the document request. (Tex. R. Civ. P. 196.3(c))

Exhibit 12-1 Request for Production of Documents

NO. 03-21545-B

MARTHA WILSON AND	)	
JOHN SCOTT WILSON	)	
	)	IN THE DISTRICT COURT OF
vs.	)	DALLAS COUNTY, TEXAS
	)	92ND JUDICIAL DISTRICT
JAMES B. JACK, M.D. AND	)	
WESTSIDE MEDICAL CENTER	)	

PLAINTIFFS' REQUEST FOR PRODUCTION OF DOCUMENTS BY WESTSIDE MEDICAL CENTER

TO: (Name and address of attorney for Defendant)

Pursuant to the provisions of Rule 196 of the Texas Rules of Civil Procedure, Plaintiffs request that the documents listed below be produced for inspection and copying by Plaintiffs or someone acting on their behalf at the offices of _____ , _____ , within thirty (30) days from service hereof, or at such other time and place upon which counsel for the parties may agree. You are directed to file a response to this Request for Production of Documents in accordance with Rule 196 of the Texas Rules of Civil Procedure within thirty (30) days from receipt hereof.

I.

DEFINITIONS

(See Chapter 12 of the textbook.)

II.

INSTRUCTIONS

(See Chapter 12 of the textbook.)

III.

DOCUMENTS

The following documents are to be produced for inspection, examination, and copying on or before _____ , at 5:00 p.m., at the offices of _____ , _____ , Texas _____ :

REQUEST NO. 1

All records from _____ to _____ , including progress notes, physician's orders, nursing admission data records, preoperative and postoperative records, intraoperative nursing notes, postanesthesia recovery records, physician's dictated history/physical operative notes, and consultation notes, discharge summaries, patient data charts, surgical pathology reports and cystology pertaining to patients upon whom Dr. James B. Jack performed _____ surgery, obliterated so as to protect the identities of the patients therein.

REQUEST NO. 2

Copies of all written standing orders or procedures required by Defendant Dr. James B. Jack to be followed by your nursing staff as of _____ , in rendering patient care to patients following _____ surgery.

REQUEST NO. 3

Copies of all insurance policies providing liability coverage to Westside Medical Center on _____ _____ , the time of the incidents made the basis of this lawsuit.

REQUEST NO. 4

Copies of any and all training manuals, pamphlets, brochures, or other written instructions provided to your nursing staff as of _____ , concerning the proper methods for the care, monitoring, and treatment of patients undergoing _____ surgery.

continued

Exhibit 12-1 Request for Production of Documents *(continued)*

REQUEST NO. 5

Please produce a copy of the policy manual for Westside Medical Center that was being used on Martha Wilson.

REQUEST NO. 6

Please produce the entire personnel files on all nurses and nurses', aides who were employees of Westside Medical Center who directly rendered nursing care, treatment, or services of any character to Plaintiff Martha Wilson on _____ .

* * *

(Additional requests for production)

Respectfully submitted,
[Name, address, and state bar number of attorney]
[Facsimile number]
ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Request for Production of Documents was mailed to all counsel of record on the _____ day of _____ , 20___.

_____
(Attorney's Name)

Exhibit 12-2 Response to Request for Production of Documents

NO. 03-21545-B

MARTHA WILSON AND	)	
JOHN SCOTT WILSON	)	
	)	IN THE DISTRICT COURT OF
vs.	)	DALLAS COUNTY, TEXAS
	)	92ND JUDICIAL DISTRICT
JAMES B. JACK, M.D. AND	)	
WESTSIDE MEDICAL CENTER	)	

RESPONSE TO PLAINTIFFS' REQUEST FOR PRODUCTION OF DOCUMENTS BY WESTSIDE MEDICAL CENTER

Defendant, WESTSIDE MEDICAL CENTER, responds to Plaintiffs' Request for Production of Documents as follows:

1. Defendant agrees to produce the documents which are responsive to Request Numbers 1–5 at _____ on or before _____ .

2. Defendant objects to Request Number 6, to the extent that it requires the production of documents not related to Plaintiff, Martha Wilson, on the grounds that such documents are irrelevant to this case.

Respectfully submitted,
[Name, address, and state bar number of attorney]
[Facsimile number]

(CERTIFICATE OF SERVICE)

PROTECTION OF DOCUMENTS

Tex. R. Civ. P. 166b grants protection of documents from inspection under certain conditions through a protective order, as discussed in Chapter 8. Another major form of document protection is through written objections to the request. This is discussed later in this chapter of the supplement.

MOTIONS TO COMPEL REGARDING THE WRITTEN RESPONSE

If no written response is served upon the requesting party within the thirty- or fifty-day time period prescribed, the requesting party may make a motion to compel response under Tex. R. Civ. P. 215.

MOTION WITH RESPECT TO PRODUCTION

If a party fails to permit inspection of the documents, the demanding party can make a motion to compel compliance under Tex. R. Civ. P. 215.

INSPECTION OF PROPERTY

Tex. R. Civ. P. 196 is substantively similar to former Rule 167, except for a few notable refinements. For example, if the requesting party seeks to sample or test the requested items, the means, manner, and procedure for testing or sampling must be described with sufficient specificity in the request to inform the responding party of the means, manner, and procedure for testing or sampling. (Rule 196.1(b)) Testing or sampling that is destructive or materially alters an item is not permitted without prior court approval. (Rule 196.5)

There is a new notice requirement applicable to requests for a nonparty's medical or mental health records. (Rule 196.1(c)) This rule does not imply that such records are or should be discoverable in every case.

Rule 196.7 sets forth the procedures for obtaining entry upon property. If the landowner is a party, entry may be by request. If the landowner is not a party, the party requesting entry must obtain a court order. (Rule 196.7(a)) To facilitate discovery on land owned by a nonparty who cannot be located, a new provision permits motions and orders permitting such discovery upon any form of notice permissible under Tex. R. Civ. P. 21a.

CHAPTER 13
Request for Admissions

KEY POINTS

- Admissions in state court are governed by Tex. R. Civ. P. 198.
- There is no limit to the number of requests for admissions in state court, for Levels l and 2 cases.
- Failure to respond to a request for admissions results in a deemed admission.
- Verification of the response to the request for admissions is not required.

THE REQUEST FOR ADMISSIONS

In Texas state courts, the request for admissions is regulated by Tex. R. Civ. P. 198, which is similar to the federal rule regulating requests for admissions.

A request for admissions can be served by the plaintiff at any time after commencement of the action, but no later than thirty days before the end of the discovery period. Requests and responses to request for admission are not filed with the court.

The number of requests for admissions is unlimited for Levels 1 and 2 cases. From a practical standpoint, a smaller number of requests for admissions, if carefully drafted, may accomplish more than a larger number of poorly drafted requests.

ADVANTAGES OF THE REQUEST FOR ADMISSIONS

Any matter admitted by a party is considered proven for trial under Tex. R. Civ. P. 198. In Texas the failure of a party to respond automatically results in the matter's being deemed admitted.

DRAFTING THE REQUEST FOR ADMISSIONS

FORM AND CONTENT OF THE REQUEST FOR ADMISSIONS

There is no prescribed form and content set forth in Tex.R. Civ. P. 198 for a request for admissions. However, the same format used for interrogatories is used in the preparation of the request for admissions: introduction, instructions, definitions, and requests. This practice clarifies the intent of the party making the request and avoids problems with or objections to the use of vague or confusing terminology.

Each request for admission must be made separately. The basis for this procedural rule is that part of a combined request may not be disputed, but all of it may be denied.

See Exhibit 13-1 for an example of a request for admissions used in the Texas courts.

Exhibit 13-1 Request for Admissions

NO. 03-124850-C

GREGORY DUNCAN	)
	) IN THE 93RD JUDICIAL
vs.	) DISTRICT COURT FOR
	) DALLAS COUNTY, TEXAS
FIRST STATE BANK	)

PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS

TO: (Name and address of counsel for Defendant)

Plaintiff, GREGORY DUNCAN, in order to simplify the issues for consideration by the court, makes the following Request for Admissions of fact pursuant to Rule 198 of the Texas Rules of Civil Procedure, and demands that within thirty (30) days after service of this Request, Defendant admit or deny under oath the facts set forth below. Defendant is hereby advised that a failure to specifically answer any matter will be taken as an admission of the truth of the matter. Each of the matters of which an admission is requested shall be deemed admitted unless a sworn statement is delivered to the undersigned attorney of record as provided in Rule 198 of the Texas Rules of Civil Procedure.

1. Admit or deny that Plaintiff opened a personal checking account, numbered 123-456789, with you, your employees or agents.

ANSWER:

2. Admit or deny that pursuant to opening said checking account Plaintiff ordered checks from you, your employees or agents.

ANSWER:

3. Admit or deny that checks for Plaintiff's checking account were mailed to Plaintiff.

ANSWER:

4. Admit or deny that Plaintiff informed you, your employees or agents that he did not receive his checks for the above-described checking account.

ANSWER:

5. Admit or deny that Plaintiff reported to you, your employees or agents that he had not received the above-described checks from you in the mail.

ANSWER:

6. Admit or deny that two of these "lost" checks had been presented to you for payment.

ANSWER:

continued

Exhibit 13-1 Request for Admissions *(continued)*

7. Admit or deny that Plaintiff informed you that checks had been written on his account that had a forged signature and were not authorized by him to be written.

ANSWER:

Respectfully submitted,
[Name, address, and state bar number of attorney]
[Facsimile number]
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing Plaintiff's First Request for Admissions has been duly served upon counsel of record for the Defendant, by depositing same in the United States mail, postage prepaid and properly addressed, on this _____ day of _____ , 20___.

_____
ATTORNEY FOR PLAINTIFF

RESPONDING TO THE REQUEST FOR ADMISSIONS

A response to a request for admissions must be served on the propounding party within thirty days of service of the request, unless the parties have agreed otherwise or unless a prior court order has been entered. When Tex. R. Civ. P. 198 was amended in 1990 to provide for service of a request at any time after commencement of the action, the revised rule extended the time to respond in that instance to no less than fifty days after service of the citation on the responding party. This amendment also provided that the parties may agree to extend or shorten the time for responding to a request.

In Texas, the response to a request for admissions need not be verified.

ALTERNATIVE RESPONSES TO THE REQUEST FOR ADMISSIONS

In Texas, a party has four choices of response to a request for admissions: (1) admit; (2) deny; (3) refuse to admit or deny; or (4) object.

Lack of information or knowledge cannot be cited as a reason for failure to admit or deny unless the responding party states that he or she has made reasonable inquiry and that the information known or "easily obtainable" by the party is insufficient to enable him or her to admit or deny. Tex. R. Civ. P. 198.2(b).

If a party considers that a matter on which an admission is requested presents a genuine issue for trial, the party may not, on that ground alone, object to the request. He or she may deny the matter or list the reasons why it cannot be admitted or denied, subject to the provisions of paragraph 3 of Tex. R. Civ. P. 215.

When a party qualifies an answer or denies only a part of the matter about which an admission is requested, the party must specify so much of the request as is true and qualify or deny the remainder.

OBJECTIONS TO THE REQUEST FOR ADMISSIONS

The same objections available under Tex. R. Civ. P. 193.2 for other discovery techniques are available in response to a request for admissions.

CHAPTER 13
Addendum

MOTIONS REGARDING ADMISSIONS

MOTION FOR PROTECTIVE ORDER

Refer to Tex. R. Civ. P. 192.6 for the procedure that must be followed to obtain a protective order regarding requests for admissions.

MOTION TO COMPEL FURTHER RESPONSE

If the response to the request for admissions contains incomplete or evasive answers or an objection that has no merit, the requesting party may make a motion to compel further response. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with Tex. R. Civ. P. 198, it may order either that the matter be deemed admitted or that an amended answer be served.

MOTION TO AMEND OR WITHDRAW AN ADMISSION

The court may permit withdrawal or amendment of responses and deemed admissions, upon a showing of good cause for such withdrawal or amendment, if the court determines that the parties relying upon the responses and deemed admissions "will not be unduly prejudiced and that the presentation of the merits of the action will be subserved by permitting the party to amend or withdraw the admission." (Tex. R. Civ. P. 198.3(b)) However, this provision for withdrawal or amendment is subject to the provisions of Tex. R. Civ. P. 193.5(a) governing the duty to supplement discovery responses.

MOTION TO RECOVER EXPENSES INCURRED IN PROVING MATTERS NOT ADMITTED

If a party denies a matter in a request for admissions and that matter is subsequently proven at trial, the court has the authority to award reasonable expenses incurred, including reasonable attorney fees. (Tex. R. Civ. P. 215-4(f))

PART IV
Pretrial, Trial, and Posttrial

CHAPTER 14
Settlements, Dismissals, and Alternative Dispute Resolution

KEY POINTS

- The structured settlement is used in cases with extensive damages and ongoing medical expenses.
- Installment payments in settlements are often in the form of an annuity or trust.
- The structured settlement involving an annuity may be drafted to provide for percentage increases to cover the cost of inflation.
- Under a "Mary Carter" agreement, the plaintiff and a defendant settle the litigation among themselves, but the defendant remains as a party to the lawsuit and retains a financial interest in the plaintiff's recovery.
- Court approval is required for settlements involving minors, incompetents, and class actions.
- Worker's compensation settlements between an employee and the company's insurance carrier require court approval.

THE SETTLEMENT

Most legal disagreements do not reach the litigation stage. The majority of lawsuits are settled short of trial. Discovery activity often initiates or speeds up settlement discussions.

Many cases involving money damages are settled when the defendant agrees to pay the plaintiff a set amount of money. Generally, the agreement requires a lump-sum payment. However, some settlements contemplate installment payments.

STRUCTURED SETTLEMENT

A *structured settlement* is often reached in cases with extensive damages and ongoing medical expenses that require installment payments. Normally the installment payments are in the form of an annuity or trust purchased or established by either the defendant or its liability carrier.

In the case of an annuity, the defendant or its insurance carrier purchases an annuity from a life insurance carrier that makes the periodic payments. The defendant owns the annuity and has both the right to receive monthly payments from the annuity and a duty to make payments to the plaintiff. However, the annuity carrier is generally instructed to make such payments directly to the plaintiff. The structured settlement involving an annuity may be drafted to provide for percentage increases to cover the cost of inflation. Guaranteed annuities can be purchased to make payments over a guaranteed duration rather than the lifetime of an individual plaintiff.

At the time of purchase of the annuity, the plaintiff normally releases all claims against the defendant. However, specific provisions should be made for the possibility of a default. A settlement is often structured to include a fixed trust. Through this investment vehicle, the defendant purchases United States government bonds or similar secured investments. Interest payments from the bonds are paid either to a trust account at a bank or to an individual trustee that makes the payments to the plaintiff. The principal from the trust is paid to the plaintiff or his or her estate.

Structured settlements are very complex and require careful drafting.

"MARY CARTER" AGREEMENT

A second type of settlement in Texas is the "Mary Carter" agreement. The "Mary Carter" designation comes from the 1967 Florida case of *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. Dist. Ct. App. 1967). Under this type of agreement, the plaintiff and a defendant settle the litigation between themselves, but the defendant remains as a party to the lawsuit and retains a financial interest in the plaintiff's recovery. Refer to Exhibit 14-1 for an example of a Mary Carter settlement agreement.

Exhibit 14-1 Settlement Agreement

SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is made and entered into by and between WINSTEAD LEASING, INC., hereinafter referred to as "Plaintiff," and GERALD GRIGGS, hereinafter referred to as "Defendant."

WHEREAS, Plaintiff filed suit against Defendant on January 14, 2004, wherein Plaintiff seeks recovery of the amount owed, such suit being styled Winstead Leasing, Inc. v. Gerald Griggs, No. 04-11225-A in the 100th Judicial District Court, Dallas County, Texas (hereinafter referred to as the "Litigation"); and

WHEREAS, the Parties have agreed that settlement of all of the disputes between the Parties relating to the Litigation is the most economical, efficient, and desirable disposition for the Parties;

WHEREAS, this agreement is executed by the Parties for the sole purpose of compromising and settling the matters involved in this dispute, and it is expressly understood and agreed, as a condition of the signing of this Agreement, that this Agreement does not constitute and shall not be construed as an admission on the part of the Defendant as to the claims asserted by the Plaintiff.

NOW, THEREFORE, for good and valuable consideration, and in consideration of the mutual promises, covenants, and agreements set forth herein, WINSTEAD LEASING, INC. and GERALD GRIGGS (sometimes herein referred to collectively as the "Parties") agree as follows:

1. That GERALD GRIGGS shall pay to WINSTEAD LEASING, INC. the sum of FIFTY THOUSAND DOLLARS ($50,000), to be paid in the form of a certified or cashier's check or money order, immediately upon the execution of this Agreement.

2. Plaintiff hereby releases the Defendant from any claims arising from the pending Litigation and forever discharges Gerald Griggs, his successors, legal representatives, employees, servants, agents, representatives, heirs, and assigns from all claims, demands, damages, and causes of action which may arise from the claims of Plaintiff.

3. This Agreement states the entire Agreement of the Parties hereto with regard to the subject matter of the Agreement. This Agreement supersedes all prior and contemporaneous negotiations and agreements, oral or written, with regard to the subject matter of the Agreement, and all prior and contemporaneous negotiations and agreements with regard to the subject matter of the Agreement are deemed to have been abandoned if not incorporated into this Agreement.

4. This Agreement may only be amended by a written agreement signed by all of the Parties to this Agreement.

5. This Agreement shall be governed by the laws of the State of Texas and venue for its enforcement shall be exclusively in Dallas County, Texas.

6. This Agreement shall bind and inure to the benefit of the respective successors and assigns of the Parties.

7. The persons signing this Agreement represent and warrant that they are authorized to do so.

EXECUTED effective this _____ day of _____ , 20___ (Execution under Oath).

SETTLEMENT AGREEMENTS AND RELEASES

SETTLEMENTS FOR MINORS OR INCOMPETENTS

If one of the parties to the lawsuit is either a minor or an incompetent, court approval of the settlement agreement and subsequent investment of settlement proceeds is required. A guardian ad litem is appointed for purposes of settlement negotiations.

CLASS ACTIONS

Compromise or settlement of a class action suit requires approval of the court. Notice of the proposed compromise must be given to all members of the class. (Tex. R. Civ. P. 42)

WORKER'S COMPENSATION

Settlements between an employee and the employer's worker's compensation carrier must be approved by the court. This is normally accomplished by filing the settlement agreement with a judgment noting that the settlement is fair and just. Tex. Rev. Civ. Stat. Ann. art. 8306.

UNINSURED MOTORIST INSURANCE

The standard Texas automobile insurance policy has an exclusion in the uninsured motorist provision that renders settlements inapplicable to bodily injury when the injured party has settled with the party responsible for those injuries without the written consent of the insurance company. (Tex. Ins. Code Ann. § 5.06-1(6))

Tex. R. Civ. P. 97(a) provides that settlement between a plaintiff injured party and an insurer representing a motorist may not bar a subsequent suit by that motorist for his or her own personal injuries unless the settlement specifically disposes of all asserted and potential claims by the motorist, or the motorist consents in writing that a judgment in the primary suit bars any subsequent claim by the motorist.

DISMISSALS, CONSENT DECREES, AND DISTRIBUTION OF FUNDS

DISMISSALS

STIPULATED DISMISSALS. Parties to a lawsuit may stipulate to a dismissal at any time and on any terms. In such a situation, a request to dismiss the case, with prejudice, should be filed.

VOLUNTARY DISMISSAL ON NOTICE. Tex. R. Civ. P. 162 permits the plaintiff to voluntarily dismiss its case, or take a nonsuit, at any time before the plaintiff has introduced all of his evidence other than rebuttal evidence. Such an action is entered in the minutes of the court. Notice of the dismissal or nonsuit must be served in accordance with Tex. R. Civ. P. 21a on any party who has answered or has been served with process.

Any dismissal pursuant to this rule which terminates the case must authorize the clerk to tax court costs against the dismissing party, unless otherwise ordered by the court. Exhibit 14-2 is an example of a voluntary dismissal by nonsuit.

COURT-ORDERED INVOLUNTARY DISMISSAL. In Texas, a court has the power to dismiss a case for a number of reasons. Tex. R. Civ. P. 165a lists as bases for dismissal: want of prosecution, failure to appear, and noncompliance with time standards.

Exhibit 14-2 Voluntary Dismissal

NO. 04-05740-J

MELISSA GREEN	)
	) IN THE 100TH JUDICIAL
vs.	) DISTRICT COURT FOR
	) DALLAS COUNTY, TEXAS
ACME TRUCKING CO.	)

ORDER OF DISMISSAL FOR NONSUIT

On _____ ,20___ , came on to be heard Defendant's Motion for Nonsuit in the above action for Plaintiff's failure to prosecute the matter. It appears to the Court that the motion is well taken and should be granted.

IT IS, THEREFORE, ORDERED that the above action be and it is hereby dismissed without prejudice to Plaintiff's right to reinstitute the action; that it be removed from the docket of the Court; and that all costs incurred in the matter be taxed against Plaintiff.

SIGNED this _____ day of _____ , 20___.

_____
PRESIDING JUDGE

CHAPTER 15
Trial Techniques

KEY POINTS

- A forty-five-day notice of court setting is required for a first trial setting.
- Leave of court is required for any amendment to pleadings made less than seven days before trial.
- A motion in limine, if granted, precludes the introduction of prejudicial matters at trial.
- A jury trial must be requested not less than thirty days in advance of the setting on the nonjury docket.
- Either party may invoke the rule to exclude witnesses from the courtroom.

PRELIMINARY PREPARATION FOR TRIAL

TRIAL SETTING

The court may set contested cases for trial on the written request of any party or on the court's own motion, with reasonable notice of not less than forty-five days to parties in the case of a first setting for trial, or by agreement of the parties.

The clerk must give notice of setting and inform any nonresident attorney of the setting if the attorney provides a stamped, self-addressed envelope. Failure to furnish the requested trial date information is sufficient grounds for a continuance or new trial if it appears to the court that this action prevented the attorneys from preparing or presenting their claims or defenses. (Tex. R. Civ. P. 246)

AMENDING THE PLEADINGS

Any amendments to pleadings should be made no later than seven days prior to trial. Any amendment after that time requires leave of court. However, the court will normally allow a party to amend after that time unless there is a showing that such filing "will operate as a surprise to the opposite party." (Tex. R. Civ. P. 63)

PRETRIAL CONFERENCE

The court may in its discretion require a pretrial conference to consider a number of critical matters, including:

1. A discovery schedule;
2. Amendments to pleadings;
3. The possibility of obtaining stipulations of fact;
4. The exchange of a list of direct fact witnesses, including the address, telephone number, and subject of the witness's testimony;
5. The exchange of a list of expert witnesses who will be called to testify at trial, including the address, telephone number, subject of the testimony, and opinions to be offered by the expert witness;
6. Proposed jury charge questions, instructions, and definitions for a jury case, or proposed findings of facts and conclusions of law for a nonjury case;
7. The marking and exchange of all exhibits to be used at trial and stipulation as to the authenticity and admissibility of the exhibits;
8. Written objections to the opposite party's exhibits;
9. Settlement of the case.

Refer to Tex. R. Civ. P. 166 for additional matters to be considered at the pretrial conference.

PRETRIAL MOTIONS

Chapter 7 of this supplement discusses a number of motions that might be presented to the court before trial.

MOTION FOR CONTINUANCE. A *motion for continuance* may be needed if a party's counsel is unable to prepare for trial by the trial date. The motion must be substantiated by affidavits and allege good cause for the continuance. Exhibit 15-1 shows an example of a motion for continuance in state court.

MOTION IN LIMINE

The *motion in limine* is an important pretrial motion because, if approved, it precludes the introduction of prejudicial matters at trial. Prior to the beginning of the trial, careful consideration must be given to harmful facts or documents in your case that would not be admissible under the rules of evidence, such as settlement offers, a party's previous criminal record, pending lawsuits, or numerous marriages of a party.

This motion streamlines the trial process by avoiding delays to excuse the jury, while the attorneys argue privately in the judge's chamber, and then reassemble the jury in the courtroom.

Exhibit 15-1 Motion for Continuance

NO. 03-21545-B

MARTHA WILSON AND	)
JOHN SCOTT WILSON	)
	) IN THE DISTRICT COURT OF
vs.	) DALLAS COUNTY, TEXAS
	) 92ND JUDICIAL DISTRICT
JAMES B. JACK, M.D. AND	)
WESTSIDE MEDICAL CENTER	)

MOTION FOR CONTINUANCE

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME MARTHA WILSON AND JOHN SCOTT WILSON, Plaintiffs in the above-captioned cause, and file their verified motion for continuance, and in support thereof would respectfully show unto the Court as follows:

I .

Gene Blake, attorney for Plaintiffs Martha Wilson and John Scott Wilson, is a member of the Texas House of Representatives and will be in actual attendance of a session of the House within thirty days of the date that this matter is set for trial.

II.

As stated in the affidavit of Gene Blake, attached hereto as Exhibit "A" [not included in this sample, it is his intention to actively participate in the preparation and presentation of this matter at trial.

WHEREFORE, PREMISES CONSIDERED, Martha Wilson and John Scott Wilson request that the abovecaptioned cause be removed from its present trial setting and not reset until after _____ , 20___ or at least thirty (30) days after the adjournment of the special session of the Texas State Legislature.

Respectfully submitted,
[Name, address, and state bar number of attorney]
[Facsimile number]
ATTORNEYS FOR PLAINTIFF

(VERIFICATION)
(ORDER SETTING HEARING DATE)
(CERTIFICATE OF SERVICE)

The motion in limine is normally filed before jury selection begins. Ideally, it should be worded so that the court may either grant it before the beginning of trial or postpone a ruling until the time of trial. In some instances, a motion in limine may be granted after the trial has begun.

Information in the motion should include the fact that opposing counsel's conduct and/or facts discovered indicate that it is eminently probable that counsel intends to present the contested evidence at trial. The items and/or inferences that a party seeks to exclude must be specifically identified in a manner sufficient to show prejudice and harm. The motion should preclude mention of the motion in limine to the jury.

A memorandum of authorities and order is generally presented to the court simultaneously with the motion in limine.

JURY REQUEST

A written request for jury trial must be filed with the clerk of court a "reasonable time" before the date set for trial on the nonjury docket, but not less than thirty days in advance. (Tex. R. Civ. P. 216(a))

Normally a $10 jury fee for district court ($5 for county court) must be deposited with the clerk of the court within the time for making a written request for a jury trial. (Tex. R. Civ. P. 216(b)) Notation of the jury fee payment is entered on the docket sheet.

PREPARATION OF WITNESSES

SUBPOENA OF WITNESSES

The subpoena process for depositions, discussed in Chapter 9, is the same procedure utilized to make certain that witnesses are in attendance at trial.

INVOKING THE RULE

Either party may request that the witnesses on both sides be sworn and removed from the courtroom so that they cannot hear the testimony delivered by other witnesses. This practice is known as *invoking the rule,* and is discussed in Tex. R. Civ. P. 267. Parties, their spouses, and in some instances representatives of the parties may not be excluded.

THE JURY PROCESS

JUROR QUALIFICATIONS

Tex. Rev. Civ. Stat. Ann. art. 2133 lists the qualifications necessary to serve on a state court jury:

1. Eighteen years or older;
2. Citizen of state, domiciliary of county, and qualified to vote;
3. Able to read and write;
4. Not have served as juror six days during preceding six months in district court or preceding three months in county court;
5. Not have been convicted of a felony;
6. Not be under indictment or legal accusation of theft or any felony;
7. Legally blind person is not disqualified solely due to legal blindness, but is subject to challenge for cause if in the court's opinion the blindness renders the juror unfit to serve. This challenge for cause due to legal blindness does not count as a peremptory challenge.

JURY SELECTION PROCEDURE

Tex. R. Civ. P. 223–225 govern the selection of the particular jury members, based on the qualifications previously listed. The court's initial instructions are prescribed in Tex. R. Civ. P. 226a, as reproduced in Exhibit 15-2. These instructions may be modified as necessary.

VOIR DIRE

Voir dire is the method by which the attorneys for the parties garner background information on the individual jurors, on the basis of which they can challenge a particular juror. The two types of jury challenges are:

1. Challenge to the array (to the entire jury panel) on the basis of defect or irregularity in selection or jury summons;
2. Challenge to the individual jurors (cause or peremptory challenge).

Tex. Gov't Code Ann. § 62.105, which sets forth the procedures for voir dire in state court, allows a challenge for cause if the prospective juror is:

1. A witness in the case;
2. A person interested, directly or indirectly, in the subject matter of the suit;
3. A person related by consanguinity or affinity within the third degree to the parties;
4. A person with bias or prejudice in favor of or against either of the parties;
5. Anyone who was a petit juror in the former trial of the same or another case involving the same questions of fact.

Disqualification on one of these grounds is nondiscretionary. In addition, the trial court, in its discretion, may remove for cause any juror who in the court's opinion is unfit to sit on the jury.

As in federal court, peremptory challenges may be made without the statement of any reason for the challenge. (Tex. R. Civ. P. 232) Each party has six peremptory challenges. An agreement as to the challenges must be reached by all parties. (Tex. R. Civ. P. 233)

The voir dire should be recorded to assist the parties in the preservation of errors.

THE PARALEGAL'S ROLE AT TRIAL

KEEPING TRACK OF EXHIBITS

The number of exhibits offered at trial is often quite voluminous. Many exhibits will not be introduced because of objections granted by the court. For example, if a witness uses a writing on the stand to refresh his memory for the purpose of testifying, the other side may object to the use of the exhibit unless the witness furnishes a copy of the writing. If opposing counsel objects to production of the exhibit, the court may not permit the introduction of that exhibit into evidence. (Tex. R. Evid. 610)

Exhibit 15-2 Initial Jury Instructions

INITIAL JURY INSTRUCTIONS

Rule 226a. Admonitory Instructions to Jury Panel and Jury

The court shall give such admonitory instructions to the jury panel and to the jury as may be prescribed by the Supreme Court in an order or orders entered for that purpose.

Approved Instructions

Pursuant to the provisions of Rule 226a, Texas Rules of Civil Procedure, it is ordered by the Supreme Court of Texas, effective January 1, 1967; January 1, 1971; February 1, 1973; December 5, 1983, effective April 1, 1984;

I.

That the following oral instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jurors after they have been sworn as provided in Rule 226 and before the voir dire examination:

Ladies and Gentlemen of the Jury Panel:

The case that is now on trial is _____ vs. _____ . This is a civil action which will be tried before a jury. Your duty as jurors will be to decide the disputed facts. It is the duty of the judge to see that the case is tried in accordance with the rules of law. In this case, as in all cases, the actions of the judge, parties, witnesses, attorneys and jurors must be according to law. The Texas law permits Proof of any violation of the rules of proper jury conduct. By this I mean that jurors and others may be called upon to testify in open court about acts of jury misconduct. I instruct you, therefore, to follow carefully all instructions which I am now going to give you, as well as others which you will receive while this case is on trial. If you do not obey the instructions I am about to give you, it may become necessary for another jury to retry this case with all of the attendant waste of your time here and the expense to the litigants and the taxpayers of this county for another trial. These instructions are as follows:

1. Do not mingle with nor talk to the lawyers, the witnesses, the parties, or any other person who might be connected with or interested in this case, except for casual greetings. They have to follow these same instructions and you will understand it when they do.

2. Do not accept from, nor give to, any of those persons any favors however slight, such as rides, food or refreshments.

3. Do not discuss anything about this case, or even mention it to anyone whomsoever, including your wife or husband, nor permit anyone to mention it in your hearing until you are discharged as jurors or excused from this case. If anyone attempts to discuss the case, report it to me at once.

4. The parties through their attorneys have the right to direct questions to each of you concerning your qualifications, background, experiences and attitudes. In questioning you, they are not meddling in your personal affairs, but are trying to select fair and impartial jurors who are free from any bias or prejudice in this particular case.

a. Do not conceal information or give answers which are not true. Listen to the questions and give full and complete answers.

b. If the attorneys ask some questions directed to you as a group which require an answer on your part individually, hold up your hand until you have answered the questions.

Do you understand these instructions? If not, please let me know now.

Whether you are selected as a juror for this case or not, you are performing a significant service which only free people can perform. We shall try the case as fast as possible consistent with justice, which requires a careful and correct trial. If selected on the jury, unless I instruct you differently, you will be permitted to separate at recess and for meals, and at night.

The attorneys will now proceed with their examination.

continued

Exhibit 15-2 Initial Jury Instructions *(continued)*

II.

That the following oral and written instructions, with such modifications as the circumstances of the particular case may require shall be given by the court to the jury immediately after the jurors are selected for the case:

Oral Instructions

Ladies and Gentlemen:

By the oath which you take as jurors, you become officials of this court and active participants in the public administration of justice. I now give you further instructions which you must obey through- out this trial.

It is your duty to listen to and consider the evidence and to determine fact issues later submitted to you, but I, as judge, will decide matters of the law. You will now receive written instructions which you will observe during this trial, together with such other instructions as I may hereafter give, or as heretofore I have given to you.

(A copy of the written instructions set out below in this Section II shall thereupon be handed to each juror.)

As you examine the instructions which have just been handed to you, we will go over them briefly together. The first three instructions have previously been stated, and you will continue to observe them throughout the trial. These and the other instructions just handed to you are as follows:

(The written instructions set out below in this Section II shall thereupon be read by the court to the jury.)

Counsel, you may proceed.

Written Instructions

1. Do not mingle with nor talk to the lawyers, the witnesses, the parties, or any other person who might be connected with or interested in this case, except for casual greetings. They have to follow these same instructions and you will understand it when they do.

2. Do not accept from, nor give to, any of those persons any favors however slight, such as rides, food or refreshments.

3. Do not discuss anything about this case, or even mention it to anyone whomsoever, including your wife or husband nor permit anyone to mention it in your hearing until you are discharged as jurors or excused from this case. If anyone attempts to discuss the case, report it to me at once.

4. Do not even discuss this case among yourselves until after you have heard all of the evidence, the court's charge, the attorneys' arguments and until I have sent you to the jury room to consider your verdict.

5. Do not make any investigation about the facts of this case. Occasionally we have a juror who privately seeks out information about a case on trial. This is improper. All evidence must be presented in open court so that each side may question the witnesses and make proper objection. This avoids a trial based upon secret evidence. These rules apply to jurors the same as they apply to the parties and to me. If you know of, or learn anything about, this case except from the evidence admitted during the course of this trial, you should tell me about it at once. You have just taken an oath that you will render a verdict on the evidence submitted to you under my rulings.

6. Do not make personal inspections, observations, investigations, or experiments nor personally view premises, things or articles not produced in court. Do not let anyone else do any of these things for you.

continued

Exhibit 15-2 Initial Jury Instructions *(continued)*

7. Do not tell other jurors your own personal experiences nor those of other persons, nor relate any special information. A juror may have special knowledge of matters such as business, technical or professional matters or he may have expert knowledge or opinions, or he may know what happened in this or some other lawsuit. To tell the other jurors any of this information is a violation of these instructions.

8. Do not discuss or consider attorney's fees unless evidence about attorney's fees is admittees.

9. Do not consider, discuss, nor speculate whether or not any party is or is not protected in whole or in part by insurance of any kind.

10. Do not seek information contained in law books, dictionaries, public or private records or elsewhere, which is not admitted in evidence.

At the conclusion of all the evidence, I may submit to you a written charge asking you some specific questions. You will not be asked, and you should not consider, whether one party or the other should win. Since you will need to consider all of the evidence admitted by me, it is important that you pay close attention to the evidence as it is presented.

The Texas law permits proof of any violation of the rules of proper jury conduct. By this I mean that jurors and others may be called upon to testify in open court about acts of jury misconduct. I instruct you, therefore, to follow carefully all instructions which I have given you, as well as others which you later receive while this case is on trial.

You may keep these instructions and review them as the case proceeds. A violation of these instructions should be reported to me.

III.

That the following written instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jury as part of the charge:

Ladies and Gentlemen of the Jury:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

continued

Exhibit 15-2 Initial Jury Instructions *(continued)*

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

(Definitions, questions and special instructions given to the jury will be transcribed here.)

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

_____
Judge Presiding

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

(To be signed by the presiding juror if unanimous.)

_____
Presiding Juror

(To be signed by those rendering the verdict if not unanimous.)

_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____

IV.

That the following oral instructions shall be given by the court to the jury after the verdict has been accepted by the court and before the jurors are discharged:

The court has previously instructed you that you should observe strict secrecy during the trial and during your deliberations, and that you should not discuss this case with anyone except other jurors during your deliberations. I am now about to discharge you. After your discharge, you are released from your secrecy. You will then be free to discuss the case and your deliberations with anyone. However, you are also free to decline to discuss the case and your deliberations if you wish.

After you are discharged, it is lawful for the attorneys or other persons to question you to determine whether any of the standards for jury conduct which I have given you in the course of this trial were violated and to ask you to give an affidavit to that effect. You are free to discuss or not to discuss these matters and to give or not to give an affidavit.

The original of an exhibit is required, but under certain circumstances (such as loss or destruction of the original) a copy may be used in place of the original.

Summaries of voluminous exhibits may be introduced in lieu of the exhibits. The summary may be in the form of a chart or calculation.

VIDEOTAPING AT THE TRIAL

Testimony and evidence in videotape format may be used at trial. Deposition testimony excerpts are often more effective in videotape form than when read orally to the jury. The expenses of videotaping are taxed as costs. (Tex. R.

Civ. P. 264) The paralegal may be asked to investigate and retain a videotape technician to edit deposition testimony for use at trial. Another function the paralegal might perform at trial is comparing the hard copy of the testimony or evidence with the videotape to ensure the accuracy of the videotaped submission.

JURY CHARGE

Tex. R. Civ. P. 271–279 govern the court's charge to the jury and the preservation of error. The charge may consist of questions, definitions, and instructions.

All charges requested are submitted to the court. If the trial court refuses an instruction, question, or definition, the Judge must endorse that item as "Refused" and sign the refusal. The same process must be followed for charges that the court modifies. Refused or modified instructions, questions, or definitions constitute a bill of exceptions; no formal bill of exceptions is required. (Tex. R. Civ. P. 276) If the court refuses to sign and endorse its refusal on a question, a formal bill of exceptions is required to preserve error.

The Texas Rules of Civil Procedure provide that the trial court will prepare a charge for submission to the jury at the conclusion of the evidence. The court's proposed charge must be delivered to the attorneys so they can prepare and present their objections and additional requests. Tex. R. Civ. P. 273 is clear that a party must make objections and requests with regard to the charge which the court is submitting to the jury. Normally the trial judge requests the submission of the attorneys' requests for the charge at the pretrial stage or at the beginning of the trial. However, some courts do not ask for and do not expect to receive requested issues and instructions until the conclusion of the evidence. In other instances, the court will initially prepare the charge and then submit it to the attorneys for review and objections or additional requests.

The court must mark its ruling on an issue, date the issue, and sign the issue. A file-stamped copy should be obtained from the clerk of court before submission of the charge to the jury.

Exhibit 15-3 contains objections to the charge as a whole and to specific questions, definitions, and instructions, as governed by Tex. R. Civ. P. 271–279.

The request for a jury charge must be made in writing or a waiver occurs, for which there is no ground for appeal. Tex. R. Civ. P. 279.

Exhibit 15-3 Objections to the Court's Charge

OBJECTIONS TO THE COURT'S CHARGE

The following checklist includes common objections to the court's charge. These objections may be made pursuant to Rules 271-279 of the Texas Rules of Civil Procedure.

Objections to the Charge as a Whole:

1. Charge unsigned
2. Charge not filed
3. Charge not inspected by counsel
4. Counsel not permitted a reasonable time to examine and object to the charge

Objections to Definitions and Instructions:

1. Definition or instruction is incorrect or contains omissions
2. Definition or instruction is unnecessary
3. Additional or specific definitions are necessary
4. Definition or instruction omitted

Objections to Questions:

1. No pleadings to support submission
2. Assumes fact not in evidence
3. No or improper predicate
4. No evidence to support submission
5. Uncontroverted question
6. Duplicity of questions
7. Allows double recovery
8. Immaterial question

CHAPTER 16
Posttrial Practice

KEY POINTS

- A motion for new trial must be filed within thirty days after the judgment or other order complained of is signed.
- The appellate practice in state court is regulated by Tex. R. App. P. 1–234.
- An appeal is normally perfected with the filing of the appeal bond.
- The transcript of the trial proceedings is the statement of facts.
- The enforcement of judgments in Texas is regulated by Tex. R. Civ. P. 621 et seq.

TRIAL AND POSTTRIAL MOTIONS

Trial and posttrial motions in state court matters are similar to those in federal court. The types and number of motions made normally depend on whether the case is tried with or without a jury.

ENTRY OF JUDGMENT

Tex. R. Civ. P. 306a governs the entry of judgments in state courts. The timing for most posttrial motions generally depends on when the judgment was entered and when and if notice of entry of the judgment was given to all parties. The official entry of judgment is the date the judge signed the order.

In district and county courts, the clerk of court is required to immediately give notice to the parties or their attorneys of record, by first-class mail, that the judgment or order was signed. If a party against whom the judgment was rendered has not received the required notice nor acquired actual knowledge of the order, the effective date of the judgment is the date that the party receives notice or acquires knowledge of the judgment, but in no event shall these periods begin more than ninety days after the original judgment or other appealable order was signed.

MOTION FOR A DIRECTED VERDICT

Tex. R. Civ. P. 268 provides for a motion for directed verdict. Normally the motion for directed verdict is made after all parties have presented their evidence at trial of the case. In some instances the motion is made with respect to the entire case; in other cases the motion may relate only to certain issues in the case. For example, in the *Imperial* case discussed in the text, the attorneys for Paragon Cable might have made a motion for directed verdict limited to the issue of liability.

MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT

Tex. R. Civ. P. 301 allows a party to raise a motion for a judgment notwithstanding the verdict in a case tried in state court. This motion essentially asks the court to disregard the jury's verdict and make its own determination in the matter.

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

In a district or county court nonjury case, any party may file a *request for findings of fact and conclusions of law* within twenty days after the judgment is signed. The clerk of court must immediately call such request to the attention of the judge who tried the case. The party making the request serves the request on all parties. Tex. R. Civ. P. 296 governs request for findings of fact and conclusions of law.

The court must file its findings of fact and conclusions of law within twenty days after receipt of the request and cause a copy to be mailed to each party to the suit. If the court fails to file its response within that period, the party making the request must, within thirty days after filing the original request, file with the clerk and serve on all parties a notice of past due findings of fact and conclusions of law, which the clerk must immediately call to the court's attention. With this filing, the time for the court to file its response is extended to forty days from the date of the original request.

Within ten days after the court files its original findings of fact and conclusions of law, any party may file with the clerk of court a request for additional or amended findings of fact or conclusions of law, to which the court must respond within ten days. The request and response must be served on all parties.

Tex. R. App. P. 299a states that the findings of fact and conclusions of law shall not be recited in the judgment, but must be filed in a separate document. Exhibit 16-1 is an example of a findings of fact and conclusions of law in state court.

MOTION FOR A NEW TRIAL

Tex. R. Civ. P. 320–329b regulate motions for new trials in state court proceedings. The grounds for such a motion are found in Tex. R. Civ. P. 320 and are basically the same as in federal court.

A motion for new trial is required to raise these points on appeal:

1. A complaint on which evidence must be heard, such as jury misconduct, newly discovered evidence, or failure to set aside a judgment by default;
2. A complaint of factual insufficiency of the evidence to support a jury finding;
3. A complaint that a jury finding is against the overwhelming weight of the evidence;
4. A complaint of inadequate or excessive damages found by the jury; or
5. Incurable jury argument if not otherwise ruled on by the trial court.

Tex. R. Civ. P. 326 limits to two the number of new trials that may be granted to either party in the same cause because of insufficiency or weight of the evidence.

Any motion for a new trial must be filed within thirty days after the judgment or other order complained of is signed.

Exhibit 16-1 Findings of Fact and Conclusions of Law

NO. 03-21545-B

MARTHA WILSON AND	)
JOHN SCOTT WILSON	)
	) IN THE DISTRICT COURT OF
vs.	) DALLAS COUNTY, TEXAS
	) 92ND JUDICIAL DISTRICT
JAMES B. JACK, M.D. AND	)
WESTSIDE MEDICAL CENTER	)

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE OF SAID COURT:

Pursuant to Rule 297 of the Texas Rules of Civil Procedure, MARTHA WILSON and JOHN SCOTT WILSON, Plaintiffs in the above-captioned cause, in which judgment was rendered on _____ , 20___ , request that you state separately, in writing, your conclusions of law, and that you file such findings of fact and conclusions of law with the clerk of the said Court so that they become a part of the record of said cause.

Respectfully submitted,
(Name, address, and state bar
number of attorney)
[Facsimile number]
ATTORNEYS FOR PLAINTIFFS

Receipt of Request for Findings of Fact and Conclusions of Law acknowledged this _____ day of_____ , 20___.

_____
Presiding Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Request for Findings of Fact and Conclusions of Law has been served on , attorney of record for Defendants, James B. Jack, M.D. and Westside Medical Center, by mailing same to him in the United States mail, postage prepaid and properly addressed, on this _____ day of _____ , 20___.

_____

THE PRELIMINARY STEPS IN THE APPEAL

Appellate practice in state court is regulated by Tex. R. App. P. 1–234 and numerous procedural rules of the Texas Rules of Civil Procedure.

STEPS IN APPEAL

The appellate rules govern appeals at all levels, from the county court to an appeal to the Texas Supreme Court or court of criminal appeals. Exhibit 16-2 is a chart of the steps that must be followed to perfect an appeal in state court. The pertinent rules are cited for each step. Normally, an appeal is perfected with the filing of an appeal bond.

NOTICE OF APPEAL

In the federal jurisdiction, the notice of appeal is the only document necessary to perfect an appeal. This is not true in state court. Perfection of an appeal through the notice of appeal is available only for a very limited statutory class of governmental and court-appointed fiduciary appellants, as governed by Tex. Civ. Prac. & Rem. Code Ann. § 6.001 et seq. and Tex. Prob. Code Ann. § 29.

The requirements for a notice of appeal are quite simple. Tex. R. App. P. 25.1(d) merely provides that the notice should contain the number and style of the case, the court in which it is pending, and that the appellant desires to appeal from the judgment or some designated portion of the judgment.

Service requirements for the notice of appeal are the same as for an appeal bond.

TERRITORIAL JURISDICTION FOR FILING AN APPEAL

Tex. Gov't Code Ann. § 22.201 assigns the territorial jurisdiction of each of the fourteen courts of appeals to "court of appeals districts." Exhibit 16-3 lists the jurisdiction and primary seats for the court of appeals districts in Texas.

Notice that two courts of appeals districts are listed for Houston. Cases are assigned at random in this district. In East Texas, a few counties are in more than one court of appeals district. There an appellant may choose from either of the two available courts of appeals districts.

DOCKETING THE APPEAL

Each case filed in a court of appeals must be assigned a docket number that consists of four parts, separated by hyphens:

1. The number of the supreme judicial district;
2. The last two digits of the year in which the case is filed;
3. The number assigned to the case;
4. The designation "CV" for a civil appeal or "CR" for criminal cases.

For example, the docket number "05-03-00484-CV" indicates that the appeal was in the fifth district, filed in 2003, case number 00484, and is a civil matter.

APPEAL BOND

An appeal bond, the usual manner of perfecting an appeal in state courts, secures the ultimate payment of all costs that have accrued in the trial court and the costs to be incurred on appeal.

The appellant may make the bond payable to the clerk instead of the appellee for the use and benefit of the appellee. (Tex. R. App. P. 24.2) The bond must have sufficient surety (a licensed corporate surety or two satisfactory individual sureties). Exhibit 16-4 is a sample appeal bond.

In lieu of a bond, the appellant may deposit cash with the clerk, which has the same force and effect as an appeal bond. The clerk prepares a certificate of cash deposit, which is included in the transcript as a substitute for the appeal bond.

When security for costs is required, the bond or affidavit in lieu must be filed with the clerk of court within thirty days after the judgment is signed, or within ninety days after the judgment is signed if a timely motion for new trial has been filed or if any party has timely filed a request for findings of fact and conclusions of law in a case tried without a jury.

Notification of the filing of the bond or certificate of deposit must be promptly given by the appellant by serving a copy on all parties to the litigation. Failure to serve the notice of filing may be grounds for dismissal of the appellant's appeal or other appropriate action if an appellee is prejudiced by the failure to provide notice of filing.

The filing and approval of the appeal bond signals the beginning of a duty on the part of the trial clerk of court and the court reporter to prepare the clerk's record and statement of facts.

AFFIDAVIT OF INABILITY

In some cases, the person desiring to bring an appeal is unable to pay the attendant costs. An appellant may file in the trial court an affidavit stating that the appellant is unable to pay or give the security for the costs of appeal. The provisions for contesting such an affidavit are governed by Tex. R. App. P. 20.1(a)(1).

ORDERING THE REPORTER'S RECORD

In state courts, the transcript of the trial proceedings is referred to as the *reporter's record*. Unlike the transcript of

Exhibit 16-2 Appellate Timetable and Procedures

APPELLATE TIMETABLE AND PROCEDURES

State Court System

Action

1. Perfect the appeal.

   Time Due: Within thirty days after the judgment is signed, within ninety days after the judgment is signed, if any party timely files a motion for new trial, motion to modify the judgment, motion to reinstate under Tex. R. Civ. P. 165a, or a request for findings of fact and conclusions of law, if findings and conclusions either are required by the Rules of Civil Procedure or, if not required, could properly be considered by the appellate court.

   Rule(s): Tex. R. App. P. 26.1(a)(1)-26.1(d).

   Comment(s): Bond, cash deposit, or negotiable obligation is filed with the trust department of the district clerk's office. Copies of the appeal bond are mailed to attorneys for all parties.

Action

2. Letter requesting trial court clerk to prepare clerk's record.

   Time Due: At or before time prescribed for perfecting the appeal.

   Rule(s): Tex. R. App. P. 34 and 35.

   Comment(s): Burden is on appellant to see that sufficient record is presented to show sufficient error for reversal. Any party may file with the clerk a written designation specifying matters for inclusion in the transcript and serve a copy of the designation on all parties. If the clerk misses the deadline and an extension is not filed within the fifteen-day grace period, the court may not consider the transcript and the appeal must be dismissed. Unless designated otherwise in accordance with Rules 34 and 35, the transcript should include:

   (1) all pleadings upon which the trial was held,

   (2) Docket sheet

   (3) Charge of the court and jury's verdict or the court's findings of fact and conclusions of law

   (4) Court's judgment or other order appealed from

   (5) Any request for findings of fact and conclusions of law, any post-judgment motion, and the court's order on the motion.

   (6) Notice of appeal

   (7) Any request for a reporter's records, including any statement of points or issues under Rule 34.6(c).

   (8) Any request for preparation of the clerk's record.

   (9) Certified bill of costs

   (10) Any formal bill(s) of exception

   (11) Subject to Rule 34.5(b) filed paper designated by a party.

Action

3. Written request to court reporter requesting reporter's record.

   Time Due: At or before the time prescribed for perfecting the appeal.

   Rule(s): Tex. R. App. P. 34.6(b)(1).

continued

Exhibit 16-2 Appellate Timetable and Procedures *(continued)*

Comment(s): Appellant must designate the evidence or other proceedings to be included in the record. The party making the designation shall serve a copy of the designation on all other parties. Appellant's attorney is responsible for seeing that court reporter files record in appellate court. No extension can be granted, if it is discovered after the fifteen-day grace period that the reporter has not filed the record. Appellant may request a partial record, but must include in the written request to the court reporter a list of appellate points.

Action

4. Pile clerk's record and reporter's record.

Time Due: Within sixty days after judgment has been signed, unless a motion for new trial has been filed, in which case they are due 120 days after the judgment is signed. (If a writ of error has been perfected to the court of appeals, the record should be filed within sixty days after perfection of the writ of error.)

Rule(s): Tex. R. App. P. 35.1.

Comment(s): The clerk's record is filed in the appellate court by the district clerk and the reporter's record is filed in the appellate court by the court reporter. (The latter is the appellant's responsibility.) Upon perfection of the appeal, the clerk of the trial court prepares and affixes the court's seal to the transcript and transmits the record to the appellate court. The clerk must number the pages of the record consecutively and index the record.

The appellant is responsible for seeing that these filings are timely made and complete.

Action

5. Brief of appellant.

Time Due: Thirty days after the later of:

(1) the date the clerk's record was filed; or

(2) the date the reporter's record was filed.

Rule(s): Tex. R. App. P. 38.6(a).

Comment(s): Principal brief must not exceed fifty pages and reply briefs may not exceed twentyfive pages, without the court's permission. The aggregate number of pages of all briefs filed by a party must not exceed ninety.

Motions for leave to file longer briefs are only granted for extraordinary and compelling reasons.

Briefs may be typed or printed; if typed, they must be double-spaced.

The original and six copies of briefs are filed with the appellate court. There is no requirement for cover color.

Action

6. Brief of appellee.

Time Due: Thirty days after appellant's brief is filed.

Rule(s): Tex. R. App. P. 38.6(b).

Comment(s): Principal brief must not exceed fifty pages and reply briefs may not exceed twentyfive pages, without the court's permission. The aggregate number of pages of all briefs filed by a party must not exceed ninety.

Motions for leave to file longer briefs are only granted for extraordinary and compelling reasons.

Briefs may be typed or printed; if typed, they must be double-spaced. The original and six copies of briefs are filed with the appellate court. There is no requirement for cover color.

continued

Exhibit 16-2 Appellate Timetable and Procedures *(continued)*

Action

7. Oral argument.

   Time Due: [not applicable]

   Rule(s): Tex. R. App. P. 39.

   Comment(s): Usually granted as a matter of right if requested when brief is filed. Request by one side does not act as automatic entitlement to other side.

Action

8. Court of appeals opinion.

   Time Due: [not applicable]

   Rule(s): Tex. R. App. P. 47.

   Comment(s): Opinion will be received promptly.

Action

9. Motion for rehearing.

   Time Due: Within fifteen days after appellate court's decision.

   Rule(s): Tex. R. App. P. 49.1.

   Comment(s): Any party desiring rehearing must file six copies of a motion for rehearing. The motion is a prerequisite for filing a writ of error to the Texas Supreme Court. No response to a motion for rehearing need be filed unless it is requested by the court.

Action

10. Motion for rehearing overruled.

    Time Due: [not applicable]

    Rule(s): Tex. R. App. P. 49.3.

    Comment(s): If a majority of the court of appeals or the panel assigned to hear the case are of the opinion that the case should not be reheard, the motion for rehearing must be overruled.

11. Second motion for rehearing.

    Time Due: Within fifteen days of the action complained of.

    Rule(s): Tex. R. App. P. 49.5.

    Comment(s): If on rehearing the judgment is modified or vacated and a new judgment is rendered, or the court of appeals hands down an opinion in connection with the overruling of a motion for rehearing, a second motion for rehearing may be filed. This second motion is not required or necessary as a predicate for a point in the application for writ of error if the asserted point of error was overruled by the appellate court in a prior motion for rehearing.

Action

12. En banc consideration.

    Time Due: Within fifteen days after decision.

    Rule(s): Tex. R. App. P. 49.7.

    Comment(s): A majority of the justices en banc may order en banc reconsideration.

Action

13. Application for writ of review.

    Time Due: Thirty days from date motion for rehearing is overruled.

    Rule(s): Tex. R. App. P. 53.

continued

Exhibit 16-2 Appellate Timetable and Procedures *(continued)*

Comment(s): File nineteen copies of the application with the clerk of the court of appeals along with cost deposit of $20, payable to the clerk of court of appeals, and $50 check payable to clerk of the Texas Supreme Court.

The application should be brief. It is addressed to the Supreme Court of Texas, includes the name of the party or parties applying for the writ, using the designations "Petitioner" and "Respondent." The application must include the following:

(1) Names of all parties on first page so that members of the court may determine any possible conflict in their participation in the case, and the names and addresses of all trial and appellate counsel;

(2) Table of Contents and Index of Authorities (refer to requirements for briefs);

(3) Statement of the case, normally not exceeding one page;

(4) Statement of jurisdiction

(5) Issues presented

(6) Statement of facts

(7) Summary of the argument

(8) Argument

(9) Prayer

(10) Appendix

An application may be amended at any time upon such "reasonable terms as the Court may prescribe."

The application must not exceed fifteen pages, excluding table of contents, index of authorities, statement of the case, statement of jurisdiction, issues presented, signature, proof of service, and the appendix. The court may permit a longer brief, upon filing of a motion and order.

The court may require an application to be redrawn if it is too long or nonconforming.

The clerk of the court of appeals promptly forwards the application for writ of error to the clerk of the Supreme Court, along with the original record in the case, the opinion of the court of appeals, motions filed, and certified copies of the judgment and order of the court of appeals.

Action

14. Respondent's brief in response to application for petition for review.

Time Due: Fifteen days from step 13 or 14.

Rule(s): Tex. R. App. P. 53.3.

Comment(s): File twelve copies of the brief, not in excess of eight pages, with the clerk of the Supreme Court (see requirements for petition for review for method of calculating page length). The court may, upon motion and order, permit a longer brief.

Action

15. Oral argument.

Time Due: [not applicable]

Rule(s): Tex. R. App. P. 59.

Comment(s): Set by Supreme Court.

continued

Exhibit 16-2 Appellate Timetable and Procedures *(continued)*

Action

16. Texas Supreme Court opinion.
    Time Due: [not applicable]
    Rule(s): Tex. R. App. P. 60.
    Comment(s): Judgment or decree pronounced in open court and may be reduced to writing in cases the court deems sufficiently important to be reported.

Action

17. Motion for rehearing to Supreme Court.
    Time Due: Fifteen days from step 16.
    Rule(s): Tex. R. App. P. 64.1.
    Comment(s): The clerk shall notify the attorneys of record by mail of the filing.

Action

18. Response to motion for rehearing.
    Time Due: Five days after notice of step 17.
    Rule(s): Tex. R. App. P. 64.3.
    Comment(s): [not applicable]

Action

19. Mandate.
    Time Due: Fifteen days from judgment if the motion for rehearing is filed or at expiration of fifteen days after overriding the motion for rehearing
    Rule(s): Tex. R. App. P. 65.
    Comment(s): The clerk issues and delivers the mandate to the lower court.

the court record, the reporter's record is not a prerequisite to an appeal. However, from a practical standpoint, it is an important part of the appeals process.

The appellant must make a written request to the court reporter at or before the time for perfecting the appeal, designating the evidence or other proceedings to be included. Exhibit 16-5 is an example of such a written request. A copy of the request must be filed with the clerk of the trial court and a copy served on the appellee. (Tex. R. App. P. 34.6(b))

The appellee has ten days from the date of the appellant's request for the reporter's record to request that additional portions of the evidence or proceedings be included.

The court reporter is responsible for causing the reporter's record to be filed in the appellate court. If the attorney discovers after the expiration of the fifteen-day grace period that the court reporter has not filed the reporter's record, the court cannot grant an extension.

Generally the appellant will request a complete reporter's record. An appellant may also request a partial record, but must include with the request to the court reporter a list of the appellate points it intends to raise.

Tex. Gov't Code Ann. §§ 52.041 and 52.046 and Tex. R. App. P. 34.6 outline the duties of a court reporter in relation to the preparation of a reporter's record. The reporter's record should include the following: front cover; an index of each volume, consisting of an alphabetical and chronological index referring to the pages of direct, cross-, redirect, and recross-examination; an index of the exhibits by number, description, and page in the reporter's record in which the exhibit is identified, offered, omitted, or excluded; and a certification by the court reporter.

The appellant must pay or make satisfactory arrangements to pay the court reporter upon completion and delivery of the reporter's record.

TRANSMITTING THE RECORD

In state court, the clerk's record includes all pleadings on which the trial was held; the judgment; the appeal bond; the docket sheet, and similar documents. (Tex. R. App. P. 34.5) The reporter's record consists of the court reporter's transcribed notes of the evidence, bits, objections, rulings made in open court, and the voir dire and jury argument, if requested. Only live pleadings are included in the

Exhibit 16-3 Jurisdiction and Seats of Texas Courts of Appeals

JURISDICTION AND SEATS OF COURTS OF APPEALS DISTRICTS IN TEXAS

FIRST[5]

*Houston**	Galveston
Austin	Grimes
Brazoria	Harris
Brazos[1]	Trinity
Burleson	Walker
Chambers	Waller
Colorado	Washington
Fort Bend	

SECOND

*Fort Worth**	Montague
Archer	Parker
Clay	Tarrant
Cooke	Wichita
Denton	Wise
Hood	Young
Jack	

THIRD

*Austin**	Lee
Bastrop	Llano
Bell	McCulloch
Bianco	Milam
Burnet	Mills
Caldwell	Runnels
Cooke	San Saba
Comal	Schielcher
Concho	Sterling
Fayette	Tom Green
Hays	Travis
Irion	Williamson
Lampasas	

FOURTH

*San Antonio**	Kinney
Atascosa	LaSalle
Bandera	McMullen
Bexar	Mason
Brooks	Maverick
Dimmit	Medina
Duval	Menard
Edwards	Real
Frio	Starr
Gillespie	Sutton
Guadalupe	Uvalde
Jim Hogg	Val Verde
Jim Wells	Webb
Karnes	Wilson
Kendall	Zapata
Kerr	Zavala
Kimble	

FIFTH

*Dallas**	Hunt[3]
Collin	Kaufman[4]
Dallas	Rockwall
Crayson	Van Zandt[4]

SIXTH

Texarkana[6]**	Hunt[3]
Bowie	Lamar
Camp	Marion
Cass	Morris
Delta	Panola[2]
Fannin	Red River
Franklin	Rusk[2]
Gregg[2]	Titus
Harrison	Upshur[2]
Hopkins[2]	Wood[2]

SEVENTH

*Amarillo**	Hemphill
Armstrong	Hockley
Bailey	Hutchinson
Briscoe	Kent
Carson	King
Castro	Lamb
Childress	Lipscomb
Cochran	Lubbock
Collingsworth	Lynn
Cottie	Moore
Crosby	Motley
Dallam	Ochiltree
Deaf Smith	Oldham
Dickens	Parmer
Donley	Potter
Floyd	Randall
Foard	Roberts
Garza	Sherman
Gray	Swisher
Hale	Terry
Hall	Wheeler
Hansford	Wilbarger
Hardeman	Yoakum
Hartley	

EIGHTH

El Paso[6]**	Loving
Andrews	Martin
Brewster	Midland
Crane	Pecos
Crockett	Presidio
Culberson	Reagan
Ector	Reeves
El Paso	Terrell
Gaines	Upton
Glassock	Ward
Hudspeth	Winkler
Jeff Davis	

NINTH

*Beaumont**	Montgomery
Angelina	Newton
Hardin	Orange
Jasper	Polk
Jefferson	San Jacinto
Liberty	Tyler

TENTH

*Waco**	Johnson
Bosque	Leon
Brazos[1]	Limestone
Coryell	McLennan
Ellis	Madison
Falls	Navarro
Freestone	Robertson
Hamilton	Somervell
Hill	

ELEVENTH

*Eastland**	Howard
Baylor	Jones
Borden	Knox
Brown	Mitchell
Callahan	Nolan
Coleman	Palo Pinto
Comanche	Scurry
Dawson	Shackelford
Eastland	Stephens
Erath	Stonewall
Fisher	Taylor
Haskell	Throckmorton

TWELFTH

*Tyler**	Rains
Anderson	Rusk[2]
Cherokee	Sabine
Gregg[2]	Smith
Henderson	San Augustine
Hopkins[2]	Shelby
Houston	Upshur[2]
Kaufman[4]	Van Zandt[4]
Nacogdoches	Wood[2]
Panola[2]	

THIRTEENTH

Corpus Christi[6]**	Kleberg
Aransas	Lavaca
Bee	Live Oak
Calhoun	Matagorda
Cameron	Nueces
DeWitt	Refugio
Goliad	San Patricio
Gonzales	Victoria
Hidalgo	Wharton
Jackson	Willacy
Kenedy	

FOURTEENTH[5]

*Houston**	Galveston
Austin	Grimes
Brazeria	Harris
Brazos[1]	Trinity
Burleson	Walker
Chambers	Waller
Colorado	Washington
Fort Bend	

Notes:
* Primary seat.
[1] Brazos is in 1st, 10th, and 14th Districts.
[2] Gregg, Hopkins, Panola, Rusk, Upshur, and Wood are in 6th and 12th Districts.
[3] Hunt is in 5th and 4th Districts.
[4] Kaufman and Van Zandt are in 5th and 12th Districts.
[5] The 1st and 14th Districts are coextensive.
[6] The Corpus Christi, El Paso, and Texarkana courts may sit in any county seat within the courts of appeals district.

Exhibit 16-4 Appeal Bond

NO. 03-148540-A

DAVID BATES)
)
vs.)
)
AMERIOIL CO.)

IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS
100TH JUDICIAL DISTRICT

APPEAL BOND

WHEREAS, on the _____ day of _____ , 20___ , judgment was rendered in favor of David Bates against Amerioil Co. for damages in the aggregate amount of $1,000,000, with interest at rate of 10 per cent per annum from _____ , plus all costs of courts, and

WHEREAS, Amerioil Co. desires to remove said judgment for revision and correction to the Court of Appeals for the Fifth District of Texas sitting at Dallas;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that Amerioil Co. as principal and the Travelers Indemnity Co. as surety, acknowledge ourselves bound to pay to _____, district clerk, the sum of $_____, conditioned that Amerioil Co. shall prosecute its appeal with effect and shall pay all costs which have accrued in this Court, and the cost of the statement of facts and transcript.

WITNESS OUR HANDS this _____ day of _____ , 20___.

AMERIOIL CO.
Principal

By:_____
Attorney-at-Law

The TRAVELERS INDEMNITY CO.
Surety

By:_____
Attorney-in-Fact

transcript. This specifically excludes pleadings that were superseded by subsequently filed amended pleadings and briefs.

As in the federal court, the burden is on the appellant to ensure that a sufficient record is presented to establish the error that requires the appellate court's reversal. Any party may file with the clerk a written designation of matters for inclusion in the transcript. Under Tex. R. App. P. 34.5, certain materials must be included in the transcript if the parties do not designate the matters to be incorporated into the transcript. These materials are listed in Exhibit 16-2.

If the appellant desires any materials to be included in the clerk's record other than those listed in Tex. R. App. P. 34.5, a letter must be sent to the clerk, at or before the clerk's record is prepared, with a copy to opposing counsel, listing the documents desired in the record. (Tex. R. App. P. 34.5(b)) Normally this request is in the form of a pleading to ensure that the designation itself becomes a part of the record.

The clerk's record and reporter's record are due in the appellate court within sixty days after the judgment is signed, unless a motion for new trial has been filed or any party has timely filed a request for findings of fact and conclusions of law in a nonjury trial. In these two situations, the transcript and statement of facts must be filed within 120 days after the judgment is signed.

The record may be supplemented or amended if anything material to a party is omitted from the clerk's record or reporter's record. This addition may be by stipulation of the parties, by order of the trial court, or by order of the appellate court. (Tex. R. App. P. 34.5(c))

THE APPELLATE BRIEF

DRAFTING THE APPELLATE BRIEF

The format for an appellate brief is described in great detail in Tex. R. App. P. 38. An appellant or an appellee's brief must be no longer than fifty pages, exclusive of pages containing the identity of parties and counsel, the table of contents, the index of authorities, the statement of the

Exhibit 16-5 Request for Statement of Facts

NO. 03-148540-A

DAVID BATES	)	
	)	IN THE DISTRICT COURT OF
vs.	)	DALLAS COUNTY, TEXAS
	)	100TH JUDICIAL DISTRICT
AMERIOIL CO.	)	

REQUEST FOR PREPARATION OF STATEMENT OF FACTS AND DESIGNATION OF MATTERS TO BE INCLUDED AND OMITTED

TO THE CLERK AND COURT REPORTER OF SAID COURT:

AMERIOIL CO., hereinafter referred to as "Appellant," requests, pursuant to Rule 34.6(b) of the Texas Rules of Appellate Procedure, that the court reporter of the 100th Judicial District Court of Dallas County, Texas, prepare a statement of facts in the above-entitled and numbered cause.

I .

Appellant requests that the following matters be included in the statement of facts:

1. Opening statement by all counsel;
2. All of the testimony, including arguments and objections of counsel made at the trial;
3. All bills of exception and offers of proof presented at trial;
4. All trial exhibits marked for identification;
5. Defendant's Motion for Directed Verdict.

Respectfully submitted,
[Name, address, and state bar number of attorney]
[Facsimile number]

(CERTIFICATE OF SERVICE)

case, the issues presented, the signature, the proof of service, and the appendix. A reply brief must be no longer than twentyfive pages, exclusive of the items stated above. The aggregate number of pages of all briefs filed by a party must not exceed ninety, exclusive of the items stated above. The court may, on motion, permit a longer brief. The brief may be typewritten or printed. If typewritten rather than printed, the brief must be double-spaced.

CONTENTS OF BRIEF

The appellate brief includes an identity of parties and counsel, table of contents, index of authorities, statement of the case, issues presented, statement of facts, summary of the argument, argument, prayer, signature, proof of service, and the appendix.

Refer to Exhibit 16-2 for a summary of the additional appellate brief requirements relating to number of copies, cover colors, and filing.

COORDINATING THE ORAL ARGUMENT

PREPARING FOR THE ORAL ARGUMENT

Tex. R. App. P. 39 directs that a party who desires oral argument must make a request therefore when the party's brief is filed. Failure to make the request generally waives the right to argue.

Some state appellate courts prefer that the request be typed on the cover of the brief: "ORAL ARGUMENT REQUESTED." Other appellate courts prefer that the request be in the form of a letter.

The court will set the time that will be allowed for argument.

FINAL PROCEDURES

FURTHER APPEAL PROCEDURES

MOTION FOR REHEARING. Under Tex. R. App. P. 49, a party may file a motion for rehearing within fifteen days after rendition of the judgment or decision of the court. No reply to a motion for rehearing is necessary unless requested by the court.

If the majority of the justices of the court of appeals or of the panel that was assigned the case are of the opinion that the case should be reheard, the motion for rehearing is granted. If the majority is of the opinion that it should not be reheard, the motion for rehearing is denied.

A second motion for rehearing must be filed within fifteen days after the court's decision on the prior motion for rehearing.

The Texas Supreme Court does not have jurisdiction over a complaint in an application for a writ of review unless the complaint was made in a motion for rehearing.

APPLICATION FOR WRIT OF REVIEW IN THE SUPREME COURT

Most appearances before the Texas Supreme court involve appellate review of court of appeals' decisions in cases appealed from trial courts' judgments.

Tex. R. App. P. 53 provides that an application for writ of review must be filed with the clerk of the court of appeals within forty-five days after the date the court of appeals rendered judgment, if no motion for rehearing is timely filed, or the date of the court of appeals' last ruling on all timely filed motions for rehearing. The writ of error process is two-tiered. It involves a ruling on the application followed by a judgment if the application is granted. If the application is not granted, the Supreme Court's review is completed at the application stage and the court of appeals' judgment stands. The granting of the application generally indicates that the required number of justices believe a possibility exists that the court of appeals committed error that should be corrected. When an application is granted, the court normally sets the matter for oral argument, following which it enters a judgment of reversal or affirmation (or a combination) and delivers an opinion.

The standard components of an application for a writ of review are contained in Tex. R. App. P. 53.2. Twelve copies of the application must be filed. The application may not exceed fifty pages, exclusive of the table of contents, index of authorities, points of error, and addendum.

A motion for extension of time to file the application must be filed within fifteen days after the last date for filing the motion. The request for additional time should contain the reasons for the need for additional time.

POSTTRIAL JUDGMENT PROCEDURES

The enforcement of judgments in Texas is regulated by Tex. R. Civ. P. 621 et seq. These rules provide methods for discovering the financial condition of a judgment debtor and the procedures for satisfying a judgment.

Immediately after a judgment has been entered, the judgment creditor should create a judgment lien on the debtor's nonexempt real property by recording and indexing an abstract of judgment—an index of the lien—in the county or counties in which the debtor has real property. A lien on the debtor's nonexempt personal property in a particular county is created through the levy of a writ of execution.

The timing of the filing of an abstract of judgment is critical, since the first to record an abstract of judgment has a priority lien on present and future real property holdings of the debtor.

An abstract of judgment may be issued immediately upon entry of a final judgment in the court's minute book, even if a motion for new trial is filed or the judgment is appealed. The essential requirements for an abstract of judgment are contained in Tex. Prop. Code Ann. § 52.003 and include:

1. The name(s) of plaintiff(s) and defendant(s);
2. The birth date(s) and driver's license number(s) of defendant(s), if available; if not, the notation should be "Birth date(s) and driver's license number(s) of defendant(s) unknown to the Clerk of the Court at this time";
3. The defendant's address or, if the address is not shown in the lawsuit, the nature of the citation and the date and place of service of the citation;
4. The date on which the judgment was entered;
5. The amount of the judgment and the balance due;
6. The rate of interest specified in the judgment;
7. The signature and seal of the clerk of court.

Exhibit 16-6 is a sample letter requesting the issuance of an abstract of judgment.

Extreme caution is necessary when securing an abstract of judgment, as the failure to correctly index the abstract can render the judgment lien void.

WRIT OF EXECUTION

A writ of execution may be issued thirty days after the entry of a final judgment or thirty days after a motion for new trial is overruled, if no supersedeas bond or notice of appeal has been filed and approved.

The writ may be issued before the expiration of the thirtyday period if it is accompanied by an affidavit from

Exhibit 16-6 Letter Requesting Issuance of Abstract of Judgment

[Date]

Mr. Jim Hamlin, District Clerk
Dallas County Courthouse
600 Commerce Street
Dallas, Texas 75202

Re: [Cause No. _____ ; Style of Case, Court]

Dear Sir:

Please make out, certify, and deliver to me an Abstract of Judgment showing the following:

(1) The names of the plaintiff(s) and of the defendant(s) in such judgment;
(2) The birth date and driver's license number of defendant(s) available to you; if not available, please state "birth date(s) and driver's license number(s) not available to clerk of court at this time";
(3) The number of this suit;
(4) The address of defendant(s), if shown in this suit, and if not, the nature of citation and the date and place citation is served;
(5) The date when judgment was rendered;
(6) The amount for which the judgment was rendered and balance due thereon; and
(7) The rate of interest specified in the judgment, and if not provided, the rate of interest should be stated as " ____ per cent from the date of judgment until paid" in accordance with Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 (Vernon Supp. 19___). [Check on latest interest rate on judgments.]

I enclose a check for $_____ to cover the fee for this service. Thank you.

Sincerely,
[Name of Attorney]

the creditor or its attorney stating that the debtor is about to remove its personal property from the county or transfer the property for the purpose of defrauding the creditor. (Tex. R. Civ. P. 628)

Any writ of execution must be issued within twelve months of the judgment so that the judgment can be renewed within the prescribed ten-year period.

Refer to Tex. R. Civ. P. 629 and 622 for the requirements for a writ of execution.

DISCOVERING JUDGMENT DEBTOR'S ASSETS

Tex. R. Civ. P. 621a provides that pretrial discovery procedures can be used after judgment to enforce collection of the judgment. Pretrial discovery rules also apply to postjudgment discovery.

Postjudgment discovery need not be delayed for the thirty days after which the judgment becomes final. It may begin any time after the judgment is signed.

ORAL DEPOSITION BY NONSTENOGRAPHIC MEANS

An efficient and inexpensive postjudgment discovery technique is the oral deposition by nonstenographic means. This deposition may be taken without a court reporter, with only a tape recorder or dictating machine. In the event the debtor fails to appear for the deposition, a motion for sanctions and a hearing are appropriate. If the debtor is found to be in contempt of court, the clerk of court issues a writ of attachment and the sheriff or constable arrests the defendant and brings the defendant to court.

POSTJUDGMENT GARNISHMENT

Tex. R. Civ. P. 657 to 679 govern postjudgment garnishment. A *writ of garnishment* may be obtained after judgment under the following conditions (Tex. Civ. Prac. & Rem. Code Ann. § 63.001(B)):

1. The creditor has a valid and final judgment against the debtor. (It is not necessary to wait thirty days or until the judgment is no longer appealable.)
2. The debtor has not filed an approved supersedeas bond to suspend execution on the judgment.
3. The creditor files an affidavit that to his or her knowledge, the judgment debtor does not have in his or her possession in Texas sufficient property subject to execution to satisfy the judgment.

A postjudgment garnishment is a separate suit, but should be brought in the court that entered the judgment to be enforced. The garnishment action is brought against the thirdparty garnishee as defendant; the judgment debtor usually is not a necessary party to the garnishment. All nonexempt personal property of the judgment debtor held by the garnishee may be attached by the judgment creditor through garnishment, including, for example, bank accounts, safety deposit boxes, stock, promissory notes, and trust funds of which the debtor is a beneficiary.

Tex. R. Civ. P. 59 lists the requirements for obtaining a postjudgment garnishment.

TURNOVER ORDERS

The turnover statute permits a judgment creditor to reach property of a judgment debtor that cannot be readily attached or levied on through ordinary legal process, such as property outside the jurisdiction or state, or intangible property rights such as copyrights or rights to payments under a contract. (Tex. Civ. Prac. & Rem. Code Ann. § 31.002)

RECEIVERSHIP

The court may appoint a receiver for the judgment debtor's property to take possession of and sell the nonexempt property and pay the proceeds to the judgment creditor in an amount sufficient to satisfy the judgment. (Tex. Civ. Prac. & Rem. Code Ann. § 31.002(b)(3))

Normally three days' notice and a hearing are required for the appointment of a receiver, but the trial court has the discretion to appoint a receiver without notice. A bond is required before the appointment of a receiver and is regulated by Tex. R. Civ. P. 695a.

TEMPORARY RESTRAINING ORDERS AND INJUNCTIONS

Tex. Civ. Prac. & Rem. Code Ann. § 31.002(a) permits injunctions and temporary restraining orders to assist a judgment creditor in reaching a judgment debtor's property to satisfy the judgment.

SUPERSEDING THE JUDGMENT

A writ of execution may not be issued on a judgment until the expiration of thirty days after the judgment is signed, or, if a timely motion for new trial is filed, until the expiration of thirty days after the motion is overruled either by order or by operation of law. (Tex. R. Civ. P. 627)

However, there is no automatic stay of the judgment in relation to the issuance of a writ of garnishment, which may be granted at any time after the judgment is signed unless a supersedeas bond has been filed and approved. (Tex. R. Civ. P. 657) An automatic stay is also not available for any discovery in aid of enforcement of the judgment or other postjudgment remedies. (Tex. R. Civ. P. 621)

SUPERSEDEAS BOND

The filing and approval of a supersedeas bond suspends execution on the judgment (Tex. R. App. P. 24.1(f)) and suspends the execution of a writ of garnishment or postjudgment discovery. (Tex. R. Civ. P. 621a) There is no statutory deadline for filing a supersedeas bond. The trial court may, even after the expiration of its plenary power over the judgment, fix the amount, type, and sufficiency of the surety.

A supersedeas bond must be payable to the judgment creditor and contingent upon the judgment debtor prosecuting the appeal or writ of error with effect. The bond must be sufficient to pay any judgment, sentence, or decree and damages and costs as the court may award. (Tex. R. App. P. 24.2)

The amount of the supersedeas bond depends on the nature of the relief awarded by the judgment. If the judgment grants a monetary recovery, the amount of the bond must be at least the amount of the judgment, interest, and costs. (Tex. R. App. P. 24.2)

A supersedeas bond must be approved by the trial court clerk, subject to review by the trial court at a hearing (Tex. R. App. P. 24.2). If the judgment awards nonmonetary relief, the trial court is not required to approve the actual bond, but must set the amount and terms of the bond.

A supersedeas bond also often operates as an appeal bond. The supersedeas bond must be sufficient to secure the costs and must be filed within the prescribed time frame for an appeal bond. (Tex. R. App. P. 24.2)

As an alternative to filing a supersedeas bond, the judgment debtor may deposit cash or a negotiable obligation of the United States or a federal agency, or, with leave of court, a negotiable obligation of a state-chartered or federally chartered agency. (Tex. R. App. P. 24.1(c)(1)) In this type of deposit, the clerk's certificate reflecting the deposit substitutes for the actual supersedeas bond.